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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1911

CHARLES HENRY BUTLER

REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.[1]

EDWARD DOUGLASS WHITE, CHIEF JUSTICE.
JOHN MARSHALL HARLAN, ASSOCIATE JUSTICE.[2]
JOSEPH McKENNA, ASSOCIATE JUSTICE.
OLIVER WENDELL HOLMES, ASSOCIATE JUSTICE.
WILLIAM R. DAY, ASSOCIATE JUSTICE.[3]
HORACE HARMON LURTON, ASSOCIATE JUSTICE.
CHARLES EVANS HUGHES, ASSOCIATE JUSTICE.
WILLIS VAN DEVANTER, ASSOCIATE JUSTICE.
JOSEPH RUCKER LAMAR, ASSOCIATE JUSTICE.
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 in cases 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 in cases which were argued or submitted before that date.

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.

TABLE OF CONTENTS.

TABLE OF CASES REPORTED.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported

Table of Cases Reported.

TABLE OF CASES

CITED IN OPINIONS.

TABLE OF STATUTES

CITED IN OPINIONS.

(A.) Statutes of the United States.

(B.) Statutes of the States and Territories.

(C.) Statutes of Foreign Nations.

(D.) Treaties.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1911.

HENRY *v.* A. B. DICK COMPANY.[1]

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

No. 20. Argued October 27, 1911.—Decided March 11, 1912.

Complainant sold his patented machine embodying the invention claimed and described in the patent, and attached to the machine a license restriction that it only be used in connection with certain unpatented articles made by the vendor of the machine; with the knowledge of such license agreement and with the expectation that it would be used in connection with the said machine, defendant sold to the vendee of the machine an unpatented article of the class

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[1] This case was argued after the death of Mr. Justice Harlan, and during the absence of Mr. Justice Day (see p. v *ante*). The opinion of the court was delivered by Mr. Justice Lurton (see p. 11 *post*), with whom Mr. Justice McKenna, Mr. Justice Holmes and Mr. Justice Van Devanter concurred; a dissenting opinion was delivered by Mr. Chief Justice White (see p. 49 *post*,), with whom Mr. Justice Hughes and Mr. Justice Lamar concurred. After the opinion was delivered, the plaintiff in error asked leave to file a petition for rehearing, and *The Attorney General* and *The Solicitor General* filed an application and brief on behalf of the United States for leave to intervene and for a rehearing of the cause; both applications were denied.

described in the license restriction. *Held* that the act of defendant constituted contributory infringement of complainant's patent.

This court does not prescribe the jurisdiction of courts, Federal or state, but only gives effect to it as fixed by law.

A suit for infringement which turns upon the scope of the patent and privileges of the patentee thereunder presents a case arising under the patent law.

In determining questions of jurisdiction this court never shirks the responsibility of maintaining the lines of separation defined in the Constitution and the laws made in pursuance thereof.

A patentee who has leased his patent to a licensee under restrictions may waive the tort involved in infringement and sue upon the broken contract; but in that event the case is not one arising under the patent laws and, in absence of diversity of citizenship, a Federal court has no jurisdiction thereof.

Whether the case is one of infringement, of which the Federal court has jurisdiction or of contract of which it has not jurisdiction, is often determined by the remedy which complainaint seeks.

The test of jurisdiction is whether complainant does or does not set up a right, title or interest under the patent laws or make it appear that a right or privilege will be defeated by one, or sustained by another, construction of those laws.

Whether a patentee may lawfully impose restrictions on the use of a patent and whether the violation thereof constitutes infringement are questions under the patent law.

A patentee may elect to sue his licensee upon the broken contract, or for forfeiture for breach, or for infringement.

While an absolute and unconditional sale operates to pass the patented article outside of the boundaries of the patent, a patentee may by a conditional sale so restrict the use of his vendee within specific boundaries of time, place or method as to make prohibited uses outside of those boundaries constitute infringement and not mere breach of collateral contract.

The extent of a license to use, which is carried by a sale of a patented article depends upon whether any restrictions were placed upon the sale, and if so what they were, and how they were brought home to the vendee; and where, as in this case, a restriction is plainly placed upon the article itself, a sale carries with it only the right to use within the limits specified, and any other use is an infringing one.

The patent statute is one creating and protecting a true monopoly granted to subserve a broad public policy, and it should be construed so as to give effect to a wise and beneficial purpose.

The monopoly of a patent extends to the right of making, selling and using, and each is a separable and substantial right.

A patentee may exclude others from the use of his invention although he does not use it himself. *The Paper Bag Patent Case*, 210 U. S. 405.

Although a contract in regard to use of a patent may include interstate commerce and restrain interstate trade, if it involves only the reasonable and legal conditions imposed under the patent law, it is not within the prohibitions of the Sherman Act. *Bement* v. *National Harrow Co.*, 186 U. S. 70.

Contributory infringement is the intentional aiding of one person by another in the unlawful making, selling or using of a patented invention.

The larger right of exclusive use of the patentee embraces the lesser one of only permitting the licensee to use upon prescribed conditions.

Courts cannot declare the monopoly created by Congress under authority of the Constitution to be unwise; Congress alone has power to prescribe what restraints shall be imposed.

Where a great majority of the courts to which Congress has committed the interpretation of a law have construed it, so that the line of decisions has become a rule of property, this court should not, in the absence of clear reason to the contrary, overrule those decisions on certiorari, and so held in this case after reviewing the decisions sustaining the rule of contributory infringement.

A bare supposition that an article adapted for use in connection with a patented machine sold under restricted license is to be used in connection therewith will not make the vendor a contributory infringer, but where the article so sold is only adapted to an infringing use, there is a presumption that it is intended therefor.

Questions certified by Circuit Court of Appeals on appeal from 149 Fed. Rep. 424, answered in affirmative.

THE facts, which involve the power of a patentee to enforce a license restriction as to the use of the patented article, and the determination of what constitutes contributory infringement, are stated in the opinion.

Mr. Arthur v. Briesen, with whom *Mr. Antonio Knauth* was on the brief, for Henry:

The attempted restriction on the sale of the article is void at common law. *United States* v. *Sequi*, 10 Pet. 306; *United States* v. *Rodman*, 15 Pet. 130, 139; *Merrifield* v.

Cobleigh, 4 Cush. 178. See also *Packard* v. *Ames*, 16 Gray, 327; 6 Am. & Eng. Ency., 438, note 5.

By the common law, the absolute property in the article which passes upon an ordinary sale "denotes a full and complete title and dominion over it," which is incompatible with a continued control over it in some shape, matter or respect by the seller of the article. 2 Kent's Com., 14th ed., 347; 2 Blackstone's Comm., 4th ed., 1, 154, 389, 446; Benjamin on Sales, 6th ed., 746.

The only kind of conditional sale known to our law is a sale in which the transfer of title to the things sold to the purchaser, or his retention of it, is made dependent upon the performance of some condition. The chief point of distinction between a condition subsequent and a covenant is that a breach of the former subjects the estate to a forfeiture; a breach of the latter is a ground for damages. Am. & Eng. Ency. Law, 503; *Jewett* v. *Lincoln*, 14 Maine, 116; *Green* v. *Bennett*, 23 Michigan, 464; and see *Park* v. *Hartman*, 153 Fed. Rep. 24; affirmed, 212 U. S. 588; *Taddy* v. *Sterious*, 1 Chan. 354; *McGruther* v. *Pitcher*, 2 Chan. 306 (1904).

The patent statute does not interfere with the working of the rule of the common law as applied to patented articles which have been sold by the patentee by an absolute sale passing the title, not conditionally, but absolutely. *Wilson* v. *Rousseau*, 4 How. 646; *Bloomer* v. *McQuewan*, 14 How. 539, 549; *Bloomer* v. *Millinzer*, 1 Wall. 340; *Chaffee* v. *Boston Belting Co.*, 22 How. 217–222; *Goodyear* v. *Beverly Rubber Co.*, 1 Cliff. 348, 354; *Mitchell* v. *Hawley*, 16 Wall. 544–547; *Adams* v. *Burke*, 17 Wall. 453; *Webber* v. *Virginia*, 103 U. S. 344, 348; *Paper Bag Cases*, 105 U. S. 766; *Hobbie* v. *Jennison*, 149 U. S. 355; *Morgan Envelope Co.* v. *Albany Paper Co.*, 152 U. S. 425; *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659.

It must be admitted, however, that the question, whether a mere notice on the article restricting the right of sale by

conditions as to price, can be enforced under the patent law in the absence of any agreement made by the purchaser, has not been decided by this court. *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 343, and *Cortelyou* v. *Johnson*, 207 U. S. 196, are not authority, nor is *Bement* v. *Harrow Co.*, but see *Re Brosnaham, Jr.*, 18 Fed. Rep. 62.

If the patentee desires to secure to himself the continued control over the use of the patented article in the hands of others, he may do so by leasing it upon suitable conditions, terminating the lease in case of a breach of the condition or by selling it under conditional sale, providing that upon breach of the condition, the title to the article will revert to the patentee. *Bill Publishing Co.* v. *Smythe*, 27 Fed. Rep. 914.

The leading cases in the courts below, *Button Fastener Co.* v. *Eureka Specialty Co.*, 77 Fed. Rep. 288, and *Courtelyou* v. *Johnson*, 145 Fed. Rep. 933, can be distinguished from the case at bar, as each was rendered upon a proper conditional sale at common law, while in this case no such conditional sale is found; and further, that it was sustainable as an action on contract.

Edison Phonograph Co. v. *Kaufmann*, 105 Fed. Rep. 960 was decided upon the supposed authority of *Dickerson* v. *Matheson*, 57 Fed. Rep. 524, and *Dickerson* v. *Tingling*, 84 Fed. Rep. 192, 195, but there is no true analogy between a purchase in a foreign country and importation of the article into this country, treated in those cases and a purchase from the patentee in this country under "restrictions," and see also *Edison Phonograph Co.* v. *Pike*, 116 Fed. Rep. 863.

In view of the statements of this court in the more recent decision of *Bobbs-Merrill Co.* v. *Straus*, *supra*, the statement of Judge Lowell concerning the approval by this court of the broad doctrines laid down in the *Button Fastener Case* must be considered doubtful; see *Green* v. *Bennett*, 23 Michigan, 464; 6 Am. & Eng. Ency. 437.

If the sale is to be considered a conditional sale which

can be rescinded upon breach of the condition, the seller cannot rescind the contract and at the same time retain the benefits of the contract. He must, as a condition precedent to rescission, restore or offer to restore the price paid for the goods. 35 Cyc. 144.

That this is not a suit arising under the patent statute, but one arising from the contract and having for its object the enforcement of the contract seems manifest both on principle and on authority. *Excelsior Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S. 282.

The license restriction is void because unreasonable and tending to create an unlawful, permanent monopoly in the patentee in something which is not protected by his patent.

The notice of restriction is not connected with any patent or patents, nor is there any time limit stated as to the obligation of the purchaser of the machine to buy the supplies for it only from the complainant, which supplies are not even completely enumerated, and may comprise oil, blotting paper, rollers, copying paper, and anything else which may be useful in the handling of the machine. *Cortelyou* v. *Johnson*, 145 Fed. Rep. 933; *Morgan Envelope Co.* v. *Albany Paper Co.*, 152 U. S. 425.

Machines like the mimeograph are not purchased with the amount of care and circumspection with which a piece of real estate is purchased; they are ordinary articles of trade like any other hand machines and the purchaser very likely either pays no attention to the notice of restriction, or if he does see it, will think that it is impossible to insist on such a condition, because the maker of the machines cannot possibly follow them into the hands of many thousands of purchasers to watch over their use.

A court of equity should never by injunction imply obligations on one party, when there are no clear and definite obligations imposed upon the other party to the contract. *Lawrence* v. *Dixey*, 119 App. Div. (N. Y.) 295; *Chicago Railroad Company* v. *Dane*, 43 N. Y. 240; *Rafolo-*

vitz v. *American Tobacco Co.*, 73 Hun, 87; *Jackson* v. *Alpha Portland Cement Company*, 122 App. Div. (N. Y.) 345.

Mr. Frederick P. Fish, with whom *Mr. Samuel Owen Edmonds* was on the brief, for A. B. Dick Co.:

Under Art. I, § 8, of the Constitution, Congress is given power to promote the progress of science and useful arts by securing to inventors, for limited terms, the "exclusive" right to their discoveries. Accordingly, § 4884 of the Revised Statutes provides that the grant of a patent shall vest in the patentee "the exclusive right to make, use and vend the invention or discovery." This is, in effect, the grant of three separable substantial rights, each vested exclusively in the patentee. *Bloomer* v. *McQuewan*, 14 How. 538; *Adams* v. *Burke*, 17 Wall. 453.

A patentee is under no obligation to exercise any of the exclusive rights covered by his grant. Doing nothing thereunder himself he may still, during the patent term, exclude others from making, or using, or selling the patented thing. *Paper Bag Patent Case*, 210 U. S. 405; *Bement* v. *Harrow Co.*, 186 U. S. 70. This is an incident of his ownership, for a limited period, of a true but lawful monopoly authorized by the Constitution and statute. *Wilson* v. *Rousseau*, 4 How. 674; *Button Fastener Case*, 77 Fed. Rep. 294.

If, on the other hand, the patentee elect to exercise the rights so vested in him exclusively by the grant of the patent, it rests with him, and with him only, to determine the manner in which the value of those rights shall be realized. He may manufacture, or use, or sell the patented thing, or he may license others to do these things or any of them. Having the right wholly to exclude others, he may waive it to such extent and for such consideration as he sees fit. Cases *supra*.

If the patentee elect not to manufacture, he may retain the machine so made and himself exclusively enjoy its use.

Or, on such terms and under such conditions as he sees fit to impose, he may waive his exclusive right of use or some particular part of it, and permit such use by others to a definite extent, fixed by agreement. If he sell the machine outright and unconditionally, it passes out from under the patent monopoly, which thenceforth is ineffective to control its use. On the other hand, if he sell it conditionally or under license governing its use, the patentee thereby carves out from his exclusive right of use, and transfers, merely a limited right to use the patented machine in the manner which the license prescribes. Such use is protected by the patent. Any other use violates it and constitutes infringement. *Providence Rubber Co.* v. *Goodyear*, 9 Wall. 788; *Mitchell* v. *Hawley*, 16 Wall. 544; *Birdsell* v. *Shaliol*, 112 U. S. 485; *Bement* v. *Harrow Co., supra.*

The market for standard and unpatented articles is established. That for a patented article the patentee must create. The particular method selected must be such as will bring him his return within the limited term of the patent. Outright sale at high price limits the market, injuring both patentee and public. Accountings in the form of rental or according to quantum of product are vexatious. When the method satisfies both patentee and public, it does not lie in the mouth of a stranger to the transaction to complain.

On all sales of patented articles a license to use is a necessity. In the case of an outright sale, such license is *implied. Adams* v. *Burke, supra.* In the case of a sale under conditions governing use, the license, as in the case at bar, is *express.* Attack upon such a license assails the freedom of the parties to contract with respect to the patent monopoly. *Button Fastener Case, supra.*

The complainant-appellee, A. B. Dick Company, owner of the patents covering the rotary mimeograph, had the right to exclude all others from using those machines in any manner whatever. It might lawfully have withheld

them from the public until the expiration of the patents. It was quite within its rights, therefore, when it sold its machines under license restriction precluding lawful use thereof save with supplies (such as ink) of its own manufacture. Operating under such license, the vendees shared the patent monopoly with the patentee. Operating in defiance of it, they violated that monopoly.

Unlicensed use, even the threat of unlicensed use, of a patented machine constitutes infringement. And one who aids or abets such infringement, as by knowingly furnishing the means for the unlicensed use and thereby procuring such use, is liable as a tort-feasor and equally guilty of infringement. Suit, under the patent, lies against either or both the direct and the contributory infringer. *Button Fastener Case, supra; Kalem Co.* v. *Harper Bros.*, 222 U. S. 55.

The license in question is reasonable and necessary for the protection of the parties. The machines were sold at cost. They were therefore purchased by many who, had a manufacturing profit been added, would have been unable to enjoy the patented inventions. The patentee's profits on the supplies represented royalty; this accrued only in proportion to the licensee's use of his machine. An accounting on any other basis would have been vexatious to both parties. By using the patentee's specially adapted supplies, licensees obtained work of high quality and the reputation and prestige of the machine were preserved.

The injunction granted below does not stop the defendants from selling supplies but from procuring the licensees to infringe by selling such supplies to them, with knowledge of their license and with intent that the same shall be violated by the unlawful use of such supplies upon their licensed machines.

There is no substance in the suggestion that the license plan in question expands the scope of the patent, making it cover articles otherwise unpatented and possibly un-

patentable. If this were true, complainant would have the exclusive right to manufacture, use and sell the ink complained of. It claims no such right. All it claims is the right to make the ink which its licensees agreed to use when they employ the patented machines.

Equally without foundation is the suggestion as to monopolizing unpatented articles. The public never had the right to sell supplies for use on the patented machines. This being true, it is deprived of no right when complainant licenses the use of those machines only with its own supplies. Except where the use of the supplies will constitute or procure a tort, the public is as free to make and sell them to-day as it ever has been.

As to the fanciful suggestions concerning what other patentees may do in the way of imposing license restrictions, these are without weight or persuasiveness. If a restriction be unduly onerous or burdensome, one who would otherwise become a licensee may decline the license. He is not compelled to purchase. The whole matter is, *ex necessitate*, self-regulating. The public is safeguarded by the self-interest of the patentee, who can be depended upon not to throttle his market by imposing burdensome restrictions.

Additional authorities urged in complainant's behalf are *National Phonograph Co.* v. *Schlegel*, 128 Fed. Rep. 733; *Rubber Tire Case*, 154 Fed. Rep. 358; *Indiana Co.* v. *Case Co.*, 154 Fed. Rep. 365; *Æolian Co.* v. *Juelg*, 145 Fed. Rep. 939, and 155 Fed. Rep. 119; *Brodrick* v. *Mayhew*, 131 Fed. Rep. 92, and 137 Fed. Rep. 596; *Brodrick* v. *Roper*, 124 Fed. Rep. 1019; *Commercial Co.* v. *Autolox Co.*, 181 Fed. Rep. 387; *Cortelyou* v. *Lowe*, 111 Fed. Rep. 1005; *Cortelyou* v. *Carter's Ink Co.*, 118 Fed. Rep. 1022; *Cortelyou* v. *Johnson*, 138 Fed. Rep. 110; *Crown &c. Co.* v. *Brooklyn &c. Co.*, 172 Fed. Rep. 225; *Same* v. *Standard Brewery*, 174 Fed. Rep. 252; *Dick Co.* v. *Milwaukee Co.*, 168 Fed. Rep. 930; *Edison* v. *Kaufmann*, 105 Fed. Rep. 960; *Same*

v. *Pike*, 116 Fed. Rep. 863; *New Jersey Co.* v. *Schaefer*, 144 Fed. Rep. 437, 159 Fed. Rep. 171, and 178 Fed. Rep. 276; *New Jersey Co.* v. *Weinberg*, 183 Fed. Rep. 588; *Rupp* v. *Elliott*, 131 Fed. Rep. 730; *Victor Co.* v. *The Fair*, 123 Fed. Rep. 424. The English authorities are cited in the decision of the Privy Council in *National Phonograph Co.* v. *Menck*, 27 T. L. R. 239.

MR. JUSTICE LURTON delivered the opinion of the court.

This cause comes to this court upon a certificate under the sixth section of the Court of Appeals Act of March 31, 1891.

The facts and the questions certified, omitting the terms of the injunction awarded by the Circuit Court, are these:

"This action was brought by the complainant, an Illinois corporation, for the infringement of two letters patent, owned by the complainant, covering a stencil-duplicating machine known as the 'Rotary Mimeograph.' The defendants are doing business as co-partners in the City of New York. The complainants sold to one Christina B. Skou, of New York, a Rotary Mimeograph embodying the invention described and claimed in said patents under license which was attached to said machine, as follows:

"LICENSE RESTRICTION.

"This machine is sold by the A. B. Dick Co. with the license restriction that it may be used only with the stencil paper, ink and other supplies made by A. B. Dick Company, Chicago, U. S. A.

"The defendant, Sidney Henry, sold to Miss Skou a can of ink suitable for use upon said mimeograph with knowledge of the said license agreement and with the expectation that it would be used in connection with

said mimeograph. The ink sold to Miss Skou was not covered by the claims of said patent."

"QUESTION CERTIFIED.

"Upon the facts above set forth the question concerning which this court desires the instruction of the Supreme Court is:

"Did the acts of the defendants constitute contributory infringement of the complainant's patents?"

There could have been no contributory infringement by the defendants, unless the use of Miss Skou's machine with ink not made by the complainants would have been a direct infringement. It is not denied that she accepted the machine with notice of the conditions under which the patentee consented to its use. Nor is it denied that thereby she agreed not to use the machine otherwise. What defendants say is that this agreement was collateral, and that its validity depended upon principles of general law, and that if valid the only remedy is such as is afforded by general principles of law. Therefore, they say that the suit is not one arising under the patent law, and one not cognizable in a Federal court, unless diversity of citizenship exists.

But before coming to the question whether this is a suit of which the Circuit Court had jurisdiction as a suit arising under the patent law, it may be well to notice an argument against jurisdiction based upon the suggestion that if a breach of such a license restriction will support a suit for infringement, direful results will follow. Chief among the results suggested are, an encroachment upon the authority of the state courts and an extension of the jurisdiction of the Federal courts. And to swell the grievance it is said that if it be held that a breach of such a restriction will support a suit for infringement, parties will be deprived of the right to have the validity and import of the license restriction determined by the general law,

and be compelled to have their rights determined by the patent law.

We are unable to assent to these suggestions. We do not prescribe the jurisdiction of courts, Federal or state, but only give effect to it as fixed by law. If a bill asserts a right under the patent law to sell a patented machine subject to restrictions as to its use, and alleges a use in violation of the restrictions as an infringement of the patent, it presents a question of the extent of the patentee's privilege, which, if determined one way, brings the prohibited use within the provisions of the patent law, or, if determined the other way, brings into operation only principles of general law. Obviously, a suit for infringement, which must turn upon the scope of the monopoly or privilege secured to a patentee, presents a case arising under the patent law. The jurisdiction of the Circuit Court over such cases has, for more than a century, been *exclusive*, by the express terms of the statute, although, for the most part, its jurisdiction over other kinds of suits arising under the Constitution and laws of the United States is only concurrent with that of the state courts.

The suggestion, therefore, that we should refrain from ruling that a patentee may sell a patented machine subject to restrictions as to its use, and may predicate infringement upon a use in violation of the restrictions lest such a ruling may draw to the Federal courts cases which otherwise would not come to them, cannot be sustained without placing our decision upon considerations which are quite apart from the law. This, of course, we may not do. In determining questions of jurisdiction, this court has never shirked the responsibility of maintaining the lines of separation defined in the Constitution and the laws made in pursuance thereof, but, on the contrary, has been ever watchful to maintain those lines as obligatory alike upon all courts and all suitors.

We come, then, to the question, whether a suit for infringement is here presented.

That the license agreement constitutes a contract not to use the machine in a prohibited manner, is plain. That defendants might be sued upon the broken contract, or for its enforcement or for the forfeiture of the license, is likewise plain. But if by the use of the machine in a prohibited way Miss Skou infringed the patent, then she is also liable to an action under the patent law for infringement. Now that is primarily what the bill alleged, and this suit is one brought to restrain the defendants as aiders and abettors to her proposed infringing use.

That the patentee may waive the tort and sue upon the broken contract, or in assumpsit, is elementary. Robinson on Patents, §§ 1225, 1250, and notes; *Steam Stone Cutter Co.* v. *Sheldons*, 15 Fed. Rep. 608; *Pope Mfg. Co.* v. *Owsley*, 27 Fed. Rep. 100; *Button Fastener Cases*, 77 Fed. Rep. 288, 291; *Wilson* v. *Sandford*, 10 How. 99. But if the patentee elect to waive the tort and sue upon the covenants or for a breach of contract, the suit would not be one dependent upon or arising out of the patent law, and a Federal court would have no jurisdiction unless diversity of citizenship existed. Robinson on Patents, § 1250; *Magic Ruffle Co.* v. *Elm City Co.*, 13 Blatchf. 151; *Goodyear* v. *Union India Rubber Co.*, 4 Blatchf. 63; *Goodyear* v. *Congress Rubber Co.*, 3 Blatchf. 449. This would be so although the damages for a breach would be measured by the loss resulting from the infringement. *Magic Ruffle Co.* v. *Elm City Co.*, 13 Blatchf. 151. After such a recovery in assumpsit, no further damages for the infringement can be claimed. *Steam Stone Cutter Co.* v. *Sheldons*, 15 Fed. Rep. 608.

The remedy which the complainant seeks may often determine whether the suit is one arising under the patent law and cognizable only in a court of the United States, or one upon a contract between the patentee and his assigns or licensees, and, therefore, cognizable only in a

state court, unless there be diversity of citizenship. Thus, a bill to enforce a contract concerning the title to a patent, or an interest therein, or to declare a forfeiture of an assignment of an interest in a patent, or even a license to make, sell or use the patented thing, or an action to recover damages for a breach of a contract relating to a patent or a license thereunder, would not, because of the character of remedy or relief sought, be a suit cognizable in a United States court, although the facts stated might have justified a suit for infringement in a United States court, if the complainant had elected that remedy. To sustain the contention that a breach of the implied agreement not to use the machine in question except in a particular way might have supported a suit to forfeit the license, or an action for damages upon the broken contract, counsel have cited and commented at great length upon the cases of *Wilson* v. *Sandford*, 10 How. 99; *Dale Tile Mfg. Co.* v. *Hyatt*, 125 U. S. 46; *Albright* v. *Teas*, 106 U. S. 613; *Hartell* v. *Tilghman*, 99 U. S. 547; *Pratt* v. *Paris Gaslight & Coke Co.*, 168 U. S. 255; *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659, and *Bement* v. *National Harrow Co.*, 186 U. S. 70; but an examination of these cases will disclose that while in some of them a suit for infringement might have been brought, the complainants had in fact brought suits to set aside or enforce contracts relating to patents, or licenses under patents. They were, therefore, not "Patent cases," but cases determinable upon principles of general law. In *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S. 282; Mr. Justice Brown reviews the cases and shows so plainly why they were not patent cases that we shall only refer to that opinion.

To support their contention that the only remedy for a violation of the license under which Miss Skou acquired her machine is one in the state courts, counsel quote a paragraph from the same opinion in these words: "Now, it may be freely conceded that if the licensee had failed to

observe any one of the three conditions of the license, the licensor would have been obliged to resort to the state courts, either to recover the royalties or to procure a revocation of the license. Such suit would not involve any question under the patent law." But the three conditions of the license there referred to were: First, to pay royalties; second, that the transferee would not transfer or assign the license without consent of the licensor; third, that the failure to use the license in the manufacture of pipe should operate to revoke it. It is evident that the licensee would not have infringed the patent by either failing to pay royalties, by assigning the license, or by neglecting to use his privilege. The licensor would clearly have been compelled to rely wholly upon his contract, as such, in any suit for the violation of any of the conditions named.

The test of jurisdiction is this: Does the complainant "set up some right, title or interest under the patent laws of the United States, or make it appear that some right or privilege will be defeated by one construction, or sustained by another, of those laws?" *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S. 282; *Pratt* v. *Paris Gaslight & Coke Co.*, 168 U. S. 255, 259; *White* v. *Rankin*, 144 U. S. 628.

The bill alleges that the complainant's patent has been infringed by the breach of the conditions upon which the patented machine was sold. The remedy it seeks is an injunction against indirect infringement by the defendants. The facts stated upon the face of the bill may be insufficient to show an infringement of the patent; but the right to treat the conduct of the defendants as an indirect infringement is a right which the complainant sets up as arising under the patent law. One construction of the scope of the grant will sustain the rights asserted, if the facts be as alleged, and another will defeat those rights.

Whether a patentee may lawfully impose such restrictions, and whether their violation constitutes an infringement, are obviously questions arising under the patent law. In *Littlefield* v. *Perry*, 21 Wall. 205, 222, this court said: "An action which raises a question of infringement is an action arising 'under the law,' and one who has the right to sue for the infringement may sue in the Circuit Court. Such a suit may involve the construction of a contract as well as the patent, but that will not oust the court of its jurisdiction. If the patent is involved it carries with it the whole case."

Although the complainant might have sued upon the broken contract, or brought a bill to declare a forfeiture of the licensee's rights for breach of the implied covenant to operate it only in connection with materials supplied by it, it has elected to sue for infringement. To quote from Judge Shipman's opinion in *Magic Ruffle Co.* v. *Elm City Co.*, 13 Blatchf. 151, "It was competent for the complainants to take either one of the two remedies. . . . They could bring a bill alleging an injury to their exclusive rights under the laws of the United States, or, as the residence of the parties gave this court jurisdiction, could bring a proper suit, setting up a breach of the contract as the gravamen of their action."

That a patentee may effectually restrict the time, place or manner of using a patented machine, so that a prohibited use will constitute an infringement of the patent, is fully conceded. Thus, in the printed brief counsel for defendants say: "Aside from such special contracts, an agreement that the article shall be used only in a certain manner, can be made only by way of lease of the article, terminating the lease upon condition broken, or by way of conditional sale, by breach of which the title reverts to the seller." In either such case, counsel say, "a use of the article in violation of the condition may terminate the lease or sale of the article

(which) would become the property of the patentee again, and a use thereof by the lessee or purchaser may constitute a violation of the patent, for which an infringement may lie. . . . He cannot make a sale with the condition attached that the article shall be used or disposed of in a certain manner, leaving the title, however, in the purchaser in case of a breach of the condition."

The books abound in cases upholding the right of a patentee owner of a machine to license another to use it subject to any qualification in respect of time, place, manner or purpose of use which the licensee agrees to accept. Any use in excess of the license would obviously be an infringing use and the license would be no defense. Robinson on Patents, §§ 915, 916 and notes. This is so elementary we shall not stop to cite cases.

The contention is not that a patentee may not permit the use of a patented thing with such qualifications as he sees fit to impose, and that a prohibited use will be an infringing one, but that he can only keep the article within the control of the patent by retaining the title. To put the contention in another form—it is, that any transfer of the patentee's property right in a patented machine carries with it the right to use the entire invention so long as the identity of the machine is preserved, irrespective of any restrictions placed by the patentee upon the use of the article and accepted by the buyer. It is said that by such a sale the patentee "disposes of all his rights under his patent, and thereby removes the article from the operation of the patent law." If he attempts to sell the machine for specified uses only and prohibit all others, the restriction is disposed of as constituting a collateral agreement such as any vendor of personal property might impose, and enforceable, if valid at all, only as a collateral contract.

The issue is a plain one. If it be sound, it concludes the case, and our response should be a negative one, since

the violation of a mere collateral contract, which is not also an infringement of the patent would not be a case arising under the patent law. But is it true that where a patentee sells his patented machine for a specific and limited use, he does not thereby reserve to himself, as patentee, the exclusive right to all unpermitted uses which may be made of his invention as embodied in the machine sold? Obviously, this is a question arising under the patent law. By a sale of a patented article subject to no conditions the purchaser undeniably acquires the right to use the article for all the purposes of the patent so long as it endures. He may use it where, when, and how he pleases, and may dispose of the same unlimited right to another. This has long been the settled doctrine of this and all patent courts. *Mitchell* v. *Hawley*, 16 Wall. 544; *Livingston* v. *Woodworth*, 14 How. 546, 550; *Adams* v. *Burks*, 17 Wall. 453, 456; *Folding Bed Case* (*Keeler* v. *Standard Folding Bed Co.*), 157 U. S. 659, 666. By such an unconditional sale of the thing patented it is said to be "no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the act of Congress."

In the cases cited above, as well as in the leading case of *Bloomer* v. *McQuewan*, 14 How. 539, the statement that a purchaser of a patented machine has an unlimited right to use it for all the purposes of the invention, so long as the identity of the machine is preserved, was made of one who bought unconditionally, that is, subject to no specified limitation upon his right of use. The question of the effect of limitations upon the right of use arose, however, in *Mitchell* v. *Hawley*, and there we find the distinction was deemed material and the effect declared.

In that case one Taylor was the patentee, under a grant for a term of fourteen years, for a machine for felting hats. By what Mr. Justice Clifford calls "a conveyance of license, subject to certain restrictions or limitations,"

one Bayley was given the "exclusive right to make and use and to license to others the right to use the said machines in the States of Massachusetts and New Hampshire, during the remainder of the original term of said letters-patent," subject to a stipulation that "the licensee shall not in any way, or form, dispose of, sell, or grant any license to use the said machines beyond the expiration of the original term." There was also a provision that if the term of the patent should be extended Bayley should have the right to control the same in those two States, upon paying a reasonable compensation, etc.

Bayley, as such licensee, made and sold four machines to the appellant Mitchell, with the right to use them for felting hats in the town of Haverhill, Massachusetts, "under Taylor's patent bearing date May 3, 1864." Before the patent expired it was extended for the further term of seven years, the benefits of which extension for the said two States were assigned to the appellee Hawley. Hawley then filed his bill to restrain Mitchell from using the four identical machines which had been sold to him by Bayley. From a decree restraining their further use Mitchell appealed. Mr. Justice Clifford, before stating the facts upon which the judgment must rest as to the right of Mitchell as the purchaser of the machines to continue their use after the expiration of the original term of Taylor's patent, and after directing attention to what he termed "the well-grounded distinction between the grant of the right to make and vend the patented machine and the grant of the right to use it," which, he says, "was first satisfactorily pointed out by the late Chief Justice Taney, with his accustomed clearness and precision," says (p. 548):

"Purchasers of the exclusive privilege of making or vending the patented machine hold the whole or a portion of the franchise which the patent secures, depending upon the nature of the conveyance, and of course the interest

which the purchaser acquires terminates at the time limited for its continuance by the law which created the franchise, unless it is expressly stipulated to the contrary. But the purchaser of the implement or machine for the purpose of using it in the ordinary pursuits of life stands on different grounds, as he does not acquire any right to construct another machine either for his own use or to be vended to another for any purpose. Complete title to the implement or machine purchased becomes vested in the vendee by the sale and purchase, but he acquires no portion of the franchise, as the machine, when it rightfully passes from the patentee to the purchaser, ceases to be within the limits of the monopoly."

In the succeeding paragraph he, in effect, limits what was above said to unconditional sales of such patented machines by adding this:

"Patented implements or machines sold to be used in the ordinary pursuits of life become the private individual property of the purchasers, and are no longer specifically protected by the patent laws of the State where the implements or machines are owned and used. Sales of the kind may be made by the patentee with or without conditions, as in other cases, but where the sale is absolute, and without any conditions, the rule is well settled that the purchaser may continue to use the implement or machine purchased until it is worn out, or he may repair it or improve upon it as he pleases, in same manner as if dealing with property of any other kind."

The force and bearing of this opinion cannot be escaped by suggesting that the court was referring to mere common-law contractual conditions, for the suit was to restrain infringement by the use of four machines which had been sold, *not leased.*

That the bill was one alleging and seeking to enjoin further use as an infringement of the patent is shown by the statement that "they," referring to the purchaser

Mitchell and those associated with him, "appeared to the suits and filed an answer setting up as a defense to the charge of infringement that they are by law authorized to continue the use of the four machines just the same under the extended letters-patent as they had the right to do under the original patent, when the purchase was made by those under whom they claim, which is the only question in the case."

The question argued, as shown by the brief, as set out in the report, was there, as here, that by a sale of the machines "they were taken out of the reach of the patent law altogether, and that as long as the machines themselves lasted, the owner could use them." For the patentee it was urged that "the right to make and use and to license others to use was expressly limited by apt words, showing clearly an intent that it should not survive the original term of the patent." This latter was the argument which prevailed. Mr. Justice Clifford, after referring to the principle of law that one cannot convey a better title or right than he has, said (p. 550), touching the restriction imposed by Bayley on the machines sold by him to Mitchell: "The form of the license which he gave to the purchasers shows conclusively that he understood that he was not empowered to give a license which should extend beyond that limitation." Later, referring to this sale with license to use, the learned Justice says (p. 551): "The terms of the license which the seller gave to the purchasers were sufficient to put them upon inquiry, and it is quite obvious that the means of knowledge were at hand, and that if they had made the least inquiry they would have ascertained that their grantor could not give them any title to use the machine beyond the period of fourteen years from the date of the original letters-patent, as he was only a licensee and never had any power to sell a machine so as to withdraw it indefinitely from the operation of the franchise secured by the patent."

The distinction between the sale of a machine free from specific restrictions upon the right of use and a sale subject to such limitations becomes the more evident, in view of the fact that but for the license to use only for the remainder of the original patent term the purchaser would have acquired the right to continue the use during an extended term of the same patent. This was the express holding in the two prior cases of *Wilson* v. *Rousseau,* 4 How. 646, and *Bloomer* v. *McQuewan,* 14 How. 539, where the unlimited right of use by an unconditional purchaser was laid down in the strongest terms, and which cases are now relied upon by counsel in this case as equally applicable to a sale subject to a restricted use.

It is obvious that if Taylor, the patentee, could authorize Bayley to make and sell the patented machines, subject to the restriction that he should not sell for use beyond the terms of the original patent, and that a purchaser of the machines so made and sold by Bayley, with notice, would infringe the extended patent by a use after the original term had expired, it is because the exclusive right of the patentee embraces the right to make and sell patented machines subject to restrictions upon the right of use, which, if not observed, will support an action for infringement.

An absolute and unconditional sale operates to pass the patented thing outside the boundaries of the patent, because such a sale implies that the patentee consents that the purchaser may use the machines so long as its identity is preserved. This implication arises, first, because a sale without reservation, of a machine whose value consists in its use, for a consideration, carries with it the presumption that the right to use the particular machine is to pass with it. The rule and its reason is thus stated in Robinson on Patents, § 824: "The sale must furthermore be unconditional. Not only may the patentee impose conditions limiting the use of the patented article,

upon his grantees and express licensees, but any person having the right to sell may at the time of sale restrict the use of his vendee within specific boundaries of time or place or method, and these will then become the measure of the implied license arising from the sale."

The argument for the defendants ignores the distinction between the property right in the materials composing a patented machine, and the right to use for the purpose and in the manner pointed out by the patent. The latter may be and often is the greater element of value, and the buyer may desire it only to apply to some or all of the uses included in the invention. But the two things are separable rights. If sold unreservedly the right to the entire use of the invention passes, because that is the implied intent; but this right to use is nothing more nor less than an unrestricted license presumed from an unconditional sale. A license is not an assignment of any interest in the patent. It is a mere permission granted by the patentee. It may be a license to make, sell and use, or it may be limited to any one of these separable rights. If it be a license to use, it operates only as a right to use without being liable as an infringer. If a licensee be sued, he can escape liability to the patentee for the use of his invention by showing that the use is within his license. But if his use be one prohibited by the license, the latter is of no avail as a defense. As a license passes no interest in the monopoly, it has been described as a mere waiver of the right to sue by the patentee. Robinson on Patents, §§ 806, 808.

We repeat. The property right to a patented machine may pass to a purchaser with no right of use, or with only the right to use in a specified way, or at a specified place, or for a specified purpose. The unlimited right of exclusive use which is possessed by and guaranteed to the patentee will be granted if the sale be unconditional. But if the right of use be confined by specific restriction, the use not permitted is necessarily reserved to the patentee.

If that reserved control of use of the machine be violated, the patent is thereby invaded. This right to sever ownership and use is deducible from the nature of a patent monopoly and is recognized in the cases.

In *Sawin* v. *Guild*, 1 Gall. 485, Mr. Justice Story, as far back as 1813, recognized the distinction by holding that a sale of patented machines under an execution against the patentee did not render the sheriff liable under a statute which made any person liable who should sell a patented device without consent of the patentee, because the sheriff had merely sold the materials and had not undertaken to pass any right of use. But in *Wilder* v. *Kent*, 15 Fed. Rep. 217, it was held that under such an execution sale there passed whatever right of use the debtor had if the sale was unconditional.

Judge Lowell, in *Porter Needle Co.* v. *National Needle Co.*, 17 Fed. Rep. 536, after saying that an absolute and unqualified sale of a patented machine carried with it the right of use, said: "But the mere value of a patented machine is often, as is proved to be in this case, insignificant in comparison with the value of its use; and the courts have permitted a severance of ownership and right of use, if the patentee has chosen to dissever them and if his intent is not doubtful."

It is plain from the power of the patentee to subdivide his exclusive right of use that when he makes and sells a patented device that the extent of the license to use which is carried by the sale must depend upon whether any restriction was placed upon the use and brought home to the person acquiring the article.

That here the patentee did not intend to sell the machine made by it subject to an unrestricted use is of course undeniable from the words upon the machine, viz.:

"LICENSE RESTRICTION."

"This machine is sold by the A. B. Dick Co., with the

license restriction that it may be used only with the stencil, paper, ink and other supplies made by A. B. Dick Co."

The meaning and purpose of this restriction was that while the property in the machine was to pass to the purchaser, the right to use the invention was restricted to use with other articles required in its practical operation, supplied by the patentee. It was stated at the bar, and appears fully in the opinion of Judge Ray (149 Fed. Rep. 424), who decided the case in the Circuit Court, that the patentee sold its machines at cost, or less, and depended upon the profit realized from the sale of other non-patented articles adapted to be used with the machine, and that it had put out many thousands of such machines under the same license restriction. Such a sale, while transferring the property right in the machine, carries with it only the right to use it for practicing the invention according to the terms of the license. To no other or greater extent does the patentee consent to the use of the machine. When the purchaser is sued for infringement by using the device, he may defend by pleading, not the general and unlimited license which is carried by an unconditional sale, but the limited license indicated by the metal tablet annexed to the machine. If the use is not one permitted, it is plainly an infringing use.

If, then, we assume that the violation of restrictions upon the use of a machine made and sold by the patentee may be treated as infringement, we come to the question of the kind of limitation which may be lawfully imposed upon a purchaser.

To begin with, the purchaser must have notice that he buys with only a qualified right of use. He has a right to assume, in the absence of knowledge, that the seller passes an unconditional title to the machine, with no limitations upon the use. Where, then, is the line between a lawful and an unlawful qualification upon the use? This is a question of statutory construction. But with what eye

shall we read a meaning into it? It is a statute creating and protecting a monopoly. It is a true monopoly, one having its origin in the ultimate authority, the Constitution. Shall we deal with the statute creating and guaranteeing the exclusive right which is granted to the inventor with the narrow scrutiny proper when a statutory right is asserted to uphold a claim which is lacking in those moral elements which appeal to the normal man? Or shall we approach it as a monopoly granted to subserve a broad public policy, by which large ends are to be attained, and, therefore, to be construed so as to give effect to a wise and beneficial purpose? That we must neither transcend the statute, nor cut down its clear meaning, is plain. In *Bement* v. *National Harrow Co.*, 186 U. S. 70, 89, 90, 91 and 92, this court quoted with approval the language of Chief Justice Marshall in *Grant* v. *Raymond*, 6 Pet. 218, 241. Concerning the favorable view which the law takes as to the protection extended to the exclusive right, the court, through Chief Justice Marshall, said:

"It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made; and to execute the contract fairly on the part of the United States, where the full benefit has been actually received, if this can be done without transcending the intention of the statute, or countenancing acts which are fraudulent or may prove mischievous. The public yields nothing which it has not agreed to yield; it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved, and for his exclusive enjoyment of it during that time the public faith is pledged."

If the patent be for a machine, the monopoly extends to the right of making, selling and using, and these are

separable and substantial rights. In *Bloomer* v. *McQuewan*, 14 How. 539, 547, it is said that the grant is of "the right to exclude every one from making, using or vending the thing without the permission of the owner." In *Bement* v. *National Harrow Co.*, 186 U. S. 70, 90, there was involved the legality of certain contracts between patentees of and dealers in patented harrows. The purpose and effect of the combination and of the contracts between the parties was to fix and keep up the prices at which licensees might sell the patented harrows. It was claimed that the combination and contracts were obnoxious to the Sherman Act; but, upon the other side, it was said that as the contracts concerned only the sale of patented articles that act did not apply. The character of the monopoly granted under the patent act was therefore involved. Touching the right of the patentee to exclude all others from the use of his invention, the court quoted with approval what was said in the *Button Fastener Cases*, 77 Fed. Rep. 288, as follows:

"If he sees fit, he may reserve to himself the exclusive use of his invention or discovery. If he will neither use his device nor permit others to use it, he has but suppressed his own. That the grant is made upon the reasonable expectation that he will either put his invention to practical use or permit others to avail themselves of it upon reasonable terms, is doubtless true. This expectation is based alone upon the supposition that the patentee's interest will induce him to use, or let others use, his invention. The public has retained no other security to enforce such expectations. A suppression can endure but for the life of the patent, and the disclosure he has made will enable all to enjoy the fruit of his genius. His title is exclusive, and so clearly within the constitutional provisions in respect of private property that he is neither bound to use his discovery himself nor permit others to use it."

In the *Paper Bag Patent Case*, 210 U. S. 405, this right to exclude others from all use of the invention was held to be so comprehensive that a patentee was allowed to restrain, by injunction, one who was infringing his patent, although he had, during a long term of years, neither used his invention himself, nor allowed others to use it.

That there are limitations upon the right of vending and using a patented machine may be conceded. Thus, if the thing patented belong to a class of things which on account of their inherent danger to the public safety or health cannot be sold or used because prohibited by an exertion of the police power of a State, they will not be immune to such a law because patented. Upon this ground a patent for "an improved burning oil," was held not to take the article without the operation of a state statute forbidding the sale of oil which was unsafe for illuminating purposes. *Patterson* v. *Kentucky*, 97 U. S. 501. And so in the *Bement Case*, the court said of this exclusive grant of privilege (p. 90):

"It is true that in certain circumstances the sale of articles manufactured under letters patent may be prevented when the use of such article may be subject, within the several States, to the control which they may respectively impose in the legitimate exercise of their powers over their purely domestic affairs, whether of internal commerce or of police regulation."

In that case the question was not one of infringement, but one arising in a suit to enforce certain contracts directly restraining commerce in patented articles which were claimed to violate the Sherman law, although the agreements covered only patented articles. The court, after referring to the exceptions to the patentee's monopoly resulting from conflict with the police power of the State, said (p. 91):

"Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the

patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."

Now, if this was a suit to recover damages upon the contract not to use the machine except in connection with other articles proper in its use made by the patentee, the only possible defense would be that the agreement was one contrary to public policy in that it affected freedom in the sale of such articles to the user of such machines. But that was the nature of the defense made to the suit to enforce the agreements under consideration in the *Bement Case*. The court in that case found that the contracts did include interstate commerce within their provisions and restrained interstate trade, but with reference to the Sherman Act said (p. 92):

"But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act we have no doubt was never contemplated by its framers."

As to whether the restrictions upon sales imposed by the agreements were "legal and reasonable conditions," the court said (p. 93):

"The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manu-

factured and sold, but that was only recognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article."

If the stipulation in an agreement between patentees and dealers in patented articles, which, among other things, fixed a price below which the patented articles should not be sold, would be a reasonable and valid condition, it must follow that any other reasonable stipulation, not inherently violative of some substantive law, imposed by a patentee as part of a sale of a patented machine, would be equally valid and enforceable. It must also follow, that if the stipulation be one which qualifies the right of use in a machine sold subject thereto, so that a breach would give rise to a right of action upon the contract, it would be at the same time an act of infringement, giving to the patentee his choice of remedies.

But it has been very earnestly said that a condition restricting the buyer to use it only in connection with ink made by the patentee is one of a character which gives to a patentee the power to extend his monopoly so as to cause it to embrace any subject, not within the patent, which he chooses to require that the invention shall be used in connection with. Of course the argument does not mean that the effect of such a condition is to cause things to become patented which were not so without the requirement. The stencil, the paper and the ink made by the patentee will continue to be unpatented. Anyone will be as free to make, sell and use like articles as they would be without this restriction, save in one particular—namely, they may not be sold to a user of one of the patentee's machines with intent that they

shall be used in violation of the license. To that extent competition in the sale of such articles, for use with the machine, will be affected; for sale to such users for infringing purposes will constitute contributory infringement. But the same consequence results from the sale of any article to one who proposes to associate it with other articles to infringe a patent, when such purpose is known to the seller. But could it be said that the doctrine of contributory infringement operates to extend the monopoly of the patent over subjects not within it because one subjects himself to the penalties of the law when he sells unpatented things for an infringing use? If a patentee says, "I may suppress my patent if I will. I may make and have made devices under my patent, but I will neither sell nor permit anyone to use the patented things," he is within his right, and none can complain. But if he says, "I will sell with the right to use only with other things proper for using with the machines, and I will sell at the actual cost of the machines to me, provided you will agree to use only such articles as are made by me in connection therewith," if he chooses to take his profit in this way, instead of taking it by a higher price for the machines, has he exceeded his exclusive right to make, sell and use his patented machines? The market for the sale of such articles to the users of his machine, which, by such a condition, he takes to himself, was a market which he alone created by the making and selling of a new invention. Had he kept his invention to himself, no ink could have been sold by others for use upon machines embodying that invention. By selling it subject to the restriction he took nothing from others and in no wise restricted their legitimate market.

A like objection has been made against injunctions restraining the sale for infringing purposes of a single element in a patent combination. It was said that to enjoin such sales, although the thing sold was intended

to be used with other elements to complete an infringing combination, was to extend the scope of the patent so as to give to the patentee the same advantage as if the element had been claimed alone. But in *Davis Electrical Co.* v. *Edison Co.*, 60 Fed. Rep. 276, 280, Judge Putnam answered this, saying:

"Neither in such instances, nor in the case at bar, is the course of the law to be turned aside because the practical result may be to give a patentee for the time being more than the patent office contemplated, nor is the patentee to be deprived of his just rights because under some circumstances he gets incidental advantages beyond what he expressly bargained for. We do not in terms give the patentee the benefit of a claim for the filament alone, nor prohibit its use in some other combination than that set out in the second claim, if some ingenious way of making such other combination is ever discovered."

In *Thomson-Houston Co.* v. *Kelsey Co.*, 72 Fed. Rep. 1016, the language was adopted by Judge Townsend.

Neither can we see that the liability of the defendants for aiding and abetting an infringing use by Miss Skou would be different whether she had made her machine in open defiance of the rights of the patentee or had bought it under conditions limiting her right of use. If she had made it, she would have been liable to an action for infringement for making; and if she used it, she would become liable for such infringing use. But if the defendants knew of the patent and that she had unlawfully made the patented article, and then sold her ink or other supplies without which she could not operate the machine, *with the intent and purpose that she should use the infringing article by means of the ink supplied by them*, they would assist in her infringing use.

"Contributory infringement," says Judge Townsend in *Thomson-Houston Co.* v. *Kelsey Co.*, 72 Fed. Rep. 1016,

1017, "has been well defined as the intentional aiding of one person by another in the unlawful making or selling or using of the patented invention." To the same effect are *Wallace* v. *Holmes*, 29 Fed. Cases, 74, 79; *Risdon Iron & Locomotive Works* v. *Trent*, 92 Fed. Rep. 375; *Thomson-Houston Co.* v. *Ohio Brass Works*, 80 Fed. Rep. 712; *American Graphophone Co.* v. *Hawthorne*, 92 Fed. Rep. 516.

In the *Risdon Case*, a member of the firm which made the plans for the construction of certain mining machinery to be made in the owner's shop, and then superintended its erection at the mine, was held to be guilty of infringement, though he neither personally made nor used the machines which were found to be an infringement of valid patents. In *American Graphophone Co.* v. *Hawthorne*, one who sold a machine with knowledge that it was to be used to produce an infringing article was held to be liable as an infringer.

For the purpose of testing the consequence of a ruling which will support the lawfulness of a sale of a patented machine for use only in connection with supplies necessary for its operation bought from the patentee, many fanciful suggestions of conditions which might be imposed by a patentee have been pressed upon us. Thus it is said that a patentee of a coffee pot might sell on condition that it be used only with coffee bought from him, or, if the article be a circular saw, that it might be sold on condition that it be used only in sawing logs procured from him. These and other illustrations are used to indicate that this method of marketing a patented article may be carried to such an extent as to inconvenience the public and involve innocent people in unwitting infringements. But these illustrations all fail of their purpose, because the public is always free to take or refuse the patented article on the terms imposed. If they be too onerous or not in keeping with the benefits, the patented article will not find a market. The public, by permitting the invention to go unused, loses nothing

which it had before, and when the patent expires will be free to use the invention without compensation or restriction. This was pointed out in the *Paper Bag Case*, where the inventor would neither use himself nor allow others to use, and yet was held entitled to restrain infringement, because he had the exclusive right to keep all others from using during the life of the patent. This larger right embraces the lesser of permitting others to use upon such terms as the patentee chooses to prescribe. It must not be forgotten that we are dealing with a constitutional and statutory monopoly. An attack upon the rights under a patent because it secures a monopoly to make, to sell and to use, is an attack upon the whole patent system. We are not at liberty to say that the Constitution has unwisely provided for granting a monopolistic right to inventors, or that Congress has unwisely failed to impose limitations upon the inventor's exclusive right of use. And if it be that the ingenuity of patentees in devising ways in which to reap the benefit of their discoveries requires to be restrained, Congress alone has the power to determine what restraints shall be imposed. As the law now stands it contains none, and the duty which rests upon this and upon every other court is to expound the law as it is written. Arguments based upon suggestions of public policy not recognized in the patent laws are not relevant. The field to which we are invited by such arguments is legislative, not judicial. The decisions of this court, as we have construed them, do not so limit the privilege of the patentee, and we could not so restrict a patent grant without overruling the long line of judicial decisions from Circuit Courts and Circuit Courts of Appeal, heretofore cited, thus inflicting disastrous results upon individuals who have made large investments in reliance upon them.

The conclusion we reach is that there is no difference, in principle, between a sale subject to specific restrictions as to the time, place or purpose of use and restrictions

requiring a use only with other things necessary to the use of the patented article purchased from the patentee. If the violation of the one kind is an infringement, the other is also. That a violation of any such restriction annexed to a sale by one with notice constitutes an infringing use has been decided by a great majority of the Circuit Courts and Circuit Courts of Appeal, and has come to be a well-recognized principle in the patent law, in accordance with which vast transactions in respect to patented articles have been conducted. But it is now said that the numerous decisions by the lower courts have been erroneous in respect to the proper construction of the limit of the monopoly conferred by a patent, and that they should now be overruled. To these courts has been committed the duty of interpreting and administering the patent law. There is no power in this court to review their judgments, except upon a writ of certiorari, or to direct their decisions, save through a certified interrogatory for direction upon a question of law. This power to review by certiorari is one which has been seldom exercised in patent cases. A line of decisions, which has come to be something like a rule of property, under which large businesses have been conducted, should at least not be overruled except upon reasons so clear as to make any other construction of the patent law inadmissible.

The earliest of the reported cases in which the precise question here presented arose were cases arising in suits for the infringement of a patent upon an iron band connected by a buckle, intended for binding cotton bales. The band and this buckle were of iron. The buckle was so adjusted as that the band could be removed from the bale only by cutting. Upon the buckle were stamped the words: "Licensed to use only once." When cut from the bale the band and buckle were sold to persons, who used the buckles either upon a new band, or one repaired, and these bands were sold to planters to be used again in baling

cotton. The question arose in a number of cases as to whether such second use of the buckles by one with notice, was an infringing use. In *American Cotton Tie Co.* v. *Simmons*, 3 Ban. & A. 320, Judge Shepley dismissed the bill. The case, upon appeal to this court, was reversed, upon the ground that that which had been done after the first use was a reconstruction, and not a repair, and was, therefore, an infringement. 106 U. S. 89. The court did not pass upon the question whether a second use of the buckles would be an infringing use. Another case arising under the same patent was that of *American Cotton Tie Supply Co.* v. *Bullard*, 4 Ban. & A. 520, decided by Judge Blatchford, who gave the question great consideration. "It is manifest," says Judge Blatchford, "that the owner of the patents intended, by the stamps upon the buckles and the imprints on the billheads, to grant a restricted license for the use of the ties and the buckles, and that the intended restriction was to a use of them once only, as baling ties. The words, 'licensed to use once only,' stamped on each buckle, were a notice to everyone who handled it that there was attached to it a restriction in the shape of a license, and of a license merely to use, and of a license to use only once. This was a lawful restriction." Concerning the question of the effect of this restriction upon subsequent buyers of the cotton with its bands and buckles, the court said: "It is difficult to see how, in view of the facts of the case, the owners of these patents can properly be said to have sold the buckles for the purpose of allowing them to be used in the ordinary pursuits of life and to pass into the markets of the country as an ordinary article of commerce. . . . The original license is fairly a license to have the buckle and the band confine a bale until the consumer needs to confine the bale no longer, and a license for no longer time. There is no purchase of buckle and band by a purchaser of the baled cotton, except as he purchases them confining the cotton

and to confine it until it reaches the consumer, and such purchase of buckle and band is, in effect, only a purchase of them subject to such original license. It is quite as reasonable to say that the purchaser of the cotton buys subject to such license as it is to say that the licensor, having imposed the restricted license, permits it to be instantly destroyed. The former view is consistent with the original intention, and the latter view is inconsistent with it."

As indicating the trend of judicial opinion that such license restrictions annexed to patented articles, when sold, constitute licenses under the patent, and that their violation by persons having notice constitutes an infringement of the patent, we here set out in the margin a number of the reported cases.[1]

It would lengthen this opinion unreasonably to make

[1] *Dickerson* v. *Matheson*, 57 Fed. Rep. 524, Second Circuit Court of Appeals; *Heaton-Penin. Co.* v. *Eureka Specialty Co.*, 77 Fed. Rep. 288, Sixth Circuit Court of Appeals; *Tubular Rivet Co.* v. *O'Brien*, 93 Fed. Rep. 200; *Cortelyou* v. *Lowe*, 111 Fed. Rep. 1005, Second Circuit Court of Appeals; *Edison Phonograph Co.* v. *Kaufmann*, 105 Fed. Rep. 960; *Edison Phonograph Co.* v. *Pike*, 116 Fed. Rep. 863; *Victor Talking Machine Co.* v. *The Fair*, 123 Fed. Rep. 424, Seventh Circuit Court of Appeals; *National Phonograph Co.* v. *Schlegel*, 128 Fed. Rep. 733; *The Fair* v. *Dover Mfg. Co.*, 166 Fed. Rep. 117; *Æolian Co.* v. *Juelg Co.*, 155 Fed. Rep. 119, Second Circuit Court of Appeals; *A. B. Dick Co.* v. *Milwaukee Co.*, 168 Fed. Rep. 930, Seventh Circuit Court of Appeals; *Crown Cork & Seal Co.* v. *Brooklyn Co.*, 172 Fed. Rep. 225; *Rupp* v. *Elliott*, 131 Fed. Rep. 730, Sixth Circuit Court of Appeals; *Commercial Co.* v. *Autolux Co.*, 181 Fed. Rep. 387; *Boesch* v. *Graff*, 133 U. S. 697, where articles made in Germany under a German patent, and imported to this country, were held to infringe a United States patent for the same article; and *Dickerson* v. *Tinling*, 84 Fed. Rep. 192, where it was held that one purchasing a patented article in Germany from the owners of a United States patent, having marked on it a condition that it should not be imported into the United States, was held guilty of infringement by bringing it into the United States.

See also Curtiss on Patents, §§ 218–218a; Walker on Patents, §§ 300, 301, 302; *Wilson* v. *Sherman*, 1 Blatchf. 536.

quotations from these opinions to show either the grounds upon which they go or their applicability. Some of them concern sales subject to a restriction upon the price upon resale, and others relate to a requirement that the article sold shall be used only in connection with certain other things to be bought from the patentee. We deem it well, however, to refer to the opinion of the Circuit Court of Appeals of the Eighth Circuit, delivered by Judge (now Mr. Justice) Van Devanter in *National Phonograph Co.* v. *Schlegel*, cited above, because it draws so clearly the distinction between a conditional and an unconditional sale of a patented article. Speaking for the court, Judge Van Devanter said (128 Fed. Rep. 733, 735):

"An unconditional or unrestricted sale by the patentee, or by a licensee authorized to make such sale, of an article embodying the patented invention or discovery, passes the article without the limits of the monopoly, and authorizes the buyer to use or sell it without restriction; but to the extent that the sale is subject to any restriction upon the use or future sale the article has not been released from the monopoly, but is within its limits, and, as against all who have notice of the restriction, is subject to the control of whoever retains the monopoly. This results from the fact that the monopoly is a substantial property right conferred by law as an inducement or stimulus to useful invention and discovery, and that it rests with the owner to say what part of this property he will reserve to himself and what part he will transfer to others, and upon what terms he will make the transfer."

There is no collision between the rule against restrictions upon the alienation or use of chattels not made under the protection of a patent and the right of the patentee through his control over his invention. The distinction is pointed out by Mr. Justice Hughes in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 401.

The English patent law, like our own, grants to the

patentee the exclusive right to make, to sell and to use. The decisions of the English courts upon the subject are, therefore, worthy of examination, and weight should be attached not only because of the respect due by reason of the similarity of statutes, but because many English patentees take out American patents and the converse. The English opinions which we shall refer to have to do with the sale of patented articles with restrictions upon the use.

The cases of *Incandescent Gaslight Co.* v. *Cantelo*, 12 Patent Law Reports, 262, decided in 1895, and *Incandescent Gaslight Co.* v. *Brogden*, 16 Patent Law Reports, 179, decided in 1899, were actions for the infringement of the Welsbach mantle patent for incandescent gas lighting. The mantles were sold subject to a license restriction, printed on the box containing them, that they should be used in connection with burners or apparatus sold or supplied by the patentee. In the *Cantelo Case* Mr. Justice Wills said (p. 264):

"The sale of a patented article carries with it the right to use it in any way that the purchaser chooses to use it, unless he knows of restrictions. Of course, if he knows of restrictions, and they are brought to his mind at the time of the sale, he is bound by them. He is bound by them on this principle: The Patentee has the sole right of using and selling the articles, and he may prevent anybody from dealing with them at all. Inasmuch as he has the right to prevent people from using them, or dealing in them at all, he has the right to do the lesser thing, that is to say, to impose his own conditions. It does not matter how unreasonable or how absurd the conditions are. It does not matter what they are if he says at the time when the purchaser proposes to buy, or the person to take a license, 'Mind, I only give you this license on this condition,' and the purchaser is free to take it or leave it as he likes. If he takes it, he must be bound by the condition. It seems

to be common sense, and not to depend upon any patent law, or any other particular law."

Upon the evidence it was held that Cantelo not having bought direct, he did not have actual knowledge of the restriction, and he was given judgment for costs upon that defense.

In the subsequent case against Brogden, the complainants were given an injunction against future infringement, and an accounting for damages for past infringement, upon the second point in the claim, namely, that the defendant had sold, being a dealer, with notice of the restriction, for use upon a burner not made or supplied by the patentee. As to the effect of the sale subject to the license restriction as to the use, Lord Justice Kennedy said: "A patentee has a right, not merely by sale without reserve, to give an unlimited right to the purchaser to use, and thereby to make a grant from which he cannot derogate, but may attach to it conditions, and if these conditions are broken then there is no license, because the licensee is bound up with the observance of the conditions."

In *British Mutoscope and Biograph Company* v. *Homer*, 17 Times Law Reports, 213, decided in 1901, it was held that the purchaser of a mutoscope under a rent distress warrant obtained no greater right to the use of the patented machine than that which pertained to the execution debtor, and that if the debtor had no right other than a strictly personal right to use, the purchaser obtained no right to the use. Mr. Justice Farwell, who delivered the opinion, cited and quoted with approval from the case of the *Incandescent Gaslight Co.* v. *Brogden*, 16 Patent Law Reports, 179, where it was said that a purchaser who buys with knowledge of the conditions under which his vendor is authorized to use a patented invention is bound by such conditions, and that such conditions are not contractual, but are incident to and a

limitation of the grant of the licensee to use, so that if the conditions are broken there is no grant at all.

In *McGruther* v. *Pitcher*, 20 Times Law Reports, 652, it is held that the purchaser of an article made under a patent and sold originally subject to restrictions as to place or method of use is not bound by such restrictions unless he buys with notice of them, as such restrictions do not run with the goods and are obligatory only upon those persons who take the article with knowledge of the conditions.

In the very late case of the *National Phonograph Co.* v. *Menck*, decided in 1911 by the Judicial Committee of the Privy Council, and reported in 27 Times Law Reports, 239, the cases were cited and reviewed. Referring to the distinction between the principles applicable to sales of unpatented and patented articles, Lord Shaw, in delivering the opinion of the court said (p. 241): "To begin with, the general principle . . . applicable to ordinary goods bought and sold, is not here in question. The owner may use and dispose of these as he sees fit. He may have made a certain contract with the person from whom he bought, and to such a contract he must answer. Simply, however, in his capacity as owner, he is not bound by any restrictions in regard to the use or sale of the goods, and it is out of the question to suggest that restrictive conditions run with the goods. . . ." Referring to former cases, he proceeds: "All that is affirmed is that the general doctrine of absolute freedom of disposal of chattels of an ordinary kind is, in the case of patented chattels, subject to the restriction that the person purchasing them, and in the knowledge of the conditions attached by the patentee, which knowledge is clearly brought home to himself at the time of sale, shall be bound by that knowledge and accept the situation of ownership subject to the limitations. These limitations are merely the respect paid and the effect given to those conditions of transfer of the

patented article which the law, laid down by statute, gave the original patentee a power to impose. Whether the law on this head should be changed and the power of sale *sub modo* should be withdrawn or limited is not a question for a court. It may be added that where a patented article has been acquired by sale, much, if not all, may be implied as to the consent of the licensee to an undisturbed and unrestricted use thereof. In short, such a sale negatives in the ordinary case the imposition of conditions and the bringing home to the knowledge of the owner of the patented goods that restrictions are laid upon him." Lord Shaw then referred to the case of the *Incandescent Light Co.* v. *Cantelo*, cited above, saying that, "The judgment in that case by Mr. Justice Wills forms undoubtedly a leading authority in the law of England." The passage above set out is then quoted in full.

The precise question here involved has never been decided by this court. It was raised in the *Cotton Tie Case*, 106 U. S. 89, but was passed by and the case decided upon the single ground that the defendants had infringed by a reconstruction of the bands after they had been cut. It was again presented in *Cortelyou* v. *Johnson*, 207 U. S. 196, 199, but was not decided, because it did not appear that the defendants, charged as contributory infringers as in the present case, had notice of the restriction upon the use of the patented machine.

In *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 345, it was urged that the analogy between the right of one under the copyright statute to fix the price at which a copyrighted book might be sold by retailers by a mere notice accompanying the book, and the right of one selling a patented article subject to a condition that it should not be sold at less than a prescribed minimum price, was such as to entitle the owner of the copyright to treat a sale contrary to the notice as an infringing sale. But this court declined to consider the rule applicable to restrictive

licenses accompanying the sale of a patented article, saying: "If we were to follow the course taken in the argument, and discuss the rights of a patentee, under letters patent, and then, by analogy, apply the conclusions to copyrights, we might greatly embarrass the consideration of a case under letters patent, when one of that character shall be presented to this court.

"We may say in passing, disclaiming any intention to indicate our views as to what would be the rights of parties in circumstances similar to the present case under the patent laws, that there are differences between the patent and copyright statutes in the extent of the protection granted by them. This was recognized by Judge Lurton, who wrote a leading case on the subject in the Federal courts (*The Button Fastener Case*, 77 Fed. Rep. 288), for he said in the subsequent case of *Park & Sons* v. *Hartman*, 153 Fed. Rep. 24:

" 'There are such wide differences between the right of multiplying and vending copies of a production protected by the copyright statute and the rights secured to an inventor under the patent statutes, that the cases which relate to the one subject are not altogether controlling as to the other.' "

Touching the question there involved, the court said (p. 350):

"The precise question, therefore, in this case is, does the sole right to vend (named in § 4952) secure to the owner of the copyright the right, after the sale of the book to a purchaser, to restrict future sales of the book at retail, to the right to sell it at a certain price per copy, because of a notice in the book that a sale at a different price will be treated as an infringement, which notice has been brought home to one undertaking to sell for less than the named sum? We do not think the statute can be given such a construction, and it is to be remembered that this is purely a question of statutory construction. There is

no claim in this case of contract limitation, nor license agreement controlling the subsequent sales of the book.

"In our view the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose, by notice, such as is disclosed in this case, a limitation at which the book shall be sold at retail by future purchasers, with whom there is no privity of contract. This conclusion is reached in view of the language of the statute, read in the light of its main purpose to secure the right of multiplying copies of the work, a right which is the special creation of the statute. True, the statute also secures, to make this right of multiplication effectual, the sole right to vend copies of the book, the production of the author's thought and conception. The owner of the copyright in this case did sell copies of the book in quantities and at a price satisfactory to it. It has exercised the right to vend. What the complainant contends for embraces not only the right to sell the copies, but to qualify the title of a future purchaser by the reservation of the right to have the remedies of the statute against an infringer because of the printed notice of its purpose so to do unless the purchaser sells at a price fixed in the notice. To add to the right of exclusive sale the authority to control all future retail sales, by a notice that such sales must be made at a fixed sum, would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment."

Though the Constitution gives to Congress power to promote "Science and Useful Arts," by securing for a limited time to writers and inventors "the exclusive right to their respective writings and discoveries," the legislation for this purpose had to be adapted to the difference between a "discovery" and a "writing." To secure to

the author an exclusive right to his "writings" Congress provided that he should have "the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same." Revised Statutes, § 4952. This is, in short, the sole right to multiply and vend copies of his production. While there are resemblances between the right of the author to "vend" his copyrighted production, and of the patentee to "vend" the patented thing, the inherent difference between the production of an author, be it a book, music or a picture, and that of an inventor, be it a machine, a process or an article, is so manifest that the exclusive right of one to multiply and sell was declared sufficient to give him that exclusive right to his writings proposed by the Constitution. To the inventor, by § 4884, Revised Statutes, there is granted "the exclusive right to make, *use* and vend the invention or discovery." This grant, as defined in *Bloomer* v. *McQuewan*, 14 How. 539, 549, "consists altogether in the right to exclude every one from making, *using* or vending the thing patented." Thus, there are several substantive rights, and each is the subject of subdivision, so that one person may be permitted to make, but neither to sell nor use the patented thing. To another may be conveyed the right to sell, but within a limited area, or for a particular use, while to another the patentee may grant only the right to make and use, or to use only for specific purposes. *Adams* v. *Burks*, 17 Wall. 453; *Mitchell* v. *Hawley*, 16 Wall. 544; *Rubber Co.* v. *Goodyear*, 9 Wall. 788, 799. Thus, in the case last cited the license was "to use the said Goodyear's gum-elastic composition for coating cloth for the purpose of japanning, marbling, and variegate japanning, at his own establishment, but not to be disposed of to others for that purpose without the consent of the said Charles Goodyear, . . . the right and license hereby conferred being limited to the United States, and not extending to any foreign country, and not being

intended to convey any right to make any contract with the government of the United States." Of this license, this court said (p. 799):

"It authorizes Chaffee to use it himself. It gave him no right to authorize others to use it in conjunction with himself, or otherwise, without the consent of Goodyear, which is not shown, and not to be presumed. It was to be used at his own establishment, and not at one occupied by himself and others. Looking at the terms of the instrument, and the testimony in the record, we are satisfied that its true meaning and purpose were to authorize the licensee to make and sell India-rubber cloth, to be used in the place, and for the purposes, of patent or japanned leather. In our judgment it conveyed authority to this extent and nothing more."

The licensees were held to have infringed the license by uses not permitted.

We have already pointed out that in the *Bement Case*, 186 U. S. 91, it was said in respect of the power of a patentee that, in the sale of rights under a patent, "with few exceptions any conditions which are not in their nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee, for the right to manufacture, *or use, or sell the article* will be upheld by the courts." (Italics ours.) The question, as was said in reference to the copyright, is one of statutory construction. The kinds of property rights sought to be guaranteed and the terms of the two statutes are so different that very different constructions have been placed upon them. There is no collision whatever between the decision in the *Bobbs-Merrill Case* and the present opinion. Each rests upon a construction of the applicable statute, and the special facts of the cases.

The *Paper Roll Case* (*Morgan Envelope Co.* v. *Albany Paper Co.*), 152 U. S. 425, has been relied upon by the defendants. We do not question that case, nor anything it

decides. But it has no application to the question here presented. This is manifest when that case is attentively examined. First, because here the ink and other supplies used in the operation of the complainant's rotary mimeograph patent were not made elements of the patent, as in the *Paper Roll Case;* and second, the toilet paper fixture in the *Paper Roll Case* was not sold with the license restriction that it was not to be used except in connection with paper supplied by the patentee. There was some evidence of a practice to sell the fixture only to those who used the patentee's paper; but this was far from proof of a specific license annexed to the sale of the fixtures that they were sold only to be used with paper supplied by the patentee. One who bought subject to no such restriction acquired the right to use the fixture with any paper. The opinion in that case is considered and analyzed in all of its aspects in the *Button Fastener Case*, 77 Fed. Rep. 288, 298–9.

We come then to the question as to whether "the acts of the defendants constitute contributory infringement of the complainants' patent."

The facts upon which our answer must be made are somewhat meagre. It has been urged that we should make a negative reply to the interrogatory as certified, because the intent to have the ink sold to the licensee used in an infringing way is not sufficiently made out. Undoubtedly a bare supposition that by a sale of an article which though adapted to an infringing use is also adapted to other and lawful uses, is not enough to make the seller a contributory infringer. Such a rule would block the wheels of commerce. There must be an intent and purpose that the article sold will be so used. Such a presumption arises when the article so sold is only adapted to an infringing use. *Rupp & Wittgenfeld Co.* v. *Elliott*, 131 Fed. Rep. 730. It may also be inferred where its most conspicuous use is one which will coöperate in an infringement when sale to such user is invoked by advertise-

ment. *Kalem Co.* v. *Harper Brothers*, decided at this term, 222 U. S. 55.

These defendants are, in the facts certified, stated to have made a direct sale to the user of the patented article, with knowledge that under the license from the patentee she could not use the ink, sold by them directly to her, in connection with the licensed machine, without infringement of the monopoly of the patent. It is not open to them to say that it might be used in a non-infringing way, for the certified fact is that they made the sale, "with the expectation that it would be used in connection with said mimeograph." The fair interpretation of the facts stated is that the sale was with the purpose and intent that it would be so used.

So understanding the import of the question in connection with the facts certified, *we must answer the question certified affirmatively.*

MR. JUSTICE DAY did not hear the argument and took no part in the decision of this case.

MR. CHIEF JUSTICE WHITE, with whom concurred MR. JUSTICE HUGHES and MR. JUSTICE LAMAR, dissenting.

My reluctance to dissent is overcome in this case: First, because the ruling now made has a much wider scope than the mere interest of the parties to this record, since, in my opinion, the effect of that ruling is to destroy, in a very large measure, the judicial authority of the States by unwarrantedly extending the Federal judicial power. Second, because the result just stated, by the inevitable development of the principle announced, may not be confined to sporadic or isolated cases, but will be as broad as society itself, affecting a multitude of people and capable of operation upon every conceivable subject of human contract, interest or activity, however

intensely local and exclusively within state authority they otherwise might be. Third, because the gravity of the consequences which would ordinarily arise from such a result is greatly aggravated by the ruling now made, since that ruling not only vastly extends the Federal judicial power, as above stated, but as to all the innumerable subjects to which the ruling may be made to apply, makes it the duty of the courts of the United States to test the rights and obligations of the parties, not by the general law of the land, in accord with the conformity act, but by the provisions of the patent law, even although the subjects considered may not be within the embrace of that law, thus disregarding the state law, overthrowing, it may be, the settled public policy of the State, and injuriously affecting a multitude of persons. Lastly, I am led to express the reasons which constrain me to dissent, because of the hope that if my forebodings as to the evil consequences to result from the application of the construction now given to the patent statute be well founded, the statement of my reasons may serve a twofold purpose: First, to suggest that the application in future cases of the construction now given be confined within the narrowest limits, and, second, to serve to make it clear that if evils arise their continuance will not be caused by the interpretation now given to the statute, but will result from the inaction of the legislative department in failing to amend the statute so as to avoid such evils.

Let me briefly recapitulate the facts and the rulings based thereon. A machine styled a rotary mimeograph was covered by a patent. The claims of the patent, however, did not embrace the ink or other materials used in working the machine, nor were they covered by independent patents. The Dick Company, owner of the patent, sold one of the machines to a Miss Skou. The entire title was parted with; in other words, there

was no condition imposed affecting the title or the uses to which the machine might be applied or the duration of the use. Upon the machine, however, was inscribed a notice, styled a License Restriction, reciting that the machine "may be used only with the stencil paper, ink and other supplies made by the A. B. Dick Company, Chicago, U. S. A." The Henry Company, dealers in ink, sold to Miss Skou, for use in working her machine, ink not made by the Dick Company. The court now decides that a use of such ink by Miss Skou would have been "a use of the machine in a prohibited way," and would have rendered her "liable to an action under the patent law for infringement," and that the seller of the ink was liable as an infringer of the patent on the machine because of the aiding and abetting of a proposed infringing use.

I cannot bring my mind to assent to the conclusion referred to, and shall state in the light of reason and authority why I cannot do so. As I have said, the ink was not covered by the patent; indeed, it is stated in argument and not denied that a prior patent which covered the ink had expired before the sale in question. It, therefore, results that a claim for the ink could not have been lawfully embraced in the patent, and if it had been by inadvertence allowed such claim would not have been enforcible. This curious anomaly then results, that that which was not embraced by the patent, which could not have been embraced therein and which if mistakenly allowed and included in an express claim would have been inefficacious, is now by the effect of a contract held to be embraced by the patent and covered by the patent law. This inevitably causes the contentions now upheld to come to this, that a patentee in selling the machine covered by his patent has power by contract to extend the patent so as to cause it to embrace things which it does not include; in other words, to exercise legislative power

of a far-reaching and dangerous character. Looking at it from another point of view and testing the contention by a consideration of the rights protected by the patent law and the rights which an inventor who obtains a patent takes under that law, the proposition reduces itself to the same conclusion. The natural right of any one to make, vend and use his invention which but for the patent law might be invaded by others, is by that law made exclusive, and hence the power is conferred to exclude others from making, using or vending the patented invention. *Paper Bag Patent Case*, 210 U. S. 405, 424–425, and cases cited.

The exclusive right of use of the invention embodied in the machine which the patent protected was a right to use it anywhere and everywhere for all and every purpose of which the machine as embraced by the patent was susceptible. The patent was solely upon the mechanism which when operated was capable of producing certain results. A patent for this mechanism was not concerned in any way with the materials to be used in operating the machine, and certainly the right protected by the patent was not a right to use the mechanism with any particular ink or other operative materials. Of course as the owner of the machine possessed the ordinary right of an owner of property to use such materials as he pleased in operating his patented machine and had the power in selling his machine to impose such conditions in the nature of covenants not contrary to public policy as he saw fit, I shall assume that he had the power to exact that the purchaser should use only a particular character of materials. But as the right to employ any desired operative materials in using the patented machine was not a right derived from or protected by the patent law, but was a mere right arising from the ownership of property, it cannot be said that the restriction concerning the use of the materials was a restriction upon the use of the machine protected

by the patent law. When I say it cannot be said I mean that it cannot be so done in reason, since the inevitable result of so doing would be to declare that the patent protected a use which it did not embrace. And this after all serves to demonstrate that it is a misconception to qualify the restriction as one on the use of the machine, when in truth both in form and substance it was but a restriction upon the use of materials capable of being employed in operating the machine. In other words, every use which the patent protected was transferred to Miss Skou, and the very existence of the particular restriction under consideration presupposes such right of complete enjoyment, and because of its possession there was engrafted a contract restriction, not upon the use of the machine, but upon the materials. And these considerations are equally applicable to the exercise of the exclusive right to vend protected by the patent unless it can be said that by the act of selling a patented machine and disposing of all the use of which it is capable a patentee is endowed with the power to amplify his patent by causing it to cover in the future things which at the time of the sale it did not embrace.

But the result of this analysis serves at once again to establish, from another point of view, that the ruling now made in effect is that the patentee has the power, by contract, to extend his patent rights so as to bring within the claims of his patent things which are not embraced therein, thus virtually legislating by causing the patent laws to cover subjects to which without the exercise of the right of contract they could not reach, the result being not only to multiply monopolies at the will of an interested party, but also to destroy the jurisdiction of the state courts over subjects which from the beginning have been within their authority.

The vast extent to which the results just stated may be carried will be at once apparent by considering the facts

of this case and bearing in mind that this is not the suit of a patentee against one with whom he has contracted to enforce as against such person an act done in violation of a contract as an infringement, but it is against a third person who happened to deal in an ordinary commodity of general use with a person with whom the patentee had contracted. And this statement shows that the effect of the ruling is to make the virtual legislative authority of the owner of a patented machine extend to every human being in society without reference to their privity to any contract existing between the patentee and the one to whom he has sold the patented machine. It is worthy of observation that the vast power which the ruling confers upon the holders of patented inventions does not alone cause controversies which otherwise would be subject to the state jurisdiction to become matters of exclusive Federal cognizance, but subjects the rights of the parties when in the Federal forum to the patent law to the exclusion of the state law which otherwise would apply and it may be to the overthrow of the settled public policy of the State wherein the dealings involved take place. All these results are in a measure comprehensively portrayed by the decree of the Circuit Court. They are, moreover, vividly shown by a reference made by the court to and the putting aside as inapplicable of a previous decision of this court (*Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373), which if here applied would cause the alleged license to be held void as against public policy. As the theory upon which the *Miles Medical Co. Case* is treated as inapplicable is that this case is one governed by the patent laws and therefore not within the rule of public policy which the *Miles Case* applied, it is made indubitably clear that the ruling now announced endows the patentee with a right by contract not only to produce the fundamental change as to jurisdiction of the state and Federal courts to which I have referred, but also to bring about the over-

throw of the public policy both of the State and Nation, which I at the outset indicated was a consequence of the ruling now made.

I do not think it necessary to stop to point out the innumerable subjects which will be susceptible of being removed from the operation of state judicial power and the fundamental and radical character of the change which must come as a result of the principle decided. But nevertheless let me give a few illustrations:

Take a patentee selling a patented engine. He will now have the right by contract to bring under the patent laws all contracts for coal or electrical energy used to afford power to work the machine or even the lubricants employed in its operation. Take a patented carpenter's plane. The power now exists in the patentee by contract to validly confine a carpenter purchasing one of the planes to the use of lumber sawed from trees grown on the land of a particular person or sawed by a particular mill. Take a patented cooking utensil. The power is now recognized in the patentee to bind by contract one who buys the utensil to use in connection with it no other food supply but that sold or made by the patentee. Take the invention of a patented window frame. It is now the law that the seller of the frame may stipulate that no other material shall be used in a house in which the window frames are placed except such as may be bought from the patentee and seller of the frame. Take an illustration which goes home to every one—a patented sewing-machine. It is now established that by putting on the machine, in addition to the notice of patent required by law, a notice called a license restriction, the right is acquired, as against the whole world, to control the purchase by users of the machine of thread, needles and oil lubricants or other materials convenient or necessary for operation of the machine. The illustrations might be multiplied indefinitely. That they are not imaginary is now a matter of common

knowledge, for, as the result of a case decided some years ago by one of the Circuit Courts of Appeal, which has been followed by cases in other Circuit Courts of Appeal, to which reference will hereafter be made, what prior to the first of those decisions on a sale of a patented article was designated a condition of sale, governed by the general principles of law, has come in practice to be denominated a license restriction, thus, by the change of form, under the doctrine announced in the cases referred to, bringing the matters covered by the restriction within the exclusive sway of the patent law. As the transformation has come about in practice since the decisions in question, the conclusion is that it is attributable as an effect caused by the doctrine of those cases. And, as I have previously stated, it is a matter of common knowledge that the change has been frequently resorted to for the purpose of bringing numerous articles of common use within the monopoly of a patent when otherwise they would not have been embraced therein, thereby tending to subject the whole of society to a widespread and irksome monopolistic control.

But I need not reason further, since, in my opinion, many adjudications of this court directly refute the existence of a supposed right of extension by contract of the patent laws, and are therefore, as I understand them, in conflict with the ruling now made. In *Wilson* v. *Sandford* (1850), 10 How. 99, the facts were these: Wilson granted to Sandford and the other defendants the right to use a patented planing machine, the consideration to be paid in instalments. Each note contained a provision that the title should revert in case of non-payment. Upon the theory that the refusal to pay an instalment forfeited the rights of the licensees, Wilson sued to restrain the further use of the machine on the ground that such use was an infringement of his patent rights. It was, however, decided that the matter in controversy arose

upon contract, and that the requisite jurisdictional value was not involved. The claim that jurisdiction could be exercised because the case arose under the patent laws, was thus disposed of (p. 101):

"Now the dispute in this case does not arise under any act of Congress; nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill; and there is no act of Congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common law and equity principles. The object of the bill is to have this contract set aside and declared to be forfeited; and the prayer is, 'that the appellant's reinvestiture of title to the license granted to the appellees, by reason of the forfeiture of the contract, may be sanctioned by the court,' and for an injunction. But the injunction he asks for is to be the consequence of the decree of the court sanctioning the forfeiture. He alleges no ground for an injunction unless the contract is set aside. And if the case made in the bill was a fit one for relief in equity, it is very clear that whether the contract ought to be declared forfeited or not, in a court of chancery, depended altogether upon the rules and principles of equity, and in no degree whatever upon any act of congress concerning patent rights. And whenever a contract is made in relation to them, which is not provided for and regulated by congress, the parties, if any dispute arises, stand upon the same ground with other litigants as to the right of appeal; and the decree of the circuit court cannot be revised here, unless the matter in dispute exceeds two thousand dollars."

The foregoing views were reiterated in *Bloomer* v. *McQuewan* (1852), 14 How. 539.

In *Hartshorn* v. *Day* (1856), 19 How. 211, the court, in commenting upon the effect upon a license, of the nonperformance, by the licensee of a patent right, of cove-

nants made by him, and speaking in particular of a covenant to pay an annuity to one Chaffee, the patentee, said (p. 222):

"The payment of the annuity was not a condition to the vesting of the interest in the patent in Judson, and of course . . . the omission or refusal to pay did not give to Chaffee a right to rescind the contract, nor have the effect to remit him to his interest as patentee. The right to the annuity rested in covenant. . . . The remedy for the breach could rest only upon the personal obligation" of the covenantor.

The cases just referred to and others in accord with them were reviewed in the opinion in *Albright* v. *Teas*, 106 U. S. 613, decided in 1883. The case was this: A patentee sold and assigned all his title and interest in the invention covered by his patents, and the purchasers covenanted to use their best efforts to introduce the invention, to pay specified royalties for the use of the patented improvements, etc. The assignor sued in a state court for a discovery and account and a decree for the amount of royalties found due and for general relief. On the application of the defendants the cause was removed into a Circuit Court, upon the theory that the suit was one arising under the patent laws of the United States, and, in consequence, exclusively within the cognizance of the courts of the United States. On final hearing, however, the Circuit Court remanded the cause as being one for the settlement of controversies under a contract, of which the state court had full cognizance. This court held that as the transfer of title was absolute, no rights secured by the patent under any act of Congress remained in the patentee, and that the case arose solely upon the contract and not upon the patent laws of the United States.

The prior cases on the subject were again reviewed by Mr. Justice Gray in *Dale Tile Mfg. Co.* v. *Hyatt* (1888), 125 U. S. 46. The plaintiff sued in a state court to re-

cover from one, who had been licensed by a patentee to make and use certain patented articles, to recover royalties due under the contract. The defendant contended in the state court that the subject-matter was one exclusively cognizable in the courts of the United States because the case was one arising under the patent laws, citing Rev. Stat., § 629, cl. 9; § 711, cl. 5. The contention was held untenable, and in the course of the opinion the court said (p. 52):

"It has been decided that a bill in equity in the Circuit Court of the United States by the owner of letters patent, to enforce a contract for the use of the patent right, or to set aside such a contract because the defendant has not complied with its terms, is not within the acts of Congress, by which an appeal to this court is allowable in cases arising under the patent laws, without regard to the value of the matter in controversy. Act of July 4, 1836, c. 357, § 17, 5 Stat. 124; Rev. Stat., § 699; *Wilson* v. *Sandford*, 10 How. 99; *Brown* v. *Shannon*, 20 How. 55."

Reviewing the decisions in *Hartell* v. *Tilghman*, 99 U. S. 547, and *Albright* v. *Teas*, *supra*, the court said (p. 53):

"It was said by Chief Justice Taney in *Wilson* v. *Sandford*, and repeated by the court in *Hartell* v. *Tilghman*, and in *Albright* v. *Teas*, 'The dispute in this case does not arise under any act of Congress; nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill; and there is no act of Congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common law and equity principles.' 10 How. 101, 102; 99 U. S. 552; 106 U. S. 619.

"Those words are equally applicable to the present case, except that, as it is an action at law, the principles of equity have no bearing. This action, therefore, was within the jurisdiction, and, the parties being citizens of the same State, within the exclusive jurisdiction, of the

State courts; and the only federal question in the case was rightly decided."

The case of *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659, touches upon the precise question before us. In the course of the opinion, the court said—italics mine—(p. 666):

"Upon the doctrine of these cases we think it follows that one who buys patented articles of manufacture from one authorized to sell them becomes possessed of an absolute property in such articles, unrestricted in time or place. Whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers is not a question before us, and upon which we express no opinion. *It is, however, obvious that such a question would arise as a question of contract, and not as one under the inherent meaning and effect of the patent laws.*"

A reference to the foregoing and other decided cases is contained in the opinion in *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S. 282. The suit was by a licensee authorized to manufacture and sell wooden pipe under certain letters patent, against two defendants, one of whom was the licensor and owner of the patent. The covenants of the licensee were, (1) to pay a license fee or royalty; (2) not to transfer or assign the license without the consent of the patentee; and (3) that the license might be revoked for failure to manufacture. While, because of peculiar conditions present in the case, the suit was held to be one arising under the patent laws, the court yet observed (p. 290):

"Now, it may be freely conceded that, if the *licensee* had failed to observe any one of the three conditions of the license, the *licensor* would have been obliged to resort to the state courts either to recover the royalties, or to procure a revocation of the license. Such suit would not involve any question under the patent law."

The court, after reciting the facts in the case of *Pratt* v.

Paris Gaslight & Coke Co., 168 U. S. 255, said (pp. 286, 287):

"It was held that the action was not one arising under the patent laws of the United States, and that to constitute such a cause the plaintiff must set up some right, title or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction or sustained by the opposite construction of those laws. That 'section 711 does not deprive the state courts of the power to determine *questions* arising under the patent laws, but only of assuming jurisdiction of *cases* arising under those laws. There is a complete distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading—be it a bill, complaint or declaration—sets up a right under the patent laws as ground for a recovery. Of such the state courts have no jurisdiction. The latter may appear in the plea or answer or in the testimony. The determination of such question is not beyond the competency of the state tribunals.' "

The case of *Bement* v. *National Harrow Co.*, decided at the same term as the *Wooden Pipe Case*, illustrates the doctrine. In that case the National Harrow Company, the patentee, commenced the action in a state court of New York to recover damages for the violation of license contracts pertaining to the manufacture and sale of a patent harrow and also sought to restrain the future violation of the contracts and compel their specific performance. If in consequence of the subject-matter the case was one arising under the patent laws, as it would have been if the question of infringement of the patent was involved, the jurisdiction of the courts of the United States was exclusive. The case was disposed of on its merits in the state courts and came to this court by writ of error upon the question as to whether the agreements between the licensor and licensee violated

the Federal anti-trust law, and jurisdiction was entertained and the Federal question was passed upon.

Finally, it seems to me the rulings made in the *Morgan Envelope Case*, 152 U. S. 425, are so apposite here as practically in reason to foreclose all controversy on the question. In that case suit was brought on three patents, one for an oval roll of paper, the other two for apparatus for holding the paper. The patentee sold the fixtures or apparatus only to purchasers of his paper, with the understanding that the paper would be subsequently purchased of the plaintiff company. It was held that the patent for the roll of paper was invalid, but the validity of the apparatus claims, or at least of some of them, was not challenged. The defendant sold the paper with full knowledge of the restriction imposed by the patentee. Mr. Justice Brown, after quoting from *Chaffee* v. *Boston Belting Co.*, 22 How. 217, 223, says (pp. 432, 433):

"The real question in this case is, whether, conceding the combination of the oval roll with the fixture to be a valid combination, the sale of one element of such combination, with the intent that it shall be used with the other element, is an infringement. We are of opinion that it is not. . . . Of course, if the product itself is the subject of a valid patent, it would be an infringement of that patent to purchase such product of another than the patentee; but if the product be unpatentable, it is giving to the patentee of the machine the benefit of a patent upon the product, by requiring such product to be bought of him."

Earlier in the opinion it was said (p. 431):

"The first defense raises the question whether, when a machine is designed to manufacture, distribute, or serve out to users a certain article, the article so dealt with can be said to be a part of the combination of which the machine itself is another part. If this be so, then it would seem to follow that the log which is sawn in the

mill; the wheat which is ground by the rollers; the pin which is produced by the patented machine; the paper which is folded and delivered by the printing press, may be claimed as an element of a combination of which the mechanism doing the work is another element. The motion of the hand necessary to turn the roll and withdraw the paper is analogous to the motive power which operates the machinery in the other instances."

Nor when accurately appreciated is there any conflict between the principles so long and firmly established by the cases to which I have just referred and the doctrine upheld in the *Goodyear Rubber Case*, 9 Wall. 788, and *Mitchell* v. *Hawley*, 16 Wall. 544. In the *Goodyear Case* the facts were these: The right was conferred upon one Chaffee by license "to use the said Goodyear's gum elastic composition for coating cloth for the purpose of japanning, marbling, and variegate japanning, at his own establishment, but not to be disposed of to others for that purpose without the consent of the said Charles Goodyear; . . . the right and license hereby conferred being limited to the United States, and not extending to any foreign country, and not being intended to convey any right to make any contract with the Government of the United States." Looking at the terms of the license and the testimony in the record, the court considered the instrument only "to authorize the licensee to make and sell India rubber cloth, to be used in the place, and for the purpose, of patent or japanned leather." The patent was held to be infringed because a right of use of the invention not granted to the licensee but reserved by the patentee or his assignee to himself, viz.: "the exclusive right to manufacture and sell army and navy equipments made of vulcanized India rubber," etc., had been invaded by the defendants.

In *Mitchell* v. *Hawley* this was the controversy: A patentee of certain machines, whose original patent had

still between six and seven years to run, conveyed to another person the "right to make and use and to license to others the right to make and use four of the machines" in two States "during the remainder of the original term of the letters-patent, *provided*, that the said grantee shall not in any way or form dispose of, sell, or grant any license to use the said machines *beyond* the said term." The licensee constructed and sold four machines to persons who, as found by the court, had knowledge of the limited title of the licensee. After the patent had expired, and during an extended term of the patent, the persons to whom the licensee had transferred the machines made use of the machines in violation of the limitation, and the owner of the patent sued to prevent the infringement, and his right to do so was upheld. Stating it to be unquestioned that a patentee who had absolutely parted with the title to the machine and with the use which the patent protected must be understood to have parted with all his exclusive right, and hence ceased to have any interest in the machine protected by the patent law, the court maintained the contentions of the complainant, on the ground that the rule just stated did not apply where the patentee did not grant the entire right covered by the patent, but retained a part thereof in himself, and therefore a violation of such reserved right was in conflict with a right still protected by the patent and an infringement of the patent. The difference between the rule applied in that case and the doctrine of the many other cases which we have cited and which also exists between the controversy presented in *Mitchell* v. *Hawley* and the one here under consideration was simply as follows: (*a*) That which exists between the conveyance of all one's rights covered by a patent and a transfer of only a part of such rights; (*b*) that which obtains between the ability of a patentee to protect the right which he enjoys under the patent law from infringement and his

want of power on parting with all his rights under the patent to contract so as to secure rights never embraced in his patent, and to bring such newly acquired contract rights under the protection of the patent law. That the sale here in question was one of all the rights which the patent protected has, it seems to me, at the outset been demonstrated beyond reasonable dispute. I mean, of course, within the limit of my powers of understanding, since, looking at the so-called license restriction again and again with a purpose if possible to bring my mind to assent to the view which the court takes of it, I find it impossible to do so. And in this connection it is to be observed that the real nature of the transaction is, in the argument of counsel for the Dick Company, stated to be directly the opposite of that which the court now holds it to be. Thus, counsel say:

"In the license plan in issue, the licensor, by limiting the market at which supplies may be purchased, is merely insuring to himself a royalty based upon the output of the machine. The licensor, by requiring the purchase of ink of him, in fact exacting a royalty (infinitesimal in amount) for every copy of the original produced by the mimeograph. The very nature of the work of these machines forbids the use of a fixed money royalty upon the work produced, since the money value is so small that the expense of the accounting would be prohibitive of such a method."

A construction of the restriction which, by speaking of license and licensor, obscures the fact that the restriction itself states the transaction to have been a sale of the machine and its right of use, yet by the very force of the nature of the so-called restriction describes it as being in essence and effect but a consideration for the rights parted with, and thus brings the case within the doctrine of *Wilson* v. *Sandford*, *Albright* v. *Teas*, and other cases which I have referred to.

The distinction between the two rules and the absolute harmony and coöperation between them had been pointed out before the decision in *Mitchell* v. *Hawley*, and has been since so clearly indicated as to my mind to leave no room for contention or evasion. Let me quote from some of the cases. In one of the early cases, *Bloomer* v. *McQuewan*, 14 How. 539, after referring to previous cases which had marked the distinction between the grant of the right to make and vend a patented machine and the grant of the right to use it, the court said (p. 549):

"The distinction is a plain one. The franchise which the patent grants, consists altogether in the right to exclude every one from making, using, or vending the thing patented, without the permission of the patentee. This is all that he obtains by the patent. And when he sells the exclusive privilege of making or vending it for use in a particular place, the purchaser buys a portion of the franchise which the patent confers. He obtains a share of the monopoly, and that monopoly is derived from, and exercised under, the protection of the United States. . . .

"But the purchaser of the implement or machine for the purpose of using it in the ordinary pursuits of life, stands on different ground. In using it, he exercises no rights created by the act of congress, nor does he derive title to it by virtue of the franchise or exclusive privilege granted to the patentee. The inventor might lawfully sell it to him, whether he had a patent or not, if no other patentee stood in his way. And when the machine passes to the hands of the purchaser, it is no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the act of congress. And if his right to the implement or machine is infringed, he must seek redress in the courts of the State, according to the laws of the State, and not in the courts of the United States, nor under the law of congress granting the patent. The implement or machine becomes his private individual

property, not protected by the laws of the United States, but by the laws of the State in which it is situated. Contracts in relation to it are regulated by the laws of the State, and are subject to state jurisdiction."

Likewise in *Adams* v. *Burke*, 17 Wall. 453, the court, speaking through Mr. Justice Miller said (p. 456):

"In the essential nature of things, when the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and he parts with the right to restrict that use. The article, in the language of the court, passes without the limit of the monopoly. That is to say, the patentee or his assignee having in the act of sale received all the royalty or consideration which he claims for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentee."

Yet, again, in the *Folding Bed Company Case*, 157 U. S. 659, 666, this court, reiterating the doctrine, said:

"Upon the doctrine of these cases we think it follows that one who buys patented articles of manufacture from one authorized to sell them becomes possessed of an absolute property in such articles, unrestricted in time or place. Whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers is not a question before us, and upon which we express no opinion. It is, however, obvious that such a question would arise as a question of contract, and not as one under the inherent meaning and effect of the patent laws.

"The conclusion reached does not deprive a patentee of his just rights, because no article can be unfettered from the claim of his monopoly without paying its tribute. The inconvenience and annoyance to the public that an opposite conclusion would occasion are too obvious to require illustration."

In view of the settled rule of this court, established by so many decisions, I might well refrain from referring to the English cases and the decisions of lower Federal courts relied on as persuasively supporting the doctrine now announced. But, nevertheless, I shall briefly notice the cases.

I pass by the English decisions relied upon with the remark that it is not perceived how they can have any persuasive influence on the subject in hand in view of the distinction between state and national power which here prevails and the consequent necessity, if our institutions are to be preserved, of forbidding a use of the patent laws which serves to destroy the lawful authority of the States and their public policy. I fail also to see the application of English cases in view of the possible difference between the public policy of Great Britain concerning the right, irrespective of the patent law, to make contracts with the monopolistic restriction which the one here recognized embodies and the public policy of the United States on that subject as established, after great consideration, by this court in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373. See especially on this subject the grounds for dissent in that case expressed by Mr. Justice Holmes, referring to the English law, on page 413.

So far as the various decisions of Circuit Courts of Appeals which the court refers to are concerned, as they conflict with the many adjudications of this court to which I have referred, it seems to me they ought not to be followed, but should be overruled. It is undoubted that the leading one of the cases which all the others but follow and reiterate is the *Button Fastener Case* to which I have previously referred. I shall not undertake to review that case elaborately, because in substance and effect the theory upon which it proceeds is in absolute conflict with the many adjudications of this court to which I have referred, and the reasoning which was employed in the case, in my

opinion, in its ultimate aspect rests upon a failure to distinguish between the principle announced in *Wilson* v. *Sandford*, and followed and applied in the many cases which I have reviewed, and the doctrine announced and applied in *Mitchell* v. *Hawley*. In other words, the *Button Fastener Case* and the confusion which has followed the application of the ruling made in that case was but the consequence of failing to observe the difference between the rights of a patentee which were protected by the patent and those which arose from contract and therefore were subject alone to the general law. In addition it may be well to observe that the very groundwork upon which the case proceeded has been since authoritatively declared by this court to be without foundation. For instance, it will become apparent from an analysis of the opinion in the case that it proceeded upon the theory that the doctrine upheld had been virtually sanctioned in previous adjudications of this court. Since the decision, however, this court, in *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 345, has expressly declared that the doctrine had never been upheld by this court. Moreover, also, in the *Bobbs-Merrill Case* this court, in considering one of the cases principally relied upon, in the opinion in the *Button Fastener Case*—the *Cotton Tie Case*—expressly pointed out that that case had been misconceived in the opinion in the *Button Fastener Case*, and did not have the significance which had there been attributed to it.

But even if I were to put aside everything I have said and were to concede for the sake of argument that the power existed in a patentee, by contract, to accomplish the results which it is now held may be effected, I nevertheless would be unable to give my assent to the ruling now made. If it be that so extraordinary a power of contract is vested in a patentee, I cannot escape the conclusion that its exercise, like every other power, should be subject to the law of the land. To conclude otherwise

would be but to say that there was a vast zone of contract lying between rights under a patent and the law of the land, where lawlessness prevailed and wherein contracts could be made whose effect and operation would not be confined to the area described, but would be operative and effective beyond that area, so as to dominate and limit rights of every one in society, the law of the land to the contrary notwithstanding.

Again, a curious anomaly would result from the doctrine. The law in allowing the grant of a patent to the inventor does not fail to protect the rights of society; on the contrary, it safeguards them. The power to issue a patent is made to depend upon considerations of the novelty and utility of the invention and the presence of these prerequisites must be ascertained and sanctioned by public authority, and although this authority has been favorably exerted, yet when the rights of individuals are concerned the judicial power is then open to be invoked to determine whether the fundamental conditions essential to the issue of the patent existed. Under the view now maintained of the right of a patentee by contract to extend the scope of the claims of his patent it would follow that the incidental right would become greater than the principal one, since by the mere will of the party rights by contract could be created, protected by the patent law, without any of the precautions for the benefit of the public which limit the right to obtain a patent.

I have already indicated how, since the decision in the *Button Fastener Case*, the attempt to increase the scope of the monopoly granted by a patent has become common by resorting to the device of license restrictions manifested in various forms, all of which tend to increase monopoly and to burden the public in the exercise of their common rights. My mind cannot shake off the dread of the vast extension of such practices which must come from the decision of the court now rendered. Who, I submit,

can put a limit upon the extent of monopoly and wrongful restriction which will arise, especially if by such a power a contract which otherwise would be void as against public policy may be successfully maintained?

What could more cogently serve to point to the reality and conclusiveness of these suggestions than do the facts of this case? It is admitted that the use of the ink to work the patented machine was not embraced in the patent and yet it is now held that by contract the use of materials not acquired from a designated source has become an infringement of the patent, and exactly the same law is applied as though the patent in express terms covered the use of ink and other operative materials. It is not, as I understand it, denied, and if it were, in the face of the decision in the *Miles Medical Co. Case, supra*, in reason it cannot be denied that the particular contract which operates this result if tested by the general law would be void as against public policy. The contract, therefore, can only be maintained upon the assumption that the patent law and the issue of a patent is the generating source of an authority to contract to procure rights under the patent law not otherwise within that law, and which could not be enjoyed under the general law of the land. But here, as upon the main features of the case, it seems to me this court has spoken so authoritatively as to leave no room for such a view. In *Pope Manufacturing Company* v. *Gormully*, 144 U. S. 224, the validity of certain stipulations contained in a license to use patented inventions came under consideration. It was decided that contracts of that character, like all others, were to be measured by the law of the land and were non-enforcible if they were contrary to general rules of public policy. And it was further held that even if contracts of that character were not void as against general principles of public policy, the aid of a court of equity would not be given to their enforcement if the stipulations were unconscionable and

oppressive, as are, in my judgment, aside from the rule of public policy, the stipulations of the contract here involved.

Indeed, when the decree rendered by the lower court which is now affirmed and which is excerpted in the margin [1] is considered, it seems to me the conclusion cannot be escaped that although in the mental process by which it was held that relief under the patent law could

[1] The Circuit Court granted a decree in favor of the complainant for an accounting of profits and damages and for an injunction restraining the defendants from infringing upon the said letters patent and "from directly or indirectly procuring or attempting to procure, inducing or attempting to induce or causing any breach or violation of the covenant, condition or obligation now existing or which may hereafter exist on the part of vendees or licensees of said patented and restricted rotary mimeographs to the complainant by reason of the license restrictions hereinbefore set out and particularly from directly or indirectly making or causing to be made, or selling or causing to be sold, or offering or causing to be offered, to any person or concern whatsoever, any supplies adapted for use or capable of being used on said patented or restricted mimeographs with design or intent that the same shall be so used in violation of such license restriction; from directly or indirectly persuading or inducing such persons or concerns to purchase any such supplies not of the complainant's manufacture and sale, designed or adapted for use in such machines for use thereon in violation of such license; from advertising or causing to be advertised in any manner any supplies intended or designed for use in said rotary mimeographs in violation of such license; from publishing or causing to be published any offer, promise or inducement designed or intended to procure licensees or vendees of the said patented and restricted rotary mimeographs to use or purchase for use in such machine supplies not of the manufacture of the complainant in violation of such license, and from doing and performing any and all other acts or things designed or intended to persuade or induce said licensees or vendees to violate the condition or covenant binding upon them with respect to the use of said rotary mimeograph and from in any way further interfering with the business of the said complainant of marketing said machines and supplies therefor under license restrictions limiting such machines to use only in conjunction with supplies made by or procured from said complainant.

be afforded the contract was treated as a restriction upon the use of the machine covered by the patent, so inexorable was the contrary result of the contract that in framing the decree it became necessary to give relief upon the theory that the gravamen of the suit was the violation of a contract stipulation in regard to unpatented materials.

For these reasons I, therefore, dissent.

THOMAS *v.* TAYLOR.

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

No. 171. Argued February 28, 1912.—Decided March 18, 1912.

How an action brought in the state court shall be denominated is for the state court to determine.

Although the common-law action of deceit does not lie against directors of a national bank for making a false statement, and the measure of their responsibility is laid down in the National Banking Act, *Yates* v. *Jones National Bank*, 206 U. S. 158, an action may be maintained in the state court regardless of the form of pleading if the pleading itself satisfies the rule of responsibility declared by that act.

There is, in effect, an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine.

The fact that a statement of the condition of a national bank is not made voluntarily, but under order of the Comptroller of the Currency, does not relieve the directors from liability for false statements knowingly made therein.

Notice from the Comptroller of the Currency to directors of a national bank to collect or charge off certain assets is a warning that those assets are doubtful; and to disregard such a notice and represent the assets in a statement to be good is a violation of the law and renders the directors making the statement liable for damages to one deceived thereby.

The objection that an action for deceit against directors of a national

bank was not declared in the trial court to be based on the Federal statute, and, therefore, defendants did not introduce evidence applicable to such a suit but which could be omitted in a common-law action, should be raised in the lower courts; such an objection is without merit where it appears that the issues actually raised were broad enough to allow and require the introduction of such evidence.

A judgment cannot be reversed on the mere suggestion that upon some other theory than that on which the case was tried evidence might have been introduced which might have changed the result.

195 N. Y. 590, affirmed.

THE facts, which involve the liability of directors of a national bank for damages caused by a false statement of the condition of the bank, are stated in the opinion.

Mr. Nash Rockwood for plaintiffs in error:

The remedy prescribed by the statute is exclusive; no common-law action for deceit will lie. See §§ 5211, 5239, Rev. Stats.

This is a penal statute, prescribing a duty, creating a liability, imposing a penalty, and providing a method for its enforcement; the duty so prescribed is entirely new, the liability so created had not theretofore existed, and this penalty had never been imposed, until the statute changed and entirely abrogated the common law relating to the subject. *Yates* v. *Jones National Bank*, 206 U. S. 158, 176.

The judgment of the state court, awarded in a common-law action for deceit, cannot be sustained here as a recovery under the Federal statute.

Having secured his judgment at common law, upon common-law proceedings and common-law proof, defendant in error now seeks to sustain it upon a different theory, and one which plaintiffs in error have never been permitted to defend.

Under our system of jurisprudence such a contention cannot prevail.

For distinction between these forms of action see *Utley*

v. *Hill*, 155 Missouri, 232, cited with approval in 206 U. S. 180; *Kountze* v. *Kennedy*, 147 N. Y. 129, 234.

Section 5239 has been so strictly construed as to require proof of something more than mere negligence and recklessness; nothing short of intentional violation will suffice. *Yates* v. *Jones National Bank*, 206 U. S. 180; *Utley* v. *Hill*, 155 Missouri, 232, 264; *McDonald* v. *Williams*, 174 U. S. 397.

Proceedings by virtue of which it is sought to impose upon plaintiffs in error a severe penalty do not in any sense constitute due process of law, which means a legal proceeding appropriate to the case and just to the parties, and which, above all else, gives the party to be affected a full opportunity to be heard. *Burton* v. *Platter*, 53 Fed. Rep. 901; *Gentry* v. *United States*, 101 Fed. Rep. 51; *In re Rosser*, 101 Fed. Rep. 562, 567; *Galpin* v. *Page*, 18 Wall. 350, 368; *Windsor* v. *McVeigh*, 93 U. S. 274; *Hovey* v. *Elliott*, 167 U. S. 409, 414; *Simon* v. *Craft*, 182 U. S. 427, 436; *Holden* v. *Hardy*, 169 U. S. 366, 391; *Merrill* v. *Rokes*, 12 U. S. App. 183; *Garfield* v. *Goldsby*, 211 U. S. 249, 262; *Bailey* v. *Alabama*, 219 U. S. 219, 238; *Moyer* v. *Peabody*, 212 U. S. 78, 84.

No violation of the statute was shown, even if the proper remedy had been invoked.

Directors can only be held liable under the Federal statute for a violation "knowingly done" or "knowingly permitted." *Yates* v. *Jones National Bank*, 206 U. S. 158–180.

The report was a true and correct statement of the condition of the bank as shown by its books. This is established by the evidence and findings, and is nowhere disputed.

The letter of the Comptroller of the Currency was not a final decision upon the value of these assets, which compelled the directors to immediately treat them as worthless. *United States* v. *Graves*, 53 Fed. Rep. 634. See also

Potter v. *United States*, 155 U. S. 438; *United States* v. *Young*, 128 Fed. Rep. 111; *Coffin* v. *United States*, 156 U. S. 446; *Graves* v. *United States*, 165 U. S. 324; *Twining* v. *United States*, 141 Fed. Rep. 41.

There is no sufficient evidence that the defendant in error suffered damage by reason of any act of the plaintiffs in error.

Defendant in error has mistaken his forum, as this action cannot be maintained in a state court. *In re Eno*, 54 Fed. Rep. 669; *State* v. *Tuller*, 34 Connecticut, 280; *Commonwealth* v. *Felton*, 101 Massachusetts, 204; *People* v. *Fonda*, 62 Michigan, 401; *Commonwealth* v. *Ketner*, 92 Pa. St. 372.

The Federal courts have exclusive cognizance of the offense of embezzlement of the funds, etc., of a national bank, and the offense is punishable only under United States statutes. *United States* v. *Buskey*, 38 Fed. Rep. 99; *State* v. *Tuller*, 34 Connecticut, 280; *Commonwealth* v. *Felton*, 101 Massachusetts, 214; *Commonwealth* v. *Ketner*, 92 Pa. St. 372; *People* v. *Fonda*, 62 Michigan, 401.

State courts have jurisdiction of offenses by national bank officers for which the acts of Congress have not made provision. *State* v. *Tuller*, *supra*; *State* v. *Fields*, 98 Iowa, 748; *State* v. *Bardwell*, 72 Mississippi, 535.

Mr. Edgar T. Brackett for defendant in error:

At the time of the commencement of the action, the facts here proven and before recited made out against the defendants a case of deceit at common law. *Brackett* v. *Griswold*, 112 N. Y. 454, 467; *Kley* v. *Healy*, 127 N. Y. 555, 561; *Kuelling* v. *Lean Mfg. Co.*, 183 N. Y. 78, 84; *Kingsland* v. *Haines*, 62 App. Div. 146, 148; *Ettlinger* v. *Weil*, 94 App. Div. 291; *Mason* v. *Moore*, 4 L. R. A. 597, 605; *Mors* v. *Swits*, 19 How. Pr. 275, 287; *Barber* v. *Morgan*, 19 How. Pr. 275, 287.

The action is well brought and the recovery right under

the terms of § 5211, Rev. Stat., the necessary implication of which is that the statement thus made and attested must be true and that a false report is prohibited. *Yates* v. *Jones Nat. Bank*, 206 U. S. 157–177; § 5239 Rev. Stat.

Two results may flow from a violation of its provisions: the franchise of the association may be forfeited—if such a result is sought, or reached, it must be through the medium of the Federal courts; or the directors guilty may be held liable for the damages sustained by any person. *Yates* v. *Jones National Bank, supra.*

Even if the recovery is sustained upon a theory different from that upon which it was based by the Special Term, as it is correct it will not be reversed because founded on a wrong reason. *Marvin* v. *Universal*, 85 N. Y. 278, 284; *Ward* v. *Hasbrouck*, 169 N. Y. 407, 420; *Siefke* v. *Siefke*, 6 App. Div. 472, 474; *Penny* v. *Rochester*, 7 App. Div. 595, 606; *Cullinan* v. *Furthman*, 70 App. Div. 110, 112; *Arnot* v. *Erie*, 67 N. Y. 315, 321; *McLaughlin* v. *Fowler*, 154 U. S. 663; *Lancaster* v. *Collins*, 115 U. S. 222, 227.

A finding that the defendants below knew, or were convinced, is simply stating in two forms that the defendants knew; and a statement recklessly made, without knowledge of its truth, which is, in reality, false, is a false statement knowingly made. *Cooper* v. *Schlesinger*, 111 U. S. 148, 155; *Moline Plow Co.* v. *Carson*, 72 Fed. Rep. 387, 392; *Boddy* v. *Henry*, 113 Iowa, 463, 468; *Rothschild* v. *Mack*, 115 N. Y. 1, 7; *Hadcock* v. *Osmer*, 153 N. Y. 604, 609.

Mr. Justice McKenna delivered the opinion of the court.

Action against plaintiffs in error for attesting as directors a false report, as it is alleged, of the condition of The Citizens' National Bank of Saratoga Springs, New York, whereby the plaintiff in the action (defendant in error)

was deceived and induced to purchase thirty shares of the stock of the bank for the sum of $160 per share, which would have been worth that sum had the report been true, but on account of its being false he was compelled to pay 100 per cent assessment on his shares, which was required to be made by the Comptroller of the Currency. Damages were laid in the sum of $4,800, for which, with interest, judgment was prayed.

The action was framed in deceit under the common law, the trial court stating that "the defendant claims, and the plaintiff concedes, that this is not an action to recover upon any liability stated in the National Banking Act against a director or officer of a national bank." And this was the ground of judgment, the trial court rejecting the contention of defendants (plaintiffs in error) that the only action, if any, available to the plaintiff (defendant in error) was under the National Bank Act. The court said: "But here the liability set forth in the complaint is not created by statute; the action is not a statutory action. It is the common-law action to recover damages in deceit affecting plaintiff only, not the bank or the stockholders generally, and must be considered as such. In the complaint the plaintiff has set forth a cause of action for deceit, and not a cause of action under the statute." The court was also of the view that there was nothing in the statutes of the United States "that destroys the common-law action for deceit practiced by the directors of a national bank;" and said, further, that if the plaintiff were attempting to enforce a liability under the statute against the directors of a national bank, there would be a different case. Considering that the evidence established all the elements necessary for the recovery in an action for deceit, the court rendered judgment against defendants (plaintiffs in error) for the sum of $4,800 and interest.

The Appellate Division, where the case was carried by defendants, and also the Court of Appeals, gave a broader

effect to the action, and decided that its requirements under the common law of the State coincided with the requirements of the statutes of the United States, and satisfied the measure of responsibility of those statutes as expressed in *Yates* v. *Jones National Bank,* 206 U. S. 158. "The case," the court said, "both as to pleadings and proofs, meets the statutory requirements."

The court, however, decided that by the realization of $97,000 of the assets condemned by the Comptroller, defendant in error's stock was not a total loss, as found by the trial court, but had a value of nearly $2,000, and required him to stipulate to deduct from the judgment the sum of $2,000 and interest, in which case the judgment so reduced was to be affirmed. The stipulation was filed.

The judgment was affirmed by the Court of Appeals, "on opinion of Cochrane, J., in the Appellate Division." We shall refer to the opinion as that of the Appellate Division, although it was adopted by the Court of Appeals.

A consideration of the pleadings need not detain us long. How the action should be denominated or regarded was for the Appellate Division and the Court of Appeals to decide, and those courts, considering the laws of the State, decided that it was the facts pleaded and not the technical designation of the action which constituted grounds of recovery; and we accept their decision. There is nothing in the national banking laws which precludes such view. Those laws are not concerned with the form of pleadings. They only require that the rule of responsibility declared by them shall be satisfied.

The attack made by the plaintiffs in error is as much directed against the evidence as against the ruling of the court, and it is well to consider the facts. They are stated in a general way in the opinion of the Appellate Division as follows (124 App. Div. 53, 54):

"The defendants [plaintiffs in error here] are directors of the Citizens' National Bank organized under the National Bank Law and doing business in the village of Saratoga Springs, N. Y. Prior to March 1, 1904, the Comptroller of the Currency informed the directors of the bank by letter that certain specified assets, amounting to $194,107.02, must be regarded as doubtful, and that immediate steps should be taken for their collection or removal from the bank. Of such letter the defendants had knowledge. On April 8, 1904, pursuant to a call of the Comptroller, a report of the condition of the bank at the close of business on March 28, 1904, made in regular form, verified by the cashier of the bank, and attested to be correct by each of the defendants, was published as required by law. In such report were included as a part of the resources of the bank the doubtful assets to which the attention of the defendants had been called by the Comptroller. The report also stated that the capital stock of the bank was $100,000; that there was a surplus of $50,000 and that there were undivided profits of $13,456.75. This published report was not seen by plaintiff, but its contents were communicated to him, and relying on the same, he purchased in the early part of June, 1904, thirty shares of the stock of said bank for the sum of $4,800. On June 27, 1904, the bank received notice from the Comptroller that its capital had become totally impaired, and that the same must be supplied by assessment upon the stockholders. Immediately thereafter such assessment was ordered, and the plaintiff paid $3,000 on account of the stock he had recently purchased."

All through the argument of plaintiffs in error runs the insistence that the common-law action of deceit does not lie against the directors of a national bank and that the only measure of their responsibility is laid down in the national banking laws. This is admitted. It was conceded by the Appellate Division as having been established

by *Yates* v. *Jones National Bank*, 206 U. S. 158, and the question in the case comes to the simple one, whether the Appellate Division rightly decided that the findings in the case at bar satisfied the test of liability declared in the *Yates Case*.

In that case a broad consideration of the national banking laws was given, and it was deduced from them that the report which § 5211 of the Revised Statutes required must contain a "'true'" statement of the condition of the bank and that "the making and publishing of a false report is prohibited." These, however, it was said, were implications but that the liability of the directors was fixed by the express provisions of the laws, and its extent was measured "by the promise not to 'knowingly violate, or willingly permit to be violated, any of the provisions of'" the Title relating to national banks.

This test is the foundation of the action. The complaint charges plaintiffs in error with actual knowledge. The allegation is that when plaintiffs in error attested the report "they knew the same was not correct and was false, and said statement was thus attested by them with the intention of deceiving the public and, among others, the plaintiff" (defendant in error). And the Appellate Division says (p. 56): "That the report was false and known to the defendants to be false they do not deny, nor do they attempt to explain their conduct." This would seem like a finding of fact of knowledge of the falsity of the report on the part of plaintiffs in error. Indeed, in distinguishing the case from the *Yates Case* the court did so on the ground that in that case "there had been a recovery against directors without proof of scienter, which proof the statute requires," and added: "Such proof has been supplied in the present case."

But, not insisting on this, let us consider the argument of plaintiffs in error. It is that the statement was not voluntary, having been made under the command of the

National Banking Act, and therefore an element of the action of deceit is wanting; and that such act requires "proof of something more than mere negligence and recklessness; nothing short of an intentional violation will suffice." *Yates* v. *Jones National Bank* and other cases are cited to support the contention. The contention goes beyond what was said in *Yates* v. *Jones National Bank*. The language there is "that where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required—that is, that the violation must in effect be intentional." Not, therefore, that as a condition of liability there should be proof of something more than recklessness; not that there should be an intentional violation, but a violation "in effect" intentional. There is "in effect" an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine. And such was the conduct of plaintiffs in error in this case. They had notice from the Comptroller of the Currency that $194,000 of the items counted as assets of the bank were doubtful and should be collected or charged off. This "was a direct warning to them," as the trial court said, "by the bank examiner and Comptroller that assets to nearly twice the amount of the capital stock were considered doubtful." They, notwithstanding, represented the assets to be good. Such disregard of the direction of the officers appointed by the law to examine the affairs of the bank is a violation of the law. Their directions must be observed. Their function and authority cannot be preserved otherwise and be exercised to save the banks from disaster and the public who deal with them and support them from deception.

It is further urged that it is unjust to sustain against plaintiffs in error the view of the action entertained by the Appellate Division because they say that their defense in the trial court was addressed and adapted to the case made

against them. "Had the action," they say, "been considered as based upon a Federal statute, there were many matters of defense which they could have interposed to such a charge, but which they had a right to omit, and were justified in omitting, at the time." In specialization of this it is said that they might have shown their relation to the bank and the confidence they had and were justified in having in the statements of certain of its officers, the cashier being instanced as one upon whom they might have relied "to prepare and correct a legal statement." And they contend that by such showing they would have been acquitted of having "'knowingly violated the statute.'"

This contention does not seem to have been urged in any of the courts below. It is stated in the opinion of the Appellate Division that "there is no pretense by defendants that they have been prejudiced by the theory followed in the court below." It is somewhat late now to urge it, but, however, we think it is without merit. There was an issue of knowledge tendered by the pleadings, and to sustain their side of the issue plaintiffs in error offered testimony of the correctness of the books and to show that the report was a true copy of them, as it was alleged in their answer to be. No attempt was or is made to show why the notice from the Comptroller was disregarded (we have seen it was known to plaintiffs in error prior to the attesting of the report), except that they point to the fact that $97,000 of the items mentioned by the Comptroller were subsequently collected and that they should have been given time to collect the other assets. But the fact of the false representation remains, and the assessment of 100 per cent upon the stock purchased by defendant in error, which increased the cost of his stock $3,000.

The plaintiffs in error, indeed, are quite at pains to show that a representation to be actionable for deceit

must not only be false, but must be known to be false. In other words, to quote from their brief, "To sustain an action for deceit, not only falsity but knowledge of falsity of representation must be shown," and for this New York cases are cited. In another part of their argument they say actual knowledge is not necessary, but that the action may be supported if reckless inattention has made the injury possible.

It is manifest, therefore, that plaintiffs in error did not refrain from showing want of knowledge because of the theory upon which the case was tried, and such showing was obviously relevant to support that theory and the defense that the requirement of the National Banking Act had not been violated, which was their explicit contention.

Besides, judgment cannot be reversed upon the mere suggestion that upon some other theory than that upon which the case was tried evidence might have been introduced which might have changed the result. But we are extending the discussion unnecessarily. The courts of New York have decided that the requirements of the local law of deceit are identical with what we have decided are the requirements of the National Banking Act.

Judgment affirmed.

BEUTLER *v.* GRAND TRUNK JUNCTION RAILWAY COMPANY.

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

No. 194. Submitted March 6, 1912.—Decided March 18, 1912.

Courts may not abolish an established rule of law upon personal notions of what is expedient; and so as to the fellow-servant doctrine even if it be, as it has been called, a bad exception to a bad rule.

In cases tried in the United States courts the court must follow its understanding of the common law when no settled rule of property intervenes.

The fellow-servant rule applies where the character of their respective occupations brings the people engaged in them into necessary and frequent contact even if they have no personal relations.

An employé of a railroad company engaged in work in the repair yard is a fellow-servant of the crew of a switching engine of the same company engaged in running cars needing repairs into the yard.

Although the question of fellow-servant may be left to the jury in the state court, the question whether the facts do or do not constitute a ground of liability is one of law; this court accordingly answers a question certified by the Circuit Court of Appeals as to whether employés in this case were fellow-servants.

If a law is bad, the legislature, and not juries, must change it.

THE facts, which involve the determination of whether certain classes of employés of railroad companies are fellow-servants, are stated in the opinion.

Mr. James J. Barbour, with whom *Mr. Raymond W. Beach* and *Mr. Elmer E. Beach* were on the brief for Beutler:

A car repairer exclusively employed under a separate and special foreman in the car repair department of a railroad company whose duties never bring him in relation to or in contact with the persons comprising an

engine and switching crew—exclusively engaged in a separate and distinct department known as the operating department—is not a fellow-servant with the members of such engine or switching crew. *Gilmore* v. *Nor. Pac. R. R. Co.*, 18 Fed. Rep. 866, 870; *Pike* v. *Chicago & A. R. R. Co.*, 41 Fed. Rep. 95, 99; *Nor. Pac.* v. *Herbert*, 116 U. S. 642; *B. & O. R. R. Co.* v. *Baugh*, 149 U. S. 368, 383; *Santa Fe & Pacific R. R. Co.* v. *Holmes*, 202 U. S. 438; *McCabe & Steen Co.* v. *Wilson*, 209 U. S. 275, 280; *Northern Pacific R. R. Co.* v. *Hambly*, 154 U. S. 349.

The case at bar arose in Illinois, and the Supreme Court of that State has held in cases similar to the one at bar that the doctrine of fellow-servant does not apply. Although the state decisions are not binding on this court, the reasoning therein may well be adopted as the law covering this particular case. *Nor. Pac. R. R. Co.* v. *Hambly*, 154 U. S. 361; *I., I. & I. R. R. Co.* v. *Otstot*, 212 Illinois, 429; *Rolling Mill Co.* v. *Johnson*, 114 Illinois, 57; *P. D. & E. Ry. Co.* v. *Rice*, 144 Illinois, 227; *Haas* v. *St. L. & S. Ry. Co.*, 111 Mo. App. 706, 713; *Gathman* v. *City of Chicago*, 236 Illinois, 9, 15; *L. E. & W. R. R. Co.* v. *Middleton*, 142 Illinois, 550; *Duffy* v. *Kivilen*, 195 Illinois, 630, 634.

Mr. George W. Kretzinger for Railway Company:

The trial court in holding that the deceased and the engine and switching crew were fellow-servants followed the law as many times declared by this court.

Persons in the service of the same employer and bearing such relations to each other and to the business they are jointly engaged in, as a switching crew and a car repairer in the railroad yards of the master, are fellow-servants, and the master is not liable for an injury to one through the negligence of the other.

In this case it must be assumed that all proper regulations were made by the master for the safety of the

deceased while he was at work on the car. There is no charge made that the method adopted for the safety of the deceased was not reasonably safe, but the sole trouble was that the switching crew did not heed the signal but negligently allowed the car, which was being propelled toward the one on which deceased was working, to run against it with such force that it ran over and killed him.

The duty and implied contract of the master with its servants is that it will exercise reasonable care to furnish its servants a safe place to work and shall employ competent co-servants, etc.

Where there is a general agent or superintendent having the management or control of any particular department or branch of the business, such agent takes the place of the corporation and any neglect or omission of duty in respect to his employés is the negligence of the master, for which the latter is responsible. *Randall* v. *Balt. & Ohio R. R. Co.*, 109 U. S. 478; *Quebec Steamship Co.* v. *Merchant*, 133 U. S. 375; *Central Railroad Co.* v. *Keegan*, 160 U. S. 267.

The cause of the accident was the negligence of the engine and switching crew, and such negligence in this respect was the negligence of fellow-servants for which the defendants in error are not liable. *Nor. Pac. Ry. Co.* v. *Dixon*, 194 U. S. 345; *Nor. Pac. R. R.* v. *Peterson*, 162 U. S. 355.

The negligence of the switching crew which caused the death of the deceased was not the negligence of one clothed with the control and management of the operating department of defendants in error. The case at bar, therefore, does not form an exception as to the general law of non-liability as above defined. *New England R. R. Co.* v. *Conroy*, 175 U. S. 328, 339; *Tex. Pac. Ry. Co.* v. *Bourman*, 212 U. S. 536.

The cases cited by plaintiff in error do not apply to this case.

MR. JUSTICE HOLMES delivered the opinion of the court.

The deceased, Fetta, was at work in the repair yard of a railroad; other servants of the road, an engine and switching crew, ran a car needing repair from the general tracks into the special yard, and by their negligence killed him. There was no further relation between the parties than these facts disclose, and the question is certified whether they were fellow-servants within the rule that would exempt the railroad from liability in that case.

The doctrine as to fellow-servants may be, as it has been called, a bad exception to a bad rule, but it is established, and it is not open to courts to do away with it upon their personal notions of what is expedient. So it has been decided that in cases tried in the United States courts we must follow our own understanding of the common law when no settled rule of property intervenes. *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349. *Northern Pacific R. R. Co.* v. *Hambly*, 154 U. S. 349, 360.

The precedents in this court carry the doctrine as far as it is necessary to carry it in this case to show that the two persons concerned were engaged in a common employment. No testimony can shake the obvious fact that the character of their respective occupations brought the people engaged in them into necessary and frequent contact, although they may have had no personal relations. Every time that a car was to be repaired it had to be switched into the repair yard. There is no room for the exception to the rule that exists where the negligence consists in the undisclosed failure to furnish a safe place to work in, an exception that perhaps has been pushed to an extreme in the effort to limit the rule. *Santa Fe Pacific R. R. Co.* v. *Holmes*, 202 U. S. 438. *McCabe & Steen Construction Co.* v. *Wilson*, 209 U. S. 275. The head of the switching crew and the deceased were as

clearly fellow-servants as the section hand and engineer in *Texas & Pacific Railway Co.* v. *Bourman*, 212 U. S. 536. *Northern Pacific R. R. Co.* v. *Hambly*, 154 U. S. 349. It may be that in the state court the question would be left to the jury, *Gathman* v. *Chicago*, 236 Illinois, 9; *Indiana, Illinois & Iowa R. R. Co.* v. *Otstot*, 212 Illinois, 429, but whether certain facts do or do not constitute a ground of liability is in its nature a question of law. To leave it uncertain is to leave the law uncertain. If the law is bad the legislature, not juries, must make a change. We answer the certificate, Yes.

SAN JUAN LIGHT & TRANSIT CO. *v.* REQUENA.

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

No. 96. Argued December 13, 1911.—Decided March 18, 1912.

Denial by the trial court of a motion to strike from the complaint allegations as to exemplary damages does not harm defendant if the court instructs the jury that only compensatory, and not exemplary, damages can be recovered.

Where the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case is in the appellate court for review.

The doctrine of *res ipsa loquitur* is that when a thing which causes injury, without fault of the person injured, is shown to be under the exclusive control of defendant, and would not cause the damage in ordinary course if the party in control used proper care, it affords reasonable evidence, in absence of an explanation, that the injury arose from defendant's want of care.

The doctrine of *res ipsa loquitur* was rightly applied against defendant electric light company in the case of a person injured while adjusting an electric light in his residence by an electric shock transmitted

from the outside wires of the defendant company entirely without fault on his part and in manner which could not have happened had such outside wires been in proper condition.

Although an instruction may be subject to criticism standing alone, it may be unobjectionable if read in the light of what preceded and what followed it.

4 Porto Rico Fed. Rep. 356, affirmed.

THE facts are stated in the opinion.

Mr. Hugo Kohlmann, with whom *Mr. F. Kingsbury Curtis*, *Mr. H. H. Scoville* and *Mr. H. P. Leake* were on the brief, for plaintiff in error:

The doctrine of *res ipsa loquitur* was not applicable, and the court below erred in applying it to this case.

This doctrine applies only where all the agencies which might have been instrumental in bringing about the injury are under the exclusive control and management of the defendant. There can be no presumption of negligence on the part of the defendant where plaintiff's evidence tends to show contributory negligence on his part as it did in the case at bar; or that the accident would not have happened had the defective installation owned by the defendant or the owner of the house been in good condition, or facts from which it could be inferred that a third agency was the proximate cause of the accident, or that it was a case of divided responsibility where an unexplained accident may have been attributable to one of several causes, for some of which the defendant is not responsible. *Peters* v. *Lynchburg Light Co.*, 108 Virginia, 333; *Minneapolis Electric Co.* v. *Cronon*, 166 Fed. Rep. 651; *Memphis National Fire Ins. Co.* v. *Denver Electric Co.*, 16 Colo. App. 86; *Gas Co.* v. *Speers*, 113 Tennessee, 83; *Harter* v. *Colfax Light Co.*, 124 Iowa, 500.

Moreover, the doctrine of *res ipsa loquitur* does not apply at all where complainant relies on specific acts of negligence. In such case, plaintiff must prove the negli-

gence alleged. *McGrath* v. *St. Louis Transit Co.*, 197 Missouri, 97.

The complaint specifically charged negligence in connection with the wire inside the electric light globe which the deceased was alleged to have touched, and plaintiff, in order to recover, was obliged to prove the specific negligence alleged. The fact of the death of the deceased was no evidence at all of its having occurred by reason of negligence on defendant's part as set forth in the complaint. The testimony tended to show that defendant could not have been guilty of the negligence alleged, as it did not have any control over the wires to which the allegations of the complaint referred.

The doctrine of *res ipsa loquitur*, even if applicable, was incorrectly applied by the court below.

The correct application of the doctrine of *res ipsa loquitur* requires that the evidence of the happening of the accident, even without other proof of negligence, should be allowed to go to the jury as evidence from which negligence may be inferred by the jury. It creates no presumption of negligence, and does not shift the burden of proof. *Lyles* v. *Carbonating Co.*, 140 Nor. Car. 25, 26; *Ross* v. *Cotton Mills*, 140 Nor. Car. 115, 119, 120; *Cherall* v. *Palmer Brick Co.*, 117 Georgia, 106, 108; *Buckland* v. *New York, N. H. & H. R. Co.*, 181 Massachusetts, 3; *De Glopper* v. *Nashville Light Co.*, 134 S. W. Rep. 609; *East End Oil Co.* v. *Pennsylvania Torpedo Co.*, 190 Pa. St. 350, 353; *Dean* v. *Tarrytown &c. R. R. Co.*, 113 App. Div. 437.

An instruction telling the jury substantially that if they believed certain facts, then the law raises the presumption of negligence, is misleading, unless it also tells the jury that such presumption is rebuttable. *Chicago &c. Co.* v. *Crose*, 113 Ill. App. 547; *Chicago &c. Co.* v. *Jamieson*, 112 Ill. App. 69.

The rule, *res ipsa loquitur*, cannot be applied where the evidence shows the conditions under which the accident

happened, and the question is raised whether, under the circumstances specified, the conduct of the defendant was negligent. *Dentz* v. *Penn. R. R. Co.*, 75 N. J. L. 893.

Plaintiff's cause of action being based upon alleged negligence of defendant in respect to the interior wiring of deceased's house, there could be no recovery in this action if such wiring was not under the defendant's control.

If the injury was caused by matters other than the defects in such wires the plaintiff was not entitled to recover, for the reason that the negligence upon which the complaint is based is in reference to such inside wiring, and clearly recovery could not be based upon negligent acts or omissions other than those alleged in the complaint. *McGrath* v. *St. Louis Transit Co.*, 197 Missouri, 97; *Batterson* v. *Chicago & G. T. Ry.*, 49 Michigan, 184; *T. W. & W. Ry. Co.* v. *Foss*, 88 Illinois, 551; *Atlantic Coast Line* v. *Capple*, 110 Virginia, 514; *Long* v. *Doxey*, 50 Indiana, 385; *Murphy* v. *North Jersey St. R. Co.*, 71 N. J. L. 5.

On the other hand, if the defects in the house installation did cause the death of plaintiff's husband, plaintiff is not entitled to recovery unless defendant was shown to control and to be responsible for the condition of such installation. *Murphy* v. *North Jersey St. Ry. Co.*, 71 N. J. L. 5, 7.

The burden of showing that negligence, or other wrong, was the proximate cause of the injury is upon the plaintiff. The plaintiff must not only prove negligence, but he must also prove that such negligence was the proximate cause of the injury. *Kelsey* v. *Jewett*, 28 Hun, 51; *Larson* v. *St. Paul &c. Ry. Co.*, 43 Minnesota, 488.

Proximate cause was a question for the jury. *Milwaukee & St. P. Ry. Co.* v. *Kellogg*, 94 U. S. 469; *St. Louis, I. M. & S. Ry. Co.* v. *Needham*, 69 Fed. Rep. 823; 1 Thomp. on Negligence, § 161 and cases; *Pittsburg Ry. Co.* v. *Carlson*, 24 Ind. App. 559; *Ætna Fire Ins. Co.* v. *Boon*, 95

U. S. 130; and see a decision of the Supreme Court of Spain, March 7, 1902, Vol. 93, Jurisprudencia Civil, referred to in *Roman* v. *American Ry. Co.*, 10 Porto Rico 52. See also *Little* v. *Hackett*, 116 U. S. 366, 371.

The court erred in refusing to charge that if the cause of deceased's death was an inevitable accident, plaintiff could not recover herein. *Clyde* v. *Richmond R. Co.*, 59 Fed. Rep. 394; *Hodgson* v. *Dexter*, 12 Fed. Rep. 283; *Dryer* v. *People*, 188 Illinois, 40; *Dyget* v. *Bradley* (N. Y.), 8 Wend. 469.

The defendant exercised the degree of care in the inspection of its wires which the law requires to be exercised. It could not anticipate the fire in the bakery, nor did it know the plaintiff's installation was defective. *Texas Pac. Ry. Co.* v. *Patton*, 61 Fed. Rep. 259; *Atlantic Coast Line* v. *Capple*, 110 Virginia, 514.

The court erred in refusing charge that if defendant had made a proper inspection a short time before the accident, and the inspection disclosed no defect, plaintiff could not recover. *Smith* v. *East End Elec. Co.*, 198 Pa. St. 19; *Denver Com. El. Co.* v. *Simpson*, 31 L. R. A. 566; *Cosgrove* v. *Kennebec Light & Heat Company*, 98 Maine, 473.

Defendant's motion to strike from the complaint all allegations as to exemplary damages should have been granted. *Milwaukee &c. R. Co.* v. *Arms*, 91 U. S. 489; *W. U. Tel. Co.* v. *Eyser*, 91 U. S. 495; *Re California Nav. & Imp. Co.*, 110 Fed. Rep. 670; *Thomson* v. *Chicago, M. & S. Paul R. R. Co.*, 104 Fed. Rep. 845; *Bube* v. *B. R. L. & P. Co.*, 140 Alabama, 276.

In Porto Rico there is no statute authorizing the recovery either by parent, widow, or any other person, of exemplary damages in a case of negligence.

The court declined to hear further argument. *Mr. Willis Sweet* and *Mr. George H. Lamar* submitted a brief for defendant in error.

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

The judgment here to be reviewed is one awarding damages to a widow for the death of her husband, caused by an electric shock received while he was adjusting an incandescent light in his residence in San Juan, Porto Rico. The case presented by the evidence produced upon the trial, which was to the court and a jury, was this:

The defendant was supplying the inhabitants of San Juan with electricity for lighting purposes, and had engaged to deliver at the deceased's residence a current suitable for lighting it. The electricity was conveyed along the street in front of his residence by a primary wire carrying a current of 2,200 volts, and by means of parallel or multiple converters the current was reduced to 110 volts and then carried to his residence and those of his neighbors by a secondary wire. These wires and converters were owned and controlled by the defendant, and the wiring and fixtures in the residence of the deceased were owned and controlled by him. On the occasion in question the current carried by the secondary wire, and by it communicated to the wiring in the residence of the deceased, became in some way greatly and dangerously increased in voltage, and it was because of this that he received the fatal shock. Had this current been maintained at substantially its normal standard, as was contemplated, it would not, in the circumstances, have done him any injury. He was not responsible for the increased voltage, and neither did he have reason to expect it.

There were no outside electric wires in that vicinity save those of the defendant, and the increased and dangerous current could only have come from its primary wire. About the time of the shock to the deceased two of his neighbors had trouble with a like current in their houses. One received a shock which felled him to the

floor and rendered him unconscious, and the other found the wires in his shop flashing, and on coming in contact with one of them was made unconscious and burned so that he was taken to a hospital for treatment. Shortly thereafter it was found that the ground or protecting wire leading from one of the converters to the earth was broken or severed and that the other converter was heated and out of order, the insulation being charred.

There was testimony tending to show that on the day preceding these shocks the primary and secondary wires and the converters had been examined by the defendant's inspector and found in good condition, but this testimony was greatly impaired upon the cross-examination of the inspector, who then said: "My inspection consisted in seeing that the poles and overhead trolley lines were in good condition. I just walked along and examined each pole, but did not climb them. When I came to the transformer [converter] I did not climb the pole and didn't look at the fuses. . . . No, sir; on that day I didn't look at the transformer any closer than I could see it from the ground. . . . There is no way you can tell from looking at the outside of the transformer whether it is in good condition or not."

There was also testimony tending to show that the wiring in the deceased's residence was not properly insulated or in good condition, but there was no claim that the defendant was responsible for this, and neither was there any evidence that the fatal shock resulted therefrom.

Much of the testimony was addressed to the questions, whether a current of unusual and dangerous voltage was communicated from the defendant's wires to the wiring in the residence of the deceased, and, if so, whether this resulted from negligence of the defendant in failing to exercise appropriate care in the maintenance and inspection of its wires and converters. This testimony was

admitted without objection, both parties tacitly treating it as within the issues.

That the fatal shock resulted, without fault of the deceased, from an unusual and dangerous current carried to his residence by the wires of the defendant was so conclusively established by the evidence that that part of the case might well have been covered by a peremptory direction to the jury; leaving them to determine, under appropriate instructions, the question of the defendant's negligence and the amount, if any, which the plaintiff was entitled to recover.

With this statement of the case presented upon the trial, we come to the rulings which are assigned as error.

1. A motion to strike from the complaint a paragraph relating in part to exemplary damages was denied, because not all of the paragraph was deemed objectionable, and complaint is made of that ruling. But it is not necessary to consider its propriety. Even if wrong, it did the defendant no harm, because the court instructed the jury that there could be no recovery of exemplary damages, but only such as were compensatory.

2. It is urged that the negligence charged in the complaint related only to the condition of the wiring inside the residence of the deceased, and therefore that the court erred in permitting a recovery on the theory that the defendant was negligent in respect of the maintenance and care of the wires and converters outside. This contention must fail. While the complaint was not drafted with commendable precision, and, if critically examined, might be regarded as leaving it uncertain whether the negligence charged related to the wiring inside or to that outside whereby the current was supplied, there was no objection to this uncertainty in the court below. On the contrary, the trial proceeded, as we have seen, upon the theory that the question whether the defendant had failed to exercise appropriate care in the maintenance and inspec-

tion of its outside wires and converters was within the issues. Each party, without objection from the other, introduced evidence bearing upon that question; and when it was submitted to the jury there was no exception upon the ground of a variance. Effect must therefore be given to the well-settled rule that where the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review.

3. In its charge to the jury the court explained, in substance, that a company supplying electricity for lighting purposes and engaging with individuals to deliver a suitable current at their residences and places of business over its own system of wires and appliances is bound to exercise such control over the subtle and perilous agency with which it is dealing and to take such precautions in the maintenance and inspection of its wires and appliances as are reasonably essential to prevent an excessive and dangerous current from passing from its supply wires to the service wires of its patrons, and then said:

"And you are further instructed that if you believe from a preponderance of the evidence that the deceased came to his death while innocently and without knowledge of any danger using an incandescent light, the current for which was furnished, or to which the electricity was supplied, by the defendant company, the presumption is that the electric company was negligent, and it devolves upon it to show that the surplus and dangerous current that came over the wires did not occur from any negligent act on its part."

Exception to this instruction was taken upon the ground that it erroneously applied the doctrine of *res ipsa loquitur*. While recognizing that that doctrine is of restricted scope, and when misapplied is calculated to operate prejudicially, we think there was no error in its application in this in-

stance. The deceased was without fault. The defendant's primary wire was carrying a current of high and deadly voltage. Its secondary wire conveyed to his residence an excessive and dangerous current which could only have come from its primary wire. Had its wires and converters been in proper condition, the excessive and dangerous current would not have been communicated to its secondary wire and the injury would not have occurred. These wires and converters were exclusively under its control, and it was charged with the continuing duty of taking reasonable precautions, proportioned to the danger to be apprehended, to maintain them in proper condition. In the ordinary or usual course of things, the injury would not have occurred had that duty been performed. Not only did the injury occur, but immediately thereafter both converters were found to be out of order; one being heated and its insulation charred, and the protecting ground wire of the other being broken or severed. Besides, the defendant engaged to supply a current of low voltage, reasonably safe and suitable for lighting, while the current delivered on this occasion was of high voltage, extremely dangerous and unsuitable for lighting purposes. These circumstances pointed so persuasively to negligence on its part that it was not too much to call upon it for an explanation. Of course, if the cause of the injury was one which it could not have foreseen and guarded against, it was not culpable, but in the absence of that or some other explanation there was enough to justify the jury in finding it culpable. This was all that was meant by the instruction, reasonably interpreted. It was not a model, and, if it stood alone, might be subject to criticism. But, if read in the light of what preceded and followed it and of the case before the jury, it was unobjectionable. When so read it rightly declared and applied the doctrine of *res ipsa loquitur*, which is, when a thing which causes injury, without fault of the injured person, is shown to be under

the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care. *Inland and Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551, 554; *East End Oil Co.* v. *Pennsylvania Torpedo Co.*, 190 Pa. St. 350; *Alexander* v. *Nanticoke Light Co.*, 209 Pa. St. 571; *Trenton Passenger Railway Co.* v. *Cooper*, 60 N. J. L. 219; *Newark Electric Co.* v. *Ruddy*, 62 N. J. L. 505; 2 Cooley on Torts, 3d ed., 1424; 4 Wigmore on Evidence, § 2509.

4. Complaint is made of the court's refusal to give several instructions requested by the defendant. All have been examined, and we find no error in their refusal. Some were in substance incorporated in the charge, some were inapplicable to the case before the jury, and others did not correctly state the law.

Judgment affirmed.

CAMPBELL *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 161. Argued March 6, 1912.—Decided March 18, 1912.

As §§ 566, 649 and 700, Rev. Stat., do not make any provisions for such a case, the trial of a case in the District Court of the United States without a jury is in the nature of a submission to an arbitrator, and the court's determination of issues of fact and questions of law supposed to arise on its special findings is not a judicial determination, and, therefore, not subject to reëxamination in an appellate court.

In such a case the Circuit Court of Appeals has no power to consider the sufficiency of facts found to support the judgment, but is limited to a consideration of such questions of law as are presented by the

record proper independently of the special finding; and, in the absence of any such independent questions, must affirm.

An objection to form of pleading that can be cured by amendment should be seasonably taken on the trial.

Where a statement in the answer that defendant had not and could not obtain sufficient information upon which to base a belief respecting the truth of an allegation in the complaint is not objected to in the trial court as an insufficient denial of the allegation but is treated as sufficient, the objection cannot be made in an appellate court, and the truth of the allegation must be regarded as at issue.

170 Fed. Rep. 318, reversed.

THE facts are stated in the opinion.

Mr. A. B. Browne, with whom *Mr. Gerald Hughes*, *Mr. Alexander Britton*, *Mr. Evans Browne*, *Mr. Clayton C. Dorsey* and *Mr. Barnwell S. Stuart* were on the brief, for plaintiffs in error:

There was no jurisdiction in the United States Circuit Court of Appeals to review and reverse the judgment of the District Court.

In actions at law in the courts of the United States, if the questions of fact are, by the consent of the parties, determined by the court without a jury, no ruling made upon or in connection with the trial can be reviewed by the Court of Appeals upon writ of error in the absence of a statute providing otherwise. *Rogers* v. *United States*, 141 U. S. 548; *United States* v. *Cleague*, 161 Fed. Rep. 85, 86; *United States* v. *Louisville & N. R. Co.*, 167 Fed. Rep. 306, 308; *United States* v. *St. Louis, I. M. & S. Ry. Co.*, 169 Fed. Rep. 73, 74, 76.

The question of jurisdiction is one which the court will determine regardless of whether it was raised or suggested by the parties. *Cutler* v. *Rae*, 7 How. 729; *Mansfield, Coldwater &c. Ry. Co.* v. *Swan*, 111 U. S. 379, 382; *Parker* v. *Ormsby*, 141 U. S. 81, 85; *Perez* v. *Fernandez*, 202 U. S. 80, 100; *Dones* v. *Urrutia*, 202 U. S. 614.

The same rule obtains in the Circuit Courts of Appeals

in cases appealed or brought by writ of error to those courts. Where the jurisdiction is found not to be conferred by the Constitution and laws, objection thereto cannot be waived by the parties. *Henrie* v. *Henderson*, 145 Fed. Rep. 316; *Fred Macey Co.* v. *Macey*, 135 Fed. Rep. 725, 726; *Cochran* v. *Childs*, 111 Fed. Rep. 433; *Wetherby* v. *Stinson*, 62 Fed. Rep. 173; *Tinsley* v. *Hart*, 53 Fed. Rep. 682.

The judgment of the Circuit Court of Appeals is not warranted by the facts and the principles of law applicable thereto.

Not only by virtue of the notice were these sureties released but by the necessary consequences which must be deemed to result from the action which they took.

The sureties did all they could do in the performance of their obligations to the Government and gave the latter the opportunity to prevent any and all loss, and this opportunity was recognized and accepted by the Government, with which latter the rules and principles of fair dealings in its contractual relations with an individual must be held to obtain and be of equal force as in the case of dealing and contractual relations between individuals. *Burgess* v. *Eve*, L. R. 13 Eq. Cases, 450, 457; *Phillips* v. *Foxall*, L. R. 7 Q. B. 766.

The principle contended for by plaintiff in error as applicable, and upon which, in the case at bar, the sureties should be held to have fully performed their obligation and to be released from further liability, has been recognized and followed in the United States. See *Walsh* v. *Colquitt*, 64 Georgia, 740; *Emery* v. *Baltz*, 94 N. Y. 408; *Dwellinghouse Ins. Co.* v. *Johnston*, 90 Michigan, 170; *Rapp* v. *Phœnix Ins. Co.*, 113 Illinois, 390, 402; *Lewiston* v. *Gagne*, 89 Maine, 395.

Anderson v. *Blair* can be distinguished, and see *United States* v. *Kirkpatrick*, 9 Wheat. 720; *United States* v. *Van Zandt*, 11 Wheat. 184; *Dox* v. *Postmaster General*, 1 Pet.

318; *Jones* v. *United States*, 18 Wall. 662; *Hart* v. *United States*, 95 U. S. 315.

The case at bar has clearly exceptional features; and see 2 Brandt on Suretyship, § 555.

When sureties take notice of the principal's default, and with diligence discover his misconduct and do all that is within their power to perform their contract to see that the principal faithfully and without default performs his duty, the performance being complete, the obligation should cease to exist. See 2 Parsons on Contracts, p. 31.

The Government could have immediately dismissed Westcott without injury, and when it acted upon the notifications of the sureties and took charge of his office, and found that he had been guilty of misconduct and knew that the sureties were unwilling and refused to remain longer liable upon the bond, it was then and there its duty to dismiss Westcott unless he provided new and adequate sureties for the performance of his duties.

There is no question that the bond is revocable.

Mr. Assistant Attorney General Denison for the United States:

The bond itself contained no provision that the sureties should be released by any laches on the part of government officers.

The decision of the District Court on the question of law was directly contrary to at least eight decisions of this court. *United States* v. *Kirkpatrick*, 9 Wheat. 720; *United States* v. *Vanzandt*, 11 Wheat. 184; *Dox* v. *Postmaster General*, 1 Pet. 318; *Jones* v. *United States*, 18 Wall. 662; *Hart* v. *United States*, 95 U. S. 316; *Minturn* v. *United States*, 106 U. S. 437; *Fidelity &c. Co.* v. *Courtney*, 186 U. S. 361; *German Bank* v. *United States*, 148 U. S. 573; *United States* v. *Sisk*, 176 Fed. Rep. 886.

As the facts found by the District Judge did not legally

support the judgment, *Rogers* v. *United States*, 141 U. S. 548, does not apply and the Circuit Court of Appeals had jurisdiction to reverse for this error of law. *Andes* v. *Slauson*, 130 U. S. 435; *Campbell* v. *Boyreau*, 21 How. 223; *Paine* v. *Cent. Vt. R. R. Co.*, 118 U. S. 152.

But errors made apparent by a scrutiny of the pleadings also afford a basis for review. Cases *supra* and *O'Reilly* v. *Brooke*, 209 U. S. 45; *Lyons* v. *Nat. Bank*, 19 Blatchf. 287; *Doty* v. *Jewett*, 22 Blatchf. 65; *Bond* v. *Dustin*, 112 U. S. 604; *Supervisors* v. *Kennicott*, 103 U. S. 554; *Low* v. *United States*, 169 Fed. Rep. 86; *United States* v. *St. L., I. M. & S. Ry. Co.*, 169 Fed. Rep. 73; *United States* v. *Cleage*, 161 Fed. Rep. 85; *United States* v. *L. & N. R. R.*, 167 Fed. Rep. 306; *Rush* v. *Newman*, 58 Fed. Rep. 158; *Prentice* v. *Zane*, 8 How. 470; *Guild* v. *Frontin*, 18 How. 135; *Suydam* v. *Williamson*, 20 How. 427, 433; *Madison County* v. *Warren*, 106 U. S. 622; *Glenn* v. *Fant*, 134 U. S. 398; *Flanders* v. *Tweed*, 9 Wall. 425; *Norris* v. *Jackson*, 9 Wall. 125; *Blair* v. *Allen*, 3 Dillon, 101; *Wear* v. *Mayer*, 2 McCrary, 172.

As to the pleadings the District Court erred in overruling the Government's demurrer to the separate defense of laches. *Lyons* v. *Nat. Bank*, *supra*.

Also the first defense did not present any valid issue under the laws of the State of Colorado, the denials being in part mere conclusions of law. *Gale* v. *James*, 11 Colorado, 540, 541; *Pueblo* v. *Gould*, 6 Colo. App. 44; Bliss Code Pleading, § 334, and cases cited, and in part negative pregnant; Chitty on Pleading, § 566; *Harden* v. *Atchison &c. R. Co.*, 4 Nebraska, 521; *Moses* v. *Jenkins*, 50 Oregon, 447.

As to the balance they were defective because they denied not "knowledge or information" but only "information." See *Downing* v. *North Denver Land Co.*, 30 Colorado, 283; *Haney* v. *People*, 12 Colorado, 345; *James* v. *McGhee*, 9 Colorado, 486; *Grand Valley Ins. Co.* v. *Lesher*, 28 Colorado, 273.

The first defense was also sham because its denial was only of information in regard to the defalcation, which in this case was a matter of public record accessible to the defendants. *Patrick* v. *McManus*, 14 Colorado, 65; *Simpson* v. *Langley*, 23 Colorado, 69; *Fravert* v. *Fesler*, 11 Colo. App. 387; *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 276; *Kennedy* v. *McGary*, 21 Wisconsin, 496; *Van Dyke* v. *Doherty*, 6 N. Dak. 263; *Wallace* v. *Bacon*, 86 Fed. Rep. 553; *Mulcahey* v. *Buckley*, 100 California, 484; *Zivi* v. *Einstein*, 20 N. Y. Supp. 893; *Barrett* v. *Goodshaw*, 12 Bush (Ky.), 592; *Mendocino County* v. *Peters*, 2 Cal. App. 24; *Thompson* v. *Skeen*, 14 Utah, 209; *Appel* v. *State*, 9 Wyoming, 187; Ency. Pl. & Pr., Vol. 1, 813.

Looking broadly at the case it is beyond question that the sole point in controversy was the validity of the defense of laches and on that question the District Court's judgment was plainly in error and should be reversed. *O'Reilly* v. *Brooke*, and *Supervisors* v. *Kennicott*, *supra*.

The District Judge was never intended to be constituted an arbitrator even of the facts and if a determination of facts should be deemed requisite the case should be remanded with instructions to make the determination by correct proceedings as a court. *Flanders* v. *Tweed*, 9 Wall. 425; *Low* v. *United States*, and *Prentice* v. *Zane*, 8 How. 470, *supra*.

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

This was an action at law against the sureties on the official bond of a receiver of public moneys to recover for a default of their principal. The answer set forth that the defendants had not and could not obtain sufficient information upon which to base a belief respecting the default charged and therefore denied the same, and also interposed an affirmative defense, which need not be

specially noticed. The action was begun in the District Court, and was tried to the court without a jury. There was a special finding of the facts, accompanied by conclusions of law, and upon these there was a judgment for the defendants. The plaintiff took the case on writ of error to the Circuit Court of Appeals, which held that the facts found were insufficient to support the judgment, and reversed the latter with a direction to enter a judgment for the plaintiff upon the finding. 170 Fed. Rep. 318. The defendants then sued out the present writ of error.

At the outset we are confronted with the question of the power of the Circuit Court of Appeals to consider the sufficiency of the facts found to support the judgment. Section 566, Rev. Stat., provided that the trial of issues of fact in the District Courts, in all cases except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, should be by jury. This was not one of the excepted cases. Sections 649 and 700, Rev. Stat., made special provision for the trial by the court, without a jury, of the issues of fact in actions at law in the Circuit Courts, and for the review of the rulings of the court in the progress of such a trial, including the question of the sufficiency of the facts found to support the judgment; but those sections were in terms limited to cases in the Circuit Courts, and there was no similar provision in respect of cases in the District Courts. In this state of the statute law the trial to the District Court without a jury was in the nature of a submission to an arbitrator, a mode of trial not contemplated by law, and the court's determination of the issues of fact and of the questions of law supposed to arise upon its special finding was not a judicial determination and therefore was not subject to reëxamination in an appellate court. *Campbell* v. *Boyreau,* 21 How. 223; *Rogers* v. *United States,* 141 U. S. 548. It follows that the

Circuit Court of Appeals was without power to consider the sufficiency of the facts found to support the judgment.

The power of that court was limited to a consideration of such questions of law as may have been presented by the record proper, independently of the special finding, such as whether the pleadings were sufficient to support the judgment. It is now said that such a question was presented, and that its right solution required that the judgment of the District Court be reversed. If the answer did not put in issue the allegation of the complaint respecting the default of the principal in the bond, this claim is well founded; otherwise it is not. The denial of that allegation was predicated upon a statement that the defendants had not and could not obtain "sufficient information" upon which to base a belief respecting its truth. This, it is said, was not an adequate denial, because the state statute (Colo. Code, § 62) required that such a denial be based upon a disavowal of "sufficient knowledge or information." But of this it is enough to say that no such objection was raised in the District Court, but, on the contrary, the answer was treated as sufficient in that respect. This being so, the plaintiff was not at liberty to raise the objection in an appellate court. Had it been made seasonably it could, and doubtless would, have been avoided by an amendment. *Roberts* v. *Graham*, 6 Wall. 578, 581; *Nashua Savings Bank* v. *Anglo-American Co.*, 189 U. S. 221, 231.

It results that the Circuit Court of Appeals erred in not affirming the judgment of the District Court.

Judgment reversed.

SCHODDE, EXECUTRIX OF SCHODDE, *v.* TWIN FALLS LAND AND WATER COMPANY.

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

No. 2. Argued March 7, 8, 1911.—Decided April 1, 1912.

Under the laws of Idaho relating to appropriation of water, the extent of beneficial use is an inherent and necessary limitation upon the right to appropriate; and one who appropriates does not have further right to the current of the stream for the purpose of obtaining power to distribute the water required for the beneficial use which is the basis of his appropriation.

There is no rule of riparian rights in Idaho by which one whose land borders on a stream can appropriate the whole current thereof for the purpose of making fruitful the limited appropriation of water to which he is entitled for beneficial use.

The Federal courts below rightly followed the decisions of the state courts of Idaho, in holding that the common law doctrine of riparian rights had been abrogated to the extent that the provisions of the constitution and statutes of Idaho in regard to the rights of appropriators for beneficial use are in conflict therewith.

In this case *held* that one who had lawfully appropriated the amount of water from a stream in Idaho to which he was lawfully entitled for beneficial use could not restrain those below him from raising the river so as to interfere with the power necessary to raise the water appropriated by him to a height necessary for distribution over his land; neither his appropriation nor his riparian rights gave him any control over the current of the stream.

161 Fed. Rep. 43; 88 C. C. A. 207, affirmed.

THE facts, which involve the extent of the right to appropriate water in Idaho, are stated in the opinion.

Mr. Joseph R. Webster, with whom *Mr. Kirtland I. Perky* and *Mr. John F. McLane* were on the brief, for plaintiff in error:

The decisions of both courts below ignore plaintiff's riparian rights and his common law right to a continuance

of the flow of the current which are not abrogated by the doctrine of appropriation as applied in Idaho, but merely modified or supplemented as to the mode of acquisition and the conditions of enjoyment.

Plaintiff has complied with the requirements of the law of appropriation and has thus fixed his riparian right to the current, so as to vest the same in him as against subsequent appropriators.

No notice of intention to appropriate the current was necessary; the diversion of the current within the channel, by means of wing dams, to the plaintiff's wheels, was a sufficient diversion, if any is required, to satisfy the law of appropriation; and the maxim, "*Aqua currit et debet currere ut currere solebat,*" applies. 3 Kent's Comm. 439–441, cited in *United States* v. *Rio Grande Dam and Irrigation Co.*, 174 U. S. 690, 702.

The right to the use of water flows from riparian ownership of land; it belongs to the land. The water must be permitted to run in its accustomed channel, without material alteration of the channel, or acceleration or diminution of the flow. The rights of the various riparian proprietors are equal regardless of any priority in such use; each must be careful not to injure any other. Each may make a reasonable use of the water as it passes, even though there is some slight decrease in quantity, or variation in weight and velocity, of the current.

The doctrine of appropriation is claimed to have overthrown the common law doctrine in many of the western States, Idaho among the number. It had its origin in the customs of the California miners, and its legal justification in necessity. For the history of its origin and development see *Irwin* v. *Phillips*, 5 California, 140; *Conger* v. *Weaver*, 6 California, 548; *Hill* v. *King*, 8 California, 336; *Bear River Co.* v. *New York Min. Co.*, 8 California, 327.

In these cases there is no denial of riparian rights if

any had accrued. In *Crandall* v. *Woods*, 8 California, 136, appropriation is established as a distinct doctrine, not based upon the common law, but derived from the customs of miners, and until the decision in *Lux* v. *Haggin* (1886), 69 California, 225, the California court is devoted to the development of the doctrine of appropriation.

While the doctrine of appropriation is thus established as independent of that of riparian rights, its principles come to be assimilated to the latter doctrine. *Phœnix Water Co.* v. *Fletcher*, 23 California, 481; *Hill* v. *Smith*, 27 California, 476.

For cases involving conflict between appropriation and riparian rights, see *Yunker* v. *Nichols*, 1 Colorado, 551; *Coffin* v. *Left Hand Ditch Co.*, 6 Colorado, 443; Long on Irrigation, § 6.

The question is one of the local law, and the rule laid down by the state courts having jurisdiction to declare the law in the particular case should be followed. *United States* v. *Rio Grande &c. Co.*, 174 U. S. 690; *Gutierrez* v. *Albuquerque Co.*, 188 U. S. 545; *Clark* v. *Nash*, 198 U. S. 361; *Kansas* v. *Colorado*, 206 U. S. 46.

As to riparian rights in Idaho, see act of February 10, 1881. See Laws, 267, and compare with California Civil Code, 1872, §§ 1410–1422. See also Rev. Stat., Idaho, 1887, §§ 3155–3167, and § 3299, Rev. Codes, 1909.

The state of the law when Idaho was admitted to the Union was an irrigation code taken from California, a statute conferring the right to the use of waters in riparian owners, and a single Supreme Court decision, adopting in effect the California doctrine of modified riparian rights as established in *Irwin* v. *Phillips* and *Lux* v. *Haggin*. By the constitution of 1889, while nothing is said about riparian rights, the use of water is declared a public use to be acquired by appropriation; it is no longer merely private riparian property where a question of priority of appropriation is involved. In other words, a purely ri-

parian right to the use of water may be defeated by a subsequent, as well as by a prior, appropriation, but it does not follow that the doctrine of riparian rights is "abolished *in toto*."

For cases involving the doctrine of appropriation and of priority between appropriators, the public character of the use of waters, and the right of the State to regulate the matters involved in the application of the waters of the State to its development, during the first ten or twelve years of statehood, see *Wilterding* v. *Green*, 4 Idaho, 773; *Geertson* v. *Barrack*, 3 Idaho, 344; *Conant* v. *Jones*, 3 Idaho, 606; *Malad Valley Irrigating Co.* v. *Campbell*, 2 Idaho, 411; *Sandpoint Water & Light Co.* v. *Panhandle Development Co.*, 11 Idaho, 405; *Boise City Irrig. & Land Co.* v. *Stewart*, 10 Idaho, 38. *Powell* v. *Springston Lumber Co.*, 12 Idaho, 723, 1904, is the first case in Idaho which consciously recognized a riparian right as such. But it is soon followed by others. See *Johnson* v. *Johnson*, 14 Idaho, 561; *Shephard* v. *Cœur d'Alene Lumber Co.*, 101 Pac. Rep. 591.

A riparian owner in Idaho still retains such right to have the waters flow in the natural stream through or by his premises as he may protect in the courts as against persons interfering with the natural flow, or who attempt to divert or cut off the same wrongfully and arbitrarily, and without doing so under any right of location, appropriation, diversion or use, and who do not rest their right to do so upon any right of use or appropriation. *Hutchinson* v. *Watson Slough Co.*, 101 Pac. Rep. 1059.

A riparian owner may claim or "fix" his right in such a way as to prevent its subsequent appropriation. This is accomplished by "appropriating" that right in the manner prescribed by the statute.

The foregoing rules apply to this case. Up to the time that the defendant began the construction of its works the plaintiff had the rights of a riparian proprietor, good as against everybody but an appropriator.

The riparian right upon which the plaintiff insists is to the current flow of the stream. That is established. *Tyler* v. *Wilkinson*, 4 Mason, 397; *Weiss* v. *Iron Co.*, 11 Pac. Rep. (Ore.) 255; *Gould* v. *Boston Dock Co.*, 13 Gray, 442; *Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 19; *Shamleffer* v. *Peerless Mill Co.*, 18 Kansas, 33; *Lux* v. *Haggin*, 69 California, 255; *McCalmont* v. *Whitaker*, 3 Rawle, 84; 23 Am. Dec. 102.

This riparian right to the flow is a valuable property right, of which the riparian owner cannot be deprived without his consent, or compensation being paid therefor, when it is desired to devote the right to a public use. *Yates* v. *Milwaukee*, 10 Wall. 497; *Pine* v. *York*, 103 Fed. Rep. 337; *Kaukauna Water Power Co.* v. *Green Bay Co.*, 142 U. S. 276; *Sturr* v. *Beck*, 133 U. S. 541.

Even assuming that defendant is an appropriator, the plaintiff must still prevail as a riparian owner. As a riparian owner, he had title to the current good as against all but an appropriator. He had the right to "fix" such right so as to prevent its subsequent appropriation, or its defeat by such an appropriation.

What was so clearly a riparian right at common law may be appropriated by a riparian proprietor under the Idaho law. The difference between the Idaho law and the common law of riparian rights rests principally in the mode of acquisition of those rights. Under the common law the right attaches to riparian proprietorship, and continues as incident thereto whether it is ever used or not. Under the Idaho law the right exists, but to be secure against the higher law of appropriation, it must be appropriated, that is, beneficially used; the riparian owner cannot sit back and retard the development of the country by claiming a dormant right. If he wants the right he must use it, and give notice to the world that he is using it, before some one else spends time and money in acquiring a similar right.

Plaintiff had a riparian owner's right to the current;

he could fix that right by an appropriation to a beneficial use so as to make it available as against a subsequent appropriator; he did fix the right by such an appropriation.

Mr. Edward B. Critchlow, with whom *Mr. William J. Barrette* was on the brief, for defendant in error:

Each State may determine for itself whether the common law rule in respect to riparian rights or the rule of appropriation shall be enforced as to waters within its boundaries. *Kansas* v. *Colorado*, 206 U. S. 46, 94.

Generally, the arid States and Territories, Idaho included, have adopted the rule that water may be appropriated for beneficial uses. Colorado—*Hammond* v. *Rose*, 7 Am. St. Rep. 258; Arizona—*Austin* v. *Chandler*, 42 Pac. Rep. 483; Idaho—*Drake* v. *Earhart*, 2 Idaho, 716; *Hutchinson* v. *Watson Slough Co.*, 101 Pac. Rep. 1059; New Mexico—*Trambley* v. *Luterman*, 27 Pac. Rep. 312; *Albuquerque &c. Co.* v. *Gutierrez*, 61 Pac. Rep. 357; Nevada—*Reno &c., Co.* v. *Stevenson*, 19 Am. St. Rep. 364; *Walsh* v. *Wallace*, 26 Nevada, 299; Utah—*Cole* v. *Richards Irrig. Co.*, 27 Utah, 205; 101 Am. St. Rep. 962; *Morris* v. *Bean*, 146 Fed. Rep. 431; Wyoming—*Willey* v. *Decker*, 100 Am. St. Rep. 939.

The common-law rights of riparian owners and the rights acquired under the doctrine of appropriation are distinct and antagonistic and cannot both be recognized or enforced. *Clark* v. *Nash*, 198 U. S. 361; *Boquillas Cattle Co.* v. *Curtis*, 213 U. S. 339; *United States* v. *Rio Grande Dam & Irrig. Co.*, 174 U. S. 690; *Hutchinson* v. *Watson Slough Co.* (Idaho), 101 Pac. Rep. 1059; *Stowell* v. *Johnson*, 7 Utah, 225.

Appropriation involves these several elements: An intent to apply to some beneficial use; an actual diversion such as gives physical control of the stream or such part as is appropriated; an application within a reasonable time to some useful industry. *Low* v. *Rizor*, 25 Oregon,

551; 37 Pac. Rep. 84; Black's Pomeroy's Water Rights, 48–51.

The manner of use so far as it affects the quantity of water sought to be appropriated must be reasonable and with due regard to the rights of others. An unreasonable claim of appropriation is a void claim. *Basy* v. *Gallagher*, 20 Wall. 670; *Atchison* v. *Peterson*, 20 Wall. 507; *Rio Grande West. Ry. Co.* v. *Telluride Co.*, 16 Utah, 137; *Roeder* v. *Stein*, 23 Nevada, 92; 42 Pac. Rep. 867; *Barnes* v. *Sabron*, 10 Nevada, 243; *Nevada Ditch Co.* v. *Bennett*, 30 Oregon, 59; *Van Camp* v. *Emery*, 13 Idaho, 202; *Hough* v. *Porter*, 51 Oregon, 318; *S. C.*, 98 Pac. Rep. 1083; *Farmers' Co-op. Ditch Co.* v. *Riverside Irrig. Dist.*, 16 Idaho, 525; *S. C.*, 102 Pac. Rep. 481; *Fitzpatrick* v. *Montgomery*, 20 Montana, 181, 187.

Plaintiff's claim is that the entire Snake River shall be allowed to flow as in a state of nature, with volume and current undiminished. This is tantamount to a claim either that the entire river has been appropriated by the plaintiff for the irrigation of about 420 acres of land, or that independently of any use or appropriation the right so to control the river vests through riparian ownership.

This claim which is the basis of plaintiff's asserted cause of action cannot be sustained.

Because the appropriation was for irrigation only and the limit of such appropriation was the amount necessary to irrigate about 430 acres; because the current or velocity, being a mere incident or function of the water, cannot be appropriated; because except as to the water actually placed upon the lands there was no such diversion as is necessary; because an appropriation of the entire stream, if plaintiff's use for the operation of water wheels was to be considered such, would be unreasonable and therefore void. In a legal sense it would not be beneficial; and because such an appropriation would be void for uncertainty.

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

Since the writ of certiorari in this case was granted the petitioner died, and his executrix was substituted. The writ was allowed to enable us to review the action of the court below in affirming a judgment of the Circuit Court of the United States for the District of Idaho. The judgment of the Circuit Court sustained a demurrer to the complaint of the petitioner, who was plaintiff, on the ground that it stated no cause of action. An absolute judgment of dismissal was entered consequent on the election by the plaintiff to stand on the complaint as filed. The court below summarized the averments of the three counts of the complaint, and as that summary accurately and sufficiently states the case, we adopt and reproduce it, as follows (161 Fed. Rep. 43):

"Plaintiff's complaint contains three counts. Briefly stated, the cause of action as set out in the three counts of the complaint is as follows: Plaintiff is the owner of three tracts of land on the banks of Snake river, containing in the aggregate 429.96 acres. Two of these tracts, containing 263.96 acres, are on the south bank, and one tract of 160 acres is on the north bank. One of the tracts on the south bank is agricultural land, and the other is partly agricultural land and partly mining ground. The tract of land on the north bank is agricultural. In the year 1889 plaintiff's predecessors in interest, and in 1895 the plaintiff himself, appropriated certain quantities of water of the flow of Snake river for use on said lands. In the first count the quantity is stated in cubic feet per second; in the second and third counts the quantities are stated in miner's inches. The aggregate of water appropriated as alleged in the three counts is referred to in the briefs as 1,250 miner's inches. Soon after this water was appropriated the parties in interest erected

water wheels in the river to lift the water to a sufficient height for distribution over the land. Nine of these wheels were erected opposite or near the tracts on the south side of the river, and two near the tract on the north side of the river. These wheels vary in height from 24 to 34 feet. The parties also constructed wing dams in the river adjoining or in front of the lands owned by them, for the purpose of confining the flow of the water of the river and raising it at such points above the natural flow of the river, so that the current would drive the water wheels and cause them to revolve and carry the water in buckets attached to the wheels to a height where it would be emptied into flumes and distributed over the lands by ditches and used thereon to irrigate and cultivate the agricultural land and work the mining ground. It is not alleged in the complaint, but it is assumed that the river at this point runs between high banks and that the water is lifted by the wheels at least 20 feet before it is emptied into the flumes for distribution over plaintiff's lands. In the year 1903, while plaintiff was using the appropriated water of the river upon the described premises, the defendant commenced the construction of a dam across Snake river at a point about nine miles westerly from and below the lands of the plaintiff. The work was prosecuted on said dam until its completion in March, 1905. This dam is so constructed as to impound all the water of Snake river flowing at said point, and to raise the water about forty feet in height. It is alleged that when defendant's dam was filled with water the water was turned into a canal known as the Twin Falls canal, owned by the defendant, and located on the north side of the river; that this canal was constructed at a cost, as plaintiff is informed and believes, of $1,500,000, for the purpose of supplying water for irrigation and domestic purposes to the settlers on about 300,000 acres of arable and arid lands situated below the dam; that for

said lands and for a great number of people, being, as plaintiff is informed and believes, 5,000 in number, there is no other supply available for irrigation, stock, domestic, or manufacturing purposes except the water from said canal. It is alleged that by reason of this dam the waters of Snake river have been backed up from said dam and to and beyond plaintiff's premises and have destroyed the current in the river by means of which plaintiff's water wheels were driven and made to revolve and raise the water to the elevation required for distribution over plaintiff's lands. It is alleged that it is now impossible for plaintiff to so arrange or change his said dams or water wheels or flumes, or to build or construct other dams or water wheels or flumes that will raise any water whatever from said stream that can be used upon the plaintiff's lands, and by reason thereof plaintiff has not been able to irrigate said lands or any part thereof or to raise profitable crops thereon or to use the same as pasture lands, and will not in the future be able to irrigate said lands or to raise profitable crops or any crops thereon, as long as defendant's dam is maintained; that there is no other supply of water available for use upon said lands except the waters of Snake river; that by reason of the backing up of said water and stopping the plaintiff from using said water wheels to raise the waters of Snake river to and upon said lands and cutting off the water supply from plaintiff's lands he has been damaged in the aggregate sum of $56,650.

"In the first count of the complaint a separate and distinct cause of action is alleged in an averment that about twelve acres of plaintiff's land *has* been covered by the waters of Snake river backed up by defendant's dam, but the land is not described or its boundaries given, or any particulars stated so that the land can be identified or ascertained. To this cause of action defendant interposed a special demurrer on the ground of uncer-

tainty and the improper joinder of two separate causes of action. This special demurrer appears to be admitted.

"The defendant also interposed a general demurrer on the ground that the facts stated in the complaint do not constitute a cause of action against the defendant as to either or any of said counts. The demurrer was sustained by the Circuit Court, and the plaintiff has brought the cause to this court upon a writ of error."

The trial court recognized fully the right of the plaintiff to the volume of water actually appropriated for a beneficial purpose. It nevertheless dismissed the complaint on the ground that there was no right under the constitution and laws of the State of Idaho to appropriate the current of the river so as to render it impossible for others to apply the otherwise unappropriated waters of the river to beneficial uses. The court did not find it necessary to deny that power might be one of the beneficial purposes for which appropriations of water might be made, but in substance held that to uphold as an appropriation the use of the current of the river to the extent required to work the defendant's wheels would amount to saying that a limited taking of water from the river by appropriation for a limited beneficial use, justified the appropriation of all the water in the river as incident to the limited benefit resulting from the use of the water actually appropriated. The court said:

"It is conceded and is beyond question, that the statute law as well as judicial authority directly protects plaintiff in all water he has actually appropriated, diverted and used, but there is no statute, nor so far as known, any judicial rulings, protecting him in the establishment and in the use of his water wheels, as he claims to, and must, use them for the diversion of water to his land."

Again:

"As by Art. 15, Sec. 3, Constitution of Idaho, all unappropriated waters are subject to appropriation, it fol-

lows that all water that plaintiff has legally appropriated belongs to him, but all other is subject to appropriation. It is unquestioned that what he has actually diverted and used upon his land, he has appropriated, but can it be said that all the water he uses or needs to operate his wheels is an appropriation? As before suggested, there is neither statutory nor judicial authority that such a use is an appropriation. Such use also lacks one of the essential attributes of an appropriation; it is not reasonable."

After pointing out the limited right of appropriation for beneficial use which had been exercised considering the quantity of water actually appropriated and the use to which that water was put, the court came to state the vast extent of the incidental appropriation, having no proper relation to beneficial use, which would result from admitting the theory that the plaintiff, because of his limited appropriation for a named beneficial use, had the power to appropriate the entire current of the river for the purpose of making his actual and limited appropriation and meager beneficial enjoyment fruitful. The court said:

"The only way in which his wheels can be used for the purpose he intended them, is to preserve the river in the condition it was when he erected them. And with what result, it may be asked. It may be stated as a fact that the banks of the river and the adjacent country sustain such relations to each other, that the latter cannot be irrigated by ditches cut from the river in its natural state and the erection of dams becomes a necessity, which of course changing the surface elevation of the water affects the plaintiff's premises and all others similarly situated. Then without the dam the Twin Falls scheme with all its present great promise fails. Not only this, but the Government is now constructing a dam across the river some distance above plaintiff for

another extensive irrigating scheme, known as Minidoka Project, which will take a large amount of the water and so much that probably there will not be enough left, especially at low stages of the river, for the full operation of the plaintiff's wheels. . . ."

Illustrating the subject, the court said:

"Suppose from a stream of 1000 inches a party diverts and uses 100, and in some way uses the other 900 to divert his 100, could it be said that he had made such a reasonable use of the 900 as to constitute an appropriation of it? Or, suppose that when the entire 1000 inches are running, they so fill the channel that by a ditch he can draw off to his land his 100 inches, can he then object to those above him appropriating and using the other 900 inches, because it will so lower the stream that his ditch becomes useless? This would be such an unreasonable use of the 900 inches as will not be tolerated under the law of appropriation. In effect this is substantially the principle that plaintiff is asking to have established."

The Court of Appeals, in affirming the decree of dismissal, did so for substantially the reasons which controlled the trial court. The Court of Appeals said (p. 44):

"The assignments of error present the single question whether the facts stated in the complaint constitute a cause of action against the defendant. It is not denied that the plaintiff has the right by appropriation to divert 1,250 miner's inches of waters of the Snake river, mainly for irrigation purposes, and it is not charged by plaintiff that this amount of water is not still in the river subject to his right of appropriation and diversion. His claim is that he cannot divert it by the means he first adopted for taking the waters from the river, and that the defendant by placing a dam across the river has deprived him of the right to the current of the river which prior to the erection of the dam rendered his means of diver-

sion available. Is this current and the means adopted for the diversion of the appropriated water part of or attached to plaintiff's right of appropriation? It is contended on the part of the plaintiff that the current of the river is necessarily appurtenant to the water location and that the means of utilizing that current is attached as an appurtenance to the appropriation. We have not been referred to any case—and we know of none—where either of these propositions has been upheld."

After elaborately reviewing the general principles upon which the law of appropriation rested, and referring to provisions of the constitution and statute law of Idaho and the decisions interpreting and enforcing the same, it was held that the extent of beneficial use was an inherent and necessary limitation upon the right to appropriate. Pointing out the disastrous results which would follow from any other view, the court said (p. 45):

"If the plaintiff were permitted to own the current of the stream as appurtenant to his right of appropriation and diversion, he would be able to add indefinitely to the water right he would control and own. There might be a great surplus of water in the stream at and above plaintiff's premises and an urgent demand for a portion of this surplus for beneficial uses, but if an appropriator above should divert a sufficient quantity to lower the current under plaintiff's water wheels so that they would not revolve, the plaintiff would have a cause of action to prevent such an appropriation. It is clear that in such a case the policy of the state to reserve the waters of the flowing streams for the benefit of the public would be defeated."

And in this connection, in conclusion, it was observed (p. 47):

"There is, furthermore, the general principle that the right of appropriation must be exercised with some regard to the rights of the public. It is not an unrestricted right.

In *Basey* v. *Gallagher*, 20 Wall. 670, 683, the Supreme Court of the United States said: 'Water is diverted to propel machinery in flour-mills and saw-mills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual.'

"In *Fitzpatrick* v. *Montgomery*, 20 Montana, 181, 187, the Supreme Court of the State of Montana, after referring to what has been just quoted from *Basey* v. *Gallagher*, said: 'While any person is permitted to appropriate water for a useful purpose, it must be used with some regard for the rights of the public. The use of water in this state is declared by the constitution to be a public use. Constitution, Art. 3, § 15. It is easy to see that, if persons by appropriating the waters of the streams of the state became the absolute owners of the waters without restriction in the use and disposition thereof, such appropriation and unconditional ownership would result in such a monopoly as to work disastrous consequences to the people of the state. The tendency and spirit of legislation and adjudication of the northwestern States and Territories have been to prevent such a monopoly of the waters of this large section of the country, dependent so largely for prosperity upon an equitable, and, as far as practical, free, use of water by appropriation.' "

We have freely excerpted from the opinions of the courts below because, in our judgment, they so clearly portray the situation and correctly apply the law to that

situation as resulting from the constitution and statutes of Idaho and the reiterated decisions of the court of last resort of that State, which are referred to in the margin,[1] that we might place our decree of affirmance upon the reasons which controlled the courts below. We, however, refer to a contention urged by the petitioner as to the existence of riparian rights in Idaho and the sanction which those rights as there recognized are deemed to give to the asserted power to appropriate the whole current of the river for the purpose of making fruitful the limited appropriation of water which was made. It is not urged that the law of appropriation does not prevail in Idaho, but it is supposed that a system of riparian rights goes hand in hand with the doctrine of appropriation and that the two co-exist and may harmoniously coöperate. But the best demonstration of the error which the proposition involves results from a consideration of the effort made to apply it in this case and the reasons advanced to sustain it. We say this because it may not be doubted that the application here sought to be made of the doctrine of riparian rights would be absolutely destructive of the fundamental conceptions upon which the theory of appropriation for beneficial use proceeds, since it would allow the owner of a riparian right to appropriate the entire volume of the water of the river without regard to the extent of his beneficial use. And the incongruity of the proposition is aptly illustrated by the arguments

[1] Constitution of Idaho, art. 14, § 3; Rev. Stat. of Idaho, §§ 3155 *et seq.;* Laws of Idaho 1903, p. 223.

Malad Valley Irrigating Co. v. *Campbell*, 2 Idaho, 411; *Geertson* v. *Barrack*, 3 Idaho, 344; *Conant* v. *Jones*, 3 Idaho, 606; *Wilterding* v. *Green*, 4 Idaho, 773; *Boise City Irrigation & Land Co.* v. *Stewart*, 10 Idaho, 38; *Sand Point Water & Light Co.* v. *Panhandle Development Co.*, 11 Idaho, 405; *Van Camp* v. *Emery*, 13 Idaho, 202; *Hutchinson* v. *Watson Slough Ditch Co., Limited*, 16 Idaho, 484; *Farmers' Coöperative Ditch Co.* v. *Riverside Irr. Dist.*, 16 Idaho, 525; *Speer* v. *Stephenson*, 16 Idaho, 707.

advanced to sustain it, since those arguments recur to and rest upon the common-law doctrine of riparian rights, of the duty to allow a stream to flow as it was wont and of the relative rights of all persons bordering upon the stream arising from their riparian ownership. The misapprehension upon which the contention rests is the assumption that because a certain character of riparian rights may exist in Idaho therefore such rights as are absolutely incompatible with the rule of prior appropriation for beneficial use may co-exist with that system. For instance, the case of *Shephard* v. *Cœur d'Alene Lumber Company*, 16 Idaho, 293, which upheld the right of a riparian proprietor to prevent another from wrongfully virtually taking his water front and cutting him off from ingress to and egress from such water front affords no ground for holding that such riparian rights exist as are wholly incompatible with and indeed destructive of the system of appropriation for beneficial use. So, again, the license given by the terms of § 3184 of the Revised Statutes of Idaho, excerpted in the margin [1] as pointed out by the court below does not confer upon such riparian owner the power to appropriate without reference to beneficial use the entire volume of a river or its current to the destruction of rights of others to make appropriations of the unused water. But the precise question we are considering has been so completely foreclosed by a ruling of the Supreme Court of the State of Idaho as to leave no room for discussion. Thus, in *Van Camp* v. *Emery*, 13 Idaho, 202,

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[1] All persons, companies and corporations, owning or having the passory [*sic*] title or right to lands adjacent to any stream, have the right to place in the channel of, or upon the banks or margin of the same, rams or other machines for the purpose of raising the waters thereof to a level above the banks, requisite for the flow thereof to and upon such adjacent lands; and the right of way over and across the lands of others, for conducting said waters, may be acquired in the manner prescribed in the last two sections. (§ 3184, Rev. Stat. Idaho.)

the facts were these: The defendant lived above the plaintiff on a stream and was assumed as a prior appropriator to be entitled to forty-five inches of the water of the stream. The plaintiff who also was an appropriator, but subordinate to the rights of the defendant complained that the latter had not only diverted his forty-five inches, but had erected a dam in the stream so as to impede the flow to his (plaintiff's) intake and deprive him of his right of appropriation, the dam being put in place by the defendant for the purpose of holding the water so as to give him the benefit of subirrigation of certain meadow lands which he owned. It was held that the defendant, while he had a full right to draw off the forty-five inches to which he was entitled as an appropriator for beneficial use, could not by damming the stream get more than his beneficial appropriation entitled him to so as to injure the right of others to appropriate from the stream. In the course of the opinion, the court said (p. 208):

"If the defendant who lives above plaintiff is entitled to a priority for forty-five inches of water, he may unquestionably divert that quantity, but when he has once done so, he may not dam the stream below or hinder or impede the flow of the remaining stream to the plaintiff's headgate. The fact that such dams and impediments hold the water and cause a subirrigation of the adjacent meadows cannot of itself justify the maintenance of such obstructions. Whatever amount of water defendant shows himself entitled to for the irrigation of his meadows or other lands as a prior right over the plaintiff, the judgment should so decree, but beyond that he cannot go under any other pretext or claims for the natural condition of the stream. In this arid country where the largest duty and the greatest use must be had from every inch of water in the interest of agriculture and home-building, it will not do to say that a stream must be dammed so as to cause subirrigation of a few acres at a loss of enough

water to surface irrigate ten times as much by proper application. . . ."

And the absolute untenability of the contention here made as to riparian rights was again foreclosed by the Supreme Court of Idaho in *Hutchinson* v. *Watson Slough Ditch Co., Limited,* 16 Idaho, 484. Indeed, in that case the court referred to and adversely disposed of the view taken of the authorities here relied on as sustaining the co-existence of the asserted riparian rights and the doctrine of appropriation. After making a full reference to authorities, in the course of its opinion the court said (p. 491):

"A riparian proprietor in the state of Idaho has no right in or claim to the waters of a stream flowing by or through his lands that he can successfully assert as being prior or superior to the rights and claims of one who has appropriated or diverted the water of the stream and is applying it to a beneficial use. To this extent, therefore, the common-law doctrine of riparian rights is in conflict with the constitution and statutes of this state and has been abrogated thereby.

* * * * * * * *

"Sight should not be lost of the correct principle involved in such cases, namely, that a riparian owner, as such, acquires no right to the waters flowing by or through his lands that is prior or superior to that of a locator, appropriator and user of such waters. In other words, there is no such thing in this state as a riparian right to the use of waters as against an appropriator and user of such waters who has pursued the constitutional and statutory method in acquiring his water right. In order to acquire a prior or superior right to the use of such water, it is as essential that a riparian owner locate or appropriate the waters and divert the same as it is for any other user of water to do so."

As we have pointed out the court below did not question the right of the plaintiff to take by proper means

from the river the quantity of water actually appropriated by him for beneficial use and our decree of affirmance will therefore not in any way affect such rights.

Affirmed.

GONZALES *v.* BUIST.

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

No. 181. Submitted March 4, 1912.—Decided April 1, 1912.

Appellant's contention that he was not accorded a proper hearing in the court below cannot be availed of here if the record does not show that he formally excepted or objected to the rulings. *Apache County* v. *Barth*, 177 U. S. 538.

Under § 35 of the Porto Rican act of April 12, 1900, 31 Stat. 85, c. 191, writs of error to and appeals from final decisions of the Supreme Court for the District of Porto Rico are governed by the rules that govern writs of error to and appeals from Supreme Courts of the Territories, which confine this court to determining whether the court below erred in deducing its conclusions of law from the facts as found, and to reviewing errors committed as to admission or rejection of testimony upon proper exceptions preserved. *Young* v. *Amy*, 171 U. S. 179.

On appeal from the Supreme Court of a Territory the agreed statement or findings must be of the ultimate facts; for if they are merely, as in this case, a recital of testimony or evidentiary facts, there is nothing brought to this court for consideration, and the judgment must be affirmed. *Glenn* v. *Fant*, 134 U. S. 398.

4 Porto Rico Fed. Rep. 243, affirmed.

THE facts, which involve the rules governing appeals from the Supreme Court of Porto Rico and the District Court of the United States for the District of Porto Rico, are stated in the opinion.

Mr. H. H. Scoville and *Mr. J. R. F. Savage* for appellant.

Mr. Willis Sweet filed a brief for appellees.

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

Gonzales, the appellant, sued in the court below to be declared the owner and entitled to the possession of a tract of land valued at six thousand dollars, situated in the District of Porto Rico, from the possession of which he claimed to have been unlawfully ousted by the defendants in March, 1907. In addition to specifically denying the averments of the complaint, the defendants by an amended answer pleaded that as the result of a controversy between them and the grantor of the plaintiff concerning the land in dispute, the title and right of possession were adjudicated in their favor, and in virtue of the judgment they were put in possession of the property, which was the ouster complained of. Averments were also made which tended to show that the conveyance under which plaintiff asserted his ownership was made and received in bad faith after the commencement of the action the judgment in which was pleaded as *res judicata*, in order to deprive the plaintiffs in that action of the benefit to result from a recovery therein.

On July 9, 1908, the case was called for trial, a jury was waived, and after the allowance of amendments to the pleadings the following took place, according to recitals in the journal of the court:

"Whereupon the Court, not being satisfied with the situation of the pleadings, calls upon the respective counsel for argument as to the question whether or not the plea as to the matters in issue being *res judicata* should not be sustained. Thereupon such argument is proceeded with, and the Court, after having heard counsel for the

respective sides in that behalf, gave them until Monday the 13th instant to file briefs and memoranda of authorities, after which the issue will be passed upon."

On July 31, 1908, the court filed a written opinion sustaining the plea of *res judicata*, and ordering the complaint to be dismissed. An entry of dismissal was made on the same day. The next step in the litigation was the filing on October 12, 1909, of a petition for the allowance of an appeal to this court, and the granting of the same on October 26, 1909. Cotemporaneous with the allowance of the appeal there was filed with the papers in the cause a document styled "Findings of fact and conclusions of law." The opening paragraphs contained recitals of the taking of the appeal and that the court, upon the application of the appellant, "makes the following findings of fact upon which it based its final decree." The written agreement of the parties to waive a trial by jury was next stated, as also that argument was heard "as to the question whether or not the plea as to the matters in issue being *res judicata* should not be sustained," and the statement contained in the excerpt heretofore made from the journal as to granting leave to file briefs, etc., was reiterated.

It was next recited, in the opening sentence of the paragraph of findings numbered III: "That thereupon counsel for defendants, on July 13, 1908, filed, without first submitting the same to the inspection of counsel for the plaintiff, the following brief and statement of facts, with annexed exhibit." The remainder of paragraph III, found on pages 17 to 25 of the printed transcript of record, consists of a copy of the "defendant's brief on *res judicata* and the translation of what purport to be findings made in the judgment in the action pleaded as *res judicata*."

Paragraph IV of the findings opens with the following statement:

"That thereupon, on July 27, 1908, counsel for plain-

tiff filed, without first submitting the same to the inspection of the counsel for defendants, the following brief and statement of facts with annexed exhibit."

Next follows a copy of a document entitled in the action and styled, "Statement and brief on plea of *res judicata*," found on pages 25 to 38 of the printed transcript, subdivided into headings entitled "Facts," "Documentary proof No. 1," "Documentary proof No. 2," and "Translation of Exhibit A," an alleged cautionary notice of the institution of the prior suit.

The findings of fact thus concluded:

"V.

"That with the exception of said briefs and statements so filed as aforesaid and the exhibits attached thereto, no other or further evidence was received, submitted or considered in this cause, and no further hearing of this cause was had.

"VI.

"That counsel for plaintiff requested the Court for a further hearing and that evidence be taken by the Court in support of the statements made by counsel for plaintiff and counsel for defendant in their respective briefs, and that the Court refused to allow any further evidence in the premises other than that contained in the Exhibits attached to said briefs, and the relief map presented at the hearing."

Declaring that it had sufficient evidence before it to pass upon the question of *res judicata*, the court, thereupon, as a conclusion of law found that the prior judgment was *res judicata* of the claims set up in the complaint and concluded as follows:

"The foregoing statement of facts, in the nature of a special verdict, and the above conclusions of law having been submitted by counsel for the respective parties and

approved by the Court, the same is signed and certified, at San Juan, Porto Rico, this twenty-sixth day of October, 1909, and the same with a copy of the Court's opinion in the case will be transmitted to the Honorable the Supreme Court of the United States according to law."

The assignments of error are eleven in number, and state in various forms of expression the contention that the judgment entered was erroneous because plaintiff was not accorded a proper hearing upon the issue of *res judicata*. The appellant did not, however, formally except to any ruling or decision of the court on the subject, and in consequence, even upon the assumption that the objection of want of regularity in the practice pursued might, under some circumstances, be available here (*Salina Stock Co.* v. *Salina Creek Irrigation Co.*, 163 U. S. 109), it cannot on this record be availed of. *Apache County* v. *Barth*, 177 U. S. 538, 542.

There is nothing shown by the record which we can review, since what is denominated findings of fact is not such in legal effect, and the record does not contain any rulings of the court, excepted to, upon the admission or rejection of evidence. By § 35 of the Porto Rican act of April 12, 1900, 31 Stat. 85, writs of error and appeals from final decisions of the Supreme Court for the District of Porto Rico shall be allowed and may be taken to this court "in the same manner and under the same regulations . . . as from the Supreme Courts of the Territories of the United States." Now, as held in *Young* v. *Amy*, 171 U. S. 179, 183:

"It is settled that on error or appeal to the Supreme Court of a Territory this court is without power to reexamine the facts and is confined to determining whether the court below erred in the conclusions of law deduced by it from the facts by it found, and to reviewing errors committed as to the admission or rejection of testimony when the action of the court in this regard has been duly ex-

cepted to, and the right to attack the same preserved on the record."

But whether the court adopts an agreed statement of facts or itself finds the facts, the agreed statement or findings must be of the ultimate facts, and if they be merely a recital of testimony or evidentiary facts, it brings nothing before this court for consideration. *Thompson* v. *Ferry*, 180 U. S. 484; *United States Trust Company* v. *New Mexico*, 183 U. S. 535, 540. As said in *Crowe* v. *Trickey*, 204 U. S. 228, 235, the statement of facts required by the statute should present clearly and precisely the ultimate facts, although, as further observed in the same case, a mere incorporation of unnecessary details may not be fatal if "a sufficient statement finally emerges." Under no possible view, however, of the findings we are considering can they be held to constitute a compliance with the statute, since they merely embody conflicting statements of counsel concerning the facts as they suppose them to be and their appreciation of the law which they deem applicable, there being, therefore, no attempt whatever to state the ultimate facts by a consideration of which we would be able to conclude whether or not the judgment was warranted. The case is analogous to that presented by the record in *Glenn* v. *Fant*, 134 U. S. 398, where it was held that an agreement that the parties might refer to and rely upon all the grounds of action or defense to be found in the voluminous records of two equity cases in other courts, including the pleadings and findings and orders and decrees therein, could not take the place of a special verdict of a jury or the special findings of fact by the court, so as to enable this court to determine the questions of law thereon arising.

No error being apparent on the record, the judgment of the District Court of Porto Rico must be and it is

Affirmed.

WOOD *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 71. Argued November 16, 17, 1911.—Decided April 1, 1912.

An officer of the Navy serving as aid to the Admiral under the provisions of the acts of March 2 and 3, 1899, cc. 378 and 421, 30 Stat. 995, 1024, 1045, is not entitled under the assimilating provisions of § 13 of the Navy Personnel Act of March 3, 1899, c. 413, 30 Stat. 1007, to the higher rank and pay provided under § 1019, Rev. Stat., for aids to the General of the Army, irrespective of the actual rank held by such naval officer during his period of service as such aid.

By the proviso to § 1094, Rev. Stat., which became effective prior to 1888, the office of General of the Army created by § 1096, and the rank and incidents thereto ceased, and were revived by the act of June 1, 1888, 25 Stat. 165, c. 338, only for the period of the life of General Sheridan, and again ceased on his death, since which time there is no officer of the Army to which pay of aids to the Admiral of the Navy can be assimilated under § 13 of the Navy Personnel Act of 1899.

An incongruity resulting from an omission in an act of Congress does not justify the courts exercising legislative power to create an office or pay therefor, and so *held* that the fact that the pay of all other naval officers, including aids to Rear Admirals, is assimilated to that of corresponding officers of the Army except aids to the Admiral is a matter that must be corrected, if it is to be corrected, by Congress and not by the courts.

44 Ct. Cl. 611, affirmed.

THE facts, which involve the construction of the acts of Congress relating to pay of aids to the Admiral of the Navy, are stated in the opinion.

Mr. George A. King, with whom *Mr. William B. King* was on the brief, for appellant.

Mr. Assistant Attorney General Thompson, with whom

Mr. Frederick De C. Faust, Attorney, was on the brief, for the United States.[1]

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

The office of Admiral of the Navy was reëstablished by the act of March 2, 1899, 30 Stat. 995, reënacted in identical terms by a portion of the Naval Appropriation Act of March 3, 1899, 30 Stat. 1045, c. 421. By another provision of the same act, 30 Stat. 1024, 1025, the Admiral was given the same pay and allowances "as had been received by the last General of the United States Army.

"From October 17, 1904, until February 29, 1908, the claimant performed the duties prescribed by an order of the Secretary of the Navy, dated October 1, 1904, which directed him to report to the Admiral of the Navy, . . . President of the General Board, . . . for duty as aid to the Admiral of the Navy, and for duty in connection with the general board." During the period within which these services were performed the claimant received the pay belonging to his rank in the Navy, which, for the earlier portion of the time, was that of Lieutenant Commander and during the remainder of the time that of Commander. He demanded the pay and allowances

[1] On January 31, 1912, the court directed additional briefs to be filed upon the following questions:

Did § 1096 of the Revised Statutes cease to be operative when the office of General of the Army became extinct? In other words, were not the provisions of that section repealed by force of the proviso of § 1094, Revised Statutes?

If repealed, what provision, if any, is relied upon as the basis for applying the terms of § 1096 to the claim made in this action?

In compliance with this order an additional brief was filed on behalf of the appellant on February 15, 1912, and on behalf of the United States on February 13, 1912.

of a Captain of the Navy, upon the theory that the Admiral of the Navy corresponded in rank with the General of the Army, that by Rev. Stat., § 1096, the General of the Army was entitled to aids, who received increased compensation as such aids by reason of the pay attached to the higher rank conferred upon them while serving as aids to the General, which higher pay the aid to the Admiral became entitled to receive by virtue of the clause of § 13 of the Naval Personnel Act of March 3, 1899, 30 Stat. 1004, 1007, c. 413, assimilating the pay of officers of the Navy to that of officers of the Army.

Section 1096, Rev. Stat., relied upon in connection with the assimilating provision just referred to is as follows:

"SEC. 1096. The General may select from the Army such number of aids, not exceeding six, as he may deem necessary, who shall have, while serving on his staff, the rank of colonel of cavalry."

This appeal was taken from a judgment of the Court of Claims dismissing the claim.

Putting aside immaterial considerations, the question upon which the controversy turns is this: In March, 1899, when the office of Admiral was re-created, were the provisions of § 1096, Rev. Stat., existing or had they been repealed, thereby causing it to come to pass that there was no law concerning aids to the General of the Army upon which the assimilating provisions of the act of 1899 could operate? We say this is the fundamental question, because it is patent that the act of 1899 which re-created the office of Admiral did not in and of itself provide for aids to that officer or fix extra compensation for such services, and therefore the right here asserted must depend exclusively upon the existence of some law providing for aids to the General of the Army and their pay, which in virtue of the application of the assimilating statute became operative as to aids to the Admiral.

While by § 1094, Rev. Stat., it was provided that the Army of the United States should consist, among other officers, of "one General," the section concluded with the following:

"*Provided,* That when a vacancy occurs in the office of General or Lieutenant-General such office shall cease, and all enactments creating or regulating such offices shall, respectively, be held to be repealed."

It is not questioned that § 1096, Rev. Stat., was a regulation concerning the office of General of the Army, and it is not disputed that that section was repealed prospectively by the proviso to § 1094 above quoted, a repeal which became operative when the event provided for the cessation of the office of General occurred. It is, further, not disputed that years before the re-creation of the office of Admiral in 1899 the result provided for in the proviso to § 1094 had taken place, and hence that § 1096, concerning aids to the General of the Army, had ceased to exist as the result of the non-existence of the grade of General of the Army to which the provisions of that section applied.

The primary contention is that § 1096 was revived as the result of the act of June 1, 1888, 25 Stat. 165, c. 338, by virtue of which Lieutenant General Sheridan was made for life the General of the Army. The secondary proposition is that the provisions of the section which it is contended were thus revived remained in force (although in abeyance) after the death of General Sheridan and despite the fact that the act of 1888, which provided for his appointment as General declared that the grade should cease on his death. The contention, however, in reason rests upon a plain misconception of the act of 1888, since it but insists that while the provisions of that act only revived the grade of General for a limited and specified purpose, nevertheless the effect of the act was to revive incidental provisions of law concerning that

office so as to cause them to continue to exist after the period during which alone the statute contemplated they should be in existence. But so to construe the statute would divide it against itself, would presuppose that it contemplated that an effect should arise from its enactment plainly at war with the purpose which its text manifests Congress intended to accomplish by its adoption. When it is considered that the grade of General of the Army had ceased to exist long prior to the act of 1888 and that the statutory incidents regulating that office, including § 1096, Rev. Stat., had also passed out of existence, we think it results that the provisions of the act of 1888 reviving the office of General and the incidents relating to that office were all controlled by the limitation of time which that act imposed. In other words, we think that the office and its incidents were but revived for the sole purposes and for the limited period specified, and none other, and therefore no subject to which that act related can be said to have been generally reënacted so as to survive the limitations which the act itself expressly contemplated.

The failure by Congress during the many years which have elapsed since the re-creation of the office of Admiral to make any provision concerning the pay of aids to that officer gives rise to the assumption of a legislative construction in accord with the view which we have expressed. The matter is not however left to mere inference resulting from silence, since although Congress in what is known as the New Navy Pay Act of May 13, 1908, 35 Stat. 127, c. 166, in terms specifically provided for the pay of every officer in the Navy, including the Admiral and embracing extra compensation to aids to Rear Admirals, made no provision whatever for compensation for services which might be rendered by an officer acting as aid to the Admiral. The incongruity, if any, which it is suggested must result from providing for extra com-

pensation for an aid to a Rear Admiral and none for aids to the higher officer, the Admiral, if admitted, would be but the consequence of legislative omission, and would not justify the exertion of judicial power for the purpose of re-creating a provision of law, concerning aids to the General of the Army, which has long since ceased to exist, in order to afford a subject upon which the assimilating provision of the Naval Personnel Act of 1899 might operate.

Affirmed.

PLUMMER *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 177. Argued February 29, March 1, 1912.—Decided April 1, 1912.

Under § 13 of the Navy Personnel Act of March 3, 1899, 30 Stat. 1007, c. 413, and the acts of June 7, 1900, 31 Stat. 697, c. 859, March 2, 1907, 34 Stat. 1167, c. 2511, and May 13, 1908, 35 Stat. 127, c. 166, the pay of acting assistant surgeons was enhanced and assimilated to that of assistant surgeons in the Army, and did not remain fixed as regulated by § 1556, Rev. Stat.

Where an act of Congress, such as the Navy Personnel Act of 1899, provides for a standard by which to determine rank and pay of officers, it will not be presumed that Congress intended to create an inequality of compensation while leaving unmodified equality of rank and duty, and so held as to the provisions for pay of assistant surgeons and acting assistant surgeons in the Navy.

The construction of the statutes involved in this case is the contemporaneous construction given thereto by the Executive Department charged with execution of the provisions thereof.

Longevity pay of officers of the Army and Navy under the act of May 13, 1908, 35 Stat. 127, c. 166, is computed on the sum of the base pay and not the base pay and previous increases thereof.

Where Congress, after a decision of this court construing a certain expression used in a statute, passes a statute declaring that those

words shall be construed as having a definite meaning different from that given by this court, that expression, when used in a later statute on the same subject, will be presumed to have the meaning so given to it by Congress and not that previously given by this court.

Congress having by the act of June 30, 1882, 22 Stat. 118, c. 254, expressly provided that the current yearly pay on which longevity pay of officers of the Army and Navy is to be computed is base pay, and not base pay and increases, so as to overcome the construction given to the words "current yearly pay" by this court in *United States* v. *Tyler*, 105 U. S. 44, those words will be construed in the same manner when used in the subsequent act of May 13, 1908, 35 Stat. 125, c. 166, and not as construed in *United States* v. *Tyler*.

45 Ct. Cl. 614, reversed.

THE facts, which involve the construction of the provisions of acts of Congress relating to pay of acting assistant surgeons in the Navy, are stated in the opinion.

Mr. George A. King, with whom *Mr. William B. King*, *Mr. William E. Harvey* and *Mr. Archibald King*, were on the brief, for appellant.

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

Mr. Hilary A. Herbert, *Mr. Benjamin Micou* and *Mr. Richard P. Whiteley* filed a brief on behalf of certain officers of the Navy.

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

This appeal is from a judgment of the Court of Claims denying the right to recover from the United States an alleged balance of compensation claimed to be due for services rendered as an acting assistant surgeon, at the Naval Station, Key West, Florida, from July 1, 1903, to July 1, 1909.

By an act approved May 4, 1898, 30 Stat. 369, 380, c. 234, the President was authorized "to appoint for temporary service twenty-five acting assistant surgeons, who shall have the relative rank and compensation of assistant surgeons. When the act of 1898 was passed the pay of officers in the naval service was generally regulated by § 1556, Rev. Stat., and the pay of an assistant surgeon for shore duty was fixed at $1,400 a year. By § 13 of the Naval Personnel Act of March 3, 1899, 30 Stat. 1004, 1007, c. 413, it was provided that commissioned officers of the line of the Navy and of the Medical and Pay Corps "shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law, for the officers of corresponding rank in the Army;" and in a proviso it was declared "That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty." The effect of this act was to increase the pay of naval officers generally, and therefore to enhance the pay of assistant surgeons.

The act of June 7, 1900, 31 Stat. 697, c. 859, raised the rank of assistant surgeons in the Navy by providing that "Assistant Surgeons shall rank with Assistant Surgeons in the Army." We say that this act raised the rank of assistant surgeons in the Navy for the following reasons: Prior to that act the rank of assistant surgeon in the Navy upon entrance into the service was that of ensign. (Rev. Stat., § 1474.) As by Rev. Stat., § 1168, the lowest rank of an assistant surgeon in the Army during the first three years of service was that of a lieutenant of cavalry, the effect of the act of 1900 was therefore to give to assistant surgeons in the Navy a higher rank, that is, to raise them from the rank of ensign to that of lieutenant, junior grade.

On December 29, 1902, the Surgeon General of the Navy published a circular soliciting applications for appointment "as acting assistant surgeons for three years

of service," and in the circular, among other things, it was stated as follows:

"The Secretary of the Navy, in order to meet the exigencies of the service, has authorized the appointment of 25 acting assistant surgeons for three years' service, to have the same rank and pay as assistant surgeons in the regular service.

The pay is as follows:

At sea	$1,650.00	a year.
On shore, with quarters	1,402.50	"
On shore, without quarters..	1,690.50	" "

Plummer applied for appointment, and was commissioned by the President as an acting assistant surgeon in the naval service, to serve for three years from July 1, 1903. After the expiration of the first appointment he was reappointed for another term of three years, and his commission under the first and second appointment stated his rank to be that of lieutenant, junior grade.

During Plummer's second three year period of service two acts were passed which it is claimed enhanced the compensation of assistant surgeons, viz.: An act approved March 2, 1907, 34 Stat. 1158, 1167, c. 2511, and an act approved May 13, 1908, 35 Stat. 127, 128, c. 166. By the act of 1907 assistant surgeons were allowed heat and light for quarters and commutation for the same. By the act of 1908, the pay of a lieutenant, junior grade, the relative rank of an assistant surgeon, was fixed at $2,000.

During the term of both services Plummer was paid not at the rate provided by law for the pay of assistant surgeons at the time his services as acting assistant surgeon were rendered, but at the rate of pay which was fixed for assistant surgeons at the time the act of 1898 was passed. That is to say, despite the change in rank and pay of assistant surgeons in the Navy brought about by the legislation subsequent to 1898, Plummer was paid

upon the theory that those changes had no effect upon the pay of acting assistant surgeons, and therefore they were entitled only to the sum which was allowed by law (Rev. Stat., § 1556) at the time the appointment of acting assistant surgeons was provided for.

By an express finding of the court below, as to which there is no dispute, if Plummer had been paid at the rate fixed by law for assistant surgeons at the time his services as acting assistant surgeon were rendered he would have been entitled, irrespective of the question of longevity pay as to which there is dispute, to $1,814.78 more pay than he received; to $2,007.20, as commutation of quarters, and to $341.88 for heat and light for quarters under the act of March 2, 1907, in all $4,213.86. Whether, therefore, an acting assistant surgeon under the legislation to which we have referred was entitled to be paid as his services were performed at the rate then fixed by law as the pay and allowance of an assistant surgeon, and what was the proper basis for the calculation of longevity pay, are the two questions requiring solution.

The court below based its conclusion that the acting assistant surgeon was only entitled to the pay which was allowed assistant surgeons at the time of the passage of the act authorizing the appointment of acting assistant surgeons, and, hence, that acting assistant surgeons got no benefit from subsequent increases of the pay of assistant surgeons, upon two previous decisions to that effect—James S. Taylor (38 Ct. Cl. 155), and Hugh T. Nelson (41 *Ibid.* 157).

The reasoning of the court was thus expressed in the *Taylor Case* (p. 161):

"In the act of March 3, 1899, we fail to find any express provision applying to officers of the Navy in the temporary service. That was 'An act to reorganize and increase the efficiency of the personnel of the Navy and the Marine Corps of the United States,' evidently referring

to the officers of the Regular Navy, as it certainly could not be contended that the Congress had in view the reorganization of the officers in the temporary service, or that by that act they intended to incorporate them into the permanent service. On the contrary, it was not until the act of June 7, 1900, that provision was made for continuing them in the service by permanent commissions. Those who received commissions in the permanent service prior to that act did so presumably after a proper examination and approval by the board of naval surgeons designated by the Secretary of the Navy under the act of May 4, 1898."

But conceding the correctness of the premise upon which the reasoning just quoted rests—that is, the purpose of the Naval Personnel Act to deal with the standard of pay of the regular naval establishment—we think it is not conclusive or even in any degree persuasive of the question here for decision, which is not what was the purpose of Congress in fixing a standard for the pay of the regular naval establishment, but whether that standard as fixed must be resorted to for the purpose of determining the pay of acting assistant surgeons. The solution of that question must primarily be found within the text of the act of 1898, and as that text expressly gives to the acting assistant surgeons whose appointment it provides for the relative rank and compensation allowed by law to assistant surgeons, it must follow that in the absence of an express provision or a necessary implication to the contrary in the statute fixing the pay of assistant surgeons such standard became the measure by which the pay of the officers provided for in the act of 1898 was to be ascertained and allowed. In other words, as the act of 1898 provided for a standard by which to determine the rank and pay of the acting assistant surgeons—that is, the rank and compensation allowed assistant surgeons—in the nature of things it provided not for the application

of a non-existing or obsolete standard, but for an existing standard—that is, the rank and pay in force at the time when the services of the acting assistant surgeons were rendered. Looked at from a broader point of view—that is, testing the subject from a consideration of the obvious intent and purpose of the act of 1898—the same conclusion becomes necessary. It may not be doubted that the relation which the act of 1898 established between the rank and pay of acting assistant surgeons and assistant surgeons in reason must rest upon the substantial identity of the services to be rendered by the incumbents of both offices. This being true, it of course necessarily also is true that a mere increase of the compensation of assistant surgeons without any change between the duties of those officers and the duties of acting assistant surgeons cannot justify the implication unless there was a clear manifestation of the purpose to do so—that it was the intention of Congress to create an inequality of compensation while leaving unmodified equality of rank and duty.

That the view which we take of the act of 1898 was also the contemporaneous administrative construction given to the act plainly results from the circular of the Surgeon General under which Plummer was appointed, since the pay stated in that circular was not that fixed in § 1556, Rev. Stat., but was the sum fixed as the pay of assistant surgeons in the Navy at the time the circular was issued. Indeed that such also must have been the view entertained by the President when Plummer was commissioned obviously is shown by the fact that Plummer was commissioned as a lieutenant, junior grade, the rank of an assistant surgeon at the time of his appointment, and not as an ensign, the rank accorded to assistant surgeons at the time when the act of 1898 was adopted.

The controversy as to the sum of the longevity pay arises from a portion of the text of the act of May 13, 1908, 35 Stat. 127, 128, c. 166, reading as follows:

"There shall be allowed and paid to each commissioned officer below the rank of rear admiral ten per centum of his current yearly pay for each term of five years' service in the Army, Navy, and Marine Corps. The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law."

It is insisted that as the words "current yearly pay," as employed in Rev. Stat., § 1262, were construed in *United States* v. *Tyler*, 105 U. S. 244, to require that the calculation of the longevity pay should be made, not upon the sum of the base pay, but on the base pay and previous increases thereof, that the same rule must be applied to the words as used in the provision of the statute above quoted. But, subsequent to the *Tyler Case*, by the act of June 30, 1882, 22 Stat. 118, c. 254, Congress expressly directed that the ten per cent longevity increase provided for in § 1262, Rev. Stat., should be "computed on the yearly pay of the grade. . . ." That this act was passed for the express purpose of commanding a method of computation which would render inapplicable the construction adopted in the *Tyler Case* is not open to controversy. *United States* v. *Miller*, 208 U. S. 32, 38. Indeed, that from the date of the act of 1882 down to the present time the longevity pay of Army officers has been computed by the method directed by the act of 1882 is not controverted. In view of the purpose of Congress to equalize as far as possible the pay of Army and Navy officers, manifested by the adoption of the Navy Personnel Act of 1899 and in all subsequent legislation as to such pay, we think it plainly results that the provision relied upon must be held to have been adopted with reference to the settled rule prevailing for so many years, a rule consequent upon the act of 1882. In other words, we think it may not be doubted that the intention of Congress in the provision relied upon was that the longevity pay therein prescribed should be com-

puted according to the methods then prevailing, and which had resulted from the enactment of the statute of 1882.

Judgment reversed and cause remanded, with a direction to enter judgment in favor of claimant for $4,213.86.

J. W. CALNAN COMPANY *v.* DOHERTY.

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

No. 212. Argued March 14, 1912.—Decided April 1, 1912.

A ruling of the Circuit Court of Appeals that the petitioning creditors held provable claims is not a judgment allowing or rejecting a claim within the meaning of § 25b of the Bankruptcy Act of 1898, and cannot under § 25a and subparagraph 1 be reviewed by this court.

Where the prerequisites for an appeal to this court specified in subparagraph 1 of § 25b of the Bankruptcy Act do not exist, and the Circuit Court of Appeals does not make the findings of fact and conclusions of law required by clause 3 of General Order 36, the appeal must be dismissed. *Chapman* v. *Bowen*, 207 U. S. 89.

Appellate jurisdiction over a ruling of the Circuit Court of Appeals in a bankruptcy matter may not be exercised by this court by virtue of § 6 of the Judiciary Act of March 3, 1891, c. 517, *Tefft* v. *Munsuri*, 222 U. S. 114.

Appeal from 174 Fed. Rep. 222, dismissed.

THE facts are stated in the opinion.

Mr. Clarence F. Eldredge for appellant.

The court declined to hear further argument. *Mr. John H. Blanchard* and *Mr. Hugh C. Blanchard* filed a brief for appellee.

Memorandum opinion by direction of the court. By MR. CHIEF JUSTICE WHITE.

Involuntary proceedings in bankruptcy were commenced against the J. W. Calnan Company, appellant here, in the District Court of the United States for the District of Massachusetts, by a creditor owning claims aggregating $713.86. After the filing of an answer by the alleged bankrupt, two creditors—one owning a judgment for $1,038.71 and the other asserting a claim of $963.75—intervened and joined in the petition.

The Calnan Company was adjudicated a bankrupt on May 13, 1909. Eight days afterwards an appeal was prayed for and allowed from that decision. In the assignment of errors, in addition to alleging that the court erred in adjudicating it a bankrupt, the Calnan Company alleged that the court erred in finding that the alleged creditors owning claims for $713.86 and $963.75 respectively were creditors holding valid provable claims against it. In many forms of statement it was also alleged that the court erred in finding that the company had made an unlawful preferential payment to a creditor. The Circuit Court of Appeals affirmed the judgment. (174 Fed. Rep. 222.) Within thirty days after the denial of a petition for a rehearing this appeal was taken.

Section 25b and subparagraph 1 of the Bankruptcy Act are mainly relied upon by counsel for the appellant as conferring jurisdiction upon this court to review the judgment of the Court of Appeals. The clauses referred to authorize an appeal to this court in bankruptcy proceedings from any final decision of a Court of Appeals allowing or rejecting a claim "where the amount in controversy exceeds the sum of two thousand dollars, and the question is one which might have been taken on appeal or writ of error from the highest court of a State" to this court. The contention, however, is untenable. By § 25 (a) of

the Bankruptcy Act appeals in bankruptcy proceedings are authorized to the Circuit Courts of Appeals in three specified cases, two being: "(1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt;" and, "(3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over." It is manifest that the ruling made in the course of the determination of an issue as to alleged bankruptcy upon a subordinate issue as to whether or not the petitioning creditors held "provable" claims is not a judgment allowing or rejecting a debt or claim within the meaning of the section, and it is also evident that a decision by the Court of Appeals upon such a ruling is not a "final decision . . . allowing or rejecting a claim under this act," within the meaning of § 25b. See in this connection *Duryea Power Company* v. *Sternbergh*, 218 U. S. 299, 300. Aside, however, from these considerations the prerequisites for an appeal to this court specified in subparagraph 1 of § 25 (b) do not exist, nor could the appeal be entertained inasmuch as the Court of Appeals did not make the findings of fact and conclusions of law required by clause 3 of General Order 36. *Chapman* v. *Bowen*, 207 U. S. 89, 90.

The further contention that jurisdiction may be exercised by virtue of § 6 of the Judiciary Act of March 3, 1891, is shown to be without merit by our recent decision in *Tefft, Weller & Co.* v. *Munsuri*, 222 U. S. 114.

Appeal dismissed.

CONSUMERS' COMPANY, LIMITED, *v.* HATCH.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 184. Argued March 4, 1912.—Decided April 1, 1912.

When prior to the granting of a charter to a public service corporation it has been clearly settled both by statute law and decisions that such a corporation must perform certain duties, the compelling of such performance does not amount to an impairment of the charter contract, nor does it deprive the corporation of its property without due process of law.

Although a public service corporation may not under its charter be required to extend its facilities in certain quarters, if it does so voluntarily, it must render the service for which it obtained its charter to those within reach of its facilities without distinction of persons.

A judgment of the state court of Idaho, compelling a water company to furnish connection at its own expense to one residing on an ungraded street in which it had voluntarily laid its mains, although not required so to do by its charter, *held* not to have impaired the charter contract of the water company or to have deprived it of its property without due process of law, it appearing that under decisions of the highest court of the State made prior to the charter, the cost of connection was to be borne by the water company.

17 Idaho, 204, affirmed.

THE facts, which involve the construction of the charter of a public service corporation in Idaho and its rights and obligations thereunder, are stated in the opinion.

Mr. Myron A. Folsom, with whom *Mr. Edward S. Elder* and *Mr. Robert H. Elder* were on the brief, for plaintiff in error

Mr. Eugene V. Boughton, with whom *Mr. Frank W. Reed* was on the brief, for defendant in error, submitted.

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

Omitting reference to matters not pertinent to the alleged Federal questions relied upon, the facts are these: Although it was optional with it to do so, the plaintiff in error, a water supply corporation, operating under a franchise granted in 1903, laid a water main in Third street, an ungraded street within the corporate limits of the then village—now city—of Cœur d'Alene, Idaho. While the company was supplying residents on the street with water for domestic use, upon payment of the regular monthly rates established by the Water Commission provided for by the statutes of Idaho, Albert L. Hatch, defendant in error, erected a dwelling upon a lot situated on the street and laid a water pipe to the curb in front of his property. He then applied to the Water Company to connect the pipe at the curb line with its service main, so that a regular supply of water might be obtained. The Water Company, however, declined to make the desired connection because of the refusal of Hatch to pay, as required by the regulations of the company, $8.50, the cost of making the connection, or to comply with alternative regulations adopted for the purpose of enabling the Water Company to recover such cost. This action in mandamus was then commenced in the Supreme Court of Idaho and culminated in a judgment in substance finding the regulations requiring a consumer to pay for service connections unreasonable and ordering the Water Company to make the connection at its own cost and to supply water to the premises of Hatch upon payment of the established monthly rate. 17 Idaho, 204. This writ of error was then prosecuted upon the assumption that rights of the Water Company, protected by the Constitution of the United States, had been wrongfully invaded.

The grounds for the claim in question are in substance

that as the Water Company was not required by its charter in express terms to make a service connection and the benefits of such connection would inure solely to the house owner, to compel the Water Company to bear the cost of the connection would amount to a confiscation of its property in violation of the due process clause of the Fourteenth Amendment and also would be to impair the obligation of its contract. A further claim of impairment of contract is based upon the contention that as it was optional with the Water Company under its franchise to lay mains in ungraded streets there was no duty to supply water from a main voluntarily placed in an ungraded street.

The contentions are devoid of merit. The charter of the company was construed by the court below in connection with the statutes in force at the time of the grant of the franchise in the light of the construction given to those statutes in decisions made prior to such grant. We excerpt in the margin [1] a passage from the opinion in one of those cases.

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[1] In *Pocatello Water Company* v. *Standley* (1900), 7 Idaho, 155, considering obligations of a water supply company and construing § 2712 of 1887 Revised Statutes of Idaho, substantially reënacted in Revised Code of Idaho 1910 as § 2840, the Supreme Court of Idaho said (p. 159):

"Under the said franchise the respondent has been granted the right to lay its mains and pipes, over, along, and under, the streets, alleys, and highways of said city for the purpose of supplying said city and its inhabitants with a sufficiency of pure water. It had the authority to lay all of the mains and pipes in said streets and alleys necessary to accomplish the purposes for which said franchise was granted. It is obliged to lay its mains and pipes in said streets and alleys, and deliver water to the consumers at its franchise limits, and to the line of the premises of the consumer, if such premises border on said franchise limits. The respondent has been granted a valuable right—that of laying its mains and laterals in the streets and alleys of the city—in consideration that it will furnish water to said city and its inhabitants. The company is under obligation to lay its pipes in the streets and alleys so as to make the water accessible to the citizen

By thus interpreting the charter by applying the settled meaning of the statutes which had been announced at the time the charter was granted to the Water Company, the court held that it was the duty of the company under its charter to make the service connections for Hatch at its own cost. This was based upon the view that as it was clearly settled by both the statute law and decisions at the time the charter was granted that it was the duty of the Water Company to make service connections and its further duty being to supply water to consumers by necessary implication the charter imposed the obligation to pay the cost of the service connection which it was incumbent upon the company to make.

That the construction thus placed upon the charter by the court below in the light of the state of the law at the time of its adoption did not amount to an impairment of the obligations of the charter by subsequent legislation is, we think, too clear for anything but statement. That the mere fact of holding that an obligation would be implied to pay for the doing of work to enable the corporation to perform a duty when the duty to do such work was clearly the result of the state law and decisions thereon at the time the charter was granted did not amount to confiscation, and the consequent taking of the property of the corporation without due process of law in violation of the Fourteenth Amendment is also, we think, so obvious as not to necessitate further consideration of the proposition.

As respects the claim based upon the clause of the charter which provided that the Water Company should not be "required" to extend its distributing system in any ungraded street or alley within the then village (now city) of Cœur d'Alene, even if it were possible to indulge in

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for his private use. It is given the right, within its franchise limits, to lay all pipes and make all connections with its mains and laterals. . . . Neither has the citizen any right to enter within the franchise limits of the company, and in any manner interfere with its mains and pipes."

the hypothesis that there was subsequent legislation, we think there is nothing supporting the claim of impairment of contract, because the Supreme Court of Idaho was clearly right in deciding that no contract provision was impaired, since the Water Company had voluntarily laid its main in the ungraded street in question and was supplying water from such main to residents on the street, and its duty was to supply water "without distinction of persons."

Affirmed.

GUARANTEE TITLE & TRUST COMPANY, TRUSTEE OF PITTSBURGH INDUSTRIAL IRON WORKS, BANKRUPT, *v.* TITLE GUARANTY & SURETY COMPANY.

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

No. 188. Argued March 5, 1912.—Decided April 1, 1912.

Under the general rule applicable to all sovereigns, the United States is not bound by the provisions of an insolvency law unless specially mentioned therein.

The Bankruptcy Act of 1867 and the act of March 3, 1797, 1 Stat. 515, c. 20, now §§ 3467, 3468, 3469, Rev. Stat., by both of which all debts due the United States are given priority over all claims, were *in pari materia*, and the Bankruptcy Act of 1867 affirmed the act of 1797. *Lewis* v. *United States*, 92 U. S. 618.

The Bankruptcy Act of 1898 was not an affirmation of the act of 1797 or of Rev. Stat., § 3467, 3468, 3469, and the change of provisions in regard to priority indicates a change of purpose in that respect.

Under a beneficent policy, which favors those working for their daily bread and does not seriously affect the sovereign, Congress, in enacting the Bankruptcy Law of 1898, preferred labor claims and gave them priority over all other claims except taxes, and the courts must assume a change of purpose in the change of order.

In this case *held* that even if a surety company which had paid the debt of the principal to the Government was subrogated to the claim of the Government and was entitled to whatever priority the Government was entitled to, under the Bankruptcy Act of 1898, the claim not being for taxes but a mere debt was not entitled to priority in distribution of the bankrupt's assets over claims for labor preferred by the act.

174 Fed. Rep. 385, 98 C. C. A. 603, reversed.

THE facts, which involve the construction of the Bankruptcy Act of 1898 in regard to priority of claims of the United States against the bankrupt, are stated in the opinion.

Mr. R. T. M. McCready for appellant.

Mr. George J. Shaffer, with whom *Mr. Walter Lyon* and *Mr. John P. Hunter* were on the brief, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case involves the consideration of the priority of payment out of the estate of a bankrupt of claims due the United States and claims for labor.

The United States is not a party to the action, but appellee brings itself into relation with it as subrogated to its rights by the payment of a judgment obtained against the appellee, as surety on a bond for the bankrupt. We shall assume that appellee may assert whatever priority the United States possessed.

After the payment of the judgment appellee petitioned the District Court having jurisdiction of the bankruptcy proceedings for an order directing the Trustee in Bankruptcy to pay it the amount of the judgment before making any other distribution of the funds of the bankrupt. The Referee in Bankruptcy decided against the priority,

and also decided that the claim had not been presented in time for allowance. Upon petition for review and the questions having been certified to the District Court, the report of the Referee was confirmed. This action was reversed by the Court of Appeals, and the appellee awarded priority.

The priority of the United States is established, it is contended, by §§ 3466, 3467 and 3468 of the Revised Statutes, which are, respectively, as follows:

Section 3466. "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

Section 3467. "Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

Section 3468. "Whenever the principal in any bond given to the United States is insolvent, or whenever, such principal being deceased, his estate and effects which came to the hands of his executor, administrator or assignee, are insufficient for the payment of his debts, and, in either of such cases, any surety on the bond, or the executor, administrator, or assignee of such surety pays

to the United States the money due upon such bond, such surety, his executor, administrator, or assignee, shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon."

The counter contention of appellant is that those sections have been superseded by the provisions of the Bankruptcy Act of 1898, which declare a different policy and give priority to labor claims. Those provisions we shall presently quote and consider.

The comprehensive objection is made to the applicability of the provisions that the United States as a sovereign is not bound by the general language of a statute, and is not bound by the provision of an insolvency law, unless specifically mentioned therein. This objection prevailed in the Circuit Court of Appeals, and is said to be sustained by *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 239; *United States* v. *Herron*, 20 Wall. 251, 260; *Lewis, Trustee*, v. *United States*, 92 U. S. 618.

The proposition is established. The first case cited gives an illustration of it not connected with bankruptcy laws. In the other two cases it was applied to such laws.

United States v. *Herron* was an action brought on a bond executed by one Collins as principal and Herron and others as sureties. Herron pleaded a discharge in bankruptcy under the act of 1867 (March 2, 1867, 14 Stat. 530, c. 176). The question was therefore presented whether a discharge under the act barred a debt due to the United States. It was held that such a discharge was not a bar, although it was also held that the United States might have proved its debt and been given priority by the act.

The decision was expressly put upon the ground "that

the sovereign authority of the country is not bound by the words of a statute unless named therein, if the statute tends to restrain or diminish the powers, rights, or interests of the sovereign." There was much reasoning to sustain the proposition, and it was especially applied to discharges in bankruptcy. Expressing the general assent to the proposition announced, the court said (p. 262):

"Greater unanimity of decision in the courts or of views among text writers can hardly be found upon any important question than exists in respect to this question in the parent country, nor is there any diversity of sentiment in our courts, Federal or State, nor among the text writers of this country."

In *Lewis, Trustee,* v. *United States,* Lewis had been appointed trustee of the estates of Jay Cooke & Company, and as such received and held their separate individual estates and assets, and the estates and assets of the firm as well. The estates of the bankrupts were insufficient to pay all their indebtedness. The United States claimed priority of payment of its debt out of the individual estates as against the creditors of the firm. Lewis denied the validity of the demand, but it was sustained.

As one of the elements in its decision the court considered the provision of the act of 1867 (§ 5101 of the Revised Statutes) that in the order for a dividend "all debts due to the United States, and all taxes and assessments under the laws thereof," should be "entitled to priority and preference." The court also considered as an element of its decision the act of March 3, 1797 (1 Stat. 512, 515, c. 20), which provided as follows:

"That where any revenue officer or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States

shall be first satisfied, and the priority hereby established shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor shall be attached by process of law, as to the cases in which a legal act of bankruptcy shall be committed."

The court decided that it was "almost too clear to admit of serious controversy" that under this act and the facts in the case the United States was entitled to the priority which they claimed, and passed to the contention against it based on the provisions of the Bankruptcy Act.

The court met the contention by the general declaration that "the United States are in no wise bound by the Bankruptcy Act." The disposing effect of the declaration was appreciated, for it was said "that the claim of the United States was not proved in the bankruptcy proceedings in question was, therefore, quite immaterial." Citing *United States* v. *Herron, supra,* and *Harrison* v. *Sterry,* 5 Cranch, 289.

The court, however, did consider the provisions of the Bankruptcy Act and said of the clause which it had quoted that it was "*in pari materia* with the several acts giving priority of payment to the United States, and was doubtless put in to recognize and reaffirm the rights which those statutes give and to exclude the possibility of a different conclusion." And, emphasizing the priority of the United States, it was pointed out (p. 623) that the Bankruptcy Law declared that the United States should be first paid and that the act of 1867 gave the debts of the United States priority. "Neither statute," the court said (p. 623), "contains any qualification, and we can interpolate none." The inference from the language of the court, it must be admitted, is quite strong, and the Court of Appeals considered that "in the light thereof the

omission in the Act of 1898 of words expressly giving priority to debts due to the United States had no more significance than the presence of such words in the Act of 1867"—that is, as we understand the reasoning, that § 3466 of the Revised Statutes, which is a reproduction of the statute of 1797, with immaterial changes, was all-sufficient to give priority and that the rights it gave were only recognized and reaffirmed by the provisions for priority in the Bankruptcy Act of 1898. But, as we have seen, the decision in *Lewis* v. *United States* declared that the statute of 1797 and the Bankruptcy Act were to be regarded as *in pari materia*, and both were unqualified; or, as the court said, as neither contained any qualification, none could be interpolated. They being affirmations of each other, either would have been sufficient without the other. The Bankruptcy Act of 1867, as we have seen, provided for priority, first, for the payment of expenses, and, second, of "all debts due to the United States, and all taxes and assessments under the laws thereof." The priority, therefore, given by the Bankruptcy Act was coextensive with the priority given by the statute of 1797. In other words, to repeat, there was a reaffirmation by the Bankruptcy Act of the statute of 1797. But there is not such affirmation by the Bankruptcy Act of 1898 of that statute, which still exists, as we have said, as § 3466 of the Revised Statutes, *supra*. There is a change in provisions, and we come to the question if there is a change of purpose. A consideration of those provisions becomes necessary. We shall quote those only which affect the United States. They are as follows: "Section 1. . . . (9) 'Creditor' shall include any one who owns a demand provable in bankruptcy." (Sec. 17.) A discharge in bankruptcy releases the bankrupt from all of his provable debts except such as are due as a tax levied by the United States. (Sec. 57–J.) Debts owing to the United States as a penalty or forfeiture shall not be allowed except for the

amount of the pecuniary loss sustained by the act, transaction or proceeding out of which the penalty arose.

Priority is provided for in § 64 as follows: "(a) The court shall order the trustee to pay all taxes legally due the United States. (b) Debts to have priority, except as herein provided, and to be paid in full, . . . and the order of payment shall be: (4) wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of the proceedings; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority."

With these provisions we may compare §§ 5091 and 5101 of the Revised Statutes, which are reproductions of the act of 1867. Section 5091 provided that creditors whose debts were duly proved and allowed should be entitled to share *pro rata* without any priority or preference except as allowed in § 5101. The latter section (5101) provided as follows:

"In the order for a dividend, the following claims shall be entitled to priority, and to be first paid in full in the following order:

". . . Second. All debts due to the United States, and all taxes and assessments under the laws thereof. . . . Fourth. Wages due to any operative, clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy. Fifth. All debts due to any person who, by the laws of the United States, are, or may be, entitled to a priority, in like manner as if the provisions of this Title had not been adopted. . . ."

It will be seen, therefore, that by the statute of 1797 (now § 3466) and § 5101 of the Revised Statutes all debts due to the United States were expressly given priority to the wages due any operative, clerk or house servant. A

different order is prescribed by the act of 1898, and something more. Labor claims are given priority, and it is provided that debts having priority shall be paid in *full*. The only exception is "taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality." These were civil obligations, not personal conventions, and preference was given to them, but as to debts we must assume a change of purpose in the change of order. And we cannot say that it was inadvertent. The act takes into consideration, we think, the whole range of indebtedness of the bankrupt, national, state and individual, and assigns the order of payment. The policy which dictated it was beneficent and well might induce a postponement of the claims, even of the sovereign in favor of those who necessarily depended upon their daily labor. And to give such claims priority could in no case seriously affect the sovereign. To deny them priority would in all cases seriously affect the claimants.

Reversed.

WESTERN UNION TELEGRAPH COMPANY *v.* CITY OF RICHMOND.

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

No. 195. Argued March 6, 7, 1912.—Decided April 1, 1912.

A municipal ordinance will not be held unconstitutional as an unreasonable grant of power because it permits the use of streets by a public service corporation only in such manner as is satisfactory to the municipal officers in charge of such streets; and so *held* that an ordinance of the City of Richmond, Virginia, in regard to location and construction of telegraph wires and conduits did not deprive telegraph companies of their property without due process of law.

The act of July 24, 1866, 14 Stat. 221, c. 230, permitting telegraph companies to occupy post-roads is permissive only and not a source of positive rights; it conveys no title in streets or roads, and does not found one by delegating the power to take by eminent domain. *West. Un. Tel. Co.* v. *Penna. R. R. Co.*, 195 U. S. 540.

Prima facie a telegraph company, not having the right of eminent domain, must submit to the terms of the owners of property which it desires to occupy, including those imposed by municipalities for use of streets.

Quære: Whether by reason of such rights as are given by the act of July 24, 1866, a municipality is restricted to only imposing reasonable terms for the use of its streets by telegraph companies.

It is not unreasonable for a municipality to require as compensation for the use of its streets by telegraph companies a money charge, in this case of two dollars for each pole, and also the right to string a limited number of wires on its poles or to use one of the pipes in the conduit for municipal service; or to require space to be left in conduits for use of third parties on compensation and permission by the city.

The court must assume that a municipality acts within its powers, if it can be authorized to do what it has done.

Charges for use of streets acquiesced in and paid for many years without complaint, will not be declared unreasonable on mere protest.

Where, as in this case, the provisions imposing penalties for non-compliance are separable from the ordinance, it is time enough to file a bill when the attempt is made to apply the penalties oppressively; they cannot be made the basis of a bill until then.

In this case *held* that a provision of a municipal ordinance limiting the use of streets for conduits under the terms imposed for fifteen years with the right of the city to then order the conduits removed does not deprive the telegraph company of its rights under the act of July 24, 1866, the ordinance itself providing that whatever rights the company has under that act shall not be affected.

178 Fed. Rep. 310, affirmed.

THE facts, which involve the constitutionality of an ordinance of the City of Richmond in regard to telegraph and telephone wires, are stated in the opinion.

Mr. Rush Taggart, with whom *Mr. A. L. Holladay* was on the brief, for appellant:

The ordinance does not impose definite rules for the

guidance of the telegraph company in the operations of its business within the city, but exposes the operations of the company to the arbitrary direction of the officers of the city without any definite rules to guide the officers in the discharge of their duties.

The telegraph company is subject to such necessary provisions respecting its buildings, poles and wires which the comfort and convenience of the community may require, *West. Un. Tel. Co.* v. *Pendleton*, 122 U. S. 359, but it is not exposed to the arbitrary discretion of any officer of the city with respect to the operations of its lines. Neither the city nor the State can prevent it from operating within their limits by any form of legislation whatever. *Pensacola Tel. Co.* v. *West. Un. Tel. Co.*, 96 U. S. 1; *Baltimore* v. *Radecke*, 49 Maryland, 217; *Anderson* v. *Wellington*, 40 Kansas, 173; *Garrabad* v. *Dering*, 84 Wisconsin, 585; *State Center* v. *Barenstein*, 66 Iowa, 249; *Winthrop* v. *New England Chocolate Co.*, 180 Massachusetts, 464; *Barthet* v. *New Orleans*, 24 Fed. Rep. 363; *Frazee's Case*, 63 Michigan, 396; *Chicago* v. *Trotter*, 136 Illinois, 430; *Lumber Co.* v. *Cicero*, 176 Illinois, 9; *Newton* v. *Belger*, 10 N. E. Rep. 464; *State* v. *Tenant*, 14 S. E. Rep. 387; *Sioux Falls* v. *Kirby*, 60 N. W. Rep. 156; *Boyd* v. *Frankfort*, 77 S. W. Rep. 669; *Omaha Gas Co.* v. *Withnell*, 110 N. W. Rep. 680; *Robison* v. *Miner*, 37 N. W. Rep. 21; *State* v. *Mahner*, 9 So. Rep. 480; *May* v. *People*, 27 Pac. Rep. 1010; *St. Louis* v. *Russell*, 22 S. W. Rep. 470; *Noel* v. *People*, 58 N. E. Rep. 616; *Elkhart* v. *Murray*, 165 Indiana, 304; *Montgomery* v. *West*, 42 So. Rep. 1000.

The ordinance imposes excessive fines and penalties for the failure to obey the arbitrary orders of the city officials in matters concerning which the company has no guide except the direction of these officers. *Ex parte Young*, 209 U. S. 123; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79.

The ordinance requires the company to furnish to the city large and extensive facilities for the doing of the city's

business without compensation or reward therefor, and such compulsion is not a legitimate exercise of the police power. For instances in which license fees have been declared unconstitutional or illegal see 2 Dillon on Municipal Corporations, 5th ed., § 661; *State* v. *Bean*, 91 No. Car. 554; *State* v. *Hoboken*, 33 N. J. L. 280; *Telephone Co.* v. *Sheboygan*, 111 Wisconsin, 23; *Muhlenbrinck* v. *Long Branch*, 42 N. J. L. 364; *Van Hook* v. *Selma*, 70 Alabama, 361; *Fort Smith* v. *Ayers*, 43 Arkansas, 82; *New Haven* v. *Water Co.*, 44 Connecticut, 106.

The placing of a cable containing one or a dozen or any greater number of wires within the conduit can require no more work in the issuing of a license therefor, or in the inspection thereof, than if only one wire were placed therein, and in the ordinance in question we have the identical graduation of fees which was the leading reason causing the Connecticut Supreme Court to hold an ordinance void. *Jackson* v. *Newman*, 59 Mississippi, 385; *Baltimore* v. *Harlem Stage Co.*, 59 Maryland, 330; *City of Ottumwa* v. *Zekind*, 64 N. W. Rep. 646; *New York* v. *Hexamer*, 59 App. Div. 4; *State* v. *Glavin*, 34 Atl. Rep. 708; *Welch* v. *Hotchkiss*, 39 Connecticut, 143; *Allegan* v. *Day*, 42 N. W. Rep. 977.

In this case the license charges are made purely as measures for collecting revenue for the city and as a punishment against the telegraph company for endeavoring to protect its rights.

The claim of the city to require reservation of space upon poles for overhead wires cannot be sustained, nor can its demand be sustained that the company, in placing its wires underground, furnish all the material and construct this expensive work and set apart at least one duct for the use of the city free of charge therefor.

The ordinance respecting underground wires requires the company to construct property which may be available for others to use, and which it is not permitted to use

without the consent of the city, and which may never be used.

The ordinance imposes illegal conditions, restrictions, expenses and burdens as conditions of the right to use the streets of the City of Richmond, which right is secured to the telegraph company by the act of Congress of 1866, subject only to the compliance with reasonable police regulations for the protection and convenience of the inhabitants of the city.

Within these underground limits, with manholes placed by the telegraph company at each block, the total cost of inspection in order to ascertain that the conduits are maintained in a safe and proper condition would be practically nothing. The charge of $2.00 per mile, therefore, cannot be maintained upon the pretext of the expense of inspection, because no such expense would be incurred by the city. *West. Un. Tel. Co.* v. *New Hope*, 187 U. S. 419; *Atl. & Pac. Tel. Co.* v. *Philadelphia*, 190 U. S. 161; *Postal Tel. Co.* v. *New Hope*, 192 U. S. 55, do not sustain the contentions of the city in this respect.

The ordinance seeks to put limits upon the right of the telegraph company to use the streets, and to require the abandonment of the use of the streets at the demand of the city, while the act of 1866 secures to the telegraph company the full and unlimited right to use the streets subject only to fair and reasonable regulations by the city. *Pensacola Tel. Co.* v. *West. Un. Tel. Co.*, 96 U. S. 1; *St. Louis* v. *West. Un. Tel. Co.*, 148 U. S. 92; *Leloup* v. *Port of Mobile*, 127 U. S. 640.

The evident design of the preparation and passage of the ordinance was to compel the telegraph and telephone companies affected by it, to submit absolutely to the control of the city within the limits of the city; that is manifest from an examination of practically every section of the ordinance, and the question which we now present is: Can the city thus limit and control the operations of the

telegraph company engaged in interstate commerce agency of the Federal Government, and compel it to submit in all essentials to the terms the city has set forth in this ordinance the same as the City of Richmond has compelled the Southern Bell Telephone Company to submit to it, the latter company not being invested with any of the rights conferred by the act of Congress of July 24, 1866? This question can only be answered in the negative.

The definition as to what constitutes a proper, as distinguished from an improper, delegation of power under the authorities is perhaps not an easy one to make, but it is clear, that, with respect to this ordinance, it is not necessary that a close analysis of the authorities be made in order to discover the dividing line, because this ordinance goes so far beyond what is proper. *United States* v. *Grimaud*, 220 U. S. 506; *Field* v. *Clark*, 143 U. S. 694.

Mr. H. R. Pollard for appellee.

Mr. Justice Holmes delivered the opinion to the court.

This is a bill in equity filed on June 21, 1904, to restrain the enforcement of an ordinance of September 10, 1895; codified as chapter 88 of the ordinances of Richmond, and amended March 15, 1902, and December 18, 1903. The plaintiff alleges that the ordinance infringes its rights under the act of July 24, 1866, c. 230, 14 Stat. 221 (Rev. Stats., §§ 5263, *et seq.*), and under Article I, § 8 (the commerce clause), and the Fourteenth Amendment of the Constitution of the United States. The Circuit Court dismissed the bill, 178 Fed. Rep. 310, and the plaintiff appealed. The act of Congress gives to telegraph companies that accept its provisions the right to construct, maintain and operate lines over the post-roads of the United States, such as the streets of Richmond concerned are admitted to be. Rev. Stats., § 3964. Act of March 1,

1884, c. 9, 23 Stat. 3. Some of the objections to the ordinance are based upon this statute and some are not; we take them as they come.

By § 1 poles and wires are not to be put up 'until the City Engineer shall have first determined the size, quality, character, number, location, condition, appearance, and manner of erection of' the same. By § 4 the Committee on Streets may require permission to be given to others to place upon the poles light current wires which in the Committee's opinion will not unreasonably interfere with the owners' business; terms, if not agreed upon, to be submitted to arbitration. By § 15 the Chief of the Fire Department and the Superintendent of Fire Alarm and Police Telegraph are to inspect poles and wires, and if a pole is unsafe, or the attachments, or insulations, etc., are unsuitable or unsafe, are to require them to be altered or replaced and removed, with a fine for each day's failure to obey the order. By § 26 violation of any provision, or failure to obey any requirement made under the ordinance by the City Engineer or the just named Superintendent or Chief, if not specially fined, is to be fined from ten to five hundred dollars a day, by the Police Justice. Finally by § 28, as amended in 1903, all overhead wires within a certain territory are to be removed, and within two months plans for conduits are to be submitted to the Committee on Streets and Shockoe Creek, showing location, plan, size, construction and material. These plans may be altered or amended by the Committee and when satisfactory to it are to be followed by the owner of the wires in a manner satisfactory to the City Engineer. The pavements are to be replaced and kept in repair to his satisfaction and the city saved harmless from damages. The conduits are to provide for an increase of 30 per cent, not to be occupied by third parties without consent of the Committee and compensation, but the wires of the city to be carried free, one duct being

reserved for them. The location, size, shape and subdivision of the conduits, the material and manner of construction, must be satisfactory to the City Engineer, and the work of laying underground conduits is to be under the direction and to the satisfaction of the Superintendent of Fire Alarm and Police Telegraph.

All these provisions are objected to as subjecting the appellant to an arbitrary discretion—in § 1, that of the City Engineer as to the poles; in § 4, that the Committee on Streets as to the use of the poles; in § 15, that of the Chief and Superintendent mentioned as to not only the safety of the poles and wires but the unsuitableness of the latter or their attachments, insulation, or appliances; in § 28, that of the Committee on Streets as to underground plans, that of the Superintendent of Fire Alarm as to laying the conduits, and that of the City Engineer as to the replacement of pavement in the streets, and the carrying out of the plans in all the details just stated. It is argued also that by § 26 the appellant is subjected to further requirements without limit from the officers named, but this argument may be dismissed, the requirements referred to being only those 'made under this chapter,' that is, specifically authorized in the other sections to which we have referred. Again the objections are not to be fortified by those decisions that turn on the power to delegate legislative functions. *United States* v. *Grimaud*, 220 U. S. 506. We have been shown no ground for supposing that the ordinance exceeded the power of the legislature to authorize or of the city to enact, unless it interferes with some special paramount right of the appellant. The bill is brought wholly on the ground that the appellant has such rights that no state legislation can touch. Unless it has them there is nothing in the Constitution of the United States to prevent the grant of these discretionary powers to the committees and officers named. *Davis* v. *Massachusetts*, 167 U. S. 43. *Gundling*

v. *Chicago*, 177 U. S. 183. *Fischer* v. *St. Louis*, 194 U. S. 361, 371. *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 225.

The appellant says that it has the right to occupy the streets of Richmond under the act of Congress, and therefore, although subject to reasonable regulation, it cannot be subjected to a discretion guided by no rules. Neither branch of this proposition, as applied to this case, commands our assent. To begin with the end, while it is true that rules are not laid down in terms, they are implied so far as there need to be any. If the Committee and officers do their duty there is no room in the questions left to them for arbitrary whim. They are to exercise their judgment on the suitableness, safety, &c., of the places, poles and wires by the criteria that would be applied by all persons skilled in such affairs who should seek to reconcile the welfare of the public and the instalment of the plant. The objection that other motives may come in is merely that which may be made to all authority, that it may be dishonest, an objection that would make government impossible if it prevailed. It is said that the ordinance should confine the Committee and officers to finding whether required and specified facts exist. But not only is it impossible to set down beforehand every particular fact that may have to be taken into account, but in case of dishonesty it would do no good. We are of opinion that the ordinance is not unreasonable as a grant of arbitrary power. Regulations very like these were upheld, so far as they presented Federal questions, against a company assumed to have a right to use the streets, in *Missouri, ex rel. Laclede Gaslight Co.* v. *Murphy*, 170 U. S. 78, 99. See also *Wilson* v. *Eureka City*, 173 U. S. 32.

In view of what we have said and the appellant's admission that it is subject to reasonable regulation it would be unnecessary to consider its rights under the act of

Congress but for some further complaint that the appellant's property is taken without due process of law. That complaint opens the question what property the appellant has. The act of Congress of course conveyed no title and did not attempt to found one by delegating the power to take by eminent domain. *Western Union Telegraph Co.* v. *Pennsylvania Railroad Co.*, 195 U. S. 540, 574. It made the erection of telegraph lines free to all submitting to its conditions, as against an attempt by a State to exclude them because they were foreign corporations, or because of its wish to erect a monopoly of its own. *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1. It has been held to prevent a State from stopping the operation of lines within the act by injunction for failure to pay taxes. *Western Union Telegraph Co.* v. *Attorney General of Massachusetts*, 125 U. S. 530. But except in this negative sense the statute is only permissive, not a source of positive rights. The inability of the State to prohibit the appellant from getting a foothold within its territory, both because of the statute and of its carrying on of commerce among the States, gives the appellant no right to use the soil of the streets, even though post-roads, as against private owners or as against the city or State where it owns the land. *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, 101. *S. C.*, 149 U. S. 465. *Richmond* v. *Southern Bell Telephone & Telegraph Co.*, 174 U. S. 761, 771. *Atlantic & Pacific Telegraph Co.* v. *Philadelphia*, 190 U. S. 160, 163. *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 357.

The only ground of title disclosed by the appellant is the act of 1866, coupled perhaps with the fact that its lines are established. The rights of the city to the streets are left a little vague, but the bill assumes that they are such as to authorize the charge of a reasonable rental on the principle of *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92. Any license that the city may have

granted as owner or representative of the owner of the public easement or otherwise may be assumed to have been revoked, and so far as the city's title is infringed by the appellant nothing appears to limit the city's right to insist upon it, as fully as a private owner might. Leaving the question of title on one side, except so far as to note that the appellant does not show one, and that the city has power to admit it to the highways, the other regulations complained of do not violate the appellant's constitutional rights.

When the appellant without the right to exercise the power of eminent domain desires to occupy land belonging to others, *prima facie* it must submit to their terms. We assume, as we have said, that the city has some interest in the streets that is affected by the presence or by the establishment of conduits or poles. If it demands, as a condition of its assent, as it does by § 6, that positions shall be reserved upon the poles for the city, and by § 28 that provision shall be made for thirty per cent increase and that the city's wires shall be carried free of charge, one duct being reserved for them, it is within its rights. Even assuming, as seems to be implied by some of the language in *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, 104, 105; *Western Union Telegraph Co.* v. *Attorney General of Massachusetts*, 125 U. S. 530, that in consequence of the act of Congress, the city is restricted to reasonable demands, the foregoing requirements do not seem to us unreasonable in view of the position of the parties. The city must use these poles and conduits or others, and it is not unfair that it should avoid the expense and additional burden of a separate system and insist on getting the help it needs from the system already there. See *Postal Telegraph Cable Co.* v. *Chicopee*, 207 Massachusetts, 341. It is no sufficient objection that from the point of view of rental the burden on certain poles may vary in a proportion different from the value

of those poles. The notion of rental cannot be used thus to restrict the conditions that may be imposed. The conditions are reasonable with reference to the occupation of the streets considered as a whole, and are not made otherwise by the fact that there is also a specific money charge for each pole or underground mile of wire.

The requirement that space be left in the conduits for wires of third parties, to be used upon permission by the city and compensation, §§ 4, 28, is merely another incident of the necessity for insisting upon a single system. It would seem not to be unreasonable for legislation, apart from any question of property rights, to require that a single conduit should contain all the wires under a street. When the legislature also is fixing the terms on which it will yield a property right the validity of the condition becomes doubly clear. So a provision in § 28 for moving or altering conduits at the appellant's expense upon notice from the city that the change is necessary for the construction or repair of gas, sewer, or water mains. These items seem to us as easily justified as the order to put the wires underground, the legality of which the appellant fully admits.

The money charges of two dollars per pole and the same sum per mile of underground wire, are found fault with. §§ 10, 32. Many of the cases relied upon by the appellant are cases turning on the limitations to the powers of the municipality. But, as we have said, this bill is brought on the theory that any such legislation by the State would be bad under the Constitution and act of Congress—not upon the suggestion that the City of Richmond is acting *ultra vires*. If the city could be authorized to do what it has done, we must assume that it is acting within its powers. Taking up the question so limited, we agree with the court below that after the appellant, as is found, has paid the charges without complaint for many years it would require something more

than a mere protest now to induce us to find it unreasonable. The sum is not so great as has been charged and sustained heretofore. *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, 104. *S. C.*, 149 U. S. 465. *Postal Telegraph Cable Co.* v. *Baltimore*, 156 U. S. 210. *Memphis* v. *Postal Telegraph Cable Co.*, 164 Fed. Rep. 600, 91 C. C. A. 135.

There is the frequently recurring contention that the ordinance is void because of the great penalties that may be incurred in the time necessary to test its legality. Especially mentioned is § 27, as amended in 1902, which imposes a fine of from $100 to $500 for each pole remaining after the time set for their removal, and of from $100 to $500 for every week thereafter. It does not look as if the penalties in this ordinance were established with a view to prevent the appellant from resorting to the Federal courts, nor do we apprehend that an attempt will be made to enforce them in respect to the past. But the penalties are separable from the rest of the ordinance, and if an oppressive application of them should be attempted it will be time enough then for the appellant to file its bill. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 417. *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433, 443.

One more objection to the ordinance is found in § 31, which limits the privilege as to the conduits to fifteen years and provides that after that time the city may put such restrictions, conditions and charges as it sees fit, or may order the conduits removed. It seems to be thought that this is an attempt to make the appellant contract itself out of the benefit of the act of Congress. What we have said will show some reason for not so regarding the ordinance—and as an amendment, § 34, adopted since the bill was filed, provides that none of the obligations, &c., of the chapter shall interfere with rights under the act of 1866, the appellant's position would be no worse by reason of its complying with what it cannot help. We think it

unnecessary to discuss the bill in greater detail to show that it cannot be maintained.

Decree dismissing bill affirmed.

WORLD'S FAIR MINING COMPANY *v.* POWERS.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 207. Argued March 11, 12, 1912.—Decided April 1, 1912.

The owner of a mine contracted with a purchaser for the latter to go into possession and proceed with the development of, and extract ore from, the mine, and to deposit to the credit of the owner in a designated bank the net proceeds up to a specified amount when deeds to the property, deposited in escrow should be delivered. The purchaser proceeded with the work, but deposited proceeds to his own credit in another bank, whereupon the owner attached such deposit and took forcible possession of the mine. In a suit brought by the purchaser, *held* that:

The deposit of proceeds of ore in the specified bank was a condition concurrent or precedent to the obligation of the owner to go on with the contract; and, unless the declaration disclosed an excuse for the breach, the owner was justified in retaking possession.

That the action of the owner in attaching the deposit was not an excuse for a breach by the purchaser, nor did the declaration disclose any sufficient excuse for the breach.

Under the contract the act of the owner in suing for part of the purchase price which belonged to him would not prevent him from terminating the contract for failure to perform; there was no election.

10 Arizona, 5, affirmed.

THE facts, which involve the construction of a contract for sale of mines and what constituted breaches thereof, are stated in the opinion.

Mr. Frank H. Hereford, with whom *Mr. F. E. Curley* was on the brief, for plaintiff in error:

The pleadings fully allege those conditions of the con-

tract that the Arizona courts construed into a condition precedent, fully allege nonperformance, and fully allege excuses for nonperformance on the part of the plaintiff in error.

If a party expressly avers or confesses a material fact omitted on the other side, the omission is cured. *Hill* v. *George*, 5 Texas, 87; *McFarland* v. *Mooring*, 56 Texas, 118; *International & G. N. R. Co.* v. *Sein*, 33 S. W. Rep. 558.

Many defects are waived and cured by pleading over, that might have been fatal on demurrer. *United States* v. *Morris*, 10 Wheat. 246, 283; 31 Cyc. 714.

The reply as a pleading on the part of plaintiff is especially authorized by the statutes of Arizona. Rev. Stat. Arizona, 1901, par. 1357.

Pleadings will be construed most favorably towards the pleader in determining whether or not the allegations therein contained are sufficient to apprise the opposite party of the questions of fact that the pleader will seek to establish on the trial. *United States* v. *Parker*, 120 U. S. 89, 97.

The provisions of the contract relating to the depositing of proceeds of shipments of ore need not be specially pleaded, because they were either independent conditions or conditions subsequent.

Payments to the credit of defendants in error for ore shipped were not conditions precedent to the contract nor to any rights thereunder. The contract did not make such payments a condition precedent.

Setting forth in the contract those failures to perform which would justify a termination of the contract, negatived any claims that a failure to perform any of the other conditions of the contract would authorize the aggrieved party to terminate it. "*Expressio unius est exclusio alterius*" applies to contracts. *Douglas* v. *Lewis*, 131 U. S. 75; *Tucker* v. *Alexandroff*, 183 U. S. 424, 436.

The putting of these deeds in escrow was an important

and an expressed condition in the contract. *New Orleans* v. *Texas & P. Ry.*, 171 U. S. 334.

None of the parties to the contract intended that its terms in relation thereto should be a condition precedent and never afterwards considered them as such.

The escrow instructions of April 15, 1904, were not a modification or amendment of the original contract, or intended as such. Those instructions prescribed no penalty except the destruction of deeds deposited in escrow for a failure to perform the conditions of the escrow. No penalty could be claimed or enforced under the terms of the escrow instruction until defendants in error had done certain things that were never alleged to have been done nor proved to have been done. 7 Ency. of U. S., Sup. C. Rep. 264; 4 *Id.* 573.

The Supreme Court of Arizona has inferentially held that the escrow instructions did not modify or become a part of the original contract. *Powers* v. *World's Fair Mining Co.* (Ariz.), 86 Pac. Rep. 15; *S. C.*, 100 Pac. Rep. 955.

What is implied is as effectual as what is expressed. The intent of the parties as manifested is the contract. *Equitable Ins. Co.* v. *Hearne*, 20 Wall. 494, 496; *United States* v. *Babbitt*, 95 U. S. 334, 336.

Even if deposits to the credit of defendant in error of the proceeds of ore shipped were a condition precedent in the contract, then before the time for its performance, defendants in error had elected not to so consider such conditions, had waived the condition precedent, and had elected to consider the contract unbroken by plaintiff in error's failure to perform. 15 Cyc. 258 *et seq.*

The so-called condition precedent was satisfied and complied with nine days before time for complying with it had arrived. *Central Nat. Bank* v. *Conn. Mut. L. Ins. Co.*, 104 U. S. 54.

Mr. Eugene S. Ives for defendants in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action brought by the plaintiff in error upon a contract made by the defendants in error, hereafter called Powers, with one Ferguson, and assigned to the plaintiff in error. The contract was for the sale of some mines known as the World's Fair Group. Powers agreed to place a deed of the mines in escrow in the Arizona National Bank of Tucson within ninety days, to be delivered on performance of the undertakings on the other side. Ferguson was to begin work within ninety days and to go on at a minimum rate until one thousand feet had been done. All ore taken or stoped out below the main level and all ores then on the dumps were to be milled, concentrated or leached on the grounds, twelve dollars per ton being allowed to Ferguson for such treatment. On all ores, if any should be extracted, better adapted to be shipped directly to a smelter, and upon all concentrates, a further allowance to the extent of the shipping and smelting charges was to be made. Ferguson agreed to ship the products 'and after the deduction of the said shipping and smelter charges, to deposit in trust in the Arizona National Bank, Tucson, Arizona, the net proceeds therefrom, the same to remain in trust in said bank until the expiration of this agreement, which shall be upon the completion of the aforesaid one thousand feet of work, or until such time' as Ferguson should pay Powers $450,000 and deliver to him one-quarter of the full paid stock of a company that Ferguson agreed to form for working the mines, the moneys deposited in trust thereupon to be Ferguson's. The agreement was to be void if Ferguson did not begin and prosecute the work in the manner and at the rate agreed upon, and in that event all permanent improvements were to belong to Powers.

By a subsequent modification of April 15, 1904, it was agreed that the money deposited in the Arizona National

Bank should at once belong to and be at the disposal of Powers and be credited upon the $450,000, the other party being released from further liability upon the amounts. On the same date deeds from Powers to Ferguson, and from Ferguson and the London and Glasgow Development Company, his assignee, to the World's Fair Mining Company were placed in escrow by Powers and Ferguson in the Arizona National Bank, with instructions that upon demand by Powers in writing the bank should appoint a person to ascertain whether there had been a breach of agreement on the other side, and if he should certify other breaches or a failure to deposit the returns from ores, less the allowances, for more than fifteen days after the receipt of the returns, then Powers's deed was to be given back and the other deed destroyed. There were also provisions that in case of performance the bank should deliver the deeds. Before April 15 Ferguson and his assignee had been in possession and at work. Shortly after that date the World's Fair Mining Company went on with the business. On June 6, 1904, it received several thousand dollars proceeds from ores and deposited them in the First National Bank of Nogales, to its own account. The money not having been deposited in the Arizona National Bank and Powers being dissatisfied with the conduct of the plaintiff's predecessors, who also seem to have failed to deposit as agreed, on June 11 he brought suit and garnisheed the Nogales account. The company kept on at work, but on July 25 Powers took forcible possession of the mines. Subsequently this action was brought.

At the trial the plaintiff offered in evidence the record of the attachment suit, but the court excluded it and directed a verdict for the defendant on the ground that the deposit in the Arizona National Bank was a condition concurrent with or precedent to the obligation of Powers to go on with the contract, and that the declaration did

not disclose an excuse for the plaintiff's breach; that it did not purport to admit a failure or to allege that such failure was due to Powers. The Supreme Court of the Territory took the same view and affirmed the judgment, as the plaintiff, on its attention being called to the matter at the trial, had not seen fit to amend.

The exclusion of the evidence and the direction to the jury both turn on the same point and call for an analysis of the pleadings so far as material. The declaration states the contracts, assignments and escrow and the other facts that we have mentioned; that Powers brought the suit with the intent to break and abrogate the contract; that therein he alleged a debt of the London and Glasgow Development Company for $6617, and one of the present plaintiff for $8000; that by his garnishment and an injunction that he obtained for a time he sought to prevent the plaintiff from carrying out its contract, and that after the injunction was dissolved Powers proceeded with the litigation, threatening to attach any other funds brought into the Territory, and 'continued to harass, impede and defeat the efforts of the plaintiff to carry out the terms of its said contracts.' The plaintiff relies upon the foregoing allegations, and especially the word 'defeat,' as showing that Powers prevented its performance by his acts. But the declaration goes on that these acts made the plaintiff fear that if it brought any more money into the Territory that also would be attached, that they crippled and impeded it, and that 'when plaintiff had finally succeeded in overcoming the conditions' thus occasioned, Powers took possession of the mine.

The declaration admits, therefore, that the acts of Powers were not sufficient to prevent the plaintiff from keeping its undertaking. It implies also that the plaintiff had other money out of the Territory, and in no way shows that it could not have made the required deposit in the Arizona Bank. The garnishment of the sum in the

Nogales Bank did not prevent putting other money into the Arizona Bank if the World's Fair Company did not see fit to release the attachment—and if the deposit had been made in time and to the right amount the source from which it came would not have mattered. The deposit never was made and therefore it is unnecessary to consider whether there had not been a breach by the failure to deposit at once before Powers attached. The plaintiff argues from the escrow that it had fifteen days—but as it also contends for other purposes that the escrow did not modify the contract, the argument is weakened. But it is enough that on the record the plaintiff discloses an unexcused breach. There is nothing in the answer to better the case thus made. We agree with the courts below that the depositing in the Arizona Bank was a condition concurrent with the obligation of Powers to allow the plaintiff to continue in possession and precedent to Powers's obligation to convey.

The escrow instructions treat making the deposits as a condition to the plaintiff's rights. The plaintiff's argument that the instructions do not modify the contract is only effective to exclude the introduction of an allowance of fifteen days for making the deposit, as the instructions are not needed to make the meaning of the contract clear. For even if the express condition of avoidance for failure to prosecute the work 'in the manner and at the rate agreed upon,' does not certainly extend to this, it is not to be supposed that the plaintiff was to be allowed to go on converting the proceeds of the mine into money and at the same time appropriate the whole instead of turning the net amount over to Powers.

Another matter might perhaps have caused a difficulty with different pleadings. It is suggested that the previous suit of Powers against the World's Fair Mining Company was a suit for the proceeds of ore that should have been deposited. It might be argued that Powers had no right to

that money unless the contract was to be carried through, that he might have declined to go further and have sued the company for the breach, *Anvil Mining Co.* v. *Humble*, 153 U. S. 540, 552, but that he could not claim part of the purchase-price, as such, unless he was content to go on, and thus that Powers had elected against the termination of the contract before he attempted it. But no such election is pleaded, and not enough appears to show that if it had been, it could have been proved. The precise nature of the former suit does not appear, nor whether it had been proceeded with far enough to conclude Powers's right of choice. Moreover if Powers terminated the contract, he would not affirm it by suing for proceeds of ore belonging to him in that event. No error appears in the judgment below, and it is affirmed.

Judgment affirmed.

SWANSON *v.* SEARS.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 217. Argued March 15, 1912.—Decided April 1, 1912.

A location and discovery on land withdrawn *quoad hoc* from the public domain by a valid and subsisting mining claim is absolutely void for the purpose of founding a contradictory right; nor does it become valid by reason of the subsequent failure of the right existing when it was filed.

17 Idaho, 321, affirmed.

THE facts, which involve the construction of the mining law of the United States, are stated in the opinion.

Mr. John M. Zane for plaintiff in error.

Mr. Frank Reeves for defendants in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

The defendant in error Kettler applied for a patent for a mining claim. The plaintiff in error filed an adverse claim under Rev. Stat., § 2326, and then brought this complaint to establish his right of possession to the area in dispute. The facts are these: In 1881 the defendant's claim, then called Emma No. 2, was located, running north and south. In 1889 the plaintiff's claim, Independence No. 2, was located, running east and west, its westerly end overlapping the southerly end of Emma No. 2, and the discovery being within the overlapping part. Kettler, who then had Emma No. 2, failed, because of the illness of her daughter, to do the assessment work upon it for 1903, and, supposing that to be the only way to hold the ground, relocated it on January 1, 1904, as Malta No. 1, since which time she has done the required annual work. The only question is whether, on the failure of the defendant, as stated, for 1903, the plaintiff's location attached, or whether it was wholly void. The state courts gave judgment for the defendant, 17 Idaho, 321, and the plaintiff brought the case to this court.

The argument for the plaintiff is a vain attempt to reopen what has been established by the decisions. A location and discovery on land withdrawn *quoad hoc* from the public domain by a valid and subsisting mining claim is absolutely void for the purpose of founding a contradictory right. *Belk* v. *Meagher*, 104 U. S. 279. *Gwillim* v. *Donnellan*, 115 U. S. 45. This doctrine was not qualified in its proper meaning by *Del Monte Mining & Milling Co.* v. *Last Chance Mining & Milling Co.*, 171 U. S. 55, for that case attributed effect to the overlapping location only for the purpose of securing extralateral rights on the dip of a vein the apex of which was within the second and outside of the first; rights consistent with all those acquired by the first location. See *Creede & Cripple Creek Mining &*

Milling Co. v. *Uinta Tunnel Mining & Transportation Co.*, 196 U. S. 337, 342. The principle of *Belk* v. *Meagher* was reaffirmed, 171 U. S. 78, 79, as it was again in *Clipper Mining Co.* v. *Eli Mining and Land Co.*, 194 U. S. 220, 226, 227, and in *Brown* v. *Gurney*, 201 U. S. 184, 193. It is true that there is reasoning to the contrary in *Lavagnino* v. *Uhlig*, 198 U. S. 443, but in *Farrell* v. *Lockhart*, 210 U. S. 142, 146, 147, that language was qualified and the older precedents recognized as in full force. We deem it unnecessary to consider the distinctions attempted by the plaintiff between location and relocation, voidable and void claims, etc., as the very foundation of his right, the offer and permission of the United States under Rev. Stat., § 2322, was wanting when he did the acts intended to erect it. His entry was a trespass, his claim was void, and the defendant's forfeiture did him no good.

There was some attempt before us to recede from the concession made below that the defendant had a right to relocate under Rev. Stat., § 2324. We do not see how it could help the plaintiff if the proposition were incorrect, or any sufficient reason for listening to the argument in this case.

Judgment affirmed.

MATTER OF THE PETITION OF LOVING, TRUSTEE.

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

No. 216. Submitted March 15, 1912.—Decided April 1, 1912.

Controversies arising in bankruptcy proceedings, as distinguished from bankruptcy proceedings, are appealable to the Circuit Court of Appeals under the Court of Appeals Act of March 3, 1891.

A claim asserted against a bankrupt's estate not only for the amount thereof but for a lien therefor on the assets of the estate is a bankruptcy proceeding, and not a controversy arising from the bankruptcy proceeding, and an appeal by the trustee from the order allowing the claim and lien is under § 25a to the Circuit Court of Appeals.

One who is entitled under § 25a to an appeal to the Circuit Court of Appeals, is not also entitled to a review in the Circuit Court of Appeals by petition under § 24b.

Under § 24b, questions of law only are taken to the Circuit Court of Appeals, while under § 25 controversies of fact as well as of law are taken to that court, with findings of fact to be made therein if the case is to be taken to this court. *In re Mueller*, 135 Fed. Rep. 711, approved.

THE facts, which involve the construction of § 24a and b of the Bankruptcy Act of 1898, are stated in the opinion.

Mr. James Denis Mocquot for Loving.

Mr. W. F. Bradshaw, Jr., for American-German National Bank.

MR. JUSTICE DAY delivered the opinion of the court.

This case is here upon certificate from the Circuit Court of Appeals for the Sixth Circuit.

From the statement in the certificate preceding the question asked of this court, it appears that Loving, Trustee in bankruptcy of the Starks-Ullman Company, filed a petition in the Circuit Court of Appeals to revise in matter of law an order of the District Court adjudging that the American-German National Bank of Paducah, Kentucky, had a lien under the statutes of Kentucky upon the property and effects of the bankrupt, in the sum of $10,125 and interest. The facts are stated as follows:

"On December 4, 1908, after the Saddlery Company had been adjudged a bankrupt, and the cause had been referred to the referee in bankruptcy, the bank filed before the referee its proof of claim, verified by its cashier, in which it alleged that the bankrupt was indebted to it in the sum of $11,125, evidenced by two notes, one for $2,000 dated April 20, 1908, and due four months after date, and the other for $8,000 dated July 25, 1908, and due two months after date, each of which provided for a reasonable attorney's fee, and executed by the bankrupt for unmanufactured leather sold to it for use in carrying on its manufacturing business. After setting forth the nature of this indebtedness, the proof of claim concluded as follows: 'Deponent says that . . . by and under the provision of Sections 2487–2490 of the Kentucky statutes, the claimant has a lien upon all the property and effects of the bankrupt involved in its business, and upon all the accessories connected therewith used in its business, to secure the payment of its said indebtedness; and deponent now asserts its claim and lien upon all such property and effects to secure the payment of its said debt, including interest upon the notes from maturity thereof, and an attorney's fee as provided in said notes of 10 per cent. for the collection thereof by legal process.'

"'Wherefore, the affiant prays that the claimant's debt be allowed as a lien claim against the assets of

this bankrupt estate, and for all other proper and equitable relief.'

"The trustee in bankruptcy thereupon filed exceptions to the allowance of this claim in so far as it was made for any sum in excess of $10,000 at the time of the adjudication of bankruptcy, for various reasons set out in the exceptions, and also further objected and excepted to the allowance of any part of the said claim as a lien in favor of the bank against the estate of the bankrupt, for various reasons set forth in the exceptions. These exceptions of the trustee concluded as follows:

"'Wherefore, he prays that said claim be disallowed as a lien against the property of the aforesaid bankrupt, and that it be allowed as a general claim only for the sum of two thousand ($2,000) dollars, with interest from August 20, 1908; and for eight thousand ($8,000) dollars, with interest from September 25, 1908.'"

The referee, having heard the case upon an agreed statement of facts, ordered that the exceptions of the trustee be overruled, and the claim of the bank was established and allowed as a lien against the estate of the bankrupt. The trustee in bankruptcy thereupon filed his petition for review of the order of the referee in the District Court. The District Court affirmed the order of the referee and adjudged the claim to be in the amount found, with a lien for the security thereof, as reported by the referee. More than ten days thereafter, on June 30, 1909, the trustee in bankruptcy filed his petition for the revision of the order of the District Court in the Circuit Court of Appeals, his petition reciting:

"That said order was erroneous in matter of law in that it adjudged a dismissal of your petitioner's petition, and in that it adjudged that the American-German National Bank of Paducah, had any lien upon any of the property or effects of the aforesaid bankrupt by virtue of the statutes of the state of Kentucky in such

cases made and provided, or by virtue of any law or contract.

"Wherefore your petitioner, feeling aggrieved, because of such order, asks that the same may be revised in matter of law by this Honorable Court of Appeals of the United States for the Sixth Circuit, as provided in Section 24b of the bankruptcy law of 1898, and the rules and practice in such cases provided."

In this certificate it is said:

"In the brief filed in this court in behalf of the trustee in support of the petition, no question is made as to the allowance of the claim of the bank as a general claim against the bank(*rupt*), or as to its amount, the sole contention of the trustee on the merits being that the District Court was in error in matter of law in adjudging that under the Kentucky statutes the claim was secured by a lien upon the property and effects of the bankrupt."

The Circuit Court of Appeals propounds the question whether it has jurisdiction to revise the order of the District Court upon the petition for revision filed under § 24b of the Bankruptcy Act.

The Bankruptcy Act of 1898, § 24, gives appellate jurisdiction to the Circuit Court of Appeals and to this court of controversies arising in bankruptcy proceedings, and in paragraph b provides:

"The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

Section 25 provides for appeals and writs of error in bankruptcy proceedings to the Circuit Court of Appeals and to this court. These sections of the Bankruptcy Act were under consideration in this court in the case of *Coder* v. *Arts*, 213 U. S. 223, and it was there held that

controversies arising in bankruptcy proceedings, as distinguished from bankruptcy proceedings, were appealable to the Circuit Court of Appeals under the Court of Appeals Act of March 3, 1891 (26 Stat. 826, c. 517); that where a claim alleged to be secured by a lien upon the bankrupt's estate, was filed against a bankrupt for allowance, an appeal was given under § 25a to the Circuit Court of Appeals, as from a judgment allowing or rejecting a claim of $500 or over, and that from any final decision of the Circuit Court of Appeals allowing or rejecting a claim coming within § 25b a further appeal was given to this court. Under the decision of this court in that case there can be no doubt that the bank in this case instituted a proceeding in bankruptcy, which was appealable under § 25a to the Circuit Court of Appeals. The fact that after the adjudication of the claim the trustee made no objection to its allowance as a valid claim, but intended only to contest its validity as a lien upon the bankrupt's estate, made no difference as to the appellate character of the controversy. A bankruptcy proceeding was instituted as to the claim and its alleged lien, as distinguished from a controversy arising in a bankruptcy proceeding, and the appeal was under § 25a to the Circuit Court of Appeals. *Coder* v. *Arts*, *supra*.

The question now propounded is: Was the trustee also entitled to a review in the Circuit Court of Appeals under § 24b by petition for review? Under that section authority, either interlocutory or final, is given to the Circuit Court of Appeals to superintend and revise in matters of law the proceedings of the inferior courts of bankruptcy within their jurisdiction. We think this subdivision was not intended to give an additional remedy to those whose rights could be protected by an appeal under § 25 of the act. That section provides a short method by which rejected claims can be promptly reviewed by appeal in the Circuit Court of Appeals, and, in certain cases, in

this court. The proceeding under § 24b, permitting a review of questions of law arising in bankruptcy proceedings, was not intended as a substitute for the right of appeal under § 25. *Coder* v. *Arts, supra,* p. 233. Under § 24b a question of law only is taken to the Circuit Court of Appeals; under the appeal section controversies of fact as well are taken to that court, with findings of fact to be made therein if the case is appealable to this court. We do not think it was intended to give to persons who could avail themselves of the remedy by appeal under § 25 a review by petition under § 24b. The object of § 24b is rather to give a review as to matters of law, where facts are not in controversy, of orders of courts of bankruptcy in the ordinary administration of the bankrupt's estate.

In our judgment the rule was well stated in *In re Mueller,* 135 Fed. Rep. 711, by Mr. Justice Lurton, then Circuit Judge (p. 715):

"The 'proceedings' reviewable [under section 24b] are those administrative orders and decrees in the ordinary course of a bankruptcy between the filing of the petition and the final settlement of the estate, which are not made specially appealable under § 25a. This would include questions between the bankrupt and his creditors of an administrative character, and exclude such matters as are appealable under § 24a."

We answer the question certified in the negative.

BROWN v. SELFRIDGE.

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

No. 214. Argued March 14, 1912.—Decided April 1, 1912.

While in an action for malicious prosecution the burden of proving malice and want of probable cause is on the plaintiff, *Wheeler* v. *Nesbit*, 24 How. 544, as the motives and circumstances are best known to the defendant, plaintiff is only required to adduce such proof as is affirmatively under his control, and which he can fairly be expected to be able to produce.

In this case *held* that plaintiff did not produce all the testimony within her control and did not sustain the burden even to that extent.

In a suit for malicious prosecution, in the absence of plaintiff adducing facts properly expected to be under her control, the question of probable cause in a clear case is one for the court and, in this case, was properly taken from the jury.

34 App. D. C. 242, affirmed.

THE facts are stated in the opinion.

Mr. Wilton J. Lambert for plaintiff in error.

Mr. Henry E. Davis, with whom *Mr. William A. Gordon* and *Mr. J. Holdsworth Gordon* were on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

The plaintiff in error brought suit in the Supreme Court of the District of Columbia against the defendant to recover damages for malicious prosecution. Judgment was entered in favor of the defendant and upon appeal to the Court of Appeals of the District of Columbia this judg-

ment was affirmed. 34 App. D. C. 242. The case was then brought to this court upon proceedings in error.

The facts as to the prosecution are, in substance: That the plaintiff, being the keeper of a boarding house in the city of Washington on or about the twenty-sixth day of December, 1907, and occupying certain premises known as 717 Eighth Street northwest, and one Mary Levy were named as defendants in a proceeding commenced by Selfridge in the police court of the District of Columbia, in which he swore out a search warrant for certain of his property, namely, twelve curtains, of the value of $300, which, he averred, had, within two hundred days last past, by some person or persons unknown, been stolen, taken and carried away out of his possession, and which, he had probable cause to suspect and did suspect, were concealed in the premises of plaintiff and Mary Levy on Eighth Street; that under authority of the search warrant certain officers, accompanied by the defendant, proceeded to search the premises, but did not find the goods in question, and that, upon return of that fact being made, the proceedings against the plaintiff and Mrs. Levy were nolled and the case thus ended.

At the trial of the case in the Supreme Court the plaintiff introduced testimony as to the prosecution and the circumstances under which the search was made, and also testimony tending to show her good reputation for honesty and integrity, and the injury to her health and occupation. At the conclusion of the plaintiff's proof the court instructed the jury to return a verdict for the defendant, upon the ground that the plaintiff had failed to make a *prima facie* showing of want of probable cause, and judgment was entered accordingly.

The question involved, therefore, is: Was there sufficient proof of the want of probable cause to carry the case to the jury?

The testimony shows that when the defendant and

officers executing the search warrant visited the house of Miss Brown, the plaintiff, search was made of the premises and also of the trunks of the plantiff and of Mrs. Levy, who, it seems, was at the time stopping with Miss Brown. As we have said, the officers found nothing.

The charge upon which the search warrant was issued did not accuse either Miss Brown or Mrs. Levy of stealing or wrongfully taking the property from the defendant, but stated that such property was thus appropriated by some person unknown, within two hundred days before the warrant was sworn out, and the belief of the defendant was alleged that the property was concealed within the premises of the persons named.

There was testimony in the record tending to show that Miss Brown had not taken the property mentioned or other property from the house of the defendant; that she was in his employ for a number of years and was trusted with monetary transactions and otherwise treated as worthy of his confidence. The plaintiff testified in her own behalf, and Mrs. Levy was called as a witness in support of her case.

The plaintiff did not show that with her knowledge or consent the alleged stolen property was not in her house or upon the premises within the time named in the search warrant. Mrs. Levy, evidently not an unwilling witness, did not testify that she had never taken the goods, or that, so far as she knew, they were never upon the premises of the plaintiff.

It is settled law that in an action of this kind the burden of proving malice and the want of probable cause is upon the plaintiff. This has been the recognized law of this court and was distinctly stated in the case of *Wheeler* v. *Nesbitt*, 24 How. 544, often cited in cases of this character, where Mr. Justice Clifford, speaking for the court, said (p. 551):

"The plaintiff must show that the defendant acted from

malicious motives in prosecuting him, and that he had no sufficient reason to believe him to be guilty. If either of these be wanting, the action must fail; and so are all the authorities from a very early period to the present time. *Golding* v. *Crowle*, Sayer, 1; *Farmer* v. *Darling*, 4 Burr. 1,974; 1 Hillard on T. 460.

"It is true, as before remarked, that want of probable cause is evidence of malice for the consideration of the jury; but the converse of the proposition cannot be sustained. Nothing will meet the exigencies of the case, so far as respects the allegation that probable cause was wanting, except proof of the fact; and the *onus probandi*, as was well remarked in the case last referred to, is upon the plaintiff to prove affirmatively, by circumstances or otherwise, as he may be able, that the defendant had no reasonable ground for commencing the prosecution. *Purcell* v. *McNamara*, 9 East, 361; *Willans* v. *Taylor*, 6 Bing. 184; *Johnstone* v. *Sutton*, 1 Term, 544; Add. on W. and R. 435; *Turner* v. *Ambler*, 10 Q. B. 257."

While it is true that the want of probable cause is required to be shown by the plaintiff and the burden of proof is upon her in this respect, such proof must necessarily be of a negative character, and concerning facts which are principally within the knowledge of the defendant. The motives and circumstances which induced him to enter upon the prosecution are best known to himself. This being true, the plaintiff could hardly be expected to furnish full proof upon the matter. She is only required to adduce such testimony as, in the absence of proof by the defendant to the contrary, would afford grounds for presuming that the allegation in this respect is true. 1 Greenleaf on Evidence, § 78. In other words, the plaintiff was only obliged to adduce such proof, by circumstances or otherwise as are affirmatively within her control, and which she might fairly be expected to be able to produce. As Mr. Justice Clifford put it, in *Wheeler* v. *Nesbitt*, *supra*,

the plaintiff must prove this part of the case "affirmatively, by circumstances or otherwise as he may be able."

It is contended by the learned counsel for the plaintiff in error that Miss Brown produced all the testimony in the case which she might reasonably be expected to control, and it is pertinently asked, What more could she prove? We think an inspection of the record furnishes an answer to the question. With respect to the search warrant, the charge was not that the plaintiff and Mrs. Levy stole or wrongfully took the property of the defendant, but the belief of the defendant was averred that the property had been by some one thus taken and was concealed in or about the premises of the plaintiff and Mrs. Levy. The plaintiff could readily have shown that, within the time named in the search warrant, so far as she knew, with the means which she had of information, the property in question had never been upon her premises. She could have shown by Mrs. Levy, whom she produced as a witness, that Mrs. Levy did not take the property from the premises of the defendant and that the property was not upon the premises of Miss Brown at any time so far as her knowledge and opportunity of knowing extended.

Failing to adduce proof of the facts to which we have called attention, and, in clear cases the question of probable cause being one of law for the court, we think that there was no error in taking the case from the jury.

Judgment of the District Court of Appeals is affirmed.

INTERSTATE COMMERCE COMMISSION *v.* GOODRICH TRANSIT COMPANY.

INTERSTATE COMMERCE COMMISSION *v.* SAME.

UNITED STATES *v.* WHITE STAR LINE.

UNITED STATES *v.* SAME.

APPEALS FROM THE UNITED STATES COMMERCE COURT.

Nos. 879, 880, 881, 882. Argued February 20, 21, 1912.—Decided April 1, 1912.

Conclusions and argumentative deductions set forth in the bill as to effect of orders of a governmental body upon complainant are not to be regarded under the rules of pleading as allegations of fact and admitted. *United States* v. *Ames*, 99 U. S. 35.

Carriers partly by railroad and partly by water under a common arrangement for a continuous carriage are as specifically within the term of the Interstate Commerce Act of June 29, 1906, 34 Stat. 584, c. 3591, as any other carrier named therein.

Such carriers are subject to the provisions of the act authorizing the Commission to require a system of accounting.

Such carriers, while engaged in carrying on traffic under joint rates with railroads filed with the Interstate Commerce Commission, are bound to deal upon like terms with all shippers availing of the rates and are generally subject to the Interstate Commerce Act.

Section 20 of the Interstate Commerce Act gives the Commission ample authority to require accounts to be kept by carriers in the manner prescribed by the Commission.

A statute requiring a carrier doing both interstate and intrastate business to render accounts of all of its business is not beyond the power of Congress as a regulation of intrastate commerce.

Carriers partly by land and partly by water may be required to keep accounts of all their traffic, both interstate and intrastate, under the provisions of § 20 of the act of June 29, 1906.

Congress may not delegate its purely legislative power; but having laid down general rules of action under which a commission may pro-

ceed, it may require that commission to apply such rules to particular situations.

The provisions of § 20 of the act of June 29, 1906, authorizing the Interstate Commerce Commission to require accounts to be kept in a specified manner by interstate carriers, are not an unconstitutional delegation of legislative power.

Under § 20 of the act of June 29, 1906, the Interstate Commerce Commission is to be fully informed of all business conducted by a carrier of interstate traffic; and this includes all operations of such carriers, whether strictly transportation or not; in this case *held* to include amusement parks operated by a carrier of interstate commerce partly by land and partly by water.

190 Fed. Rep. 943, reversed.

THE facts, which involve the constitutionality and construction of the provisions of the Interstate Commerce Act in regard to accounts to be kept by carriers partly by land and partly by water, are stated in the opinion.

Mr. Charles W. Needham for the Interstate Commerce Commission:

The provisions of § 20 have a real and substantial relation to the execution of the powers and the attainment of the purposes of the Act to Regulate Commerce; therefore Congress has power to require statistical reports from, and a uniform system of bookkeeping by, every common carrier subject to the act, and the Interstate Commerce Commission acted within its statutory power in requiring such reports from, and classification of accounts by, such carriers. *Gibbon* v. *Ogden*, 9 Wheat. 1, 196, 223; *Inter. Com. Comm.* v. *Balt. & O. R. R. Co.*, 145 U. S. 276; *Int. Com. Comm.* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 506; *Texas & Pac. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 438; *Adair* v. *United States*, 208 U. S. 178; *Inter. Com. Comm.* v. *Ill. Cent. R. R. Co.*, 215 U. S. 452, 474; *Balt. & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 31; *Balt. & Ohio R. R. Co.* v. *Int. Com. Comm.*, 221 U. S. 612, 618; *Southern Railway Co.* v. *United States*, 222 U. S. 20,

24; *N. Y., N. H. & H. Railroad Co.* v. *I. C. C.*, 200 U. S. 361, 391.

The primary objects of the Act to Regulate Commerce are to destroy favoritism, to prevent rebating and undue advantages of every kind which give to one shipper over the public highways an undue advantage over contemporaneous shippers, and when these unlawful acts by an interstate commerce agent are discovered by an examination of carriers' accounts, it becomes apparent that there is a real or substantial relation or connection between what is required by these orders in respect to accounts and the object which the Act to Regulate Commerce obviously is designed to attain. Reports would be valueless for the purposes of comparison with former reports by the same carrier unless the classification was uniform.

Common carriers by water, who have voluntarily filed with the Interstate Commerce Commission joint tariffs under which they operate jointly with railroads in transporting interstate passengers and property over through routes partly by railroad and partly by water, are agents of interstate commerce and as such may be lawfully required to classify their accounts and make statistical reports of their entire business as common carriers.

The relation of a carrier to a particular traffic, or to instrumentalities which are under the regulating power of Congress, determines whether such a carrier is subject to the act. *Re Oyster Police Steamers*, 31 Fed. Rep. 763; *The City of Salem*, 37 Fed. Rep. 846; *Daniel Ball*, 10 Wall. 557; *So. Pac. Terminal Co.* v. *Inter. Com. Comm.*, 219 U. S. 498.

These cases recognize the power of Congress to legislate in reference to the agents of interstate commerce who are carrying on a transportation business which is subject to the act. It is not the terminology of the statute or the manner in which its agents are brought under the regulating power of Congress, but it is the fact that they are

carrying on transportation which is subject to the regulating power of Congress and which is to be protected from favoritism by the Commission, that renders them subject to all the general provisions of the act applicable to agents.

The orders of the Interstate Commerce Commission are not arbitrary, but tend to advance the general purposes of the act, and the orders conform to the requirements of § 20. See address of Prof. Henry C. Adams, 5th Ann. Conv. Ry. Com'rs, 44.

Congress in adopting these regulations, and the Commission in carrying them out, have exercised that legislative discretion which belongs to that branch of the Government; they have determined what means will best enable the legislative branch of the Government to perform the duty assigned to it of regulating and protecting interstate commerce. *McCulloch* v. *Maryland*, 4 Wheat. 316, 421; *Lottery Case*, 188 U. S. 321, 353.

There is no merit in the claim of appellees that Congress has granted to the Commission legislative powers in violation of the fundamental law. *Buttfield* v. *Stranahan*, 192 U. S. 497; *Union Bridge Co.* v. *United States*, 204 U. S. 377; *Monongahela Bridge* v. *United States*, 216 U. S. 177; *United States* v. *Grimaud*, 220 U. S. 506.

As to appellees' contention that its constitutional rights are invaded by the publicity given its business, see *Corporation Tax Law Case*, 220 U. S. 107; *Baltimore & Ohio R. R. Co.* v. *Int. Com. Comm.*, *supra*.

The Commerce Court erred in holding that a recast of the forms of reports should be made by the Commission, acting in conformity with the views expressed by that court, thereby requiring that the reports and classification of accounts should only include business partly by railroad and partly by water.

Mr. James A. Fowler, Assistant to the Attorney General,

with whom *Mr. Blackburn Esterline*, Special Assistant to the Attorney General, was on the brief, for the United States:

Information relating to the entire business of a common carrier subject to the provisions of the Act to Regulate Commerce, whether interstate or intrastate, is essential to the proper enforcement of the law and Congress has the power to require its production at the instance of the Interstate Commerce Commission. *McCulloch* v. *Maryland*, 4 Wheat. 316, 421, 423; *St. Louis & San Francisco Railway Co.* v. *Gill*, 156 U. S. 649; *Minneapolis & St. Louis Railroad Company* v. *Minnesota*, 186 U. S. 257; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 465, 470, 472; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 43, 44; *Baltimore & Ohio Railroad Company* v. *Interstate Commerce Commission*, 221 U. S. 612, 622; *Flint* v. *Stone Tracy Company*, 220 U. S. 107; *Employers' Liability Cases*, 207 U. S. 463, 497.

When common carriers, either by railroad or by water, engage in commerce among the several States, however slight the extent, knowledge and information concerning their entire business are essential to the enforcement of the law, and Congress has the power to establish rules and regulations requiring them to keep books and to file reports covering their entire business, interstate and intrastate, in the manner and form prescribed by the Interstate Commerce Commission. In the keeping of books and the making of reports showing receipts and expenditures, it is impracticable to separate business which is intrastate from that which is interstate and requiring such knowledge and information concerning such intrastate business is not regulation thereof. *The Daniel Ball*, 10 Wall. 557; *Smith* v. *Alabama*, 124 U. S. 465, 479, 480; *United States* v. *Northern Securities Co.*, 193 U. S. 197, 335; *Interstate Commerce Commission* v. *Illinois Central Railroad Company*, 215 U. S. 452, 474; *Baltimore & Ohio*

Railroad Company v. *Interstate Commerce Commission*, 221 U. S. 612, 618; *Southern Railway Company* v. *United States*, 222 U. S. 20, 26.

By § 20 of the Act to Regulate Commerce, the Interstate Commerce Commission is authorized and empowered to prescribe the method of bookkeeping for and to prescribe the forms of reports and to compel the filing thereof by water line carriers subject to the provisions of the act, as to business other than that carried by them under arrangements with railroad companies for a continuous carriage or shipment. The method of bookkeeping and the forms prescribed by the Interstate Commerce Commission under § 20, which embrace all business, interstate and intrastate, and of whatsoever kind or nature, are in accordance with the intention of Congress as expressed in its legislation on the subject.

Section 20 is not unconstitutional on the ground that it authorizes unreasonable searches and seizures. *Hale* v. *Henkel*, 201 U. S. 43, 77; *Interstate Commerce Commission* v. *Baird, supra; Baltimore & Ohio Railroad Company* v. *Interstate Commerce Commission, supra; Flint* v. *Stone Tracy Company, supra.*

Section 20 is not unconstitutional on the ground that it vests legislative power in the Interstate Commerce Commission.

Mr. Ralph M. Shaw, with whom *Mr. John Barton Payne*, *Mr. Silas H. Strawn* and *Mr. Garrard B. Winston* were on the brief, for appellees:

The Act to Regulate Commerce does not provide that a water carrier, by filing a joint rate with respect to certain traffic with a rail carrier, subjects itself, or all of its business, to all of the provisions of the act.

Congress did not intend to include the water carriers within the terms of the act.

If the appellees are wrong as to this (and it is insisted

they are not), only certain specifically designated traffic of the water carriers is subject to the act.

This appears from: The history of the passage of the act of 1887, including the congressional debates thereon; contemporaneous construction by the courts; contemporaneous interpretation by the Commission itself; the congressional debates prior to the passage of the act of 1906; the act of 1910, which prohibits the interpretation urged by the Commission; the internal evidence of the act; a comparison of certain provisions of the act with specific legislation *in re* water carriers; and the rules laid down by the courts for the interpretation of the Act to Regulate Commerce, all of which preclude the interpretation placed upon it by the Commission in this case.

One engaged in intrastate business, who also engages in interstate business, does not, thereby, subject all his intrastate business to the regulating power of Congress. *Employers' Liability Cases*, 207 U. S. 502; *B. & O. R. R. Co.* v. *I. C. C.*, 221 U. S. 612, 618; *Cin., N. O. & Tex. Pac. Ry.* v. *Int. Com. Comm.*, 162 U. S. 184. *The Daniel Ball*, 10 Wall. 557, explained and distinguished.

An act of Congress, or the order of an officer of the Federal Government, or a subordinate body, created by an act of Congress, or a decree of a Federal court which under the guise or the pretense of regulating interstate commerce, is so broad in its scope as to in fact regulate or interfere with intrastate commerce, is void.

Under such circumstances, especially when the act is penal, the court will not introduce words of limitation and thus by judicial interpretation attempt to make good that which in its essence is void. *Illinois Central* v. *McKendree*, 203 U. S. 514, 529; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 247; *Employers' Liability Cases*, 207 U. S. 492, 498, 502; *United States* v. *Reese*, 92 U. S. 214, 221; *Trade-Mark Cases*, 100 U. S. 82, 99; *United States* v. *Ju Toy*, 198 U. S. 253, 262.

Section 20 of the Act to Regulate Commerce is void because it is an unlawful delegation of legislative power. The law gives the Commission discretion to determine whether it will legislate or not; the law also confers discretionary power upon the Commission to determine what (if any) the legislation shall be. *Field* v. *Clark*, 143 U. S. 645, 693; *Wayman* v. *Southard*, 10 Wheat. 1, 43; *Harriman* v. *Int. Com. Comm.*, 211 U. S. 407, 418; *O'Neil* v. *Am. Fire Ins. Co.*, 30 Atl. Rep. 943; *Anderson* v. *Manchester Fire Ins. Co.*, 63 N. W. Rep. 241; *Dowling* v. *Lancashire Ins. Co.*, 65 N. W. Rep. 758; *King* v. *Concordia Fire Ins. Co.*, 103 N. W. Rep. 616.

On this point the cases at bar are not, for several reasons, controlled by either *United States* v. *Grimaud*, 220 U. S. 506, or *St. Louis & Iron Mountain R. R. Co.* v. *Taylor*, 210 U. S. 281.

A conspicuous reason is that in the cases at bar Congress did not determine or legislate that there should or ought to be any rules or regulations respecting bookkeeping methods or any uniformity therein. On the contrary, Congress left it to the Commission in their discretion to determine: Whether there should be any legislation on the subject at all; and if so, to enact such legislation. It was thus a complete divestiture or delegation of legislative power.

Whether or not a power claimed but not granted is a necessary incident to the power granted is (where the facts are not conceded) to be determined by the court.

If under the pretense of exercising a power granted Congress or a subordinate body goes beyond that which is necessary, then such action on the part of Congress or its subordinate body is void. *Int. Com. Comm.* v. *Ill. Cent.*, 215 U. S. 452; *Adair* v. *United States*, 208 U. S. 161; *C., R. I. & P. Ry. Co.* v. *Arkansas*, 219 U. S. 453; *Employers' Liability Cases*, 207 U. S. 463; *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186; *Int. Com. Comm.* v. *Union Pacific Co.*, 222 U. S. 541.

Under our dual form of government the Federal Government is supreme in the field of interstate commerce and the state governments are supreme in the field of intrastate commerce. *McCulloch* v. *Maryland*, 4 Wheat. 472; *Worcester* v. *Georgia*, 6 Pet. 515; *Ableman* v. *Booth*, 21 How. 506; *License Tax Cases*, 5 Wall. 462; *Employers' Liability Cases*, 207 U. S. 463, 498; *Pennsylvania* v. *Knight*, 192 U. S. 28; *B. & O. R. R. Co.* v. *I. C. C.*, 221 U. S. 612, 617, 621.

Section 20 of the Act to Regulate Commerce and the orders of the Commission both *in re* "Special Accounting Methods," and *in re* "Special Reports Series Circular No. 10," are void. They are not a regulation of the rates on which interstate commerce moves; they are not a regulation of the road bed over which interstate commerce moves; they are not a regulation of the vehicles in which interstate commerce is carried; they are not a regulation of the employés engaged in handling interstate commerce; they are not a regulation of interstate commerce itself. On the contrary they are an interference with the internal affairs of the appellees; they prohibit the appellees from keeping for their corporate purposes such books as in their own judgment the corporate necessities may require; they prohibit a common carrier engaged as to any part of its business in interstate commerce from keeping any books or memoranda not prescribed by the Commission with respect to any business which is not under the Act to Regulate Interstate Commerce.

In the cases at bar there are no troublesome questions involving the necessity of regulating intrastate commerce in order to regulate interstate commerce. While the appellees deny that Congress intended to subject any of the water carriers to any regulation, nevertheless (assuming for the purposes of this point that they are wrong in this contention), each of the four bills of complaint states in apt language that it is not necessary for the Commission to establish the assailed accounting methods or to make

the assailed inquiries respecting the intrastate business, and the internal affairs of the appellees in order to properly regulate or investigate their interstate business. Each of the bills states in apt language that there is no necessary or legitimate or reasonable relation between many of the rules and regulations and many of the inquiries made affecting and respecting interstate business, and the appropriate regulation or investigation of the interstate business. These facts are admitted by the demurrers.

Congress has no power to make a general inquisitorial excursion or examination into the internal affairs of a corporation organized under the laws of one of the States. Angell & Ames, § 687; *Guthrie* v. *Harkness*, 199 U. S. 148; *Sinking Fund Case*, 99 U. S. 720; *Northern Securities Co.* v. *United States*, 193 U. S. 348; *Hale* v. *Henkel*, 201 U. S. 75; *In re Pacific Railway Investigation*, 32 Fed. Rep. 241; *Interstate Com. Comm.* v. *Brimson*, 154 U. S. 447; *Wilson* v. *United States*, 221 U. S. 361, 384.

Congress may not inquire into the internal affairs of a state corporation except for certain specific purposes. *Kilbourne* v. *Thompson*, 103 U. S. 168; *In re Chapman*, 166 U. S. 661; *Interstate Com. Comm.* v. *Brimson*, 154 U. S. 478; *Harriman* v. *Inter. Com. Comm.*, 211 U. S. 407, 417; *Wilson* v. *United States*, 221 U. S. 361, 384.

Mr. Justice Day delivered the opinion of the court.

The appellees in these four cases are corporations organized under state laws and engaged in the carriage of passengers and freight by water upon the Great Lakes. They filed bills in the United States Circuit Court for the Northern District of Illinois to enjoin the enforcement of certain orders of the Interstate Commerce Commission. The cases were afterwards transferred to the United States Commerce Court.

The orders of the Commission complained of comprise: First, an order prescribing the method of accounts and

bookkeeping as to the operating expenses of the carriers and a similar order as to bookkeeping concerning the operating revenues of the carriers; and, second, an order requiring a report of the carriers respecting their corporate organization, financial condition, etc.

The Government of the United States intervened and filed an answer in each case, but the cases were practically heard on demurrer, as the record discloses, and therefore the allegations of the bills well pleaded must be deemed to be true. The bills contain many conclusions, and argumentative deductions as to the effect of the orders upon the carriers, which, under the rules of pleading, are not considered as admitted. *United States* v. *Ames*, 99 U. S. 35, 45.

The pertinent averments necessary to a decision of the cases, as we view them, show that the carriers are corporations organized under the laws of certain States of the Union; that they carry passengers and freight upon the Great Lakes between ports in different States, which they designate as their port-to-port interstate business; that they carry passengers and freight wholly within a State, which they designate as their port-to-port intrastate business; and that they also carry passengers and property in interstate commerce under joint tariffs in connection with certain railroad carriers of the United States with whom they have agreed upon joint through rates, which they designate as their joint rail and water business. As to the Goodrich Transit Company, it is averred that eighty per cent of its gross revenue is derived from its port-to-port interstate and intrastate business, and less than twenty per cent of its gross earnings is derived from its joint rail and water business. A like averment is made with respect to the White Star Line, except that it is said that in its business the revenue derived from joint rail and water traffic, as aforesaid, is less than one per cent of its entire revenue.

It is averred that the bookkeeping and accounting methods required by the orders of the Commission differ from those prescribed and now kept by the companies; that the orders of the Commission make no difference between the intrastate port-to-port business and the interstate port-to-port business and the joint rail and water business; and that the orders entered by the Commission prohibit the companies from keeping any accounts, records or memoranda other than those prescribed by the Commission in such orders.

In the White Star Line cases the bills contain an additional averment that that company operates two amusement parks, one at Tashmoo and one at Sugar Island, both in the State of Michigan, and in connection therewith owns, operates and derives revenue from lunch stands, merry-go-rounds, bowling alleys, bath houses, etc., and collects admission fees from people entering the parks. It complains that its business concerning said parks is included within the accounting methods prescribed by the Commission.

As to the report called for by the order of the Commission, it is averred that such report was not required because of any complaint filed against the corporations for the violation of the Act to Regulate Commerce; that there is no statute requiring the report to be kept secret, and, if it is made public, the affairs of the companies will be thrown open to inspection to their injury; that a large number of the inquiries contained in the order of the Commission relate to details of the companies' business solely intrastate, or that which is from port to port; and that the report is not limited to the joint rail and water business of complainants.

There are also averments that the orders were unconstitutional, because the Commission, in undertaking to put in force such requirements, exceeded its authority in so far as the power was asserted to examine into the af-

fairs of the companies not relating to their joint rail and water business, and having reference, as it was alleged, to their domestic business or interstate business not within the terms of the act.

The Commerce Court enjoined the execution of the orders (190 Fed. Rep. 943), declaring that (p. 966):

"It [the Commission] acted within its authority when it made an order calling for reports of all business done by the petitioners under through bills of lading where the transportation was partly by railroad from one State to another, or from one place in the United States to Canada, an adjacent foreign country; and it was within its power when it prescribed the system of accounts and the uniform method of keeping accounts for such interstate business, and so far as the orders call for information confined to such traffic, or directly related thereto, and so far as the orders prescribe uniform systems of bookkeeping and accounting for such traffic and such as is directly related thereto, they must be sustained. But, in so far as the reports called for and the accounting rules prescribed extend beyond such interstate business of the carriers, or include matters of intrastate traffic accounts and affairs and concerns exclusively, they become invasions of the rights of the carriers, and to the extent of such invasions are unlawful."

The court held that the orders concerning the report and auditing would be lawful respecting the interstate business done by the carriers in connection with railroads, as provided by the act, but, in requiring a report concerning the other business of the companies and prescribing bookkeeping methods therefor, the Commission exceeded its authority, and the court granted the prayers of the petitioners for the orders of injunction, ordered a recast of the form of report in conformity with its opinion and remanded the cases to the Commission for that purpose.

Whether this order of the Commerce Court was correct

or not primarily depends upon the construction of the Interstate Commerce Act and the extent to which, in the respect involved in these cases, the carriers herein interested are within the terms of the law. The terms of the act of Congress, as amended June 29, 1906, 34 Stat. 584, c. 3591, and in force at the time when these orders were made, are plain and simple, and, we think, not difficult to comprehend. They are: "The provisions of this act [to regulate commerce] shall apply to . . . any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, etc." The proviso, at the end of the section, that its terms shall not apply to the transportation of passengers or property wholly within one State was inserted for the purpose of showing the congressional purpose not to undertake to regulate a commerce wholly domestic. The first section makes the act apply alike to common carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water under an arrangement for a continuous carriage or shipment. It is conceded that the carriers filing the bills in these cases were common carriers engaged in the transportation of passengers and property partly by railroad and partly by water under a joint arrangement for a continuous carriage or shipment. Such common carriers are declared to be subject to the provisions of the act in precisely the same terms as those which comprehend the other companies named in the act. Carriers partly by railroad and partly by water under a common arrangement for a continuous carriage or shipment are as specifically within the terms of the act as any other carrier named therein.

It may be that certain provisions of the act are in their nature applicable to some carriers and not to others; but we are only concerned to inquire in this case whether the carriers thus broadly brought within the terms of the act by § 1 thereof are subject to the provisions of the statute by the authority of which the Commission undertook to require the system of accounting and the report as to the organization and business of the corporations, and whether, if within the terms of the act, the orders are constitutionally made.

Certain it is that, when engaged in carrying on traffic under joint rates with railroads, filed with the Commission, the carriers are bound to deal upon like terms with all shippers who seek to avail themselves of such joint rates, and are subject to the general requirements of the act preventing and punishing the giving of rebates, the making of unjust discriminations, the showing of favoritism and other practices denounced in the various sections of the act. They are undoubtedly subject to the provisions of § 12 of the act, which permits the Commission to inquire into the management of the business of all common carriers subject to the act and to keep itself informed as to the manner and method in which the same is conducted, with the right to obtain from such common carriers the full and complete information necessary to enable the Commission to carry out the objects for which it was created. The joint rates established are subject to revision by the Commission under § 15 of the act. We must remember, also, in this connection, that under § 21 of the act the Commission is required to make a report each year to the Congress containing such information and data as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation as the Commission may see fit to make.

As to annual reports, the power conferred in § 20 of the

act extends to all common carriers subject to the provisions of the act. The Commission is vested with authority to prescribe the manner in which such reports shall be made and to require specific answers to all questions as to which the Commission may need information. The report required in these cases was declared to be needed to enable the Commission to procure full information of the scope and character of the business of carriers by water within the jurisdiction of the Commission and of the extent of their operations, such as would enable the Commission to determine the form for annual report which would best give the information required by the Commission, and at the same time conform as nearly as may be to the accounting systems of carriers by water.

The form of report adopted by the Commission requires a showing as to the corporate organization of each carrier by water subject to the act, the companies owned by it and the parties or companies controlling it; as to the financial condition of the carrier, the cost of its real property and equipment, its capital stock and other stock and securities owned by it, together with all special funds and current assets and liabilities, as well as its funded indebtedness, with collateral security covering same; and as to finances with respect to the operations of the carrier for the current year, giving the revenue of the company and its source, whether from transportation, and what kind, or from outside operations, and all expenses, detailed, with a statement as to the net income or deficit from the various sources, and the report contains a profit and loss account and a general balance sheet. The report further requires certain statistical information, as follows: The routes of the carrier and their mileage; a general description of the equipment owned, leased or chartered by the carrier; the amount of traffic, both passenger and freight, and mileage and revenue statistics, together with a separation of freight into the quantity of the various products transported,

showing also whether originating on the carrier's line or received from a connecting line; and a general description of any separate business carried on by the carrier. But such report is no broader than the annual report of such carriers, as prescribed by the act, for § 20 provides that:

"Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employés and the salaries paid each class; the accidents to passengers, employés, and other persons, and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require."

As to the accounts, the statute permits the Commission, in its discretion, for the purpose of enabling it the better to carry out the purposes of the act, to prescribe a period of time within which such common carriers shall have a uniform system of accounts and the manner in which such accounts shall be kept. The Commission may, the statute further provides, in its discretion, prescribe the forms of all accounts, records and memoranda to be kept by the common carriers, to which accounts the Commission shall have access. And the act makes it unlawful for the carriers to keep any accounts, records or memoranda other than those prescribed by the Commission.

We think this section contains ample authority for the Commission to require a system of accounting as provided in its orders and a report in the form shown to have been required by the order of the Commission. It is true that the accounts required to be kept are general in their nature and embrace business other than such as is necessary to the discharge of the duties required in carrying passengers and freight in interstate commerce by joint arrangement between the railroad and the water carrier, but the Commission is charged under the law with the supervision of such rates as to their reasonableness and with the general duty of making reports to Congress which might require a knowledge of the business of the carrier beyond that which is strictly of the character mentioned. If the Commission is to successfully perform its duties in respect to reasonable rates, undue discriminations and favoritism, it must be informed as to the business of the carriers by a system of accounting which will not permit the possible concealment of forbidden practices in accounts which it is not permitted to see and concerning which it can require no information. It is a mistake to suppose that the requiring of information concerning the business methods of such corporations, as shown in their accounts, is a regulation of business not within the jurisdiction of the Commission, as seems to be argued for the complainants. The object of requiring such accounts to be kept in a uniform way and to be open to the inspection of the Commission is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act that it may properly regulate such matters as are really within its jurisdiction. Further, the requiring of information concerning a business is not regulation of that business. The necessity of keeping such accounts has been developed in the reports of the Commission and has been the subject of great consideration. It caused the employ-

ment of those skilled in such matters, and has resulted in the adoption of a general form of accounting which will enable the Commission to examine into the affairs of the corporations, with a view to discharging its duties of regulation concerning them.

There is nothing in the case of *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, contrary to the conclusion herein announced. That case dealt with the authority of the Commission to compel the attendance and testimony of witnesses in cases where complaints had not been made. The extent to which the Commission might require systems of accounting and reports of corporations subject to the act was expressly left open in the opinion of the court. 211 U. S. pp. 421, 422.

The necessity of such accounts is emphasized under the English practice, and accounts and reports are required in great detail under the laws of that country.

In the report of the committee appointed by the Board of Trade under the Railway Regulation Acts to make inquiries with respect to the form and scope of the accounts and statistical returns rendered by railway companies the omission of the former law to make provision for any prescribed and uniform system of accounts is pointed out, and it is said:

"It is obviously of the first importance, from the point of view of comparison between the different railway companies, that there should be uniformity of practice among all the companies with regard to the keeping of accounts and statistics; that is to say, that every heading, both in the accounts and in the statistics, should bear precisely the same meaning in the case of all railways—should, in effect, be standardized."

The Railway Companies (Accounts and Returns) Act, December 16, 1911, 1 and 2 Geo. 5, c. 34,—to amend the laws with respect to accounts and returns of railway companies—contains requirements as to finan-

cial accounts and statistical returns which call for a uniform system of accounting, showing the organization and workings of the companies in great detail, together with statistical returns as to their business, subdivided so as to include all the operations of the companies as carriers and in all other enterprises in which they may engage.

The learned Commerce Court was of the opinion that the Commission might require accounts and reports, so far as the business of the water carriers with reference to joint rates by rail and water under a common arrangement was concerned, and remanded the cases to the Commission for revision of their orders upon that basis. But it is argued for the Commission, and it seems to us with great force, that it would be impracticable to make such separation in any system of accounting. It is a matter of general knowledge, of which we may take judicial notice, that traffic of all kinds is conducted upon the same ship and passage. A boat may leave a lake port carrying passengers and freight destined for ports within the State and for ports beyond the State, and as a part of the freight for carriage embrace some carried under the terms of joint arrangements made with connecting railroad carriers. How would it be practicable to separate the items of expense entailed in the carriage of these various classes? It is done upon one boat, with one set of officers and crew, and must, in the nature of things, be under one general bill of expense—at least it would seem impracticable to separate it into its items so as to show the expense of that which it is contended is alone within the terms of the act, as construed by the carriers.

We think the act should be given a practical construction, and one which will enable the Commission to perform the duties required of it by Congress, and, conceding for this purpose that the regulating power of the Commission is limited so far as rates are concerned to joint rates of the character named in § 1, it is still essential that to

enable the Commission to perform its required duties, even with respect to such rates, and to make reports to Congress of the business of carriers subject to the terms of the act, it should be informed as to the matters contained in the report. Congress, in § 20, has authorized the Commission to inquire as to the business which the the carrier does and to require the keeping of uniform accounts, in order that the Commission may know just how the business is carried on, with a view to regulating that which is confessedly within its power.

It is contended that this construction of the statute enables the Commission not only to regulate the interstate business, but as well the wholly intrastate business of the complaining corporations, and is, therefore, beyond the power of Congress. Such cases are cited and relied upon by complainants as the *Employers' Liability Cases*, 207 U. S. 463, and *Illinois Central R. R. Co.* v. *McKendree*, 203 U. S. 514. In those cases acts of Congress and orders of executive departments were held void because they undertook to regulate matters wholly intrastate, as distinguished from those matters of an interstate character and within the legislative power of Congress. And what we have already said as to the character of these orders is enough to indicate that in our opinion they are not regulations of intrastate commerce.

Furthermore, it is said that such construction of § 20 makes it an unlawful delegation of legislative power to the Commission. We cannot agree to this contention. The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress. This rule has been frequently stated and illustrated in recent cases in

this court, and needs no amplification here. *Buttfield* v. *Stranahan*, 192 U. S. 470; *Union Bridge Co.* v. *United States*, 204 U. S. 384; *United States* v. *Grimaud*, 220 U. S. 506.

In § 20 Congress has authorized the Commission to require annual reports. The act itself prescribes in detail what those reports shall contain. The Commission is permitted, in its discretion, to require a uniform system of accounting, and to prohibit other methods of accounting than those which the Commission may prescribe. In other words, Congress has laid down general rules for the guidance of the Commission, leaving to it merely the carrying out of details in the exercise of the power so conferred. This, we think, is not a delegation of legislative authority.

And it is argued that Congress has no visitorial power over state corporations. We need not reassert the ample power which the Constitution has been construed to confer upon Congress in the regulation of interstate commerce, declared in the many cases in this court, from *Gibbons* v. *Ogden*, 9 Wheaton, 1, to its most recent deliverances. In *Hale* v. *Henkel*, 201 U. S. 43, 75, while general visitorial power over state corporations was not asserted to be within the power of Congress, it was nevertheless declared as to interstate commerce that the General Government had, in the vindication of its own laws, the same power it would possess if the corporation had been created by act of Congress.

As to one of the corporations it is said that its business includes not only the carriage of passengers and freight, but that it owns and operates in connection therewith certain amusement parks. The report in controversy, as to business other than commerce, requires a general description of such outside operations, and also a statement of the income from and the expenses of the same. As we have said, if the Commission is to be informed of the

business of the corporation, so far as its bookkeeping and reports are concerned, it must have full knowledge and full disclosures thereof, in order that it may ascertain whether forbidden practices and discriminations are concealed, even unintentionally, in certain accounts and whether charges of expense are made against one part of a business which ought to be made against another.

Bookkeeping, it is said, is not interstate commerce. True, it is not. But bookkeeping may and ought to show how a business which, in part at least, is interstate commerce, is carried on, in order that the Commission, charged with the duty of making reasonable rates and prohibiting unfair and unreasonable ones, may know the nature and extent of the business of the corporation, the cost of its interstate transactions and otherwise to inform itself so as to enable it to properly regulate the matters which are within its authority.

We think the uniform system of accounting prescribed and the report called for are such as it is within the power of the Commission to require under § 20 of the act. Nor do the requirements exceed the constitutional authority of Congress to pass such a law. It therefore follows that the Commerce Court erred in granting the injunctions and in remanding the cases to the Commission with instructions to recast its orders.

Judgments reversed.

Dissenting, MR. JUSTICE LURTON and MR. JUSTICE LAMAR.

HASKELL *v.* KANSAS NATURAL GAS COMPANY.

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

No. 914. Submitted February 23, 1912.—Decided April 1, 1912.

Natural gas after severance from the soil being a commodity which may be dealt in like other products of the earth and a legitimate subject of interstate commerce, no State can prohibit its being transported in interstate commerce beyond the lines of the State, and the act of Oklahoma attempting so to do is an unconstitutional interference with interstate commerce as held in this case, 221 U. S. 229.

A State may by proper legislation regulate the removal from the earth of natural gas by the owner thereof, but may not discriminate against corporations doing an interstate business by denying them the right to cross highways of the State while domestic corporations engaged in the same business are permitted to use the highways.

Regulations in a state statute which may be valid as to individuals and domestic corporations engaged in business wholly within the State are not applicable to corporations engaged in doing the same business in interstate commerce when the statute expressly forbids such commerce; this court will not therefore direct that regulations of that nature become applicable to the latter class of such corporations because the prohibition has been declared unconstitutional as an interference with interstate commerce.

A decree of this court must be read in view of the issues made and the relief sought and granted; and a decree declaring a state statute unconstitutional so far as it prohibits, or is a burden upon, interstate commerce will not be construed as preventing the enforcement of such legislation as is legitimately within the police power of the State and not in conflict with the Federal Constitution.

172 Fed. Rep. 545, affirmed.

THE facts, which involve the construction of the decree entered in this case and reported in 221 U. S. 229, are stated in the opinion.

Mr. Charles West, Attorney General of the State of Oklahoma, for appellants.

Mr. E. L. Scarritt, *Mr. John J. Jones*, *Mr. John G. Johnson* and *Mr. D. T. Watson*, for appellees.

Mr. Justice Day delivered the opinion of the court.

The appellees in this case brought suit in the Circuit Court of the United States for the Eastern District of Oklahoma against the appellants, who were the Governor, Attorney General, Deputy Attorney General, County Attorney and Deputy County Attorney of Washington County, Corporation Commissioners and Mine Inspector, of the State of Oklahoma, to enjoin the enforcement of certain statutes of the State of Oklahoma which undertook to prevent the complainants, now appellees, from transporting natural gas in interstate commerce beyond the borders of the State of Oklahoma. Upon final hearing in that court such statutes were held void, as against the Constitution of the United States, and the enforcement thereof was enjoined. The case came to this court on appeal, and was argued and decided at the October Term, 1911, being reported in 221 U. S. 229.

On May 29, 1911, the last day of the term, a motion was made in this court by the Attorney General of Oklahoma to modify the affirmance of the decree in the court below. The parts objected to are found in the margin.[1]

[1] 3. The court doth find the issues and equities herein in favor of the plaintiff, and that the plaintiff is entitled to the relief prayed for in the bill of complaint herein; and doth find, adjudge and decree that chapter 67 of the Session Laws of the State of Oklahoma of 1907–8, passed and enacted by the Legislature of said State of Oklahoma, and approved by the Governor of said State on the twenty-first day of December, 1907, and referred to in plaintiff's bill of complaint herein, is unreasonable, unconstitutional, invalid and void and of no force or effect whatever.

This motion was overruled, with leave to either party to apply to the Circuit Court from whence the case came for such modification of the decree as would make it conform to the opinion of this court. Thereafter, the present proceeding was instituted by the Attorney General's filing a motion in the Circuit Court of the United States for the Eastern District of Oklahoma for the modification of such decree. The former complainants, defendants in this proceeding, appeared and filed a motion in the nature of a demurrer and also filed an answer in the case. The Circuit Court, treating the pleadings of the defendants as in the nature of a demurrer, without hearing evidence in support of or against the granting of the motion, and without considering the affidavits or exhibits filed, over-

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4. The temporary injunction heretofore ordered and entered herein is hereby made permanent and perpetual, and the defendants and each and every of them, their representatives, agents, servants, attorneys, workmen, and employés, and all other persons whomsoever, advised, inspired, influenced, incited or prompted by them, or either of them, are hereby forever restrained and enjoined from committing any of the acts complained of by complainant in its, or his, bill of complaint, and from tearing up or destroying, or in any way interfering with the laying, building, and construction of complainant's pipe lines, or any of the pipe lines referred to in the prayer of complainant's bill of complaint, in, through, or out of the State of Oklahoma, by reason of any of the terms or provisions or contents of chapter 67 of the Sessions Laws of 1907–1908 passed and enacted by the Legislature of the State of Oklahoma, or by reason of any other claimed authority or statute of said State, or common law right, rule of action or unwritten law whatsoever; and from in any manner instituting, prosecuting, or conducting any suits, or suing out any writs of process in any of the state courts of the State of Oklahoma against the complainants, or any one representing it, or him, for the purpose of enjoining, restraining or interfering with either of them in the laying, building, construction, maintenance or operation of any gas pipe line either under the authority of said Legislative act contained in said chapter 67 of the Session Laws of Oklahoma 1907–8 above referred to, or under any other law or statute of the State of Oklahoma, or under any common law right, rule of action, or unwritten law of the State of Oklahoma.

ruled the same and ordered the mandate of this court, affirming the former decree, to be spread upon the records. Thereupon this appeal was prosecuted.

In order to properly consider this motion it is necessary to notice the holding in the case in 221 U. S., *supra*. The original proceeding was brought to enjoin the officers of the State of Oklahoma from preventing the carriage in interstate commerce beyond the lines of the State of natural gas which had been severed from the earth by the owners of such gas, and particularly to enjoin the enforcement of a certain statute of the State passed in 1907, known as chapter 67 of the Session Laws of Oklahoma, 1907–08, which is inserted in full in the margin of the report of the case in 221 U. S., at page 239. This court held that natural gas after severance is a commodity which might be dealt in like other products of the earth, as coal and other minerals, and is a legitimate subject of interstate commerce; and that no State by such laws as were involved in the case can prohibit its transportation in interstate commerce beyond the lines of that State. The court held, after considering and construing the provisions of the act of 1907, that it was, upon its face, a law undertaking to prohibit the transmission or transportation in interstate commerce of natural gas to points beyond the State; that it was an unconstitutional interference with the rights of the complainants, who were legitimately engaged in that commerce, and that therefore the act was null and void.

In the course of the opinion the court recognized the right of the State by proper legislation to regulate the removal from the earth of natural gas by the owner thereof, so as to prevent its undue waste, but maintained the decree of the court below, declaring this particular act unconstitutional, upon the grounds of its prohibitory character in attempting to prevent the transmission from the State through the pipe lines of the complainants of a

legitimate subject of interstate commerce. As to the provisions of the statute concerning the right to use the highways of the State, the court declined to discuss the extent of the rights of public or private ownership therein in the State of Oklahoma, but placed the decision in this respect upon the manifest attempt to discriminate against the appellees, engaged in interstate commerce, in giving to domestic corporations engaged in intrastate transportation of natural gas the right to the use of the highways—even longitudinally—while denying to corporations transporting the gas in interstate commerce the right to pass under or over them, and this in the face of the admission in the pleadings that the greater use given to domestic corporations is no obstruction to the highways.

The particular parts of the Oklahoma act of 1907 which it is now contended should be excepted from the operation of the decree are comprised in §§ 5, 6 and 7 of chapter 67, which read as follows:

"SEC. 5. The laying, constructing, building and maintaining a gas pipe line or lines for the transportation or transmission of natural gas along, over, under, across, or through the highways, roads, bridges, streets, or alleys in this State, or of any county, city, municipal corporation or any other public or private premises within this State is hereby declared an additional burden upon said highway, bridge, road, street or alley, and any other private, or public premises may only be done when the right is granted by express charter from the State and shall not be constructed, maintained, or operated until all damages to adjacent owners are ascertained and paid as provided by law.

"SEC. 6. All pipe lines for the transportation or transmission of natural gas in this State shall be laid under the direction and inspection of proper persons skilled in such business to be designated by the chief mining inspector for such duty, and the expenses of such inspection and

supervision shall be borne and paid for by the parties laying and constructing such pipe lines for the transportation or transmission of natural gas.

"SEC. 7. No pipe line for the transportation or transmission of natural gas shall be subjected to a greater pressure than three hundred pounds to the square inch, except for the purpose of testing such lines, and gas pumps shall not be used on any gas pipe lines for the transportation or transmission of natural gas or used on or in any gas well within this State;" and also in the act of March 27, 1909, Compiled Laws of Oklahoma, 1909, Art. 3, c. 75, § 11, regulating domestic corporations, which prohibits the use of pumps or other artificial means in the transmission of gas, when used to the injury of other corporations, consumers and producers, producing or consuming natural gas in the same gas district.

It is contended for the appellants herein that each and all of these sections of the law are constitutionally valid and can be enforced consistently with the opinion of this court when the case was here upon its merits. Without entering upon a discussion of these sections, it is sufficient to say that in so far as they are part of the statute, the main and controlling purpose of which was to prohibit the transportation of natural gas in the lawful channels of interstate commerce, they were for that reason condemned and held void by the former opinion of this court affirming the Circuit Court.

Furthermore, if the laws named (§§ 5, 6 and 7 of the act of 1907 and the act of March 27, 1909) might be valid as statutory regulations, as to individuals and domestic corporations engaged in transporting gas wholly within the State, they are not, by the very terms of these statutes, made applicable to foreign corporations, such as the defendants, engaged in interstate commerce. Such corporations and such commerce are forbidden by the act. We see, therefore, no reason to modify the decree so as to ex-

cept from its provisions the sections of the act of 1907 and the act of 1909 and thus apply them to those which the act itself excludes.

It is furthermore objected that that part of the decree which undertakes to enjoin not only the execution of the statute law of Oklahoma, chapter 67, in controversy, but prevents interference with the pipe lines of complainants "by reason of any other claimed authority or statute of said State, or common law right, rule of action or unwritten law whatsoever; and from in any manner instituting, prosecuting, or conducting any suits, or suing out any writs of process in any of the State courts of the State of Oklahoma . . . under the authority of said legislative act . . . or under any other law or statute of the State of Oklahoma, or under any common law right, rule of action, or unwritten law of the State of Oklahoma," is so broad as to prevent the State from enforcing any of its lawful enactments at any time passed or to be passed under authority of the State or from taking any action whatsoever for protecting the lawful authority of the Commonwealth. But the decree must be read in view of the issues made and the relief sought and granted. Looking to the pleadings and reading the opinion of this court in the case when it was considered upon its merits, and thus construing the decree, we are of opinion that it cannot be given any such broad construction as is intimated by the Attorney General, and will not prevent the enforcement of legitimate legislation of the State of Oklahoma, if such is passed in the exercise of its police powers, and not conflicting with rights protected by the Federal Constitution. As we have said, this court in its decision affirmed the right of the complainants, in the conduct of interstate commerce, to take natural gas out of the State, and declared that a State could not prohibit the transportation of such product beyond its borders and that the legislative act in question was an act the main purpose and effect of

which were to prohibit the exercise of lawful rights secured by the Federal Constitution.

Construing the decree as we do, we think there is no occasion to modify its terms. The order in this proceeding will, therefore, be

Affirmed.

JOHNSON *v.* WASHINGTON LOAN & TRUST COMPANY.

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

No. 40. Argued December 8, 1911.—Decided April 1, 1912.

A will contained the following provision: "It is my will and desire that my said homestead shall be kept and continued as the home and residence of my daughters so long as they shall remain single and unmarried. I therefore first after the death of my wife will and devise the said estate to my said daughters being single and unmarried and to the survivor and survivors of them so long as they shall be and remain single and unmarried and on the death or marriage of the last of them then I direct that the said estate shall be sold by my executors and the proceeds thereof be distributed by my said executors among my daughters living at my death and their children and descendants (*per stirpes*)."

The testator had three sons and five daughters, all of whom were living when the will was made. The will contained provisions for testator's wife and sons. Four of the daughters married and had children; only one of them married before testator's death, and her children were born subsequently. One daughter remained single and survived all her sisters. Nine years after testator's death, the widow having also died, a decree was entered in a suit in which the daughters alone were parties, directing that the property be sold and proceeds divided among the daughters. In a suit brought subsequently by a purchaser to quiet title against claims of grandchildren of the testator, *held* that:

The provision in the will for the sale of the homestead was for the protection of testator's daughters, and the words "living at the time of my death" may not be disregarded, and the daughters had a vested remainder in fee not defeasible as to any of them by her death leaving descendants, before the expiration of the preceding estates.

Although the clause is elliptical, and the provision for representation is not fully expressed, the court finds from this and other provisions in the will that the intent of the testator is clear, in providing for his daughters and their children and descendants *per stirpes*, to establish the right of those daughters who survived him as of the time of his death and to provide for the representation of any who might previously die.

The purchasers under the decree in the previous suit for sale and division of proceeds, acquired a good title under the decree.

33 App. D. C. 242, affirmed.

THE facts, which involve the construction of a will disposing of real estate in the District of Columbia, are stated in the opinion.

Mr. A. S. Worthington for appellants:

Appellants contend that by the words—"On the death or marriage of the last of them (testator's five daughters) then I direct that the said estate shall be sold by my executors and the proceeds thereof be distributed by my said executors among my daughters living at my death and their children and descendants (*per stirpes*)," testator meant that the proceeds of sale which he directed to be made should be distributed among his daughters and their children and descendants as those classes should exist when all of the daughters should be dead or married. Appellee contends on the other hand that the testator meant that the proceeds of sale should be divided among his daughters and their children or descendants as those classes existed at the time of his death; and that as none of his daughters had any children at that time the daughters took the entire remainder after the termination of the life estate of the widow of the testator.

Where the intention of a testator is plain, rules of construction are not to be resorted to for the purpose of determining that the testator did not mean what he has said in his will. *Clark* v. *Boorman's Executors*, 18 Wall. 502; *Robison* v. *Female Orphan Asylum*, 123 U. S. 702, 707; *Travers* v. *Reinhardt*, 205 U. S. 423; *Line's Estate*, 221 Pa. St. 374; *Hood* v. *Penna. Society*, 221 Pa. St. 474, 479.

The language of this will is so plain that no resort is necessary to rules of construction adopted in construing ambiguous devises. *Burnside* v. *Wall*, 9 B. Mon. 318.

In this case there was not only a preceding life estate in the widow, but an estate till marriage only in the four daughters who did not remain single. After their marriage no one had a right of possession in Metropolis View except Eliza T. Berry so long as she lived.

Nothing in the will tends to sustain the contention of the appellee as to the proper construction of Item 5th.

There is no rule of law as to the construction of wills which requires the court to overthrow the manifest intention of the testator in this case as to the persons who should share in the distribution which he directed to be made when he should have no living unmarried daughter.

When in a will there is no direct gift of property to the beneficiaries, but merely a direction that after the termination of a preceding life, or other particular estate, it shall be divided among or paid to certain classes of beneficiaries, in the absence of anything in the instrument to indicate a different intention, only those of the classes described who survive till the time fixed for the distribution will participate therein. *O'Brien* v. *Dougherty*, 1 App. D. C. 148; 2 Williams on Executors, 6th Am. ed., 1232.

When the only gift is in a direction to pay at a future time, and the will does not otherwise indicate any intention to make a present gift, the remainder will generally be construed contingent. 1 Jarman on Wills, 6th Am. ed.,

star page 757, note 2; *Hoghton* v. *Whitgreave*, 1 Jac. & Walk. 146; *Brograve* v. *Winder*, 2 Vesey, Jr., 638; *Jones* v. *Colback*, 8 Vesey, Jr., 38; *Nichols* v. *Guthrie*, 109 Tennessee, 536; *Richey* v. *Johnson*, 30 Oh. St. 288, 296; 2 Williams on Executors, 514; Hawkins on Wills, 232; Jarman on Wills (as quoted in 118 Illinois, 403), and Beach on Wills, § 120; *McClain* v. *Capper*, 98 Iowa, 145; *Benner* v. *Mawer*, 113 N. W. Rep. 663; *McCartney* v. *Osburn*, 118 Illinois, 403–423; *Bates* v. *Gillett*, 132 Illinois, 287, 299; *Matter of Baer*, 147 N. Y. 348; *Stoors* v. *Burgess*, 101 Maine, 26, 34; *Dougherty* v. *Thompson*, 167 N. Y. 472; *Matter of Crane*, 164 N. Y. 71, 76; *Lewisohn* v. *Henry*, 179 N. Y. 352; *In re Hogarty*, 62 App. Div. 79; *Hale* v. *Hobson*, 167 Massachusetts, 397; *Hobson* v. *Hale*, 95 N. Y. 588; *Dary* v. *Grau*, 190 Massachusetts, 482; *Boston Safe Deposit Co.* v. *Blanchard*, 196 Massachusetts, 35; *Reilly* v. *Bristow*, 105 Maryland, 326; *Rosengarten* v. *Ashton*, 228 Pa. St. 389.

That a remainder is vested on the death of the testator does not necessarily determine that the devisee, his heirs or assigns shall be entitled to the property which is the subject of the gift, since the estate so vested may be divested by the death of the devisee before the determination of the preceding particular estate. 2 Wash. on Real Property, star pages 263, 530; 24 Am. & Eng. Ency. 405; 23 L. R. A. 642, note; 27 L. R. A. (N. S.), 454, note.

Assuming that the intention of this testator was that the distribution involved was to be made among his daughters and their children and their remote descendants as those classes should exist, not when he died but when the distribution was to take place, it becomes wholly immaterial whether the chance which each daughter had of being in existence when that time came gave her a purely contingent interest, or a vested interest subject to be defeated by her prior death leaving children or other descendants to take her distributive share in her place. *Myers* v. *Adler*, 6 Mackey, 515; *Richardson* v. *Penicks*,

1 App. D. C. 261; *Carver* v. *Jackson*, 4 Pet. 1; *Croxall* v. *Shererd*, 5 Wall. 268; *Blanchard* v. *Blanchard*, 10 Allen, 227; *McArthur* v. *Scott*, 113 U. S. 340; *Thaw* v. *Ritchie*, 136 U. S. 519; *Hine* v. *Morse*, 218 U. S. 493.

Poor v. *Considine*, 6 Wall. 458; *Cropley* v. *Cooper*, 19 Wall. 167, can be distinguished, and the reasons given for the conclusion reached in those cases lead to a directly opposite conclusion from that which is maintained for the appellee here. See *Mitchell* v. *Mitchell*, 126 Wisconsin, 47, 49; *Cripps* v. *Wolcott*, 4 Maddock Ch. 12; *Hearn* v. *Baker*, 2 K., K. & J. 386; 69 English Rep. 831.

The same principle was applied in *Stephenson* v. *Gullan*, 18 Beav. 590; *Knight* v. *Poole*, 32 Beav. 548, and *Hoghton* v. *Whitgreave*, 1 Jac. & W. 146. See also 1 Jarman on Wills, 6 Am. ed., star page 547; *Peter* v. *Beverley*, 10 Pet. 532, 563; *Cropley* v. *Cooper*, 19 Wall. 167, 174; *Robertson* v. *Guenther*, 241 Illinois, 511; and see note in 25 L. R. A. (N. S.) 887, 904, containing complete review of the numerous cases in which the question has been whether language similar to that used in that case and in *O'Brien* v. *Dougherty*, *supra*, makes the interest taken by the "surviving" beneficiaries vested or contingent. About one hundred cases are cited in the note. It was held in all that the remainder was contingent, and except in seven cases where it was held that it was vested subject to be divested by the death of the beneficiary before the termination of the preceding estate. *Hudgens* v. *Wilkins*, 77 Georgia, 555; *Blanchard* v. *Blanchard*, 1 Allen, 223; *In re Seamen*, 147 N. Y. 69; *Nodine* v. *Greenfield*, 7 Paige, 655; *Parker* v. *Ross*, 69 N. H. 213; *Smaw* v. *Young*, 109 Alabama, 528; *Acree* v. *Dabney*, 133 Alabama, 437.

The rule of construction, that a construction which may result in partial intestacy is to be avoided, does not apply in this case.

The language of a will which gives property to certain persons and to their children upon the happening of a

future event should not be distorted into a gift to those persons to the exclusion of their children because of the possibility that they may not have any children. *Augustus* v. *Seabolt*, 3 Metc. (Ky.) 155; *Matter of Disney*, 190 N. Y. 128.

When there is a devise to parent and children—as to parent and descendants—without more, the parent takes a life estate with remainder to such children or descendants. *Ward* v. *Grey*, 26 Beaven, 485; *Jeffery* v. *De Vitre*, 24 Beav. 296; *Jeffrey* v. *Honeywood*, 4 Madd. Ch. 397; *Hall* v. *Hall*, 78 Atl. Rep. 971; *Hood* v. *Dawson*, 98 Kentucky, 285; 33 S. W. Rep. 75; *Noe's Admr.* v. *Miller, Excr.*, 31 N. J. Eq. 234; *Stiles* v. *Cummings*, 50 S. E. Rep. 484; *Logan* v. *Hall*, 43 S. W. Rep. 402; *Ballantine* v. *Ballantine*, 152 Fed. Rep. 775; *Forest Oil Co.* v. *Crawford*, 23 C. C. A. 55; *Barclay* v. *Platt*, 170 Illinois, 384; *Kuhn* v. *Kuhn*, 78 S. W. Rep. 16.

The interests of the children of Washington Berry's daughters were not in any wise affected by the proceedings in Equity Case No. 500 or by the conveyances made by the trustees appointed in that case. *McArthur* v. *Scott*, 113 U. S. 340; *Bennett* v. *Hamill*, 2 Sch. & Lef. 566, 577; *Masie* v. *Donaldson*, 8 Ohio, 377, 381; *Long* v. *Long*, 62 Maryland, 33; *Marshall* v. *Augusta*, 5 App. D. C. 183, 194; *Gedges* v. *Western Baptist Theological Institution*, 13 B. Mon. 530; *Harris* v. *Strodl*, 132 N. Y. 392, 397; *Firth* v. *Denny*, 2 Allen, 468; *Hinkley* v. *House of Refuge*, 40 Maryland, 461; *Lowell* v. *Charlestown*, 66 N. H. 584; *Sawyer* v. *Freeman*, 161 Massachusetts, 543; *Estate of Delaney*, 49 California, 76; *Matter of Lorenz's Estate*, 76 N. Y. Supp. 653.

The authorities cited by counsel for the appellee on the subject of acceleration do not support his claim that the failure of a preceding estate by renunciation of the devisee thereof has the same effect as the death of the devisee where that would be inconsistent with the scheme of the

will. *Blatchford* v. *Newberry*, 99 Illinois, 11, 57; *Coltman* v. *Moore*, 1 McA. 197, do not support appellee's contention in this case.

Mr. B. F. Leighton for appellee:

The remainders were vested. Testator's direction for a sale of the property and a division of the proceeds among his daughters living at his death was equivalent to a limitation of the title in fee to them, and they could have elected, on testator's death, to take the property instead of the proceeds to be derived from its sale. *Poor* v. *Considine*, 6 Wall. 472; *Cropley* v. *Cooper*, 19 Wall. 167; *Hauptman* v. *Carpenter*, 16 App. D. C. 524; Fearne on Contingent Remainders, 351; Goodlittle on Whitby, 1st Burrows, 232.

The legal presumption arising from the making of the will itself is that the testator intended to dispose of all of his property, and not die intestate as to any of it. This presumption must prevail unless overborne by the terms of the will itself. *Given* v. *Hilton*, 95 U. S. 591; *Snyder* v. *Baker*, 5 Mackey, 455.

The first taker is always the favorite object of testator's bounty, and, as such, entitled to every implication. *Barber* v. *Pittsburgh &c. Ry.*, 166 U. S. 100; and see *Inglis* v. *Sailor's Snug Harbor*, 3 Pet. 118; *Sheriff* v. *Brown*, 5 Mack. 172.

Taking *per stirpes* is taking by descent, and is the only mode of succession known to the common law. 2 Blackstone's Comm., c. 32, p. 517.

Where the distribution is to be *per stirpes*, the principle of representation will be applied to all degrees; children never take concurrently with their parents. 2 Jarman on Wills, 5th ed., marginal page 100, and 3 *Id.* 174; *Dengel* v. *Brown*, 1 App. D. C. 423.

A bequest to A and his children when A has no children, either at the time the will is made or when it takes effect

at the testator's death, vests the absolute property in A. *Van Zant* v. *Morris*, 25 Alabama, 292.

The binding force of the rule is recognized in *Akers* v. *Akers*, 23 N. J. Eq. (8 Green) 26; *Nightingale* v. *Burrell*, 15 Pick. 104; *Moore* v. *Leach*, 5 Jones' Law (N. C.), 88; *Jones' Ex.* v. *Jones*, 13 N. J. Eq. 236; *Johnson* v. *Johnson*, McMullan's Equity (S. C.), 345; *Reader* v. *Spearman*, 5 Richardson (S. C.), 88; *Chrystie* v. *Phyfe*, 19 N. Y. 345, 354; *Hamlin* v. *Osgood*, 1 Redf. 411; *Torrance* v. *Torrance*, 4 Maryland, 11.

A descendant is one who proceeds from the body of another, however remotely. The word is coextensive with issue, but does not embrace others not of issue. *Estes* v. *Gillett*, 132 Illinois, 287, 297; *Tichnor* v. *Brewer's Exrs.*, 98 Kentucky, 349; and see also *Baker* v. *Baker*, 8 Gray, 101, 120; *Barstow* v. *Goodwin*, 2 Bradf. 413, 416; *Hauptman* v. *Carpenter*, 16 App. D. C. 524; *Myers* v. *Adler*, 6 Mackey, 515; *O'Brien* v. *Dougherty*, 1 App. D. C. 148; *Richardson* v. *Penicks*, 1 App. D. C. 261; *Thaw* v. *Ritchie*, 136 U. S. 519; *McArthur* v. *Scott*, 113 U. S. 340; *Williamson* v. *Field*, 2 Sanford's Chancery, 608; *Croxall* v. *Shererd*, 5 Wall. 288; *Linton* v. *Laycock*, 33 Oh. St. 128; *Tayloe* v. *Mosher*, 29 Maryland, 454, cited and followed in *Fairfax* v. *Brown*, 60 Maryland, 50.

In cases of doubt as to whether a remainder be vested or contingent, it is a circumstance of weight in favor of its being the former, where the beneficiaries are the children of the testator. *Boston Safe Deposit Co.* v. *Blanchard*, 196 Massachusetts, 35; *Smith* v. *Bell*, 6 Pet. 68. The intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law. 15 S. & R. 195; Hawkins on Wills, 2d ed., 222; *Allender* v. *Keplinger*, 62 Maryland, 12; *Sheriff* v. *Brown*, 5 Mackey, 176; *Vaughan* v. *Headfort*, 10 Sim. 641.

The intention of the testator is the first rule of construction to which all other rules are subsidiary. *Earnshaw* v.

Daly, 1 App. D. C. 218; *De Vaughn* v. *De Vaughn*, 3 App. D. C. 50.

Tested by the decided cases of this jurisdiction, as well as upon principle, the remainder devised to the daughters of Washington Berry is vested and not contingent.

Under the circumstances the court had the power, and it was its duty, to accelerate the time named by the testator in his will for the sale of Metropolis View. *Coltman* v. *Moore*, 1 MacA. 197; *Trustees* v. *Morris*, 36 S. W. Rep. 2; *Estate of Rawlings*, 81 Iowa, 701; *Randall* v. *Randall*, 85 Maryland, 431; *Woodburn's Estate*, 151 Pa. St. 586; *Ferguson's Estate*, 138 Pa. St. 208; *Schulz's Estate*, 113 Michigan, 592; *Vance's Estate*, 141 Pa. St. 201; *Slocum* v. *Hogan*, 176 Illinois, 539; 1 Jarman, 5th ed., 574; *Blatchford* v. *Newberry*, 99 Illinois, 11; *Coover's Appeal*, 74 Pa. St. 143.

As to the doctrine of *stare decisis*, as applied to titles of real property, see *Middleton* v. *Parke*, 3 App. D. C. 149.

Mr. Justice Hughes delivered the opinion of the court.

This is an appeal from a decree of the Court of Appeals of the District of Columbia, which affirmed a decree in favor of the complainant, The Washington Loan & Trust Company. The suit was brought to quiet title, and the question concerns the construction of the fifth clause of the will of Washington Berry, who died in 1856. This clause relates to the testator's homestead—the property known as Metropolis View, containing about 410 acres, in the District of Columbia—and is as follows:

"Item 5th. It is my will and desire that my said homestead shall be kept and continued as the home and residence of my daughters so long as they shall remain single and unmarried. I therefore first after the death of my wife will and devise the said estate to my said daughters being single and unmarried and to the survivor and survivors of them so long as they shall be and remain single and

unmarried and on the death or marriage of the last of them then I direct that the said estate shall be sold by my executors and the proceeds thereof be distributed by my said executors among my daughters living at my death and their children and descendants (*per stirpes*) and I hereby reserve to my heirs the family vault and burial ground embracing half an acre of ground and having the said vault as a centre and on such sale as aforesaid by my executors I earnestly enjoin on my sons or some of these sons to purchase the said homestead that it may be kept in the family."

The will was executed in 1852. The testator had three sons and five daughters, all of whom were living at that time; and they, with his wife, survived him. Four of the daughters married and had children; only one of them was married before the testator's death and her children were born subsequently. One daughter, Eliza Thomas Berry, remained single and survived all her sisters, dying in 1903. The testator appointed his wife and one of his sons executors and trustees; the widow acted as executrix, but the son declined.

Soon after the death of the testator, the widow removed from the homestead and neither she nor any of her unmarried daughters occupied it again. During the war the estate suffered much injury; the vault was destroyed and it was necessary to remove the bodies it had contained; the rent and profits were not sufficient to pay taxes or to provide for repairs and the property fell into a dilapidated condition.

The testator's widow died in 1864. In the following year a suit was brought by three of the married daughters and their husbands in the Supreme Court of the District of Columbia to have the property sold and the proceeds divided among the daughters—save the proceeds of the burial ground and vault, which the bill asked to have distributed among the heirs at law. The other children

of the testator, with the spouses of those that were married, were parties defendant. There were, then living, three grandchildren—by the daughters—but they were not parties or represented. All the defendants, save one married daughter—who was a minor and answered by guardian, submitting her rights to the court—consented to the decree. Eliza Thomas Berry, the unmarried daughter, stated in her answer that she relinquished "upon the sale of the estate in the bill mentioned her right to the possession and enjoyment thereof whilst unmarried," and consented "to the distribution of the proceeds of sale as prayed." The case was referred to the auditor to take testimony and report whether the sale would be for the advantage of the infant defendant. He reported that the property was an unfit residence for the unmarried daughter; that the land generally was poor and unproductive as a farm; that the testator had used it as a mere place of residence, and it was fit only, as a whole, for a man of fortune; that the burial place had been demolished and the buildings and fences were out of repair; and that it was a fit case for a sale.

In October, 1865, the court entered a decree for sale, appointing for that purpose two trustees, who were authorized to divide the estate and to sell it in parcels if this were found advisable. The division was made accordingly, and certain lots were sold at public auction. Subsequently, upon the petition of two of the daughters and their husbands, stating that they had children to support and were in need of the money that would come from the sale, the court ordered the trustees to sell the residue of the estate, and sales were made at public auction, which were confirmed by the court in October, 1868, and the proceeds were distributed among the five daughters of the testator. In the long period of years since that time the property has been divided into many separate parcels, which have been the subject of convey-

ances, it being assumed that a valid title passed under the court's decree.

In 1906, suit was brought in the Supreme Court of the District of Columbia by the children of the daughters of the testator against the children of the deceased sons, averring that on the death of the unmarried daughter, Eliza T. Berry, in 1903, the entire equitable interest in the property vested in fee simple in the complainants; that their rights and interests had not been affected by the decree in the former suit or by the sales that had been made under it. It was prayed that trustees might be appointed in the place of those named in the testator's will, to whom the legal title should be transferred. Decree was passed and trustees were appointed by the court on February 20, 1907.

Thereupon Henry P. Sanders brought this suit against all the parties in the suit above mentioned—including the trustees—to quiet the title to a portion of the land which he had derived, by mesne conveyances, through the sale made under the decree passed in 1868; and he alleged that he, and those under whom he claimed, had been for thirty-five years in exclusive and continuous possession, relying upon the validity of their title acquired *bona fide* for a valuable consideration. Mr. Sanders died in 1907, appointing The Washington Loan & Trust Company executor and trustee of his last will and testament by which the real property in question was devised, and an order was made substituting this company as complainant.

It is contended by the appellants that, under the provision of the fifth item of the will, the proceeds of the sale, which the testator directed to be made of the property, should be distributed "among his daughters and their children and descendants as those classes should exist when all of the daughters should be dead or married." The appellee insists that, at the death of the testator, the

daughters took a vested remainder in fee, "to take effect in possession on the marriage of all of them, or the death of the last unmarried daughter."

On examining the scheme of the will, we find that the testator made separate provision for his three sons on the one hand, and for his five daughters on the other. While he contemplated the marriage of his children, and the birth of issue, he did not seek to tie up his property for the benefit of his children's descendants. The testator made no provision whatever for grandchildren or for the descendants of his children save as it was made in the clause in question and in the residuary clause.

To each of his sons he devised a tract of land. The devise was to the son, his heirs and assigns. In the case of two of the sons, it was made on condition that the son and his heirs should convey to the testator's daughters the son's interest in certain real estate, and in case the conveyance were not made within two years, the devise was not to take effect and the property was to go to his daughters living at his death, share and share alike. There was a slight difference in the wording of the conditional devises to the daughters; in the one, they were described as "my daughters living," and in the other as "my daughters living at my death." After thus providing for the sons in the first three items of the will, the testator adds that he annexes to their several estates "this limitation that if either of them shall die without leaving lawful issue that the estate of each one or both if more than one shall go to the survivor or survivors, his and their heirs." We have no occasion to consider the effect of this provision upon the devises to the sons, but it may be noted that there was no gift to the children or descendants of the sons, nor did the testator undertake in case all the sons died without leaving issue to devise the property to the children or descendants of his daughters.

By the fourth item of the will, the testator gave to his

wife for life, in case she survived him, the homestead estate—the property here in question—together with certain money and securities subject to the maintenance and education of his five daughters, while unmarried, and to the provision that each daughter, on marriage and birth of issue, should receive one-sixth part of the personal property bequeathed. When the condition was satisfied by birth of issue, the daughter took her share absolutely. Then followed the fifth clause above quoted, under which this controversy has arisen. And to this was added the residuary clause—item sixth—providing as follows: "I direct that my executors shall divide and distribute all the rest residue and remainder of my personal estate among my children at my death and the descendants of such as may have died during my life to take a parent's part."

In the disposition of the homestead, the testator explicitly states his purpose. He was planning for the protection of his daughters. He desired the property to be the home of his widow so long as she lived and that after her death it should continue to be the home of his daughters while they remained unmarried. When this object had been attained, the property was to be sold and the proceeds divided.

These avails were to be distributed "among my daughters living at my death and their children and descendants (*per stirpes*)." The words "living at my death" may not be disregarded. They are not to be eliminated in the interest of a construction which would leave the clause as though it read, "among my daughters who shall be living at the time of the death or marriage of my last unmarried daughter and the children and descendants (*per stirpes*) of such of my daughters as may have previously died." At the time of the death of the testator, his five daughters were living, and none of them had children or descendants. By the definitive language of the

clause, these daughters were then ascertained and identified as those entitled to the immediate enjoyment of the property on the termination of the preceding estates. They, therefore, had a vested remainder in fee. *Croxall* v. *Shererd*, 5 Wall. 268, 288; *Doe* v. *Considine*, 6 Wall. 458, 474–477; *Cropley* v. *Cooper*, 19 Wall. 167, 174; *McArthur* v. *Scott*, 113 U. S. 340, 380; *Hallifax* v. *Wilson*, 16 Ves. 171. The fact that the property was directed to be sold and that they were described as distributees of the proceeds did not postpone the vesting of the interest. "For many reasons," said this court by Mr. Justice Gray in *McArthur* v. *Scott*, *supra* (pp. 378, 380), "not the least of which are that testators usually have in mind the actual enjoyment rather than the technical ownership of their property, and that sound policy as well as practical convenience requires that titles should be vested at the earliest period, it has long been a settled rule of construction in the courts of England and America that estates, legal or equitable, given by will, should always be regarded as vesting immediately, unless the testator has by very clear words manifested an intention that they should be contingent upon a future event. . . . Words directing land to be conveyed to or divided among remaindermen after the termination of a particular estate are always presumed, unless clearly controlled by other provisions of the will, to relate to the beginning of enjoyment by the remaindermen, and not to the vesting of the title in them. . . . So a direction that personal property shall be divided at the expiration of an estate for life creates a vested interest." In *Cropley* v. *Cooper*, *supra*, the testator bequeathed the rent of his house to his daughter for her life, and it was provided that at her decease the property should "be sold, and the avails therefrom become the property of her children or child, when he, she, or they have arrived at the age of twenty-one years, the interest in the meantime to be applied to their maintenance." When the testator

died, his daughter, who survived him, had one son about three years old. It was held that the son took a vested interest at the death of the testator. The court said (p. 174): "A bequest in the form of a direction to pay at a future period vests in interest immediately if the payment be postponed for the convenience of the estate or to let in some other interest. . . . In all such cases it is presumed that the testator postponed the time of enjoyment by the ultimate legatee for the purpose of the prior devise or bequest. A devise of lands to be sold after the termination of a life estate given by the will, the proceeds to be distributed thereafter to certain persons, is a bequest to those persons and vests at the death of the testator."

The question remains, whether the interest vested in the daughters was defeasible on condition subsequent. That is, whether on the death of a daughter—before the determination of the preceding estates—leaving descendants, her interest was to be divested and her descendants were to take by substitution.

What, then, was the intent of the testator in providing for the children and descendants of daughters *per stirpes?* If the clause be considered to import a condition subsequent, providing for a divesting of the interest of the daughters who survived him and a substitution of their children and descendants, it would necessarily follow that the children and descendants of daughters who died before him would be excluded from participation. It is difficult to suppose that this was his purpose. That his daughters might marry and die, leaving children, before he died, was undoubtedly contemplated. At the time of his death, one of his daughters had already married. If she survived him, she was to have a share in the property. Did the testator intend that if she died after his death, and before the time for distribution, her interest was to be divested in favor of her children and descendants, and if she died before the testator her children and descendants were

to be barred? Or, if it had happened that three of the daughters had married and died during the testator's lifetime, leaving children, and another daughter had married and died after the testator, were the children of the latter daughter to share in the avails of the property, on the death of the last daughter, unmarried, to the exclusion of all the other daughters' children? It is not to be thought that the testator designed such a purely arbitrary selection unless the words forbid a different interpretation.

The language of the clause is not of this imperative character. As well might it be said that it required the conclusion that the daughters and their respective children and descendants were to take concurrently. But this would not be a sensible construction, and it would seem to be equally contrary to the intention of the testator to imply a condition subsequent and thus not only to make defeasible the interest which passed to the daughters, but to shut out the children and descendants of daughters who predeceased him.

The clause is obviously elliptical, and the provision for representation is not fully expressed. Taking the context and the entire plan of the will into consideration, we believe that what the testator had in mind was to establish the right of his daughters, who survived him, as of the time of his death, and to provide for the representation of any of his daughters, who might previously die, by her children and descendants. So construed, the disposition is a natural one and representation of the same sort is accorded as that provided for in the next paragraph when, in giving to his children the residuary personal estate, the testator fully defined the representation intended by stating that "the descendants of such as may have died during my life" were "to take a parent's part."

We are of the opinion that the remainder in fee which vested in the daughters, all of whom survived the testator, was not defeasible as to any of them by her death, leaving

descendants, before the expiration of the preceding estates. As already stated, all the daughters were parties to the suit brought in 1865; and all consented to the decree, save the married daughter who was under age and whose interests were duly protected by the court. It follows that the purchasers under the decree acquired a good title.

The complainant was entitled to the relief sought.

Decree affirmed.

SHARPE *v.* BONHAM.

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

No. 396. Submitted March 12, 1912.—Decided April 1, 1912.

In a controversy which embraces the rights of an association, the mastery of which is claimed by both complainants and defendants, the trustees of the association are properly made parties defendant and are not to be realigned by the court on the side of the complainant for jurisdictional purposes. *Helm* v. *Zarecor*, 222 U. S. 32.

THE facts are stated in the opinion.

Mr. John M. Gaut for appellants.

Mr. W. C. Caldwell, with whom *Mr. Frank Slemons*, *Mr. J. H. Zarecor* and *Mr. W. B. Lamb* were on the brief, for appellees.

Memorandum opinion by direction of the court. By MR. JUSTICE HUGHES.

Appeal from decree dismissing the bill for want of jurisdiction.

The suit was brought by members of a religious society in Nashville, Tennessee, known as Grace Church, citizens of States other than Tennessee, against the pastor and elders of another religious society calling itself Grace Cumberland Presbyterian Church, and also against three individuals described as trustees, who hold the legal title to certain land and a house of worship, all the defendants being citizens of Tennessee. The controversy grew out of the proceedings to consolidate the Cumberland Presbyterian Church with the Presbyterian Church in the United States of America. It was alleged in the bill that the union had been legally effected, and the complainants sought decree that the church property be declared to be held in trust for the congregation which adhered to the alleged united body.

The defendants, other than the trustees, filed a plea to the jurisdiction, alleging that the trustees, "who are alleged to hold the legal title of the property described and involved, are indispensable parties complainant, and yet, as these defendants aver, those persons are improperly and collusively joined as defendants for the purpose of creating a case cognizable in this honorable court;" and it was also asserted that parties had been improperly and collusively omitted for the same purpose. The court dismissed the bill, and in its certificate states that the dismissal was upon the ground that the three defendants, trustees, were not antagonistic to the complainants, and should be aligned upon the same side of the controversy; and, therefore, as some of the complainants and some of the defendants were citizens of the same State, the court was without jurisdiction.

The case is not to be distinguished from *Helm* v. *Zarecor*, 222 U. S. 32. There the controversy arising from the same proceedings, having in view the union of the two religious bodies, related to the property and management of an incorporated committee of publication, or publishing

agency, known as the Board of Publication of the Cumberland Presbyterian Church. It was held that to align the corporation itself with the complainants was virtually to decide the merits in their favor; that the corporation was simply a title holder—an instrumentality, the mastery of which was in dispute; and that it was properly made a party defendant.

As, in that case, the controversy embraced the fundamental question of the rights of the religious associations, said to be represented by the respective parties, to control the corporate agency and to have the benefit in their denominational work of the corporate property, so here the controversy is with respect to the control of the church property which the three trustees hold in trust. These trustees were not indispensable parties complainant as alleged in the plea, and, as mere title holders, they were properly made parties defendant. The court erred in aligning them with the complainants.

Decree reversed.

CONVERSE, RECEIVER, *v.* HAMILTON.

SAME *v.* McCAULEY.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

Nos. 42, 43. Argued November 7, 1911.—Decided April 1, 1912.

This court looks to the constitution and statutes of a State and the decisions of its courts to determine the nature, extent, and method of enforcing the liability of stockholders of a corporation of that State.

The provisions of the Minnesota constitution imposing double liability on stockholders of corporations other than those carrying on manufacturing or mechanical business is self-executing, and under it each

stockholder becomes liable for the debts of the corporation in amount measured by the par value of his stock.

The liability of stockholders under the Minnesota constitution is not to the corporation but to the creditors collectively; is not penal but contractual; not joint, but several; and the means of its enforcement are subject to legislative regulation.

Under § 272 of the Laws of Minnesota, the receiver of a corporation, the stockholders whereof are subject to double liability, is invested with authority to sue for and collect the amount of the assessment established in the sequestration suit provided by the statute.

A receiver to collect the double liability of stockholders of a Minnesota corporation is more than a mere chancery receiver; he is a *quasi*-assignee, invested with the rights of creditors, and he may enforce the same in any court of competent jurisdiction.

As the statute of Minnesota providing for determining whether stockholders of a corporation of that State are subject to statutory double liability does not preclude a stockholder from showing that he is not a stockholder or from setting up any defense personal to himself, it is not unconstitutional as denying due process of law, but is a reasonable regulation, and the jurisdiction of the court is sustained by the relation of the stockholder to the corporation and his contractual obligation in respect to its debts.

While an ordinary chancery receiver cannot exercise his powers in jurisdictions other than that of the court appointing him, except by comity, one who is a *quasi*-assignee and invested with the rights of his *cestuis que trustent* may sue in other jurisdictions, and his right so to do is protected by the full faith and credit clause of the Federal Constitution.

While there are certain well-recognized exceptions to the full faith and credit clause, especially in regard to the enforcement of penal statutes, the right of a receiver of a Minnesota corporation to sue in the courts of another State to recover the double liability imposed on the stockholders is within the rule, and the courts of the latter State are bound to give full faith and credit to the laws of Minnesota and the judicial proceedings upon which the receiver's title, authority and right to relief are grounded.

136 Wisconsin, 589, reversed.

THE facts, which involve the recognition to be given, under the full faith and credit clause of the Federal Constitution, in the courts of a State of a receiver appointed by the courts of another State and the right of such re-

ceiver to enforce double liability against the stockholders in the former State, are stated in the opinion.

Mr. C. A. Severance, with whom *Mr. Burr W. Jones, Mr. E. J. B. Schubring, Mr. Frank B. Kellogg* and *Mr. Robert E. Olds* were on the brief, for plaintiff in error:

It was held by the Supreme Court of Minnesota that the manufacturing company was not exclusively a manufacturing or mechanical corporation, and hence the stockholders are liable. *Merchants' National Bank* v. *Minnesota Thresher M. Co.*, 90 Minnesota, 144; *Bernheimer* v. *Converse*, 206 U. S. 516, 524.

The plaintiff receiver under chapter 272 of the General Laws of Minnesota for 1899, and §§ 3184 to 3190, inclusive, of the Revised Laws of 1905, is a representative of the corporation and of its creditors, and has title to the assessments sued upon and is authorized to enforce such assessments by proper proceedings either in that State or elsewhere. *Bernheimer* v. *Converse*, 206 U. S. 516; *Converse* v. *Ayer* (Mass.), 84 N. E. Rep. 98.

Prior to the enactment of chapter 272, the receiver did not have such title, being nothing but the ordinary chancery receiver, and hence he could not maintain an action to recover stockholders' liability outside the State of Minnesota. *Finney* v. *Guy*, 189 U. S. 335; *Hale* v. *Allinson*, 188 U. S. 56; *Finney* v. *Guy*, 106 Wisconsin, 256.

Chapter 272 and §§ 3184 to 3190, Revised Laws of 1905, merely changed and enlarged the remedy for the enforcement of stockholders' liability, and did not change the substantive right, and hence the said laws are constitutional. *Bernheimer* v. *Converse*, 206 U. S. 516; *Converse* v. *Ayer* (Mass.), 84 N. E. Rep. 98; *Straw & Ellsworth* v. *Kilbourne Co.*, 80 Minnesota, 125; *London & Northwest American Mortgage Co.* v. *St. Paul Park Improvement Co.*, 84 Minnesota, 144.

The judgment at law against the thresher company in

the state court of Minnesota and the decree in the subsequent suit based thereon, by which decree the receiver was appointed, cannot be collaterally attacked. Cases *supra* and *Mutual Life Ins. Co.* v. *Phœnix Ins. Co.*, 108 Michigan, 170; *Bank* v. *Lawrence*, 117 Michigan, 669; *Hinckley* v. *Kettle River Co.*, 80 Minnesota, 32; *Parker* v. *Stoughton Mill Co.*, 91 Wisconsin, 181.

Chapter 272 and §§ 3184 to 3190, both declare that assessments levied pursuant to their provisions, which the demurrer admits were followed in this case, are conclusive upon stockholders wherever they may be. *Straw* v. *Kilbourne Co.*, 80 Minnesota, 125, 136; The *Bernheimer Case*, *supra; Converse* v. *Ayer*, 84 N. E. Rep. 100.

Under *Bernheimer* v. *Converse* and other cases decided by this court, full faith and credit must be given in all courts to the interlocutory decrees of the District Court of Washington County, Minnesota, levying the assessments in question. *Hawkins* v. *Glenn*, 131 U. S. 319; *Hancock Nat'l Bank* v. *Farnum*, 176 U. S. 640, and cases therein cited.

There is no question of comity in this case as in *Finney* v. *Guy*, 106 Wisconsin, 256; *S. C.*, 189 U. S. 335; *Hale* v. *Allinson*, 188 U. S. 56.

In *Hunt* v. *Whewell*, 122 Wisconsin, 33, the Wisconsin court erred in holding that the questions were settled by *Finney* v. *Guy*, and so the decision is contrary to *Bernheimer* v. *Converse*.

In the case at bar the question is as to the credit and effect given in the courts of Minnesota in a like action to an assessment there ordered by interlocutory decrees such as those attached to the complaint. An approval of the position of the Supreme Court of Wisconsin in this case would be a distinct disavowal of *Hancock Bank* v. *Farnum*, and the decisions in many other cases in which the constitutional provision requiring full faith and credit to be given to judicial proceedings of sister States, has been

under consideration. It would mean that the right to recover in an action based upon such judicial proceedings would be determined not by the Constitution but by the whim or caprice of the courts of the State where the suit was brought. The law of this case is well stated in the dissenting opinion below of Mr. Justice Timlin.

Mr. Charles E. Buell, with whom *Mr. John B. Sanborn* and *Mr. Chauncey E. Blake* were on the brief, for defendant in error:

The question of "full faith and credit" is not involved in this case.

An assessment made by the court upon the stock of an insolvent Minnesota corporation and upon the stockholders thereof in an action to sequester the assets of the corporation is not such a judgment against the stockholders as to come within the full faith and credit clause of the Federal Constitution. *Hale* v. *Allinson,* 188 U. S. 56.

The corporation is not the representative of the stockholder in the sense that it can represent him in making an assessment upon his stock, so as to establish a personal liability. *Hale* v. *Allinson, supra; Hanson* v. *Davison,* 73 Minnesota, 454; *Willus* v. *Mann,* 91 Minnesota, 494; *Lageman* v. *Casserly,* 107 Minnesota, 491; *Finney* v. *Guy,* 106 Wisconsin, 256; *Danforth* v. *Chemical Co.,* 68 Minnesota, 308; *Schrader* v. *Manufacturers' Bank,* 133 U. S. 67.

It has always been the law of Wisconsin, and was always the law of Minnesota until the enactment of chapter 272, Laws of 1899, that upon the insolvency of a corporation whose stockholders were subject to a double liability the only remedy the creditors had to enforce that liability was by an action brought by all the creditors or by one or more creditors on behalf of all against the corporation and all of the stockholders to wind up the corporation, sequester its assets and enforce the double liability of the

stockholders and that the judgment as to such double liability bound only such of the stockholders as could be personally served with process within the jurisdiction of the court or should voluntarily appear in the action and that no other action could be brought to enforce such liability either in the State in which the insolvent corporation was located or elsewhere. *In re Martin's Estate*, 56 Minnesota, 420; *Allen* v. *Walsh*, 25 Minnesota, 543; *Merchants' Bank* v. *Bailey Mfg. Co.*, 34 Minnesota, 323; *Minneapolis Base Ball Co.* v. *City Bank*, 66 Minnesota, 441; *Hanson* v. *Davison*, 73 Minnesota, 454; *Coleman* v. *White*, 14 Wisconsin, 700; *Cleveland* v. *Marine Bank*, 17 Wisconsin, 545; *Merchants' Bank* v. *Chandler*, 19 Wisconsin, 434; *Terry* v. *Chandler*, 23 Wisconsin, 456; *Hurlbut* v. *Marshall*, 62 Wisconsin, 590; *Gianella* v. *Biglow*, 96 Wisconsin, 185; *Booth* v. *Dear*, 96 Wisconsin, 516; *Gager* v. *Marsden*, 101 Wisconsin, 598; *Foster* v. *Posson*, 105 Wisconsin, 99; *Finney* v. *Guy*, 106 Wisconsin, 256; *Eau Claire Nat. Bank* v. *Benson*, 106 Wisconsin, 624; *Hunt* v. *Whewell*, 122 Wisconsin, 33; *Hale* v. *Allinson*, 188 U. S. 56; *Finney* v. *Guy*, 189 U. S. 335.

Chapter 272, Laws of Minnesota for the year 1899, and the amendments thereto have not changed the legal aspect of this case.

Whether or not a right exists depends on the law of the State where it was created; the remedy for enforcing such right depends upon the law of the forum where it is sought to be enforced. *Herrick* v. *Minneapolis & St. Louis Ry. Co.*, 31 Minnesota, 11; *Northern Pacific Railroad* v. *Babcock*, 154 U. S. 190, 197; *Marshall* v. *Sherman*, 148 N. Y. 9; *Leucke* v. *Treadway*, 45 Mo. App. 507.

A receiver has no extraterritorial jurisdiction or power of official action and is not entitled, as matter of right, to sue in a foreign jurisdiction; and the refusal of another State to entertain such suit does not amount to failure to give full faith and credit to the laws and judgments of the

State of appointment within the meaning of the Federal Constitution. High on Receivers, § 239; *Booth* v. *Clark*, 17 How. 322; *Filkins* v. *Nunnemacher*, 81 Wisconsin, 91; *Farmers' & Merchants' Ins. Co.* v. *Needles*, 52 Missouri, 17; *Brigham* v. *Luddington*, 12 Blatchf. 237; *Hagard* v. *Durant*, 10 Fed. Rep. 471.

The statutes of a State have no extraterritorial force. A foreign receiver cannot, as matter of right, maintain an action outside of the State of his appointment. He is often permitted through comity, or the courtesy of a sister State, to maintain an action therein; but never where the courts of such sister State have declared the maintenance of such action to be against the public policy of that State or that the rights of its citizens would be thereby jeopardized or impaired. High on Receivers, § 241; *Comstock* v. *Frederickson*, 51 Minnesota, 350; *Mercantile Bank* v. *MacFarlane*, 71 Minnesota, 497; *Hanson* v. *Davison*, 73 Minnesota, 454 (455); *Herrick* v. *Minneapolis & St. Louis Ry. Co.*, 31 Minnesota, 11; *New Haven Nail Co.* v. *Linden Spring Co.*, 142 Massachusetts, 349; *Post & Co.* v. *Toledo &c. R. R. Co.*, 144 Massachusetts, 345; *Higgins* v. *Central N. E. R. R.*, 155 Massachusetts, 176; *Howarth* v. *Lombard*, 175 Massachusetts, 570; *Smith* v. *Mutual Life Ins. Co.*, 96 Massachusetts, 336; *Rice* v. *Hosiery Co.*, 56 N. H. 114, 127; *Nimick & Co.* v. *Mingo Iron Works Co.*, 25 W. Va. 184; Rover on Interstate Law, 167, 226; *Foster* v. *Glazener*, 27 Alabama, 391; *Stevens* v. *Brown*, 20 W. Va. 450 (460, 461); *Gilman* v. *Ketchum*, 84 Wisconsin, 60; *Sobemheimer* v. *Wheeler*, 45 N. J. Eq. 614; *Disconto Gesellschaft* v. *Umbreit*, 127 Wisconsin, 651; *Bagby* v. *A. M. & O. R. Co.*, 86 Pa. St. 291; *Falk* v. *Jones*, 49 N. J. Eq. 484; *Finney* v. *Guy*, 189 U. S. 335 (345).

Whether or not a complaint in a state court states a cause of action, no Federal question being involved, is exclusively for the state court to determine. *Finney Case*, 189 U. S. 335; *Johnson* v. *New York Life Ins. Co.*, 187

U. S. 491, 496; *Allen* v. *Alleghany Co.*, 196 U. S. 458; *Kirtley* v. *Holmes*, 46 C. C. A. 102; 107 Fed. Rep. 1; *Lewis* v. *Clark*, 64 C. C. A. 138; 129 Fed. Rep. 570; *Rogers* v. *Riley*, 80 Fed. Rep. 759; *Burr* v. *Smith*, 113 Fed. Rep. 858.

The validity of chapter 272, Laws of Minnesota for 1899, and the amendments thereto are not drawn in question in this case; hence no Federal question is raised.

Where a case turns upon the construction and not upon the validity of statute of another State it does not necessarily involve a Federal question. *Finney* v. *Guy*, 189 U. S. 335, 340; *Johnson* v. *New York Life Ins. Co.*, 187 U. S. 491, 496; *Allen* v. *Alleghany Co.*, 196 U. S. 463; *Lloyd* v. *Matthews*, 155 U. S. 222; *Banholzer* v. *New York Life Ins. Co.*, 178 U. S. 402; *Johnson* v. *New York Life Ins. Co.*, 187 U. S. 491.

Upon demurrer to a complaint alleging the law of another State the defendant is not concluded by such allegations; the court will examine the statutes and decisions of such State and determine for itself whether the law is as pleaded. *Finney* v. *Guy*, 189 U. S. 335 (343, 344); *Knickerbocker Trust Co.* v. *Iselin*, 185 N. Y. 54 (58).

There is nothing in any of the cases arising under the amended Minnesota statute and decided by this court since the amendment to the Minnesota law in conflict with the decision of the Wisconsin court in *Hunt* v. *Whewell*.

In *First National Bank of Ottawa* v. *Converse*, 200 U. S. 425; *Bernheimer* v. *Converse*, 206 U. S. 516; *Converse* v. *First National Bank of Suffield*, 212 U. S. 565, and *Converse* v. *Stewart*, 218 U. S. 666, no question was raised as to whether the action was against the public policy of the State where brought or whether a remedy was provided by the Minnesota law different from that of the *lex fori*, and which remedy was denied the citizens of the State where such action was brought, or whether this court

would compel a state court to entertain such action against its solemn declaration that by so doing it would subject its citizens to great and manifold injustice and hardship. *Howarth* v. *Angle*, 162 N. Y. 179; *Post & Co.* v. *Toledo, Cincinnati & St. Louis Railroad*, 144 Massachusetts, 341; *Howarth* v. *Lombard*, 175 Massachusetts, 570; *Hancock National Bank* v. *Farnum*, 176 U. S. 640, distinguished. No case holds that the failure of a state court to permit such action to be brought is a violation of the "full faith and credit" clause of the Federal Constitution. The cases cited—several of which are from the Minnesota court and all from courts of the highest standing—uniformly hold that such receiver cannot maintain such action as a strict right, but only when the public policy of the sister State will permit.

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

These were actions at law, brought in the Circuit Court of Dane County, Wisconsin, by a receiver of an insolvent Minnesota corporation, the Minnesota Thresher Manufacturing Company, to enforce an asserted double liability of two of its stockholders. The facts stated in the complaints, which were substantially alike, were these: A judgment creditor, upon whose judgment an execution had been issued and returned *nulla bona*, commenced a suit against the company in the District Court of Washington County, Minnesota, for the sequestration of its property and effects and for the appointment of a receiver of the same. The company appeared in the suit, a receiver was appointed, and such further proceedings were had therein, conformably to the statutes of the State, as resulted in the appearance of the creditors of the company, in the presentation and adjudication of their claims aggregating many thousands of dollars, in an ascertainment of

the complete insolvency of the company and of the necessity of resorting to the double liability of its stockholders for the payment of its creditors, and in orders levying upon its stockholders two successive assessments of 36 and 64 per cent. of the par value of their respective shares, requiring that these assessments be paid to the receiver within stated periods, and directing the receiver, in case any of the stockholders should fail to pay either assessment within the time prescribed, to institute and prosecute all such actions, whether within or without the State, as should be necessary to enforce the assessments. Some of the stockholders intervened in the suit and appealed from the order levying the first assessment, and the order was affirmed by the Supreme Court of the State. 90 Minnesota, 144.

The defendants here were stockholders in the company and failed and refused to pay either assessment, although payment was duly demanded of them. But they were not made parties to the sequestration suit and were not notified, otherwise than by publication or by mail, of the applications for the orders levying the assessments. Upon the expiration of the times prescribed in the orders the receiver brought the present actions to enforce them. The complaints set forth the proceedings in the sequestration suit and the provisions of the Minnesota constitution and statutes relating to the double liability of stockholders and its enforcement, with the interpretation placed upon those provisions by the Supreme Court of that State, and also made the claim that § 1, Art. IV, of the Constitution of the United States and § 905, Rev. Stat., required the courts of Wisconsin to give such faith and credit to those proceedings and provisions as they have by law or usage in the courts of Minnesota.

Demurrers to the complaints were sustained upon the ground that to permit the actions to be maintained in the Wisconsin courts would be contrary to the settled policy

of that State in respect of the enforcement of the like liability of stockholders in its own corporations, and judgments of dismissal were entered accordingly. The judgments were affirmed by the Supreme Court of the State, 136 Wisconsin, 589 and 594, and the receiver sued out these writs of error, alleging that he had been denied a right asserted, as before indicated, under the Constitution and laws of the United States.

Of course, we must look to the Minnesota constitution, statutes and decisions to determine the nature and extent of the liability in question, and the effect given in that State to the laws and judicial proceedings therein looking to its enforcement, and when this is done we find that the situation, as applied to the cases now before us, is as follows:

1. Section 3, article 10, of the Minnesota constitution provides: "Each stockholder in any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him." The insolvent company, before mentioned, is within the general terms of this provision, not the excepting clause. *Merchants' National Bank* v. *Minnesota Thresher Manufacturing Co.*, 90 Minnesota, 144; *Bernheimer* v. *Converse*, 206 U. S. 516, 524. The provision is self-executing, and under it each stockholder becomes liable for the debts of the corporation in an amount measured by the par value of his stock. This liability is not to the corporation but to the creditors collectively, is not penal but contractual, is not joint but several, and the mode and means of its enforcement are subject to legislative regulation. *Willis* v. *Mabon*, 48 Minnesota, 140; *Minneapolis Baseball Co.* v. *City Bank*, 66 Minnesota, 441, 446; *Hanson* v. *Davison*, 73 Minnesota, 454; *Straw & Ellsworth Co.* v. *Kilbourne Co.*, 80 Minnesota, 125; *London & Northwest Co.* v. *St. Paul Co.*, 84 Minnesota, 144; *Bernheimer* v. *Converse, supra.*

2. The proceedings in the sequestration suit, looking to the enforcement of this liability, were had under chapter 272, Laws of 1899, and §§ 3184–3190, Revised Laws of 1905, the latter being a continuation of the former with changes not here material. An earlier statute prescribed a mode of enforcement by a single suit in equity in a home court, which was to be prosecuted by all the creditors jointly, or by some for the benefit of all, against all the stockholders, or as many as could be served with process in the State, and all the rights of the different parties were to be finally adjusted therein. That mode was exclusive. A receiver could not sue on behalf of the creditors in a home court or elsewhere. A single creditor could not sue in his own behalf, and, if all united, or one sued for the benefit of all, it was essential that the suit be in a home court. The statute was so interpreted by the Supreme Court of the State. See *Hale* v. *Allinson*, 188 U. S. 56, and *Finney* v. *Guy*, 189 U. S. 335, where the cases were carefully reviewed. In one of them, *Minneapolis Baseball Co.* v. *City Bank*, *supra*, that court, after holding that the liability could not then be enforced through a suit by a receiver, added: "If it be desirable, in order to secure a speedy, economical and practical method of enforcing the liability, to invest the receiver with such power, it must be done by statute." Doubtless responding to this suggestion, the legislature enacted chapter 272, Laws of 1899. It expressly prescribed the mode of enforcement pursued in the present instance; that is to say, it made provision for bringing all the creditors into the sequestration suit, for the presentation and adjudication of their claims, for ascertaining the relation of the corporate debts and the expenses of the receivership to the available assets, and whether and to what extent it was necessary to resort to the stockholders' double liability, for levying such assessments upon the stockholders according to their respective holdings as should

be necessary to pay the debts, and for investing the receiver with authority to collect the assessments on behalf of the creditors. And it also contained the following provisions respecting the effect to be given to the orders levying assessments and respecting the authority and duties of the receiver (Gen. Laws, 1899, p. 317):

"SEC. 5. Said order and the assessment thereby levied shall be conclusive upon and against all parties liable upon or on account of any stock or shares of said corporation, whether appearing or represented at said hearing or having notice thereof or not, as to all matters relating to the amount of and the propriety of and necessity for the said assessment. This provision shall also apply to any subsequent assessment levied by said court as hereinafter provided.

"SEC. 6. It shall be the duty of such assignee or receiver to, and he may, immediately after the expiration of the time specified in said order for the payment of the amount so assessed by the parties liable therefor, institute and maintain an action or actions against any and every party liable upon or on account of any share or shares of such stock who has failed to pay the amount so assessed against the same, for the amount for which such party is so liable. Said actions may be maintained against each stockholder, severally, in this state or in any other state or country where such stockholder, or any property subject to attachment, garnishment or other process in an action against such stockholder, may be found. . . ."

3. Under this statute, as interpreted by the Supreme Court of the State, as also by this court, the receiver is not an ordinary chancery receiver or arm of the court appointing him, but a *quasi*-assignee and representative of the creditors, and when the order levying the assessment is made he becomes invested with the creditors' rights of action against the stockholders and with full authority to enforce the same in any court of competent

jurisdiction in the State or elsewhere. *Straw & Ellsworth Co.* v. *Kilbourne Co., supra; Bernheimer* v. *Converse, supra.*

4. The constitutional validity of chapter 272 has been sustained by the Supreme Court of the State, as also by this court; and this because (1) the statute is but a reasonable regulation of the mode and means of enforcing the double liability assumed by those who become stockholders in a Minnesota corporation; (2) while the order levying the assessment is made conclusive, as against all stockholders, of all matters relating to the amount and propriety of the assessment and the necessity therefor, one against whom it is sought to be enforced is not precluded from showing that he is not a stockholder, or is not the holder of as many shares as is alleged, or has a claim against the corporation which in law or equity he is entitled to set off against the assessment, or has any other defense personal to himself, and (3) while the order is made conclusive as against a stockholder, even although he may not have been a party to the suit in which it was made and may not have been notified that an assessment was contemplated, this is not a tenable objection, for the order is not in the nature of a personal judgment against the stockholder and as to him is amply sustained by the presence in that suit of the corporation, considering his relation to it and his contractual obligation in respect of its debts. *Straw & Ellsworth Co.* v. *Kilbourne Co., supra; London & Northwest Co.* v. *St. Paul Co., supra; Bernheimer* v. *Converse, supra.*

This statement of the nature of the liability in question, of the laws of Minnesota bearing upon its enforcement, and of the effect which judicial proceedings under those laws have in that State, discloses, as we think, that in the cases now before us the Supreme Court of Wisconsin failed to give full faith and credit to those laws and to the proceedings thereunder, upon which the receiver's right to sue was grounded. It is true that an ordinary chancery

receiver is a mere arm of the court appointing him, is invested with no estate in the property committed to his charge, and is clothed with no power to exercise his official duties in other jurisdictions. *Booth* v. *Clark*, 17 How. 322; *Hale* v. *Allinson*, 188 U. S. 56; *Great Western Mining and Mfg. Co.* v. *Harris*, 198 U. S. 561. But here the receiver was not merely an ordinary chancery receiver, but much more. By the proceedings in the sequestration suit, had conformably to the laws of Minnesota, he became a *quasi*-assignee and representative of the creditors, was invested with their rights of action against the stockholders, and was charged with the enforcement of those rights in the courts of that State and elsewhere. So, when he invoked the aid of the Wisconsin court the case presented was, in substance, that of a trustee, clothed with adequate title for the occasion, seeking to enforce, for the benefit of his *cestuis que trustent*, a right of action, transitory in character, against one who was liable contractually and severally, if at all. The receiver's right to maintain the actions in that court was denied in the belief that it turned upon a question of comity only, unaffected by the full faith and credit clause of the Constitution of the United States, and this view of it was regarded as sustained by the decision of this court in *Finney* v. *Guy*, 189 U. S. 335. But that case is obviously distinguishable from those now before us. It involved the right of a Minnesota receiver and of the creditors of a Minnesota corporation to sue a stockholder in Wisconsin prior to the enactment of chapter 272, and while the earlier statute, before mentioned, provided an exclusive remedy through a single suit in equity in a Minnesota court. That remedy having been exhausted, the receiver and the creditors sought, by an ancillary suit in Wisconsin, to enforce the liability of a stockholder who resided in that State and was not a party to the suit in Minnesota. The Supreme Court of Wisconsin, treating the right to maintain the suit in that

State as depending upon comity only, ruled that it ought not to be entertained. The case was then brought here, it being claimed that full faith and credit had not been accorded to the laws of Minnesota and the proceedings in the suit in that State. This claim was grounded upon a contention that the first decisions in Minnesota, holding that the remedy provided by the earlier statute was exclusive, that a receiver could not sue thereunder, and that the rights of creditors against stockholders must be worked out in the single suit in the home court, had been overruled by later decisions giving, as was alleged, a different interpretation to that statute. The contention was fully considered by this court, the cases relied upon being carefully reviewed, and the conclusion was reached that "the law of Minnesota still remains upon this particular matter as stated in the former cases, which have not been overruled." The claim under the full faith and credit clause was accordingly held untenable, and it was then said: "Whether, aside from the Federal considerations just discussed, the Wisconsin court should have permitted this action to be maintained, because of the principle of comity between the States, is a question exclusively for the courts of that State to decide."

We perceive nothing in the decision in that case which makes for the conclusion that when the representative character, title and duties of a receiver have been established by proceedings in a Minnesota court conformably to the altogether different provisions of the later statute embodied in chapter 272, his right to enforce in the courts of another State the assessments judicially levied in Minnesota depends upon comity, unaffected by the full faith and credit clause. Indeed, the implication of the decision is to the contrary. We say this, first, because had it been thought that the controlling question was one of comity only there would have been no occasion to consider what effect was accorded in Minnesota to the

earlier statute and to the proceedings thereunder, and, second, because especial care was taken to explain that the case in hand was not controlled by the decision in *Hancock National Bank* v. *Farnum*, 176 U. S. 640. That was an action in a Rhode Island court by a creditor of a Kansas corporation against one of its stockholders to enforce the contractual double liability of the latter. The creditor had recovered against the corporation in a court in Kansas a judgment which, according to the laws of that State, invested the creditor with a cause of action against the stockholder which could be asserted in any court of competent jurisdiction. The Supreme Court of Rhode Island, treating the right to maintain the action in that State against the stockholder as dependent upon comity only, and finding that the right with which the creditor was invested under the law of Kansas was unlike that conferred by the law of Rhode Island in like situations, ruled that the action could not be maintained in the courts of that State. 20 R. I. 466. But when the case came here it was held that full faith and credit had not been given to the Kansas judgment upon which the creditor relied, and the judgment of the Supreme Court of Rhode Island was accordingly reversed, it being said in that connection: "The question to be determined in this case was not what credit and effect are given in an action against a stockholder in the courts of Rhode Island to a judgment in those courts against the corporation of which he is a stockholder, but what credit and effect are given in the courts of Kansas in a like action to a similar judgment there rendered. Thus and thus only can the full faith and credit prescribed by the Constitution of the United States and the act of Congress be secured."

In *Bernheimer* v. *Converse*, 206 U. S. 516, the present receiver sought, by reason of the proceedings in the Minnesota court under chapter 272, to maintain an action in New York against a stockholder residing in that State

to enforce one of the assessments before mentioned, and this court sustained the action, saying (p. 534):

"It is objected that the receiver cannot bring this action, and *Booth* v. *Clark*, 17 How. 322; *Hale* v. *Allinson*, 188 U. S. 56, and *Great Western Mining Co.* v. *Harris*, 198 U. S. 561, are cited and relied upon. But in each and all of these cases it was held that a chancery receiver, having no other authority than that which would arise from his appointment as such, could not maintain an action in another jurisdiction. In this case the statute confers the right upon the receiver, as a *quasi*-assignee, and representative of the creditors, and as such vested with the authority to maintain an action. In such case we think the receiver may sue in a foreign jurisdiction. *Relfe* v. *Rundle*, 103 U. S. 222, 226; *Howarth* v. *Lombard*, 175 Massachusetts, 570; *Howarth* v. *Angle*, 162 N. Y. 179, 182."

And in *Converse* v. *First National Bank of Suffield*, 212 U. S. 567, where, in a similar action, the Supreme Court of Errors of Connecticut had given judgment against the receiver, this court reversed the judgment on the authority of *Bernheimer* v. *Converse*, *supra*.

True, the full faith and credit clause of the Constitution is not without well-recognized exceptions, as is pointed out in *Huntington* v. *Attrill*, 146 U. S. 657; *Andrews* v. *Andrews*, 188 U. S. 14, and *National Exchange Bank* v. *Wiley*, 195 U. S. 257, but the laws and proceedings relied upon here come within the general rule which that clause establishes, and not within any exception. Thus, the liability to which they relate is contractual, not penal. The proceedings were had with adequate jurisdiction to make them binding upon the stockholders in the particulars before named. The subject to which chapter 272 is addressed is peculiarly within the regulatory power of the State of Minnesota; so much so that no other State properly can be said to have any public policy thereon. And what the law of Wisconsin may be respecting the

relative rights and obligations of creditors and stockholders of corporations of its creation, and the mode and means of enforcing them, is apart from the question under consideration.

Besides, it is not questioned that the Wisconsin court in which the receiver sought to enforce the causes of action with which he had become invested under the laws and proceedings relied upon, was possessed of jurisdiction which was fully adequate to the occasion. His right to resort to that court was not denied by reason of any jurisdictional impediment, but because the Supreme Court of the State was of opinion that, as to such causes of action, the courts of that State "could, if they chose, close their doors and refuse to entertain the same."

In these circumstances we think the conclusion is unavoidable that the laws of Minnesota and the judicial proceedings in that State, upon which the receiver's title, authority and right to relief were grounded, and by which the stockholders were bound, were not accorded that faith and credit to which they were entitled under the Constitution and laws of the United States.

The judgments are accordingly reversed, and the cases are remanded for further proceedings not inconsistent with this opinion.

Reversed.

HOLT, TRUSTEE IN BANKRUPTCY OF DAVIS, KELLY & CO., *v.* CRUCIBLE STEEL COMPANY OF AMERICA.

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

No. 183. Argued March 4, 1912.—Decided April 1, 1912.

Under § 67a of the Bankruptcy Act of 1898, the effect to be given to an unrecorded chattel mortgage must be determined by the recording law of the State.

As construed by the highest court of the State, the term "creditors" as used in § 496, Kentucky Statutes, 1903, which declares that no mortgage shall be valid against purchasers without notice or creditors until recorded does not include antecedent creditors, or subsequent creditors whose claims are acquired with notice, but does include subsequent creditors without notice, who by diligence secure a specific lien before the mortgage is recorded; but that court has not specifically decided whether the term includes subsequent creditors without notice who have not so secured such lien.

The Circuit Court of Appeals having held that under the decisions of the highest court of the State bearing on the question, the term "creditors" as used in § 496, Kentucky Statutes, 1903, does not include subsequent creditors without notice who have not secured a lien on the property prior to the recording thereof, and this court not being able to say that such construction is wrong, *held* that the title of the holder of an unrecorded chattel mortgage on property in Kentucky is valid and effective as against the trustee in bankruptcy as to the creditors who became such after the mortgage was given and who had not fastened any lien on the property prior to the proceeding in bankruptcy.

174 Fed. Rep. 127, affirmed.

THE facts, which involve priority of claims against the bankrupts' estate, are stated in the opinion.

Mr. H. H. Nettelroth, with whom *Mr. John C. Doolan* was on the brief, for appellant:

The contest is a proceeding in bankruptcy between the

holder of an unrecorded chattel mortgage, on one side, and the trustee in bankruptcy, on behalf of certain subsequent creditors, on the other side.

As § 496, Kentucky Statutes, providing that no deed or deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until such deed shall be acknowledged or proved according to law, and lodged for record, has been construed, an unrecorded mortgage is invalid as to subsequent creditors without notice even though such creditors have fastened no lien upon the mortgaged property. *Wicks Bros.* v. *McConnell*, 102 Kentucky, 434; *Besten & Langan* v. *People's Messenger & Parcel Delivery Co.*, 99 S. W. Rep. 631; 30 Ky. Law Rep. 787; *Swafford's Adm'r* v. *Asher*, 105 S. W. Rep. 164; 31 Ky. Law Rep. 1338; *In re Ducker*, 134 Fed. Rep. 43; 13 Am. Bankruptcy Rep. 760.

York Manufacturing Co. v. *Cassell*, 201 U. S. 344, involved a similar question under the laws of Ohio, but under the laws of that State such creditors only who have obtained a lien may resist an unrecorded mortgage.

Appellant relies upon §§ 67a and b of the Bankruptcy Act.

Mr. Keith L. Bullitt, with whom *Mr. Wm. Marshall Bullitt* was on the brief, for appellee:

An unrecorded chattel mortgage is valid under § 496, Kentucky Statutes, as against subsequent creditors who have not reduced their claims to liens. The contract in this case is in effect a mortgage for the purchase price of the steel. *Baldwin* v. *Crow*, 86 Kentucky, 679; *Wicks* v. *McConnell*, 102 Kentucky, 434, 436; *Swafford's Adm'r* v. *Asher*, 31 Ky. Law Rep. 1338.

The lien of the unrecorded mortgage of the Crucible Steel Co. is superior to that of general unsecured creditors

whose debts were created subsequent to the execution of the contract.

The rule in Kentucky prior to the decision of *Swafford's Adm'r* v. *Asher*, 31 Ky. Law Rep. 1338, and *Besten & Langan* v. *People's Messenger Co.*, 99 S. W. Rep. 631, and the general rule throughout the United States, has been that the term "creditors" includes only those who by judgment, attachment, or otherwise, have obtained an interest in, or a lien upon, the property covered by the mortgage, *Button* v. *Rathbone*, 124 N. Y. 538; *Overstreet* v. *Mannering*, 67 Texas, 657; 8 Am. & Eng. Ency. of Law, 241; *Ayres* v. *Duprey*, 27 Texas, 593; *McFadden* v. *Worthington*, 45 Illinois, 365; *Stewart* v. *Beale*, 7 Hun, 405; *Ransom* v. *Schmela*, 13 Nebraska, 77; 12 N. W. Rep. 926; *Grace* v. *Wade*, 45 Texas, 527; *Citizens' Bank* v. *Hibbs*, 11 Ky. Law Rep. 441; *Underwood* v. *Ogden*, 6 B. Mon. 606 (Ky.); *Bailey & Carter* v. *Welch*, 4 B. Mon. 244; *United States Bank* v. *Huth*, 4 B. Mon. 423, 451; *Wicks Bros.* v. *McConnell*, 102 Kentucky, 534; *In re Ducker*, 134 Fed. Rep. 48; *In re Doran*, 154 Fed. Rep. 471; *York Mfg. Co.* v. *Cassell*, 201 U. S. 344.

The rule in Kentucky has not been changed by the decisions rendered in *Swafford's Adm'r* v. *Asher*, and *Besten* v. *People's Messenger Co.*, *supra*.

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

This appeal brings up for review a decree reversing an order of the District Court for the Western District of Kentucky in a proceeding in bankruptcy. The matter in dispute is the validity, under the recording law of that State, of an unrecorded chattel mortgage as against creditors who became such after the mortgage was given, and without knowledge of it, where none of them had secured a lien upon the mortgaged property by execution,

attachment or otherwise. The mortgagee, in making proof of its claim, asserted a lien under the mortgage and sought priority of payment out of the proceeds of the property covered by it. The claim was allowed, but the District Court, being of opinion that the mortgage was invalid as against the subsequent creditors without notice, held that it gave no right to priority of payment as against them. The mortgagee appealed to the Circuit Court of Appeals, and that court, taking the view that the mortgage was valid as against those creditors, since none had secured any specific lien upon the mortgaged property, sustained the right to priority asserted by the mortgagee. 174 Fed. Rep. 127. The trustee prosecutes the present appeal.

Section 67a of the Bankruptcy Act declares:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

And the applicable provision of the recording law of Kentucky (Stat. 1903, § 496) is as follows:

"No deed or deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until such deeds shall be acknowledged or proved according to law, and lodged for record."

It is apparent from the language of § 67a and from the decisions of this court in *York Manufacturing Co.* v. *Cassell*, 201 U. S. 344; *Thomas* v. *Taggart*, 209 U. S. 385, and other like cases, that the effect to be given to the unrecorded chattel mortgage must be determined by the recording law of the State; and it is also apparent that the question arising under that law turns upon who are included in the term "creditors" in § 496.

Upon that question the decisions of the Court of Appeals

of the State have not been uniform, but it is conceded, and is evident upon an examination of the more recent decisions, that the term does not include antecedent creditors, or subsequent creditors whose claims are acquired with notice of the unrecorded mortgage, but does include subsequent creditors, without notice, who by their diligence secure a specific lien upon the property, as by execution or attachment, before the mortgage is recorded. *Baldwin* v. *Crow*, 86 Kentucky, 679; *Wicks* v. *McConnell*, 102 Kentucky, 434; *Clift* v. *Williams*, 105 Kentucky, 559; *Bowles' Ex'r* v. *Jones*, 123 Kentucky, 395; *Swafford's Adm'r* v. *Asher*, 105 S. W. Rep. 164. And so, the question for decision is reduced to this: Does the term include subsequent creditors, without notice, who have not secured such a lien?

No case in that court has been called to our attention, and none has been found by us, in which this question was presented for decision and decided; but in two of the later cases there are expressions bearing thereon which are respectively relied upon here. Thus, in *Wicks Bros.* v. *McConnell*, *supra*, where the prior cases were reviewed with the evident purpose of extracting a general and guiding rule, it was said: "On the one hand, the unrecorded lien is upheld as against creditors who cannot be presumed to have given credit upon the faith of the property held in lien. On the other hand, creditors who may be presumed on such faith to have given credit are protected as against the secret lien *in the rights which they secure by their diligence in the levy of their execution or attachment.*" (Italics ours.) And in *Swafford's Adm'r* v. *Asher*, *supra*, it was said: "As the mortgage was not recorded, *it would, of course, not be valid as to creditors whose debts were subsequently created;* but as to those whose debts were created prior to the purchase of the teams and the mortgage upon them the lien is valid, although not recorded as required by § 496 of the Kentucky Statutes of 1903, and,

as said before, *there is nothing to show that any debt of the estate was created after the purchase of the teams, except that of appellant, who had actual notice.*" As *Wicks* v. *McConnell* was cited as sustaining this statement, it is not probable that the court regarded it as overruling or departing from what had been said in that case; and this view receives added support from the fact that the opinion in *Swafford's Adm'r* v. *Asher* was marked by the court "Not to be officially reported." These considerations, coupled with the further fact that in cases such as *Bowles' Ex'r* v. *Jones, supra,* where subsequent creditors prevailed over such a mortgagee, the court was careful to state, not only that the claims of the creditors arose after the date of the unrecorded mortgage, but also that the creditors had obtained attachment or other liens upon the mortgaged property before the mortgage was recorded, are persuasive that what was said in *Wicks Bros.* v. *McConnell* should be accepted as reflecting the true construction of § 496, in the absence of some more positive and direct ruling upon the subject by the Court of Appeals of the State. Such was the view of the Circuit Court of Appeals, and we are at least unable to say that it was wrong. It follows that, as here the subsequent creditors had not fastened any lien upon the property covered by the mortgage prior to the proceedings in bankruptcy by which the title passed to the trustee, the mortgage, although unrecorded, was valid and effective against them.

Decree affirmed.

BRINKMEIER *v.* MISSOURI PACIFIC RAILWAY CO.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 206. Submitted March 11, 1912.—Decided April 1, 1912.

The Safety Appliance Act of March 2, 1893, 27 Stat. 531, c. 196, did not embrace all cars on the lines of interstate carriers, but only those engaged in interstate commerce. It did not, until amended by the act of March 2, 1903, 32 Stat. 943, c. 976, embrace all cars used on railroads engaged in interstate commerce.

A declaration for injuries sustained prior to the amendment of March 2, 1903, which did not allege that the car involved was engaged in interstate commerce, was properly held defective.

The rule that decisions of the state court on questions of pleading and practice under the laws of a State are not reviewable by this court *held* to include the denial, on the ground that the period of limitation had expired, of an application made after trial to amend the declaration, so as to state a cause of action. *Texas & New Orleans R. R. Co.* v. *Miller*, 221 U. S. 408.

Although the petition may declare under a Federal statute, if it states no cause of action thereunder but at most a right of recovery at common law, rulings on the sufficiency of evidence do not involve Federal questions.

81 Kansas, 101, affirmed.

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

Mr. C. V. Ferguson, with whom *Mr. Kos Harris* and *Mr. V. Harris* were on the brief, for plaintiff in error.

Mr. Bailie P. Waggener, *Mr. Charles E. Benton* and *Mr. David Smyth* for defendant in error.

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

This was an action to recover for personal injuries

sustained by a brakeman while coupling two freight cars on a side track of the defendant railway company at Hutchinson, Kansas. The defendant prevailed in the state courts, 81 Kansas, 101, and the plaintiff brings the case here. The injury occurred November 12, 1900, and the action was begun March 15, 1901.

The question first presented for decision is, whether the petition stated a cause of action under the original Safety Appliance Act of March 2, 1893, 27 Stat. 531, c. 196, which made it unlawful for any common carrier engaged in interstate commerce by railroad "to haul or permit to be hauled or used on its line any car *used in moving interstate traffic* not equipped with couplers coupling automatically by impact," etc. The petition, if liberally construed, charged that defendant was a common carrier engaged in interstate commerce by railroad; that the cars in question were not equipped with couplers of the prescribed type, and that the plaintiff's injuries proximately resulted from the absence of such couplers; but there was no allegation that either of the cars was then or at any time used in moving interstate traffic. The Supreme Court of the State held that in the absence of such an allegation the petition did not state a cause of action under the original act. We think that ruling was right. The terms of that act were such that its application depended, first, upon the carrier being engaged in interstate commerce by railroad, and, second, upon the use of the car in moving interstate traffic. It did not embrace all cars used on the line of such a carrier, but only such as were used in interstate commerce. *Southern Railway Co.* v. *United States*, 222 U. S. 20, 25. The act was amended March 2, 1903, 32 Stat. 943, c. 976, so as to include all cars "used on any railroad engaged in interstate commerce," but the amendment came too late to be of any avail to the plaintiff.

In 1908, after the case had been twice tried without any

decisive result, the plaintiff sought to amend his petition by charging that the cars were used in moving interstate traffic, but the application was denied, the period of limitation having expired in the meantime. Error is assigned upon this ruling; but as it involved only a question of pleading and practice under the laws of the State, it is not subject to review by us. *Texas & New Orleans R. R. Co.* v. *Miller*, 221 U. S. 408, 416.

It also was held that the evidence produced upon the third trial was not sufficient to sustain a recovery under the petition, and error is assigned upon this. As the petition did not state a cause of action under the Safety Appliance Act, but at most a right of recovery at common law, the ruling upon the sufficiency of the evidence did not involve a Federal question, and so is not open to re-examination in this court.

Finding no error in the record in respect of any Federal right, the judgment must be

Affirmed.

STANDARD OIL COMPANY OF INDIANA *v.* STATE OF MISSOURI ON THE INFORMATION OF HADLEY, ATTORNEY GENERAL, SUCCEEDED BY MAJOR.

REPUBLIC OIL COMPANY *v.* SAME

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

Nos. 47, 48. Argued November 8, 9, 1911.—Decided April 1, 1912.

It is essential to the validity of a judgment that the court rendering it have jurisdiction of the subject-matter and of the parties; but it is for the highest court of a State to determine its own jurisdiction and that of the local tribunals.

Where the constitution of a State gives to its highest court the power

to issue writs of *quo warranto* and to hear and determine the same, judgment of ouster and fine entered by that court implies that it had jurisdiction to so decide and enter judgment and is conclusive upon this court whether the judgment is civil or criminal or both. *Standard Oil Co.* v. *Tennessee*, 217 U. S. 420.

Under due process of law one is entitled to notice and opportunity to be heard, and the notice must correspond to the hearing and the relief must be appropriate to the notice and the hearing.

Even a court of original general jurisdiction, civil and criminal, cannot enter a judgment beyond the claim asserted. It would not be due process of law.

Quære: Whether under general rules, information in the nature of *quo warranto* is a civil, or criminal, proceeding, and whether under general allegations of misuse, with only a prayer for ouster, a fine may be imposed in those jurisdictions where *quo warranto* has ceased to be a criminal proceeding.

Whatever the rule elsewhere, in Missouri a corporation may in *quo warranto* be subjected to a money judgment, whether in nature of fine or damages for breach of implied contract not to violate its franchise.

The prayer for relief is not a part of the notice guaranteed by the due process clause of the Constitution. The facts state the limit of the relief.

It is not a denial of due process of law for a court having jurisdiction to determine *quo warranto* and to enter judgment for a fine because there is no statute fixing the maximum penalty.

The power to fine reposed in a court of last resort is not unlimited, but is limited by the obligation not to impose excessive fines.

Right of appeal is not essential to due process of law, and the legislature may determine where final power shall be lodged and litigation cease. *Twining* v. *New Jersey*, 211 U. S. 111.

If due process has been accorded as to notice and opportunity to be heard, it is not for this court to determine whether error has been committed in construction of statute or common law.

If the judgment of the state court is not void, this court cannot consider collateral and non-Federal questions.

A corporation tried under information in the nature of *quo warranto* for combination in restraint of trade and sentenced to ouster and fine is not denied equal protection of the law, because corporations prosecuted under the anti-trust statute of the State would not be subjected to as severe a penalty.

The highest court of Missouri having held that *quo warranto* for mis-

user can be maintained against a corporation for entering into a combination in restraint of trade, the validity or invalidity of the anti-trust statute of that State has no bearing on the subject.

If the judgment of the state court cannot be reversed on the constitutional ground, it cannot be modified or amended by this court.

This court has no right to assume that a state statute will be so applied as to interfere with the constitutional right of a corporation to carry on interstate business.

218 Missouri, 1, affirmed.

WRIT of error to a judgment of ouster and fine against plaintiffs in error in original *quo warranto* proceedings in the Supreme Court of Missouri.

The Missouri Anti-trust Act (Rev. Stat. of 1899, §§ 8968, 8971) provides that any person or corporation which shall form a combination in restraint of trade shall be deemed guilty of a conspiracy to defraud, and on conviction shall be subject to a penalty of not less than $5 nor more than $100 per day for each day the combination continues, and in addition the guilty corporation shall have its franchises forfeited.

In April, 1905, while this act was in force, the Attorney General filed an information in the nature of a writ of *quo warranto* against the Standard Oil Company and the Republic Oil Company, foreign corporations, holding licenses to do business in Missouri, and the Waters-Pierce Oil Company, a domestic company, alleging that between the day of 1901, and March 29, 1905, they had formed and maintained a combination to prevent competition in the buying, selling and refining oil to the great damage of the people of Missouri.

The information contained no reference to the Anti-trust Act further than was involved in the allegation that "by reason of the premises, said respondents, . . . grossly offended against the laws of the State, and wilfully and flagrantly abused and misused their . . . franchises . . . and their acts . . . constitute a

wilful and malicious perversion of the franchise granted the said corporations . . . Wherefore, your Informant, prosecuting in this behalf for the State of Missouri, prays" that each of the defendants be ousted of their said corporate franchises and license to do business under the laws of the State.

The defendants answered, denying all the allegations of the petition and moving to dismiss on many grounds not material to be considered here. The case was referred to a commissioner to take testimony and report findings of fact and conclusions of law.

While the case was under consideration the anti-trust statute was amended in March, 1907, so as to provide that if any corporation should be found guilty of a violation of the provisions of the act its charter or license should be forfeited, and the court might also forfeit any or all of its property to the State, or cancel its right to do business, or the court might assess a fine. It was provided that the act should not operate to release any penalty, forfeiture or liability already incurred.

After the passage of this amendment, making new and increased penalties for a violation of the anti-trust statute, the commissioner made his report, finding (May 24, 1907), against the defendants on the law and the fact. On June 22, 1907, the Republic Oil Company filed with the Secretary of State, in statutory form, a notice of its withdrawal from the State. On October 23, 1907, the fact of this withdrawal was brought to the attention of the court, and a motion was made that the case be abated so far as the Republic Oil Company was concerned. The motion was overruled, and later the court found that each of the defendants had entered into a combination in restraint of trade and prevented and destroyed competition. And it was adjudged that the defendants had each forfeited their right to do business, and they were each ousted of any and all right and franchise and fined

$50,000. In view of the capital of the company and the amount of profits that had been made during the period of the combination, some members of the court expressed the opinion that the fine should be $1,000,000.

A motion for rehearing was denied. The Waters-Pierce Oil Company paid the fine and complied with conditions, by virtue of which it was permitted to continue to do business in the State. The other two defendants brought the case here.

It is alleged that—

(*b*) "The court held that this was a civil proceeding, and that it had no criminal jurisdiction. It then, in addition to an ouster, adjudged that this respondent should pay a fine of $50,000. This fine was at least the exercise of criminal jurisdiction in an original proceeding, which was beyond the court's power and jurisdiction. The court thereby takes from the respondent its property without due process of law, discriminates against respondent, and refuses to accord to it the equal protection of the law, all of which is contrary to the Fourteenth Amendment to the Constitution of the United States."

There are various assignments of error challenging the constitutionality of the anti-trust statute, on the ground that it deprived defendants of their property without due process of law and interfered with interstate commerce. It was also claimed that the defendants were denied the equal protection of the law, in that in forfeiting their franchise and imposing a fine of $50,000, without a jury trial, a different procedure had been adopted and a different judgment entered from that which could have been rendered on conviction by a jury for violation of the anti-trust statute.

The defendants (now plaintiffs in error) sought first a reversal of the judgment of the Supreme Court of Missouri, and, in the alternative, a modification of the judgment.

To this end attention was called to the fact that the plaintiffs in error were parties in the case of *United States* v. *Standard Oil Company et al.* They pray that the judgment herein be modified so as to provide that it should not be held to conflict with any decree entered in that equity cause so far as concerned property in Missouri belonging to plaintiffs in error.

It was also urged that the statute making it a felony for any person to sell or deal in articles manufactured by a corporation whose license had been forfeited, would operate to destroy the value of the plaintiff's property in Missouri, and would in effect prevent them from engaging in interstate commerce. They moved that the judgment be modified here so as to provide against any such result.

Mr. Frank Hagerman, with whom *Mr. Alfred D. Eddy* and *Mr. Robert W. Stewart* were on the brief, for plaintiffs in error:

A judgment of ouster, coupled with a fine of $50,000, did not accord due process or the equal protection of the law. The cases below were civil, and distinguished from criminal. Const. of Missouri, Art. 6, §§ 2, 3, 22, 31. In Missouri the jurisdiction of the Supreme Court in *quo warranto* is original, civil, as distinguished from criminal, and there is no criminal jurisdiction except such as is appellate. *State* v. *Vallins*, 140 Missouri, 523, 535; *State* v. *Loan Company*, 142 Missouri, 325, 335; *Ames* v. *Kansas*, 111 U. S. 449, 461.

The cases, until judgment, proceeded upon the theory that they were wholly civil in their nature and no suggestion at any time was made by anyone that the respondents could be fined.

When a judgment was finally rendered against each respondent for an ouster and also for a fine of $50,000, there was a clear attempt to exercise the criminal power

of a court of justice; this too by a court which had no original criminal jurisdiction in a proceeding civil in its nature, and upon an information which asked no relief of a criminal nature and none in the way of an imposition of a fine. See § 2396, Rev. Stats., Missouri, 1899; *Kansas City* v. *Clark*, 68 Missouri, 588; 4 Black. Com. 5; *Kentucky* v. *Denison*, 24 How. 66.

Theretofore the power to impose a fine had been exercised, *State* v. *Armour Packing Co.*, 173 Missouri, 356, 393, only as an incident to the judgment of ouster, *i. e.*, the ouster was adjudged unless, as in the case of a remittitur of excessive damages, the defendant voluntarily elected to pay a sum of money called a fine. If the fine was not paid, it was neither due nor collectible, but the defendant was ousted of its franchises. *State* v. *Delmar Jockey Club*, 200 Missouri, 34, 69, 74.

At common law, no fine in a substantial sum could be imposed. *Ames* v. *Kansas*, 111 U. S. 449, 461; 3 Black. Com. 263; *The King* v. *Francis*, 2 T. R. 484; Bac. Ab., Title Information D; 2 Kyd on Corporations, 439.

In Missouri the common law so far as it authorized a fine in any case in excess of $200 was never adopted; see §§ 4151, 4152, Rev. Stats., 1899.

The Fourteenth Amendment accords to the defendant the right to due process and the equal protection of the law. The respondents had paid the statutory tax upon their capital and were granted the right to do business in Missouri for the remainder of their corporate existence, Rev. Stat., Missouri, 1899, §§ 1024, 1025, the same as if they were domestic corporations. To treat them, in a civil suit, which asked no such relief, as criminals and fine each of them $50,000, by an exercise of original criminal jurisdiction, upon the court's own suggestion, after the submission of the case and when the judgment was entered, was not due process of law, because at the threshold to that protection is the question of jurisdiction. If that

does not exist, there is no due process. *Twining* v. *New Jersey*, 211 U. S. 78, 111; *Scott* v. *McNeal*, 154 U. S. 34, 46; *Bell* v. *Bell* 181 U. S. 175, 178; *Andrews* v. *Andrews*, 188 U. S. 14.

The judgment of the court below did not accord the equal protection of the law, because when rendered it was for both ouster and fine. *Gulf &c.* v. *Ellis*, 165 U. S. 150, 154; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 559; *Southern Ry. Co.* v. *Green*, 216 U. S. 400.

United States v. *Standard Oil Co.*, 173 Fed. Rep. 177; *S. C.*, 221 U. S. 1, involved the question of whether there had been a violation of the Sherman Anti-trust Act by the Standard Oil form of organization and method of conducting business. The Sherman Act does not, in substance, differ from the statutes of Missouri as construed below, further than that one applies to interstate and the other to state transactions. The same facts which adjudged guilt below were here held to establish guilt under the Sherman Act. To prove the Government's case, all the evidence offered below in the Missouri case was, in fact, offered therein; the same reasons for a decree and judgment were given by both state and Federal courts. In the case under the Sherman Act the defendants were given a fixed time in which to reorganize so as to avoid the consequences which now confront them. When the reorganization takes effect, the trust will be dissolved and the existing evils destroyed. As the organization in both cases made guilt, the reorganization will make clean. Hence if that reorganization takes place, as this court has heretofore decided would be proper, no objection can be made of a further violation of the State law by reason of the original reorganization.

The large investments in Missouri are of great importance and entitled to serious consideration. The Standard Oil Company of Indiana was wholly owned by the Stand-

ard Oil Company of New Jersey. Upon reorganization its stock will be distributed to the individual stockholders of that company. Not so with the Waters-Pierce Company.

In case of absolute ouster, the consequences are fearful. If there be a literal construction and enforcement of § 8972, Rev. Stat., Missouri, 1899, and §§ 8969 and 8975, Laws of Missouri, 1907, pp. 379, 380, the property becomes practically confiscated, and any person dealing therewith a felon.

The judgment of ouster and a fine was clearly wrong as to the Republic Oil Company which voluntarily withdrew from the State. The action should, as to it, therefore, be simply abated at its costs.

The Republic Oil Company having withdrawn from the State, thereby gave to informant, in substance, the entire relief sought, which was solely exclusion from the State. To thereafter retain the case and, without any claim for such relief, or intimation before judgment that it could be granted, adjudge against that company a fine of $50,000, was clearly the exercise of criminal jurisdiction in an original civil proceeding. Neither the common law, statute nor constitution so authorized.

The effect of the judgment of ouster is confiscation. Under § 8972 (Rev. Stats. of Missouri, 1899) and §§ 8969, 8975 (Laws of Missouri, 1907, pp. 379, 380), the obligation of a contract is impaired and the equal protection of the law denied. It needs no argument to demonstrate that these sections do not accord the equal protection of the law.

Neither an offending corporation nor its successor or assign, to whom it may sell its plant, under the literal reading of the statute may in the State deal in a commodity made by it. No person may, in the State, deal in any commodity made by such corporation, its successor or assign. Individuals and partnerships engaged in the

same business and alike guilty of the same act and of a violation of the same statute, cannot be so punished. Their property receives no such blight. According to previous decisions, the illegality of such discrimination is too clear to admit of discussion. *Gulf &c. Railway Co.* v. *Ellis*, 165 U. S. 150, 154; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 559; *Southern Ry. Co.* v. *Green*, 216 U. S. 400.

Section 8972 denies freedom in making contracts. *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *Holden* v. *Hardy*, 169 U. S. 366, 390; *Lochner* v. *New York*, 198 U. S. 45, 53; *Adair* v. *United States*, 208 U. S. 161, 172, 173.

The statute is not one of exclusion; it applies alike to all corporations, domestic and foreign, and therefore cannot be upheld upon the ground of being a condition to a foreign corporation entering the State or remaining therein. *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 409.

So the Constitution of the United States is a protection against the act of the State regardless of the form which it takes or method it is to pursue. It may be by judgment of a court or come into existence for the first time by the effect to be given to such judgment. *Terre Haute &c. R. Co.* v. *Indiana*, 194 U. S. 579, 589; *Attorney General* v. *Lowry*, 199 U. S. 233, 239; *C., B. & Q. R. Co.* v. *Illinois*, 200 U. S. 561, 580; *West Chicago St. R. Co.* v. *Illinois*, 201 U. S. 506, 519, 520.

Here the court below enforced its own penalty of ouster for an abuse of a corporate privilege.

The judgment of ouster as entered and especially as it is to be enforced under § 8972, Rev. Stat. of Missouri, 1899, and § 8975, Laws of Missouri, 1907, 380, unwarrantably interferes with the right to do interstate business and hence it violates § 8 of Article I of the Constitution of the United States. *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S.

56; *International Text Book Co.* v. *Pigg*, 217 U. S. 91. The language of the judgment not only revokes the license, but also recites that the respondents are "hereby ousted of any and all rights accorded to them under the laws of this State from doing business in this State."

The judgment of ouster as written should not stand. If not absolutely reversed, it should at least be modified.

The statute, for the violation of which there was an ouster, was, prior to the trial, repealed, and it was not due process of law to enforce it. *State* v. *Centerville Bridge Co.*, 18 Alabama, 678, 681; *In re Franklin Telegraph Co.*, 119 Massachusetts, 449.

Mr. Elliott W. Major, Attorney General of the State of Missouri, and *Mr. Charles G. Revelle*, for defendants in error.

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

The Standard Oil Company and the Republic Oil Company by this writ of error seek to reverse a judgment of ouster and fine of $50,000, entered against each of them in original *quo warranto* proceedings by the Supreme Court of Missouri, contending that they are thereby deprived of property without due process of law and denied the equal protection of the law.

The briefs and arguments for the defendants were addressed mainly to the proposition that the fine of $50,000 was a criminal sentence in a civil suit and void because beyond the jurisdiction of the court, and, for the further reason, that the pleadings and prayer gave no notice which would support such a sentence.

1. It is, of course, essential to the validity of any judgment that the court rendering it should have had jurisdiction, not only of the parties, but of the subject-

matter. *Chicago, B. & Q. Ry. Co.* v. *Chicago*, 166 U. S. 226, 234, 247. But it is equally well settled that it is for the Supreme Court of a State finally to determine its own jurisdiction and that of other local tribunals, since the decision involves a construction of the laws of the State by which the court was organized. In this case the constitution of Missouri declared that "the Supreme Court shall have power to issue writs of *habeas corpus*, *quo warranto*, certiorari and other remedial writs, and to hear and determine the same." Its decision and judgment necessarily imply that under that clause of the constitution it had jurisdiction of the subject-matter and authority to enter judgment of ouster and fine in civil *quo warranto* proceedings. That ruling is conclusive upon us regardless whether the judgment is civil or criminal or both combined. *Standard Oil Co.* v. *Tennessee*, 217 U. S. 413, 420.

2. The Federal question is whether, in that court, with such jurisdiction, the defendants were denied due process of law. Under the Fourteenth Amendment they were entitled to notice and an opportunity to be heard. That necessarily required that the notice and the hearing should correspond, and that the relief granted should be appropriate to that which had been heard and determined on such notice. For even if a court has original general jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based.

"Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand,

the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. . . . The judgments mentioned, given in the cases supposed, would not be merely erroneous: they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases." *Windsor* v. *McVeigh*, 93 U. S. 274, 282. See also *Reynolds* v. *Stockton*, 140 U. S. 254, 265–268. *Barnes* v. *Railway*, 122 U. S. 1, 14.

The defendants claim that the present case is within this principle—that the judgment for a fine of $50,000—which some of the Missouri court thought should have been a million dollars—was not only a criminal sentence in a civil suit, but beyond the issues and the prayer for relief in the Information—and therefore void as having been in substance entered without notice and opportunity to be heard. This raises the old question whether Information in the nature of *quo warranto* is a civil or a criminal proceeding, and the further question whether, under general allegations of misuser in an Information with only a prayer for ouster, a fine may be imposed in those jurisdictions where *quo warranto* has ceased to be a criminal proceeding. The uncertainty as to the relief that may be granted in such case arises from the fact that at one time the proceeding was wholly criminal and those guilty of usurping a franchise were prosecuted by Information instead of by Indictment, and punished both by judgment of ouster and by fine. But in England before the Revolution, and since that date in most of the American States, including Missouri, *quo warranto* has been resorted to for the purpose of trying the civil right, and determining

whether the defendant had usurped or forfeited the franchise in question. After this method of procedure began to be used as a form of action to try title, it was inevitable that the civil feature would tend to dominate in fixing its character for all purposes. But the discussion as to the nature of such writs and the character of the judgment that could be entered, though not controlled by their use (*Coffey* v. *County of Harlan*, 204 U. S. 659, 664; *Huntington* v. *Attrill*, 146 U. S. 657, 667; *Boyd* v. *United States*, 116 U. S. 616, 634), has been prolonged by the retention of the words Information, Prosecute, Guilty, Punish, Fine—survivals of the period when the writ was a criminal proceeding in every respect.

In some jurisdictions the writ is still treated as criminal both in the procedure adopted and in the relief afforded. *State* v. *Kearn*, 17 R. I. 391, 401. But there are practically no decisions which deal with the nature and amount of the fine which can be entered, in States where, as in Missouri, *quo warranto* is treated as a purely civil proceeding. The references to the subject both in text-books and opinions are few and casual. They usually repeat Blackstone's statement (3 Comm. 262) that the writ is now used for trying the civil right, "the fine being nominal only." *Ames* v. *Kansas*, 111 U. S. 449, 470; *Commonwealth* v. *Woelper*, 3 Serg. & R. 29, 53; High on Extraordinary Legal Remedies, 593, 697, 702. These authorities and the general practice indicate that in most of the American States only a nominal fine can be imposed in *civil quo warranto* proceedings. We shall not enter upon any discussion of the question as to the character of the proceeding nor the amount and nature of the money judgment. For, in Missouri, and prior to the decision in this case, the rulings were to the effect that the Supreme Court of Missouri had jurisdiction not only to oust but to impose a substantial fine in *quo warranto*.

In 1865, under a constitution which, like the present,

conferred power "to issue writs of *quo warranto* and hear and determine the same," the court tried the case of *State ex Inf.* v. *Bermoudy*, 36 Missouri, 279, brought against the clerk of a Circuit Court for usurpation of the office. There was a prayer for judgment of ouster and costs. The court said:

"No evidence is offered to charge the defendant with any evil intent, and it being probable that he acted from mistaken views only, the court will not avail itself of the power given by law, to impose a fine on him, and will compel him to pay the costs only of this proceeding."

In 1902, in *State* v. *Armour Packing Co. et al.*, 173 Missouri, 356, 393, information in the nature of *quo warranto* was filed in the Supreme Court against three corporations, praying that their franchises be forfeited because they had formed and maintained a conspiracy in restraint of trade. The court held that, "under the circumstances, the judgment of absolute ouster is not necessary, but the needs of justice will be satisfied by the imposition of a fine." It thereupon adjudged that each of the defendants should pay the sum of $5,000 as a fine, together with the costs of court.

In *State ex Inf.* v. *Delmar Jockey Club*, 200 Missouri, 34, *quo warranto* was brought to forfeit the charter of the company, because it had violated a criminal statute prohibiting the sale of pools on horse races. A judgment of ouster was entered and a fine of $5,000 was imposed. On rehearing the judgment was amended and the provision for a fine omitted. Evidently this was not for want of jurisdiction to impose such sentence, but because it was considered that ouster was all that was demanded by the facts. This appears from the fact that in the present case the court adopted the language of the original Delmar decision, in which it was said that the fine is imposed for a violation of the corporation's implied con-

tract not to violate the franchise granted by the State (218 Missouri, 360). So that, whatever may be the rule elsewhere, in Missouri a corporation may in *quo warranto* be subjected to a money judgment—whether called a fine as punishment,—or damages for its implied contract not to violate its franchise.

3. But the defendants insist that even if the court had jurisdiction of the subject-matter and was authorized to impose a fine, there was nothing in the pleading to indicate that such an issue was to be tried, nor any prayer warranting such relief, and hence that the judgment is wanting in due process of law and void for want of notice of what was to be heard and determined. It is true that the Information did not ask for damages or that a fine should be imposed. But if this be treated as a criminal case a prayer was no more necessary than in an Indictment or ordinary Information, since such proceedings never contain any reference whatever to the judgment or sentence to be rendered on conviction. In civil suits the pleadings should no doubt contain a prayer for judgment so as to show that the judicial power of the court is invoked. The rules of practice also may well require that the plaintiff should indicate what remedy he seeks. But the Prayer does not constitute a part of the notice guaranteed by the Constitution. The facts stated fix the limit of the relief that can be granted. While the judgment must not go beyond that to which the plaintiff was entitled on proof of the allegations made, yet the court may grant other and different relief than that for which he prayed.

4. Nor, from a Federal standpoint, is there any invalidity in the judgment because there was no statute fixing a maximum penalty, no rule for measuring damages, and no hearing on a subject which it is claimed was not referred to in the Information. At common law, and under many English statutes, the amount of the fine to be im-

posed in criminal cases was not fixed. This was true of the statute of 9 Ann, chapter 20, which, in *quo warranto* cases, made it "lawful as well to give judgment of ouster as to fine for usurping or unlawfully exercising any office or franchise." The amount to be paid in all such cases was left to the discretion of the court, "regulated by the provisions of Magna Charta and the Bill of Rights that excessive fines ought not to be demanded." 4 Black. Comm. 378. Or, considering the fine as in the nature of a civil penalty, the case is within the principle which permits the recovery of punitive damages. They are not compensatory, nor is the amount measured by rule. But "where the defendant has acted wantonly or perversely, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations" (*Lake Shore &c. Ry. Co.* v. *Prentice*, 147 U. S. 101), damages may in some jurisdictions be assessed, even in civil cases, by way of punishment. It is true that, except in cases for the breach of a contract of marriage, punitive damages have been allowed only in actions for torts. But no Federal question arises on a ruling that, in Missouri, punitive damages may be recovered from a corporation for the violation of its implied contract when, as alleged in the Information, the defendants "wilfully and wantonly misused their licenses." *Iowa Central Ry.* v. *Iowa*, 160 U. S. 389.

The real objection is not so much to the existence of the power to fix the amount of the fine as the fact that, when exercised by the Supreme Court of the State, it is not subject to review, and is said to be unlimited. But it is limited. *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 111. It is limited by the obligation to administer justice, and to no more assess excessive damages than to impose excessive fines. But the power to render a final judgment must be lodged somewhere, and in every case a point is reached where litigation must cease. What that point is can be determined by the legislative power of the State,

for right of appeal is not essential to due process of law. *Twining* v. *New Jersey*, 211 U. S. 78, 111.

The Fourteenth Amendment guarantees that the defendant shall be given that character of notice and opportunity to be heard which is essential to due process of law. When that has been done the requirements of the Constitution are met, and it is not for this court to determine whether there has been an erroneous construction of statute or common law. *Iowa Central Railway* v. *Iowa*, 160 U. S. 389; *West* v. *Louisiana*, 194 U. S. 261. The matter was summed up by Justice Moody in *Twining* v. *New Jersey*, 211 U. S. 78, 110, where, citing many authorities, he said:

"Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, . . . and that there shall be notice and opportunity for hearing given the parties. . . . Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law. . . . "

There is nothing in the present record which takes the case out of that principle. This was not like a suit on a note resulting in a sentence to the penitentiary; nor does it resemble any of the extreme illustrations given in *Windsor* v. *McVeigh*, 93 U. S. 274, 282, in which, after a trial, the judgment of a court having jurisdiction might be invalidated because the relief so far exceeded the issue heard as, in effect, to deprive the defendant of the benefit of his constitutional right to notice. No such question is presented in the present case, for the plaintiffs in error were bound to know that, under the laws of Missouri, the court, on proof of the charge contained in the Information, might impose a fine, and were afforded an op-

portunity to offer evidence in mitigation or reduction. On the application for a rehearing there was no claim that the fine was excessive, but the judgment was attacked on the ground that, for want both of jurisdiction and of notice, no such penalty could be imposed. We are concluded by the decision of the Supreme Court of the State as to its power; the judgment was within the issues submitted and is not void as having been entered without due process of law.

If the judgment was not void we cannot consider the collateral questions as to whether the suit abated against the Republic Oil Company when it gave notice of its withdrawal from the State; nor whether the act of 1905, amending the Anti-trust Act, operated to relieve the defendant from the penalties for all combinations in restraint of trade entered into prior to the adoption of the amending statute. These are non-federal questions.

5. It is further contended that the defendants were denied the equal protection of the law. This claim is based upon the fact that without indictment or trial by jury they were ousted of their franchise and subjected to a fine of $50,000 at the discretion of the Supreme Court, while corporations prosecuted in the Circuit Court for the identically same acts in violation of the anti-trust statute were entitled to a trial by jury and, if convicted, could be ousted of their franchises and subjected to a fine not to exceed $100 per day, during the time the combination continued in effect.

But proceedings by Information in the nature of *quo warranto* differ in form and consequence from a prosecution by indictment for violation of a criminal statute. In the one the State proceeds for a violation of the company's private contract—in the other it prosecutes for a violation of public law. The corporation may be deprived of its franchise for nonuser—a mere failure to act. It may also be deprived of its charter for that which, though

innocent in itself, is beyond the power conferred upon it as an artificial person. If, however, the act of misuser is not only *ultra vires* but criminal, there is no merger of the civil liability in the criminal offence. Separate proceedings may be instituted—one to secure the civil judgment, and the other to enforce the criminal law. Both cases may involve a consideration of the same facts; and evidence warranting a judgment of ouster may be sufficient to sustain a conviction for crime. A judgment may in one case sometimes be a bar to the other; but neither remedy is exclusive. The double liability, in civil and criminal proceedings, finds its counterpart in many instances, as, for example, where an attorney is disbarred or ousted of his right to practice in the court because of conduct for which he may likewise be prosecuted and fined.

In addition to these considerations it is to be noted that though the Anti-trust Act provides for penalties somewhat similar to those which may be entered in *quo warranto* proceedings, the statute did not, and, as held by the Supreme Court, could not lessen the power conferred upon it to hear and determine *quo warranto* proceedings and to enter judgments which on general principles appertained to the exercise of such constitutional jurisdiction. *Standard Oil Co.* v. *Tennessee*, 217 U. S. 413, 421; *Delmar Jockey Club* v. *Missouri*, 210 U. S. 324.

It was pointed out in the opinion (218 Missouri, 349), that where a corporation had entered into a combination in restraint of trade, it thereby offended against the law of its creation, and consequently forfeited its right longer to exercise its franchise. It was thereupon held, that in Missouri *quo warranto* might have been instituted for such acts of misuser, even though there had been no criminal statute on the subject. For this reason neither the validity nor invalidity of the anti-trust statute have any bearing on the case. The plaintiffs in error cannot

complain that they were deprived of the equal protection of the law, because in the civil proceeding they were not tried in the manner, and subjected to the judgment, appropriate in criminal cases.

If the plaintiffs in error were afforded due process of law, and were not deprived of the equal protection of the law, the judgment cannot be reversed. And, if it cannot be reversed, it cannot be modified to provide that it shall not be construed to conflict with a decree entered in an equity cause in another court to which plaintiffs are parties. Neither can it be amended by adding a provision that the judgment of ouster shall not operate to make those who buy plaintiff's products subject to prosecution, under the act of 1907, making it a felony for any person to deal in articles manufactured by a corporation whose license had been forfeited. This statute which, it is said, will deprive plaintiffs of the right to do interstate business, is not before us. We have no right to assume that it will be applied so as to interfere with any right, which plaintiffs have, under the Constitution, to do interstate business.

Affirmed.

CROZIER *v.* FRIED. KRUPP AKTIENGESELLSCHAFT.

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

No. 8. Argued April 30, 1911.—Decided April 8, 1912.

Prior to the passage of the act of June 25, 1910, 36 Stat. 851, c. 423, a patentee, whose patent was infringed by an officer of the United States, could not sue the United States unless a contract to pay was implied; and the object of the statute is to afford a remedy under circumstances where no contract can be implied, but where the

property rights of the inventor have been appropriated by an officer of the United States for its benefit and the acts of such officer ratified by the Government by the adoption of such act.

Compensation for property taken under eminent domain need not necessarily be made in advance of the taking if adequate means be provided for a reasonably just and prompt ascertainment and payment thereof.

The duty to provide for payment of compensation for property taken under eminent domain may be adequately fulfilled by an assumption of such duty by a pledge either express or by necessary implication of the public good faith to that end.

The act of June 25, 1910, having afforded a remedy for a patentee whose property rights have been appropriated by an officer of the United States for the benefit of the Government, such patentee is entitled to maintain an action in the Court of Claims to have his compensation determined, and the statute makes full and adequate provisions for the exercise of power of eminent domain.

Since the enactment of the act of June 25, 1910, a patentee cannot maintain an action for injunction against an officer of the United States for infringing his patent for the benefit of the Government; his remedy is to sue in the Court of Claims for compensation.

In this case *held* that although this action was commenced before June 25, 1910, as it was confined solely to obtaining an injunction against future use, which cannot now be allowed, the action must be dismissed without prejudice to the right of the patentee to proceed in the Court of Claims for compensation under the act of 1910.

32 App. D. C. 1, reversed.

THE facts, which involve the right of a patentee to enjoin an officer of the United States from using the patent, and the construction and effect of the act of June 25, 1910, conferring jurisdiction on the Court of Claims in certain instances of claims of patentees against the United States, for use of patents, are stated in the opinion.

Mr. Stuart McNamara, Special Assistant to the Attorney General, with whom *The Attorney General* was on the brief, for petitioner:

The suit is unauthorized, being either against the United States directly, which is the only person to be

affected by the decree, in which case a necessary party is wanting; or indirectly against the United States through the person of its officer and agent, for which proceeding no authority is vouchsafed by law.

The rule that the Government is immune from suit except where immunity is waived applies to the United States. Bracton, de Leg., 168 B; Staunford Prerogative, 72 B; Hale, Analysis of Law, § 9; *Doe* v. *Roe*, 8 Mees. and W. 579. It cannot be subjected to legal proceedings at law or in equity without its consent, and whoever institutes such proceedings must bring his case within the authority of some act of Congress. *United States* v. *Clark*, 8 Pet. 444. The same exemption from judicial process extends to the property of the United States and for the same reasons. *The Siren*, 7 Wall. 152, 154.

The United States has consented to be sued through successive acts of Congress. These suits must be filed in the Court of Claims or in the Circuit or District Courts of the United States. The first consent was granted in the act of February 24, 1855, 10 Stat., c. 122, p. 612, followed by the act of March 3, 1863, 12 Stat., c. 92, p. 765, and the act of March 3, 1887, 24 Stat., c. 359, p. 509, with amendments, and finally in the recent act (passed since the decree below) of June 25, 1910, 36 Stat., c. 423, p. 853.

Under the statutes the United States may be sued on a contract where it or its representatives have used the inventions under a contract made by the United States with the owner of the invention. *United States* v. *Palmer*, 128 U. S. 262; *United States* v. *Berdan Company*, 156 U. S. 552. The United States may also be sued under an implied contract, where it has appropriated the patented property of an individual under circumstances implying an agreement on the part of the Government to pay reasonable compensation therefor. *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645; *United States* v. *Alexander*, 148 U. S. 186, 191. But the Government

cannot be sued in cases of tort. The United States has not consented to be sued in actions sounding in tort for wrongs done by their officers, even though in the discharge of official duties. *Gibbons* v. *United States*, 8 Wall. 269; *Langford* v. *United States*, 101 U. S. 341; *Hill* v. *United States*, 149 U. S. 593; *Schillinger* v. *United States*, 155 U. S. 163; *Russell* v. *United States*, 182 U. S. 516; *Stanley* v. *Schwalby*, 147 U. S. 508, 512.

This immunity does not extend to the officers of the Government. In times of peace they are personally liable to an individual whose rights of property they have wrongfully invaded, even by authority of the United States. *Bates* v. *Clark*, 95 U. S. 204. Such officers, although acting under the orders of the Government, are personally liable to be sued for their own infringement of a patent. *Cammeyer* v. *Newton*, 94 U. S. 225, 235.

In the recent act, approved June 25, 1910, the patentee is given still further authority to sue the United States, and he may now file suit in the Court of Claims to recover compensation where his patents have been used without his consent, though there be no contract with the Government, express or implied. The conceit of suing the officer in this case does not save the proceeding from its necessary gravitation into its reality as a suit against the United States and its property. The United States cannot be sued in this indirect manner any more readily than in a direct proceeding. *Belknap* v. *Schild*, 161 U. S. 10; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601.

The petitioner has no interest in the suit, has made no profits, and no damages are asked from him.

The frame of the bill seeking to enjoin the future making of field guns and carriages does not take the case out of the rule. The injunction, if granted, necessarily affects only the Government and its property. *Dashiell* v. *Grosvenor*, 162 U. S. 424.

The dominion of the owner of a patent confers no

rights greater than those of the owner of other property. He may secure compensation from the Government for the taking of his patented property, but he may not restrain the taking. *Schillinger* v. *United States*, 155 U. S. 163, 168.

A very important branch of public policy supports the doctrine of the immunity of the United States from being sued and enjoined by a patentee under such circumstances as these. The Government has reserved no right in the patents conferred superior to that bestowed, but it must retain its own sovereignty, one incident of which is the right to be free from being enjoined in its public works whenever a litigant may conceive an infringement and resort to suit.

Plain, adequate, and complete remedy may be had by respondent for the invasion of its patents and no circumstances of the case warrant the court's interference by injunction, even if jurisdiction to do so otherwise existed. *Bates* v. *Clark*, 95 U. S. 204; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Armstrong-Whitworth Co.* v. *Norton*, 15 App. D. C. 223; *United States* v. *Lee*, 106 U. S. 196.

Wholly apart from the considerations which apply to a case where, as in the case at bar, effort is being made to enjoin the United States, there is still no authority for the injunction even were both parties private litigants, for under the circumstances the rule of the apportionment of hardships would be invoked and the injunction accordingly denied. Courts of equity frequently weigh the relative hardship inuring to the complainant if the injunction be denied, and to the defendant, if it be granted. And if it appear that the injury resulting to the defendant from the granting of the injunction would be harsher and more oppressive than that falling to the complainant if it be denied, the courts will remit the complainant to his other remedy and refuse to enjoin. *Gerken* v. *Hall*, 71 N. Y. Suppl. 753; *Gray* v. *Patterson*, 45 Atl. Rep.

995, N. J., 1900; *Lloyd* v. *Catlin Co.*, 210 Illinois, 460; *Smith* v. *Sands*, 24 Fed. Rep. 470; *Bowers Dredging Co.* v. *N. Y. Dredging Co.*, 77 Fed Rep. 980; *Huntington* v. *Alpha Portland Cement Co.*, 91 Fed. Rep. 534.

Mr. William A. Jenner for respondent:

The right of a patentee to make, use and vend the patented invention is exclusive of the Government of the United States as well as of all others, and any use of such invention unauthorized by the owner of the letters patent, whether done directly by the United States or indirectly through one of its officers, is a violation of that right. *Belknap* v. *Schild*, 161 U. S. 10; *Hollister* v. *Benedict Mfg. Co.*, 113 U. S. 59; *James* v. *Campbell*, 104 U. S. 356; *Cammeyer* v. *Newton*, 94 U. S. 225, 235; *United States* v. *Burns*, 12 Wall. 246.

The fact that the invasion of a plaintiff's property is done by a defendant while acting in his official capacity as an officer of the United States Government or of a state government does not of itself justify the wrong nor deprive plaintiff of the relief which otherwise the court would grant. *Davis* v. *Gray*, 16 Wall. 203; *Osborn* v. *United States Bank*, 9 Wheat. 738; *Board of Liquidation* v. *McComb*, 92 U. S. 531, 541; *Allen* v. *Baltimore & Ohio R. R.*, 114 U. S. 311; *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *Howell* v. *Miller*, 91 Fed. Rep. 129; *American School of Healing* v. *McAnnulty*, 187 U. S. 94; *United States* v. *Lee*, 106 U. S. 196; *Tindal* v. *Wesley*, 167 U. S. 204; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Bates* v. *Clark*, 95 U. S. 204; *Teal* v. *Felton*, 12 How. 284; *Little* v. *Barreme*, 2 Cr. 169; *Elliott* v. *Swarthout*, 10 Pet. 137. *Belknap* v. *Schild*, 161 U. S. 10; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, do not sustain the defendant's contention, and the facts and the prayer for relief in those cases are materially different from those in the case at bar.

The courts have frequently entertained jurisdiction of actions brought to enjoin officers of the United States from infringement of letters patent. *Dashiell* v. *Grosvenor*, 162 U. S. 425; *Cammeyer* v. *Newton*, 94 U. S. 225; *James* v. *Campbell*, 104 U. S. 356; *Hollister* v. *Mfg. Co.*, 113 U. S. 59.

The argument that an injunction against the manufacture by defendant of guns and gun carriages infringing complainant's patent would in effect be an injunction against the free use by the United States of the material at its arsenals used in the manufacture of guns and gun carriages, and that the case is within *Belknap* v. *Schild* and *International Postal Supply Co.* v. *Bruce*, is untenable. See *Howell* v. *Miller*, 91 Fed. Rep. 129.

The complainant had no remedy at law for the infringement by defendant of its patents.

It was intimated in *James* v. *Campbell*, 104 U. S. 356, and *Hollister* v. *Manufacturing Co.*, 113 U. S. 59, that an action would lie within the jurisdiction of the Court of Claims to recover from the Government upon an implied promise to compensate a patentee for the use by the Government, or one of its officers, of his patented invention, but it was later settled that such a suit could not be maintained either in the Court of Claims, *Shillinger* v. *United States*, 155 U. S. 163, or in the Circuit Court of the United States, *Hill* v. *United States*, 149 U. S. 593.

If the officers of the United States have since the act approved June 25, 1910, used or shall hereafter use complainant's patented design, it is possible or probable that complainant may receive reasonable compensation under that act in the Court of Claims, but that possibility does not operate to defeat complainant's right to the equitable relief sought when the bill was filed.

The general rule is that where jurisdiction in equity has become established, a subsequent statute creating a remedy at law or removing the obstacles at law upon

the existence of which the equity jurisdiction was originally founded does not oust equity of that jurisdiction, unless the statute affirmatively discloses the legislative intent to make the legal remedy exclusive. 16 Cyc. 34, and cases cited, and see *White* v. *Meday*, 2 Edw. Ch. (N. Y.) 486; *New York Ins. Co.* v. *Roulet*, 24 Wend. 504–514; *Mayne* v. *Griswold*, 2 Sandf. (Sup. Ct. N. Y.) 463; *Saitly* v. *Elmore*, 2 Paige, 497; *Labadie* v. *Hewitt*, 85 Illinois, 341; *McNab* v. *Heald*, 41 Illinois, 326; *Crass* v. *R. R.*, 96 Alabama, 447; *Hardeman* v. *Batterlea*, 53 Georgia, 36.

The act of June 25, 1910, does not evidence any intent to oust equity when its jurisdiction had attached because there is no expression, and the act is not retroactive.

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

The defendant, a corporation organized under the laws of the German Empire, commenced this suit on June 8, 1907, in the Supreme Court of the District of Columbia. Relief was sought because of alleged infringements of three described letters patent of the United States, originally issued in the name of Fried. Krupp and assigned to the corporation. Two of the patents, numbered 722,724 and 722,725, were granted in 1903, and the third, issued in 1905, was numbered 791,347. The patents related to improvements in guns and gun carriages. The petitioner here, William Crozier, was named as sole defendant in the bill.

After full averments as to the issue of the patents and the assignments by which the plaintiff had become the owner thereof, it was charged that the defendant Crozier well knowing of the existence of the patents "in violation and infringement of said letters patent and of the exclusive rights granted and secured under said letters patent . . . since the seventeenth day of March,

1903, and within the period of six (6) years prior to the filing of this bill of complaint, in the city of Bridgeport, State of Connecticut, and in the Watervliet Arsenal in the State of New York, and in the Rock Island Arsenal in the State of Illinois, . . . and elsewhere in the United States," has "made and used, or caused to be made and used, is now making and causing to be made and used and threatens and intends to continue to make or cause to be made and to use and cause to be used," guns and recoil-brake apparatus and guns and gun carriages embodying the inventions owned by the complainant, in violation of the rights secured by the patents.

The prayer was for a preliminary and a permanent writ enjoining the defendant "his agents and employés, from making or using or causing to be made or used any guns or gun carriages or other devices which shall contain or employ the inventions or any of the inventions covered and secured by said letters patent or any of said letters patent." There was also a prayer that the defendant "may be compelled to account for and pay over to your orator all the profits which the defendant has or had derived from any making or using of any gun or any specimen or device covered and secured by said letters patent or any of said letters patent, and that also the defendant be decreed to pay all damages which your orator has incurred or shall incur upon account of defendant's infringement of any of said letters patent, with such increase thereof as shall be meet. . . ."

A stipulation was filed in the cause, in which, while expressly reserving the right of the defendant "to demur or otherwise plead to the bill of complaint, because of lack of jurisdiction on any ground, it was agreed as follows:

"The complainant stipulates that no pecuniary benefit has accrued to the defendant, William Crozier, by reason of the acts set forth in the bill, and complainant waives any claim against said defendant for an accounting of the

profits or for damages, if any, arising out of or suffered by the complainant by reason of the acts and things set forth in the bill. Defendant stipulates and agrees that the Government of the United States of America and the Ordnance Department of said Government have manufactured, are now manufacturing, and intend to continue the manufacture and use, or to cause to be manufactured for their use, field guns and carriages made after the so-called 'Model of 1902' referred to in the bill of complaint, the claim or claims of complainant being in nowise admitted; that the defendant, William Crozier, sued in this suit is an officer in the United States Army and Chief of the Ordnance of the United States Army, and is the officer in the service of the United States who directs and is in charge of such manufacture of said field guns and carriages for the United States. The complainant concedes that the defendant, William Crozier, is such officer. The defendant further stipulates and agrees that the complainant is a corporation organized and existing under the laws of the Empire of Germany and a citizen of said Empire and a subject of the Emperor of Germany.

"Further, complainant desires to amend its bill in certain particulars, and the defendant desires to consent thereto. It is therefore stipulated that the bill of complaint herein be amended to read as follows: In paragraph XXXII of said bill shall be eliminated and expunged the words 'a preliminary and also,' and also the words 'or using' and the words 'or used,' so that the said 32nd paragraph of said bill of complaint shall, when so amended, read as follows:

"'And your orator therefore prays your honors to grant unto your orator a permanent writ of injunction issuing out of and under the seal of this honorable court directed to the said defendant, William Crozier, and strictly enjoining him, his agents and employés, from making or causing to be made any guns or gun carriages or other

devices which shall contain or employ the inventions or any of the inventions covered and secured by said letters patent or any of said letters patent.'

"Paragraph XXXIII of said bill of complaint shall be amended so as to eliminate and expunge from said paragraph the following words:

"'by a decree of this court may be compelled to account for and pay over to your orator all the profits which the defendant has or had derived from any making or using of any gun or any specimen or device covered and secured by said letters patent or any of said letters patent, and that also the defendant be decreed to pay all damages which your orator has incurred or shall incur upon account of defendant's infringement of any of such letters patent, with such increase thereof as shall seem meet, and that also the defendant'

"so that the paragraph marked XXXIII when so amended shall read as follows:

"'And your orator further prays that the defendant be decreed to pay the costs of this suit and that your orator may have such other and further relief as the equity of the cause or the statutes of the United States may require and to this court may seem just.'"

The defendant demurred to the amended bill on various grounds, all of which, in substance, challenged the jurisdiction of the court over the cause on the ground that the suit was really against the United States.

The demurrer was sustained and the bill dismissed. The Court of Appeals reversed and remanded the cause for further proceedings not inconsistent with its opinion. 32 App. D. C. 1.

The court held that there was a broad distinction between interfering by injunction with the use by the United States of its property and the granting of a writ of injunction for the purpose of preventing the wrongful taking of private property, even although the individual

who was enjoined from such taking was an officer of the Government, and although the purpose of the proposed taking was to appropriate the private property when taken to a governmental purpose. The cases of *Belknap* v. *Schild*, 161 U. S. 10, and *International Postal Supply Company* v. *Bruce*, 194 U. S. 601, were analyzed and held to be apposite solely to the first proposition, that is the want of authority to interfere with the property of the United States used for a governmental purpose. The court said:

"It will thus be seen that in the *Belknap* and *Bruce Cases* the subject-matter involved was property of the United States, and that, therefore, the United States was necessarily a party. In the present case it is not sought to disturb the United States in the possession and use of the guns already manufactured. The court is not asked to deal with property of the United States. The plaintiff simply asks that an officer of the United States be restrained from invading rights granted by the Government itself. The acts complained of are not only not sanctioned by any law, but are inconsistent with the patent laws of the United States."

A writ of certiorari was thereupon allowed.

The arguments at bar ultimately considered but affirm on the one hand and deny on the other the ground of distinction upon which the court below placed its ruling and by which the decisions in *Belknap* v. *Schild* and *International Postal Supply Company* v. *Bruce* were held to be distinguishable from the case in hand, and therefore not to be controlling. Thus the Government insists that although under the stipulation and the bill as amended, it resulted that no damages were sought in respect to use by the Government of the patented inventions, and no interference of any kind was asked with property belonging to the Government, nevertheless the suit was against the United States, because the defendant was conceded to be

an officer of the Army of the United States, engaged in the duty of making or causing to be made guns or gun carriages for the Army of the United States. This, it is contended, is demonstrated to be the case by considering that the right to enjoin the officer of the United States, which the court below upheld, virtually asserts the existence of a judicial power to close every arsenal of the United States. On the other hand, the plaintiff insists that the act of the officer in wrongfully attempting to take its property cannot be assumed to be a governmental act, but must be treated as an individual wrong which the courts have the authority to prevent. The exertion of the power to enjoin a wrong of that nature in order to prevent the illegal conversion of private property is, it is urged, a manifestly different thing from using the process of injunction to interfere with property in the possession of the Government and which is being used for a public purpose. But we do not think, under the conditions which presently exist, we are called upon to consider the correctness of the theory upon which the Court of Appeals placed its decision or the soundness of the contentions at bar by which that theory is supported on the one hand or assailed on the other. We reach this conclusion because since October 7, 1908, when the decision of the Court of Appeals was rendered, the subject to which the controversy relates was dealt with by Congress by a law enacted on June 25, 1910, 36 Stat., c. 423, p. 851, as follows:

"An Act To provide additional protection for owners of patents of the United States, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whenever an invention described in and covered by a patent of the United States shall hereafter be used by the United States without license of the owner thereof or lawful right to use the same, such owner may recover reasonable compensation for such use by suit in the Court

of Claims: *Provided, however,* That said Court of Claims shall not entertain a suit or reward [*sic*] compensation under the provisions of this Act where the claim for compensation is based on the use by the United States of any article heretofore owned, leased, used by, or in the possession of the United States: *Provided further,* That in any such suit the United States may avail itself of any and all defenses, general or special, which might be pleaded by a defendant in an action for infringement, as set forth in Title Sixty of the Revised Statutes, or otherwise: *And provided further,* That the benefits of this Act shall not inure to any patentee, who, when he makes such claim is in the employment or service of the Government of the United States; or the assignee of any such patentee; nor shall this Act apply to any device discovered or invented by such employé during the time of his employment or service."

The text of this statute leaves no room to doubt that it was adopted in contemplation of the contingency of the assertion by a patentee that rights secured to him by a patent had been invaded for the benefit of the United States by one of its officers, that is, that such officer under the conditions stated had infringed a patent.

The enactment of the statute, we think, grew out of the operation of the prior statute law concerning the right to sue the United States for the act of an officer in infringing a patent as interpreted by repeated decisions of this court. *United States* v. *Palmer,* 128 U. S. 62; *Schillinger* v. *United States,* 155 U. S. 163; *United States* v. *Berdan Fire-Arms Mfg. Co.,* 156 U. S. 552; *Russell* v. *United States,* 182 U. S. 516; *Harley* v. *United States,* 198 U. S. 229. The effect of the statute was thus pointed out in the last cited case. (198 U. S. p. 234.)

"We held in *Russell* v. *United States,* 182 U. S. 516, 530, that in order to give the Court of Claims jurisdiction, under the act of March 3, 1887, 24 Stat. 505, c. 359,

defining claims of which the Court of Claims had jurisdiction, the demand sued on must be founded on 'a convention between the parties—a coming together of minds.' And we excluded, as not meeting this condition, those contracts or obligations that the law is said to imply from a tort. *Schillinger* v. *United States*, 155 U. S. 163; *United States* v. *Berdan Fire-Arms Mfg. Co.*, 156 U. S. 552."

In other words, the situation prior to the passage of the act of 1910 was this. Where it was asserted that an officer of the Government had infringed a patent right belonging to another—in other words, had taken his property for the benefit of the Government—the power to sue the United States for redress did not obtain unless from the proof it was established that a contract to pay could be implied—that is to say, that no right of action existed against the United States for a mere act of wrongdoing by its officers. Evidently inspired by the injustice of this rule as applied to rights of the character of those embraced by patents, because of the frequent possibility of their infringement by the acts of officers under circumstances which would not justify the implication of a contract, the intention of the statute to create a remedy for this condition is illustrated by the declaration in the title that the statute was enacted "to provide additional protection for owners of patents." To secure this end, in comprehensive terms the statute provides that whenever an invention described in and covered by a patent of the United States "shall hereafter be used by the United States without license of the owner thereof or lawful right to use the same, such owner may recover reasonable compensation for such use by suit in the Court of Claims." That is to say, it adds to the right to sue the United States in the Court of Claims already conferred when contract relations exist the right to sue even although no element of contract is present. And to render the power thus conferred efficacious the statute endows any owner of

a patent with the right to establish contradictorily with the United States the truth of his belief that his rights have been in whole or in part appropriated by an officer of the United States, and if he does so establish such appropriation that the United States shall be considered as having ratified the act of the officer and be treated as responsible pecuniarily for the consequences. These results of the statute are the obvious consequences of the power which it confers upon the patentee to seek redress in the Court of Claims for any injury which he asserts may have been inflicted upon him by the unwarranted use of his patented invention and the nature and character of the defences which the statute prescribes may be made by the United States to such an action when brought. The adoption by the United States of the wrongful act of an officer is of course an adoption of the act when and as committed, and causes such act of the officer to be, in virtue of the statute, a rightful appropriation by the Government, for which compensation is provided. In substance, therefore, in this case, in view of the public nature of the subjects with which the patents in question are concerned and the undoubted authority of the United States as to such subjects to exert the power of eminent domain, the statute, looking at the substance of things, provides for the appropriation of a license to use the inventions, the appropriation thus made being sanctioned by the means of compensation for which the statute provides.

This being the substantial result of the statute, it remains only to determine whether its provisions are adequate to sustain and justify giving effect to its plain and beneficent purpose to furnish additional protection to owners of patents when their rights are infringed by the officers of the Government in the discharge of their public duties. This inquiry may be solved, under the conditions here involved, by taking the most exacting

aspect of the well established and indeed elementary requirements in favor of property rights essential to be afforded in order to justify the taking by government of private property for public use.[1] Indisputably the duty to make compensation does not inflexibly, in the absence of constitutional provisions requiring it, exact, first, that compensation should be made previous to the taking—that is, that the amount should be ascertained and paid in advance of the appropriation—it being sufficient, having relation to the nature and character of the property taken, that adequate means be provided for a reasonably just and prompt ascertainment and payment of the compensation; second, that, again always having reference to the nature and character of the property taken, its value and the surrounding circumstances, the duty to provide for payment of compensation may be adequately fulfilled by an assumption on the part of government of the duty to make prompt payment of the ascertained compensation—that is, by the pledge, either expressly or by necessary implication, of the public good faith to that end.

Coming to apply these principles and confining ourselves in their application, as we have done in their statement, strictly to the conditions here before us, that is, the intangible nature—patent rights—of the property taken, the great possibilities in the essential operations of government that such rights may be invaded by incorporating them into property of a public character, of the vital public interest involved in the subject-matter of the patents in question and the grave detriment to the very existence of government which might result from interference with the right of the Government to make and use

[1] *United States* v. *Russell*, 13 Wall. 623; *Cherokee Nation* v. *Southern Kan. Ry. Co.*, 135 U. S. 641; *Sweet* v. *Rechel*, 159 U. S. 380; see Lewis' Eminent Domain, 3d ed., vol. 2, §§ 675, 679, and Cooley Cons. Lim., 7th ed., p. 813.

instrumentalities of the character of those with which the patents in question are concerned, of the purpose which the statute manifests to add additional protection and sanction to private rights, and the pledge of the good faith of the Government which the statute plainly implies to appropriate for and pay the compensation when ascertained as provided in the statute, we think there is no room for doubt that the statute makes full and adequate provision for the exercise of the power of eminent domain for which considered in its final analysis it was the purpose of the statute to provide. Indeed, the desire to confine ourselves to the particular case before us has led us to state and limit the doctrine which we here apply, when it was possibly unnecessary to do so. We say this because no contention was made in argument by counsel for the corporation that the statute of 1910 does not provide methods of compensation adequate to the exercise of the power of taking for which the statute provides. Thus, in the argument, it is said: "If the officers of the United States have since the act . . . used or shall hereafter use complainant's patented design, it is possible or probable that complainant may receive reasonable compensation under the act in the Court of Claims,"—this statement being followed by an insistence that even although this be the case the statute is not controlling because it was enacted after the bill was filed and did not therefore retroactively deprive the court below of the power to afford relief under the conditions existing when the suit was commenced. The conclusion of the argument on this subject was thus stated:

"The general rule is that where jurisdiction in equity has been established a subsequent statute creating a remedy at law or removing the obstacle at law upon which the existence of the equity jurisdiction was originally founded does not oust equity of that jurisdiction unless the statute affirmatively discloses the legislative

intent to make the legal remedy exclusive . . . We cannot discover in the act of June 25, 1910, any evidence of an intent to oust equity when its jurisdiction had attached, because there is no expression and the act is not retroactive."

But this contention is either an afterthought or is occasioned by overlooking the amendment to the pleadings operated by the stipulation to which we have hitherto referred. By that stipulation every conceivable claim based on the prior use of infringing devices was withdrawn. The prayer for a preliminary restraint was waived and all right to an accounting was likewise withdrawn. As a result the case was confined solely to obtaining at the end of the suit a permanent injunction forbidding the making of, or causing to be made by the defendant, guns or gun carriages embodying the inventions owned by complainant.

Upon the hypothesis that the decree of the court below remanding the case for further proceedings not inconsistent with its opinion was correct under the conditions existing when it was rendered, clearly under the circumstances now existing, that is, the acquiring by the Government under the right of eminent domain, as the result of the statute of 1910, of a license to use the patented inventions in question, there could be no possible right to award at the end of a trial the permanent injunction to which the issue in the case was confined. Moreover, taking a broader view and supposing that a final decree granting a permanent injunction had been entered below, in view of the subject-matter of the controversy and the right of the United States to exert the power of eminent domain as to that subject, at most and in any event the injunction could rightfully only have been made to operate until the United States had appropriated the right to use the patented inventions, and as that event has happened the injunction, if granted, would no longer have operative

force. It follows that the decree of the Court of Appeals must be reversed with directions to that court to affirm the decree of the Supreme Court of the District of Columbia dismissing the bill, without prejudice however to the right of the defendant here, who was the complainant below, to proceed in the Court of Claims in accordance with the provisions of the act of 1910.

Reversed and remanded.

THE UNITED STATES *v.* SOCIÉTÉ ANONYME DES ANCIENS ETABLISSEMENTS CAIL.

SOCIÉTÉ ANONYME DES ANCIENS ETABLISSEMENTS CAIL *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 209, 210. Argued March 12, 13, 1912.—Decided April 8, 1912.

In order to find that there was an implied contract for use of a patent, there must be use with patentee's assent and agreement to pay something therefor, *United States* v. *Berdan Fire Arms Company*, 156 U. S. 552, and these elements may be collected from conduct of the parties, even if there are no explicit declarations.

Where the facts show that the patentee consented that the Government use his invention, and the proper officers of the Department in which it was used have stated that there is a claim for royalties if the patent is a valid one, the claim is founded on contract and the Court of Claims has jurisdiction.

The intention to plainly do a wrongful act by deliberately taking the property of another without compensation will not be imputed to officers of the United States without the most convincing proof.

The excellence of an ordnance invention is testified to by its use by the Government in guns for the national defense.

In this case, *held* that the De Bange gas check for large guns is a device of excellence, that the patents therefor are valid, and the gas checking device used by the Government is an infringement thereof.

The law secures the patentee against infringement by a use in other forms and proportions than those specifically described in the claims.

This court will not direct the Court of Claims to certify evidence and not its conclusions from the evidence. The rule is that the finding must be of the facts established by the evidence.

This court, in appeals from the Court of Claims, can only act upon the record; and a finding of that court that a definite amount of compensation is due from the Government for use of a patent, to which no objection is taken or exception reserved, is as finally determinative of the matter, as a special verdict of a jury. The evidence cannot be certified up so as to make such finding reviewable by this court. *United States* v. *New York Indians*, 173 U. S. 464, followed, and *Ceballos & Co.* v. *United States*, 214 U. S. 47, distinguished.

44 Ct. Cl. 610, affirmed.

THE facts, which involve the jurisdiction of the Court of Claims of claims of patentee of the De Bange gas check for use of that invention by the Government, whether there was such use and what the proper compensation should be therefor, are stated in the opinion.

Mr. Assistant Attorney General John Q. Thompson and *Mr. Malcolm A. Coles* for the United States.

Mr. Philip Mauro and *Mr. T. D. Merwin*, for appellee in No. 209 and appellant in No. 210.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This suit is for royalties alleged to be due for the use by the Government of a certain patented invention known as a "gas check" or "obturator," a device applied to breech-loading cannon to prevent the escape of gas.

The Court of Claims rendered judgment against the United States for the sum of $136,000. Both parties appeal, the United States contending against any judgment, the claimant contending for the recovery of a larger sum. No further distinction is necessary to be observed between the appeals. The discussion of the case will dispose of both.

The first contention of the Government is that the facts

set out in the findings did not constitute an implied contract in fact as distinguished from a tort, and that, therefore, the Court of Claims had no jurisdiction of the case.

Such a contract is necessary to sustain the exercise of jurisdiction. *Russell* v. *United States*, 182 U. S. 516, and cases cited. The Court of Claims decided that such a contract existed and that the jurisdiction of the court was established, citing *United States* v. *Berdan Fire Arms Mfg. Company*, 156 U. S. 552. The court said: "The findings disclose an invitation to present the details of the patent to the defendant [the Government], its examination by a board of officers appointed to investigate such inventions, and its final use without the slightest claim of ownership. Nothing appears to show an intention to dispute claimant's title to the patent, hence an implied contract arose to pay for such use."

In discussing the correctness of these conclusions we necessarily assume the validity of the patent, its utility and use by the Government, the question being only for the present whether such use was a trespass upon the rights of the claimant, or in concession of such rights and of an obligation to pay for them.

The findings lack, and, it may be, necessarily lack, definiteness. They trace the history and progress of the invention of gas checks from an early period to the culmination in the patent to Colonel De Bange, an officer of the French army, in 1884, granted upon an application made in 1883. It immediately attracted the notice of American army and naval officers and received favorable commendation in ordnance notes.

In 1883, under an act of Congress of that year (March 3, 1883, 22 Stat. 472, 474), a board was constituted known as the "Gun Foundry Board," composed of eminent officers of the army and navy, headed by Rear Admiral Simpson of the navy, whose duty it was, among others, as it is recited in the findings, to report on the establish-

ment of a Government foundry, "'or what other method, if any, should be adopted for the manufacture of heavy ordnance adapted to modern warfare, for the use of the army and navy of the United States.'"

The board visited the claimant's works at Paris on June 29, 1883. "In the official report of this board reference is made to a visit to the claimant's works at Paris, France, on August 29, 1883, and to the inspection by said board of the De Bange system of ordnance. In the said report of said board is the following:

"'*Breech fermeture.*—All the French guns are breech-loading, and are fitted with the interrupted screw system, as modified by Colonel De Bange to suit his gas check.

"'*Gas check.*—The De Bange gas check is universally employed.'"

Prior to the visit of the Gun Foundry Board the De Bange obturator was brought directly to the attention of the United States ordnance authorities through Lieutenant Commander Chadwick, naval attaché at London, to whom De Bange explained his invention and who gave to Lieutenant Commander Folger of the Bureau of Ordnance, Navy Department, a detailed description of the gas check, with a description of the method of making it, furnished by De Bange, subsequently (July 5, 1883) forwarding to the department the device, accompanied by the following letter:

"SIR: I have the honor to forward herewith a De Bange 'obturator,' which was kindly presented on request by the French minister of war.

"I am, very respectfully, your obedient servant,

F. E. CHADWICK,

Lt. Comdr., U. S. Navy, Naval Attaché.

"Commodore J. E. WALKER,

U. S. Navy, Chief of Bureau of Navigation,

Navy Department, Washington."

In 1884 the ordnance officers of the United States, after experimenting with the De Bange device, adopted it for heavy ordnance (5-inch caliber and upward) and have used no other device since.

"The United States Government [we quote from the findings] has never disputed the title of claimant's assignor, Colonel De Bange, as inventor of the said invention; but, on the contrary, the said invention has, ever since its adoption, been known in the service of the United States as the 'De Bange gas check,' and is described by that name in the official reports of the Secretaries of War and of the Navy."

The findings contain certain correspondence which is relied on by the Government to sustain its contention, and, as it is not possible to condense it, it is given in full:

"PARIS, *June 29, 1891.*

Colonel De Bange to H. E., the Minister Plenipotentiary of the United States.

"MR. MINISTER: In order to respond to the desire expressed by your excellency in the letter which you have done me the honor to address to me, I add some details to my previous observations.

"One of my patents bears the number 331,618; it relates to gun carriages; it is not very important because one can do without it; but the second, No. 301,220, which is connected with the obturation of guns and breech mechanism is of the highest importance. Without my obturator the loading of a gun by the breech is difficult and the service is rendered ineffectual. The metallic ring used in Germany is far from having its value and imparts to the gun a considerable inferiority. Thus all the makers of cannon are led to employ my invention, either openly or in a disguised form, styled by them improvement. The War and Navy Departments at New York, which are well acquainted with the question, will certainly not contest

the truth of my assertions; they have under their eyes, on trial, guns which speak for themselves.

"This is not the first time that I have had to complain of my idea being borrowed without my knowledge in France or abroad. The English Government particularly had taken up my system, and without my having demanded anything had offered me twenty thousand pounds sterling to indemnify me. I refused this offer, it is true, but because as a French officer I ought not to aid in the arming of a power which I do not consider as friendly. In part, deprived of my assistance, England has copied me badly and possesses but a moderate artillery.

"In any case, I appeal to the sentiments of equity of the Government of the United States, convinced that it will recognize easily the justice of my claim.

"Pray accept, &c., &c.,

(Sgd.) Colonel De Bange.

"United States Legation,
Naval Attaché,
Paris, July 2nd 1891.

The Naval Attaché at London suggested in a communication to Mr. Reid, our Minister there, that Colonel De Bange's letter be forwarded to the Navy Department. The Minister, however, referred it to the Secretary of State.

De Bange sent the following letter to the Secretary of the Navy:

"Versailles, near Paris, 16/8/91.

"*Colonel De Bange to Monsieur Benjamin F. Tracy, Secretary of the Navy at Washington.*

"Mr. Secretary: Some months ago I addressed the United States minister at Paris, verbally and by writing, several remarks on the subject of loans which I had made of my invention to the departments of War and of the Navy; finally, as I have undertaken to write to you directly, I now have the honor to lay before you the following:

"I had taken out letters patent, which treated of artillery in the United States, one number, 301,220, relative to l'obturation of guns, and of principal importance; the other number, 331,618, relative to the carriage.

"Furthermore, I have seen at Paris many of your officers to whom I furnished without reserve all the information which they have asked of me.

"Under these circumstances I hope that if the Government has desired to utilize my inventions, it will inform me; there has been no defect, and I have learned from a reliable source that my system was copied, unknown to me, by the departments of War and of the Navy, be it under the disguise of an improvement or be it openly.

"I regret that this has occurred, but in any case I consider that an indemnity is due me. If you will have the kindness to notify the Government of my claim, I am confident that it will see that justice is accorded me in the indemnity to which I believe myself to be entitled.

"Please accept, Mr. Secretary, the expression of sentiments of highest consideration, with which I am

"Your obedient servant,

"De Bange.

"Please reply.

This letter seems also to have been sent to the Department of State and referrred by it to the Secretary of the Navy, as appears from the following letter of the Chief of the Bureau of Ordnance:

"Bureau of Ordnance, *August 27, 1891.*

"Respectfully returned to the honorable Secretary of the Navy.

"The bureau has not manufactured and is not using any gun carriages which contain principles which could be held as infringing any claims secured in United States patent No. 331,618. The gas check which has been adopted for the naval guns of 6-in. calibre and upwards

resembles in certain features that described in United States patent No. 301,220, issued to Col. De Bange. It also differs from it materially in particulars which are original in this bureau.

"I am not in position to give an opinion as to the question of infringement, and have to suggest that the applicant refer the matter to the Court of Claims.

"The bureau will note for the information of the applicant that there are no funds appropriated or available for the payment of any claim that might be allowed by the Court of Claims, and that it will be necessary for the applicant to go to Congress for relief in the event of a decision being obtained which will warrant such action.

(Sgd.) WM. M. FOLGER,
Chief Bureau of Ordnance."

The Navy Department then addressed the Secretary of State as follows:

"NAVY DEPARTMENT,
"*Washington, September 3, 1891.*

"SIR: I have the honor to acknowledge the receipt of your communication of the 20th ultimo, enclosing copies of correspondence relating to a claim of Colonel De Bange, a retired officer of the French army, residing in Paris, France, who alleges the use by this Government of certain inventions patented by him in guns and gun carriages.

"In reply I have to state that the Chief of the Bureau of Ordnance, in this department, to whom the communication and accompanying papers were referred, reports as follows:

"' The bureau has not manufactured, and is not using, any gun carriages which contain principles which could be held as infringing any claims described in U. S. patent No. 331,618.

"' The gas check which has been adopted for the naval guns of 6-inch calibre and upwards resembles in certain

features that described in U. S. patent 301,220, issued to Colonel De Bange. It also differs from it materially in particulars which were original in this bureau.'

"In view of the statement made by the Chief of the Bureau of Ordnance, there appears to be no proper ground for the claim of Colonel De Bange.

"Very respectfully,

F. M. RAMSEY,

"*Acting Secretary of the Navy.*

"The Honorable the SECRETARY OF STATE."

On January 31, 1894, the claimant, by its attorneys addressed substantially similar letters to the Secretary of War and the Secretary of the Navy, stating its claim for the use of its patented invention and requesting payment for the use of it. The letters described and extolled the device and stated that they "deemed it expedient to take a low average price and apply it to all guns." They fixed such price at $200 per gun.

The Secretary of the Navy, on February 10, 1894, in replying, referred to and quoted from the department's letter of August 20, 1891, and added: "As the status of the case has not been changed since the date of the department's letter above mentioned, and as the matter has been previously disposed of by the department, no further consideration of the case appears to be required."

The letter of the claimant's attorneys, however, was the subject of a report and recommendation by the Chief of Bureau of Ordnance, which resulted in the following letters:

"BUREAU OF ORDNANCE,

December 4, 1894.

"Respectfully returned to the department.

"The gas check applied to guns constructed for the navy is that illustrated in United States Letters Patent No. 318,093, of May 10, 1885, and so far as this patent

is valid no royalties should be paid. (See Court of Claims Reports, p. 334, vol. 23, 1887–88.) If, however, as the bureau believes to be the case, the above-mentioned patent is only valid so far as it covers improvements on the De Bange patent (No. 301,220, of July 1, 1884), then, so far as the latter patent is valid, the within claim for royalties, in the bureau's opinion, is a proper one, and would be maintained by the courts.

"It must be noted, however, that until recently there has been no authority of law for the payment of royalties out of the naval appropriations, and the manufacture of most of the gas checks in question had been completed prior to the legislation giving such authority. Moreover, the bureau is of opinion that the Davis patent (No. 318,093, of May 19, 1885) covers real and important improvements, without which it is doubtful if the De Bange system would have been adopted for United States naval guns, and consequently it will be necessary to decide as to the relative values of the device in its original and improved forms. The fact that practically the same gas check is in use in all United States army guns of recent construction, and is being applied to guns now being made by the Bethlehem Iron Company, under contract with the War Department, should also be considered, since independent action on the part of the Navy Department might easily be against the interests of the Government.

"It is therefore recommended that an investigation be made in regard to the De Bange patent, and if this patent is concluded to be valid that the War Department be consulted as to whether a definite sum, to be fixed upon either by a board or in some other way, should not be offered the claimants for the right on the part of the Government to use the device in question on all its guns.

"W. T. Sampson.

"*Chief of Bureau of Ordnance.*"

The final action of the Navy Department upon petitioner's claim was communicated to the petitioner in a letter of the Secretary of the Navy, dated December 31, 1894, as follows:

"NAVY DEPARTMENT,
"*Washington, December 31, 1894.*

"GENTLEMEN: The department has carefully considered the questions presented in the brief filed by you, as well as in former correspondence, relative to the matter of the claim of the Société Anonyme des Anciens Etablissements Cail for compensation for the use by the United States of a gas check invented by Col. Charles T. W. V. De Bange, of the French army.

"It appears that the matter is now in such a condition that it will in all probability involve not only questions arising under the patent issued to Colonel De Bange, but also those growing out of the claims and affecting the rights of other patentees. Under these circumstances the department is of opinion that the full consideration and determination of these questions can be more certainly and equitably reached and the rights of all the parties concerned, as well as the Government, more definitely ascertained and assured through the medium of a court of justice. It is therefore suggested that the necessary proceedings for the consideration and adjustment of the matter by the Court of Claims be instituted.

"Very respectfully,
"H. A. HERBERT, *Secretary.*

"Messrs. POLLOCK & MAURO,
"*Attorneys at Law, Washington, D. C.*"

The final action of the War Department was communicated to claimant's attorneys in a letter dated January 14, 1895, in which the language and suggestion of the Secretary of the Navy were adopted substantially verbatim.

It is not possible to review the arguments by which the claimant asserts and the Government denies the sufficiency of the facts as we have related them to constitute an implied contract between the claimant and the Government. The ultimate contention of the Government is that the mere use of the patentee's invention with his knowledge does not create an implied contract in fact to pay for such use, but "there must be (1) a use of it with the patentee's assent, and there must *also* be (2) an *agreement* or *meeting of minds* on the part of the patentee and on the part of the user *as to compensation for the use*, even though the amount of the compensation be not fixed." These elements, it is insisted, were present in the *Berdan Case*, which we have seen was relied on by the Court of Claims; they are, it is further insisted, absent in the case at bar.

But these elements do not have to appear by the explicit declaration of the parties. They may be collected from their conduct. The alternative of a contract is important to be kept in mind. The officers of the Government knew of the De Bange invention and were aware of its great importance, and the purpose to deliberately take property of another without the intention that he should be compensated—in other words, to do plainly a wrongful act—cannot be imputed to them without the most convincing proof. Such proof does not exist in the present case. On the contrary, the record shows that compensation was contemplated. There was doubt as to the extent of it because there was doubt as to how far the devices used were attributable to or belonged to De Bange or whether they constituted an infringement of his patent, and therefore there was hesitancy and doubt, not as to compensation, but as to the amount and extent of it.

We agree with the Court of Claims that there is resemblance between this case and the *Berdan Case*. In that case the court had no difficulty in adducing the assent of Berdan to the use of his invention. The court

found more difficulty in inferring the assent of the Government. The court said, by Mr. Justice Brewer: "While the findings are not specific and emphatic as to the assent of the Government to the terms of any contract, yet we think they are sufficient. There was certainly no denial of the patentee's rights to the invention; no assertion on the part of the Government that the patent was wrongfully issued; no claim of the right to use the invention regardless of the patent; no disregard of all claims of the patentee, and no use in spite of protest or remonstrance. Negatively, at least, the findings are clear. The Government used the invention with the consent and express permission of the owner, and it did not, while so using it, repudiate the title of such owner."

Like comment may be made of the facts in the case at bar. It is true that the letter of William F. Folger, Chief of the Bureau of Ordnance, stated that while the gas check used by the Government resembled in certain features De Bange's gas check, it differed from it materially in particulars which were original in the bureau. But this was not a denial of the use or the utility of De Bange's invention. Whether there was infringement the officer did not decide, but suggested that the "applicant refer the matter to the Court of Claims." Subsequently the Acting Secretary of the Navy did deny infringement. But that position was abandoned and the Secretaries of War and the Navy "suggested that the necessary proceedings for the consideration of the adjustment of the matter by the Court of Claims be instituted." There were parallel circumstances in the *Berdan Case.*

The invention of Berdan was an "extractor-ejector" for use in breech-loading rifles, and that which was used by the Government was devised by one of its employés. There was a difference between it and Berdan's device, but the officers of the Government doubted if the difference was material, and concluded that it was a mat-

ter for the courts to decide. It is true there was no assertion of right against the Berdan device in consequence of the difference between it and the device used by the Government as, it may be said, there was in the case at bar by the letter of Admiral Ramsey of September 3, 1891. But the position taken in that letter was, as we have seen, abandoned, and it was declared that so far as the De Bange patent was valid its claim for royalties was, in the opinion of the Bureau of Ordnance, a proper one and would be sustained by the courts. This was in 1894. Prior to that time and afterwards the Government continued to use the device. We think the Court of Claims had jurisdiction.

The Government contends that it has not infringed the De Bange patent. Infringement is a question of fact, and as an aid to its solution courts are furnished usually with an expert comparison of the contending devices, their identity or difference of construction and modes of operation. This record is destitute of such testimony. The Government contends for the very narrow construction of the patent based on its claims and the prior art. The only proof of the prior art, however, is a reference to thirteen or fourteen patents by number and patentee, some of which are English, some French and some American. The only explanation of them is in the argument of counsel and an exhibition of the patents. It is very doubtful if we may take notice of even the American patents; more doubtful if we may of the foreign ones. We, however, have considered counsel's explanation of them. They reveal nothing material to be considered that the findings of the Court of Claims do not show of the prior art and the progress from its failure to the success of the De Bange invention, a success, it may be conceded, that availed itself of all that the prior art demonstrated, but went beyond it to the fulfillment that it had not achieved.

The necessity of a gas check to the success of breech-

loading guns all could see, and what a device, to be successful, must do; but the world struggled a long time with the problem, and that problem was to find something which would stand the intense heat generated and the great force caused by the explosion of the powder in a high power gun and the backward escape of the resultant gas under the enormous pressure exerted, and this not in one service of the gun, but in many services. The experiments are detailed in the findings. Metallic cups were tried and paper cups. As early as 1858 India rubber was suggested. Its elasticity, it was thought, would afford all that was necessary for a complete automatic obturation, the gas by its expansion "to seal its own escape."

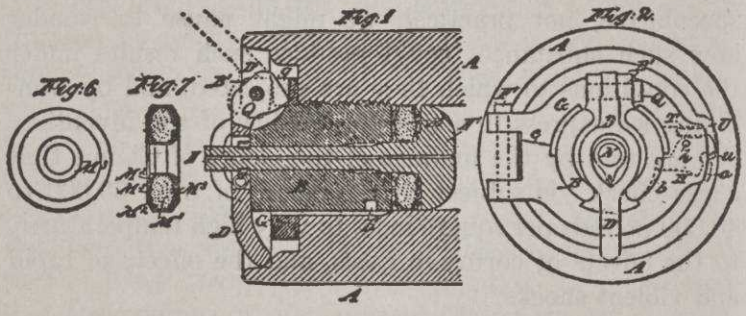
Rubber had some success when constructed in rings of varying degrees of suppleness and hardness, and seemed to have settled the problem. But defects subsequently developed and experiments continued for something better and which would fulfill all the conditions. Then soap obturators were tried, and finally Colonel De Bange's invention of tallow and asbestos. If our purpose was speculative, not practical, we might pause to wonder how such substances could produce such results under the conditions to which they are subjected, and by wondering we express in a way the quality of the invention. We are told by the findings of the Court of Claims that a gas check "is subject to a pressure of from 30,000 to 40,000 pounds per square inch, to very high temperatures, to the effects of corrosive gases, and the effects of rapid and violent shocks."

We need not, however, dwell longer on the excellence of the invention. The Government has testified to its excellence by using it in the guns intended for the national defense.

But it is contended that the claim of the patent is for a specific combination of elements and that that combination of elements is not used by the Government.

This contention is based upon what is considered to be the proper construction of claim 1 of the patent, a strict construction being urged of it—indeed, as we understand the argument, the claim must be confined to the specific forms of its elements, giving the widest latitude to imitation.

The patent answers the contention. Describing his invention, De Bange calls it "certain new and useful improvements in breech-loading guns." Specifying the improvements, he says that they "apply to breech-loading guns which employ a screw-plug having its threads interrupted." Further specifying, he adds: "I have devised a system of packing placed in advance of the plug, and which is expanded by the force of the explosion of the powder to make a tight joint to prevent the leakage of gas." He declares the drawings form a part of the specification and represent what he considers the best means of carrying out the invention. It is only necessary to give Figures 1, 2, 6 and 7.



They are described in the patent as follows: "Figure 1 is a central longitudinal section. The strong lines show the parts ready for firing. The dotted lines show the transverse lever in a position for conveniently operating to turn the screw-plug. Fig. 2 is a rear view showing the parts locked. Fig. 3 is a corresponding view showing

the parts unlocked. . . . Figs. 6 and 7 represent the packing-ring detached. Fig. 6 is a face view, and Fig. 7 a section in the plane of the axis." The specification then proceeds as follows:

"A liberal hole in the line of the axis of the screw-plug B carries a stout sliding pin, N, at the extreme front of which is a stout head, N'. The portion of the body adjacent to the head N' is slightly enlarged. The head N' is adapted to receive the force of the powder at the discharge. At the moment of the discharge this head moves backward, compressing a relatively soft and expansible packing-ring, M, behind it. Certain portions of this ring will be distinguished, when necessary, by additional marks, as M' M^2. The body M' of this packing is of asbestos saturated with tallow, and affords a sufficiently yielding mass with the required capacity for enduring heat and for withstanding the very strong compressive force to which it is subjected by the discharge. It is inclosed between two thin shells, M^2 M^2, of copper, one fitting the body M' on the inner and the other on the outer side, and nearly incasing the entire packing. Both the body M' and the copper M^2 are then inclosed between two strong shells of brass, M^3 M^3. The entire packing thus made is adapted to maintain its form, but to allow a small amount of radial expansion sufficient to pack the joint tightly against the escape of gas. This expansion is due to two causes—the tapering form of the front end of the pin N, which acts on the interior of the packing, and the powerful compression received from the head N'. The expansion from one or both causes is sufficient to press the exterior of the copper M^2 tightly against the interior of the gun, thus effectually preventing any leakage of gas."

Claim 1 is the important one and is as follows:

"1. The partially-threaded plug B, headed pin N N', extending through said plug, and the yielding packing M,

arranged between the head N′ and the inner end of the plug, in combination with each other and with the gun A, arranged as shown, to allow the pin to be driven rearward and compress the packing, as herein specified."

It will be observed, therefore, that De Bange declared that what he devised was a "system of packing" which by the force of the explosion of the powder is expanded to make a tight joint to prevent the leakage of gas. The mechanical parts are but aids to this result, securing in place the packing and enabling its qualities to operate, enabling it to maintain its form but to allow radial expansion sufficient "to pack the joint tightly against the escape of gas." This expansion has also the effect of pressing "the copper (M^2)" against the interior of the gun and coöperates to prevent the leakage of gas.

That this packing constitutes the very essence of the invention is declared in all of the literature on the subject and recognized in all of the Government publications. The Government now contends for a limitation of it, and insists that it consists of "a yielding packing M," exactly as described, although the description is declared by De Bange to represent "the best means of carrying out his invention," and he declares also that "modifications could be used in the forms and proportions."

We cannot therefore assent to the contention of the Government, and in rejecting it we do not render "the claim elastic and indefinite where it should be certain." We preserve that which was declared to be and which has always been recognized to be the invention, and by those competent to declare, whose duty it was to comprehend and estimate, not only the result achieved but by what achieved.

In the description furnished by De Bange to Commander Chadwick a covering of cloth is described. The description in the Ordnance Notes of April 20, 1883, mentions "plates of tin, strengthened at the edges by thin brass

rings." Another description speaks of "a metallic split ring." These are but details. As said by the Court of Claims, through Booth, J., "The invention described by the language of the claim was the yielding pad of asbestos and tallow." And this, the learned Judge also said, predominates as the one "central idea" in every description of the patent in either the specifications or claim.

We learn from the court that it heard much expert testimony, and in its opinion it considers two subsequent patents expressed to be improvements on the De Bange patent. One of these was issued to James B. Davis and the other to Gregory Gerdom. The difference between them and the De Bange patent was commented on, and it was said that the record disclosed that in all inventions subsequent to De Bange's "the pad of asbestos and tallow is the functioning element of the device, without which its utility is as nothing," and that a pad of that composition supplied "the necessary expansion, indispensable to forward the operation of both the Davis and Gerdom patents. The United States used the Gerdom patent and paid him substantial royalities for its use."

It would seem, therefore, that the contention of the Government turns upon a question of fact found against it by the court below; that is, it was found that the particular envelope of the tallow and asbestos pad were not essential features of De Bange's invention, and that the substitution of steel rings for brass rings could be an infringement of the invention. As said by counsel for claimant, claim 1 "does not recite among its elements the materials whereof the envelope [of the pad] and rings are made. . . . It is, on the contrary, obvious that any suitable material may be used for these subsidiary parts." It is conceded that the pliable copper envelope (M^2) may be properly regarded as a part of the "yielding packing." The patentee so states, but he does not say that the "strong shells of brass M^3 M^3 are parts" of it.

It would indeed be arbitrary, as said by claimant, to read into the claim the specific metal of which those shells are composed "for no other purpose than to render it [the claim] worthless."

We have seen De Bange describe what he conceived to be the best form of his invention, and contemplated that it could be represented in other forms and proportions. This, however, was unnecessary, for the law would secure him against imitation by other forms and proportions. *Winans* v. *Denmead*, 15 How. 330; *Hotchkiss* v. *Greenwood*, 11 How. 248, 265; *Western Electric Co.* v. *La Rue*, 139 U. S. 601, 608.

We think, therefore, that the Court of Claims rightfully decided the question of infringement against the Government.

The cross-appeal of claimant is directed to the question of damages.

In the original petition filed by it on January 31, 1895, damages were laid at $140,000. There was no traverse filed until October, 1907. An amended petition was filed April 12, 1909, and judgment was prayed for $1,447,667.98. In this petition it was alleged that the invention was used upon 1,518 guns of various calibers within the six years next preceding the filing of the original petition, the number which was used by the army and that used by the navy being given. The total cost of the guns was stated to be $18,226,263. There is no finding responding to these allegations. The opinion of the court was filed December 2, 1907, that is, before the filing of the amended petition. The opinion contains the following statement: "There is no testimony in the record upon which the quantum of damages can be predicated. The measure of damages would be the value of the device to the defendants. Following the precedents heretofore established, the case will stand upon the docket, with leave to furnish testimony upon this point."

On the twentieth of May, 1909, judgment was rendered for claimant in the sum of $136,000. Each party moved for an amendment to the findings, which were overruled in part and allowed in part. The former findings were withdrawn and amended findings of fact filed. No exception appears to have been taken to this action. Indeed, the record does not furnish us with a comparison between the findings which were withdrawn and those filed. There is nothing to show upon what the court's ruling was invoked.

A motion was presented to this court April 25, 1910, to remand the case to the Court of Claims, and that that court be instructed to find and certify as matters of fact, in addition to the facts found, in regard to the cost of the guns in which the De Bange obturators were used, the amount the Government paid or contracted to pay for patented improvements in breech-loading mechanism for ordnance, and whether there appears in the record the testimony of experts as to the value of the De Bange device, or what would be a reasonable compensation for its use, and, if so, to state the amounts of such estimates.

It was further moved that the Court of Claims be instructed to strike out certain matters in the findings which were described to be evidentiary. The motion was postponed to the hearing, and is now to be considered. The motion is, in effect, for a direction to the Court of Claims to certify the evidence to this court, and not its conclusions from the evidence. This is clearly in contravention of the rule of this court which requires the record on appeal from the Court of Claims to contain a finding by the court "of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing it."

Besides, as we have seen, the record does not disclose what ruling was invoked. We can only act upon the

record, and that shows a finding of the court upon the question of compensation, to which finding there was no objection taken nor exception reserved. The finding determines the matter, being in the nature of a special verdict of a jury. *United States* v. *New York Indians*, 173 U. S. 464.

Ceballos & Co. v. *United States*, 214 U. S. 47, is not applicable. There was a contract of which there could be no dispute, and therefore a motion to embrace it in the record from the Court of Claims was granted and the case reviewed in the light thereof.

The motion to remand the case is therefore denied.

Judgment affirmed.

CITY OF POMONA *v.* SUNSET TELEPHONE AND TELEGRAPH COMPANY.

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

No. 215. Argued March 14, 15, 1912.—Decided April 8, 1912.

A provision in a state constitution that municipal corporations may establish and operate public utility plants, and that persons and corporations may establish and operate works for supplying public service upon such conditions and under such regulations as the municipality may prescribe, is a step towards municipal control or ownership, and is not a grant to others of a right to occupy streets without the consent of the municipality; nor does it limit the municipality to regulations under its police power. The conditions are of general import; and so *held* as to the provision in Article XI, § 19, of the constitution of California as amended October 11, 1911.

There is no sufficient reason why this court should not follow the highest court of California in construing "telegraph" corporations as used in § 536 of the Civil Code of that State as not including "telephone" corporations.

Where a statute is amended so as to bring a certain class thereunder, the amendment to take effect at a subsequent date, before which date another act is passed relating to the same subject with a general repealing act enumerating exceptions, the amended statute is repealed, subject only to the exceptions before any rights accrue under the amendment.

In the absence of any apparent policy inducing it, it will be assumed that an exception to the repealing clause of an act to regulate franchises of "lines doing an interstate business" was made unwillingly and because the legislature assumed it was bound to exempt such lines from regulations.

In this case *held* that under the statutes of California a telephone corporation operating interstate and local lines in Pomona, a city of the fifth class, obtained rights to maintain its main line in the streets but not its local posts and wires except subject to regulations of the city.

172 Fed. Rep. 829; 97 C. C. A. 251, reversed.

THE facts, which involve the validity and constitutionality of certain provisions of the constitution and statutes of California in regard to the use of streets by telephone companies, are stated in the opinion.

Mr. John W. Shenk and *Mr. William J. Carr*, with whom *Mr. C. W. Guerin*, *Mr. Robert G. Loucks*, *Mr. W. B. Mathews*, *Mr. Leslie R. Hewitt*, *Mr. J. P. Wood* and *Mr. J. W. Joos* were on the brief, for appellants:

Poles and wires in the streets without permission given by competent authority are nuisances and may be abated. No user and no lapse of time can legalize the nuisance. The company can justify its invasion of the streets only by pointing to a particular statute or law authorizing it. The burden is on it to justify its use of the streets. *L. T. Co.* v. *S. & W. W. R. Co.*, 41 California, 562; *Siskiyou Lumber Co.* v. *Rostel*, 121 California, 511; *Marini* v. *Graham*, 67 California, 130; *Taylor* v. *Reynolds*, 92 California, 573; *Vandehurt* v. *Thoicke*, 113 California 147; *So. Pac. Co.* v. *Pomona*, 144 California, 339; *Coverdale* v. *Edwards*, 155 Indiana, 374, 383; *Valparaiso* v. *Bozarth*, 153 Indiana,

536; *Baumgartner* v. *Hasty*, 100 Indiana, 57; *Indianapolis* v. *Miller*, 27 Indiana, 394; *Telegraph Co.* v. *Hess*, 125 N. Y. 641; *D., L. & W. R. R. Co.* v. *Buffalo*, 158 N. Y. 266, 478; *Daublin* v. *Mayor of New Orleans*, 1 Martin (La.), 185.

No user or lapse of time can legalize such a nuisance. *People* v. *Gold Run Min. Co.*, 66 California, 138, *Ex parte Tayor*, 87 California, 91; *Bowen* v. *Wendt*, 103 California, 236; *Cloverdale* v. *Smith*, 128 California, 230; *Webb* v. *Demopolis*, 95 Alabama, 116.

It devolves upon the company to justify the use of the streets by its poles and lines. *Sunset Tel. & Tel. Co.* v. *Pasadena*, 42 Cal. Dec. 593; *D., L. & W. R. R. Co.* v. *Buffalo*, 158 N. Y. 266, 478.

No claim of right under the act of Congress of July 24, 1866 (Federal Telegraph Act) is here presented.

The interstate commerce clause of the Constitution does not in itself confer upon the company the right to appropriate for the maintenance of its system portions of the streets of the city of Pomona. Competent authority from the State therefore is necessary. *N. W. Telephone Exch. Co.* v. *St. Charles*, 154 Fed. Rep. 386.

The expenditure of money by the company and the extension of its system, even though with the consent or at the request of the city, furnishes no authority to the company to maintain its lines. The mode whereby the city may contract or grant a privilege being prescribed, that mode constitutes the measure of the city's power in such respect, and any right granted or claimed otherwise is a mere nullity. Estoppel will not lie against the city in such case to deny the existence of the contract or privilege. *Dean* v. *Contra Costa County*, 122 California, 421, 422; *Pac. Electric Ry. Co.* v. *Los Angeles*, 194 U. S. 112; *Pelham* v. *Telephone Co.*, 62 S. E. Rep. (Ga.) 186; *Tri-State Tel. Co.* v. *Thief River Falls*, 183 Fed. Rep. 854; *Zottman* v. *San Francisco*, 20 California, 96; *Times Pub. Co.* v. *Weatherby*, 139 California, 618; *Frick* v. *Los Angeles*,

115 California, 512; *Wichmann* v. *Placerville*, 147 California, 162, 164, 165; *Pavement Co.* v. *Broderick*, 113 California, 628; *McCoy* v. *Briant*, 53 California, 247; *French* v. *Teschemaker*, 24 California, 518, 550; *Brady* v. *New York*, 16 How. Pr. 432, 444; *Arnott* v. *Spokane*, 6 Washington, 442; *Chippewa Bridge Co.* v. *Duland*, 99 N. W. Rep. 603; *Murphy* v. *Louisville*, 9 Bush. 189; *Jersey City Oil Co.* v. *Mayor*, 60 Atl. Rep. 381; *Providence* v. *Electric Lighting Co.*, 91 S. W. Rep. 664.

Section 536 of the Civil Code, prior to its repeal and reenactment in 1905, in terms applied only to telegraph corporations and to lines of telegraph. It did not apply to telephone corporations nor purport to confer any rights in the highways as to telephone wires or lines. The company derived no rights thereunder to construct or maintain telephone poles, lines or wires in the streets of the City of Pomona.

The lines and wires of the company in Pomona, which were destroyed or threatened by the city, were not telegraph lines or wires, but were telephone lines and wires. *Richmond* v. *Telephone Co.*, 174 U. S. 761; *Toledo* v. *West. Un. Tel. Co.*, 107 Fed. Rep. 10; *Cumberland Tel. Co.* v. *Evansville*, 127 Fed. Rep. 187.

No rights were acquired by the company under § 536 of the Civil Code prior to its repeal and reënactment in 1905. The word "telegraph" as therein used does not include "telephone." *Davis* v. *Pacific Tel. Co.*, 127 California, 312; *Sunset Tel. Co.* v. *Pasadena*, 42 Cal. Dec. 593.

The construction placed upon the word "telegraph" as contained in § 591 of the Penal Code in no wise controls the court in construing the same word as used in § 536 of the Civil Code. Because a word or expression as used in one statute is given a certain meaning, it does not follow that the same meaning must be given to it when used in another statute. The same word or expression may have different meanings even when used in the

same statute. Endlich on Statutes, § 387; *Rupp* v. *Swineford*, 40 Wisconsin, 28, 31; *L. & N. R. Co.* v. *Gaines*, 3 Fed. Rep. 266; *Wood* v. *Brady*, 150 U. S. 18; *Henry* v. *Trustees*, 48 Oh. St. 671, 676; *State* v. *Knowles*, 90 Maryland, 646, 654; *Wall* v. *Board of Directors*, 145 California, 468, 473.

The rules of construction properly applicable to the particular statute or expression controls the courts in their interpretations thereof. A previous construction of the same statute or the same expression, arrived at under a different rule of construction, is not binding and will be disregarded. *Blythe* v. *Ayers*, 96 California, 532, 590; *Dixon* v. *Pluns*, 98 California, 384, 388; *San Francisco* v. *Sharp*, 125 California, 536; *Hostetter* v. *Los Angeles St. Ry. Co.*, 108 California, 38, 44; *Bartram* v. *Central Turnpike Co.*, 25 California, 284.

If a statute relating to the exercise of a franchise or a contract therefor is susceptible of two meanings, the one restricting and the other extending the powers of the grantee, that construction is to be adopted which works the least harm to the State. *Water Co.* v. *Knoxville*, 200 U. S. 22; *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550; *Covington Turnpike* v. *Sanford*, 164 U. S. 578, 588; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365; *Vernon Shell Road &c. Co.* v. *Savannah*, 22 S. E. Rep. 625; *Water Co.* v. *Freeport*, 180 U. S. 587; *Water Co.* v. *Danville*, 180 U. S. 619; *Rogers Park Water Co.* v. *Fergus*, 180 U. S. 624.

In the construction of statutes, the intent of the legislature is to be given effect. This intent is to be found in the statute itself. Words are to be interpreted according to their meaning at the time of the passage of the statute. *Tynan* v. *Walker*, 35 California, 634, 642; *Massey* v. *Dunlap*, 146 Indiana, 350, 358; *Sharpe* v. *Wakefield*, 22 Q. B. D. 239, 242; *Board of Works* v. *United Tel. Co.*, 13 Q. B. D. 904, 914; *Aerated Bread Co.* v. *Gregg*,

L. R., 8 Q. B. 355; *Brown* v. *Visalia*, 141 California, 372, 375.

Statutes purporting to grant rights in the public highways to telegraph companies had no application to telephone companies. *Richmond* v. *Bell Tel. Co.*, 174 U. S. 761; *Cumberland Tel. Co.* v. *Evansville*, 127 Fed. Rep. 187; *Toledo* v. *West. Union Tel. Co.*, 107 Fed. Rep. 10; *Sunset Tel. Co.* v. *Pomona*, 164 Fed. Rep. 561, 573; *S. C.*, 172 Fed. Rep. 838; *Home Telephone Co.* v. *Nashville*, 101 S. W. Rep. 770. See also *Suburban Light Co.* v. *Boston*, 153 Massachusetts, 200.

Section 536 of the Civil Code, as reënacted in 1905, was repealed, except as to "telegraph or telephone lines doing an interstate business" by the Franchise Act of 1905, commonly known as the Broughton Act (Statutes 1905, page 777). The company cannot justify its use of the streets under said section as reënacted.

So far as the Broughton Act was repugnant to and in conflict with the provisions of § 536 of the Civil Code, as reënacted, it operated as repeal thereof. See *Ex parte Sohncke*, 148 California, 262.

For the history of legislation in California purporting to extend authority direct from the State to use the public highways for the construction and maintenance of telephone lines, see Ord. Mains. No. 30, Pomona; No. 75 of Pasadena; No. 1130 of Los Angeles; *Sunset Tel. Co.* v. *Pasadena*, 42 California, 593; *Horton* v. *Los Angeles*, 119 California, 602; *Home Tel. Co.* v. *Los Angeles*, 211 U. S. 265; *Telegraph Co.* v. *Spokane*, 24 Washington, 53; *Dean* v. *Contra Costa County*, 122 California, 421; *Los Angeles* v. *Davidson*, 150 California, 59; *McGinnis* v. *Mayor*, 153 California, 711.

The lines of the company in Pomona which were destroyed or threatened by the city were not lines doing an interstate business within the meaning of the exception in the Broughton Act. Exceptions must be strictly con-

strued. Lewis' Suth. Stat. Const., 2d ed., § 352; *People* v. *Morrill*, 26 California, 336; *Southern Bell Tel. Co.* v. *D'Alemberte*, 21 So. Rep. 571.

Although there may be a technical distinction between a proviso and an exception, such distinction is generally disregarded. *United States* v. *Coke*, 17 Wall. 168.

The burden was on the company to show that its lines were doing an interstate business. *Penn. Ry. Co.* v. *Knight*, 192 U. S. 21.

The exception of "telegraph or telephone lines doing an interstate business" contained in the Broughton Act is not in itself a grant of a franchise to construct and maintain such lines. It is not the function of an exception or proviso to confer power or grant a privilege. *Chicago* v. *Phœnix Ins. Co.*, 126 Illinois, 276; *Commonwealth* v. *Hough*, 22 Pa. Co. Ct. 440; *Sunset Tel. Co.* v. *Pasadena*, *supra*.

Section 19, Art. XI, of the constitution, as amended on October 10, 1911, is not to be construed as a blanket grant of a franchise from the State to use the streets of municipalities for the operation of telephone lines and the works of the other utilities mentioned. On the contrary, said section as amended repealed *in toto* § 536 of the Civil Code, as reënacted in 1905.

This court may here properly consider § 19 of Art. XI. A decree granting an injunction based upon a law repealed after the entry of such decree, but prior to the determination of the appeal therefrom, will not be affirmed. Cooley's Const. Lim., 6th ed., 469; 3 Cyc. 407; *United States* v. *Schooner Peggy*, 1 Cr. 103, 110; *Yeaton* v. *United States*, 5 Cr. 281; *Mills* v. *Green*, 159 U. S. 651, 656, 657; *New Orleans* v. *Glover*, 160 U. S. 170; *Dinsmore* v. *So. Express Co.*, 183 U. S. 115, 120; *Linn Co.* v. *Hewitt*, 55 Iowa, 505; *Vance* v. *Ruskin*, 194 Illinois, 625, 627, 628; *Wade* v. *St. Mary's School*, 43 Maryland, 178; *Muskogee Tel. Co.* v. *Hall*, 64 S. W. Rep. 600, 604.

The repeal of § 536 of the Civil Code as reënacted in 1905 by the amendment of § 19 of Art. XI of the constitution neither impairs the obligation of any contract of the company arising under said § 536, nor assails any of its vested rights.

Under § 327, Political Code, any statute may be repealed at any time except when it is otherwise provided therein.

No vested contractual rights can arise in the face of such provisions. *Shields* v. *Ohio*, 95 U. S. 319; *Gas Light Co.* v. *Hamilton*, 146 U. S. 258; *San Antonio Traction Co.* v. *Altgelt*, 200 U. S. 304; *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212; and see also *St. Louis* v. *West. Un. Tel. Co.*, 149 U. S. 465; *Postal Tel. Co.* v. *Baltimore*, 79 Maryland, 502, 510; *S. C.*, 156 U. S. 210; *Memphis* v. *Postal Tel. Co.*, 145 Fed. Rep. 602; *Blair* v. *Chicago*, 201 U. S. 200.

Again the lines destroyed or threatened by the City of Pomona were constructed or maintained wrongfully and without competent authority. Even though § 536 as reënacted in 1905 continued in full force until repealed in October, 1911, the continued maintenance of these lines wrongfully constructed or maintained in the first instance would give rise to no contractual right authorizing their maintenance for all time to come. The elements going to make up a contract are entirely wanting.

Mr. Alfred Sutro, with whom *Mr. E. S. Pillsbury* was on the brief, for appellee:

Appellee has the right, under § 536 of the Civil Code of California, as reënacted in 1905, to use the streets of the City of Pomona for its telephone system without a special franchise therefor from the city. *Davis* v. *Pacific Tel. Co.*, 127 California, 312, held that "telegraph" embraced within its meaning the narrower word "telephone," but *Sunset Telephone Co.* v. *Pasadena*, 118 Pac. Rep. 796, held otherwise.

Section 536 of the Civil Code is a grant of right by the State to telephone and telegraph corporations to use the highways of the State for their lines. *West. Un. Tel. Co.* v. *Hopkins*, 116 Pac. Rep. 557; *West. Un. Tel. Co.* v. *Los Angeles Co.*, 116 Pac. Rep. 564; *Postal Tel. Co.* v. *Los Angeles Co.*, 116 Pac. Rep. 566.

The word "highways" in § 536 includes the streets of cities and towns in California, Political Code, § 2618; *West. Un. Tel. Co.* v. *Visalia*, 149 California, 744, 746; *Niles* v. *Los Angeles*, 125 California, 572; *Smith* v. *San Luis Obispo*, 95 California, 463, 469.

The object of such legislation as is contained in § 536 is to foster and promote the growth of telegraph and telephone systems. They are recognized as an important element in the business and social life of the day. *Abbott* v. *Duluth*, 104 Fed. Rep. 833; *S. C.*, 117 Fed. Rep. 137; *Duluth* v. *Telephone Co.*, 87 N. W. Rep. 1127; *N. W. Tel. Exch. Co.* v. *Minneapolis*, 86 N. W. Rep. 69; *Wichita* v. *Old Colony Trust Co.*, 132 Fed. Rep. 641; *Wichita* v. *Missouri Telephone Co.*, 78 Pac. Rep. 886; *Rocky Mountain Bell Tel. Co.* v. *Red Lodge*, 76 Pac. Rep. 758; *Chamberlin* v. *Iowa Tel. Co.*, 93 N. W. Rep. 596; *State* v. *Nebraska Telephone Co.*, 103 N. W. Rep. 120; *Wisconsin Telephone Co.* v. *Sheboygan*, 86 N. W. Rep. 657; *S. C.*, 90 N. W. Rep. 441; *Michigan Telephone Co.* v. *Benton Harbor*, 80 N. W. Rep. 386; *Farmer* v. *Columniana Telephone Co.*, 74 N. E. Rep. 1078; *Carthage* v. *Central N. Y. Tel. Co.*, 78 N. E. Rep. 165; *Garnett* v. *Independent Telephone Co.*, 106 N. Y. S. 3; *Texarkana* v. *Southwestern Tel. Co.*, 106 S. W. Rep. 915; *Missouri River Telephone Co.* v. *Mitchell*, 116 N. W. Rep. 67; *Hodges* v. *West. Un. Tel. Co.*, 18 So. Rep. 84.

Section 536 is a general law of the State and is effective in Pomona. *The Pasedena Case*, 118 Pac. Rep. 796, 803; *Ex parte Braum*, 141 California, 204, 214.

The conclusion of the Supreme Court, in the *Pasadena*

Case, that § 536 confers no rights upon telegraph or telephone companies, so far as the streets of Pasadena are concerned, is inapplicable to Pomona, which is a city of the fifth class. Municipal Corp. Act, Cal. Stats., 1883, p. 93; *Fragley* v. *Phelan*, 126 California, 383, 387; *Ex parte Helm*, 143 California, 553; *Dawson* v. *Superior Court*, 13 Cal. App. 582.

Section 536 was not repealed by the Franchise Act of 1905, Stats. Cal., 1905, p. 777.

The provisions of the Franchise Act of 1905 are not inconsistent with those of § 536, as reënacted in 1905, because § 536 is a grant of franchise, and the Franchise Act of 1905 only provides the method by which franchises must be granted; it contains no delegation of power to grant franchises. *Supervisors* v. *Lackawanna &c.*, 93 U. S. 619, 624.

The power to grant franchises, for the use of the highways in a city, inheres in the State. *In re Johnston*, 137 California, 115, 122; *Thomason* v. *Ruggles*, 69 California, 564; *South Pasadena* v. *L. A. T. Ry. Co.*, 109 California, 315.

The delegation to a municipal corporation of the power to grant franchises must clearly appear, before the right to exercise the power may be asserted. Any reasonable doubt, concerning the existence of the power, is to be resolved against the municipal corporation. See *Von Schmidt* v. *Widber*, 105 California, 151; *Glass* v. *Ashbury*, 49 California, 571; *Wisconsin Tel. Co.* v. *Sheboygan*, 86 N. W. Rep. 657, 661; *Water Co.* v. *Los Angeles*, 88 Fed. Rep. 720.

The general rule that, where a later statute deals with the same subject-matter as does an earlier one, and in such way as to indicate that the lawmakers intended the later act to be a substitute for the earlier one, the prior statute is held to have been repealed, does not apply to this case as the 1905 Franchise Act does not deal

with the same subject-matter as does § 536. *Hess* v. *Reynolds*, 113 U. S. 73, 79; *Bank* v. *Cahn*, 79 California, 463, 465; *Patterson* v. *Tatum*, 18 Fed. Cas. 1331.

Any repeal of § 536 of the Civil Code by the Franchise Act of 1905 could have been only by implication. Such repeals are not favored and are never allowed except in cases of clear and irreconcilable conflict. *Supervisors* v. *Lackawanna R. R. Co.*, 93 U. S. 619, 624. See also *Wodd* v. *United States*, 16 Pet. 341, 362; *The Distilled Spirits*, 11 Wall. 356, 365; *Henderson's Tobacco*, 11 Wall. 652; *Arthur* v. *Homer*, 96 U. S. 137, 140; *Chew Heong* v. *United States*, 112 U. S. 536, 549; *Frost* v. *Wenie*, 157 U. S. 46, 58; *United States* v. *Greathouse*, 166 U. S. 601, 605; *Cope* v. *Cope*, 137 U. S. 682, 686; *Wetzell* v. *Paducah*, 117 Fed. Rep. 647; *Merrill* v. *Gorham*, 6 California, 41; *Soher* v. *Supervisors*, 39 California, 134; *Malone* v. *Bosch*, 104 California, 680, 683; *Banks* v. *Yolo Co.*, 104 California, 238; *Thompson* v. *Supervisors*, 111 California, 553, 556; *Hilton* v. *Curry*, 124 California, 84; *Rowe* v. *Hibernia Sav. & L. Soc.*, 134 California, 403, 406.

Section 536 of the Civil Code was reënacted at the same session of the legislature and at about the same time that the Franchise Act of 1905 was passed. This circumstance is a strong argument against the repeal by implication of the former by the latter. *State* v. *Board of Commissioners*, 85 N. E. Rep. 513, 522; *State* v. *Duncan* (Ala.), 50 So. Rep. 265, 266; *Stubblefield* v. *Menzies*, 11 Fed. Rep. 268, 276.

The Circuit Court erred in concluding that § 536 of the Civil Code was repealed by the Franchise Act of 1905. Judge Gilbert, in his dissenting opinion in the Circuit Court of Appeals, did not follow that conclusion. *N. W. Tel. Exch. Co.* v. *St. Charles*, 154 Fed. Rep. 386, does not support the conclusion for which it is cited.

Appellants concede that, under § 536 telephone lines doing an interstate business are entitled to use the high-

ways of the State, including the streets of Pomona. The lines of the appellee in Pomona are part of a homogeneous interstate telephone system operated by the appellee and extending throughout the State of California and in the States of Nevada, Washington and Oregon.

The system in Pomona is a part of the interstate telephone system of the appellee extending throughout the State of California and into many parts of the States of Nevada, Oregon and Washington. *United States* v. *Southern Ry. Co.*, 164 Fed. Rep. 347, 349; *United States* v. *Pittsburg &c. Ry. Co.*, 143 Fed. Rep. 360; *United States* v. *Northern Pac. Terminal Co.*, 144 Fed. Rep. 861; *United States* v. *Great Northern Ry. Co.*, 145 Fed. Rep. 438.

Without excluding interstate telephone lines from its operation, the act of March 22, 1905, would be unconstitutional under the commerce clause. Interstate telephone communications are interstate commerce. *Muskogee Telephone Co.* v. *Hall*, 118 Fed. Rep. 382; *West. Un. Tel. Co.* v. *Pendleton*, 122 U. S. 347; *In re Penn. Telephone Co.*, 20 Atl. Rep. 846. See also *Pasadena* v. *L. A. T. Ry. Co.*, 109 California, 315; *People* v. *Craycroft*, 11 California, 544.

The appellee has the right under § 19 of Art. XL of the constitution of the State of California, as amended October 10, 1911, to use the streets of the City of Pomona for its telephone system without a special franchise therefor from the city.

This section has been construed by the Supreme Court of California to be a direct grant, from the State, to the persons therein designated, and a city may not require the persons, to whom the grant is made, to obtain a permit from it, as a condition precedent to the exercise of the right granted by the constitutional provision. See *People* v. *Stephens*, 62 California, 209, 235; *In re Johnston*, 137 California, 115, 119; *Denninger* v. *Recorder's Court &c.*,

145 California, 638; *Stockton Gas Co.* v. *San Joaquin Co.*, 148 California, 313, 318; *San Francisco* v. *Oakland Water Co.*, 148 California, 331, 333; *People* v. *Los Angeles Gas Co.*, 150 California, 557; *Pugh* v. *McCormick*, 14 Wall. 361.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill brought by the appellee, a California corporation, to restrain the City of Pomona from removing the appellee's poles and wires from the streets of the city, and from preventing the appellee's placing further poles and wires in the streets. The Circuit Court dismissed the bill, 164 Fed. Rep. 561, but the decree was reversed and an injunction granted by the Circuit Court of Appeals. 172 Fed. Rep. 829. 97 C. C. A. 251. Two of the grounds originally relied upon were that the appellee, being a telegraph as well as a telephone company, had rights under the act of Congress of July 24, 1866, c. 230, 14 Stat. 221 (Rev. Stat., §§ 5263 *et seq.*), that were infringed, and that the conduct of the city had given rise to a contract. These are no longer pressed, but they warranted taking the case to the Circuit Court of Appeals. *Spreckles Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 407. The remaining ground is that the constitution of California as amended in 1911, or the statutes of the State, contained a grant with which the Constitution of the United States does not permit the city to interfere. This is the only argument pressed here. Unless the appellee got a grant from one of these two sources it has no right to occupy the streets.

The claim based upon the amendment to Article XI, § 19, of the constitution of the State, October 10, 1911, does not impress us. Before that date the article provided that in cities having no public works for artificial light, etc., individuals or corporations of the State duly authorized should have the privilege of using the streets, etc., for the purpose, upon the condition that

the municipal government should have the right to regulate the charges. By the amendment "any municipal corporation may establish and operate public works for . . . telephone service" either by construction or by purchase. It then goes on, "Persons or corporations may establish and operate works for supplying the inhabitants with such service upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof." We agree with the appellants that the amendment seems intended as a step in the direction of municipal ownership or control. The words 'upon such conditions,' etc., are not to be confined to police powers, which are conferred by § 11 of the same article, but are of general import. If the municipal corporation does not see fit to establish the public works itself it may let others do it, but its power to impose conditions excludes the notion that the constitution alone is a grant to others of a right to occupy the streets without its consent.

The claim founded upon the statutes seems to us stronger. By § 536 of the Civil Code "Telegraph corporations may construct lines of telegraph along and upon any public road or highway . . . and may erect poles . . . in such manner and at such points as not to incommode the public use of the road." This is treated by the Supreme Court of California as a grant when acted upon. *Western Union Telegraph Co.* v. *Hopkins*, 116 Pac. Rep. 557. But as the words 'telegraph corporations' have been construed not to include telephone corporations; *Sunset Telephone & Telegraph Co.* v. *City of Pasadena*, 118 Pac. Rep. 796; a construction that we know no sufficient reason for not following; *Yazoo & Mississippi Valley R. R. Co.* v. *Adams*, 181 U. S. 580; *Richmond* v. *Southern Bell Telephone & Telegraph Co.*,

174 U. S. 761; the section until amended did the appellee no good. On March 20, 1905, however, the section was amended so as to include telephone corporations, so that, if that were all, the case of the appellee would be clear, the City of Pomona not having been organized under provisions of the constitution that withdrew certain cities from the operation of general laws. See *Ex parte Helm*, 143 California, 553; *Sunset Telephone & Telegraph Co.* v. *Pasadena*, 118 Pac. Rep. 796, 803.

But the amendment did not go into effect for sixty days, and two days later, on March 22, a franchise act was passed, to take effect immediately, providing that "every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street or interurban railroads . . . or to exercise any other privilege whatever hereafter proposed to be granted" by the legislative body of any county, city and county, city or town, except telegraph or telephone lines doing an interstate business, should be granted upon the conditions specified in the act and not otherwise. "Any applicant for any franchise or privilege above mentioned" was required to file an application, there was to be an advertisement for bids, etc., with other particulars that need not be specified, as the appellee does not claim under this statute. It contends that this act establishes conditions only for counties, cities and towns, and does not qualify the grant from the State in the amended § 536. The appellant, on the other hand, argues that the franchise act repealed § 536, so far as it affects this case, except as to telephones doing an interstate business. In view of the frame of the act as a whole, of a general repealing clause at the end, naming certain exceptions of which § 536 is not one, and of the fact that the grant of such franchises seems generally to have been left to the local subdivisions concerned, *Sunset Telephone & Telegraph Co.* v. *Pasadena*, 118 Pac. Rep. 796, 803, we construe the words quoted as

of general application, and are of opinion that they cannot be supposed to have had the narrow operation that would be left to them if there were in force a grant from the State of almost universal scope. Until the state court shall decide otherwise we must take § 536 to have been repealed, subject to the exception contained in the later act, before any grant or right under it had accrued to the appellee.

We come then to consider the extent of the exception. This is not a question whether all telephones having the usual connections might not be instruments of commerce among the States; it is not a question whether the State could interfere with the local business of lines engaged in such commerce. It is a question of how far the offer of a grant that had not yet taken effect should be understood to have been left on foot by the repealing act; a question as to the meaning of words. In construing them it may be assumed that the exception was made unwillingly. No policy can be discovered that would be likely to induce the making of it, and it is most easily explained by the uncertainty then prevailing as to the power of the State over telegraphs, etc., running into other States, in view of the commerce clause of the Constitution and the act of July 24, 1866; an uncertainty then lately and since largely dispelled. *Western Union Telegraph Co.* v. *Pennsylvania Railroad Co.*, 195 U. S. 540. *Western Union Telegraph Co.* v. *Richmond*, April 1, 1912. The words to be interpreted are 'except telegraph or telephone lines doing an interstate business.' The qualification 'doing an interstate business' shows that not all telephones were expected to benefit by the grant in § 536, and the limitation is presumably substantial. The legislature probably supposed by mistake that it was bound to grant a right to direct through lines but evidently meant to grant no more than it must. It was understood so by the city. The order and threat of the city were confined to poles and wires

doing a state and local business. This appears by the bill and the finding of the Circuit Court, not disturbed above, as to what actually was done. We are of opinion that the city's interpretation was correct.

The result is that the appellee must be taken to have a grant of the right to keep its main through lines in the streets of Pomona, but not to maintain the posts and wires by which it connects with subscribers. So far as appears the city attacks only the latter, and therefore no present ground is shown for the bill. But as the line of distinction may be delicate and questions may arise the bill will be dismissed without prejudice.

Decree reversed.

Bill to be dismissed without prejudice.

TITLE GUARANTY & SURETY COMPANY *v.* NICHOLS.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 102. Argued December 13, 1911.—Decided April 8, 1912.

While liability under a surety bond for honesty of an employé would be defeated if the loss was due to neglect of the employer to take the precautions required by the bond, the condition is subsequent and not precedent, and there is no occasion for an averment in respect thereto; it is a matter of defense that must come from the other side, upon whom the *onus* rests.

Where the evidence, as in this case, shows that examinations were made, it is for the jury to determine whether reasonable diligence had been used in making them.

The certificate of correctness of employé's accounts on obtaining renewals of surety bond for his honesty held in this case not to be a

warranty but a certificate that his books had been examined and found correct.

The mere fact that the examination, if made by a reasonably competent person, failed to discover discrepancies covered by false entries and bookkeeping devices would not defeat renewals of the policy.

On appeals from the courts of the Territories, questions of weight and credibility of evidence are not for the consideration of this court.

12 Arizona, 405, affirmed.

THE facts, which involve the liability of a surety company on a fidelity bond given to protect a bank against dishonesty of its cashier, are stated in the opinion.

Mr. Philip Walker, with whom *Mr. C. F. Ainsworth* was on the brief, for plaintiff in error:

Through the failure of the plaintiff below to establish a condition precedent to his right to recover on the bond, that is, the monthly examination of the employé's accounts, he did not establish any liability against the plaintiff in error on the cause of action set out in the complaint.

The burden remained on the plaintiff below to establish that his assignor had performed its part of the contract, including that relating to monthly accounts and audits, and this he did not attempt to do. *Insurance Co.* v. *Ewing*, 92 U. S. 377, distinguished.

The renewal statement was in law a warranty, and if it were false, whether with or without knowledge, the bond was void as to subsequent defalcations. *American Bonding Co.* v. *Burke*, 36 Colorado, 49, 58; *Livingston* v. *Fidelity & Deposit Co.*, 76 Oh. St. 253; *Winkler Brokerage Co.* v. *Fidelity & Deposit Co.*, 119 Louisiana, 735; *Guar. Co. of N. A.* v. *First Nat. Bank of Lynchburg*, 95 Virginia, 480; *Glidden* v. *Fidelity & Guar. Co.*, 198 Massachusetts, 109; *Willoughby* v. *Fid. & Dep. Co.*, 16 Oklahoma, 546, affirmed, 205 U. S. 537; Frost on Guaranty, 241 *et seq.*; Walker on Fidelity Bonds, 49 *et seq.*

Mr. Frank B. Kellogg, with whom *Mr. C. A. Severance*, *Mr. Robert E. Olds*, *Mr. Thomas Armstrong, Jr.*, and *Mr. Ernest W. Lewis* were on the brief, for defendant in error:

The defense of noncompliance on the part of the bank with the terms and conditions of the contract has not been established.

The contract must be construed, if possible, in favor of the insured, rather than in favor of the insurer. *National Bank* v. *Insurance Co.*, 95 U. S. 673; *Thompson* v. *Phœnix Ins. Co.*, 136 U. S. 287, 297; *Imperial Fire Ins. Co.* v. *Coos County*, 151 U. S. 452, 462; *Moulor* v. *American Life Ins. Co.*, 111 U. S. 342, 343; *American Surety Co.* v. *Pauly*, 170 U. S. 133, 144, 160; *Ætna Indemnity Co.* v. *Crowe*, 154 Fed. Rep. 545, 555.

The burden of proving the allegations of the answer with respect to the falsity of specific declarations rested with the surety company. *Piedmont Life Ins. &c. Co.* v. *Ewing*, 92 U. S. 377; *Redman* v. *The Ætna Ins. Co.*, 49 Wisconsin, 431.

The performance of conditions subsequent need not be alleged and proved by the parties suing upon a contract. *Chambers* v. *Northwestern Mut. Life Ins. Co.*, 64 Minnesota, 495; *Badenfield* v. *Mass. Mut. Accident Assn.*, 13 L. R. A. (Mass.) 263, and cases cited in note; Jones on Evidence, § 179.

On the subject of the burden of proof, a distinction has been taken between express warranties contained in a policy of insurance and declarations made in an application, even where such declarations are stipulated to be warranties. *Am. Credit Indemnity Co.* v. *Wood*, 73 Fed. Rep. 81.

The bank's duty under the contract was confined to the observance of good faith and fair dealing; and the evidence shows that this obligation was fully met. *Guarantee Co.* v. *Mechanics' Saving Bank*, 80 Fed. Rep. 766, 774.

A total failure on the part of an employer to make examination of accounts, pursuant to an agreement to do so in the bond or application, will operate to defeat recovery, as in *Hunt* v. *Fidelity & Casualty Co.*, 99 Fed. Rep. 242, and *Carstairs* v. *American Bonding & Trust Co.*, 112 Fed. Rep. 620, but these cases can be distinguished from this case, in which the insured did, with the utmost good faith, make monthly examinations, the books and records do not on their face, disclose any defalcation; in fact the embezzlements could not have been detected at all through inspection of any of the data at hand when the examinations were made.

MR. JUSTICE LURTON delivered the opinion of the court.

Action upon a bond executed by the plaintiff in error to protect the Union Bank & Trust Company, of Phœnix, Arizona, against the dishonesty of its cashier. There were two or more renewals. Embezzlements by the cashier occurred during the currency of the bond. After a right of action had accrued, the bond was assigned to the defendant in error, who brought this action thereon.

The principal defense was that the loss was due to the neglect of the employer to supervise the conduct of the employé by making such monthly examinations of his accounts as it agreed to make or have made. There was a jury and verdict for the plaintiff, and a judgment against the Surety Company, which was affirmed by the Supreme Court.

A number of errors have been assigned which relate to this defense, but the argument has turned upon those which in different ways, raise the question as to whether, after the defendant in error had made out a *prima facie* case by proving the bond and its breach by a refusal to indemnify him for losses sustained during its currency through the dishonesty of the employé guaranteed, the

onus devolved upon the Surety Company to plead and prove that the loss had occurred through the fault of the employer in not making the monthly examinations which it had agreed to make. The trial judge ruled that the onus was upon the defendant, and this ruling has been affirmed by the Supreme Court.

Whether this ruling was right or wrong must depend upon whether the requirement of the bond, that monthly examinations of the books of the employé should be made, constituted a condition precedent or a condition subsequent. The bond on its face requires the employer "to take and use all reasonable steps and precautions to detect and prevent any act upon the part of the employé which would tend to render the company liable for any loss." It also provides that if the statements by the employer in the application "shall be untrue, the bond shall be void." The obligation in respect to examinations of the employé's accounts is found in the application. The questions propounded by the Surety Company and the employer's answers, so far as relevant, were these:

"To whom and how frequently will he account for his handlings of funds and securities? Monthly; to Board of Directors.

"What means will you use to ascertain whether his accounts are correct? Examination of books and count of money and securities. How frequently will they be examined? Monthly or oftener. By whom will they be examined? Our Auditor.

"When were his accounts last examined? February 8th, 1905.

"Were they reported correct? Yes.

"Is there now or has there been any shortage due you by applicant? No."

There was never any question but that liability under the bond would be defeated if it appeared that the loss attributable to the dishonesty of the employé was due

to the neglect of the bank to make the monthly examinations required. And so the jury were instructed. The question was whether this requirement was a condition precedent to liability which the bank was required to aver and prove or whether it was a defense to be made out by the defendant. But a construction which makes the bond inoperative until the employer shows that it had made such examinations is not a fair and reasonable interpretation. The distinction between conditions precedent and subsequent is plain enough. The condition here involved, if properly a condition at all, is of the latter class.

The coming into effect of a contract may be made to depend upon the happening or performance of a condition. But a condition subsequent presupposes a contract in effect which may be defeated by the happening or performance of a condition. Where, therefore, an action is upon a contract subject to a condition precedent, the performance of that condition must be averred and proved; but if the contract sued upon is subject to a condition subsequent, there is no occasion for any averment in respect to the condition. It is a matter of defense which must come from the other side. Chitty on Pleading, vol. 1, pp. 246, 255.

The plaintiff was plainly entitled to recover upon proving the bond, an embezzlement and a breach, by a refusal to indemnify. It was not obliged to aver that it had made the examinations which it agreed should be made. If it had failed in that duty, it was for the Surety Company to so plead and prove. Such, indeed, was the course of the pleading in this case, and a breach of the agreement to make such examinations was set up as a defense. There was no error in the ruling of the court that the onus was upon the Surety Company to prove a breach of the obligation to make examinations. *Piedmont & A. L. Ins. Co.* v. *Ewing*, 92 U. S. 377; *American Credit Indem. Co.* v. *Wood*, 73 Fed. Rep. 81; *Redman* v. *Ætna Ins. Co.*, 49 Wis-

consin, 431; *Murray* v. *N. Y. Life Ins. Co.*, 85 N. Y. 236; *Freeman* v. *Travelers' Ins. Co.*, 144 Massachusetts, 572.

It has been argued that there was no evidence upon which the case could go to the jury upon the question of whether reasonably proper monthly examinations were in fact made. This insistence has no foundation. The plaintiff in error brought out upon its own cross-examination of McDowell, the defaulting cashier, that he made monthly reports and that these reports were gone over by the officers of the bank regularly, once a month. He testified that his cash and securities were counted and examined and his report verified from the book entries made by the bank's bookkeeper. Indeed, he testified, "that there never was a set of directors in any bank that tried to watch things closer than that set of directors." The cashier's embezzlements of money were covered by false entries relating to remittances to the bank's correspondents, whereby the balances in such banks were made to appear much larger than they actually were. The defendant's expert evidence tended to show that if the returned vouchers or the reconciliation reports of such banks had been compared with the ledger accounts, the discrepancy would have appeared. But the cashier was cunning, and he testified to the difficulties which he threw in the way of any effort to verify the books in these particulars. He supported his report by his cash and his bills receivable and a showing of the books kept by another officer, who made the entries from "slips" made by himself (the cashier), purporting to show cash used to buy exchange for remittances. These "slips," being falsified memoranda, were innocently used by the bookkeeper as the basis for the ledger entries which misled the officers in their examinations. On this evidence the question as to whether reasonable diligence had been used in making such examinations was one for the jury. It was so submitted under a fair charge, and they found for the

plaintiff below. Finally, it is said that the greater part of the loss occurred during the currency of renewal bonds, and that each such renewal was made upon a certificate by the employer which stated that just prior thereto the books and accounts of the employé "were examined and found correct in every respect and all moneys accounted for." It is said that this statment was untrue, inasmuch as at the date of such renewals the books and accounts were not correct and the cashier was short in his cash. But the certificate is not to be taken as a warranty of the correctness of the accounts. The statement is that his books and accounts had been examined and found correct. The mere fact that the examination, if made by a reasonably competent person, failed to discover discrepancies covered up by false entries, or other bookkeeping devices, would not defeat the renewal. The case upon this point went to the jury upon the fact of reasonable examinations and the good faith of the bank in making the representation. The question of the weight or credibility of the evidence is not one for our consideration. There was some evidence which the trial judge thought sufficient to carry the case to the jury. The Supreme Court of Arizona agreed with the trial court, and with both courts we concur.

The assignments of error relating to admission of evidence have been examined so far as the state of the record admits. The court below thought most of them insufficiently saved and none of them so material as to require a reversal for new trial. In this we concur.

Judgment affirmed.

MR. JUSTICE MCKENNA dissents.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO. *v.* WYNNE.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 103. Submitted December 14, 1911.—Decided April 15, 1912.

A state statute which attaches onerous penalties to the non-payment of extravagant demands denies the due process of law guaranteed by the Fourteenth Amendment.

The statute of Arkansas of 1907, Act 61, providing that railroad companies must pay claims for live stock killed or injured by their trains within thirty days after notice and that failure to do so shall entitle the owner to double damages and an attorney's fee, even if the amount sued for is less than the amount originally demanded, as construed by the Supreme Court of that State, is unconstitutional as a denial of due process of law under the Fourteenth Amendment.

Quære: and not decided whether the statute is unconstitutional as denying due process of law even where the original demand is sustained.

90 Arkansas, 538, reversed.

THE facts, which involve the constitutionality under the due process and equal protection clauses of the Constitution of a statute of the State of Arkansas imposing double liability in certain instances upon railway corporations, are stated in the opinion.

Mr. W. E. Hemingway and *Mr. E. B. Kinsworthy* for plaintiff in error:

The statute and judgment deprive plaintiff in error of its property without due process of law and are unconstitutional as they require payment of double damages and an attorney's fee, merely because the company failed to pay an unliquidated demand, with respect to

which there were *bona fide* and substantial doubts as to the extent of the damage and as to its liability.

The mere fact that the horses were killed by the train, did not establish the railway's liability. And if it was liable for any amount, it could not exceed the reasonable market value of the horses killed.

The law not only recognizes a defense, but it maintains courts to entertain and try it. The railway company, in failing to pay the claim, and in submitting to the courts the question of its liability, acted entirely within its lawful rights.

As the statute provides heavy penalties against railway companies that are not provided against others, for a mere failure to pay a disputed claim; and as no penalty is imposed on a claimant who presents a demand against a railway that is invalid or excessive; and as the heavy penalty of double damages and attorney's fee was designed, and is calculated to deter railways from exercising their lawful right, to defend any doubtful claim, and to coerce the payment of all claims, whether fair or unfair, unless their invalidity be obvious or certainly demonstrable, such discrimination and designed coercion operate to deny to railways the equal protection of the laws.

A penalty, in excess of costs and reasonable expenses, cannot be imposed for a complete failure to make good a defense against an ordinary indebtedness. But even if so, no penalty is proper for failing to pay, and contesting in court a claim which such contest proves to have been excessive. *Pacific Mut. Life Ins. Co.* v. *Carter*, 92 Arkansas, 378, 387; *Gulf, Colo. &c. Ry. Co.* v. *Ellis*, 165 U. S. 150; *Atchison, Topeka & Santa Fe Ry.* v. *Mathews*, 174 U. S. 96.

The case of *Seaboard Air Line* v. *Seegers*, 207 U. S. 73, is distinguished, as in that case the statute imposed only a penalty of fifty dollars, and was not primarily to enforce the collection of a debt, but to compel the performance of duties which the carrier assumed.

The state court did not sustain the penalty on the ground that it was intended to enforce performance of a duty under a police regulation, and the penalty attacked is the one conditioned upon the breach of no duty whatever, except the duty to pay a disputed claim, which, from its nature, is necessarily unliquidated as to amount, and with respect to which delay in payment may often be, not only reasonable, but necessary.

The statute is invalid because it was designed and is calculated, by its heavy penalties, to deter railroads from contesting any claim fairly involved in doubt, either with respect to liability or the amount of damage, and to coerce the payment of all such claims; in this respect it denies to railroads the equal protection of the law. *Ex parte Young*, 209 U. S. 123, 145.

The practical effect of the statute is to impose absolute liability, and, in effect, to deny the right to defend.

The statute denies the railways the equal protection of the law, since they are penalized for making the same defense that all other persons can make without risk of penalty, and for the further reason, that claimants who present unfounded or excessive claims and press them to an unsuccessful termination, incur no penalty and in no way compensate the road for its expense, trouble and cost. *Fidelity Mut. Life Ass.* v. *Mettler*, 185 U. S. 308; *Minn. Ry. Co.* v. *Beckwith*, 129 U. S. 96, do not apply.

Mr. R. E. Wiley, and *Mr. Powell Clayton* for defendant in error:

The statute does not permit the owner to demand an amount clearly excessive and to refuse to accept any thing less until he brings his suit, and then, by reducing his demand in his complaint to a reasonable sum, fasten an absolute liability upon the defendant for the penalty without giving it an opportunity to contest its liability, although it had succeeded in its contention

that it was not liable for the full amount originally demanded. Statutes must be interpreted, if possible, to make them consistent with the Constitution. *Hooper* v. *California*, 155 U. S. 648, 657; *Presser* v. *Illinois*, 116 U. S. 252, 269; *Grenada County* v. *Brown*, 112 U. S. 261, 269; *Brewer* v. *Blougher*, 14 Pet. 178, 198; *United States* v. *Coombs*, 12 Pet. 72; *Parsons* v. *Bedford*, 3 Pet. 433, 448; *Knight's Templars' Ind. Co.* v. *Jarman*, 187 U. S. 197, 205.

The true construction of the statute is that the railroad must have thirty days' notice of the killing of the stock, and within this thirty days it must pay the true value on demand. If the demand for the amount due is made for the first time in the complaint, then the railroad may defeat a recovery of the penalty by paying the amount sued for.

A railroad company has the right to resist a demand that it does not owe, but the demand is always governed by the allegations of the complaint, and not by any prior negotiations between the parties, and the jury in the case at bar has determined that the plaintiff in error did owe the amount demanded. *Pacific Mut. Life Ins. Co.* v. *Carter*, 92 Arkansas, 379; *Haglin* v. *Atkinson-Williams Hardware Co.*, 93 Arkansas, 85, do not apply, as the amount recovered in each instance was less than the amount demanded in the complaint.

The statute, as properly construed, is not in conflict with the Fourteenth Amendment. *Seaboard Air Line Railway* v. *Seegers*, 207 U. S. 73; *Minn. & St. Louis Ry. Co.* v. *Beckwith*, 129 U. S. 26.

Under the statute there can be no recovery unless the company is negligent, but in order to justify a recovery of the double damages there must be, not only negligence in killing the stock, but also a refusal to respond for the actual damages suffered. *Atchison, Topeka &c. R. R. Co.* v. *Matthews*, 174 U. S. 96; *Fidelity Mutual Life Ass.* v. *Mettler*, 185 U. S. 308.

The penalty is not so heavy as to deter the railroad company from contesting a claim, and thus denying to it the equal protection of the law. *Missouri Pacific Ry. Co.* v. *Humes*, 115 U. S. 512, where the penalty was double the amount of damage done; *Minneapolis & St. Louis Railway Co.* v. *Beckwith*, 129 U. S. 26, where the penalty was for double the value of the stock killed or injured; *Seaboard Air Line* v. *Seegers*, 207 U. S. 73, where the penalty was for many times the amount of the damage.

Railroads are proper subjects of classification with respect to the matters contained in the statute. *Missouri Pac. Ry. Co.* v. *Humes*, 115 U. S. 512; *Missouri Pac. Ry. Co.* v. *Mackey*, 127 U. S. 205; *St. Louis, I. M. & S. Ry. Co.* v. *Paul*, 173 U. S. 404; *Farmers' &c. Ins. Co.* v. *Dobney*, 189 U. S. 301; *Missouri, Kan. & Tex. Ry. Co.* v. *May*, 194 U. S. 267.

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

A statute of the State of Arkansas (Laws of 1907, Act 61), relating to the liability of carriers by railroad for live stock killed, wounded or injured by their trains, contains this provision:

"And said railroad shall pay the owner of such stock within thirty days after notice is served on such railroad by such owner. Failure to do so shall entitle said owner to double the amount of damages awarded him by any jury trying such cause, and a reasonable attorney's fee. *And provided further*, that if the owner of such stock killed or wounded shall bring suit against such railroad after the thirty days have expired, and the jury trying such cause shall give such owner a less amount of damage than he sues for, then such owner shall recover only the amount given him by said jury and not be entitled to recover any attorney's fees."

The owner of two horses, which were killed within the State by a train of a railway company, served upon the company a written notice demanding damages in the sum of $500. The company refused to pay the demand, and after the expiration of thirty days the owner brought suit in a court of the State to recover his damages, alleged in the complaint to be $400. A trial to a jury resulted in a verdict for the owner, assessing his damages at the amount sued for, and the court, deeming the statute applicable, gave judgment for double that amount and for an attorney's fee of $50. The company objected that the statute, as thus applied was repugnant to the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, but the objection was overruled, and on appeal to the Supreme Court of the State the judgment was affirmed. 90 Arkansas, 538. The case is here on a writ of error to that court.

It will be perceived that, while before the suit the owner demanded $500 as damages, which the company refused to pay, he did not in his suit either claim or establish that he was entitled to that amount. On the contrary, by the allegations in his complaint he confessed, and by the verdict of the jury it was found, that his damages were but $400. Evidently, therefore, the prior demand was excessive and the company rightfully refused to pay it. And yet, the statute was construed as penalizing that refusal and requiring a judgment for double damages and an attorney's fee. In other words, the application made of the statute was such that the company was subjected to this extraordinary liability for refusing to pay the excessive demand made before the suit.

We think the conclusion is unavoidable that the statute, as so construed and applied, is an arbitrary exercise of the powers of government and violative of the fundamental rights embraced within the conception of due process of law. It does not merely provide a reasonable

incentive for the prompt settlement, without suit, of just demands of a class admitting of special treatment by the legislature, as was the case with the statute considered in *Seaboard Air Line Railway Co.* v. *Seegers*, 207 U. S. 73, but attaches onerous penalties to the non-payment of extravagant demands, thereby making submission to them the preferable alternative. Thus, it takes property from one and gives it to another, not because of a breach by the former of a duty to the latter or to the public, but because of a lawful exercise of an undoubted right. Plainly this cannot be done consistently with due process of law. And, in principle, the Supreme Court of the State has so held since its decision in this case. In *Pacific Mutual Life Insurance Co.* v. *Carter*, 92 Arkansas, 378, that court had occasion to consider a statute of the State providing that if a loss under a policy of insurance was not paid within the time specified, "after demand made therefor," the company should be liable, in addition to the amount of the loss, to twelve per cent damages and a reasonable attorney's fee. An insured demanded in payment of a loss under such a policy the sum of $1,666.66, which the insurance company refused to pay, and in a suit on the policy, wherein it was found that the loss was but $1,444.44, the insured was awarded the statutory damages and an attorney's fee. That part of the judgment was reversed, and it was said (p. 387):

"But the act makes the company liable for failure to pay the loss 'after demand made therefor.' The statute thus contemplates that there shall be a demand. A recovery for penalty and attorney's fee cannot be had when complainant makes demand for more than he is entitled to recover. It could never have been the purpose of the Legislature to make the insurance companies pay a penalty and attorney's fee for contesting a claim that they did not owe. Such an act would be unconstitutional. The companies have the right to resist the payment of a

demand that they do not owe. When the plaintiff demands an excessive amount, he is in the wrong. The penalty and attorney's fee is for the benefit of the one who is only seeking to recover after demand what is due him under the terms of his contract, and who is compelled to resort to the courts to obtain it."

In the brief for the railway company the contention is advanced that the statute would still be wanting in due process of law were it construed as imposing double liability, with an attorney's fee, only where the prior demand is fully established in the suit following the refusal to pay; but that question does not necessarily arise upon the facts of this case, and we purposely refrain from considering it.

Confining ourselves to what is necessary for the decision of the case in hand, we hold that the statute, as construed and applied by the state courts, is wanting in due process of law and repugnant to the Fourteenth Amendment of the Constitution of the United States.

The judgment is accordingly reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

GROMER, TREASURER OF PORTO RICO, *v.* STANDARD DREDGING COMPANY.

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

No. 174. Submitted February 28, 1911.—Decided April 22, 1912.

Quære: whether § 12 of the act of Legislative Assembly of Porto Rico of March 8, 1906, providing that an injunction may issue to prevent collection of illegal tolls, applies to the District Court of the United States for Porto Rico.

Even though the bill might not be sustained because complainant has an adequate remedy or because the court has not power to issue an injunction, the court prefers, in this case, to rest its decision on the fact that the bill should be dismissed upon the merits.

Under § 13 of the Foraker Act of April 12, 1900, 31 Stat. 77, c. 191, and the act of July 1, 1902, 32 Stat. 731, c. 1383, the Territory of Porto Rico has jurisdiction for taxing purposes over the harbors and navigable waters surrounding Porto Rico.

The purpose of the Foraker Act was to give local self-government to Porto Rico, conferring an autonomy similar to that of the States and Territories, reserving to the United States rights to the harbor areas and navigable waters for the purpose of exercising the usual national control and jurisdiction over commerce and navigation.

While the United States can reserve control over such places as it sees fit within a territory to which it gives autonomy, it does not reserve any such places unless it is so expressed in the act.

Property which has acquired a *situs* within the jurisdiction of the Territory of Porto Rico is not exempt from taxation by the Territory simply because it is exclusively used by the owner for carrying out a contract with the Government.

Where jurisdiction to tax property exists, the validity of the tax cannot be determined by an inquiry as to the extent to which the property may be benefited.

In this case there is nothing in the record to show that the property taxed had not acquired a *situs* in Porto Rico or that takes it out of the rule that tangible personal property is subject to taxation by the State or Territory in which it is, no matter where the domicile of the owner may be.[1]

5 Porto Rico Fed. Rep. 142, reversed.

[1] Mr. Justice Day, with whom Mr. Justice Hughes and Mr. Justice

THE facts, which involve the power of Porto Rico to tax machinery and vessels in the harbor of San Juan engaged in work in pursuance of a contract with the United States, are stated in the opinion.

Mr. Paul Charlton and *Mr. Foster V. Brown*, for appellant.

Mr. Charles Hartzell and *Mr. Manuel Roderiguez-Serra* for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The question in the case is the power of Porto Rico to tax certain machinery and boats which at the time of the levy of the taxes were in the harbor of San Juan engaged in dredging work in pursuance of a contract of the Standard Dredging Company with the United States Government.

The dredging company filed a bill to enjoin the appellant, Treasurer of Porto Rico, from enforcing the tax. Appellant demurred to the bill for insufficiency and want of equity, which was overruled. He declined to answer, and the injunction which had been granted was made perpetual. This appeal was then taken.

The material allegations of the bill are as follows:

The dredging company is a Delaware corporation, with its principal office and place of business at the city of Wilmington, State of Delaware. Gromer is Treasurer of Porto Rico.

That theretofore and prior to April 1, 1908, the dredg-

Lamar concurred, dissented solely on this point (see p. 373, *post*) on the ground that the decision of the court below that the property had not acquired a *situs* in Porto Rico was correct and was sufficient to sustain the judgment.

ing company entered into a contract with the United States Government to dredge certain portions of the harbor of San Juan and the channel leading from the ocean to the harbor area. Prior to that date, for use in connection with its operations under the contract, it brought to the harbor one dredge, one tugboat, two scows for dumping material to be removed, one coal scow and one launch. The boats and machinery are its property and have been constantly used by it in the performance of its contract, and were not used in connection with any other business or operations, and were at all times within the harbor where the operations under the contract were carried on. The dredging company has neither conducted nor carried on any other business in Porto Rico or the waters adjacent thereto except its operations under the contract.

Gromer, as Treasurer of Porto Rico, pretending to act under the revenue laws of Porto Rico, assumed to assess and levy on the said property as of the value of $75,000 a tax of $1,200, for the fiscal year 1908–9, and he and his agents "have levied an embargo on part of said property . . . and are threatening to foreclose the same and to sell the property for the purpose of enforcing the collection of the said alleged tax."

The tax is illegal and its enforcement will be illegal by virtue of the laws of the United States and of Porto Rico, and especially by virtue of the acts and proclamations of Congress and of the President of the United States creating reservations in and about the island of Porto Rico. The insular government of Porto Rico is not authorized to levy or collect any tax in connection with property the *situs* of which is within the reservation or within any navigable waters of harbor areas of the island of Porto Rico. The property of the company has not been brought within the jurisdiction of the insular government, nor is it subject to taxation while being employed in the perform-

ance of the contract with the United States and within the harbor area.

It is alleged that the company is without any remedy at law, and an injunction is therefore prayed.

In support of his demurrer appellant contends that the dredging company had an adequate remedy at law and that § 12 of the act of the Legislative Assembly of Porto Rico, approved March 8, 1906 (Acts 1906, p. 86 at 89), which provides that an "injunction may be issued to prevent the illegal levying of any tax, duty or toll, or for the illegal collection thereof, or against any proceeding to enforce such collection . . ." does not apply to the District Court of the United States for Porto Rico. We, however, pass the contention, as we prefer to rest our decision on the merits.

The bill of the dredging company, and its contentions here, are based on two propositions: (1) the property was not within the jurisdiction of Porto Rico but was within the harbor area reserved by the United States; (2) the property was being used "within the harbor area" in the performance of a contract with the United States and therefore not subject to taxation for insular purposes.

To sustain the first proposition § 13 of the Foraker Act (April 12, 1900, 31 Stat. 77, c. 191) is relied on and the act of Congress of July 1, 1902 (32 Stat. 731, c. 1383).

Section 13 (31 Stat. 80) reads as follows:

"That all property which may have been acquired in Porto Rico by the United States under the cession of Spain in said treaty of peace in any public bridges, road houses, water powers, highways, unnavigable streams, and the beds thereof, subterranean waters, mines, or minerals under the surface of private lands, and all property which, at the time of the cession belonged, under the laws of Spain then in force, to the various harbor works boards of Porto Rico, and of the harbor shores, docks, slips, and reclaimed lands, *but not including harbor areas or*

navigable waters, is hereby placed under the *control* of the government established by this Act to be administered for the benefit of the people of Porto Rico; and the legislative assembly hereby created shall have authority, subject to the limitations imposed upon all its acts, to legislate with respect to all such matters as it may deem advisable." [Italics ours.]

Under the act of Congress of July 1, 1902, a division of the public properties of Porto Rico was made under which the President of the United States was authorized to reserve certain public properties for the use of the Federal Government. The properties not reserved were granted to the Government of Porto Rico to be held or disposed of for the use and benefit of the people of the island. The reservations included lands and buildings for army and navy and other Federal governmental purposes. The exception of harbors and navigable streams was as follows:

"And all the public lands and buildings, not including harbor areas and navigable streams and bodies of water and the submerged lands underlying the same, owned by the United States in said island and not so reserved," etc.

Considering these provisions alone it is, we think, manifest that they only provide for proprietary reservations and dispositions and not for limitations upon the exercise of government. This conclusion is confirmed by § 1 of the Foraker Act, which provides that the provisions of the act "shall apply to the Island of Porto Rico and to the adjacent islands and waters of the islands lying east of the seventy-fourth meridian of longitude west of Greenwich, which were ceded to the United States by the Government of Spain by treaty entered into on the tenth day of December, eighteen hundred and ninety-eight; and the name Porto Rico, as used in this Act, shall be held to include not only the island of that name, but all of the adjacent islands, as aforesaid."

As early as 1901 the control by the Government of the

United States over Porto Rican waters came up for consideration and was referred by the Secretary of War to the Attorney General for determination. The elements in question were the River and Harbor Act of 1899 (March 3, 1899, 30 Stat. 1151, c. 425) and the act of April 12, 1900, "temporarily to provide revenues and a civil government for Porto Rico, and for other purposes." 31 Stat. 77, 80. Section 14 of the latter act provided, with certain exceptions, that the statutory laws of the United States not locally inapplicable should have the same force and effect in Porto Rico as in the United States. Section 13 provided that certain harbor property which at the time of the cession belonged, under the laws of Spain, to the various Harbor Works Boards of Porto Rico, "but not including harbor areas or navigable waters," should be "placed under the control of the government established by this act and to be administered for the benefit of the people of Porto Rico." The Legislative Assembly created by the act was given authority "to legislate with respect to all such matters" as it might deem advisable, and this authority was extended to all matters of a legislative character not locally inapplicable. It was further provided that all laws should be referred to Congress, which reserved the power to annul the same.

The River and Harbor Act of March 3, 1899 (30 Stat. 1121, 1151, c. 425) prohibited unauthorized obstructions to navigation in any of the waters of the United States, and provided for control by the Secretary of War of wharves and similar structures in ports and other waters of the United States.

The Attorney General expressed the opinion that under these statutes the coastal waters, harbors and other navigable waters of the island were waters of the United States and that a license granted by the Secretary of War to build a wharf in the harbor, given before the ratification of the treaty with Spain, was valid, and that the

power under the license to rebuild the wharf, which had been destroyed by fire, continued as against the control of the Executive Council of Porto Rico. Commenting on the provisions of the River and Harbor Act and the acts in regard to Porto Rico, it was said that Congress, since the ratification of the treaty with Spain, has nowhere indicated that Porto Rican waters are not to be regarded as waters of the United States, nor directed that the authority of the Secretary of War, under the River and Harbor Act of 1899, shall not extend to the Porto Rican waters. "On the contrary, Congress has used language in the Porto Rican Act, as, for instance, in section 13, which clearly contemplates national jurisdiction over those waters as waters of the United States." 23 Op. Atty. Genl. 551. In other words, the jurisdiction of the United States over those waters was the jurisdiction that the United States had over all other navigable waters, an exercise of which the River and Harbor Act was an example.

This is made clear by a subsequent opinion, in which it was declared "that Congress had committed to local control, subject to the express limitation upon the local legislative power, the administration of certain public property and utilities, including 'harbor shores, docks, slips, and reclaimed lands,' but excluding 'harbor areas or navigable waters.' " And, speaking of §§ 12 and 13 of the Porto Rican Act of April 12, 1900, it was said that the "obvious implication" from them is "that the General Government retains title to, possession of, and control over certain other public property, of which fortifications and their appurtenances are specified, and also reserves for its own administration the usual national powers over lights, buoys, and other matters affecting navigation or 'works undertaken by the United States.' " And it was said, further: "From all this it is certain that the ordinary national control of the marine belt affects the coastal

waters of Porto Rico as well as those of any State or any other Territory of the United States." But as to the "harbor margins" it was said that "the Government of the United States, by reason of these grants . . . to Porto Rico, is in the same position with reference to the island government, as well as to private owners, as it would be in a similar case affecting a State of the United States." 23 Op. Atty. Genl. 564, 566.

From this principle it was concluded that the United States could not appropriate the islands of Culebra for a naval base, they being within the limits described in § 1 of the act of April 12, 1900. And § 1 of that act is identical with § 1 of the Foraker Act and its provisions for "harbor areas and navigable waters" are the same as in the Foraker Act. The views of the Attorney General, therefore, are expressly applicable, for the language of the act of April 12, 1900, which determined them, was repeated in the Foraker Act, which we are now called upon to consider.

The distinction made between local control of property and the exercise of government is a substantial one and is illustrated in cases. *Shively* v. *Bowlby*, 152 U. S. 1, 30; *Thomas* v. *Gay*, 169 U. S. 264; *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525; *Id.* 542; *Western Union Telegraph Co.* v. *Chiles*, 214 U. S. 274, 278; *Reynolds* v. *People*, 1 Colorado, 179, 181; *Scott* v. *United States*, 1 Wyoming, 40; *Territory* v. *Burgess*, 8 Montana, 57.

We have seen that by § 1 of the Foraker Act all of its provisions are made applicable to a certain defined area, and that the name Porto Rico "shall be held to include not only the island of that name, but all adjacent islands and waters of the islands." The governmental powers conferred upon Porto Rico must be coextensive with that area, subject to the reservation that all laws passed shall not be in conflict with the laws of the United States, and the power of enacting such laws is conferred upon the Legislative Assembly. There is precaution against abuse.

They must be reported to Congress, which has the power to annul them.

The purpose of the act is to give local self-government, conferring an autonomy similar to that of the States and Territories, reserving to the United States rights to the harbor areas and navigable waters for the purpose of exercising the usual national control and jurisdiction over commerce and navigation.

The United States could have reserved government control and exercised it as it does in instances, by the consent of the States, over certain places in the States devoted to the governmental service of the United States. We do not think, as we have said, that the United States has done so, and that it has not is the view of the executive department of the Government as expressed through the Attorney General. The War Department entertained the same view as to military reservations in Porto Rico and also as to such reservations in the Philippine Islands.

Section 12 of the Philippine Act placed all property rights acquired from Spain under the control of the island government for the benefit of its inhabitants, except "such land or other property as shall be designated by the President of the United States for military and other reservations for the Government of the United States." The extent of the power thus reserved was referred for consideration by the Secretary of War to the Attorney General, and in an opinion written by Solicitor General Hoyt and approved by Attorney General Moody it was held that the provisions granted and reserved property, but did not confer governmental jurisdiction. It was said in the course of the opinion, after referring to the provisions of the Philippine Act which directed that all laws passed by the Philippine Government should be reported to Congress and the reservation by Congress of the power to annul the same (a similar provision is in the Porto Rico

Act), that "the relation of Congress to all territorial legislation is similar [certain organic acts of the States being cited], and thus it may be said that the exercise of local jurisdiction for ordinary municipal purposes over a reservation in a territory is valid until and unless disapproved by Congress." 26 Op. Atty. Genl. 91, 97.

There is an allegation in the bill that the property was not "subject to any lien or burden of taxation while being employed in the performance of its said contract with the United States of America and within the said harbor area." It is not clear what is meant by the allegation. So far as it means that the property is an instrument of the National Government and not subject, therefore, to local taxation, the contention cannot prevail. *Baltimore Ship Building & Dry Dock Co.* v. *Baltimore*, 195 U. S. 375, 382. Indeed, the contention is a very broad one and would seem to be independent of the situation of the property, and, if true at all, would apply to property employed in the service of the United States, wherever situated and no matter to what extent employed. Appellant discusses it somewhat. We shall consider it in the aspect presented by appellee. Counsel say that "the basic and underlying principle which must control in the determination of the case is as to the extent of the control or jurisdiction of the insular government over the harbor of San Juan, and in this connection as to whether or not property situated entirely within the harbor area, engaged in operations connected with the lands underlying such harbor area, could receive any benefit from the expenditure from moneys raised by the insular government from taxation."

There is a confusing mixture of elements. If Porto Rico had jurisdiction over the harbor area it had jurisdiction to tax property which was situated in the harbor, no matter how engaged; and, being so situated, the validity of the tax upon it cannot be determined by an inquiry of

the extent it may be benefited. *Thomas* v. *Gay, supra; Wagoner* v. *Evans*, 170 U. S. 588.

It, however, may be said that the property was only temporarily in the waters of Porto Rico and that its *situs* was at the domicile of the dredging company.

The fact is not alleged, and no other fact which removed the property from the application of the rule that tangible personal property is subject to taxation by the State in which it is, no matter where the domicile of the owner may be. *Old Dominion Steamship Co.* v. *Virginia*, 198 U. S. 299, 305.

The allegation is that prior to the first of April, 1908, the property was brought to and within the harbor of San Juan. The date is that of the assessment and levy of the tax, but whence the property had been brought, or how long it had been in the harbor before the levy of the tax, is not averred, nor was it necessary from the purpose of the cause of action alleged. There is not an intimation that the property had its *situs* for taxation elsewhere. The claims of exemption from the tax, and the only claims of exemption, were: (1) That Porto Rico, by virtue of the laws of the United States and of Porto Rico, and especially by virtue of those acts and proclamations of Congress and of the President of the United States creating reservations in and about the Island of Porto Rico, was "not authorized to levy or collect any tax in connection with property the *status* [*situs?*] of which" was "within such reservation, or within any navigable waters or harbor areas of the said island of Porto Rico." (2) That the property was not subject to taxation "while being employed in the performance of" the dredging company's "contract with the United States of America and within the said harbor area."

These allegations are, as we have already seen, the basis of the contentions made and argued by the company. It is true that after discussing them counsel "in-

vite the attention of the court" to "certain other considerations" expressed in the opinion of the court below. To analyze or summarize the opinion would extend our discussion unduly. Elements that are really independent are mingled somewhat, making it difficult to assign the exact strength given to them respectively, but we think the basis of the decision was, as it is of the contentions discussed by counsel for the company, that the property was not subject to the taxing power of Porto Rico because of its situation within the harbor area and because the title to such area had been reserved to the National Government, an untenable position, as we have seen.

Decree reversed, with directions to sustain the demurrer and dismiss the bill.

MR. JUSTICE DAY, with whom concurred MR. JUSTICE HUGHES and MR. JUSTICE LAMAR, dissenting.

We are unable to concur in the judgment just pronounced. The reversal of the judgment below is, in our view, inconsistent with decisions heretofore made in this court concerning the power of taxation.

We agree with the decision of the court that the Territory of Porto Rico has jurisdiction for taxing purposes over the harbor and waters in question and that the use of the property for Government purposes does not exempt it from taxation, and therefore do not dissent from anything that is said in the opinion of the court upon those subjects. Our objection to the judgment of reversal is that, as we see it, there is a ground of decision in the court below, ample to sustain its decree, which does not turn upon the determination of the controversy as to the political jurisdiction over these waters. In our opinion, the property of the Dredging Company had not acquired a taxable *situs* within the jurisdiction of the Territory of Porto Rico.

The case was heard upon demurrer, and we must therefore take the allegations of the bill well pleaded to be true. From them it appears that prior to the first day of April, 1908, complainant company, a corporation of the State of Delaware, having its principal office and place of business at Wilmington, in that State, entered into a contract with the United States to perform certain services in connection with the dredging of portions of the harbor of San Juan, Porto Rico, and the channel leading from the ocean to the harbor. The bill alleges:

"That by virtue of the requirements of the said contract your orator did, prior to the said first day of April, 1908, bring to and within the said harbor area of the said harbor of San Juan certain boats and machinery, to be used by it in connection with its operations under the said contract, to wit, one dredge, one tugboat, two scows for dumping material to be removed, one coal scow and one launch. That the said machinery and boats so brought by the said complainant and used in connection with its operations under said contract in the said harbor area of the harbor of San Juan were and are the property of the said complainant Company, and since the same were so brought to the said harbor area the same have been constantly used by the said complainant and engaged in its operations in carrying out its said contract with the said the United States; and the same have not been used in connection with any other business or operations whatsoever, and the same have at all times been entirely within the said harbor areas where the said operations under said contract were so being carried on. And your orator further states that it has not conducted or carried on any business in Porto Rico or in the waters adjacent thereto, except the said operations under the said contract with the United States aforesaid."

It is further alleged that on the first day of April, 1908, the taxing officer of Porto Rico undertook to levy a tax

of $1,200 upon a valuation of the property at $75,000, under the laws of the Territory, as of that date.

The case was submitted upon briefs without argument. In the brief of the Attorney General, as well as that of the appellee, the question principally argued concerns the jurisdiction of the Territory of Porto Rico over the harbor and waters of the bay. In the brief of the Attorney General argument is made and cases are cited to sustain the claim that the *situs* of the property for the purposes of taxation was within the jurisdiction of the Territory. In the brief submitted by the appellee reference is made to the opinion of the court for additional reasons for supporting the decree, which reasons are not adverted to at length in the brief. In the opinion of the court the allegations of the bill are treated, as might rightly be done, as raising the question of taxable *situs* of this property, and, among other things, the judge says (p. 146):

"It has, we think, been settled by numerous recent decisions of the Supreme Court of the United States, that the old rule of personal property following the domicil of the owner has been so varied and departed from as that it does not mean very much at the present time; the real question to be decided in every such case being whether the personal property—be the same rolling stock, machinery, merchandise, or even floating property, such as steamships, boats, or dredges—has been brought within the taxing jurisdiction of the government attempting to levy the tax. In other words, it must always be determined that the *situs* of the property is within the taxing jurisdiction. See *Old Dominion Steamship Co.* v. *State of Virginia*, 198 U. S. 299, and the many cases cited. Also *Ayer & Lord Tie Co.* v. *State of Kentucky*, 202 U. S. 409, and cases cited, and *Metropolitan Life Insurance Company* v. *New Orleans*, 205 U. S. 395, and citations."

After consideration of the subject the court reached the conclusion, not only that the local government of Porto

Rico had no jurisdiction over the harbor and waters where this work was done, but that the property had no taxable *situs* in Porto Rico. See pp. 154 and 155, Vol. V, Porto Rico Federal Reporter.

It is well settled that property outside of the jurisdiction of a State cannot be taxed within the due process clause of the Fourteenth Amendment. *Louisville &c. Ferry Co.* v. *Kentucky*, 188 U. S. 385; *Delaware, L. &c. R. R. Co.* v. *Pennsylvania*, 198 U. S. 341; *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194.

As a general rule, in the absence of a *situs* elsewhere, the domicile of the owner is the place where personalty is taxable. As was said in *Tappan* v. *Merchants' National Bank*, 19 Wall. 490, by Mr. Chief Justice Waite, speaking for the court (p. 499):

"Personal property, in the absence of any law to the contrary, follows the person of the owner, and has its *situs* at his domicile. But, for the purposes of taxation, it may be separated from him, and he may be taxed on its account at the place where it is actually located. These are familiar principles, and have been often acted upon in this court."

To the same effect, see *St. Louis* v. *Wiggins Ferry Co.*, 11 Wall. 423; *Bristol* v. *Washington County*, 177 U. S. 133; *Ayer & Lord Tie Co.* v. *Kentucky*, 202 U. S. 409.

In *Buck* v. *Beach*, 206 U. S. 392, this court, while recognizing the rule of taxable *situs* of personal property as distinguished from the domicile of the owner, held that notes temporarily within a State, although in the possession of an agent of the owner and there held for collection, were not within the taxing power, where the owner lived elsewhere.

It requires a showing that the property sought to be taxed is incorporated in or commingled with the property of the taxing authority, before it can become liable to taxation in any other jurisdiction than that of the domicile

of the owner. *Commonwealth* v. *American Dredging Co.*, 122 Pa. St. 386 (see *infra*).

The decisions in this court indicate that personal property of a tangible character, to become taxable, must have acquired a *situs* of a permanent nature within the jurisdiction of the authority seeking to levy the tax. The use of the term "permanent" in this connection may not mean the continued and unchangeable location of the property at a given place, but certainly does intend to include the idea of location which is not of a temporary or fleeting character.

As was said by this court in *Morgan* v. *Parham*, 16 Wall. 471, 476, in declaring that a vessel engaged in interstate commerce was not subject to taxation in the city of Mobile, Alabama, although it was physically within the limits of the city in the course of navigation:

"It is the opinion of the court that the State of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that State, but was there temporarily only."

In *Old Dominion Steamship Co.* v. *Virginia*, 198 U. S. 299, it was held that certain vessels engaged in interstate commerce and registered outside of the State of Virginia were taxable in that State, it appearing that they were continuously used in navigating the waters of that State. Of that case this court said in *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63, 72:

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

thereby acquired jurisdiction for imposing a tax as upon property which had become incorporated into the tangible property within her territory."

In *Ayer & Lord Tie Co.* v. *Kentucky*, *supra*, this court had occasion to consider the taxation of vessels plying between the ports of different States, and it was held that where a vessel has acquired an actual *situs* in a State other than that which is the domicile of the owner, it may be taxed, because it is within the jurisdiction of the taxing authority, and, after reviewing the previous cases in this court, Mr. Justice White, speaking for the court, said (p. 423):

"But, if enrollment at that place was within the statutes, it is wholly immaterial, since the previous decisions to which we have referred decisively establish that enrollment is irrelevant to the question of taxation, because the power of taxation of vessels depends either upon the actual domicil of the owner or the permanent *situs* of the property within the taxing jurisdiction."

As was said in one of the latest of this court's deliverances upon the subject, *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395, "but personal property may be taxed in its permanent abiding place, although the domicile of the owner is elsewhere."

And in the latest deliverance of this court upon the subject, *Southern Pacific Co.* v. *Kentucky*, *supra*, decided at this term, the principle is again stated and applied, that tangible personal property, unless it has acquired an actual *situs* elsewhere, is taxable at the domicile of the owner.

In all the cases to which our attention has been called, decided in this court, the idea of permanency in the abiding place is emphasized as essential to taxable *situs*—that is, the property sought to be taxed must become "commingled" with the property of the State (*Old Dominion Steamship Co.* v. *Virginia*, *supra*), or "intermingled" with

the general property of the State (*Delaware, L. &c. R. R. Co.* v. *Pennsylvania, supra*), or "permanently located" there (*Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194), or "incorporated in" the local property (*Southern Pacific Co.* v. *Kentucky, supra*). All these expressions indicate the idea of a permanent *situs* of the property.

The question then comes to this: When the Porto Rico authorities, on the first of April, 1908, undertook to levy this tax upon the dredging outfit, had it acquired a *situs* in that jurisdiction for the purpose of taxation? Answering this question, we must bear in mind that there is no showing that the property was permanently located in San Juan harbor, in the sense we have indicated, but that, on the contrary, it appears it was brought into Porto Rico for the purpose of carrying out a Government contract upon which the owner of the property had entered at the time of the attempted taxation; that it was not used in connection with any other business or operation whatsoever, but had been continuously and entirely engaged in carrying out the contract for which it was taken to Porto Rico, and that the owner of the property had not engaged in any operations in Porto Rico or the waters thereof, except only those under the contract with the United States.

Tangible personal property is taxable at the owner's domicile, except where it is shown to have an actual *situs* elsewhere, and, as we have seen, actual *situs* is not gained when the property comes only temporarily within the taxing jurisdiction. Applying this test, we are of the opinion that this dredging outfit had not become incorporated into the personal property of the Territory of Porto Rico, as manifestly it was there temporarily only. In our judgment this situation falls far short of a location in Porto Rico sufficient to subject it to the taxing power of that Territory.

The cases relied upon and cited in the brief of the At-

torney General of Porto Rico, *National Dredging Co.* v. *The State*, 99 Alabama, 462, and *North Western Lumber Co.* v. *Chehalis County*, 25 Washington, 95, are entirely different in their facts.

In the Alabama case the dredging outfit was held presumably to be in Mobile Bay for the purpose of carrying out a series of contracts in the line of the dredging company's business. The court says (p. 465):

"Indeed, as appears from this record, other property of the same kind, which had previously been used by residents of Alabama in the prosecution of this work, was purchased by the appellant company, and, being incorporated with that involved here, has all along been used like it in dredging the channel of Mobile Bay, and one scow so used was built in the city of Mobile, and has never been, we assume, outside of the State."

And the court further says (p. 466):

"In other words, taking into consideration the business of the corporation, the amount and continuing character of the work to be done in Mobile Bay, the preparations made by the company for doing so much thereof as is authorized under one annual appropriation, it may be that this property will be for years engaged upon this work, as a part of that now being used by the company of like kind with this had been used thereon for a year or years prior to 1891. On this state of the case—or even leaving out of view the considerations last adverted to—it is clear, we think, that this property is not merely temporarily within Alabama, but that, to the contrary, its presence here is for such an indefinite period as involves the idea of permanency, in the sense in which that term is used with respect to the *situs* of property for the purposes of taxation."

In the Washington case, the property sought to be taxed was certain tugboats, which were claimed to be exempt from taxation because they were registered at a

port in another State. The evidence disclosed that these tugs had been in use in the State of Washington from four to seven years and not elsewhere, and that the only absence of the tugs from the harbors of that State was for the temporary purpose of repairs, and further, that they were used for all those years appurtenant to and as a part of the lumber plant and business of the lumber company in the county and State where taxed. Under such circumstances the Supreme Court of Washington held that the tugs were permanently in Washington, transacting a local business, and had acquired a taxable *situs* within that State.

A statement of these cases readily distinguishes them from the one at bar. In the case now before us it was sought to tax the dredging property upon its removal from the domicile of its owner for the performance of a single contract and for the transaction of no other business whatsoever, and presumably, as the court below said, not to remain in the jurisdiction beyond the term of the contract for which it was used. To tax property in this situation, it seems to us, would be extending the doctrine of taxable *situs* elsewhere than at the owner's domicile beyond any authority shown, and certainly beyond the reason of the rule. If property thus located could be taxed, the same principle would permit the taxing of a dredging outfit upon the Great Lakes of the country, frequently moving from port to port, in the performance of dredging contracts, in every jurisdiction where it might temporarily be, as well as at the domicile of the owner, where such property could unquestionably be reached.

In *Commonwealth* v. *American Dredging Co.*, *supra*, where a dredging outfit was specifically involved, the Supreme Court of Pennsylvania held that so much of the capital stock of the corporation as was invested in the State of New Jersey in a dredging outfit, namely, $92,000 in four dredges which were built outside of the State of

Pennsylvania, three of which had never been within the limits of that State and the fourth of which had never been within its limits until after the end of the year; $6,000 in a tug which was built outside of the State of Pennsylvania and was not within its limits during the year, and $38,500 in eleven scows, built outside of the State of Pennsylvania and never within its limits, the property all being employed for corporate purposes in the States of New Jersey, Maryland and Virginia, was nevertheless subject to taxation in the State of Pennsylvania, which was the domicile of the American Dredging Company, the owner of the property. In reaching that conclusion Mr. Justice Paxson, who spoke for the court, said (p. 391):

"It must be conceded that the property in question must be liable to taxation in some jurisdiction. If it were permanently located in another state, it would be liable to taxation there. But the facts show that it is not permanently located out of the state. From the nature of the business, it is in one place to-day and another to-morrow, and, hence, not taxable in the jurisdiction where temporarily employed. It follows that if not taxable here, it escapes altogether. The rule as to vessels engaged in foreign or interstate commerce is that their situs, for the purpose of taxation is their home port of registry, or the residence of their owner, if unregistered. *Pullman Palace Car Co.* v. *Twombly*, 29 Fed. Rep. 66; *Hays* v. *Pacific Mail Steamship Co.*, 17 How. 596.

"These vessels, if they may be so called, were not registered. Hence their *situs* for taxation is the domicil of the owners. This rule must prevail in the absence of anything to show that they are so permanently located in another state as to be liable to taxation under the laws of that state."

That case was commented on in the opinion of this court in *Delaware, L. &c. R. R. Co.* v. *Pennsylvania, supra*, in which it was held that the capital stock of a corporation

represented by property in stocks of coal which had been sent out of the State and were deposited in other States for sale could not be taxed.

Of the *Dredging Company Case*, Mr. Justice Peckham, speaking for this court, said (p. 356):

"Such property is entirely unlike the property involved in *Commonwealth* v. *American Dredging Co.*, 122 Pa. St. 386. That property consisted of vessels, or scows, or tugs, only temporarily out of the State of Pennsylvania, for the purpose of engaging in business, and liable to return to the State at any time, and was without any actual *situs* beyond the jurisdiction of the State itself."

We think, therefore, that the property in question was taxable in Delaware at the domicile of the owner, and we agree with the District Court in its conclusion that it had not acquired a taxable *situs* in Porto Rico.

For this reason we dissent from the judgment of the court.

UNITED STATES *v.* TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS.

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

No. 386. Argued October 20, 23, 1911.—Decided April 22, 1912.

Whether the unification of terminals in a railroad center is a permissible facility in aid of interstate commerce, or an illegal combination in restraint thereof, depends upon the intent to be inferred from the extent of the control secured over the instrumentalities which such commerce is compelled to use, the method by which such control has been obtained, and the manner in which it is exercised.

The unification of substantially every terminal facility by which the traffic of St. Louis is served is a combination in restraint of interstate

trade within the meaning and purposes of the Anti-Trust Act of July 2, 1890, as the same has been construed by this court in *Standard Oil Co.* v. *United States*, 221 U. S. 1, and *United States* v. *American Tobacco Co.*, 221 U. S. 106.

The history of the unification of the railroad terminal systems in St. Louis in the Terminal Railroad Association shows an intent to destroy the independent existence of the terminal systems previously existing, to close the door to competition, and to prevent the joint use or control of the terminals by any non-proprietary company.

A provision in an agreement for joint use of terminals by non-proprietary companies on equal terms does not render an illegal combination legal where there is no provision by which the non-proprietary companies can enforce their right to such use.

Although the proprietary companies of a combination unifying terminals may not use their full power to impede free competition by outside companies, the control may so result in methods inconsistent with freedom of competition as to render it an illegal restraint under the Sherman Act.

This court bases its conclusion that the unification of the terminals in St. Louis is an illegal restraint on interstate traffic, and not an aid thereto, largely upon the extraordinary situation at St. Louis and upon the physical and topographical conditions of the locality.

A combination of terminal facilities, which is an illegal restraint of trade by reason of the exclusion of non-proprietary companies, may be modified by the court by permitting such non-proprietors to avail of the facilities on equal terms.

In this case *held* that the practices of the Terminal Association in not only absorbing other railroad corporations but in doing a transportation business other than supplying terminal facilities operated to the disadvantage of interstate commerce.

One of the fundamental purposes of the Anti-Trust Act is to protect, and not to destroy, the rights of property; and, in applying the remedy, injury to the public by the prevention of the restraint is the foundation of the prohibitions of the statute. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 78.

Where the illegality of the combination grows out of administrative conditions which may be eliminated, an inhibition of the obnoxious practices may vindicate the statute, and where public advantages of a unified system can be preserved, that method may be adopted by the court.

In this case the objects of the Anti-Trust Act are best attained by a decree directing the defendants to reorganize the contracts unifying

the terminal facilities of St. Louis under their control so as to permit the proper and equal use thereof by non-proprietary companies, and abolishing the obnoxious practices in regard to transportation of merchandise.

Unless defendants, whose combination has been declared illegal by reason of administrative abuse, modify it to the satisfaction of the court so as to eliminate such abuse in the future, the court will direct a complete disjoinder of the elements of the combination and enjoin the defendants from exercising any joint control thereover.

THE facts, which involve the validity under the Sherman Anti-trust Act of the Terminal Railroad Association of St. Louis, are stated in the opinion.

Mr. E. C. Crow, Special Assistant to the Attorney General, with whom *The Attorney General* and *Mr. Charles A. Houts*, United States Attorney, were on the brief, for appellant:

The record shows a plain violation of the Sherman Act of July 2, 1890.

Every contract, combination in the form of trust or otherwise, or conspiracy, in undue restraint of trade or commerce among the several States or foreign nations, is illegal. See § 1.

Monopolizing, or attempting, combining or conspiring to monopolize interstate or foreign trade or commerce is illegal. See § 2.

Certain fundamental considerations control. The statute is aimed at restrictions upon interstate commerce. Given a reasonable construction, as it must receive, its purpose is to permit commerce between the States and with foreign nations to flow in its natural channels unrestricted by any combinations, contracts, conspiracies, or monopolies whatsoever. *Hopkins* v. *United States*, 171 U. S. 586; *Loewe* v. *Lawlor*, 208 U. S. 274.

Combinations between competing railroads engaged in interstate commerce to unduly restrain commerce and combinations between *media* or instruments of interstate

commerce fall within the prohibition of the act. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 319; *United States* v. *Joint Traffic Association*, 171 U. S. 505; *Addyston Pipe &c. Co.* v. *United States*, 175 U. S. 244; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Anderson* v. *United States*, 171 U. S. 604; *Standard Oil Co.* v. *United States*, 221 U. S. 1.

To monopolize interstate commerce, or the *media*, or instruments of interstate commerce, is to secure, or adopt measures which may bring about an exclusive control of such commerce or of such instruments of commerce so as to prevent others from engaging therein, or using such instruments of commerce. *In re Green*, 52 Fed. Rep. 115; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 402; *United States* v. *American Tobacco Co.*, 164 Fed. Rep. 700; *United States* v. *Knight*, 156 U. S. 1.

It is not necessary to bring a combination within the act, that the result of its operation shall be complete restraint or monopoly, or that it shall have resulted in actual injury to the public. It is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition. *United States* v. *Chesapeake &c. Fuel Co.*, 115 Fed. Rep. 610; *United States* v. *E. C. Knight Co.*, 156 U. S. 16; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Chattanooga &c. Works* v. *Atlanta*, 203 U. S. 390.

The Terminal Association is necessarily engaged in interstate commerce. *United States* v. *Union Stock Yards*, 161 Fed. Rep. 919; *United States* v. *Colorado &c. R. R.*, 157 Fed. Rep. 321; *United States* v. *R. P. T. Co.*, 144 Fed. Rep. 861.

Mr. H. S. Priest, with whom *Mr. T. M. Pierce* was on the brief, for appellees:

The terminal service necessary to be done in a great city may, any or all of it, be done by the railroad com-

panies for themselves. A company may build its own line connecting with another road on the other side of the city, and it may use its own wagons to receive and deliver freight at store doors.

This, and no more, the railroad companies of St. Louis have done. They have acquired the terminal facilities of St. Louis for themselves and are operating them as a part of the instrumentalities of their business. That each one might do this if the instrumentalities employed were its own is conceded, but it is denied that they may combine with each other for that purpose.

The unitary system is in accord with public policy.

Terminal service is a matter of internal economy which the companies may adjust to mutual advantage and no arrangement respecting it operates to restrict competition between them as to the transportation service for the public in which they are engaged.

Whatever facility railroad companies may use in common they may own in common. Common arrangements affecting internal economy have never been held to be in violation of public policy and whenever, in the advance of civilization, they have suggested themselves as feasible, they have been recognized by law, and appropriate regulations have been prescribed for them. In the country every man builds independently. In the crowded section of a great city, however, if all construction were done independently, the waste in space and the increase in cost of construction would be very great.

Community of use of terminals in a large city is more than a matter of convenience, or economy; it is an absolute public necessity.

Under the Interstate Commerce Law, and indeed under the common law of the land, tolls must be reasonable, and the Government has the power to make them so if they are not. The charges of extortion and that the proprietary railroad companies compel all other railroad companies to

use the facilities are not true. There is, indeed, a compulsion, but it is inherent in the situation. The other companies use the terminal property because it is not possible to acquire adequate facilities for themselves. The cost to any one company is prohibitive.

Every consideration of a public nature points to a consolidation of the terminals and to a common use of them by all the railroad companies coming into the city. But to avoid the odious phases of a monopoly, this use must be open to all upon equal terms. The charge for service in any case can be stated in one word—cost. No money received for the service rendered goes to any other purpose than paying expenses of operation, taxes, fixed charges, and proper maintenance. No dividends are paid upon terminal shares, and no proprietary railroad company is a beneficiary of fixed charges. Any new railroad built into St. Louis now has but to secure a way to a terminal track and it has at once the advantages of the entire terminal system.

The public policy of the country as indicated by statutory enactments has been in favor of combination by railroad companies whenever any common matter of internal economy is involved, and also where the combination is in the nature of connecting lines of railroad for the purposes of continuous transportation. Two bridges across a great river, where one will serve, do not facilitate commerce, but burden it with an unnecessary charge.

Common use of the same facilities by different railroad companies has not only been approved, but has been enforced whenever there has been good reason therefor. Act of March 3, 1875, 18 Stat. 510; §§ 1164, 1165, Rev. Stat. Missouri; Union Depot acts of the State of Illinois; April 7, 1875; of Alabama; of February 15, 1907, of Indiana; Burns' Ann. Stat., Col. 2, §§ 5345, 5374; of Iowa, §§ 2099 to 2102, Annotated Code of 1897; of Maine, 60, 51, Rev. Stat. 1903; and of Michigan, Chap.

166, Comp. Laws, 1897; of Minnesota, Act of March 5, 1879; of Nebraska, Chap. 20, Laws of 1887, § 1816, Comp. Stat. 1901; of Ohio, Chap. 3, Tit. 2, 2 Bates' Ann. Stats.; of South Carolina, Code of 1902, Vol. 1, 813; of Tennessee, §§ 2429 to 2437, Code of 1896; of Texas, Chap. 16a, Civil Stat. 1897; of Virginia, § 1294, Code 1904. See Acts of Congress relating to Union Station in Washington, D. C.

It would be singular indeed, if all of the States severally, and the United States as well, were giving their sanction to arrangements and agreements which are in violation of the Sherman Act, and it is much more probable that a construction of that act leading to such a result is entirely without warrant.

Union terminals have been frequently before the courts for consideration, and have always been recognized and approved as legitimate agencies in the work of railroad transportation. *State* v. *Terminal R. R. Assn.*, 182 Missouri, 284; *Bernard* v. *Cheeseman*, 7 Colorado, 376; *Central Railroad Company* v. *Perry*, 58 Georgia, 461; *Birdwell* v. *Gate City Terminal Co.* (Ga.), 10 L. R. A. (N. S.) 909; *Indianapolis Union Railway Co.* v. *Cooper*, 6 Ind. App. 202; *Reisner* v. *Strong*, 24 Kansas, 410; *State* v. *Martin*, 51 Kansas, 462; *Mayor* v. *Norwich R. R. Co.*, 109 Massachusetts, 103; *Mayor* v. *Railroad Commissioners*, 113 Massachusetts, 161; *Union Depot Co.* v. *Morton*, 83 Michigan, 265; *Detroit Station* v. *Detroit*, 88 Michigan, 347; *State* v. *St. Paul Union Depot Co.*, 42 Minnesota, 142; *St. Paul Union Depot Co.* v. *M. & N. R. Co.*, 47 Minnesota, 154; *Chicago, St. Paul & Kansas C. Ry. Co.* v. *Union Depot Ry. Co.*, 54 Minnesota, 411; *Dewey* v. *Railroad*, 142 N. Car. 392; *Riley* v. *Union Station Co.*, 71 S. Car. 457; *Ryan* v. *Terminal Co.*, 102 Tennessee, 124; *Collier* v. *Union Railway Co.*, 113 Tennessee, 96; *Joy* v. *St. Louis*, 138 U. S. 1; *C., R. I. & P. Ry. Co.* v. *U. P. Ry. Co.*, 47 Fed. Rep. 15; *S. C.*, 51 Fed. Rep. 309, and 163 U. S. 564.

The arrangement in question is not in restraint of trade or commerce among the several States, or a monopoly of any part of the trade or commerce among the several States.

Counsel for the Government confuse the operation of the railroad and the cost of it, with the service rendered to the public and the charge for it. The Sherman Act has nothing to do with the former; its restrictions fall altogether upon the latter. No matter how many subordinate agencies of transportation different railroad companies employ in common, no matter how many combinations they may make to secure economy in operation, so long as they do not pool their business or their earnings, so long as they are left free in their relations to the shipping and traveling public, every motive of self-interest remains to incite to competition. And when economy of operation, however accomplished, reduces costs, the end hoped for, through competition, commerce is aided, and charges are reduced to a still lower level.

Mr. John C. Higdon, by leave of the court, filed a brief as *amicus curiæ*.

MR. JUSTICE LURTON delivered the opinion of the court.

The United States filed this bill to enforce the provisions of the Sherman Act of July 2, 1890, c. 647, 26 Stat. 209, against thirty-eight corporate and individual defendants named in the margin,[1] as a combination in re-

[1] The Terminal Railroad Association of St. Louis; The St. Louis Merchants' Bridge Terminal Railway Company; The Wiggins Ferry Company; The St. Louis Bridge Company; The St. Louis Merchants' Bridge Company; The Missouri, Kansas & Texas Railway Company; The St. Louis & San Francisco Railway Company; The Chicago & Alton Railway Company; The Baltimore & Ohio Southwestern Railroad Company; The Illinois Central Railroad Company; The St. Louis, Iron Mountain & Southern Railway Company; The Chicago, Burling-

straint of interstate commerce and as a monopoly forbidden by that law. The cause was heard by the four Circuit Judges, who, being equally divided in judgment, dismissed the bill, without filing an opinion. From this decree the United States has appealed.

The principal defendant is the Terminal Railroad Association of St. Louis, hereinafter designated as the Terminal Company. It is a corporation of the State of Missouri, and was organized under an agreement made in 1889 between Mr. Jay Gould and a number of the defendant railroad companies for the express purpose of acquiring the properties of several independent terminal companies at St. Louis with a view to combining and operating them as a unitary system.

The terminal properties first acquired and combined into one system by the Terminal Company comprised the following: The Union Railway & Transit Company of St. Louis and East St. Louis; The Terminal Railroad of St. Louis and East St. Louis; The Union Depot Company of St. Louis; The St. Louis Bridge Company, and the Tunnel Railroad of St. Louis. These properties included the great union station, the only existing railroad bridge—the Eads or St. Louis Bridge—and every connecting or terminal company by means of which that bridge could be used by railroads terminating on either side of the river. For a time this combination was operated in com-

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ton & Quincy Railway Company; The St. Louis, Vandalia & Terre Haute Railroad Company; The Wabash Railroad Company; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; The Louisville & Nashville Railroad Company; The Southern Railway Company; The Chicago, Rock Island & Pacific Railway Company; The Missouri Pacific Railway Company; The Central Trust Company of New York; A. A. Allen, S. M. Felton, A. J. Davidson, W. M. Green, J. T. Harahan, C. S. Clarke, H. Miller, Benjamin McKean, Joseph Ramsey, George E. Evans, C. E. Schaff, T. C. Powell, J. F. Stevens, A. G. Cochran, W. S. McChesney, Julius Walsh, V. W. Fisher and S. D. Webster.

petition with the terminal system of the Wiggins Ferry Company, and upon the completion of the Merchants' Bridge, in competition with it, and a system of terminals which were organized in connection with it. The Wiggins Ferry Company had for many years operated car transfer boats by means of which cars were transferred between St. Louis and East St. Louis.

Upon each side of the river it owned extensive railway terminal facilities, with which connection was maintained with the many railroads terminating on the west and east sides of the river, which gave such roads connection with each other, as well as access to many of the industrial and business districts on each side. In 1890 a third terminal system was opened up by the completion of a second railroad bridge over the Mississippi River at St. Louis, known as the Merchants' Bridge. This was a railroad toll bridge, open to every railroad upon equal terms. That it might forever maintain the potentiality of competition as a railroad bridge, the act of Congress authorizing its construction provided that no stockholders in any other railway bridge company should become a stockholder therein. But as this was a mere bridge company, it was essential that railroad companies desiring to use it should have railway connections with it on each side of the river. For this purpose two or more railway companies were organized and lines of railway were constructed connecting each end of the Merchants' Bridge with various railroad systems terminating on either side of the river. The Merchants' Bridge and its allied terminals were thereby able to afford many, if not all, of the railroads coming into St. Louis, access to the business districts on both sides of the river, and connection with each other.

Thus, for a time, there existed three independent methods by which connection was maintained between railroads terminating on either side of the river at St. Louis: First, the original Wiggins Ferry Company, and

its railway terminal connections; second, The Eads Railroad Bridge and the several terminal companies by means of which railroads terminating at St. Louis were able to use that bridge and connect with one another, constituting the system controlled by the Terminal Company, and, third, The Merchants' Bridge and terminal facilities owned and operated by companies in connection therewith.

This resulted in some cases in an unnecessary duplication of facilities, but it at least gave to carriers and shippers some choice, a condition which, if it does not lead to competition in charges, does insure competition in service. Important as were the considerations mentioned, their independence of one another served to keep open the means for the entrance of new lines to the city, and was an obstacle to united opposition from existing lines. The importance of this will be more clearly seen when we come to consider the topographical conditions of the situation.

That the promotors of the Terminal Company designed to obtain the control of every feasible means of railroad access to St. Louis, or means of connecting the lines of railway entering on opposite sides of the river, is manifested by the declarations of the original agreement, as well as by the successive steps which followed. Thus, the proviso in the act of Congress authorizing the construction of the Merchants' Bridge, which forbade the ownership of its stock by any other bridge company or stockholder in any such company, was eliminated by an act of Congress, and shortly thereafter the Terminal Company obtained stock control of the Merchants' Bridge Company, and of its related terminal companies, and likewise a lease.

The Wiggins Ferry Company owned the river front on the Illinois shore opposite St. Louis for a distance of several miles. It had on that side and on its own property, switching yards and other terminal facilities. From these yards extended lines of rails which connected with its car transfer boats and with the termini of railroads on the Illinois side.

On the St. Louis side of the river it had like facilities by which it was in connection with railway lines terminating on that side. That company was, consequently, able to interchange traffic between the systems on opposite sides of the river and to serve many industries. In 1892 the Rock Island Railroad Company endeavored to obtain an independent entrance to the city. For this purpose it sought to acquire the facilities owned by the Wiggins Ferry Company by securing a control of its capital stock. This was not deemed desirable by the railroad companies which jointly owned the Terminal Company's facilities, and to prevent this acquisition effort was made to secure control of the stock. The competition was fierce and the market price of the shares pushed to an abnormal price. The final result being in doubt, an agreement was reached by which the Rock Island Company was admitted to joint ownership with the other proprietary companies in all of the terminal properties which were operated by the Terminal Company or which should be acquired by it. The shares in the Ferry Company bought by the Rock Island were transferred to the Terminal Company at cost and were paid for by that company. These shares, united with those which had been acquired by the Terminal Company, enabled the latter to absorb the properties of the Ferry Company, and thus the three independent terminal systems were combined into a single system.

We come, then, to the question upon which the case must turn: Has the unification of substantially every terminal facility by which the traffic of St. Louis is served resulted in a combination which is in restraint of trade within the meaning and purpose of the Anti-trust Act?

It is not contended that the unification of the terminal facilities of a great city where many railroad systems center is, under all circumstances and conditions, a combination in restraint of trade or commerce. Whether it is a facility in aid of interstate commerce or an unreason-

able restraint forbidden by the act of Congress, as construed and applied by this court in the cases of *The Standard Oil Company* v. *The United States*, 221 U. S. 1, and *The United States* v. *American Tobacco Company*, 221 U. S. 106, will depend upon the intent to be inferred from the extent of the control thereby secured over instrumentalities which such commerce is under compulsion to use, the method by which such control has been brought about and the manner in which that control has been exerted.

The consequence to interstate commerce of this combination cannot be appreciated without a consideration of natural conditions greatly affecting the railroad situation at St. Louis. Though twenty-four lines of railway converge at St. Louis, not one of them passes through. About one-half of these lines have their termini on the Illinois side of the river. The others, coming from the west and north, have their termini either in the city or on its northern edge. To the river the city owes its origin, and for a century and more its river commerce was predominant. It is now the great obstacle to connection between the termini of lines on opposite sides of the river and any entry into the city by eastern lines. The cost of construction and maintenance of railroad bridges over so great a river makes it impracticable for every road desiring to enter or pass through the city to have its own bridge. The obvious solution is the maintenance of toll bridges open to the use of any and all lines upon identical terms. And so the commercial interests of St. Louis sought to solve the question, the system of car ferry transfer being inadequate to the growing demands of an ever-increasing population. The first bridge, called the Eads Bridge, was, and is, a toll bridge. Any carrier may use it on equal terms. But to use it there must be access over rails connecting the bridge and the railway. On the St. Louis side the bridge terminates at the foot of the great hills upon which the city is built; on the Illinois side it

ends in the low and wide valley of the Mississippi. This condition resulted in the organization of independent companies which undertook to connect the bridge on each side with the various railroad termini. On the Missouri side it was necessary to tunnel the hills, that the valley of Mill Creek might be reached, where the roads from the west had their termini. Thus, though the bridge might be used by all upon equal terms, it was accessible only by means of the several terminal companies operating lines connecting it with the railroad termini.

This brought about a condition which led to the construction of the second bridge, the Merchants' Bridge. This, too, was, and is, a toll bridge, and may be used by all upon equal terms. To prevent its control by the Eads Bridge Company, it was carefully provided that no stockholder in any other bridge company should own its shares. But this Merchants' Bridge, like the Eads Bridge, had no rail connections with any of the existing railroad systems, and these facilities, as in the case of the Eads Bridge, were supplied by a number of independent railway companies who undertook to fill in the gaps between the bridge ends and the termini of railroads on both sides of the river. It must be also observed that these terminal companies were in many instances so supplied with switch connections as not only to connect with the bridge, but also served to connect such roads with each other and with the industries along their lines. Now, it is evident that these lines connecting railroad termini with the railroad bridges dominated the situation. They stood, as it were, just outside the gateway, and none could enter, though the gate stood open, who did not comply with their terms. The topographical situation making access to the city difficult does not end with the river. The city lies upon a group of great hills which hug the river closely and rapidly recede to the west. These hills are penetrated on the west by the narrow valley of Mill Creek, which crosses the city about

its center. Railways coming from the west use this valley, but its facilities are very restricted and now quite occupied. North of the city the hills drop back from the river gradually, and there exists a valley formed by the Mississippi and Missouri rivers. Railroads coming from the north on the west side of the river come by this valley. As we have stated before, the valley of the Mississippi at St. Louis is on the Illinois side of the river. Railroads coming from the east, northeast and southeast have their termini in that valley. As a consequence, there have grown up numerous cities and towns of some consequence as manufacturing places, the chief of which is East St. Louis.

The result of the geographical and topographical situation is that it is, as a practical matter, impossible for any railroad company to pass through, or even enter St. Louis, so as to be within reach of its industries or commerce, without using the facilities entirely controlled by the Terminal Company. The averment of the bill that the railroad companies, here defendants, being the sole stockholders of the Terminal Company, as we shall later see, compel all other railroad companies converging at St. Louis to use the facilities owned and operated by the Terminal Company, is, therefore, borne out by the facts of the situation. Nor is this effect denied, for the learned counsel representing the proprietary companies, as well as the Terminal Company, say in their filed brief: "There indeed is compulsion, but it is inherent in the situation. The other companies use the terminal properties because it is not possible to acquire adequate facilities for themselves. The cost to any one company is prohibitive." Obviously, this was not true before the consolidation of the systems of the Wiggins Ferry Company and the Merchants' Bridge Company with the system theretofore controlled by the Terminal Company. That the non-proprietary companies might have been compelled to use the instrumentalities of one or the other of the three systems then available, and

that the advantages secured might not have been so great as those offered by the unified system now operated by the Terminal Company, must be admitted. But that there existed before the three terminal systems were combined a considerable measure of competition for the business of the other companies, and a larger power of competition, is undeniable. That the fourteen proprietary companies did not then have the power they now have to exclude either existing roads not in the combination, or new companies, from acquiring an independent entrance into the city, is also indisputable. The independent existence of these three terminal systems was, therefore, a menace to complete domination as keeping open the way for greater competition. Only by their absorption or some equivalent arrangement was it possible to exclude from independent entrance the Rock Island Company, or any other company which might desire its own terminals. To close the door to competition large sums were expended to acquire stock control. For this purpose the obligations of the absorbed companies were assumed and new funds obtained by mortgages upon the unified system.

The physical conditions which compel the use of the combined system by every road which desires to cross the river, either to serve the commerce of the city or to connect with lines separated by the river, is the factor which gives greatest color to the unlawfulness of the combination as now controlled and operated. If the Terminal Company was in law and fact the agent of all, the mere unification which has occurred would take on quite a different aspect. It becomes, therefore, of the utmost importance to know the character and purpose of the corporation which has combined all of the terminal instrumentalities upon which the commerce of a great city and gateway between the East and West must depend. The fact that the Terminal Company is not an independent corporation at all is of the utmost significance. There

are twenty-four railroads converging at St. Louis. The relation of the Terminal Company is not one of impartiality to each of them. It was organized in 1889, at the instance of six of these railroad companies, for the purpose of acquiring all existing terminal instrumentalities for the benefit of the combination, and such other companies as they might thereafter admit to joint ownership by unanimous consent, and upon a consideration to be agreed upon. From time to time other companies came to an agreement with the original proprietors until, at the time this bill was filed, the properties unified were held for the joint use of the fourteen companies made defendants. In the contract of 1889, above referred to, the purpose of acquiring the first terminals combined, is declared to be, "that said properties may be held in perpetuity as a unit and developed and improved in the interest of the proprietary companies, for the purpose of furnishing adequate terminal facilities in St. Louis and East St. Louis." This purpose was carried out by the conveyance to "each of the proprietary companies . . . forever a right of joint use with each other and such other companies as may be admitted as proprietary lines to joint use thereof, of all said terminal properties . . . now held or that may be hereafter acquired in St. Louis and East St. Louis, . . . it being understood that the right herein granted to each proprietary company is not transferable to any extent whatever, but is to remain as an appurtenant to the railroad now owned by each proprietary company"

That these facilities were not to be acquired for the benefit of any railroad company which might desire a joint use thereof was made plain by a provision in the contract referred to which stipulated that other railroad companies not named therein as proprietary companies might only be admitted "to joint use of said terminal system on unanimous consent, but not otherwise, of the

directors of the first party, and on payment of such a consideration as they may determine, and on signing this agreement," etc. Inasmuch as the directors of the Terminal Company consisted of one representative of each of the proprietary companies, selected by itself, it is plain that each of said companies had and still has a veto upon any joint use or control of terminals by any non-proprietary company.

By that and the supplemental agreement of December, 1902, the Ferry Company and the Merchants' Bridge Company having then been absorbed, the proprietary companies prescribed that the charges of the company shall be so adjusted as to produce no more revenue than shall equal the fixed charges, operating and maintenance expenses. Deficiencies for those purposes the proprietary companies guarantee to make good, though such payments are to be reimbursed by an increase in charges, if necessary.

We fail to find in either of the contracts referred to any provision abrogating the requirement of unanimous consent to the admission of other companies to the ownership of the Terminal Company, though counsel say that no such company will now find itself excluded from joint use or ownership upon application. That other companies are permitted to use the facilities of the Terminal Company upon paying the same charges paid by the proprietary companies seems to be conceded. But there is no provision by which any such privilege is accorded.

By still another clause in the agreement the proprietary companies obligate themselves to forever use the facilities of the Terminal Company for all business destined to cross the river. This would seem to guarantee against any competitive system, since the companies to the agreement now control about one-third of the railroad mileage of the United States.

In acquiring these properties the Terminal Company has assumed mortgage and stock dividend obligations of

the constituent companies aggregating about twenty-five million dollars. It has executed its own mortgage upon all of its property to secure an issue of fifty million dollars of bonds, of which twenty million dollars worth have been sold, and the proceeds used in construction or in paying for the properties acquired. It has thus about forty-five million dollars of mortgage or fixed charges or liabilities. The company has an authorized capital stock of fifty million dollars. Of this about twenty-eight million dollars has been issued in equal proportions, to the several owning railroad companies. No dividends have ever been paid, and the company disclaims any purpose to pay dividends. We fail to find any obligation by which they may be prevented from paying dividends upon the stock held by the proprietary companies, or that in its treasury, if ever issued. Undoubtedly, the major part of this revenue arises from the business done by the proprietary companies through the Terminal Company, but that coming from other companies is, however, a large contribution. That no direct profit is derived by the owning companies from the operation of the terminals, may be true. But it is not clear that the proprietary companies do not make an indirect profit through ownership of obligations of the absorbed companies.

That through their ownership and exclusive control they are in possession of advantages in respect to the enormous traffic which must use the St. Louis gateway, is undeniable. That the proprietary companies have not availed themselves of the full measure of their power to impede free competition of outside companies, may be true. Aside from their power under all of the conditions to exclude independent entrance to the city by any outside company, their control has resulted in certain methods which are not consistent with freedom of competition. To these acts we shall refer later.

We are not unmindful of the essential difference be-

tween terminal systems properly so described and railroad transportation companies. The first are but instrumentalities which assist the latter in the transfer of traffic between different lines, and in the collection and distribution of traffic. They are a modern evolution in the doing of railroad business, and are of the greatest public utility. They, under proper conditions, do not restrain, but promote commerce.

The argument that the combination of the instrumentalities operated by the Terminal Company with those of the Merchants' Bridge Company was a combination of two competing lines of railroad, such as was condemned in *Northern Securities Company* v. *United States*, 193 U. S. 197, is not well founded. This combination if properly regarded as of parallel and competing lines would have been obnoxious to the seventeenth section of the constitution of Missouri. For the purpose of enforcing this Missouri prohibition, the State instituted a proceeding to dissolve the combination of the properties of the Merchants' Bridge Terminal Railroad Company with the Terminal Railroad Association of St. Louis, upon the ground that the railroads operated by those companies were parallel and competing lines of railroad. Relief was denied. The Missouri court held that the merger of mere railway terminals used to facilitate the public convenience by the transfer of cars from one line of railway to another, and instrumentalities for the distribution or gathering of traffic, freight or passenger, among scattered industries, or to different business centers of a great city, were not properly railroad companies within the reasonable meaning of the statutes forbidding combinations between competing or parallel lines of railroad. Referring to the legitimate use of terminal companies, the Missouri court said:

"A more effectual means of keeping competition up to the highest point between parallel or competing lines could not be devised. The destruction of the system would re-

sult in compelling the shipper to employ the railroad with which he has switch connection, or else cart his product to a distant part of the city, at a cost possibly as great as the railroad tariff.

"St. Louis is a city of great magnitude in the extent of its area, its population, and its manufacturing and other business. A very large number of trunk line railroads converge in this city. In the brief of one of the well-informed counsel in this case it is said that St. Louis is one of the largest railroad centers in the world. Suppose it were required of every railroad company to effect its entrance to this city as best it could and establish its own terminal facilities, we would have a large number of passenger stations, freight depots and switch yards scattered all over the vast area and innumerable vehicles employed in hauling passengers and freight to and from those stations and depots. Or suppose it became necessary in the exigency of commerce that all incoming trains should reach a common focus, but every railroad company provide its own track; then not only would the expense of obtaining the necessary rights of way be so enormous as to amount to the exclusion of all but a few of the strongest roads, but, if it could be accomplished, the city would be cut to pieces with the many lines of railroad intersecting it in every direction, and thus the greatest agency of commerce would become the greatest burden." 182 Missouri, 284, 299.

Among the cases in which the public utility of such companies has been recognized are: *Bridwell* v. *Gate City Terminal Co.* (Georgia), 10 L. R. A. (N. S.) 909; *Indianapolis Union Railroad Company* v. *Cooper*, 6 Ind. App. 202; *State ex rel.* v. *Martin*, 51 Kansas, 462; *Mayor* v. *Norwich E. W. Railroad Co.*, 109 Massachusetts, 103; *Union Depot Company* v. *Morton*, 83 Michigan, 265; *State* v. *St. Paul Union Depot Co.*, 42 Minnesota, 142; *Ryan* v. *Terminal Co.*, 102 Tennessee, 111, 124.

While, therefore, the mere combining of several independent terminal systems into one may not operate as a restraint upon the interstate commerce which must use them, yet there may be conditions which will bring such a combination under the prohibition of the Sherman Act. The one in question, counsel say, is not antagonistic to but in harmony with the Anti-trust Act, "because it expands competition by extending equal conveniences and advantages to all shippers located upon each of the three systems for all traffic to and from St. Louis; expedites and economizes the service." It is justified, they argue by "(1) the physical or topographical conditions peculiar to the locality; by (2) its commercial, industrial and railroad development and history; by (3) public opinion expressed legislatively and judicially, and (4) by the judgment of experienced railroad engineers and managers." From which consideration the same counsel say that the issue presented by this record is, "whether the common control or ownership of all the terminal facilities (mechanical devices for the exchange, receipt and distribution of traffic) of a large commercial and manufacturing center by all of the railroad companies, and for the benefit of all upon equal terms and facilities, without discrimination, is condemned by the Sherman act."

Let us analyze the proposition included in the issue, as stated by counsel, quoted above: Counsel assume that the combined terminals have come under a "common control or ownership." But this is not the case. That the instrumentalities so combined are not jointly owned or managed by all of the companies compelled to use them is a significant fact which must be taken into account for the purpose of determining whether there has been a violation of the Anti-trust Act. The control and ownership is that of the fourteen roads which are defendants. The railroad systems and the coal roads converging at St. Louis, which are not associated with the proprietary companies are

under compulsion to use the terminal system, and yet have no voice in its control.

It cannot be controverted that, in ordinary circumstances, a number of independent companies might combine for the purpose of controlling or acquiring terminals for their common but exclusive use. In such cases other companies might be admitted upon terms or excluded altogether. If such terms were too onerous, there would ordinarily remain the right and power to construct their own terminals. But the situation at St. Louis is most extraordinary, and we base our conclusion in this case, in a large measure, upon that fact. The "physical or topographical condition peculiar to the locality," which is advanced as a prime justification for a unified system of terminals, constitutes a most obvious reason why such a unified system is an obstacle, a hindrance and a restriction upon interstate commerce, unless it is the impartial agent of all who, owing to conditions, are under such compulsion, as here exists, to use its facilities. The witness upon whom the defendants chiefly rely to uphold the advantages of the unified system which has been constructed, Mr. Albert L. Perkins, gives this as his unqualified judgment. He was and is an experienced railroad engineer and manager and is the railway expert of the Municipal Bridge and Terminal Board, a commission appointed under a city ordinance, headed by the mayor, to study and report legislation needed to relieve the terminal conditions of St. Louis. From his study of the local situation he expresses the opinion that the terminals of railway lines in any large city should be unified as far as possible, and that such unification may be of the greatest public utility and of immeasureable advantage to commerce, state and interstate. Neither does he find in the conditions at St. Louis any insurmountable objection to such unification. The witness, however, points out that such a terminal company should be the agent of every

company, and, furthermore, that its service should not be for profit or gain. In short, that every railroad using the service should be a joint owner and equally interested in the control and management. This, he thinks, will serve the greatest possible economy, and will give the most efficient service without discrimination. When thus jointly owned and controlled, whether through the medium of a mere holding or operating company, such as the Terminal Company is, or by other means, the facilities would belong to each relatively to its own business and delivery would be made by each company over its own tracks to connecting lines or places of destination in the city. The charge for the haul thus lengthened would then be properly absorbed by the through rate, leaving nothing to be added to that to be charged the shipper or consignee but switching and storage charges proper.

The terminal properties in question are not so controlled and managed, in view of the inherent local conditions, as to escape condemnation as a restraint upon commerce. They are not under a common control and ownership. Nor can this be brought about unless the prohibition against the admission of other companies to such control is stricken out and provision made for the admission of any company to an equal control and management upon an equal basis with the present proprietary companies.

There are certain practices of this Terminal Company which operate to the disadvantage of the commerce which must cross the river at St. Louis, and of non-proprietary railroad lines compelled to use its facilities. One of them grows out of the fact that the Terminal Company is a terminal company and something more. It does not confine itself to supplying and operating mere facilities for the interchange of traffic between railroads and to assistance in the collecting and distributing of traffic for the carrier companies. It, as well as several of the absorbed

terminal companies, were organized under ordinary railroad charters. If the combination which has occurred is to escape condemnation as a combination of parallel and competing railroad companies, it is because of the essential difference between railroad and terminal companies proper—differences pointed out by the Missouri Supreme Court in the case heretofore referred to. Indeed, the defense to this proceeding is based upon the insistence that the Terminal Company is solely engaged in operating terminal facilities, defined in the briefs, "as mechanical devices for the exchange, receipt and distribution of traffic." This Terminal Company, in addition to its schedule for terminal charges proper, such as switching, warehousing, etc., files its rate-sheets for the transportation of every class of merchandise from the termini of the railroads on the Illinois side of the river to destinations across the river over its lines. These rates are applied to all traffic destined to cross the river, with certain exceptions to which we shall later refer, which originates within an irregular area of which St. Louis is the center, and having a diameter of from one to two hundred miles. This arbitrary operates to cast a burden upon short hauls, which has led to much complaint, as being both discriminatory and extortionate. An exception is made as to traffic originating within so much of this area as constitutes what is called "Green Line Territory," or which is destined to points within "Green Line Territory." This seems to be based upon competitive conditions caused by the great toll railway bridge at Memphis, Tennessee, the bridge toll being treated by lines using the bridge as a part of the through rate.

Another exception to the rule imposing this arbitrary is that it does not apply to traffic which originates in East St. Louis, whether it is destined to cross the river or not. The reason for this exemption, where such traffic does cross the river, is not apparent. Possibly, it may be said

that it is because the traffic of St. Louis and East St. Louis should be treated as arising in the same commercial area. But this reason does not seem to apply to the traffic originating in St. Louis, which is bound east, though that of East St. Louis is altogether free from this arbitrary charge. The effect of this arbitrary discrimination is obviously injurious to the commerce and manufacturers of St. Louis, and is among the chief causes of complaint against the Terminal Company. Mr. Perkins, to whom we have before referred as a capable and impartial expert, says of the consequence of this curious exception out of the one hundred mile area rule, that "the effect of these charges was, of course, to put the man doing business in St. Louis at a disadvantage to that extent with the man doing business at East St. Louis on his eastern business." Again he says, that the practical operation was to give East St. Louis a distinct advantage in the manufacturing lines. Another practice which marks this Terminal Company as a transportation company which interposed itself between railroads having their termini on opposite sides of the river, and between the city itself and the roads terminating on the east side of the river, is that all traffic destined to cross the river at St. Louis, whether bound east or west, or destined for the city if coming from the east, is billed only to East St. Louis, and there rebilled to destination.

The practice of rebilling and of making a distinct hauling charge is an evident survival of the methods which existed when the eastern lines had no termini in St. Louis. They then billed to East St. Louis, and there turned the traffic over to one of the existing terminal companies, who made their own specific charges for the haul to places of delivery within the city. The practice has been continued after the reason for it has disappeared. The effect of this practice of rebilling at East St. Louis and of imposing this arbitrary upon traffic originating within

one hundred miles of the city, destined to cross the river, seems to have been also applied to the large coal traffic between the Illinois coal mines, upon which the city is largely dependent.

We come now to the remedy. In determining what this should be we, as said by this court in *Standard Oil Company* v. *United States*, 221 U. S. 1, 78, must not overlook the fact that in applying a remedy "that injury to the public by the prevention of an undue restraint on, or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rest, and moreover that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property." If, as we have already said, the combination of two or more mere terminal companies into a single system does not violate the prohibition of the statute against contracts and combinations in restraint of interstate commerce, it is because such a combination may be of the greatest public utility. But when, as here, the inherent conditions are such as to prohibit any other reasonable means of entering the city, the combination of every such facility under the exclusive ownership and control of less than all of the companies under compulsion to use them violates both the first and second sections of the act, in that it constitutes a contract or combination in restraint of commerce among the States and an attempt to monopolize commerce among the States which must pass through the gateway at St. Louis.

The Government has urged a dissolution of the combination between the Terminal Company, the Merchants' Bridge Terminal Company and the Wiggins Ferry Company. That remedy may be necessary unless one equally adequate can be applied.

But the illegal restraint upon commerce among the States which we here find to exist consists in the possession acquired by the proprietary companies through the

means and with the object we have stated of dominating commerce among the States carried on by other railroads entering or seeking to enter the city of St. Louis and by which such railroads are compelled either to desist from carrying on interstate commerce or to do so upon the terms imposed by the proprietary companies. This control and possession constitutes such a grip upon the commerce of St. Louis and commerce which must cross the river there, whether coming from the east or west as to be both an illegal restraint and an attempt to monopolize.

The power resulting from the combination even before completed by the acquisition of the Wiggins Ferry Company and its related terminals was exhibited when the Rock Island sought an independent entrance.

Some of its abuses are shown by the imposition of the arbitrary hauling charge imposed upon the artificially limited trade districts described. It is shown also by the maintenance of the system of billing traffic destined to cross the river at St. Louis, either east or west, or to St. Louis, if from points on the east side of the river, a practice so galling and universal as to practically "eliminate St. Louis from the railroad map," to quote the graphic, if extravagant, language of counsel for the United States, as respects the great traffic subject to the regulation.

Plainly the combination which has occurred would not be an illegal restraint under the terms of the statute if it were what is claimed for it, a proper terminal association acting as the impartial agent of every line which is under compulsion to use its instrumentalities. If, as we have pointed out, the violation of the statute, in view of the inherent physical conditions, grows out of administrative conditions which may be eliminated and the obvious advantages of unification preserved, such a modification of the agreement between the Terminal Company and the proprietary companies as shall constitute the former the *bona fide* agent and servant of every railroad line which

shall use its facilities, and an inhibition of certain methods of administration to which we have referred, will amply vindicate the wise purpose of the statute, and will preserve to the public a system of great public advantage.

These considerations lead to a reversal of the decree dismissing the bill. This is accordingly adjudged and the case is remanded to the District Court, with directions that a decree be there entered directing the parties to submit to the court, within ninety days after receipt of mandate, a plan for the reorganization of the contract between the fourteen defendant railroad companies and the Terminal Company, which we have pointed out as bringing the combination within the inhibition of the statute.

First. By providing for the admission of any existing or future railroad to joint ownership and control of the combined terminal properties, upon such just and reasonable terms as shall place such applying company upon a plane of equality in respect of benefits and burdens with the present proprietary companies.

Second. Such plan of reorganization must also provide definitely for the use of the terminal facilities by any other railroad not electing to become a joint owner, upon such just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.

Third. By eliminating from the present agreement between the Terminal Company and the proprietary companies any provision which restricts any such company to the use of the facilities of the Terminal Company.

Fourth. By providing for the complete abolition of the existing practice of billing to East St. Louis, or other junction points, and then rebilling traffic destined to St. Louis, or to points beyond.

Fifth. By providing for the abolition of any special or

so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called one hundred mile area, that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area.

Sixth. By providing that any disagreement between any company applying to become a joint owner or user as herein provided for and the Terminal or proprietary companies which shall arise after a final decree in this cause, may be submitted to the District Court, upon a petition filed in this cause, subject to review by appeal in the usual manner.

Seventh. To avoid any possible misapprehension, the decree should also contain a provision that nothing therein shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Company, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such Commission.

Upon failure of the parties to come to an agreement which is in substantial accord with this opinion and decree, the court will, after hearing the parties upon a plan for the dissolution of the combination between the Terminal Company, The Wiggins Ferry Company, the Merchants' Bridge Company, and the several terminal companies related to the Ferry and Merchants' Bridge Company, make such order and decree for the complete disjoinder of the three systems, and their future operation as independent systems, as may be necessary, enjoining the defendants, singly and collectively from any exercise of control or dominion over either of the said terminal systems, or their related constituent companies, through lease, purchase or stock control, and enjoining the defendants from voting any share in any of said companies or receiving dividends, directly or indirectly, or from any future

combination of the said systems in evasion of such decree or any part thereof.

Reversed and remanded accordingly.

MR. JUSTICE HOLMES took no part in the hearing or determination of this case.

HECKMAN *v.* UNITED STATES.

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

No. 496. Argued October 12, 13, 1911.—Decided April 1, 1912.

The United States has capacity to maintain a suit to set aside conveyances made by allottee Indians of allotted lands within the statutory period of restriction; and this suit brought against numerous defendants, all of whom were grantees of allottees of the same tribe, is properly maintainable in equity; the return of the consideration to the grantee is not essential; there is no defect of parties because the allottee Indians making the conveyances are not joined; there is no misjoinder of causes of action, and the bill is not multifarious.

Congress has power to extend the restrictions upon alienation of allotted lands by allottee Indians, *Tiger* v. *Western Investment Co.*, 221 U. S. 286; and so *held* that the provision for extending the period of alienation of lands allotted in severalty to full-blood Cherokees in the act of May 27, 1908, 35 Stat. 312, c. 199, is a valid exercise by Congress of its power over Indian affairs.

The relations of the United States to the Cherokee Indians as established by treaties and statutes reviewed, and *held* that in executing the policy of extinguishing the tribal organization and title, and the allotment of the tribal lands in severalty, the intent of Congress was to fulfill the national obligation, not only by an equitable apportionment of the property but by safeguarding through suitable restrictions the individual ownership of the allottees.

The placing of restrictions upon the right of alienation was an essential part of the plan of individual allotment of tribal lands among the members of the Five Civilized Tribes; and such restrictions evinced the continuance to this extent of the guardianship of the United States over the Indians as wards of the Nation.

Conferring citizenship upon an allottee Indian is not inconsistent with retaining control over his disposition of lands allotted to him. *Tiger* v. *Western Investment Co.*, 221 U. S. 286.

The maintenance of limitations prescribed by Congress as part of its plan for distribution of Indian lands is distinctly an interest of the United States, and one which it may sue in its own courts to enforce.

A transfer of allottee lands in violation of statutory restrictions is not simply a violation of the proprietary rights of the Indian but of the governmental rights of the United States.

Where there is a violation of the rights of the United States, and a justiciable question as to the effect thereof, the United States may invoke the jurisdiction of a court of equity, and a pecuniary interest in the controversy is not essential. *United States* v. *American Bell Telephone Co.*, 128 U. S. 315.

Congress has power to authorize the Government to sue to maintain the statutory restrictions upon alienation of Indian allottee lands. *Minnesota* v. *Hitchcock*, 185 U. S. 373.

Where Congress has power to authorize the Government to sue, an appropriation for expenses of suits already brought is a recognition of the right to bring them; and so *held* that the provisions of the act of May 27, 1908, 35 Stat. 312, c. 199, and of subsequent acts making appropriations for suits brought to cancel conveyances made by Cherokee allottee Indians in violation of statutory restrictions on alienation are within the power of Congress.

The presence of the Indian grantors as parties to suits brought by the United States to set aside conveyances of allotted lands made in violation of statutory restrictions on alienation is not essential; nor are the grantees placed in danger of double litigation by reason of the absence of the grantors as parties.

The effect of an act of Congress passed in pursuance of a policy and a matter of general knowledge cannot be destroyed so as to assist those who attempted to profit by violating its provisions; and so *held* that when a conveyance is made by an allottee Indian in violation of statutory restrictions on alienation, the return of the consideration is not an essential prerequisite to a decree of cancellation.

Quære, but not presented on this record, whether cases may arise where, without interfering with the policy of restricting alienation,

the decree should provide in cancelling the transfers for a return of the consideration and the bringing in as parties of any person whose presence might be necessary.

The bill in a suit brought to cancel for the same reason in each instance a large number of conveyances of allotted lands, made by different members of the same tribe to different defendants, *held* not to be multifarious in this case as it is manifestly in the interest of justice to avoid unnecessary suits; nor is there in such a case a misjoinder of causes of action.

179 Fed. Rep. 13, modified and affirmed.

THE United States by its Attorney-General, upon the recommendation of the Secretary of the Interior, brought this suit in the Circuit Court of the United States for the Eastern District of Oklahoma to cancel certain conveyances of allotted lands made by members of the Cherokee Nation. Demurrer to the bill was sustained by the Circuit Court and the bill was dismissed. *United States* v. *Allen, and similar cases*, 171 Fed. Rep. 907. The judgment was reversed by the Circuit Court of Appeals and the trial court was directed to proceed with the suits in accordance with the views expressed in its opinion. 179 Fed. Rep. 13.

The Government states in its brief that between July 14, 1908, and October 12, 1909, the United States brought 301 bills in equity against some 16,000 defendants to cancel some 30,000 conveyances of allotted lands, made by as many or more grantors, members of the Five Civilized Tribes, upon the ground that the conveyances were in violation of existing restrictions upon the power of alienation. It is said that the selection and grouping of defendants in each case was determined by the substantial identity of the facts and propositions of law upon which the question of alienability of the lands depended.

Forty-six bills were filed to cancel 3715 conveyances of lands of Cherokee Indians.

This particular suit deals with conveyances by Cherokee allottees of the full-blood of lands allotted subsequent

to the act of April 26, 1906. 34 Stat. 137, c. 1876. The grantors were not made parties. There are involved a number of separate conveyances to distinct grantees, parties defendant, two of whom prosecute this appeal from the judgment of the Circuit Court of Appeals.

The bill alleges that under the treaties between the United States and the Cherokee tribe of Indians and its members, the United States granted to the Cherokee tribe certain lands in the Indian Territory, now the Eastern District of Oklahoma, and obligated itself by the terms of these treaties and of its laws to protect the Cherokee tribe in the enjoyment of the lands granted; that according to the terms of said treaties and laws, and of the patent to the lands, the Cherokee tribe and every member thereof have at all times been and now are without power to dispose of any interest in the lands without the authority of the United States, or otherwise than in the manner it prescribed; that the Government of the United States, by reason of the helpless and dependent character of the Indian tribes, and of their several members, is the guardian and has exclusive control of their property, by virtue of which there is imposed upon the United States the duty to do whatever may be necessary for their guidance, welfare and protection; that the Cherokee tribe has always been and is now treated as a tribe of Indians by the Government of the United States and its several branches; that this tribe is now under the care of an Indian agent duly appointed under the laws of Congress, and large sums are still appropriated by Congress for the benefit and protection of the tribe and of its individual members, and for the maintenance of schools; and that under the laws of Congress the Government of the United States still has a large sum of money in its possession belonging to the tribe, and there still remains unallotted a large area of tribal lands, the common property of the tribe.

It is further alleged that in the exercise of its powers to

regulate and govern the affairs of the Cherokee tribe of Indians and its members, having in view their welfare and the carrying out of its treaty obligations, Congress by the act approved July 1, 1902 (32 Stat. 716, c. 1375), provided that the lands belonging to the Cherokee tribe in the present State of Oklahoma should be allotted in severalty among its members, but deeming the Indians to be untutored and improvident and still requiring the protection and supervision of the General Government, it was provided by this act that the portion of the lands so allotted as homesteads should be inalienable, and further that the allotted lands other than homesteads should be alienable only in five years after the issuance of patent to the allottee, and that, in accordance with its provisions, the act of Congress was duly ratified by the Cherokee people on the seventh day of August, 1902.

The bill describes certain conveyances of lands situated in the Eastern District of Oklahoma made by Cherokee Indians to the defendants, respectively, with particulars as to the lands embraced in the conveyances, the consideration, the dates of execution, acknowledgment and recording, and also the dates of the allotment certificates and of the recording of allotment deeds. The dates of the conveyances were between November 19, 1904, and May 7, 1908, and of the allotment certificates between April 30, 1906, and May 4, 1908. It is alleged that each of the tracts of land described was land of the Cherokee tribe which had been allotted to full-blood Indians of that tribe, that is, to those mentioned as grantors in the conveyances specified; that they were so allotted as to be subject to restrictions upon their alienation and incumbrance, and were so subject at the date of the execution and recording of the deeds described, which restrictions have never been removed; that the facts concerning the allotments and restrictions were matters of public record and notorious, and that the restrictions were im-

posed by public laws of the United States of which the defendants had knowledge and by which they were put upon inquiry and notice as to all matters concerning the condition of the particular tracts of land mentioned in the bill; that the deeds had been secured by the defendants in willful violation of law and of the duty which rested upon this Nation and every member thereof, and for the purpose of unlawfully incumbering the allotted lands; and that by causing the deeds to be recorded the defendants had unlawfully obtained an apparent title or interest of record in the lands described in defiance of said agency supervision and in open violation and contempt of the laws of the United States to the irreparable injury of the Indians and in direct interference with the supervision and control, policy and duty of the Government of the United States in that behalf.

It is also averred on information and belief that the defendants have unlawfully secured from members of the Cherokee tribe other deeds, conveyances, mortgages, powers of attorney and contracts for and about their allotments, which the Indians and freedmen were without authority to make; that as these have not been recorded the complainant is unable to give a minute and correct description without the discovery prayed for; that the defendants are continuing to induce the members of the Cherokee tribe named in the bill and other members of said tribe to execute deeds and instruments for and about their allotments, and threaten that they will continue such unlawful acts; that this unlawful conduct will greatly harass the United States in the discharge of its duties and in the administration of its policy in relation to these Indians and compel it to bring many suits in order to annul the deeds and instruments which the defendants have taken and are taking as alleged; that in addition to the instruments specified in the bill upward of four thousand instruments of a similar nature purporting to con-

vey or to incumber the title to lands located within the Eastern District of Oklahoma and duly allotted to members of the Five Civilized Tribes or belonging to said tribes, have been executed and placed on record by the defendants herein and other persons and corporations in contravention of the treaties, entered into between the United States and the several Indian tribes, and the laws of the United States; and that unless the United States shall be permitted to join in its bills numerous defendants, against each of whom it has a like cause of action, and against each of whom it seeks the same relief, and whose pretended claims are based upon similar facts and involve precisely the same questions of law, it will be driven to the necessity of bringing a great number of distinct and separate suits, and that it will be practically impossible for the United States to prosecute, and for the courts to adjudicate and dispose of so large a number of separate and distinct suits within any reasonable length of time.

The bill prays that the specified conveyances be declared void and that the title to the lands described be decreed to be in the allottees or their heirs, subject to the terms, conditions and limitations contained in the treaties, agreements and laws of the United States. Discovery of all claims to lands allotted to any of the Cherokee tribe or to unallotted lands of the tribe, and the surrender of instruments for cancellation, are sought; and it is also prayed that all defendants in possession, or claiming possession, be ordered to vacate or to cease making such claims, and that the United States have such other and further relief as may be proper.

The objections to the sufficiency of the bill as set forth in the demurrers are thus summarized in the appellants' brief:

(1) That the United States has no capacity to maintain the suit.

(2) That the bill is wholly without equity.

(3) That there is a defect of parties.
(4) That there is a misjoinder of alleged causes of action.
(5) That the bill is multifarious.

The appeal from the judgment of the Circuit Court of Appeals, which reversed the judgment of the Circuit Court sustaining the demurrers, is taken under § 3 of the act of June 25, 1910, c. 408 (36 Stat. 837).

Mr. Joseph C. Stone, Mr. Robert J. Boone and *Mr. S. T. Bledsoe* for appellants: [1]

For treaties and statutory provisions affecting the lands of allottees in the Five Civilized Tribes, see as to Tribal Titles, of the Choctaws and Chickasaws, Treaties of October, 1820, 7 Stat. 210; September 27, 1830, 7 Stat. 333; of 1837, 11 Stat. 57; of 1855, act of Congress of May 28, 1830; Treaty of 1855, 11 Stat. 611; of 1866, 14 Stat. 769; of the Creeks; Treaty of February 1, 1833, 7 Stat. 417, and patent issued pursuant thereto; of 1852; Treaty of August 7, 1856; of the Seminoles; Art. 1 of Treaty of 1856, 11 Stat. 699; Art. III of Treaty of 1866, 14 Stat. 755; of the Cherokees; Treaty of May 6, 1828; of August 6, 1846, 9 Stat. 871.

As to title of allottees to individual allotments, see Atoka Agreement with the Choctaws and Chickasaws, § 29, act of June 28, 1898, 30 Stat. 495, and Supplemental Agreement, 32 Stat. 641; § 3, original Creek Agreement, 31 Stat. 861; Seminole Agreement, December 16, 1897, 30 Stat. 567; Cherokee Agreement, 32 Stat. 716.

All the above provisions with reference to the allotment of lands of the various tribes should be considered and

[1] The succeeding cases of *Mullen* v. *United States, post*, p. 448; *Goat* v. *United States, post*, p. 458; and *Deming Investment Co.* v. *United States, post*, p. 471, which were appeals taken by different parties from the decrees entered by the Circuit Court of Appeals in *United States* v. *Allen and similar cases*, 179 Fed. Rep. 13, were argued simultaneously, with this case.

construed in the light of the previous legislation looking to allotment.

For legislation affecting all five of the tribes, see act of March 3, 1893, 27 Stat. 645, authorizing the appointment of commissioners.

Pursuant to the authority conferred upon this commission to enter into agreements with the Five Civilized Tribes for the allotment in severalty of their lands and the provision that on the allotment of the lands held by such tribes, respectively, the reversionary interest of the United States therein should be relinquished and should cease, negotiations were entered into, resulting in the agreements above quoted from.

Relinquishment as used in this connection is correctly interpreted in *United States* v. *Joseph*, 94 U. S. 614.

When the members of each of the Five Civilized Tribes select, as required by the provisions referred to, the lands they desire to take in allotment, and that selection is approved, nothing further remains to be done by such members in order to perfect their title to the lands so selected. The issuance of the allotment certificate and patent which follows are mere ministerial acts. It requires neither allotment certificate nor patent to pass title to the allottee. The provision that "there shall be allotted," etc., contained in the various agreements is sufficient when the land is selected and designated to pass title to the allottee without the necessity of certificate or patent. *Wallace* v. *Adams*, 143 Fed. Rep. 716; *Jones* v. *Meehan*, 175 U. S. 1, 16; *Doe* v. *Wilson*, 23 How. 457; *Quinney* v. *Denney*, 18 Wisconsin, 485; *Crews* v. *Burcham*, 1 Black, 352; *French* v. *Spencer*, 21 How. 228; *Stark* v. *Starrs*, 6 Wall. 402; *Lamb* v. *Davenport*, 18 Wall. 307; *Ryan* v. *Carter*, 93 U. S. 78; *Best* v. *Polk*, 18 Wall. 112; *Oliver* v. *Forbes*, 17 Kansas, 113; *Clark* v. *Lord*, 20 Kansas, 390; *Francis* v. *Francis*, 99 N. W. Rep. 000, 203 U. S. 233; *United States* v. *Torrey*, 154 Fed. Rep. 263; *United States*

v. *Moore*, 154 Fed. Rep. 712; *New York Indians* v. *United States*, 170 U. S. 1.

The mere existence of restriction upon alienation imposed for the protection of the allottee vests no interest whatever in the United States in reversion or otherwise. A violation of the statute imposing restrictions upon alienation does not in any event redound to the interest of the United States or impair the title of the allottee. *Libby* v. *Clark*, 118 U. S. 250, 255; *Schrimpscher* v. *Stockton*, 183 U. S. 290, 299.

The whole estate having vested in the allottee, there can be no possible interest remaining in the United States. Not even a possibility of forfeiture or reversion.

The United States owns no property interest upon which to maintain this action, nor may the same be maintained for the protection of citizens, generally, against violations of law.

The sole authority of the Circuit Courts of the United States to exercise jurisdiction over causes where the United States is plaintiff or petitioner, is given by the act of August 13, 1888, 25 Stat. 434. For its construction see *United States* v. *Sayward*, 160 U. S. 493; *United States* v. *Payne Lumber Company*, 206 U. S. 467; *United States* v. *Anger*, 153 Fed. Rep. 671; *United States* v. *Paine Lumber Company*, 154 Fed. Rep. 263.

The former members of the Five Civilized Tribes are citizens of the United States and the State of Oklahoma, and not wards of either the state or the National Government. *Mackey* v. *Cox*, 18 How. 100; *Mehlin* v. *Ice*, 56 Fed. Rep. 12.

Allotment agreements were made by the various tribes and approval thereof given by Congress as follows:

Seminole Original Allotment Agreement (30 Stat. 567); Seminole Supplemental Allotment Agreement (31 Stat. 250); Choctaw and Chickasaw Allotment Agreement (30

Stat. 495–505); Supplemental Allotment Agreement (32 Stat. 641); Creek Allotment Agreement (31 Stat. 861); Creek Supplemental Agreement (32 Stat. 500), and Cherokee Allotment Agreement (32 Stat. 716).

The policy of isolation from surrounding country applied to Indians on Indian Reservations was never, in fact, applied to the territory of the Five Civilized Tribes. In 1890 there were 180,182 persons residing in Indian Territory, of whom 51,279 were Indians. In 1900, the population of Indian Territory had increased to 392,000, of which 52,500 were Indians. In 1890 the Indian population, which included a few more Indians than those of the Five Civilized Tribes, constituted 25.5 per cent of the total population and in 1900, 13.4 per cent.

These conditions, and the progress made in securing of allotment agreements with the various tribes, caused Congress in 1901 to deem it advisable to confer the full rights of citizenship upon every Indian in the Indian Territory. See act of March 3, 1901, 31 Stat. 1447.

For effect of the General Allotment Act of 1887 as applied to conditions similar to those in Oklahoma with reference to citizenship, see *United States* v. *Saunders*, 96 Fed. Rep. 268; *United States* v. *Kopp*, 110 Fed. Rep. 161; *Ex parte Viles*, 139 Fed. Rep. 68; *United States* v. *Dooley*, 151 Fed. Rep. 697; *United States* v. *Auger*, 153 Fed. Rep. 671; *Ex parte Savage*, 158 Fed. Rep. 214; *United States* v. *Boss*, 160 Fed. Rep. 132.

No such public policy exists as that upon which the jurisdiction of the trial court was sustained by majority of the Circuit Court of Appeals.

The allottees are indispensable parties. They own the lands involved and have such an interest in the subject-matter of the controversies that final decrees cannot be made without affecting their interest.

Every party to a contract of sale except one who has released his interest or an agent through whom the title

has passed is a necessary party to set it aside. *Shields* v. *Barrow*, 17 How. 130; *Coiron* v. *Millaudon*, 19 How. 113; *Gaylords* v. *Kelshaw*, 1 Wall. 81; *Ribbon* v. *Railroad Cos.*, 16 Wall. 446; *Lawrence* v. *Wirtz*, 1 Wash. C. C. 417; *Tobin* v. *Walkinshaw*, 1 McAll. 26; *Bell* v. *Donohoe*, 17 Fed. Rep. 710; *Florence Machine Co.* v. *Singer Mfg. Co.*, 8 Blatchf. 113; *Chadbourne* v. *Coe*, 45 Fed. Rep. 822; *Empire C. & T. Co.* v. *Empire C. & M. Co.*, 150 U. S. 159; *New Orleans W. Co.* v. *New Orleans*, 164 U. S. 471; *S. C.*, in C. C. A., 51 Fed. Rep. 479; *Clark* v. *Great Northern Ry. Co.*, 81 Fed. Rep. 282; but see *French* v. *Shoemaker*, 14 Wall. 314; *West* v. *Duncan*, 42 Fed. Rep. 430; *Smith* v. *Lee*, 77 Fed. Rep. 779.

In every case where the parties acted in good faith the court ought to decree a personal judgment against the allottees for the amount of the consideration, for it was paid by mistake and the consideration for the payment has failed. If the contracts were void, but in good faith, equity will impute a promise to repay. *Wrought Iron Bridge Co.* v. *Utica*, 17 Fed. Rep. 316; *City of Louisiana* v. *Wood*, 12 Otto, 294; *Marsh* v. *Fulton County*, 10 Wall. 676; *Tate* v. *Gains* (Okla.), 105 Pac. Rep. 193.

Though the void deeds will be treated as nullities, the law will imply just such an obligation to pay for the enhanced value to the premises on account of the improvements as the Secretary of the Interior would have permitted the allottees to contract upon proper application to him. Where the lands had no rental value, and, on account of the improvements so made in good faith, now have a great rental value, it should be decreed that the rentals or a part thereof be set aside each year until compensation shall have been made for the same. *Muskogee Development Co.* v. *Green* (Okla.), 97 Pac. Rep. 619; *White* v. *Brown* (Ind. T.), 38 S. W. Rep. 335; *Poplin* v. *Clausen*, 38 S. W. Rep. 974; *Shumate* v. *Harbin*, 15 S. E. Rep. 270; *Brockway* v. *Thomas*, 36 Arkansas, 518; *Beard* v. *Dansby*,

48 Arkansas, 182; 2 S. W. Rep. 701; *Potts* v. *Cullum*, 68 Illinois, 217.

The United States cannot maintain this bill. It is wholly devoid of equity. The United States has not offered to return the consideration; it is out of possession, and if the facts alleged are true, it has an adequate remedy at law. *Frost* v. *Spittley*, 121 U. S. 552; *Orton* v. *Smith*, 18 How. 263; *Dick* v. *Foraker*, 155 U. S. 404, 414; *United States* v. *Wilson*, 118 U. S. 86.

If the conveyances referred to are void they constitute no cloud upon the title of the owner thereof, and a bill will not lie to cancel the same, even though the other grounds of equitable jurisdiction are present. *United States* v. *Saunders*, 96 Fed. Rep. 268; *Piersol* v. *Elliott*, 6 Pet. 96, 101; *Rich* v. *Braxton*, 158 U. S. 375, 407; *Kennedy* v. *Hazelton*, 128 U. S. 667, 672; *Town of Venice* v. *Woodruff*, 62 N. Y. 462, 467; *March, Executrix*, v. *The City of Brooklyn*, 59 N. Y. 280.

The bill of complaint is multifarious.

The Solicitor General and *Mr. A. N. Frost* and *Mr. Harlow A. Leekley*, Special Assistants to the Attorney General, for the United States:

The United States may by suit in equity enforce the restrictions imposed by it upon the alienation of allotted tribal lands by members of the Indian tribes. *Marchie Tiger* v. *Western Investment Co.*, 221 U. S. 286; *United States* v. *Allen*, 179 Fed. Rep. 13; *Conley* v. *Ballinger*, 216 U. S. 84; *United States* v. *Kagama*, 118 U. S. 375; *Worcester* v. *Georgia*, 6 Pet. 515; *In re Debs*, 158 U. S. 564; *United States* v. *Am. Bell Tel. Co.*, 128 U. S. 315; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273; *United States* v. *Rickert*, 188 U. S. 432; *In the Matter of Heff*, 197 U. S. 488; *Beck* v. *Flournoy Live Stock Co.*, 65 Fed. Rep. 30; *United States* v. *Flournoy Live Stock &c. Co.*, 69 Fed. Rep. 886; *Pilgrim* v. *Beck*, 69 Fed. Rep. 895; *United States* v. *Flour-*

noy &c. Co., 71 Fed. Rep. 576; *Rainbow* v. *Young*, 161 Fed. Rep. 835.

The Indian allottees are not necessary parties to such a suit, as the United States has rights and interests of its own to conserve and is, moreover, under obligation to protect the Indians in those restrictions. *United States* v. *Allen*, 179 Fed. Rep. 13; *United States* v. *Am. Bell Tel. Co.*, 128 U. S. 315; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273; *United States* v. *Hammers*, 221 U. S. 220; *Marchie Tiger* v. *Western Investment Co.*, 221 U. S. 286; *United States* v. *Trinidad Coal Co.*, 137 U. S. 160; *Pilgrim* v. *Beck*, 69 Fed. Rep. 895.

The bill is not multifarious for it joins only such transactions as depend for their validity or invalidity upon the same state of facts and the same propositions of law. Story on Equity Pleading, 14th ed., § 539; Jennison's Chancery Practice, 26; *Hale* v. *Allinson*, 188 U. S. 56; *Ill. Cent. R. R. Co.* v. *Caffrey*, 128 Fed. Rep. 770; *Bitterman* v. *L. & N. R. R. Co.*, 207 U. S. 205.

Mr. Justice Hughes, after making the above statement, delivered the opinion of the court.

The conveyances, which this suit was brought to cancel, were executed by members of the Cherokee tribe of Indians, of the full-blood, of lands allotted to them in severalty. The statute under which the allotments were made (act of July 1, 1902, c. 1375, 32 Stat. 716), accepted by the Cherokee nation on August 7, 1902, provided that the lands should be inalienable for a period specified. Sections 11–15 (*Id.*, p. 717). The lands in question were "surplus" lands, that is, those other than homesteads. While the restrictions, applicable to lands of this character, were still in force, Congress extended the period of inalienability by the act of April 26, 1906. 34 Stat. 137, c. 1876. Section 19 of this act (*Id.*, p. 144) is as follows:

"Sec. 19. That no full-blood Indian of the Choctaw,

Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided, however,* That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided further,* That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: *Provided further,* That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

The power of Congress thus to extend the restriction upon alienation was sustained by this court in *Tiger* v.

Western Investment Co., 221 U. S. 286. There the question related to a conveyance of inherited lands, made by a Creek Indian, of the full-blood, without the approval of the Secretary of the Interior as required by § 22 of the act of 1906. The conveyance had been executed after the expiration of the five-year limitation upon alienation, prescribed by the supplemental agreement with the Creek Nation (act of June 30, 1902, c. 1323, § 16; 32 Stat. 503); but meanwhile, and during the continuance of the original restriction, the act of 1906 had been enacted. It was held that the restriction of the later statute was valid.

The reasoning of this decision is conclusive as to the validity of the extension by § 19 of the act of 1906 of the period of inalienability of lands allotted, as in this case, to full-blood Cherokees. And the same principle governs the restrictions provided by the act of May 27, 1908, c. 199, 35 Stat. 312.

It is not open to dispute that, upon the facts alleged, all the conveyances specified in the bill in this suit were executed in violation of restrictions lawfully imposed.

The principal question now presented is with respect to the capacity of the United States to sue in its own courts to enforce these restrictions.

The relations of the United States to the Cherokees have repeatedly been described in the decisions of this court. *Cherokee Nation* v. *Georgia*, 5 Pet. 1; *Worcester* v. *Georgia*, 6 Pet. 515; *United States* v. *Rogers*, 4 How. 567; *Mackey* v. *Coxe*, 18 How. 100; *The Cherokee Trust Funds*, 117 U. S. 288; *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641; *United States* v. *Old Settlers*, 148 U. S. 427; *Cherokee Nation* v. *Journeycake*, 155 U. S. 196; *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Lowe* v. *Fisher*, 223 U. S. 95. But in view of the nature of the present controversy the facts of main importance may be briefly restated.

The United States made its first treaty with the Cherokees on November 28, 1785 (7 Stat. 18). Constituting one of the most powerful tribes of Indians which then inhabited the country, they claimed the principal part of the territory now comprised within the States of North and South Carolina, Georgia, Alabama and Tennessee. By this treaty, the Cherokees acknowledged that they were under the protection of the United States of America and of no other sovereign, the boundary of their hunting grounds was fixed, and it was provided that "for the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States in Congress assembled shall have the sole and exclusive right of regulating trade with the Indians, and managing all their affairs in such manner as they think proper." Another treaty with similar objects was made on July 2, 1791 (7 Stat. 39). In 1817, following a migration of a portion of the tribe to lands of the United States on the Arkansas and White Rivers, the Cherokee Nation ceded to the United States certain tracts which they formerly held, and in exchange the United States bound themselves to give to that branch of the Nation on the Arkansas as much land as they had received, or might thereafter receive, east of the Mississippi. 7 Stat. 156 (July 8, 1817). A further cession of land was made to the United States in 1819. 7 Stat. 195 (February 27, 1819).

By the terms of the treaty of May 6, 1828 (7 Stat. 311, 315), with the representatives of the Cherokee Nation, West, reciting the purpose of securing to them and their friends and brothers from the east who might join them, "a permanent home" which should "under the most solemn guarantee of the United States be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines or placed over it the jurisdiction of a Territory or State,"

the United States agreed to guarantee to the Cherokees forever seven millions of acres of land, as described, situated in what became known as the Indian Territory, and, in addition, "a perpetual outlet, West, and a free and unmolested use of all the Country lying West of the Western boundary of the above described limits, and as far West as the sovereignty of the United States and their right of soil extend." On May 28, 1830, Congress authorized the President to assure title to the Indians to such exchanged lands, and to execute a patent if desired, "provided always, that such lands shall revert to the United States, if the Indians become extinct or abandon the same." 4 Stat. 411. A supplementary treaty confirming the guarantee of lands and fixing boundaries was made on February 14, 1833. 7 Stat. 414.

The continued presence of the Eastern Cherokees gave rise to serious controversies and oppressive legislation in the States where they resided. To terminate these difficulties and "with a view to reuniting their people in one body," a treaty was signed at New Echota, in the State of Georgia, on December 29, 1835. 7 Stat. 478. The Cherokee Nation ceded to the United States all their land east of the Mississippi River in consideration of the payment of five million dollars; and in addition to the lands described in the treaties of 1828 and 1833, the United States agreed to convey to the Cherokees eight hundred thousand acres for the sum of five hundred thousand dollars. It was stipulated that the ceded lands should not at any future time, without the consent of the Cherokee Nation, be included "within the territorial limits or jurisdiction of any State or Territory," and the United States agreed to secure to the Cherokee Nation "the right by their national councils" to make such laws as might be deemed necessary "for the government and protection of the persons and property within their own country belonging to their people or such

persons as have connected themselves with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same."

The two tracts—the one consisting of the seven million acres and the "outlet," together aggregating 13,574,135.14 acres, and the other of 800,000 acres—were conveyed to the Cherokee Nation by patent on December 31, 1838, subject to the condition specified in the act of 1830, that the land should revert to the United States if the Cherokee Nation should become extinct or abandon the same. On September 6, 1839, the Cherokees adopted a constitution for the reunited nation. Dissensions having arisen among the members of the tribe, a new treaty was made with the United States on August 6, 1846 (9 Stat. 871), in which it was set forth that the lands occupied by the Cherokee Nation should "be secured to the whole Cherokee people for their common use and benefit," and provision was made for the settlement of differences. There was a further treaty on July 19, 1866. 14 Stat. 799.

The "Cherokee Outlet" was purchased by the United States in 1893 for the sum of $8,595,736. 27 Stat. 640.

At this time, the conditions in the Indian Territory were most unsatisfactory. There had been a large accession of whites who made no claim to Indian citizenship and were residing in the Territory with the approval of the Indian authorities. These greatly outnumbered the Indians. The existing means of government had failed of their purpose, and an exigency had arisen, originally unforeseen, requiring the adoption of new measures. This led to the enactment of legislation which contemplated

the dissolution of the tribal organizations and the distribution of the tribal property. By § 15 of the act of March 3, 1893, c. 209 (27 Stat. 612, 645), it was provided: "The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles; and upon such allotments the individuals to whom the same may be alloted shall be deemed to be in all respects citizens of the United States, . . . and upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease." And by § 16 of the same act provision was made for the appointment of commissioners to enter into negotiations with the Five Civilized Tribes "for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such and [*sic*] adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within such India [*sic*] Territory."

But in executing this policy, Congress was solicitous to conserve the interests of the Indians and to fulfill the national obligation, not simply by assuring an equitable apportionment of the property, but by safeguarding the individual ownership of allottees through suitable restric-

tions which were designed to secure them in their possession and to prevent their exploitation.

The necessity for legislative action, and the purposes to be subserved, were fully presented in the report submitted in May, 1894, by the Senate Committee on the Five Civilized Tribes (S. Rept. No. 377, 53d Cong. 2d Sess.), a portion of which is quoted in the statement of facts made by the court in *Stephens* v. *Cherokee Nation*, *supra*, pp. 447–451. The committee said (p. 448): "'This section of the country was set apart to the Indian with the avowed purpose of maintaining an Indian community beyond and away from the influence of white people. We stipulated that they should have unrestricted self-government and full jurisdiction over persons and property within their respective limits, and that we would protect them against intrusion of white people, and that we would not incorporate them in a political organization without their consent. Every treaty, from 1828 to and including the treaty of 1866, was based on this idea of exclusion of the Indians from the whites and non-participation by the whites in their political and industrial affairs. We made it possible for the Indians of that section of country to maintain their tribal relations and their Indian polity, laws and civilization if they wished so to do. And, if now, the isolation and exclusiveness sought to be given to them by our solemn treaties is destroyed, and they are overrun by a population of strangers five times in number to their own, it is not the fault of the Government of the United States, but comes from their own acts in admitting whites to citizenship under their laws and by inviting white people to come within their jurisdiction, to become traders, farmers and to follow professional pursuits.'"

And, referring to the tribal lands, the report continued: "The theory of the Government was when it made title to the lands in the Indian Territory to the Indian tribes as bodies politic that the title was held for all of the Indians

of such tribe. All were to be the equal participators in the benefits to be derived from such holding. But we find in practice such is not the case. A few enterprising citizens of the tribe, frequently not Indians by blood but by intermarriage, have in fact become the practical owners of the best and greatest part of these lands, while the title still remains in the tribe—theoretically for all, yet in fact the great body of the tribe derives no more benefit from their title than the neighbors in Kansas, Arkansas or Missouri. . . . As we have said, the title to these lands is held by the tribe in trust for the people. We have shown that this trust is not being properly executed, nor will it be if left to the Indians, and the question arises what is the duty of the Government of the United States with reference to this trust? While we have recognized these tribes as dependent nations, the Government has likewise recognized its guardianship over the Indians and its obligations to protect them in their property and personal rights. In the treaty with the Cherokees, made in 1846, we stipulated that they should pass laws for equal protection, and for the security of life, liberty and property. If the tribe fails to administer its trust properly by securing to all the people of the tribe equitable participation in the common property of the tribe, there appears to be no redress for the Indian so deprived of his rights, unless the Government does interfere to administer such trust."

The commission for which provision was made by the act of 1893—known as the Dawes Commission—also made reports to Congress (November 20, 1894, and November 18, 1895), "finding a deplorable state of affairs and the general prevalence of misrule." In the report of November 18, 1895, the commission said: "There is no alternative left to the United States but to assume the responsibility for future conditions in this Territory. It has created the forms of government which have brought

about these results, and the continuance rests on its authority. . . . The commission is compelled by the evidence forced upon them during their examination into the administration of the so-called governments in this Territory to report that these governments in all their branches are wholly corrupt, irresponsible, and unworthy to be longer trusted with the care and control of the money and other property of Indian citizens, much less their lives, which they scarcely pretend to protect." *Stephens* v. *Cherokee Nation, supra,* pp. 452, 453.

By the acts of June 10, 1896, c. 398 (29 Stat. 321, 339), and of June 7, 1897, c. 3 (30 Stat. 62, 84), the authority of the Dawes Commission was continued and extended; and provision was made for the hearing and determination of applications for citizenship in the tribes and for the making of rolls of membership. It was further provided by the statute of 1897, that none of the acts, ordinances, and resolutions (with certain stated exceptions) of the council of either of the Five Tribes should take effect if disapproved by the President. Then followed the act of June 28, 1898, c. 517 (30 Stat. 495), a comprehensive statute embracing provisions as to the enrollment of members of the tribes and for the allotment of "the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment, among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location and value of the same." By this legislation "the United States practically assumed the full control over the Cherokees as well as the other nations constituting the five civilized tribes and took upon itself the determination of membership in the tribes for the purpose of adjusting their rights in the tribal property." *Cherokee Nation* v. *Hitchcock, supra,* p. 306.

Between 1898 and 1902, allotment agreements with

the Five Civilized Tribes were approved by Congress. The allotment act of July 1, 1902, which related to the Cherokees (32 Stat. 716, c. 1375), provided (§ 63) that the tribal government should not continue longer than March 4, 1906. But by joint resolution of Congress passed March 2, 1906, the tribal existence and government of this tribe and of the others were "continued in full force and effect for all purposes under the existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law." 34 Stat. 822. A similar provision was contained in the act of April 26, 1906. 34 Stat. 137, 148.

The placing of restrictions upon the right of alienation was an essential part of the plan of individual allotment; and limitations were imposed by each of the allotment agreements. The separate statutes were supplemented by the general acts of 1906 and 1908, already mentioned. These restrictions evinced the continuance, to this extent at least, of the guardianship which the United States had exercised from the beginning. That the conferring of citizenship was in no wise inconsistent with the retention of control over the disposition of the allotted lands, was expressly decided in the case of *Tiger* v. *Western Investment Co.*, *supra*, in which the conclusions of the court were thus stated (p. 316):

"Conceding that Marchie Tiger by the act conferring citizenship obtained a status which gave him certain civil and political rights, inhering in the privileges and immunities of such citizenship unnecessary to here discuss, he was still a ward of the Nation so far as the alienation of these lands was concerned, and a member of the existing Creek Nation. . . . Upon the matters involved our conclusions are that Congress has had at all times, and now has, the right to pass legislation in the interest of the Indians as a dependent people; that there is nothing in

citizenship incompatible with this guardianship over the Indian's lands inherited from allottees as shown in this case; that in the present case when the act of 1906 was passed, the Congress had not released its control over the alienation of lands of full-blood Indians of the Creek Nation; that it was within the power of Congress to continue to restrict alienation by requiring, as to full-blood Indians, the consent of the Secretary of the Interior to a proposed alienation of lands such as are involved in this case; that it rests with Congress to determine when its guardianship shall cease, and while it still continues it has the right to vary its restrictions upon alienation of Indian lands in the promotion of what it deems the best interest of the Indian."

During the continuance of this guardianship, the right and duty of the Nation to enforce by all appropriate means the restrictions designed for the security of the Indians cannot be gainsaid. While relating to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United States. A review of its dealings with the tribes permits no other conclusion. Out of its peculiar relation to these dependent peoples sprang obligations to the fulfillment of which the national honor has been committed. "From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen." *United States* v. *Kagama*, 118 U. S. 375, 384.

This national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust. When, in 1838, patent was issued

to the Cherokees providing that it was subject to the condition that the granted lands should revert to the United States if the Cherokee Nation became extinct or abandoned them, neither the rights nor the duties of the United States were confined to the reversionary interest thus secured. And its relinquishment made it no less a matter of national concern that the restrictions designed to protect the Indian allottees should be enforced. But this object could not be accomplished if the enforcement were left to the Indians themselves. It is no answer to say that conveyances obtained in violation of restrictions would be void. That, of course, is true, and yet, by means of the conveyances and the consequent assertion of rights of ownership by the grantees, the Indians might be deprived of the practical benefits of their allotments. It was the intent of Congress that, for their sustenance and as a fitting aid to their progress, they should be secure in their possession during the period specified and should actually hold and enjoy the allotted lands. As was well said by the court below, "If they are unable to resist the allurements by which they are enticed into making the conveyances, will they be expected to undertake the difficult and protracted litigation necessary to set aside their own acts? To ask these questions is to answer them. Congress intended that both the Indians and the members of the white race should obey its limitations. A transfer of the allotments is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States. If these Indians may be divested of their lands, they will be thrown back upon the Nation a pauperized, discontented and, possibly, belligerent people." The authority to enforce restrictions of this character is the necessary complement of the power to impose them.

Whether these restrictions upon the alienation of the allotted lands had been violated and the alleged convey-

ances were void, was a justiciable question; and in order that it might properly discharge its duty, and that it might obtain adequate relief, suited to the nature of the case in accordance with the principles of equity, the United States was entitled to invoke the equity jurisdiction of its courts. It was not essential that it should have a pecuniary interest in the controversy. In *United States* v. *American Bell Telephone Co.*, 128 U. S. 315, 367, where the suit was brought to obtain the cancellation of certain patents, this court in commenting upon the statements which had been made in the case of *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, with respect to the right of the United States to sue, said: "This language is construed by counsel for the appellee in this case to limit the relief granted at the instance of the United States to cases in which it has a direct pecuniary interest. But it is not susceptible of such construction. It was evidently in the mind of the court that the case before it was one where the property right to the land in controversy was the matter of importance, but it was careful to say that the cases in which the instrumentality of the court cannot thus be used are those where the United States has no pecuniary interest in the remedy sought, and is also under no obligation to the party who will be benefited to sustain an action for his use, and also where it does not appear that any obligation existed on the part of the United States to the public or to any individual. The essence of the right of the United States to interfere in the present case is its obligation to protect the public from the monopoly of the patent which was procured by fraud, and it would be difficult to find language more aptly used to include this in the class of cases which are not excluded from the jurisdiction of the court by want of interest in the government of the United States. It is insisted that these decisions have reference exclusively to patents for land, and that they are not applicable to patents for inventions and discoveries. The

argument very largely urged for that view is the one just stated, that in the cases which had reference to patents for land the pecuniary interest of the United States was the foundation of the jurisdiction. This, however, is repelled by the language just cited, and by the fact that in more than one of the cases, notably in *United States* v. *Hughes*, *supra*, [11 How. 552], the right of the government to sustain the suit was based upon its legal or moral obligation to give a good title to another party who had a prior and a better claim to the land, but whose right was obstructed by the patent issued by the United States."

And in *In re Debs*, 158 U. S. 564, where the question was as to the jurisdiction of a court of equity at the suit of the Government to enjoin interference with the transportation of the mails, the court, while adverting to the fact that the United States had a property in the mails, declined to place its decision upon that ground alone, and rested it also upon governmental duty. The court said (pp. 584, 586): "Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. . . . The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control."

In *United States* v. *Rickert*, 188 U. S. 432, the suit was brought to restrain the collection of certain county taxes alleged to be due in respect of permanent improvements

on, and personal property used in the cultivation of, lands occupied by Sioux Indians in South Dakota. The lands had been allotted under the general allotment act of February 8, 1887, 24 Stat. 389. One of the questions certified to this court was whether the United States had such an interest in the controversy or in its subjects as entitled it to maintain the suit; and the question was answered in the affirmative. It is true that, in that case, the statute provided that the United States should hold the land allotted for twenty-five years in trust for the sole use and benefit of the Indian allottee. But the decision rested upon a broader foundation than the mere holding of a legal title to land in trust, and embraced the recognition of the interest of the United States in securing immunity to the Indians from taxation conflicting with the measures it had adopted for their protection. The court said (p. 444): "In view of the relation of the United States to the real and personal property in question, as well as to these dependent Indians still under national control, and in view of the injurious effect of the assessment and taxation complained of upon the plans of the Government with reference to the Indians, it is clear that the United States is entitled to maintain this suit." By the act of August 15, 1894, c. 290, 28 Stat. 286, 305, as amended by the act of February 6, 1901, c. 217, 31 Stat. 760, Congress authorized suits to be brought against the United States, in its Circuit Courts, "involving the right of any person, in whole or in part of Indian blood or descent" (with certain exceptions) "to any allotment of lands under any law or treaty." *Sloan* v. *United States,* 193 U. S. 614. Prior to the amendment of 1901, the United States could not be sued in such a case. But the amendment required that "in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant." Commenting upon this, the court said in *McKay* v. *Kalyton,* 204 U. S. 458, 469: "Nothing could more clearly

demonstrate, than does this requirement, the conception of Congress that the United States continued as trustee to have an active interest in the proper disposition of allotted Indian lands and the necessity of its being made a party to controversies concerning the same, for the purpose of securing a harmonious and uniform operation of the legislation of Congress on the subject." And *In Matter of Heff*, 197 U. S. 488, 509, this court said: "In *United States* v. *Rickert*, 188 U. S. 432, we sustained the right of the Government to protect the lands thus allotted and patented from any encumbrance of state taxation. Undoubtedly an allottee can enforce his right to an interest in the tribal or other property (for that right is expressly granted) and equally clear is it that Congress may enforce and protect any condition which it attaches to any of its grants. This it may do by appropriate proceedings in either a National or a state court."

Not only was the United States entitled to prosecute this suit by virtue of the interest springing from its peculiar relations to the Indians and the course of dealing which had finally led to the plan of separate allotments accompanied by restrictions for the protection of the allottees, but Congress has explicitly recognized the right of the Government thus to enforce these restrictions and has made appropriations for the maintenance of suits of this description. And, at least, the power of Congress to authorize the Government to sue, in view of the relation of the United States to the subject-matter and of the nature of the question to be determined, cannot be doubted. *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387, 388.

By the act of May 27, 1908, c. 199, 35 Stat. 312, which defined restrictions with respect to allotments to members of the Five Civilized Tribes, the representatives of the Secretary of the Interior were authorized to advise all allottees, having restricted lands, of their rights, and at the request of any such allottee to bring suit in his name

to cancel any conveyance or incumbrance in violation of the act and to take all steps necessary to assist the allottees in acquiring and retaining possession. But the following provision was added (p. 314):

"Nothing in this act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same, in cases where deeds, leases or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof; such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, the necessary expenses incurred in so doing to be defrayed from the money appropriated by this act."

It is urged that this clause did not confer authority to sue, but was inserted merely to rebut any possible inference of an intention to deny this right to the United States. This seems to us a strained construction in view of the obvious purpose of the act. And it fails to give adequate effect to the words "such suits *to be brought* on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, *the necessary expenses incurred in so doing to be defrayed from the money appropriated by this act.*" In addition to the appropriation of moneys for expenditure under the direction of the Secretary of the Interior, that act appropriated the sum of $50,000 "to be immediately available and available until expended as the Attorney General may direct," which was "to be used in the payment of necessary expenses incident to any suits brought at the request of the Secretary of the Interior in the eastern judicial district of Oklahoma;" with the proviso that $10,000 of this amount,

or so much as might be necessary, should be expended in the prosecution of cases in the western judicial district of that State. In 1909 (act of March 4, 1909, c. 299, 35 Stat. 945, 1014), a further appropriation of a like sum for the same purposes was made under the heading "Suits to set aside conveyances of allotted lands." Another appropriation was made in 1910 (act of June 25, 1910, c. 384, 36 Stat. 703, 748), under a similar heading with specific reference to the "Five Civilized Tribes," and also with the provision "and not to exceed ten thousand dollars of said sum shall be available for the expenses of the United States on appeals to the Supreme Court of the United States;" and still another to the same effect in 1911 (act of March 4, 1911, c. 285, 36 Stat. 1363, 1425).

We conclude that the United States has the capacity to prosecute this suit.

It is further urged that there is a defect of parties, on account of the absence of the Indian grantors. It is said that they are the owners of the lands and hence sustain such a relation to the controversy that final decree cannot be made without affecting their interest. *Shields* v. *Barrow*, 17 How. 130, 139; *Williams* v. *Bankhead*, 19 Wall. 563.

The argument necessarily proceeds upon the assumption that the representation of these Indians by the United States is of an incomplete or inadequate character; that although the United States, by virtue of the guardianship it has retained, is prosecuting this suit for the purpose of enforcing the restrictions Congress has imposed, and of thus securing possession to the Indians, their presence as parties to the suit is essential to their protection. This position is wholly untenable. There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents—whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not

depend upon the Indian's acquiescence. It does not rest upon convention, nor is it circumscribed by rules which govern private relations. It is a representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty.

When the United States instituted this suit, it undertook to represent, and did represent, the Indian grantors whose conveyances it sought to cancel. It was not necessary to make these grantors parties, for the Government was in court on their behalf. Their presence as parties could not add to, or detract from, the effect of the proceedings to determine the violation of the restrictions and the consequent invalidity of the conveyances. As by the act of Congress they were precluded from alienating their lands, they were likewise precluded from taking any position in the legal proceedings instituted by the Government to enforce the restrictions which would render such proceedings ineffectual or give support to the prohibited acts. The cause could not be dismissed upon their consent; they could not compromise it; nor could they assume any attitude with respect to their interest which would derogate from its complete representation by the United States. This is involved necessarily in the conclusion that the United States is entitled to sue, and in the nature and purpose of the suit.

These considerations also dispose of the contention that by reason of the absence of the grantors as parties, the grantees are placed in danger of double litigation; so that if they should succeed here they would still be exposed to suit by the allottees. It is not pertinent to comment upon the improbability of the contingency, if it exists in legal contemplation. But if the United States, representing the owners of restricted lands, is entitled to bring a suit of this character, it must follow that the

decree will bind not only the United States, but the Indians whom it represents in the litigation. This consequence is involved in the representation. *Kerrison* v. *Stewart*, 93 U. S. 155, 160; *Shaw* v. *Railroad Co.*, 100 U. S. 605, 611; *Beals* v. *Ill. &c. R. R. Co.*, 133 U. S. 290, 295. And it could not, consistently with any principle, be tolerated that, after the United States on behalf of its wards had invoked the jurisdiction of its courts to cancel conveyances in violation of the restrictions prescribed by Congress, these wards should themselves be permitted to relitigate the question.

In what cases the United States will undertake to represent Indian owners of restricted lands in suits of this sort is left under the acts of Congress to the discretion of the Executive Department. The allottee may be permitted to bring his own action, or if so brought the United States may aid him in its conduct, as in the *Tiger Case*. And, as already noted, the act of May 27, 1908, makes provision for proceedings by the representatives of the Secretary of the Interior in the name of the allottee. But in the opportunities thus afforded there is no room for the vexation of repeated litigation of the same controversy. And when the United States itself undertakes to represent the allottees of lands under restriction and brings suit to cancel prohibited transfers, such action necessarily precludes the prosecution by the allottees of any other suit for a similar purpose relating to the same property.

It is said that the allottees have received the consideration and should be made parties in order that equitable restoration may be enforced. Where, however, conveyance has been made in violation of the restrictions, it is plain that the return of the consideration cannot be regarded as an essential prerequisite to a decree of cancellation. Otherwise, if the Indian grantor had squandered the money, he would lose the land which Congress intended he should hold, and the very incompetence and

thriftlessness which were the occasion of the measures for his protection would render them of no avail. The effectiveness of the acts of Congress is not thus to be destroyed. The restrictions were set forth in public laws, and were matters of general knowledge. Those who dealt with the Indians contrary to these provisions are not entitled to insist that they should keep the land if the purchase price is not repaid, and thus frustrate the policy of the statute. *United States* v. *Trinidad Coal Co.*, 137 U. S. 160, 170, 171.

But it is suggested that there may be instances where the consideration could be restored without interfering with the policy which prohibited the transfer; that is, without in any way impairing the right to the recovery of the land or the assurance to the Indian of his possession free from incumbrance. It is said, for example, that there may have been an exchange of lands, and that the Indian grantor should not, on retaking the restricted lands, be permitted at the same time to retain those which he has received from the grantee. Or there may be other property held by the Indian grantor free from restrictions, so that restoration of the consideration may be enforced without working a deprivation of the restricted lands contrary to the act of Congress. We need not attempt to surmise what cases of this sort may arise. It is sufficient to say that no such case is here presented. It is not presented by the mere allegation of the bill that the conveyances assailed purport to have been made for pecuniary consideration. It will be competent for the court, on a proper showing as to any of the transactions that provision can be made for a return of the consideration, consistently with the cancellation of the conveyances and with securing to the allottees the possession of the restricted lands in accordance with the statute, to provide for bringing in as a party to the suit any person whose presence for that purpose is found to be necessary.

A further objection is that the bill is multifarious. But in view of the numerous transfers which the Government attacks, it was manifestly in the interest of the convenient administration of justice that unnecessary suits should be avoided and that transactions presenting the same question for determination should be grouped in a single proceeding. The objection to the misjoinder of causes of action is likewise without merit.

Our conclusion is that the suit was well brought. The judgment of the court below is affirmed with the modification that the cause shall proceed in conformity with this opinion.

It is so ordered.

MR. JUSTICE LURTON dissents on the question of jurisdiction, but not on the merits.

MULLEN *v.* UNITED STATES.

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

No. 404. Argued October 12, 13, 1911.—Decided April 15, 1912.

The relations of the United States and the Choctaw Indians by treaties and statutes in regard to the allotment of lands and the restriction of alienation reviewed, and *held* that where a person, whose name appeared upon the rolls of the Choctaw Indians, died after the ratification of the agreement of distribution and before receiving the allotment, there was no provision for restriction but the land passed at once to his heirs; in such cases the United States cannot maintain an action to set aside conveyances made by the heirs within the period of restriction applicable to homestead allotments made to members of the tribe during life.

179 Fed. Rep. 13, reversed as to this point.

THE facts, which involve the validity of certain conveyances of allotted land made by Choctaw Indians and also the right of the United States to have such conveyances set aside, are stated in the opinion.

Mr. J. C. Stone, *Mr. Robert J. Boone* and *Mr. S. T. Bledsoe*, with whom *Mr. J. R. Cottingham* was on the brief, for appellants.[1]

The Solicitor General and *Mr. A. N. Frost* and *Mr. Harlow A. Leekley*, Special Assistants to the Attorney General, for the United States.[1]

MR. JUSTICE HUGHES delivered the opinion of the court.

This suit was brought by the United States to cancel certain conveyances of allotted lands, made by Choctaw Indians in alleged violation of restrictions. The Circuit Court sustained a demurrer to the bill upon the grounds that the United States was not entitled to maintain a suit of this character; that there was a defect of parties, owing to the absence of the Indian grantors, and that the bill was multifarious. This judgment was reversed by the Circuit Court of Appeals, which directed the trial court to proceed with the cause in accordance with its opinion. *United States* v. *Allen, and similar cases*, 179 Fed. Rep. 13. An appeal to this court is taken by certain defendants under § 3 of the act of June 25, 1910, c. 408, 36 Stat. 837. The lands, conveyed to the appellants, are described as those which had been allotted to Choctaws of the full-blood, deceased, and the conveyances were made by their heirs (also Choctaws of the full-blood) prior to April 26, 1906.

As early as 1786 (January 3) a treaty was made with the representatives of the Choctaws by which it was acknowledged that these Indians were under the protection

[1] See abstract of arguments in *Heckman* v. *United States*, *ante*, p. 413.

of the United States and it was provided that for their "benefit and comfort" and for the "prevention of injuries and oppressions" the United States should have "the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper." 7 Stat. 21. By the treaty of 1820 (October 18) in order "to promote the civilization of the Choctaw Indians, by the establishment of schools amongst them; and to perpetuate them as a nation, by exchanging, for a small part of their land here, a country beyond the Mississippi River, where all, who live by hunting and will not work, may be collected and settled together," there was ceded to the Choctaws a tract west of the Mississippi situated between the Arkansas and Red rivers. 7 Stat. 210. In furtherance of this purpose, another treaty was made in 1830 (September 27) by which it was agreed that the United States should "cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it," and the Choctaws ceded to the United States all their lands east of the Mississippi and promised to remove beyond that river as soon as possible. 7 Stat. 333, 334. In 1837 (January 17), with the approval of the President and Senate of the United States, an agreement was made between the Choctaws and the Chickasaws that the latter should have the privilege of forming a district within the limits of the Choctaw country "to be held on the same terms that the Choctaws now hold it, except the right of disposing of it, which is held in common with the Choctaws and Chickasaws, to be called the Chickasaw district of the Choctaw Nation." 11 Stat. 573. Controversies having arisen between these tribes, a treaty was made in 1855 (June 22) with the representatives of both, defining boundaries and providing for the settlement of differences. This contained the stipulation: "And pursuant to an act

of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits, to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal, undivided interest in the whole: *Provided, however,* no part thereof shall ever be sold without the consent of both tribes; and that said land shall revert to the United States if said Indians and their heirs become extinct, or abandon the same." 11 Stat. 612. After the Civil War, a new treaty was entered into reaffirming the obligations arising out of prior agreements and legislation. April 28, 1866, 14 Stat. 765, 774. While this treaty contemplated allotments in severalty and made provision to that end, effective action was not taken until the legislation of 1893, and subsequent years, relating to the Five Civilized Tribes, which embodied the policy—of individual allotments and the dissolution of the tribal governments—made necessary by the changed conditions in the Indian country. Acts of March 3, 1893, c. 209, 27 Stat. 645; June 10, 1896, c. 398, 29 Stat. 321, 339; June 7, 1897, c. 3, 30 Stat. 62, 64; June 28, 1898, c. 517, 30 Stat. 495.

In the case of the Choctaws and Chickasaws, as in that of the other tribes, the scheme of allotments embraced certain restrictions upon the right of alienation which Congress deemed necessary for the suitable protection of the allottees. By virtue of the relation of the United States to these Indians (*Choctaw Nation* v. *United States,* 119 U. S. 1, 28; *United States* v. *Choctaw Nation and Chickasaw Nation,* 179 U. S. 494, 532), and the obligations it has assumed, it is entitled to invoke the equity jurisdiction of its courts for the purpose of enforcing these restrictions. The Indian grantors, being represented by the Government, were not necessary parties, and in the interest of the convenient administration of justice it was competent to

embrace in one suit a class of transactions presenting the same question for determination. *Heckman* v. *United States*, *ante*, p. 413.

The question remains whether, in the execution of the conveyances to the appellants, the restrictions imposed by Congress have been violated.

The Dawes Commission, constituted by the act of 1893, entered into an agreement with the Choctaws and Chickasaws—known as the Atoka agreement—which was approved by Congress and incorporated in § 29 of the act of June 28, 1898. 30 Stat. 505. There was, however, a supplemental agreement, found in the act of July 1, 1902, 32 Stat. 641, c. 1362, which contains the restrictions in force at the time of the conveyances described in the bill.

This supplemental agreement provided that there should be allotted to each member of the Choctaw and Chickasaw tribes land equal in value to 320 acres of the average allottable land of these tribes; and to each Choctaw and Chickasaw freedman, land equal in value to forty acres. The scheme defined two classes of cases, (1) allotments made to members of the tribes, and to freedmen, living at the time of allotment, and (2) allotments made in the case of those whose names appeared upon the tribal rolls but who had died after the ratification of the agreement and before the actual allotment had been made.

With respect to allotments to living members, it was provided that the allottee should designate 160 acres of the allotted lands as a homestead, for which separate certificate and patent should issue. And the restrictions upon the right of alienation of the allotted lands are found in paragraphs 12, 13, 15 and 16 of the supplemental agreement, as follows:

"12. Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred

and sixty acres of the average allottable land of the Choctaw and Chickasaw nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead.

"13. The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment.

"15. Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this Act, nor shall said lands be sold except as herein provided.

"16. All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent; *Provided*, That such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value."

It will be observed that the homestead lands are made inalienable "during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment." The period of restriction is thus definitely limited, and the clear implication is that when the prescribed period expired the lands were to become alienable; that is, by the heirs of the allottee upon his death, or by the allottee himself at the end of the twenty-one years. Thus, with respect to homestead lands, the supplemental agreement imposed no restriction upon alienation by the heirs of a deceased allottee. And the reason may be found in the fact that each member of the tribes—each minor child

as well as each adult, duly enrolled as required—was to have his or her allotment; so that each member was already provided with a homestead as a part of the allotment, independently of the lands which might be acquired by descent. On the other hand, the proviso of paragraph 16—which relates to the additional portion of the allotment, or the so-called "surplus" lands—contains a restriction upon alienation not only by the allottee, but by his heirs. Whatever may have been the purpose, a distinction was thus made with regard to the disposition by heirs of the homestead and surplus lands respectively.

The question now presented—with regard to the conveyances made to the appellants—arises in the second class of cases, that is, where a person whose name appeared upon the rolls died after the ratification of the agreement and before receiving his allotment. In this event, provision was made for allotment in the name of the deceased person, and for the descent of the lands to his heirs. This is contained in paragraph 22 of the supplemental agreement:

"22. If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: *Provided*, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and practicable time, the Commission to the Five Civilized Tribes shall designate the lands thus to be allotted."

In the cases falling within this paragraph, there is no requirement for the selection of any portion of the allotted lands as a homestead, and there is no ground for supposing that it was the intention of Congress that a provision for such selection should be read into the paragraph so as to assimilate it to paragraph 12 relating to allotments to living members. While the lands were to be allotted in the name of the deceased allottee, they passed at once to his heirs, and as each heir, if a member of the tribe, was already supplied with his homestead of 160 acres, there was no occasion for a further selection for that purpose from the inherited lands. No distinction is made between the heirs; they might or might not be members of the tribe, and where there were a number of heirs each would take his undivided share. It is quite evident that there is no basis for implying the requirement that in such case there should be a selection of a portion of the allotment as a homestead, and all the lands allotted under paragraph 22 are plainly upon the same footing. While it appears from the record that, in the present case, separate certificates of allotment were issued for homestead and surplus lands, this was without the sanction of the statute.

In the agreement with the Creek Indians (act of March 1, 1901, 31 Stat. 861, 870, c. 676) it was provided that in the case of the death of a citizen of the tribe after his name had been placed upon the tribal roll made by the Commission, and before receiving his allotment, the lands and money to which he would have been entitled, if living, should descend to his heirs "and be allotted and distributed to them accordingly." The question arose whether in such cases there should be a designation of a portion of the allotment as a homestead. In an opinion under date of March 16, 1903, the then Assistant Attorney General for the Interior Department (Mr. Van Devanter) advised the Secretary of the Interior that this was not required by the statute. He said: "After a careful con-

sideration of the provisions of law pertinent to the question presented, and of the views of the Commissioner of Indian Affairs and the Commission to the Five Civilized Tribes, I agree with the latter that in all cases where allotment is made directly to an enrolled citizen, it is necessary that a homestead be selected therefrom and conveyed to him by separate deed, but that where the allotment is made directly to the heirs of a deceased citizen there is no reason or necessity for designating a homestead out of such lands or of giving the heirs a separate deed for any portion of the allotment, and therefore advise the adoption of that rule." It is true that under the Creek agreement, in cases where the ancestor died before allotment, the lands were to be allotted directly to the heirs, while under the Choctaw and Chickasaw agreement the allotment was to be made in the *name* of the deceased member and "descend to his heirs." This, however, is a merely formal distinction and implies no difference in substance. In both cases the lands were to go immediately to the heirs and the mere circumstance that under the language of the statute the allotment was to be made in the name of the deceased ancestor instead of the names of the heirs furnishes no reason for implying a requirement that there should be a designation of a portion of the lands as homestead.

We have, then, a case where all the allotted lands going to the heirs are of the same character and there is no restriction upon the right of alienation expressed in the statute. Had the lands been allotted in the lifetime of the ancestor, one-half of them, constituting homestead, would have been free from restriction upon his death. The only difficulty springs from the language of paragraph 16, limiting the right of heirs to sell "surplus" lands. But, on examining the context, it appears that this provision is part of the scheme for allotments to living members, where there is a segregation of homestead and surplus lands

respectively. Whatever the policy of such a distinction which gives a greater freedom for the disposition by heirs of homestead lands than of the additional lands, there is no warrant for importing it into paragraph 22 where there is no such segregation. It would be manifestly inappropriate to imply the restriction in such cases so as to make it applicable to all the lands taken by the heirs, and there is no occasion, or authority, for creating a division of the lands so as to impose a restriction upon a part of them.

There being no restriction upon the right of alienation, the heirs in the cases involved in this appeal were entitled to make the conveyances. The bill alleged that the tracts embraced in these conveyances were "allotted lands," and certificates of allotment had been issued. These Indian heirs were vested with an interest in the property which in the absence of any provision to the contrary was the subject of sale. The fact that they were "full-blood" Indians makes no difference in this case for, at the time of the conveyances in question, heirs of the full-blood taking under the provisions of paragraph 22 of the supplemental agreement had the same right of alienation as other heirs.

It does not appear from the allegations of the bill whether patents for the lands had been issued to the Indian grantors before the conveyances were made. But as the lands had been duly allotted, the right to patent was established; and there was no restriction in cases under paragraph 22 upon alienation of the lands prior to the date of patent. There was undoubtedly a complete equitable interest which, in the absence of restriction, the owner could convey. *Doe* v. *Wilson*, 23 How. 457; *Crews* v. *Burcham*, 1 Black, 352; *Jones* v. *Meehan*, 175 U. S. 1, 15–18. And any contention that the conveyances were invalid, solely because they were made before the issuance of patent—the lands not being under restriction—would be met by the proviso contained in § 19 of the act of

April 26, 1906, 34 Stat. 137, 144, c. 1876: "*Provided further*, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void."

We are therefore of the opinion that the bill is without equity as against the appellants for the reason that the conveyances were not executed in violation of any restrictions imposed by Congress, and that the demurrer should have been sustained upon this ground. It follows that, with respect to the appellants, the decree of the Circuit Court of Appeals must be reversed and that of the Circuit Court affirmed.

It is so ordered.

GOAT *v.* UNITED STATES.

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

No. 405. Argued October 12, 13, 1911.—Decided April 29, 1912.

Heckman v. *United States*, *ante*, p. 413, followed to effect that the United States has capacity to maintain a suit in equity to set aside conveyances of allotted lands made by allottee Indians in violation of statutory restrictions.

The question in this case is: What are the restrictions in the case of allotments to Seminole freedmen?

The relations of the United States to Seminole freedmen by treaties and statutes reviewed, and *held* that the United States is entitled to maintain an action to set aside all conveyances made by Seminole freedmen of homestead lands, of surplus lands made by minor allottees, and by adult allottees if made prior to April 21, 1904; but that such an action cannot be maintained as to conveyances made by adult allottees after April 21, 1904.

179 Fed. Rep. 13, modified and affirmed as to this point.

THE facts, which involve the validity of certain conveyances of allotted lands made by Seminole Indians and also the right of the United States to have such conveyances set aside, are stated in the opinion.

Mr. J. C. Stone, Mr. Robert J. Boone and *Mr. S. T. Bledsoe*, with whom *Mr. Geo. C. Crump, Mr. H. H. Rogers, Mr. J. H. Maxey, Mr. J. H. Miley* and *Mr. B. B. Blakeney* were on the brief, for appellants.[1]

The Solicitor General and *Mr. A. N. Frost* and *Mr. Harlow A. Leekley*, Special Assistants to the Attorney General, for the United States.[1]

MR. JUSTICE HUGHES delivered the opinion of the court.

The question presented by this appeal is with respect to the right of Seminole freedmen to convey the lands allotted to them in severalty pursuant to the act of July 1, 1898, c. 542, 30 Stat. 567. The United States sued to cancel conveyances alleged to have been made contrary to the statute. Demurrer to the bill was sustained by the Circuit Court, and its judgment was reversed by the Circuit Court of Appeals. *United States* v. *Allen, and similar cases*, 179 Fed. Rep. 13. So far as the demurrer contested the capacity of the United States to bring a suit of this character, the case stands upon the same footing, in all

[1] See abstract of arguments in *Heckman* v. *United States, ante*, p. 413.

material respects, as that of *Heckman* v. *United States*, *ante*, p. 413, and the right of the United States to enforce such restrictions as may have been imposed upon the alienation of the allotted lands is no longer open to dispute.

The inquiry must be, What are the restrictions in the case of allotments to Seminole freedmen, and have they been violated?

As to each of the tracts of land in question, it was alleged:

"And your orator further shows that each of the tracts of land hereinafter, in paragraph numbered six, described is situated in the Eastern District of Oklahoma, and was, at the time of the transactions of sale or incumbrance mentioned in that paragraph, allotted lands of the members of the Seminole tribe of Indians, allotted to freedman members of said tribe, and none were lands which had been patented to individuals at the time of the transactions in question; that they were not lands of heirs of allottees; that all contracts for the sale, disposition of any of said allotments prior to the date of patent were expressly, declared by law, to be void; that this law applied to all allotments of Seminole lands not inherited from allottees; that accordingly, defendants had knowledge and were, by said law, put upon inquiry and notice as to the inalienability of said unpatented lands, and had notice accordingly that the particular tracts had not been patented, any such patenting being a matter of public record and of public action; that moreover, the unpatented condition of said allotted lands was notorious and of common knowledge, since none of the Seminole allotted lands have been patented; and that other public laws of Congress and public agreements imposed further restrictions upon the transfer and incumbrance of the particular lands herein, in paragraph six, described, belonging to the particular class of tribal members herein

mentioned, in addition to those arising from the absence of patenting, and these restrictions were known, notified and notorious in like manner."

While it appears that a large number of conveyances are involved in the suit, only two are specifically described in the printed record on this appeal, the descriptions of the others, as set forth in the bill, having been omitted by stipulation. In the two cases particularly mentioned, the conveyances were made in August, 1906, and March, 1907. It is not stated whether the lands, embraced therein, were homestead or so-called "surplus" lands, but it is conceded in argument that they were of the latter class. The Government says in its brief: "In the printed record it happens that the transactions set out include only lands allotted other than homestead, but other transactions complained of in the bill, omitted from the printed record for the sake of brevity, include lands allotted as homesteads as well." The broad ground is taken by the Government that all conveyances of the lands allotted to members of the Seminole tribe are void because made prior to the date of patent.

By the treaty of 1832 (7 Stat. 368) the Seminoles relinquished to the United States their claim to the lands then occupied in the territory of Florida and agreed to emigrate to the lands assigned to the Creeks west of the Mississippi, it being understood that an additional extent of territory proportioned to their numbers should "be added to the Creek country," and that they should be received "as a constituent part of the Creek Nation." Provision to this effect was made in the Creek treaty of 1833 (7 Stat. 417, 419), which was satisfactory to the Seminoles, and territory was assigned to them accordingly. 7 Stat. 423. There were further agreements in 1845 (9 Stat. 821) and in 1856 (11 Stat. 699). In 1866 (14 Stat. 755), lands which had been ceded to the Seminoles by the Creeks were conveyed to the United States at a stipulated price;

and the United States, having obtained from the Creeks the westerly half of their lands, granted to the Seminoles a tract of 200,000 acres, which was to constitute the national domain of the latter. Subsequently, the United States purchased for the Seminoles another tract, on the east, consisting of 175,000 acres. Acts of March 3, 1873, 17 Stat. 626; August 5, 1882, 22 Stat. 257, 265, c. 390. It was provided in the treaty of 1866, inasmuch as there were among the Seminoles "many persons of African descent and blood, who have no interest or property in the soil and no recognized civil rights," that "these persons and their descendants, and such other of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatever race or color who may be adopted as citizens or members of said tribe."

Pursuant to the policy of allotting tribal lands among the individual members of the Five Civilized Tribes (act of March 3, 1893, c. 209, 27 Stat. 645), an agreement was made by the Dawes Commission with the Seminoles on December 16, 1897, which was ratified by the act of July 1, 1898. This agreement provided (30 Stat. 567, c. 542):

"All lands belonging to the Seminole tribe of Indians shall be divided into three classes, designated as first, second, and third class; the first class to be appraised at five dollars, the second class at two dollars and fifty cents, and the third class at one dollar and twenty-five cents per acre, and the same shall be divided among the members of the tribe so that each shall have an equal share thereof in value, so far as may be, the location and fertility of the soil considered; giving to each the right to select his allotment so as to include any improvements thereon, owned by him at the time; and each allottee shall have the sole right of occupancy of the land so allotted to him,

during the existence of the present tribal government, and until the members of said tribe shall have become citizens of the United States. Such allotment shall be made under the direction and supervision of the Commission to the Five Civilized Tribes in connection with a representative appointed by the tribal government; and the chairman of said Commission shall execute and deliver to each allottee a certificate describing therein the land allotted to him.

"All contracts for sale, disposition, or encumbrance of any part of any allotment made prior to date of patent shall be void."

Leases by allottees were permitted upon certain conditions.

The deeds of the allotted lands were to be executed at the termination of the tribal government and each allottee was to designate forty acres which by the terms of the deed should be inalienable and nontaxable as a homestead in perpetuity. The provision on this subject was as follows:

"When the tribal government shall cease to exist the principal chief last elected by said tribe shall execute, under his hand and the seal of the Nation, and deliver to each allottee a deed conveying to him all the right, title, and interest of the said Nation and the members thereof in and to the lands so allotted to him, and the Secretary of the Interior shall approve such deed, and the same shall thereupon operate as relinquishment of the right, title, and interest of the United States in and to the land embraced in said conveyance, and as a guarantee by the United States of the title of said lands to the allottee; and the acceptance of such deed by the allottee shall be a relinquishment of his title to and interest in all other lands belonging to the tribe, except such as may have been excepted from allotment and held in common for other purposes. Each allottee shall designate one tract of

forty acres, which shall, by the terms of the deed, be made inalienable and nontaxable as a homestead in perpetuity."

A supplemental agreement was made with the Seminoles on October 7, 1899, ratified on June 2, 1900 (31 Stat. 250, c. 610), which provided for the enrollment of children born to Seminole citizens to and including December 31, 1899, and all Seminole citizens then living, and also that if any member of the tribe should die after that date the lands, money and other property to which he would be entitled if living should descend to his heirs.

The act of March 3, 1903, c. 994, § 8 (32 Stat. 982, 1008), contained the following provisions as to the duration of the tribal government, the execution, delivery and recording of deeds and the inalienability of homesteads:

"SEC. 8. That the tribal government of the Seminole Nation shall not continue longer than March fourth, nineteen hundred and six: *Provided*, That the Secretary of the Interior shall at the proper time furnish the principal chief with blank deeds necessary for all conveyances mentioned in the agreement with the Seminole Nation contained in the Act of July first, eighteen hundred and ninety-eight (Thirtieth Statutes, page five hundred and sixty-seven), and said principal chief shall execute and deliver said deeds to the Indian allottees as required by said Act, and the deeds for allotment, when duly executed and approved, shall be recorded in the office of the Dawes Commission prior to delivery and without expense to the allottee until further legislation by Congress, and such records shall have like effect as other public records: *Provided further*, That the homestead referred to in said Act shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the deed for the allotment. A separate deed shall be issued for said homestead, and during the time the same is held by the allottee it shall not be liable for any debt contracted by the owner thereof."

The restriction upon the alienation of homestead lands applied as well to the freedmen as to the other allottees; but it was removed, with respect to the freedmen, by the act of May 27, 1908, c. 199 (35 Stat. 312). This statute, in fixing the status—after sixty days from the date of the act—of the lands of allottees of the Five Civilized Tribes, theretofore or thereafter allotted, provided: "All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions." The present bill was filed on July 23, 1908, and the conveyances it assails were executed before this provision of the act of 1908 became operative. Previous conveyances were not validated by the statute, but on the contrary it declared any attempted alienation or incumbrance of allotted lands, prior to the removal of restrictions, to be void. Section 5, *Id.* 313. It follows that the instruments described in the bill, in so far as they may have purported to convey homestead lands, were executed in violation of law and the Government was entitled to have them set aside.

The "surplus" lands were embraced in the general restriction contained in the agreement of December 16, 1897, ratified by the act of July 1, 1898, that "all contracts for sale, disposition, or encumbrance of any part of any allotment made prior to date of patent shall be void." Apart from the provisions as to leases, this was the only restriction upon the alienation of surplus lands imposed by that agreement, and no further restriction applicable to the freedmen allottees was placed upon such lands by subsequent statute.

The situation with respect to the Seminole allotments may be briefly stated. The commissioners to the Five Civilized Tribes found little difficulty in preparing the rolls of the Seminoles or in making the allotments. The enrollment following the ratification of the agreement of

1897 was begun in July, 1898, and was finished in August of that year. The rolls containing the additional names, provision for which was made by the supplemental agreement of 1899, were forwarded to the Department in December, 1900, and were approved by the Secretary of the Interior on April 2, 1901. (Reports of Commission to Five Civilized Tribes, 1900, p. 12; 1901, p. 30.) In June, 1901, the commission undertook the making of allotments and this was practically completed at an early date. In their report for 1903 (pp. 36, 37), the commissioners said: "The last annual report of the Commission showed the completion of allotment in the Seminole Nation, save as to the recording of a small number of allotments, and the issuance of certificates therefor, which was finished early in the past year." Subsequently there were additional allotments to after-born children in accordance with the act of March 3, 1905. 33 Stat. 1048, 1071, c. 1479. As already noted, the allottees were to receive their deeds on the expiration of the tribal government which, by the act of 1903, was not to continue longer than March 4, 1906. By joint resolution of March 2, 1906, Congress provided for the continuance of "the tribal existence and the present tribal governments" of the Five Civilized Tribes "in full force and effect for all purposes under existing laws," until all the property of the tribes should be distributed (34 Stat. 822); and by the act of April 26, 1906, they were continued "until otherwise provided by law" (§ 28, 34 Stat. 137, 148, c. 1876). While the duration of the tribal government was thus extended, the last mentioned statute expressly authorized the principal chief of the Seminoles meanwhile, that is, before its termination, to execute deeds to allottees. (Section 6, *Id.* 139.) These deeds, however, had not been delivered at the time of the conveyances in question. None of the lands, says the bill, had been patented to individuals, and they were not lands of heirs of allottees.

It is urged that the time for the issuance of patents was fixed as the fourth of March, 1906, and that in law they will be deemed to have been delivered on that date or within a reasonable time thereafter; that although provision was made for the continuance of the tribal government, there was likewise authority for the delivery of the deeds prior to its termination. The contention that the restriction was thus removed cannot be sustained. The agreement of 1897 did not fix a definite time for the termination of the tribal government, and while the act of 1903 set a limit to its existence, Congress was competent to extend it. This was done, and the mere authorization of the execution of patents before the tribal government ceased to exist, cannot be regarded as a repeal of the explicit provision that contracts for the sale or incumbrance of the allotted lands prior to the date of patent should be void. The one did not override the other; they could stand together.

But, in 1904—after the allotments to the Seminoles had been made—the restrictions upon the alienation by adult allottees of the five civilized tribes, who were not of Indian blood, of lands other than homesteads were removed. The provision was as follows (act of April 21, 1904, c. 1402, 33 Stat. 189, 204):

"And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian agent at the Union Agency in charge of the Five Civilized Tribes, if said agent is satisfied upon a full investigation of each individual case that such

removal of restrictions is for the best interest of said allottee. The finding of the United States Indian agent and the approval of the Secretary of the Interior shall be in writing and shall be recorded in the same manner as patents for lands are recorded."

This statute undoubtedly applied to allottees of the Seminole Nation, as one of the Five Civilized Tribes, and the enrolled freedmen of that tribe, according to the classification of the commission in making the rolls, fell within the description of allottees "not of Indian blood." The freedmen were persons of African descent—embracing former slaves and their descendants—who had been admitted to the rights of native citizens under the treaty of 1866. (Report of Dawes Commission, 1898, pp. 11, 13.) While the law did not prescribe that a separate roll of freedmen should be made in the case of the Seminoles, the commission in fact made one. As to this they said in their report for 1898 (p. 13), referring to the Seminoles: "Indeed, it is essentially a nation of full-bloods, save as to its colored citizens, who, under treaty provision, are on an equal footing with the citizens by blood. About one-third of the citizens of the Seminole Nation are freedmen, and while the law does not specifically require a separate roll of each of these classes, the commission's data will enable it to so separate them." Accordingly the freedmen in the rolls of the Seminoles, upon which the allotments were based, appear as a class distinct from the citizens by blood. (Final Rolls of Citizens and Freedmen of the Five Civilized Tribes, pp. 615, 627.) And the commissioner to the Five Civilized Tribes in his report for 1908 (p. 7), in stating the total number of the enrolled Seminoles, with the degree of blood of each, gives the number of the citizens of full-blood and of mixed-blood, three-fourths or more, one-half to three-fourths, and less than one-half blood, and then the number of the enrolled freedmen as a separate group. The bill does not allege that the allottees in

question had any Indian blood, but describes them simply as "freedmen members of said tribe," and in the specifications of the conveyances which appear in the record the grantors are named as Seminole freedmen whose names are on the freedmen roll. The import of the allegation, then, is that these grantors were not of Indian blood, and, so far as they were adults, they came within the provision of the act of 1904, removing restrictions upon the alienation of surplus lands.

These adult grantors stood in precisely the same position—after the act of 1904—as though they had received their allotments without any restriction upon their right to alienate the interest thus acquired. It is insisted, however, that this interest was not of such a character as to be susceptible of transfer. This is not a tenable proposition. Stress is laid upon the provision in the agreement of 1897 that each allottee should have "the sole right of occupancy of the land so allotted to him." But it is not to be supposed that by this form of words Congress intended in the case of the Seminoles to provide that, by virtue of the allotment, the member of the tribe should receive an interest of a different nature from that received by allottees of other tribes. The lands were allotted to the members of the tribe in severalty, so that each should have his distinct portion. The allotments constituted their respective shares of the tribal property, set apart to them as such, and while the execution of the deeds was deferred, each had meanwhile a complete equitable interest in the land allotted to him. The nature of the allottee's interest is sufficiently shown by other provisions of the agreement of 1897, as ratified by Congress, and by statutes *in pari materia*. In the agreement it was provided that any allottee might lease his allotment on certain conditions. With respect to the townsite of Wewoka, which was to be controlled and disposed of according to the provisions of the act of the General Council of the

Seminole Nation of April 23, 1897, it was provided that on extinguishment of the tribal government deeds should issue "to owners of lots" as in the case of allottees. The interest of the allottee was a descendible interest. By the supplemental agreement of 1900, in the case of the death of a member of the tribe after December 31, 1899, the lands "to which he would be entitled if living" were to descend to his heirs. Section 5 of the act of April 26, 1906, relating to "patents or deeds to allottees in any of the Five Civilized Tribes" to be thereafter issued—thus including those to be issued to the Seminole allottees—provided that if any such allottee should die before the deed became effective the title to the lands described therein should "inure to and vest in his heirs," and further, that "in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs *or his lawful assigns*, as if the patent or deed had issued to the allottee during his life" (34 Stat. 137, 138, c. 1876); and § 19 of that act (p. 144) contained a proviso declaring that conveyances theretofore made "by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed."

The inalienability of the allotted lands was not due to the quality of the interest of the allottee, but to the express restriction imposed. Their equitable interest was one which in the absence of restriction they could convey. *Doe* v. *Wilson*, 23 How. 457; *Crews* v. *Burcham*, 1 Black, 352; *Barney* v. *Dolph*, 97 U. S. 652, 656; *Jones* v. *Meehan*, 175 U. S. 1, 15–18; *Godfrey* v. *Iowa Land & Trust Co.*, 21 Oklahoma, 293; 95 Pac. Rep. 792; *Mullen* v. *United States*, April 15, 1912, *ante*, p. 448. And, hence, on the removal of the restrictions upon alienation, the adult allottees not of

Indian blood were entitled to convey their surplus lands. So far as the bill assails such conveyances it is without equity.

As all the conveyances made to the appellants are not particularly described in the printed record before this court, it is impossible to specify those which were lawful and those which were obnoxious to the statute. We are of opinion (1) that the bill should be sustained so far as it relates to conveyances of homestead lands; (2) that it should also be sustained to the extent that it is directed against conveyances of surplus lands made by freedmen allottees who were minors and thus excepted from the provision of the act of April 21, 1904, and those made by adult allottees prior to that date; and (3) that so far as the bill relates to conveyances of surplus lands made by adult freedmen allottees subsequent to April 21, 1904, it should be dismissed.

The judgment of the Circuit Court of Appeals will therefore be affirmed, with the modification that the cause shall proceed in conformity with this opinion.

It is so ordered.

DEMING INVESTMENT COMPANY *v.* UNITED STATES.

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

No. 434. Argued October 12, 13, 1911.—Decided April 29, 1912.

Goat v. *United States*, *ante*, p. 458, followed in regard to validity of conveyances of lands allotted to Seminole Indians, and the right of the United States to maintain actions to set such conveyances aside. 179 Fed. Rep. 13, modified and affirmed as to this point.

THE facts, which involve the validity of certain deeds and mortgages of allotted lands made by Seminole In-

dians and the right of the United States to have the same set aside, are stated in the opinion.

Mr. J. C. Stone, Mr. Robert J. Boone and *Mr. S. T. Bledsoe*, for appellants.[1]

The Solicitor General and *Mr. A. N. Frost* and *Mr. Harlow A. Leekley*, Special Assistants to the Attorney General, for the United States.[1]

MR. JUSTICE HUGHES delivered the opinion of the court.

The United States sought by this suit to cancel certain deeds and mortgages of lands allotted to members of the Seminole tribe of Indians. The judgment of the Circuit Court, sustaining demurrers to the bill, was reversed by the Circuit Court of Appeals. *United States* v. *Allen, and similar cases*, 179 Fed. Rep. 13.

The suit was brought on July 22, 1908, and embraced several conveyances to distinct grantees. This appeal is prosecuted—under § 3 of the act of June 25, 1910, c. 409, 36 Stat. 837—by only one of the defendants, The Deming Investment Company, of Oklahoma City.

The bill attacks mortgages made to this appellant, by others than the allottees, during the months of August, October and December, 1906. It is alleged that they were attempted incumbrances of allotted lands of members of the Seminole tribe; that none of these lands had been patented to individuals at the time of the transactions; and that all contracts for the sale, disposition and incumbrance of the lands prior to the date of patent were expressly declared by law to be void. (Agreement of December 16, 1897, ratified by the act of July 1, 1898, c. 542, 30 Stat. 567.)

In its brief the appellant states that "each conveyance only involves the surplus allotment and not the home-

[1] See abstract of arguments in *Heckman* v. *United States*, *ante*, p. 413.

stead of the particular allottee," a statement which we do not understand the Government to challenge so far as the mortgages to the appellant are concerned. The bill does not allege that these mortgages, or any of them, embraced homestead lands.

Nor is it alleged in the bill that any of the allottees whose allotments had been mortgaged to the appellant were of Indian blood, but the lands are described as those which had been allotted to Seminole freedmen whose names appear upon the freedmen rolls of that tribe. Upon the allegations of the bill, these allottees, so far as they were adults, must be held to come within the provision of the act of April 21, 1904, c. 1402 (33 Stat. 189, 204), which removed all restrictions upon alienation by adult allottees not of Indian blood with respect to their surplus lands; and, by virtue of the allotment, they had an interest in the allotted lands which on the removal of the restriction they were entitled to convey. *Goat* v. *United States*, decided this day, *ante*, p. 458.

Minors were excepted from this enabling provision of the act of 1904; and in one instance the mortgage is described as covering a portion of the allotment of a minor freedmen allottee, Ellen Sango, age 17. In this, as in other cases, the age of the allottees is given apparently as of the time when the mortgage was executed. The dates of the conveyances made by the allottees are not set forth.

Upon the authority of *Goat* v. *United States*, *supra*, the bill, with respect to the appellant, should be sustained so far as it relates to mortgages covering lands which had been conveyed by minor allottees, or by adult allottees before April 21, 1904; and it should be dismissed as to the surplus lands conveyed by adult freedmen allottees subsequent to that date. The judgment of the Circuit Court of Appeals is affirmed, with the modification that the cause shall proceed in conformity with this opinion.

It is so ordered.

INTERSTATE COMMERCE COMMISSION *v.* UNITED STATES OF AMERICA EX REL. HUMBOLDT STEAMSHIP COMPANY.

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

No. 859. Argued April 16, 1912.—Decided April 29, 1912.

Alaska is a Territory of the United States within the meaning of § 1 of the Interstate Commerce Act, as amended June 29, 1906, 34 Stat. 584, c. 3591.

An organized Territory of the United States does not necessarily mean one having a local legislature as distinguished from one having a less autonomous form of government, such as that of Alaska.

Even if "Territory of the United States" as used in § 1 of the Inter-State Commerce Act as amended includes only organized Territories, Alaska falls within its meaning. *The Steamer Coquitlam*, 163 U. S. 346; *Binns* v. *United States*, 194 U. S. 486; *Rassmussen* v. *United States*, 197 U. S. 516.

The Hepburn Act of June 29, 1906, 34 Stat. 584, c. 3591, extended the provisions of the Interstate Commerce Act to interterritorial commerce and for the first time gave to the Commission the power to fix rates. In so doing it made the act completely comprehensive, and the power given to the Commission superseded the power of the Secretary of the Interior to revise and modify rates of railroads in Alaska given by § 2 of the act of May 14, 1898, 30 Stat. 409, c. 299.

Mandamus can be issued to direct performance of a ministerial act but not to control discretion. It may be directed to a tribunal, one acting in a judicial capacity, to proceed in a manner according to his or its discretion.

The jurisdiction to determine jurisdiction, *Ex parte Harding*, 219 U. S. 363, does not exist in an administrative body which is subject to having its jurisdicton defined by the courts.

The United States Commerce Court has no jurisdiction to review the action of the Interstate Commerce Commission in refusing to entertain a complaint because the subject is beyond its jurisdiction. In such a case the remedy is by mandamus to compel the Commission

to proceed and decide the case according to its judgment and discretion.

The Interstate Commerce Commission has jurisdiction to investigate violations of the Act to Regulate Commerce in Alaska, and to compel carriers in that Territory to conform to the law; and if the Commission refuses to act on the ground that it has no jurisdiction, mandamus will issue directing it to take jurisdiction.

39 Washington Law Reporter, 386, affirmed, and 19 I. C. C. 81, disapproved.

THE facts, which involve the status of common carriers in Alaska under the Interstate Commerce Act, and the jurisdiction of the Interstate Commerce Commission over common carriers in Alaska, are stated in the opinion.

Mr. P. J. Farrell for plaintiff in error:

Alaska is not a Territory of the United States within the meaning of § 1 of the Act to Regulate Commerce. *Matter of Water Carriers in Alaska*, 19 I. C. C. 81.

In the jurisdictional clause of the Hepburn Act, the District of Alaska is not included by name and the word "District" as used in that section is confined to the District of Columbia.

Alaska has never been officially designated as a Territory: see act of May 17, 1884; Rev. Stat. 1 Sup., c. 53, p. 430; act of June 4, 1887, providing for the appointment of commissioners of deeds and a marshal; act of July 24, 1897, providing for the appointment of a surveyor general; act of June 6, 1900, 31 Stat. 321, making further provision for a civil government for Alaska.

In the Appropriation Acts of 1907 and 1908, 34 Stat. 963, and 35 Stat. 212, Alaska is called a District, while Arizona, New Mexico, and Hawaii are described as Territories. See also acts of January 27, 1905, 33 Stat. 616; of March 3, 1905, 33 Stat. 1262 and 1265; § 1, act of February 4, 1887; act of June 18, 1910.

At the time the amendment of June 29, 1906, was passed Congress was acquainted with the rulings of the

Commission that the District of Alaska is not a Territory of the United States within the meaning of § 1 of the Act to Regulate Commerce. See the Townsend Bill (H. R. 17536), reported to the Whole House by the Committee on Interstate and Foreign Commerce in the second session of the Sixty-first Congress on April 1, 1910; and the Fletcher Bill (S. 9975), introduced January 9, 1911.

Both attempts to place common carriers operating lines of transportation in Alaska under the control of the Commission failed.

Under these circumstances, this court will consider itself bound by the interpretation of the Commission, which is the tribunal primarily charged with the enforcement of the provisions of said act. See *New Haven R. R. Co.* v. *Int. Com. Comm.*, 200 U. S. 361, holding that an interpretation placed on the act by the Commission in the cases of *Haddock* v. *Delaware, L. & W. R. Co.*, 4 I. C. C. Rep. 296, and *Coxe Bros. & Co.* v. *Lehigh Valley R. R. Co.*, 4 I. C. C. Rep. 535, was binding upon the court.

The authority conferred upon the Secretary of the Interior by the act of May 14, 1898, has not been taken away by § 10 of the Hepburn Law. The law does not favor repeals by implication, Alaska is not referred to by name either in the Hepburn Law or in the act to regulate commerce, and Congress has never specifically conferred upon the Commission jurisdiction over any common carrier in any district of the United States except the District of Columbia.

Mandamus is not a proper proceeding in which to correct an error of law like that alleged in the petition. *Commissioner of Patents* v. *Whiteley*, 4 Wall. 522; *West* v. *Hitchcock*, 19 App. D. C. 333, 342; *Decatur* v. *Paulding*, 14 Pet. 497, 514; *United States* v. *Black*, 128 U. S. 40, 48; *United States* v. *Guthrie*, 17 How. 284; *Georgia* v. *Stanton*, 6 Wall. 50; *Gaines* v. *Thompson*, 7 Wall. 347; *United States* v. *Windom*, 137 U. S. 636, 644; *United States* v. *Blaine*,

139 U. S. 306, 319; *United States* v. *Lamont*, 155 U. S. 303, 308; *Kimberlin* v. *Commission to Five Civilized Tribes et al.*, 104 Fed. Rep. 653.

The preliminary question of jurisdiction the Commission decided was as much within the scope of its authority as any other which could arise. Having resolved it in the negative, there was no occasion for the Commission to look further into the case. Only a reversal by the tribunal of appeal can revive it, and cast upon the Commission the duty of further action in the premises.

This proceeding in mandamus is not the only remedy open to defendant in error. See *Proctor & Gamble Co.* v. *United States*, 188 Fed. Rep. 221.

Mr. Charles D. Drayton, with whom *Mr. John B. Daish* and *Mr. James Wickersham* were on the brief, for defendant in error.

Mr. Justice McKenna delivered the opinion of the court.

The ultimate question in the case is whether Alaska is a Territory of the United States within the meaning of the Interstate Commerce Act as amended.

The Interstate Commerce Commission resolved the question in the negative and dismissed the petition of the Humboldt Steamship Company, the relator, which alleged violations of the act by the White Pass & Yukon Railway Company, operating in Alaska, applying its decision in *Matter of Jurisdiction Over Rail and Water Carriers Operating in Alaska*, 19 I. C. C. Rep. 81.

The steamship company instituted an action in the Supreme Court of the District of Columbia praying for a mandamus against the Commission to require it to take jurisdiction and proceed as required by the act and grant the relief for which the steamship company had petitioned,

hereinafter specifically mentioned. The proceeding was dismissed. The court expressed the view that the Commission had "ample authority to assume jurisdiction over common carriers in Alaska, the same as in any other Territory, and over those carriers operating between the State of Washington and Alaska, and between Alaska and Canada, and if they took jurisdiction no one could successfully question their right to do so." The court, however, held that it had no power "to require the Interstate Commerce Commission to act contrary to its own judgment in a matter wherein, after investigation, it had reached a conclusion, honestly and fairly, which might be contrary to the conclusion which the court would reach."

The Court of Appeals, to which court the case was taken by the steamship company, entertained the same view of the Interstate Commerce Act as that expressed by the Supreme Court, but took a different view of the power of the courts to compel action upon the part of the Commission, and reversed the judgment of the Supreme Court and remanded the cause, "with directions to issue a peremptory writ of mandamus directed to the Interstate Commerce Commission requiring it to take jurisdiction of said cause and proceed therein as by law required." To this ruling the Interstate Commerce Commission prosecutes this writ of error.

The proceedings before the Commission were instituted by the steamship company filing a petition (No. 2578) against the White Pass & Yukon Route, consisting of the Pacific & Arctic Railway & Navigation Company, British Columbia-Yukon Railway Company, British-Yukon Railway Company, and British-Yukon Navigation Company, to require said companies to file with the Commission, in the form prescribed by the Act to Regulate Commerce, and to print and keep open for public inspection, schedules showing their rates and charges for transportation of passengers and property between points in Alaska and

points in the Dominion of Canada and other places; to establish through routes and joint rates in conjunction with the petitioner between certain named places in Alaska and Seattle, in the State of Washington; to afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines; and to cease and desist from preventing by sundry devices the carriage of freights from being continuous from place of shipment to place of destination when such freight is originated or in any wise handled by the Humboldt Steamship Company.

The companies proceeded against filed answers. There were intervening companies on both sides of the controversy.

A hearing was assigned and had in October, 1909, and subsequently, July 6, 1910, the Commission decided that it was "without jurisdiction to make the order sought by complainant," resting its ruling upon the authority of its decision in *Matter of Jurisdiction Over Rail and Water Carriers Operating in Alaska, supra.*

Section 1 of the Interstate Commerce Act provides that the provisions of the act "shall apply to any . . . common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, . . . or from any place in the United States through a foreign country to any other place in the United States. . . ." 34 Stat. 584.

The pivotal words are: "From one State or Territory of the United States . . . to any other State or

Territory, . . . or from one place in a Territory to another place in the same Territory," "Territory" being the especially significant word.

If we may venture to reduce to a single proposition an elaborate discussion of elements and considerations, we may say that the Commission gave to the word "territory" the signification of "organized territory," the chief and determining feature of which is a local legislature as distinguished from a territory having a more rudimentary and less autonomous form of government which it considered Alaska possessed.

To this signification and distinction the arguments of counsel are addressed, and much of the reasoning of the lower courts. That field, however, has been traversed by cases in this court, and it need not again be passed over. We may accept and apply the conclusions which have been reached and expressed.

In the case of *Steamer Coquitlam* v. *United States*, 163 U. S. 346, the relation of the courts of Alaska to the Federal judicial system and the applicability of certain statutes concerning the same were decided, after a review of those statutes and those defining the status of Alaska.

By the fifteenth section of the act of March 3, 1891, creating the Circuit Court of Appeals, it is provided that the Circuit Court of Appeals, in cases in which the judgments of the Circuit Courts of Appeal are made final by this act, shall have "the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several Territories as by this act they may have to review the judgments, orders, and decrees of the district courts and circuit courts; and for that purpose the several Territories shall, by orders of the supreme court, to be made from time to time, be assigned to particular circuits." 26 Stat. 826, 830, c. 517.

In execution of the duty imposed by that section, this

court, by an order promulgated May 11, 1891, assigned Alaska to the Ninth Judicial Circuit.

Subsequent to this order the United States brought a suit in admiralty in the District Court of Alaska for the forfeiture of the steamer Coquitlam because of an alleged violation of the revenue laws. A decree was rendered for the United States and an appeal was prosecuted to the Circuit Court of Appeals for the Ninth Circuit. The United States disputed the jurisdiction of the court on the grounds: (1) that the District Court of Alaska was not a district court within the meaning of the sixth section of the Circuit Court of Appeals Act; and (2) that the District Court of Alaska was not a Supreme Court of a Territory within the meaning of that act and the order of this court assigning Alaska to the Ninth Circuit.

The court certified the questions to this court. We answered the first in the negative and the second in the affirmative. We said, through Mr. Justice Harlan, that the Circuit Court of Appeals Act was necessarily interpreted by this court as conferring appellate jurisdiction upon the Circuit Court of Appeals when by the "order of May 11, 1891, 139 U. S. 707, Alaska was assigned to the Ninth Circuit." And it was further said (p. 352): "Alaska is one of the Territories of the United States. It was so designated in that order and has always been so regarded. And the court established by the act of 1884 (providing for a civil government for Alaska) is the court of last resort within the limits of that Territory. . . . No reason can be suggested why a Territory of the United States, in which the court of last resort is called a Supreme Court, should be assigned to some circuit established by Congress that does not apply with full force to the Territory of Alaska, in which the court of last resort is designated as the District Court of Alaska. The title of the territorial court is not so material as its character."

The case needs no comment. It clearly defines the

relation of Alaska to the rest of the United States. It was not a description of a definite area of land or "landed possession," but of a political unit, governing and being governed as such.

This view is reinforced by other cases. In *Binns* v. *United States*, 194 U. S. 486, 490, 491, we said, through Mr. Justice Brewer, that we had held in *Steamer Coquitlam* v. *United States* that "Alaska is one of the Territories of the United States." And also: "Nor can it be doubted that it is an organized Territory, for the act of May 17, 1884, 23 Stat. 24, entitled 'An act providing a civil government for Alaska,' provided: That the territory ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven, and known as Alaska, shall constitute a civil and judicial district, the government of which shall be organized and administered as hereinafter provided."

In *Binns* v. *United States* the fact of a local legislature, or indeed any special form of government, was not considered as necessarily a feature of an organized Territory. "It must be remembered," it was said, "that Congress in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution, that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories." There is much more in that case which might be quoted as establishing that the status of Alaska is that of an organized Territory. See also *Rassmussen* v. *United States*, 197 U. S. 516.

It is contended further by the Commission that railways were first authorized to be constructed in Alaska by the act passed May 14, 1898, 30 Stat. 409, c. 299, and that § 2 of the act provided as follows:

"That all charges for the transportation of freight and passengers on railroads in the District of Alaska shall be

printed and posted as required by section six of an Act to regulate commerce as amended on March second, eighteen hundred and eighty-nine, and such rates shall be subject to revision and modification by the Secretary of the Interior."

The argument is that this provision brings into force § 6 of the Interstate Commerce Act, and that, it is said, "under familiar rules of construction, excludes the application of every other section in the act," and that, besides, the provision that the rates on the Alaskan railroads should be subject to revision and modification by the Secretary of the Interior "negatived the jurisdiction of the Interstate Commerce Commission, even if Alaska was apprehended to be within section 1 of the Interstate Commerce Act."

These contentions do not seem to have been made in either the Supreme Court of the District or in the Court of Appeals. It was referred to very briefly as a circumstance to be considered in a majority report of the Interstate Commerce Commission in the ruling case, and more at length in the minority report. In the latter report important circumstances were pointed out. The Interstate Commerce law preceded that which gave authority to the Secretary of the Interior to revise and modify railroad rates, and the authority was confined to that special exercise, and, so far, it may be said to have amended the Interstate Commerce Act. At that time it had been held in the *Maximum Rate Cases* (162 U. S. 184; 167 U. S. 479, and 168 U. S. 144), that Congress had not conferred upon the Interstate Commerce Commission the legislative power to prescribe rates, either maximum, minimum or absolute. The power to prescribe a rate was conferred by the amendment of June 29, 1906, and that amendment extended the provisions of the act for the first time to intraterritorial commerce. The amendment made the act completely comprehensive of the whole subject and

entirely superseded the minor authority which had been conferred upon the Secretary of the Interior. As said by the minority of the Commission: "There is no suggestion of doubt that the ends of justice require as much the application of the same principle and regulation in Alaska as in New Mexico or Arizona." The two latter at the time this was said were Territories.

It is next contended by the Commission that "mandamus is not a proper proceeding to correct an error of law like that alleged in the petition."

The general principle which controls the issue of a writ of mandamus is familiar. It can be issued to direct the performance of a ministerial act, but not to control discretion. It may be directed against a tribunal or one who acts in a judicial capacity to require it or him to proceed, the manner of doing so being left to its or his discretion. It is true there may be a jurisdiction to determine the possession of jurisdiction. *Ex parte Harding*, 219 U. S. 363. But the full doctrine of that case cannot be extended to administrative officers. The Interstate Commerce Commission is purely an administrative body. It is true it may exercise and must exercise *quasi* judicial duties, but its functions are defined and, in the main, explicitly directed by the act creating it. It may act of its own motion in certain instances—it may be petitioned to move by those having rights under the act. It may exercise judgment and discretion, and, it may be, cannot be controlled in either. But if it absolutely refuse to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion. Give it that latitude and yet give it the power to nullify its most essential duties, and how would its non-action be reviewed? The answer of the Commission is, by "a reversal by the tribunal of appeal." And such a tribunal, it is intimated, is the United States Commerce Court.

But the proposition is plainly without merit, even al-

though it be conceded, for the sake of argument, that the Commerce Court is by law vested with the exclusive power to review any and every act of the Commission taken in the exertion of the authority conferred upon it by statute; that is, to exclusively review, not only affirmative orders of the Commission granting relief, but also the action of that body in refusing to award relief on the ground that an applicant was not entitled to relief. This is so because the action of the Commission refusing to entertain a petition on the ground that its subject-matter was not within the scope of the powers conferred upon it, would not be embraced within the hypothetical concessions thus made. A like view disposes of the cases relied upon in which it was decided that certain departmental orders were not susceptible of being reviewed by mandamus. We do not propose to review the cases, as we consider them to be plainly inapposite to the subject in hand.

In the case at bar the Commission refused to proceed at all, though the law required it to do so; and to so do as required—that is, to take jurisdiction, not in what manner to exercise it—is the effect of the decree of the Court of Appeals, the order of the court being that a peremptory writ of mandamus be issued directing the Commission "to take jurisdiction of said cause and proceed therein as by law required." In other words, to proceed to the merits of the controversy, at which point the Commission stopped because it was "constrained to hold," as it said, "upon authority of the decision recently announced in *In the Matter of Jurisdiction Over Rail and Water Carriers Operating in Alaska*, 19 I. C. C. Rep. 81, that the Commission is without jurisdiction to make the order sought by complainant," the steamship company.

Judgment affirmed.

WASHINGTON HOME FOR INCURABLES *v.* AMERICAN SECURITY AND TRUST COMPANY.

VERMILLION *v.* BALTIMORE AND OHIO RAILROAD COMPANY.

APPLICATIONS FOR THE ALLOWANCE OF AN APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, AND FOR A WRIT OF ERROR TO THE SAME.

Submitted April 15, 1912.—Decided April 29, 1912.

Section 299 of the Judicial Code of March 3, 1911, 36 Stat. 1087, c. 231, saving suits pending on appeal, does not give the right of appeal from judgments of the Court of Appeals of the District of Columbia in cases covered by the statutes repealed by the Judicial Code and in which the cause of action accrued prior to January 1, 1912, but which were not decided by the Court of Appeals until after that date.

Appeal from 40 Washington Law Reporter, 146, denied.

Writ of error to review 40 Washington Law Reporter, 228, denied.

THE facts, which involve the construction of the provisions of the Judicial Code of March 3, 1911, in regard to appeals to this court from the Court of Appeals of the District of Columbia, are stated in the opinion.

Mr. Henry B. F. Macfarland, Mr. Charles Cowles Tucker and *Mr. J. Miller Kenyon* for petitioner The Washington Home for Incurables:

The saving clause of the Judicial Code, § 299, clearly preserves the right of appeal in this case. Its language would have to be wrested from its evident meaning to bar the appeal.

Giving to the language of § 299 the consideration warranted by the familiar canons of construction of statutes will show that the intention, and the action of Congress,

contemplated the continuance of the right of appeal in this cause.

For the canons of construction of statutes, or decisions respecting them, see summary, 1 Fed. Stat., Ann., pp. VIII to CXXX, on statutes and statutory construction.

In the light of reason an examination of the Judicial Code as affected by § 299 shows that it cannot bar appeals covered by the saving clause as in this case.

If, as may be claimed, the intention of Congress was simply to preserve the jurisdiction of the Supreme Court over writs of error and appeals in cases actually pending on the first day of January, 1912, in the Supreme Court of the United States itself, and not in any appellate or other court below, Congress could and would have said so in a very few words.

If Congress meant to preserve only appeals pending in the Supreme Court it should and would have said so, as in former acts, in explicit terms. For other instances, see Act of March 3, 1873, 17 Stat. 485, c. 223; Act of March 3, 1891, 26 Stat. 1115; Act of January 20, 1897, 29 Stat. 492.

Section 299 is unnecessary for any other purpose than that suggested in this case.

In cutting off a privilege of appeal enjoyed by the National Capital for more than a century, Congress gave days of grace at least as to pending cases.

Mr. Joseph W. Cox and *Mr. John A. Kratz, Jr.*, for petitioner Vermillion:

The plain words of § 299 expressly saves the jurisdiction which this court had under the act of February 9, 1893, 27 Stat. 436.

The section is very comprehensive, and provides that the appeal of existing laws shall not affect: (a) any act done, or any right accruing or accrued; (b) any suit or proceeding pending at the time of the taking effect of this act; (c) any suit or proceeding pending on writ of

error, appeal certificate, or writ of certiorari in any appellate court referred to or included within the provisions of the act at the time of its taking effect.

The act further provides that, "all such suits and proceedings and suits and proceedings for causes arising or acts done prior to such date, may be commenced and prosecuted within the same time, and with the same effect, as if said repeal or amendments had not been made."

The meaning plainly to be deduced from a reading of this section is that Congress was leaving unaffected proceedings under the repealed laws in pending cases, and also proceedings in causes arising, or acts done prior to such date. The words of this section are not ambiguous, but leave the intent of Congress plain, and this court has decided that under such circumstances it will not give construction to an act of Congress. *Dewey* v. *United States*, 178 U. S. 510; *United States* v. *Union P. R. R. Co.*, 91 U. S. 72.

While one of the effects of § 299 is to accomplish just what the Court of Appeals declares it does, the section is far more comprehensive in its effective operation than that ascribed to it by that court.

Congress used the words of this section in their plain and natural meaning, as is clearly shown by the legislative history of the section and its comparison with §§ 5597 and 5599, Rev. Stat. of 1873, from which its language was taken. See the bill as originally reported to the Senate, S. 7031 and to the House, H. R. 23,377; Sen. Report, 388, 61st Cong., 2d Sess. of Special Joint Committee on Revision and Codification of the Laws of the United States.

Where Congress in a subsequent act adopts the provisions of a former act and in the main its language, it must be presumed that Congress intended the provisions of the subsequent law to accomplish the same thing and to have the same force and effect as the earlier law. Es-

pecially is this so where the courts have construed the earlier law, before the enactment of the subsequent law, to be in harmony with the plain meaning of the words employed. *Bechtel* v. *United States*, 101 U. S. 597; *May* v. *County of Logan*, 30 Fed. Rep. 250.

The plain words of the section, its legislative history, and this court's construction of prior laws *in pari materia* all show that the intention of Congress was to save this court's jurisdiction in a case like that at bar.

MR. JUSTICE HOLMES delivered the opinion of the court.

These are applications for the allowance of an appeal and writ of error, respectively. The cases come before the court under the same circumstances as the application for a writ of error just decided. *American Security & Trust Co.* v. *District of Columbia*, *post*, p. 491.

The first named is a bill in equity that was pending in the Court of Appeals on January 1, 1912, and decided on March 4, 1912. The matter in dispute in both, exclusive of costs, exceeds the sum of five thousand dollars. The law before the enactment of the Judicial Code of March 3, 1911, c. 231, 36 Stat. 1087, allowed a writ of error or appeal in such cases, act of February 9, 1893, c. 74, § 8, 27 Stat. 434, 436, and the applicants contend that the appeal and writ of error are rights saved by § 299 of the Code. That section is as follows: "The repeal of existing laws, or the amendments thereof, embraced in this Act, shall not affect any act done, or any right accruing or accrued, or any suit or proceeding, including those pending on writ of error, appeal, certificate, or writ of certiorari, in any appellate court referred to or included within, the provisions of this Act, pending at the time of the taking effect of this Act, but all such suits and proceedings, and suits and proceedings for causes arising or acts done prior to such date, may be commenced and prosecuted within

the same time, and with the same effect, as if said repeal or amendments had not been made." This act took effect when this suit was pending in the Court of Appeals, on January 1, 1912.

The purpose of the act in the matter of appeals from the Court of Appeals of the District was to make a substantial change and to do away with them except in classes of cases of which this is not one. There seems to be little if any more reason for preserving a further appeal in cases then before the Court of Appeals than there is in those in which no writ had been sued out, but the cause of action had accrued before January 1, 1912, which is nothing at all. It must appear clearly, therefore, that this case is saved or it will fall under the general rule. We find no clear expression of such intent. The general provision that the repeal shall not affect any right or suit, is ambiguous and is qualified and explained by the words 'including those pending on appeal,' etc., which suggest that but for them appeals already taken would have fallen. *Baltimore & Potomac R. R. Co.* v. *Grant*, 98 U. S. 398. If express words were thought necessary to save pending appeals, *a fortiori* such words were needed to save appeals not yet taken, and no such words were used. The first part of the section, declaring what shall not happen, is elucidated by the antithetical statement, in the last part, of what shall take place. We gather from that that all suits upon causes of action that arose before January 1 stand alike. We cannot suppose that a suit not yet begun can be taken to this court on the ground that a sum of more than $5,000 is involved, and we are of opinion that the applicant makes no better case. We agree with the Court of Appeals that the act saves jurisdiction when an appeal has been taken, but does not save an appeal for all suits in causes of action accrued before this year.

Leave to appeal and writ of error denied.

AMERICAN SECURITY AND TRUST COMPANY *v.* COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

PETITION FOR A WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Submitted April 15, 1912.—Decided April 29, 1912.

The jurisdiction of this court to reëxamine final judgments or decrees of the Court of Appeals of the District of Columbia under § 250 of the Judicial Code of March 3, 1911, 36 Stat. 1087, c. 231, in cases in which the construction of a law of the United States is drawn in question, does not extend to cases where the act of Congress construed by that court is a purely local law relating to the District of Columbia, but only extends to those having a general application throughout the United States.

In construing a statute the same phrase may have different meanings when used in different connections.

Section 250 of the Judicial Code should be strictly construed, as the intent of Congress was to relieve this court from indiscriminate appeals where the amount involved exceeded $5,000.

All cases in the District of Columbia arise under acts of Congress; and to so construe § 250 of the Judicial Code as to include the case at bar, because the construction of a local street extension act was involved, would largely and irrationally increase the appellate jurisdiction and the statute will not be construed so as to include such cases even if within its literal meaning. *Holy Trinity Church* v. *United States*, 143 U. S. 437.

Writ of error to review 40 Washington Law Reporter, 34, denied.

THE facts, which involve the construction of the provisions of the Judicial Code of March 3, 1911, in regard to appeals to this court from the Court of Appeals of the District of Columbia, are stated in the opinion.

Mr. Wm. G. Johnson for petitioner:

The jurisdiction of this court to review the judgment of the Court of Appeals is based upon § 250, Judicial Code, providing that any final judgment or decree of the Court

of Appeals of the District of Columbia may be reëxamined and affirmed, reversed, or modified by this court upon writ of error or appeal, when the construction of any law of the United States is drawn in question by the defendant.

Upon this provision of the statute but two questions can arise affecting the jurisdiction of this court; namely, (1) was the construction of the above-recited statutes drawn in question by the defendant, and (2) are those statutes within the descriptive words "any law of the United States," as those words are used in § 250 of the Judicial Code.

In this case the construction of the statutes was drawn in question by the defendants.

The statute is, itself, an instruction to the jury, and the instruction objected to by defendants and the one asked by defendants, of necessity, drew in question the construction of the statute.

The words "any law of the United States" embrace the statutes, the construction of which was drawn in question in this case.

The two acts of Congress, the construction of which was drawn in question in this case, are laws of the United States. Every legislative act of the Congress, whether local or general, is a law of the United States, and is so defined in the Constitution.

While it is freely conceded that the word "any" like other words, may have a greater or less extensiveness, according to the intent with which it is used, still, in general, it embraces each and every object in the class to which it is applied. *United States* v. *Palmer*, 3 Wheat. 610; *Collector* v. *Hubbard*, 12 Wall. 1.

Uniformity of statutory construction is not the object or effect of the statute.

The appellate jurisdiction conferred upon this court by clause 6 of § 250, novel in the legislation of Congress on the subject of appellate jurisdiction, and extending to but

one court in the entire judicial system of the Nation, cannot, by any possibility, even tend to produce uniformity of decisions as to the construction of laws of the United States of national application. Being wholly unadapted and incompetent to produce uniformity of decision, the clause in question cannot properly be said to have been framed with that object, in the absence of any such declared purpose in the statute, and the inference, that the clause should be confined to general statutes of the United States as distinguished from those of purely local application, based, as it is, upon that supposed purpose of the legislature, is without foundation. See *Parsons* v. *Dist. of Col.*, 170 U. S. 45; *Balt. & Pot. R. R.* v. *Hopkins*, 130 U. S. 210.

Nor is the relief of this court involved; whether this was the intention of the act admits of serious question. No such purpose is declared in the statute and it is not to be inferred from provisions expressly conferring additional appellate jurisdiction upon this court.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an application for a writ of error to the Court of Appeals of the District of Columbia under the new Judicial Code. Act of March 3, 1911, c. 231. 36 Stat. 1087. The Court of Appeals denied the writ. Thereupon application was made to the Chief Justice. He referred it to the court. Briefs were called for and one was submitted by the applicants. It now is to be decided whether the writ should be allowed.

By § 250 of the Code any final judgment or decree of the Court of Appeals may be reëxamined 'in the following cases: . . . Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant.' This is the clause relied upon. The case was a suit for the condemnation of land brought by the Commissioners under a special act of

February 6, 1909, c. 75, 35 Stat. 597, for the extension of New York Avenue. By that act the procedure was to follow subchapter one of chapter fifteen of the District Code, which provides among other things for the separate assessment of benefits. Act of March 3, 1901, c. 854. 31 Stat. 1189, 1266. The jury were instructed that by the extension of the avenue they were to understand its establishment, laying out and completion for all the ordinary uses of a public thoroughfare. The applicants contended that, as there was no present provision for grading, paving, laying water mains or sewers, or otherwise opening the avenue to traffic, any advantage that would accrue from such improvements if made must be disregarded; and so they say that they drew the construction of the special act and perhaps of the Code in question, and that these were laws of the United States.

We do not stop to consider whether any question of construction properly can be said to have been raised, rather than a question of general law in the application of words that were colorless so far as the point in controversy was concerned. It might not be just to assume that the general averment of the application was not justified by exceptions more clearly turning on the construction of the local laws than the example given in the brief. The ground on which the writ was refused by the Court of Appeals was that the words quoted from § 250 should not be construed to apply to the purely local laws of the District, and with that view we agree.

Of course there is no doubt that the special act of Congress was in one sense a law of the United States. It well may be that it would fall within the meaning of the same words in the third clause of the same section: 'Cases involving the constitutionality of any law of the United States.' *Parsons* v. *District of Columbia*, 170 U. S. 45. But it needs no authority to show that the same phrase may have different meanings in different connections.

Some reasons for strict construction apply here. We are entirely convinced that Congress intended to effect a substantial relief to this court from indiscriminate appeals where a sum above $5,000 was involved, and to that end repealed the former act. See *Carey* v. *Houston & Texas Central Ry. Co.*, 150 U. S. 170, 179. *Cochran* v. *Montgomery County*, 199 U. S. 260, 272, 273. But all cases in the District arise under acts of Congress and probably it would require little ingenuity to raise a question of construction in almost any one of them. If, then, the words have the meaning given them by the applicants the appellate jurisdiction of this court has been largely and irrationally increased. We believe Congress meant no such result.

A well-known example of construing a statute not to include a case that indisputably was within its literal meaning, but was believed not to be within the aim of Congress, is *Church of the Holy Trinity* v. *United States*, 143 U. S. 457; we may refer further to *Cochran* v. *Montgomery County*, *ubi supra*. In the case at bar if the words 'construction of any law of the United States' are confined to the construction of laws having general application throughout the United States the jurisdiction given to this court by § 250 is confined to what naturally and properly belongs to it. If they are construed the other way it would have been less arbitrary to provide that every question of law could be taken up. That they were not to be understood as the applicant contends is to be inferred not only from the sense of the thing but from clause first: 'In cases where the jurisdiction of the trial court is in issue,' with provision for certifying that question alone. It is difficult to imagine a case in which the jurisdiction of the trial court is in issue where the construction of a special law of the United States would not be drawn in question.

Writ of error denied.

HERNDON-CARTER COMPANY *v.* JAMES N. NORRIS, SON & COMPANY.

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

No. 923. Submitted April 1, 1912.—Decided April 29, 1912.

Where jurisdiction of the Circuit Court involves only the questions of fact whether the defendant corporation was doing business within the jurisdiction and the person served was its agent, those questions can be brought by direct appeal to this court under § 5 of the Circuit Court of Appeals Act of 1891.

The decree of dismissal can take the place of a certificate if the record is in such form as to show that the case was dismissed for want of jurisdiction, and for that reason only. *Excelsior Water Power Co.* v. *Pacific Bridge Co.*, 185 U. S. 282.

While the jurisdictional certificate must be issued during the term at which the question is decided, if the certificate is supplied by a decree in due form showing all that is required by the certificate, the appeal may be perfected within two years, as are other appeals. *Excelsior Water Power Co.* v. *Pacific Bridge Co.*, 185 U. S. 282.

In this case the record shows that there was but one final order or decree which at the same time quashed the service of the summons and dismissed the case for want of jurisdiction; and an appeal from such a decree brings to this court the question of jurisdiction.

A foreign corporation in order to be subject to the jurisdiction of a court must be doing business within the State of the court's jurisdiction, and the service must be made there upon some duly authorized officer or agent.

In this case, as it appears from the evidence in the record that the defendant corporation was doing business within the State and that the person served was its agent at the time of service, the Circuit Court had jurisdiction.

THE facts, which involve the jurisdiction of the Circuit Court of the Western District of Kentucky over the person of the defendant by reason of service on defendant's agent and whether defendant was doing business in that District, are stated in the opinion.

Mr. Helm Bruce for appellant.

Mr. John H. Chandler and *Mr. William B. Fleming* for appellees.

MR. JUSTICE DAY delivered the opinion of the court.

In this case a suit was brought by the Herndon-Carter Company, a corporation of the State of Kentucky, against James N. Norris, Son & Company, a corporation of the State of New York. The bill of complaint sought an accounting and settlement of transactions between the parties growing out of shipments of poultry from the Kentucky corporation to the New York corporation, sold by the latter on commission. A subpœna was issued and served on March 10, 1911, upon James N. Norris, Son & Company by delivering a copy to W. J. Adams, as manager and chief agent, and the highest officer of the company in the district. The defendant company entered a special appearance, and filed an objection and plea to the jurisdiction, setting up that it was a corporation of the State of New York; that since December, 1904, it had not had any place of business in the State of Kentucky, and had not conducted any business in that State; that since that time it had had no agent in the State of Kentucky; and that W. J. Adams was not at the time of the service of the writ the manager and officer or agent of the defendant. The defendant averred further that for a little more than two years before the first of January, 1905, Adams was employed by it and acted as its agent in Kentucky in the purchase and shipment of poultry and produce, but that at the end of the year 1904 he severed his connection with defendant and ceased to be its agent for any purpose whatever; that on January 1, 1905, Adams, James N. Norris and William H. Norris formed a partnership, in which Adams had an one-half interest and James N.

Norris and William H. Norris each an one-quarter interest, and that since the first of January, 1905, the partnership had conducted the business of buyers and shippers of poultry, butter and eggs in Louisville and other parts of Kentucky.

Upon testimony, to be hereinafter referred to, the Circuit Court heard the parties upon the issues made by the plea to the jurisdiction and replication thereto, and concluded that Adams was not the agent at the time of the attempted service upon him as such, and that James N. Norris, Son & Company was not then doing business in the State of Kentucky.

The case is brought directly here under § 5 of the Circuit Court of Appeals Act of March 3, 1891 (26 Stat. 826, c. 517). It is evident from a statement of the question made that it only involves issues of fact as to whether the defendant company was doing business in Kentucky, and whether Adams was its agent at the time of the attempted service. It is well settled that a question of this character may be brought to this court by direct appeal under the Circuit Court of Appeals Act. *Remington* v. *Central Pacific R. R. Co.*, 198 U. S. 95; *Commercial Mutual Accident Co.* v. *Davis*, 213 U. S. 245, 256; *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437.

The appellee objects that the statutory requirement that the question of jurisdiction only shall be certified to this court was not complied with, and therefore the case should be dismissed. The record, however, discloses that the case was dismissed for the want of jurisdiction, and for that reason only. Where the decree of dismissal is in such form it is sufficient to take the place of a certificate within the requirements of the act. *Excelsior W. P. Co.* v. *Pacific Bridge Co.*, 185 U. S. 282.

It is further objected that, if the decree could be held to take the place of a certificate, the present appeal was not taken at the term during which the case was decided and

the decree of dismissal entered. The record shows that an appeal was taken to the Circuit Court of Appeals from the decree of dismissal entered at the March term, 1911, of the Circuit Court. It was there dismissed, and at the October term, 1911, another appeal was allowed from the Circuit Court directly to this court. This court has held that the jurisdictional certificate must be issued during the term at which the question is decided. *Colvin* v. *Jacksonville*, 158 U. S. 456; *The Bayonne*, 159 U. S. 687. It has also been held that the certificate being supplied by a decree in due form, showing dismissal for want of jurisdiction only, the appeal may be perfected subsequently, within two years, as are other appeals. *Excelsior W. P. Co.* v. *Pacific Bridge Co.*, *supra*.

The appellee further contends that the record shows two decrees or orders—an order quashing the service of summons and separately a decree of dismissal for want of jurisdiction—and this is said to be shown because the opinion of the court, sent up with the record, states the decision upon the question of quashing service of summons to have been first made. An inspection of the record shows but one final order or decree, which at the same time quashes the service of summons and dismisses the case for want of jurisdiction, and that is the decree appealed from and which brings to this court the question of jurisdiction of the defendant.

It has frequently been held in this court that a foreign corporation, in order to be subject to the jurisdiction of a court, must be doing business within the State of the court's jurisdiction, and service must there be made upon some duly authorized officer or agent. *St. Clair* v. *Cox*, 106 U. S. 350; *Goldey* v. *Morning News*, 156 U. S. 518; *Peterson* v. *Chicago, Rock Island & Pac. Ry.*, 205 U. S. 364. We are therefore brought to review the correctness of the decision of the Circuit Court, holding that James N. Norris, Son & Company was not doing business in the

State of Kentucky, and that Adams was not its agent at the time of the attempted service.

The substance of the plea to the jurisdiction, already indicated, is that, while Adams had previously been the agent of the defendant, he ceased to be such on the first of January, 1905, when the copartnership was formed between James N. Norris and William H. Norris, officers of the defendant company, and Adams, and that thereafter he ceased to represent the corporation in Kentucky, and it ceased to do business in that State. To support this plea the defendant offered the affidavits of James N. Norris and William H. Norris to the effect that after January 1, 1905, the corporation did no business in Kentucky, and that the partnership then formed thereafter carried on the business in that State under the name of James N. Norris, Son & Company. The testimony of the bookkeeper was taken. She testified that she had been in the employ of James N. Norris, Son & Company for some time prior to January 1, 1905, and that at that date a change was made owing to the formation of the partnership. She further testified that the profits were divided on the books but no settlements were made while she was with the firm; that she drew no checks for the distribution of the profits, and that there was no such distribution while she was with the firm, which was until December, 1908; that the books did not show the individual accounts of the various members of the firm; that Mr. Adams had an individual account, but she, the bookkeeper, did not keep it, Mr. Adams keeping it himself; that Mr. Adams was paid a salary, and that statements were sent to New York giving the condition of the business. Mr. Adams was called as a witness and testified that he worked for the New York corporation prior to January 1, 1905, when the partnership was formed, and that since that time he had no connection with the New York company in any way, and was not on the ninth of

March, 1911, its agent. Upon cross-examination he testified that after January 1, 1905, and until the date of his examination as a witness, his relations to the house of James N. Norris, Son & Company had been the same, and that his relations to the New York corporation had not changed in any way since February, 1905.

To meet this testimony the complainant offered testimony tending to show that James N. Norris, Son & Company was sued in the Jefferson Circuit Court of Kentucky as a corporation of the State of New Jersey. The corporation appeared and answered that it was organized under the laws of New York, admitted that it executed and delivered a certain letter attached to plaintiff's petition and marked "Exhibit A," dated June 25, 1907, the letter being written from Louisville, Kentucky, signed James N. Norris, Son & Company, by W. J. Adams, Manager. In that action an affidavit for a continuance was filed on April 17, 1908, in which Adams deposed that the defendant, James N. Norris, Son & Company, was a corporation of New York and that deponent was the manager of its Louisville office. On April 23, 1908, an amended answer was filed, which Adams verified, making oath that he was the local manager of James N. Norris, Son & Company. In the course of the action defendant took and filed a deposition in which the witness testified that he was the manager of James N. Norris, Son & Company at Bryan, Ohio; that in 1907 he lived in Louisville, Kentucky, and that Adams was then the manager of the Louisville district.

In another suit against James N. Norris, Son & Company, Inc., an answer was filed by W. J. Adams on December 12, 1905, and in verifying which Adams made oath that he was then and at the times mentioned in the answer had been the agent of the defendant in Kentucky and had sole charge of its business in Jefferson County.

In an action brought by the corporation in a magis-

trate's court in Kentucky certain dray tickets on a printed form were introduced in evidence, which showed them to be the tickets of James N. Norris, Son & Company, 135 E. Jefferson Street, Louisville, Kentucky, and that J. N. Norris was President; W. H. Norris, Vice-President and Treasurer, and W. J. Adams, Manager, the tickets being dated November 20, 1908, and January 1 and 4, 1909.

Letters were introduced in evidence in which the defendant company referred the plaintiff company to Mr. Adams for a settlement of differences. On July 7, 1909, the defendant company wrote to the plaintiff company as follows:

"The Herndon-Carter Company, Louisville, Ky.

GENTLEMEN: I am just in receipt of your several letters in which you call attention to the unpleasantness you are having with our house in Louisville.

Now, I would like to make myself plain in this matter. As I have always stated to you and every one else, there is never any good in fighting, but, on the contrary, lots of money lost and harm done. Our Mr. Adams, who runs our house in Louisville, has a certain interest in the profits, and it would be pretty hard for me to say that he shouldn't do this or that, which, in his judgment, curtails his profits."

Examining and considering the evidence tending to show that Adams, after the formation of the alleged partnership on January 1, 1905, continued to represent the defendant company in Louisville, we are forced to the conclusion that the decided preponderance of the evidence supports the complainant's contention that Adams was the authorized managing agent of the defendant company in Kentucky and doing business for it in that State.

The learned judge of the Circuit Court reached the contrary conclusion, and his opinion is justly entitled to great weight, but it seems to proceed upon the theory that the testimony did not show the continuance of the

agency down to March 10, 1911, the time of the service of the subpœna. We think the testimony clearly shows that the relation of Adams to the defendant company was the same at that time as it had been when the various transactions, to which we have referred, were taking place in the years 1905 and the following. There could hardly be stronger testimony than the defendant's own letter of July 7, 1909, in which it is distinctly stated that "Mr. Adams, who runs our house in Louisville, has a certain interest in the profits," etc.

Reaching this conclusion, we are constrained to hold that the court below erred in quashing the return to the subpœna and in dismissing the case, and therefore the judgment must be reversed and the case remanded, with directions to overrule the order quashing the return and to set aside the decree denying the jurisdiction of the court.

Reversed.

GULF, COLORADO & SANTA FE RAILWAY CO. *v.* DENNIS.

ERROR TO THE COUNTY COURT OF MILAM COUNTY, STATE OF TEXAS.

No. 203. Submitted March 6, 1912.—Decided April 29, 1912.

The county court in Texas, being the highest court of the State to which the case could be carried, considering the amount involved, held that a railroad company was liable not only for the damages claimed, but also for an attorney's fee under Chapter 47, Laws of Texas, 1909. The railroad company sued out a writ of error from this court, having insisted in the state court that the statute violated the due process and equal protection clauses of the Federal Constitution. Before the case was reached in this court, the highest court of the State in another case adjudged the statute to be violative of a provision in the state constitution and void. That fact being brought to the attention of this court, *held* that:

The case not having been finally terminated, the right to the attorney's fee is still *sub judice*, and effect must be given by this court to the intervening decision of the highest state court and, as to dismiss the writ would leave the judgment to be enforced as rendered, the proper procedure is to vacate the judgment and remand the case to the county court so that it may give effect to the intervening decision of the highest state court.

In the exercise of its appellate jurisdiction over the courts of the several States, this court is not absolutely confined to the consideration and decision of the Federal questions, but may inquire whether, owing to any intervening event, such questions have ceased to be material, and dispose of the case in the light of that event.

THE facts are stated in the opinion.

Mr. J. W. Terry, Mr. Gardiner Lathrop, Mr. A. H. Culwell, Mr. A. B. Browne, Mr. Alexander Britton and *Mr. Evans Browne*, for plaintiff in error.

No appearance for defendant in error.

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

This was an action to recover damages from a railway company for the killing of a cow by one of its trains in Milam County, Texas. The case originated in a justice's court and was carried by appeal to the County Court, where the plaintiff obtained a judgment for $75 as damages and $20 as attorney's fee. The attorney's fee was awarded under a statute of the State (Laws of 1909, c. 47, p. 93) which the company insisted was repugnant to the due process of law and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The insistence was overruled and the company sued out this writ of error, the County Court being the highest court in the State to which the case could be carried, considering the amount involved.

Since the case was brought here the statute under which the attorney's fee was awarded has been adjudged invalid under the state constitution, by the highest court of the State, because the subject to which it relates is not sufficiently expressed in its title. *Ft. Worth & D. C. Ry. Co.* v. *Loyd,* 132 S. W. Rep. 899. Thus, the judgment of the County Court and the later decision of the highest court of the State are not in accord. The former proceeds upon the theory that the statute is valid under the state constitution, while the latter conclusively establishes that it is invalid. In these circumstances, what is the duty of this court respecting this matter of local law? Must we proceed upon the same theory as did the County Court, or must we give effect to the later decision of the highest court of the State? If we take the latter course and reverse the judgment for the attorney's fee, the question of the validity of the statute under the Fourteenth Amendment need not be considered; otherwise, it must be. The intervening decision does not in itself annul the judgment for the fee or prevent its enforcement, and so does not render the Federal question a moot one, unless it operates to place upon us the duty of reversing the judgment without regard to the merits of that question.

The case is still pending. The right to the attorney's fee is still *sub judice.* It depends entirely upon the statute, and the highest court of the State has pronounced the statute invalid under the state constitution. How, then, can we sustain the right or give effect to the statute? Should we not in this situation apply the settled rule, that the decision of the highest court of a State declaring a statute of the State valid or invalid under the state constitution must be accepted by this court? If this were a criminal case, wherein the accused had been convicted of a violation of a state statute, alleged to be repugnant to the Constitution of the United States, would we not give effect to an intervening decision of the highest court of the

State declaring the statute invalid under the state constitution? These questions may not be directly answered by the prior decisions of this court, but their right solution is more than suggested by the well-recognized rule of decision, that when, during the pendency in an appellate court of an action for a penalty, civil or criminal, the statute prescribing the penalty is repealed, without any saving clause, the appellate court must dispose of the case under the law in force when its decision is given, even although to do so requires the reversal of a judgment which was right when rendered. *United States* v. *Schooner Peggy*, 1 Cranch, 103, 110; *Yeaton* v. *United States*, 5 Cranch, 281; *Schooner Rachel* v. *United States*, 6 Cranch, 329; *Vance* v. *Rankin*, 194 Illinois, 625; *Hartung* v. *People*, 22 N. Y. 95; *Musgrove* v. *Vicksburg & Nashville R. R. Co.*, 50 Mississippi, 677; *Montague* v. *State*, 54 Maryland, 481; *Denver & R. G. Ry. Co.* v. *Crawford*, 11 Colorado, 598; *Sheppard* v. *State*, 1 Tex. App. 522; *Kenyon* v. *State*, 31 Tex. Cr. 13; Cooley's Const. Lim., 6th ed., 469; 2 Sutherland Stat. Con., 2d ed., § 286. In the first of the cases cited it was said by Chief Justice Marshall:

"It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

We think what was there said is, in principle, applicable here. For while on a writ of error to a state court our province ordinarily is only to inquire whether that court has erred in the decision of some Federal question, it does

not follow that where, pending the writ, a statute of the State or a decision of its highest judicial tribunal intervenes and puts an end to the right which the judgment sustains, we should ignore the changed situation and affirm or reverse the judgment with sole regard to the Federal question. On the contrary, we are of opinion that in such a case it becomes our duty to recognize the changed situation, and either to apply the intervening law or decision or to set aside the judgment and remand the case so that the state court may do so. To do this is not to review, in any proper sense of the term, the decision of that court upon a non-Federal question, but only to give effect to a matter arising since its judgment and bearing directly upon the right disposition of the case.

This view of the subject received practical recognition in the case of *Pacific Mail Steamship Co.* v. *Joliffe*, 2 Wall. 450. It was an action in a California court to recover half-pilotage fees allowed by a law of that State to a licensed port pilot whose services were tendered and declined. Objections of a Federal nature were interposed, but judgment was given for the plaintiff, and the case was then brought here. During its pendency in this court the legislature of the State passed a new statute, embodying the provisions of the prior law, with some modifications, and also in terms repealing it. The point was then made that the repealing clause terminated the right to recover and therefore that the action could no longer be maintained. And while the question whether the simultaneous reënactment and repeal of the prior law interrupted its continuity was a question of local law, it was fully considered, and the conclusion was reached that in practical operation and effect there was no repeal, but only a continuance of the prior law, with modifications not there material, thus leaving the right to recover and the Federal questions unaffected. The latter were then considered, and, being found untenable, the judgment was affirmed. In a dis-

senting opinion, having the approval of three members of the court, it was maintained that the new act abrogated the prior law, thereby putting an end to the right to recover, and that in consequence the judgment should be reversed, with a direction to dismiss the action. Thus, the entire court proceeded upon the theory that it was necessary to inquire whether the intervening statute put an end to the right to the fees in question, and, if so, to give effect to the statute accordingly.

Almost from the beginning it has been the settled rule in this court that when, pending a writ of error to a lower Federal court, and without the fault of the defendant in error, an event occurs which renders it impossible, if the case was decided in favor of the plaintiff in error, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the writ. And in *Kimball* v. *Kimball*, 174 U. S. 158, it became necessary to consider whether this rule was applicable to a case brought here on a writ of error to a state court. The question was resolved in the affirmative, and it was said (p. 162):

"From the necessity of the case, this court is compelled, as all other courts are, to allow facts which affect its right and its duty to proceed in the exercise of its appellate jurisdiction, but which do not appear upon the record before it, to be proved by extrinsic evidence. *Dakota County* v. *Glidden*, 113 U. S. 222, 225, 226; *Mills* v. *Green*, above cited [159 U. S. 651, 653]. The reasons are quite as strong, to say the least, for applying the rule to a writ of error to a state court, on which the jurisdiction of this court is limited to Federal questions only, as to a writ of error to a Circuit Court of the United States, on which the jurisdiction of this court extends to the whole case."

We conclude that in the exercise of our appellate jurisdiction over the courts of the several States we are not absolutely confined to the consideration and decision of the

Federal questions presented, but as a necessary incident of that jurisdiction are authorized to inquire whether by some intervening event those questions have ceased to be material to the right disposition of any particular case, and to dispose of it in the light of that event.

The present case is not one in which the writ should be dismissed, because that would leave the judgment to be enforced as rendered, which the intervening decision shows ought not to be done. Instead of being an obstacle to granting any effectual relief to the plaintiff in error, that decision constitutes in itself an all-sufficient ground for relieving it from the attorney's fee, independently of the Federal question presented on the record; and for the reasons before stated we think it becomes our duty to vacate the judgment so that the state court may apply the decision by awarding a new judgment in conformity therewith.

The judgment is accordingly reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

STATE OF WASHINGTON EX REL. OREGON RAILROAD AND NAVIGATION COMPANY *v.* FAIRCHILD ET AL., STATE RAILROAD COMMISSIONERS.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 118. Argued December 18, 1911.—Decided April 29, 1912.

An order of a railroad commission requiring a railroad company to expend money and use its property in a specified manner is not a mere administrative order, but is a taking of property; to be valid there must be more than mere notice and opportunity to be heard; the order itself must be justified by public necessity and not unreasonable or arbitrary.

The hearing which must precede an order taking property must not be a mere form, but one which gives the owner the right to secure and present material evidence; but a state statute which gives the privilege of introducing such evidence, affords compulsory process, and gives the right of cross-examination, does not deny due process by not affording sufficient opportunity to be heard.

The hearing is sufficient if the person whose property is to be taken is put on notice as to the order to be made, and given opportunity to show that it is unjust or unreasonable.

An opportunity given to test, by review in the courts, the lawfulness of an order made by a commission does not deny due process because on such review new evidence (other than newly discovered or necessary on account of surprise or mistake) is not allowed, and because the court must act on the evidence already taken, if the court is not bound by the findings, and the party affected had the right on the original hearing to introduce evidence as to all material points.

Where the party whose property has been taken has not been deprived of a right to be heard, the question is whether as a matter of law the facts proved a public necessity justifying the taking.

A State, acting through an administrative body, may require railroad companies to make track connections, *Wisconsin &c. R. R. Co.* v. *Jacobson*, 179 U. S. 287, but such body cannot compel a company to

build branch lines, connect roads lying at a distance from each other, or make connections at every point regardless of necessity; each case depends on the special circumstances involved.

In a proceeding brought to compel a carrier to furnish facilities not included in its absolute duties, the question of expense is of controlling importance.

In this case the record does not disclose any public necessity justifying the order of the State Railroad Commission of Washington to require track connections to be made at eight points.

The burden is on a state railroad commission to show that public necessity requires track connections, and the Commission is charged with notice that the reasonableness of its order is to be determined at the hearings before it.

While the statute of the State of Washington authorizing the State Railroad Commission to order additional trackage is not unconstitutional as denying due process of law, the orders in this case were not justified by public necessity, and therefore deprived the railroad company of its property without due process of law.

52 Washington, 17, reversed.

A STATUTE of the State of Washington (March 7, 1905, Sess. Laws, 1905, c. 81, p. 145, as amended March 16, 1907, Sess. Laws, 1907, c. 226, p. 536), authorizes the Railroad Commission, upon complaint made, or on inquiry upon its own motion "after a full hearing . . . to order that additional trackage or sidings be constructed . . . and that additional connections be made."

In pursuance of this act, and by direction of the Commission, the Attorney General filed a complaint against the Oregon Railroad & Navigation Company, chartered under the laws of Oregon, the Northern Pacific Railway Company and the Spokane & Inland Railroad, praying for an order requiring them to connect their tracks at Pullman, Colfax, Garfield, Oakesdale, Rosalia, Waverly, Thornton, Farmington, Connell and Palouse. The complaint averred that four of these towns were important shipping points, and that at all of them there was a demand that cars should be transferred from one line to the

other, and a public necessity that track connection should be made between the roads at all these points. The Oregon Company filed an answer in which it denied that the towns named were important shipping points; denied that there was, or had ever been, any public demand for the interchange of business at any of the places, or that there was any public necessity for the connection.

At the hearing, evidence was introduced showing that the Spokane & Inland was an electric road not yet completed; that all the roads had the same gauge; that in three of the towns they crossed at grade; that in the others the tracks were generally on the same level, and separated by distances varying from a few feet up to 600 feet; that the connecting tracks would generally be on the right of way of the carriers, though in some instances it would be necessary to acquire other property by purchase or condemnation. There was evidence as to the price of switches and the cost per lineal foot of laying a track with two necessary connecting switches.

The principal witness on behalf of the State was an inspector of the Commission, who testified that the three roads were competitors, and ran from Spokane through each of the towns named in the complaint; that wheat was the principal product of the country, and that it was shipped to Spokane or Portland, reached by each of the roads or their connections; that the main business of the towns named in the complaint was with Spokane; and that the business between local stations was small. From his testimony and a map it appears that, with the exception of Connell, all of the towns named lay in a strip about fifty miles long and fifteen miles wide, one road on each side, with the Spokane running about half way between the other two; that the roads were generally parallel to each other, but by curves and branch lines reached these towns. In answer to specific inquiries he gave the route a car would take if shipped from named stations on one

line to named stations on another, under present conditions; and said that if the connections were made and cars took that route the distance would be shortened, and that if wheat, cattle or other property was thus shipped to and from such stations there would be a saving in time and distance. He testified that he had no knowledge as to the amount of business done at any of the towns named, or that such shipments had been offered or would be made. He and the other witnesses on behalf of the Commission testified that every purpose would be served if there was a connection between the various roads at one of the points named, some of them thinking Garfield the best point and others that it should be at Oakesdale, from which it was said the tracks radiated like the spokes of a wheel. It appeared that the Oregon already connected with the Northern Pacific at Garfield. The inspector and other witnesses were not asked specifically as to all points, but in answer to inquiries testified, without contradiction, that there was no necessity for connecting the tracks at Farmington, Thornton, Colfax, Waverly, nor at Garfield or Oakesdale except as indicated above.

The witnesses for the carrier testified that a connection at Garfield would accommodate all transfers that might be offered; that there had been no demand at any of the towns for such transfers in the past, and that there was no necessity for making them.

Only one shipper was called as a witness. He testified that a connection at Oakesdale would serve all purposes, but gave no information as to the amount of his freight business, nor the saving that would result to him or others if the connection was put in. No merchants or shippers from any of the towns named in the complaint, or referred to in the evidence, were called. There was no proof as to the volume of business at any of these places, nor as to the amount of freight that would be routed over these track connections if they were constructed. Nor was there any

testimony as to the probable revenue that would be derived from the use of the track connections or of the saving in freight or otherwise that would result to shippers. The Inspector of the Commission testified that these connections would develop very little business.

After the conclusion of the evidence the Commission dismissed the complaint as to Rosalia and Palouse, where the crossings were not at grade, and made an order in which it found that the roads crossed at grade at two points and ran in close proximity to each other through all the other places; that there was a public necessity for track connection, the cost of which, at each point, was stated, varying from $316 to $1,460, and aggregating about $7,000. It thereupon ordered that the companies should agree among themselves as to the particular places in said towns where the tracks should be laid and how the expense should be divided, in default of which the Commission would make a supplemental order designating the particular places where the connections should be made and the proportion in which the expense should be borne by each company.

The Oregon Company, being dissatisfied with this order, filed in the Superior Court of Thurston County, a Petition for Review, alleging the unconstitutionality of the statute under which the order had been made, and also attacking its reasonableness on the ground that "there was no evidence showing or tending to show that there was any public demand or public necessity for such track connection, or for the interchange of freight at either of said points in carload lots . . . or that any public convenience would be subserved," but on the contrary that the only evidence offered tended to show that there was no public necessity and that it would be obliged to acquire additional property and to incur large expense to make the connection without any public necessity and be thereby deprived of its property without compensation

and without due process of law in violation of the Constitution of the United States.

This method of attacking the order by Petition for Review was in compliance with the provisions of the Washington statute which declared that "the order of the Commission shall of its own force take effect and become operative twenty days after notice thereof has been given. . . . And any railroad or express company affected by the order of the Commission and deeming it to be contrary to the law, may institute proceedings in the superior court . . . and have such order reviewed and its reasonableness and lawfulness inquired into and determined. Pending such review, if the court having jurisdiction shall be of the opinion that the order or requirement of the Commission is unreasonable, or unlawful, it may suspend the same . . . pending such litigation. . . . Said action of review shall be taken by the said railroad or express company within twenty days after notice of said order, and if said action of review is not taken within said time, then in all litigation thereafter arising between the State of Washington and said railroad or express company, or private parties and said railroad or express company, the said order shall be deemed final and conclusive. If, however, said action in review is instituted within said time, the said railroad or express company shall have the right of appeal or to prosecute by other appropriate proceedings, from the judgment of the superior court to the Supreme Court of the State of Washington, as in civil actions. . . . The action in review of such order, whether by writ of review or appeal, or otherwise, shall be heard by the court without intervention of a jury and shall be heard and determined upon the evidence and exhibits introduced before the Commission and certified to by it. . . ."

The Bill of Exceptions recites that on the hearing, in the Superior Court, the Oregon Company offered com-

petent and non-cumulative testimony in support of its contention on the issues between it and the Commission, which if received would have tended to show that there was no public necessity for such track connections at either of the places; that no public convenience would be served by making them, and that the cost, instead of aggregating $7,500, would be $21,000 (the amount at each place being specified), besides the expense of acquiring additional land and franchises needed for the construction and operation of the tracks. The court rejected all this evidence on the ground that, under the statute, the Petition for Review must be determined on the testimony which had been submitted to the Commission. After argument the Petition was dismissed and the Oregon Company excepted. All of the evidence introduced before the Commission and attached as an exhibit to its answer, was duly incorporated in the Bill of Exceptions, which also contains a recital that the photographs and maps identified by one of the witnesses, had not been forwarded by the Commission, nor were they considered by the court. There was, however, no motion by the defendant for an order requiring such omitted papers to be sent up so as to complete the record. Neither did it appear that any motion was made before the Commission to require a more definite statement of the location of the proposed tracks.

The judgment dismissing the Petition was affirmed by the Supreme Court of the State. 52 Washington, 17. It held that the statute was valid; that it gave the defendant every opportunity to make its defence and granted an adequate judicial review by which to test the validity of the order. In answer to the contention that the evidence showed that the order was unreasonable and amounted to a taking of property without public necessity, the court merely said (p. 32): "As to the public necessity for the track connections, we are not prepared to say that the

finding of the commission in that respect was not justified by the testimony." The cause was brought here by writ of error, in which it is contended that the Washington statute failed to furnish an adequate hearing or opportunity for judicial review, especially in prohibiting the submission to the court of competent evidence as to the unreasonableness of the order; and, further, there was no evidence of a public necessity and that the order was void as taking property without due process of law.

Mr. Maxwell Evarts, with whom *Mr. Zera Snow* and *Mr. W. W. Cotton* were on the brief, for plaintiff in error:

The Railroad Commission Law of Washington of 1905, as amended in 1907, and the method of enforcement of the regulation of railroads provided for by that law constitute a taking of the property of the plaintiff in error without due process of law and a denial of the equal protection of the laws because adequate or effective judicial remedies to the owners of railroad property in the State are not provided for the determination of controversies arising upon the question of whether there has been a just and reasonable exercise of the power of regulation.

All regulation of the business of common carriers, whether taking the form of a regulation of rates or the making of track connections, must be reasonable, and the question of the reasonableness or unreasonableness of all such attempted regulations is essentially a judicial question, which if not permitted by the law under which it is undertaken, constitutes the taking of property without due process of law and amounts to a denial of the equal protection of the law. *Railroad Commission Cases*, 116 U. S. 307; *Chicago &c. Railway* v. *Minnesota*, 134 U. S. 418; *Chicago &c. Railway* v. *Wellman*, 143 U. S. 339; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362, 397; *Lake Shore &c. Railway Co.* v. *Smith*, 173 U. S. 684, 697; *Smyth* v. *Ames*, 169 U. S. 466, 526.

If the State has no power to prevent a resort to the Federal courts to redress what is claimed to be a wrongful invasion of a property right, it should be equally powerless to prevent in the Federal court a full examination of the very questions at issue. It is an anomaly in judicial procedure to say that if the litigation proceeds in the state court it must be heard and determined on the evidence taken before the Commission, while if it proceeds in the Federal court a right to a full investigation of the facts exists. *Chicago, Milwaukee &c. Ry.* v. *Tompkins*, 176 U. S. 167, 172; *Wisconsin &c. Railroad Co.* v. *Jacobson*, 179 U. S. 287, 297; *Louisiana & A. Railway* v. *The State*, 85 Arkansas, 12.

One of the main cases relied upon by the appellant, *Chicago &c. R. Co.* v. *Minnesota*, 134 U. S. 418, was decided expressly upon the theory that no judicial determination was permitted.

A hearing before the Railroad Commission and the review in the Superior Court do not constitute due process because the Railroad Commission of the State of Washington is not a court; in the hearing before the Superior Court, § 8 places upon the railroad company the burden of setting aside the order of the Commission, but the statute requires that such hearing shall be had only on the evidence taken before the Commission and certified by the Commission. Prior to the order of the Commission, the railroad company had practically no knowledge of what the order would be and what proof should be introduced by it. The statute does not provide adequate means whereby the railroad company can obtain and introduce evidence before the Commission.

While the Commission may provide for hearings, process to enforce the attendance of witnesses before the Commission, or to enforce testimony from contumacious witnesses can issue only by the Superior Court, and then only at the instance of the Commission—but not of the railroads.

If process to compel the attendance of a witness is necessary and the Commission should refuse to apply for it, there is no method of reviewing its action.

If evidence is offered by the railways before the Commission and it is rejected, there is no method of review of the action of the Commission.

The Commission may take testimony by deposition—the railroad companies may not.

The Commission has no power to enforce its own orders, but a suit must lie at the instance of the State, and by the Attorney General, under direction of the Commission, to compel obedience to its orders.

Rules of evidence to guide the Commission in taking or receiving testimony are not provided for, nor is any order of proof provided for.

The Commission has power to limit the number of witnesses, and if this power is capriciously exercised, there is no method of review of the action of the Commission.

An investigation by such a tribunal with such powers, and without "the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy" cannot be said to afford to the owners of railway property the judicial protection which, by the many decisions of this court, it has been held they are entitled to in the determination of the question of reasonableness or unreasonableness of the Commission's orders; such a court is a court without rudder or compass. *Davidson* v. *New Orleans*, 96 U. S. 107; *Hagar* v. *Reclamation District No. 108*, 111 U. S. 708; *Chicago, Burlington and Quincy Railroad* v. *Chicago*, 166 U. S. 240.

The Commission failed to make return of very important evidence, which might have aided the court in its determination; nevertheless under § 3, the case must be heard in the Superior Court upon the evidence certified to by the Commission.

The Railway Commission Law is unconstitutional be-

cause of the excessive penalties which follow a refusal to comply with the Commission's orders, rendering a compliance necessary rather than resort to the courts for a decision as to the validity and reasonableness of the orders of the Commission. *Ex parte Young*, 209 U. S. 123.

There was no public necessity or public convenience to be subserved by the track connections ordered; the order was an unreasonable and arbitrary exercise of bald power, and as such it constituted a taking of the property of the plaintiff in error without due process of law.

The testimony clearly indicates that all the connections ordered were unnecessary, and such is the finding of the chairman of the Commission. In fact the ordering of all the connections in the order was a bald exercise of power by the Commission unsupported by any evidence showing any reason or necessity therefor. Under such conditions the order constitutes the taking of property without due process of law. *Wisconsin R. R. Co.* v. *Jacobson*, 179 U. S. 287; *Louisiana & A. Ry.* v. *The State*, 85 Arkansas, 12.

When the question of reasonableness of the regulation of a carrier is up for consideration, the evidence leading up to the regulation must be examined. *C. N. & St. P. Ry.* v. *Tompkins*, 176 U. S. 167, 172; *Wisconsin R. R.* v. *Jacobson*, 179 U. S. 287; *Atl. Coast Line* v. *N. Car. Commission*, 206 U. S. 1; *Louisiana & A. Ry.* v. *The State*, 85 Arkansas, 12.

Mr. W. V. Tanner, Attorney General of the State of Washington, with whom *Mr. Walter P. Bell* and *Mr. S. H. Kelleran* were on the brief, for defendants in error:

The Railroad Commission Law of Washington does not deny the due process of law clause.

After the order of the commissioners becomes a finality the Attorney General may institute an equitable action in the name of the State in the Superior Court to procure the

enforcement of the same. Provision is made for the railroad company to petition for modification of any order of the Commission whenever surrounding circumstances have changed, and the same appellate or review proceedings are provided for a decision on that order as in original cases.

An act which provides for personal notice and service of a copy of the complaint, with full and complete opportunity to appear, introduce witnesses, with compulsory process for their attendance, and a full hearing before a special tribunal, legally constituted by appointment by the Governor of the State, subject to the confirmation of the state senate, members under oath and bond, does not deprive a railroad company, whose facilities are subject thereto, of its property without due process of law, because the provision in the act giving a right of appeal to the state court from an adverse decision of the Commission requires the state court to decide the case upon the evidence adduced before the Commission. *Long Island Water Supply Co.* v. *City of Brooklyn*, 166 U. S. 685; *Voigt* v. *Detroit*, 184 U. S. 115; *Goodrich* v. *Detroit*, 184 U. S. 432; *Ross* v. *Board of Supervisors*, 128 Iowa, 427; *S. C.*, 104 N. W. Rep. 506; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112.

Due process is not necessarily judicial process. *Reetz* v. *Michigan*, 188 U. S. 505; *Public Clearing House* v. *Coyne*, 194 U. S. 497; *United States* v. *Ju Toy*, 198 U. S. 253; *Murray's Lessee* v. *Hoboken &c. Co.*, 18 How. 272.

Nor is the right of appeal essential to due process of law. *Reetz* v. *Michigan*, 188 U. S. 505; *Andrews* v. *Swartz*, 156 U. S. 272.

While the state legislature cannot deny the right of review altogether, the judicial review, provided by the act in question, is not such as to deprive the plaintiff in error of its property without due process of law.

The state legislature could not, if it would, deny to a railroad company access to the Federal courts to set

aside, by injunction or other appropriate procedure, a schedule of rates or a requirement of service or facilities, which were so low, or otherwise so unreasonable, as to amount to confiscation of the property of the railroad. *Smyth* v. *Ames*, 169 U. S. 466; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362.

The Washington act does not undertake to deprive the Federal courts of jurisdiction. *St. Louis & S. F. R. R. Co.* v. *Gill*, 156 U. S. 649; *Covington & L. Co.* v. *Sandford*, 164 U. S. 578; *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739.

This court has never attempted to define the sort of judicial review which will satisfy the requirements of the Fourteenth Amendment. *Chicago, Milwaukee & St. Paul Railway Co.* v. *Minnesota*, 134 U. S. 418, is not an authority in this case. But see *Davidson* v. *New Orleans*, 96 U. S. 107; *Brown* v. *New Jersey*, 175 U. S. 172; *Hurtado* v. *California*, 110 U. S. 516, 537; *Louisville &c. R. R. Co.* v. *Schmidt*, 177 U. S. 230, 236; *Iowa Central R. R. Co.* v. *Iowa*, 160 U. S. 389, 393; *New York & N. E. Ry. Co.* v. *Bristol*, 151 U. S. 556, 571; *Capital Traction Co.* v. *Hof*, 174 U. S. 1; *Hagar* v. *Reclamation District*, 111 U. S. 701, 708; *Twining* v. *New Jersey*, 211 U. S. 77.

The act in question falls clearly within the principles announced by this court. Obviously the object of the legislature was to require the railroad companies to present their evidence to the Railroad Commission so that the tribunal may have the benefit of a full hearing. The Commission is thereby enabled to render its decision upon a complete presentation of all the facts. The saving in both time and expense resultant from this system alone justifies its adoption. The railroad companies under such a system must necessarily produce their testimony before the Commission. The testimony will there be preserved in written form and in the review proceeding the time of taking the testimony will be saved, and the expense of

transcribing and preserving the same need not again be incurred. *Chicago, Milwaukee & St. Paul Railroad Co.* v. *Tompkins,* 176 U. S. 167; *Smyth* v. *Ames,* 169 U. S. 466; *East Tennessee &c. R. R. Co.* v. *Interstate Commerce Commission,* 181 U. S. 1; *Cincinnati &c. Railway Co.* v. *Interstate Commerce Commission,* 162 U. S. 184.

The act under consideration is not void because the penalties prescribed are so large as to practically preclude recourse to the courts to have the orders of the Commission reviewed judicially. This question has been eliminated by the decision of the state Supreme Court. It was there held that the alleged excessive penalties might fall and the remainder of the act stand. The construction of the act thus placed upon it by the state tribunal is binding and conclusive upon this court. *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362.

The act does not impose an excessive penalty nor prevent recourse to the courts in any proper case.

The order is not so unreasonable or arbitrary as to operate as a taking of property without due process of law.

The record fails to show any arbitrary, capricious or unreasonable requirement of the Commission in respect to physical connections, but, on the contrary, the record shows a necessity for a connection at each place required.

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

1. The Commission's order requiring the Oregon Company to make track connection was not a mere administrative regulation, but it was a taking of property, since it compelled the defendant to expend money and prevented it from using for other purposes, the land on which the tracks were to be laid. Its validity could not be sus-

tained merely because of the fact that the carrier had been given an opportunity to be heard, but was to be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable or was justified by the public necessities which the carrier could lawfully be compelled to meet. For the guaranty of the Constitution extends to the protection of fundamental rights,—to the substance of the order as well as to the notice and hearing which precede it. "The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation." *Chicago &c. Ry.* v. *Chicago*, 166 U. S. 226, 236; *Missouri Pacific Ry.* v. *Nebraska*, 164 U. S. 403, 416. So that where the taking is under an administrative regulation the defendant must not be denied the right to show that as matter of law the order was so arbitrary, unjust or unreasonable as to amount to a deprivation of property in violation of the Fourteenth Amendment. *Chicago &c. R. R.* v. *Minnesota*, 134 U. S. 418; *Smyth* v. *Ames*, 169 U. S. 466; *Chicago &c. R. R.* v. *Tompkins*, 176 U. S. 167, 173.

2. This was recognized by the Supreme Court of the State, which held that this constitutional right was not denied, but that the statute furnished, first, an adequate opportunity to be heard before the Commission, and then provided for a judicial review by authorizing the company to test the validity of the order in the Superior Court. Both of these rulings are assigned as error by the Oregon Company. It complains that the statute did not afford it the means of making a defence before the Commission and yet required it to attack the reasonableness of the order on such evidence as it might have been able to produce before the administrative body. If this were true the defendant's position would be correct, for the hearing which must precede the taking of property is not a mere

form. The carrier must have the right to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen but to give legal effect to what has been established. But, as construed by the state court, all these rights were amply secured by the statute, which declared that the Commission, "after a full hearing," might require track connection. On such investigation the company could have objected to the sufficiency of the complaint and obtained an order requiring it to be made more specific as to the exact location of the proposed tracks. The defendant was given the benefit of compulsory process to secure and present evidence in its behalf. There was a provision to require the attendance of witnesses, the production of documents and for the taking of testimony by deposition. It also had the right to cross-examine witnesses produced on the part of the Commission and the privilege of offering evidence on every matter material to the investigation.

3. The defendant insists, however, that, no matter how complete the right to be heard before the Commission, the statute having denied all other opportunity for testing the validity of the order in the state courts, furnished an utterly inadequate judicial review because, as the carrier could not anticipate what decision would be made, it was unjust to require it to produce evidence, to show in advance, the unreasonableness of an order, the terms of which were not known. From this it argues that the statute was unconstitutional in so far as it prevented the court from receiving competent and non-cumulative testimony tending to prove that there was no public necessity for making the track connection and that the order was void.

This position would be true if the defendant had not been put on notice as to what order was asked for and

then given ample opportunity to show that it would be unjust or unreasonable to grant it. In this case, and under the statute, it was given such notice. The complaint alleged that some of the towns were important shipping points and that at all of them there was a public necessity that the roads should be connected. The defendant denied each of these allegations. The hearing, both on the law and the facts, was necessarily limited to that issue. There could have been no valid order which was broader than that claim. The defendant was charged with notice that if the allegations of the complaint as to necessity were established the order could then be lawfully granted, unless there was also proof that the cost, in comparison with the receipts, or other fact, made it unjust to require the connections to be made. The carrier was therefore given the right both to meet the charge of public necessity and also to establish any fact which would make it unjust to pass the order for which the complainant prayed. The act further provided that after the administrative body had acted, the carrier should have the right to test the lawfulness and reasonableness of the regulation in the Superior Court, where every error in rejecting or excluding evidence, or otherwise, could be corrected. On that trial the court was not bound by the finding of fact, but, like the Commission, it was obliged to weigh and consider the testimony and to give full effect to what was established by the evidence, since it acted judicially, "under an imperative obligation, with a sense of official responsibility for impartial and right decision, which is imputed to the discharge of official duties." *Kentucky Railroad Tax Cases*, 115 U. S. 321, 334.

4. Having been given full opportunity to be heard on the issues made by the complaint and answer, and as to the reasonableness of the proposed order and having adopted the statutory method of review, this company cannot complain. It had the right to offer all competent

testimony before the Commission, which, in view of the form of proceedings authorized by the statute, acted in this respect somewhat like a master in chancery who has been required to take testimony and report his findings of fact and conclusions of law. The court would test its correctness by the evidence submitted to the master. Nor would there be any impairment of the right to a judicial review, because additional testimony could not be submitted to the chancellor. The statute enlarges what this court has recognized to be proper practice in equity cases attacking such regulations. There the hearing is *de novo* and there is no prohibition in equity against offering all competent evidence to prove that the order was unreasonable. But in *Cinn., N. O. & Tex. Pac.* v. *I. C. C.*, 162 U. S. 184, 196, it was said: "We think this a proper occasion to express disapproval of such a method of procedure on the part of the railroad companies as should lead them to withhold the larger part of their evidence from the Commission, and first adduce it in the Circuit Court. . . . The theory of the act evidently is, as shown by the provision that the findings of the Commission shall be regarded as *prima facie* evidence, that the facts of the case are to be disclosed before the commission." See also *Texas & Pacific* v. *I. C. C.*, 162 U. S. 197, 238, 239; *Missouri &c. Ry.* v. *I. C. C.*, 164 Fed. Rep. 645, 649.

There is no claim here that the evidence rejected by the Superior Court was newly discovered, or that its materiality could not have been anticipated, or that for any reason the defendant had been prevented from submitting to the Commission the testimony it offered in court to show that the cost would be $21,000 instead of $7,500. Nor was there any allegation of surprise, mistake or other extraordinary fact requiring the admission of such evidence in order to preserve the right guaranteed by the Constitution. There is, therefore, no call for a decision as

to whether, under those circumstances, such evidence should be admitted, or the case remanded so that the Commission might consider material and probably controlling testimony which the carrier, without fault on its part, had failed to submit on the first hearing.

5. If, then, the defendant had notice and was given the right to show that the order asked for, if granted, would be unreasonable, it has not in this case been deprived of the right to a hearing. That being so, it leaves for consideration the contention that as a matter of law, the order, on the facts proved, was so unreasonable as to amount to a taking of property without due process of law. This necessitates an examination of the evidence, not for the purpose of passing on conflicts in the testimony or of deciding upon pure questions of fact, but, as said in *Kansas City Railway Co.* v. *Albers Commission Co.*, 223 U. S. 573, 591, from an inspection of 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." *Cedar Rapids Gas Light Co.* v. *Cedar Rapids*, 223 U. S. 655; *Graham* v. *Gill*, 223 U. S. 643. Here the question presented is whether as matter of law the facts proved show the existence of such a public necessity as authorizes a taking of property.

6. Since the decision in *Wisconsin &c. R. R.* v. *Jacobson*, 179 U. S. 287, there can be no doubt of the power of a State, acting through an administrative body, to require railroad companies to make track connection. But manifestly that does not mean that a Commission may compel them to build branch lines, so as to connect roads lying at a distance from each other; nor does it mean that they may be required to make connections at every point where their tracks come close together in city, town and country, regardless of the amount of business to be done,

or the number of persons who may utilize the connection if built. The question in each case must be determined in the light of all the facts, and with a just regard to the advantage to be derived by the public and the expense to be incurred by the carrier. For while the question of expense must always be considered (*Chicago &c. R. R.* v. *Tompkins*, 176 U. S. 167, 174), the weight to be given that fact depends somewhat on the character of the facilities sought. If the order involves the use of property needed in the discharge of those duties which the carrier is bound to perform, then, upon proof of the necessity, the order will be granted, even though "the furnishing of such necessary facilities may occasion an incidental pecuniary loss." But even then the matter of expense is "an important criteria to be taken into view in determining the reasonableness of the order." *Atlantic Coast Line R. R.* v. *North Carolina Commission*, 206 U. S. 1, 27; *Missouri Pacific Ry.* v. *Kansas*, 216 U. S. 262. Where, however, the proceeding is brought to compel a carrier to furnish a facility not included within its absolute duties, the question of expense is of more controlling importance. In determining the reasonableness of such an order the court must consider all the facts,—the places and persons interested, the volume of business to be affected, the saving in time and expense to the shipper, as against the cost and loss to the carrier. On a consideration of such and similar facts the question of public necessity and the reasonableness of the order must be determined. This was done in *Wisconsin R. R.* v. *Jacobson*, in which for the first time, it was decided that a state commission might compel two competing interstate roads to connect their tracks.

It appeared on an examination of the facts in that case that on one of the lines there was an immense supply of wood, for which there was a great demand at points on the other, where there was none, and that if the connecting track was installed there would be a saving in time and

freight on this large volume of business. It also appeared that many cattle were raised on one line, for which there were important markets on the other, and that without the track connection these cattle would have to be hauled over a much longer route, with a resulting loss in weight and value. The advantage to the public was so great that the order requiring the track connection was sustained, in spite of the fact that one of the roads was thereby deprived of the revenue which it would otherwise have received for the longer haul.

But the court said (p. 301) that—

"in so deciding we do not at all mean to hold that under no circumstances could a judgment enforcing track connection between two railroad corporations be a violation of the constitutional rights of one or the other, or possibly of both such corporations. It would depend upon the facts surrounding the cases in regard to which the judgment was given. The reasonableness of the judgment with reference to the facts concerning each case must be a material, if not a controlling, factor upon the question of its validity. A statute, or a regulation provided for therein, is frequently valid, or the reverse, according as the fact may be, whether it is a reasonable or an unreasonable exercise of legislative power over the subject-matter involved. And in many cases questions of degree are the controlling ones by which to determine the validity, or the reverse, of legislative action."

7. The complaint in this case was framed in recognition of this principle and alleged that several of the towns were important shipping points, and that at all of them there was a public demand and a public necessity for track connection between the lines of the several roads. As there is no presumption that connection should be made merely because the roads are in proximity to each other, the burden was on the Commission. If no evidence whatever had been offered the order could not have been granted, or,

if granted, would necessarily have been set aside by the court on the hearing of the Petition for Review because there was no proof of the fact on which only the order could issue taking the defendant's property. The same result must have followed if the testimony that was so submitted to the Commission was insufficient to establish the existence of the public necessity alleged to exist. For, even if under the statute the burden was cast on the defendant when the Petition for Review came on to be heard, the Company could, in view of the limited character of the proceedings permitted, successfully carry that burden by showing to the court that there was before the Commission a lack of evidence to prove the existence of a public necessity. That it was bound to sustain the allegations of the complaint seems to have been recognized by that body, and witnesses in its behalf were examined as to the cost of laying the track and also on the subject of the public demand and necessity. It was testified, however, without contradiction, that there was no necessity for connection at Waverly, Thornton, Farmington or Colfax. They were not asked specifically as to the connections at all of the other towns, though there was proof of the general proposition that if the connections were laid it would shorten the haul between given points in case goods were routed over these tracks. But as to the essential elements of a public necessity there was nothing at all comparable to what was established in the *Jacobson Case.*

There the evidence of necessity was clear and convincing, it being shown that a large volume of business would be served and a great saving in rates effected and loss in value of cattle prevented if the two roads were united by a switch track. Here there is no evidence of inadequate service, no proof of public complaint or of a public demand, and no testimony that any freight had been offered in the past for shipment between the points named, or that any such freight would be offered in the future; nor was there

any evidence whatever as to the volume of freight that would use these tracks or that the saving in freight and time to the shipper would justify the admitted expense to the carrier, whether that expense be $7,500, as found by the Commission, or $21,000, as claimed by the carrier.

Neither do the undisputed facts establish what appeared in *Minneapolis & St. L. Ry.* v. *Minnesota*, 193 U. S. 53, where, under the statute, the order was *prima facie* binding in so far as it required the company to build stations in towns and villages. The court found that this *prima facie* case had not been overcome, and that at the town named there was no station; that in view of the increase in population since a prior refusal to grant the order "it was necessary for the accommodation of the citizens of the town and vicinity, the public at large, and the public necessity required that the company should build and maintain a station house." But here there was no evidence whatever warranting a finding that there was any public necessity for the track connections.

8. The chairman of the Commission dissented as to so much of the order as required connections to be made at Thornton, Waverly, Farmington and Pullman, on the ground that there was no evidence of any public necessity therefor at those points, and it would involve expense which would ultimately have to be paid by the people. And it is practically conceded here that the proof was insufficient—the Attorney General in his brief filed in this case saying that "it must be admitted that the testimony introduced before the Commission as to the character of the traffic, and the nature of the traffic movement in the territory served by the lines of railway is not of a very satisfactory or definite character." He argues, however, that there is nothing to show that the Commission acted arbitrarily and that the carriers ought to have produced their records for the purpose of showing that there was no need for physical connections at the places where the

Commission was seeking to have them installed. That might have been true if the evidence was peculiarly within their knowledge or if the company had been permitted to file a Bill in Equity attacking a final order in the usual and ordinary manner without being restricted by statute as to the evidence that might be considered by the court. In this case the witnesses for the railroad confirmed what had been stated by those for the Commission, and testified that there had been no demand for track connections and that there was no necessity to put them in. The company was not permitted to offer additional testimony for the purpose of establishing its defense, since the statute declared that the validity of the order was to be determined by the court on what had been proved before the Commission. The burden was on the Commission to establish the allegations in the complaint. That body, as well as the carrier, was charged with notice that the reasonableness of the order was to be determined by what appeared at the hearing before it. The insufficiency of the evidence submitted to the Commission could not under this statute be supplied on the judicial review by a presumption arising from the failure of the carrier to disprove what had not been established.

A careful examination of this record fails to show what, if any, business would be routed over these connections, or what saving would come to the public if they were constructed. There is nothing by which to compare the advantage to the public with the expense to the defendant and nothing to show that within the meaning of the law there is such public necessity as to justify an order taking property from the company. The judgment is therefore reversed without prejudice to the power of the Commission to institute new proceedings.

Reversed.

NIELSEN, ADMINISTRATRIX, *v.* STEINFELD.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 218. Argued April 17, 18, 1912.—Decided May 13, 1912.

There are exceptions to the general rule that a judgment on appeal from a territorial court should be affirmed where the record contains no exceptions or the statement of facts required by the statutes to enable the reviewing power to be exerted; and so *held*, in this case, that it is reversible error where the Supreme Court of a Territory refuses to perform its legally imposed duty of making its own statement of facts or adopting that of the trial court.

Where the judgment of a Supreme Court of a Territory is reversed for refusal to perform the statutory duty of making a statement, the case stands as though the appeal from the trial court were still pending; and if the Territory has been admitted as a State since the record came to this court, and the case is one within the jurisdiction of the state courts, it will be remanded to the Supreme Court of such State.

12 Arizona, 381, reversed.

THE facts, which involve practice regulating appeals from Supreme Courts of the Territories, are stated in the opinion.

Mr. Edwin F. Jones, with whom *Mr. William Herring* was on the brief, for appellant.

Mr. Eugene S. Ives for appellees.

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

Mary Nielsen, individually and as administratrix of the estate of her deceased husband, Carl S. Nielsen, commenced this action in 1905 in the District Court of

Pima County, in the then Territory of Arizona. Albert Steinfeld and the Nielsen Mining & Smelting Co., now the Silver Bell Copper Company, were named as defendants. The relief sought was the setting aside of a transfer made by Nielsen to Steinfeld of three hundred shares of stock in the Nielsen Company and for a decree adjudging Mary Nielsen (who is the appellant), as administratrix of her husband's estate, to be the legal owner of the stock. An accounting from Steinfeld of moneys received by him as dividends on the stock was also prayed.

The cause was tried by the court, without a jury, and evidence both oral and documentary was introduced on behalf of the plaintiff and defendants. The trial court made elaborate findings of fact upon which it entered judgment against Steinfeld for $23,300.00 with interest, and the shares of stock in controversy were decreed to be the property of the administratrix. The defendants appealed to the Supreme Court of the Territory. With the judgment roll there was filed in the office of the clerk of that court various exhibits of both plaintiff and defendants and the reporter's transcript of evidence, copies of which papers so filed, it was recited, were omitted from the transcript by direction of the attorneys for appellants. (*Steinfeld et al.*)

What errors were assigned on the appeal to the Supreme Court of the Territory do not appear in the transcript of record. It was conceded, however, in the argument at bar by the counsel of both parties that in the Supreme Court of the Territory it was insisted, on behalf of the appellants (*Steinfeld et al.*), that the decree of the trial court should be reversed, not only because there was no evidence sustaining various findings of the trial court which were material to its decree, but also because, taking the findings to be sufficiently supported by proof, they were nevertheless inadequate to sustain the decree which had been based on them. It therefore may be assumed

that the errors thus admitted to have been assigned in the Supreme Court are those referred to in the minute entry contained in the record, stating that a "motion and objection of the appellee to the consideration of assignments of error set forth and specified in appellants' brief" were denied by the Supreme Court.

The Supreme Court reversed the judgment of the trial court and remanded the cause with directions to enter judgment for the defendants. (12 Arizona, 381.) The opinion is preceded by what is denominated in the body of the opinion a statement of the facts. The statement begins with a brief recital of the nature of the controversy, the entry of judgment in the trial court and the taking of the appeal; and after the declaration that "the court (trial court) found the facts as follows," there appears a literal copy of the findings made by the trial court. In the opinion which next follows it is first declared that it was "contended by the appellants that the facts found do not constitute legal fraud, and that therefore the court erred in not so finding, and in rendering judgment for the plaintiff and against the defendants, based thereon." A summary is then made of what were styled "the facts upon which the court predicated fraud in the purchase of the shares of stock of Nielsen," followed by the statement that "unless these facts constituted legal fraud, the judgment of the trial court cannot be sustained." The court then considers whether the facts so found amounted to legal fraud, and concludes its consideration of the subject by saying (p. 405): "In our judgment the findings do not support the legal conclusion made by the trial court that such fraud was perpetrated by Steinfeld in the purchase of the stock as to warrant the rescission of the contract, and the recovery of the stock and of the dividends which have been received by Steinfeld thereon." It is then stated that "for this reason the judgment of the trial court must be reversed, and the case remanded,

with directions to the trial court to enter judgment for the defendant." The Chief Justice of the Supreme Court of the Territory dissented in the following words:

"I dissent from the conclusion and the result reached by my associates in the foregoing opinion. I think the judgment of the trial court was correct."

A motion for a rehearing was denied on May 1, 1909, and on the same day the appeal now under consideration was allowed by the Chief Justice of the court.

On June 10, 1909, there was filed *nunc pro tunc* as of May 1, 1909, what was styled in the Journal entry "a certain Statement of Facts," in which, under the title of the cause, it was recited as follows:

"I, Edward Kent, Chief Justice of the Supreme Court of the Territory of Arizona, do hereby certify that the Supreme Court of the Territory of Arizona, having adjudged that the facts as found by the District Court in this cause did not sustain the conclusions of law or the judgment of the District Court, did, without passing in this court upon the corrections (correctness?) of the facts as found by the District Court, remand this cause to the District Court with directions to that court to enter judgment absolute for the defendants.

"And on behalf of the said Supreme Court of the Territory of Arizona, I do hereby certify to the Supreme Court of the United States upon the appeal herein, that the following were the facts as found by the District Court upon which the said judgment of the Supreme Court of the Territory of Arizona was based."

This certificate was followed by a reproduction of the findings made by the trial court and the certificate concluded with the date of May 1, 1909, and the signature of the Chief Justice.

On June 12, 1909, a bond on appeal was duly filed. Five months afterwards, viz., on November 12, 1909, the following order was entered in the court below:

"At this day, it is ordered by the Court that all former Statements of Facts filed in this cause in this court, be, and the same are hereby, withdrawn, and a Certificate of the Chief Justice in regard to Statement of facts, filed."

The certificate referred to appears in the transcript of record following a recital of the entry of an order enlarging the time for preparing and filing such transcript. Omitting the title of the cause, date, and signature of the Chief Justice, the certificate reads as follows:

"I, Edward Kent, Chief Justice of the Supreme Court of the Territory of Arizona, do hereby certify that the Supreme Court of the Territory of Arizona, having adjudged that the facts as found by the District Court in this cause did not sustain the conclusions of law or the judgment of the District Court, did, without passing in this Court upon the correctness of the facts as found by the District Court, remand this cause to the District Court with directions to that Court to enter judgment absolute for the defendants, and therefore do not certify to the United States Supreme Court any statement of facts in the nature of a special verdict."

In the argument at bar it is urged on behalf of appellant —citing *Stringfellow* v. *Cain*, 99 U. S. 610, and *Bierce* v. *Hutchins*, 205 U. S. 340,—that as the Supreme Court of the Territory reversed the judgment of the trial court "for the reason that the facts as found are not sufficient to support the judgment," the court below must be held to have adopted as its own the findings of the trial court, and therefore there is an adequate statement of the facts in the nature of a special verdict as required by the act of Congress of April 7, 1874, 18 Stat. 27, c. 80. The appellees, on the other hand, relying upon the last certificate made by the Chief Justice on behalf of the court, direct attention to the fact that the court did not either adopt the findings of the trial court or make express findings of its own, since it simply accepted the findings made by the trial

court for a limited purpose, that is with the object of determining whether the findings, if hypothetically taken for true, were adequate to sustain the judgment which the trial court had based on them. It is not, however, suggested that this state of the record precludes a determination of whether the court below erred in deciding that upon the assumption of the correctness of the findings of the trial court they were inadequate to sustain its decree, but it is urged that under the circumstances, if it be deemed that the court below erred it would be a gross injustice to reverse, with directions to affirm the judgment of the trial court, because thereby the appellants in the court below, the appellees here, would be denied a hearing on the contention urged in the court below that there was no evidence sustaining some of the essential findings of the trial court.

As it is obvious from the final action of the court below as manifested by the last certificate of the Chief Justice that the premise upon which the suggestions last referred to rest is well founded, it is clear that the court below made no statement of facts complying with its statutory duty. It is equally clear under the circumstances stated that although the appellees apparently do not expressly assert the inadequacy of the purported statement of facts to sustain our jurisdiction to review, in effect their contention is equivalent to that proposition. This is true because the result of the proposition insisted upon is to contend that the statement of facts which the court below accepted for a particular purpose is sufficient to enable a review of its action if the conclusion be that the court below did not err, but is not sufficient to justify correction of its action if it be found that error was committed.

The evident duty imposed upon the court below by the statute, as long since established and repeatedly pointed out, was to make a statement of the facts in the nature of a special verdict either by adopting as correct

the findings of fact made by the trial court or by making its own express findings, a duty which was plainly disregarded by merely hypothetically assuming the findings of the trial court to be correct, and basing upon such mere hypothesis a judgment of reversal with a direction to enter a final decree against the complainant.

The general rule is to affirm a judgment on an appeal from a territorial court where the record contains no exceptions to rulings upon the admission or rejection of evidence and where there is an absence of the statement of facts required by the statute to enable the reviewing power to be exerted, and when there is no showing that the appellant has used due diligence to exact a compliance with the statute so as to enable an appeal to be prosecuted. *Gonzales* v. *Buist*, 224 U. S. 126. We are of opinion, however, that the facts of this case cause it to be an exception to this general rule. First, because the action of the court below was plainly the result not of a mere omission to perform its duty to make a statement of facts, but arose from a misconception as to the nature and extent of its powers in discharging that statutory duty, a misconception not arising from any action of the party appellant here and which in itself therefore intrinsically we think constituted reversible error. Second, because the initial action by which the error was committed was ambiguously manifested and may have misled the unsuccessful party. Third, because the final order which made it indubitably clear that the court intended to make no findings of fact and deemed that consistently with the right to review its action which was vested in this court it had the power to decide the case upon a mere hypothesis as to the correctness of the findings of the trial court was entered months after the appeal now before us had been entered.

Considering the whole situation, we think we must treat the case upon the theory that the court below com-

mitted reversible error in refusing to perform the duty imposed upon it by law, and the reversal of its decree because of such error will have the legal effect of causing the case to be as though it were yet pending undetermined on the appeal from the trial court. As since the filing of the record here the Territory of Arizona has been admitted as a State, and the case before us is of a character which, by the terms of the enabling act (36 Stat. 557, ch. 310, § 33, p. 577), should be remanded to the Supreme Court of the State, our duty therefore is to reverse the decree of the Supreme Court of the Territory of Arizona and to remand the case to the Supreme Court of the State of Arizona for further proceedings not inconsistent with this opinion.

And it is so ordered.

THE MISSOURI PACIFIC RAILWAY COMPANY *v.* CASTLE.

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

No. 344. Submitted April 22, 1912.—Decided May 13, 1912.

This court has repeatedly held that a State may impose upon a railway company liability to an employé engaged in train service for an injury inflicted through the negligence of another employé in the same service.

A State also has power to modify or abolish the common-law rule of contributory negligence, and provide by statute that damages to an employé of a railroad company shall only be diminished by reason of his contributory negligence in proportion to the amount of negligence attributable to him.

Prior to the enactment by Congress of the Employers' Liability Act, the States were not debarred from legislating for the protection of railway employés engaged in interstate commerce.

The fact that a state statute imposing liability on railway companies for injuries to employés covers acts of negligence in respect to subjects dealt with by the Federal Safety Appliance Act does not amount to an interference with interstate commerce.

The railway liability act of Nebraska of 1907 is not unconstitutional as depriving a railway company of its property without due process of law, or denying it equal protection of the law, or as interfering with interstate commerce.

A corporation of one State, which only becomes a corporation of another by compulsion of the latter so as to do business therein, is not a corporation thereof, but remains, so far as jurisdiction of Federal courts is concerned, a citizen of the State in which it was originally incorporated. *Southern Railway Co.* v. *Allison*, 190 U. S. 326.

THE facts, which involve the constitutionality of the statute of Nebraska of 1907 imposing liability on railway corporations for injury to employés, are stated in the opinion.

Mr. B. P. Waggener, with whom *Mr. F. A. Brogan* and *Mr. Edgar M. Morseman, Jr.*, were on the brief, for plaintiff in error.

Mr. T. J. Mahoney, with whom *Mr. J. A. C. Kennedy* was on the brief, for defendant in error.

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

Alleging himself to be a citizen of Nebraska and averring that the Railway Company was a citizen of Missouri, Castle sued the Railway Company to recover for injuries received by him while in the service of the Railway Company as a brakeman upon a freight train operating in the State of Nebraska, the injury having been occasioned through the negligence of a co-employé. The right to recover under such circumstances was based upon a Nebraska statute adopted in 1907 consisting of two sections which are now §§ 3 and 4 of chapter 21 of the Compiled Statutes of Nebraska. The first section made every railway company liable to its employés who, at the time of the injury,

were engaged in construction or repair works or in the use and operation of any engine, car or train for said company, for all damages which may result from the negligence of its officers, agents or employés, or by reason of any defects or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or work. The second section provided that contributory negligence shall not be a bar to recovery where the negligence of the injured employé was slight and that of the employer was gross in comparison, but that damages shall be diminished in proportion to the amount of negligence attributable to the injured employé. In its answer the Railway Company admitted that it was then and was at all of the times mentioned in the petition "a railroad corporation organized and existing under and by virtue of the laws of the State of Missouri," and set up that the injury to the plaintiff was caused by the negligence of a fellow-servant or co-employé, and was also the result of the contributory negligence of the plaintiff. The validity of the second section of the statute was challenged because it deprived "of the defence of contributory negligence accorded to all other litigants, persons or corporations within the State of Nebraska," and because the statute established and enforced against railroads a rule of damages not applicable to any other litigant in similar cases, whereby the privileges and immunities of the company as a citizen of the United States within the jurisdiction of the State of Nebraska were abridged and it was denied the equal protection of the laws in violation of the Fourteenth Amendment. The repugnancy of the statute to the commerce clause of the Constitution was also averred, on the ground that "the plaintiff at the time he received the injuries complained of was engaged as an employé of an interstate railroad engaged in commerce between the States of Missouri, Kansas and Nebraska," and the statute of Nebraska "attempts to regulate and

control as well as create a cause of action and remedy, imposing upon the defendant company a liability inconsistent with and repugnant to the action of the Congress of the United States on said subject."

At the trial the company excepted to the refusal of the court to give instructions embodying its contentions respecting the invalidity of the statute, and also excepted to the giving of certain instructions which were antagonistic to those contentions. From a judgment entered upon a verdict of a jury in favor of the plaintiff this direct writ of error was sued out.

Defendant in error moves to affirm the judgment under subdivision 5 of Rule 6. The motion we think should prevail, since the questions urged upon our attention as a basis for a reversal of the judgment have been so plainly foreclosed by decisions of this court as to make further argument unnecessary.

This court has repeatedly upheld the power of a State to impose upon a railway company liability to an employé engaged in train service for an injury inflicted through the negligence of another employé in the same service. *Missouri Pacific Railway Company* v. *Mackey*, 127 U. S. 205; *Minneapolis & St. L. Ry. Co.* v. *Herrick*, 127 U. S. 210; *Tullis* v. *Lake Erie & W. Railway Company*, 175 U. S. 348; *Chicago, K. & W. R. Co.* v. *Pontius*, 157 U. S. 209; and *Mondou* v. *New York, N. H. & H. R. Co.*, 223 U. S. 1.

Obviously, the same reasons which justified a departure from the common-law rule in respect to the negligence of a fellow-servant also justify a similar departure in regard to the effect of contributory negligence, and the cases above cited in principle are therefore authoritative as to the lawfulness of the modification made by the second section of the statute under consideration of the rule of contributory negligence as applied to railway employés. The decision in the *Mondou Case* sustaining the validity of the Federal Employers' Liability Act practically

forecloses all question as to the authority possessed by the State of Nebraska by virtue of its police power to enact the statute in question and to confine the benefits of such legislation to the employés of railroad companies; and as, at the time the plaintiff received the injuries complained of, there was no subsisting legislation by Congress affecting the liability of railway companies to their employés, under the conditions shown in this case, the State was not debarred from thus legislating for the protection of railway employés engaged in interstate commerce. See the *Mondou Case*, *supra*, and *Chicago, M. & St. P. R. R. Co.* v. *Solan*, 169 U. S. 133.

The circumstance that the Nebraska statute covers acts of negligence of railroad companies in respect to their cars, roadbed, machinery, etc., subjects dealt with by the Safety Appliance Act of March 2, 1893, 27 Stat. 531, c. 196, does not afford any substantial ground for the contention that the statute is involved in so far as it imposed liability for an injury to an employé arising from the negligence of a co-employé.

In the argument at bar, a contention is made, which was seemingly not presented in the court below nor alluded to in the assignments of errors, viz., that although originally incorporated under the laws of the State of Missouri, the Railway Company had, in law and in fact, become a domestic corporation in Nebraska under the constitution and laws of that State, and was such domestic corporation when this suit was instituted, and in consequence the diversity of citizenship essential to the jurisdiction of the Circuit Court was wanting. In support of the contention an allegation of the petition is quoted to the effect that the railway company owned and operated its road as well in the State of Nebraska as in the other States, and reference is made to a provision of the constitution of Nebraska—§ 8, art. XI, Comp. Stat. Neb. 1905, pp. 74–75—denying to a railroad corporation or-

ganized under the laws of any other State or of the United States and doing business in Nebraska the power to exercise the right of eminent domain or to acquire the right of way or real estate for depot or other uses until it shall have become a body corporate pursuant to and in accordance with the law of the State. Two decisions of the Supreme Court of Nebraska are cited, in one of which (*State ex rel. Leese* v. *Mo. Pac. Ry. Co.*, 25 Nebraska, 164–165), it is said it was decided that "because of consolidations with domestic companies," the Missouri Pacific Company had become a domestic corporation in the State of Nebraska, and could therefore "acquire a right of way," etc. As to the other (*Trester* v. *Mo. Pac. Ry. Co.*, 23 Nebraska, 242–249), the contention appears to be that the railway company was held to be a domestic corporation by force of the constitutional provision heretofore referred to. In the face, however, of the clear admission made in the answer of the railway company as to the existence of diverse citizenship, we cannot assent to the soundness of the claim now made, based on the contentions referred to. Certainly, in the absence of any issue on the subject, weight cannot be attached to the decision in 25 Nebraska; and it is consistent with the constitutional provision to infer that the railway company, if it became a domestic corporation of Nebraska, did so by compulsion of the Nebraska statutes on the subject. Indeed the contention is adversely disposed of by *Southern Ry. Co.* v. *Allison*, 190 U. S. 326, cited in *Patch* v. *Wabash R. Co.*, 207 U. S. 277, 284. In the *Allison Case*, the court, among other cases, referred approvingly to *Walters* v. *Chicago, B. & Q. R. R. Co.*, 104 Fed. Rep. 377, where it was held that a corporation originally created by the State of Illinois although made by the law of Nebraska a domestic corporation of that State, was nevertheless a citizen of Illinois.

Judgment affirmed.

AMERICAN RAILROAD COMPANY OF PORTO RICO *v.* BIRCH.

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

No. 224. Submitted April 24, 1912.—Decided May 13, 1912.

The Employers' Liability Act of 1908 expressly applies to, and is in force in, Porto Rico; but *quære*, and not necessary to decide in this case, whether the Safety Appliance Acts apply to, or are in force in, Porto Rico.

Where words of a statute are clear, they must be strictly followed, even if the construction causes apparently unnecessary inconvenience.

Where the purpose of Congress is clear, the courts must yield to such purpose, and assume that all contending considerations were taken into account by Congress.

The National Employers' Liability Act of 1908 gives the right of recovery to the personal representatives and not to the heirs of one killed by the negligence of the employer, and the heirs cannot maintain an action even where the local statute, as in Porto Rico, gives a right to the heirs as well as to the personal representatives to maintain such an action.

A defendant company has the right under the Employers' Liability Act of 1908 to have its liability determined in one action.

5 Porto Rico Fed. Rep. 273, reversed.

THE facts, which involve the construction of the Employers' Liability Act of 1908 and its application to Porto Rico, are stated in the opinion.

Mr. N. B. K. Pettingill and *Mr. F. L. Cornwell* for plaintiff in error:

Although the judgment below was for less than $5,000, this court has jurisdiction under § 35 of the Foraker Act.

The present case comes under both subdivisions of the section. If it came from the Supreme Court of one of

the Territories the writ would lie, because the jurisdiction of the court below did not depend upon the character of the parties but upon the character of the cause of action as arising under an act of Congress (the Employers' Liability Act of April 22, 1908). *Royal Ins. Co.* v. *Martin*, 192 U. S. 149, 159.

As plaintiff's claim was based upon an act of Congress and as defendant contended that plaintiff was not the party authorized by that act to sue and was overruled, it claimed a right under a statute of the United States which was denied. *Serrales* v. *Esbri*, 200 U. S. 103, 109.

The right of action is limited by the statute to the personal representative of deceased.

The plaintiff below alleges that she is the widow of the deceased, that she and her son are his only heirs, and demands the recovery in her character as widow. The company distinctly raised the question of her right to sue in that capacity under that statute. Thus the construction of the provision of the statute above quoted was directly challenged.

While the purpose of the statute is doubtless remedial and it is to be given a liberal construction consistent with its terms to effectuate that purpose, there is no place for construction in the technical sense because of the absence of ambiguity. *Hamilton* v. *Rathbone*, 175 U. S. 414, 419; *Dewey* v. *United States*, 178 U. S. 510, 521.

When suit was first begun neither letters of administration nor a declaration of heirship had been obtained, and the latter was obtained after the suit was begun and admitted in evidence at the trial.

In selecting the personal representative instead of the heirs of the deceased or the specified beneficiary as the proper party to bring the suit, Congress probably intended to mark the logical distinction between providing for the survival of a cause of action existing in the injured party up to the time of death and for the creation of a new cause

of action arising in the representative from the moment of death. *Midland R. R. Co.* v. *Fulgham*, 104 C. C. A. 151; *Walsh* v. *N. Y., N. H. & H. R. Co.*, 173 Fed. Rep. 494.

While there is no decision of any Federal court construing this very statute since its enactment, see as to similar statutes, *Lake Erie R. Co.* v. *Charman*, 161 Indiana, 95; *Louisville &c. Co.* v. *Trammel*, 93 Alabama, 350; *Cleveland &c. R. Co.* v. *Osgood*, 73 N. E. Rep. 285; *Peers* v. *Nevada W. Co.*, 119 Fed. Rep. 400.

The provision placed by Congress in the statute was not a new departure, but the adoption of a policy already fixed in the laws of several of the States, hence it is logical to presume Congress had in mind the construction given to these similar provisions of the state statutes. See *Illinois C. R. Co.* v. *Barron*, 5 Wall. 90; *Sou. Pac. Co.* v. *Tomlinson*, 163 U. S. 369; *Stewart* v. *B. & O. R. Co.*, 168 U. S. 445; *Chesapeake R. Co.* v. *Dixon*, 179 U. S. 131.

The Safety Appliance Acts of Congress have not been made applicable to Porto Rico, and the court below erred in directing the jury to make such application, and thereby deprived the company to that extent of the benefit of contributory negligence on the part of the deceased. See *New York* v. *Bingham*, 211 U. S. 468.

The instructions as to the measure of damages were erroneous.

Mr. Willis Sweet for defendants in error:

This court has no jurisdiction of this appeal. No right was denied defendant in the lower court. *Royal Ins. Co.* v. *Martin*, 192 U. S. 149, is not applicable.

The jurisdiction of the lower court depended upon diverse citizenship and the amount in controversy, and of this court on the amount in controversy.

Serrales v. *Esbri*, 200 U. S. 103, is not applicable; that case did not involve the right of the plaintiff in error under a United States statute.

The defendant in the case at bar has not been deprived of any right, and neither the Constitution, nor a treaty, nor a right of defendant under any United States statute has been questioned. Plaintiffs had capacity to sue under the statute. The record shows that there was no estate of any kind. There was no need for plaintiffs to go through the farce of having an administrator appointed, when there was not one dollar in the world, real or personal, to be administered.

Even though the court erred in holding that the plaintiffs had "capacity to sue," it is not reversible error in this case in the absence of a right taken from defendant, and the judgment being under five thousand dollars. Whether or not the error, if error it was, would have been fatal had the judgment exceeded five thousand dollars need not be discussed.

The National Safety Appliance Act is in force in Porto Rico.

The act of 1908, under which this action was brought, has for its purpose, and for its exclusive purpose, the further protection of employés of railroad companies. If it did not refer to the Safety Appliance Act, what could have been the object of using it in this statute. It must have referred to the Safety Appliance Act, as appears from § 1 of the act of 1893. See 6 Fed. Stats. Ann. 752.

Obviously the purpose of this statute is the protection of the lives and limbs of men, and such statutes, when the words fairly permit, are so construed as to prevent the mischief and advance the remedy. *Chicago, M. & St. P. Ry. Co.* v. *Voelker*, 129 Fed. Rep. 522, 527.

It is obvious that the statute was so intended, because it says so.

The act of 1908 is very drastic in its terms. It does away entirely with the old principle of the common law that if the person injured was guilty of contributory negligence he could not recover at all, and that if the

jury find that the person injured or killed was guilty of contributory negligence he must, nevertheless, have judgment, the jury substracting from the full sum to which he would be entitled a sum "in proportion to the amount of negligence attributable to such employé."

Porto Rico is brought within the terms of the act by direct provision. And how can the act mean less than that the Safety Appliance Act is applicable in Porto Rico when Congress declares, in language as broad as could be employed, that under this act of 1908, contributory negligence shall not be permitted as a defense by any railroad company that has failed to adopt those appliances.

As to the measure of damages, a party will not receive consideration in the appellate court when the error complained of did not do him any injury.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action for damages for the death, through the alleged negligence of plaintiff in error, of the husband and father of defendants in error, who are, respectively, deceased's widow and son.

The action was originally brought by Ann Elizabeth Birch. A demurrer was filed to the complaint, which was sustained in part, and the court directed counsel "to so amend the complaint as to show whether or not the plaintiff is the sole heir of the deceased, or if she sues for the benefit of certain other heirs, then the complaint must specifically state the name of said other heirs and state under what law the said action is brought."

An amended complaint was filed alleging that the deceased, Francisco Abraham Birch, was, when killed, at his post of duty as brakeman on a train of the railroad which was running through the city of Aguadilla at a high rate of speed and contrary to an ordinance of the city, in conse-

quence of which speed and a defect in one of the wheels of the car the body of the car left the tracks and was thrown to the ground, crushing the deceased beneath it and thus causing instant death.

It is alleged that a proper inspection of the wheel would have disclosed the defect in it, and, further, that if the train had been running within the limits of the requirements of the law the train might and would have been stopped before the accident occurred.

At the time of his death, it is alleged, that the deceased was forty-seven years of age, was receiving $42 per month, was a skilled and efficient railroad employé and was in vigorous health and strength. And it is alleged that his death was caused without negligence on his part and while he was in the faithful discharge of his duty.

It is declared that the "action is based upon an act of Congress entitled 'An Act relating to the Liability of Common Carriers by Railroads to their employés in certain cases,' approved April 22, 1908."

It is alleged that Ernest Victor Birch was poor in health and frail in body, and was dependent upon deceased for support.

Damages were prayed at $10,000.

The railroad company denied the specific allegations against it of speed and failure to inspect the wheels, alleged that they were inspected, and that no defects were visible or could be ascertained. It also put in issue the allegations of the complaint in regard to Ernest Victor Birch.

The answer alleged that no administration proceedings had been had on the estate of deceased, and that neither of the plaintiffs has been declared his heir as required by law. It is also alleged that Ernest Victor Birch was over the age of twenty-one years, and that deceased was under no legal obligation to support him.

The case was tried to a jury upon evidence conflicting

upon certain of the issues. There was no conflict as to the circumstances of the accident, the death of Birch in the line of duty, and that the accident was caused by a broken wheel, and that the train was not equipped with air brakes, but only with the ordinary hand brakes. There was conflict as to the speed of the train and as to whether the engineer in charge of the locomotive could see signals to stop or whether he disregarded them.

The instructions of the court, so far as material, will be noticed presently in considering the assignments of error.

These assignments are: (1) The court erred in overruling the demurrer; (2) in denying the motion to dismiss the action and direct verdict on the ground that it had not been brought by the personal representative of the deceased as required by the statute upon which it was based; (3) in holding that the heirs could sue in their own names; (4) in refusing to give the following: "That the court instruct the jury that the Federal act with regard to safety appliances has no application to the question at bar." And (5) in refusing to instruct the jury as follows:

"That they [the plaintiffs in action] are entitled to recover the actual compensation that they would have received if he [the deceased] had not been killed, and that would be limited to the purchase of an annuity for his recognized period of life."

These assignments are reducible to three propositions, to-wit: (1) the capacity of plaintiffs to sue, (2) the application of the safety appliance law, and (3) the measure of damages. Their discussion requires a consideration of the Employers' Liability Law, as the amended complaint is based on that law. Section 2 of the act provides as follows (35 Stat. 65, c. 149):

"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 em-

ployed 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; . . . 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."

Section 3 excludes the defense of contributory negligence, but requires the damages to be "diminished by the jury in proportion to the amount of negligence attributable to such employé." But provides that contributory negligence is not to be attributable to the employé injured or killed "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." And by § 4 assumption of risk by the employé is also excluded in such case.

Such part of the instructions of the court as are necessary to be considered in connection with the act are, as given by the court, in effect as follows:

(1) The action is brought under the Employers' Liability Act of Congress of April 22, 1908, which is in force in Porto Rico, the provisions of which are explained as set out above.

(2) The damages can only be compensatory, and the measure of them is what the plaintiffs or either of them necessarily lose in or by the death of their husband and father, and in measuring these damages the jury may take into consideration the age, health and expectancy of life of the deceased, his earning capacity, his character, his mode of treatment of his family and the amount contributed out of his wages to them for their support, and calculate from these facts the amount the jury, as reason-

able and practical men, believe the plaintiffs lose because of the death. If the deceased was guilty of contributory negligence the damages should be diminished in proportion to such negligence, and if it be established by a preponderence of the evidence that the violation by the defendant of the law of Congress requiring safety appliances upon its trains and cars contributed to the death of the deceased, or was the proximate cause thereof, then the deceased cannot be held to have been guilty of contributory negligence nor to have assumed the risk, if the jury believe that the absence of safety appliances in and about the train contributed to or was the proximate cause of the injury.

The Employers' Liability Act expressly applies to Porto Rico. It is, however, contended that the Safety Appliance Act does not. To this contention appellees answer that it is made a part of the former act by the provision of § 3 of that act "that no 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." A similar provision is made in § 4 as to assumption of risk. These opposing contentions present a serious controversy. It is, however, really doubtful if they arise on the record. The charge in the complaint is that the deceased came to his death by being crushed under the body of a car upon which he was acting as brakeman, and that his death was "caused by the negligence of the defendant in failing to cause a proper inspection of the wheels" of the car, which "inspection would have discovered the unsafe condition of the wheel in question." As a further ground of negligence it was charged that the train was running at a high rate of speed, and that if it had been running within the speed "requirements of the law, the same might and would have been stopped

before the accident occurred." To these charges the testimony was directed to sustain or deny. The amount of testimony as to contributory negligence and assumption of risk we should not think was worthy of attention if the court and counsel had not considered an instruction was called for in regard to them, and, it may be, that the question is presented of the application of the Safety Appliance Act to Porto Rico. However, we are not called upon to decide it, as we find a fatal defect of parties.

In the original complaint defendant in error alleged that she was the widow of the deceased. To this a demurrer was filed alleging as a ground that the complaint did not "state in what capacity" she sued. Thereupon an amendment was directed and made, as we have indicated. In the amended complaint she joined with her Ernest Victor Birch, alleging him to be the son and herself the widow of the deceased. By agreement of the parties the demurrer to the original complaint was considered as a demurrer to the amended complaint, and as such it was overruled.

The record shows that at the trial the plaintiffs presented, against the objection of the company, a certificate from the proper insular court "in which it was certified that the plaintiffs in the action were the legal heirs of the deceased." Subsequently the court, in passing on and overruling a motion of the company for direction of a verdict for it upon the ground that the suit was not "brought by any person authorized under the national Employers' Liability Act to bring suit," said "that the suit being brought under the act of Congress of April 22, 1908, it is properly brought in the name of the only persons for whose benefit any recovery could be had, and it is the opinion of the court that the words used in section two of the act in question, 'to his or her personal representative,' cannot be construed to mean that it is necessary, in cases where only the husband or wife could inherit and are the only survivors, that they be forced, in the absence of any estate

belonging to the deceased other than his right to sue, to have an administrator appointed."

But the words of the act will not yield to such a liberal construction. They are too clear to be other than strictly followed. They give an action for damages to the person injured, or, "in case of his death, . . . to his or her personal representative." It is true that the recovery of the damages is not for the benefit of the estate of the deceased but for the benefit "of the surviving widow or husband and children."

But this distinction between the parties to sue and the parties to be benefited by the suit makes clear the purpose of Congress. To this purpose we must yield. Even if we could say, as we cannot, that it is not a better provision than to give the cause of action to those in relation to the deceased. In the present case it looks like a useless circumlocution to require an administration upon the deceased's estate, but in many cases it might be much the simpler plan and keep the controversy free from elements but those which relate to the cause of action. But we may presume that all contending considerations were taken into account and the purpose of Congress expressed in the language it used.

It is not denied that under the laws of Porto Rico there is a distinction between heirs and personal representatives. Indeed, defendant in error cites § 61 of the Code of Civil Procedure which recognizes the distinction. The section provides: "When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death." And defendants in error urge that the National act should be construed to give a like alternative right to heirs or personal representatives, although its language is different. The purpose of the National act, it is argued, as of the Code of Civil Procedure of the Island, is to keep the action

alive and beneficently "to protect those dependent upon the employé as well as the employé himself," and that, therefore, "a 'personal representative' " might act in the place of the deceased. But it is further argued that this was not the only purpose of the act. It had the purpose of giving to a defendant company the right to have its liability determined in one action, and that such liability would be secured whether executors or administrators sued or heirs sued. The reasoning is not very satisfactory and puts out of account the absolute words of the statute. And these take a special force in Porto Rico. An employers' liability act existed there at the time of the enactment of the National act, which gave a cause of action, if the conditions of liability existed, to the widow of the deceased or to his children or dependent parents. The National act gives the right of action to personal representatives only.

Judgment reversed without prejudice to such rights as the personal representatives may have.

McCAUGHEY *v.* LYALL.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 228. Submitted April 19, 1912.—Decided May 13, 1912.

Section 1582 of the Code of Civil Procedure of California, as construed by the Supreme Court of that State, is not unconstitutional as denying due process of law to an heir of a mortgagor because it permits foreclosure against the administrator without making the heir a party to the suit.

The legislative power of the State is the source of the rights in real estate and remedies in regard thereto.

The highest court of the State can construe the laws of that State so as to make of them a consistent system of jurisprudence accommodating the rights and the remedies dealt with by the legislature.
152 California, 615, affirmed.

THE facts, which involve the constitutionality under the due process clause of the Constitution of a statute of California, are stated in the opinion.

Mr. Cyrus F. McNutt, with whom *Mr. Wm. G. Griffith* was on the brief, for plaintiffs in error:

By § 1384, Civil Code of California, the property of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of any administrator appointed by that court, for the purposes of administration.

The Supreme Court of the State held that upon the death of the ancestor, the title to the real estate vests immediately in the heir. *Bates* v. *Howard*, 105 California, 173, at 183; *Estate of Woodworth*, 31 California, 595, at 604; *Chapman* v. *Hollister*, 42 California, 462, 463.

While the legislature can provide that such heir shall take the estate subject to burden, such as the payment of the debts of the ancestor and support of his family for the time being, that is, during administration, *Brenham* v. *Story*, 39 California, 179–185, when the law of the State has established the right of the heir to take by descent and has provided that such descent shall be cast *eo instanti* at the death of the ancestor, his right is fixed by such positive law and he becomes invested of the measure of title which that law has fixed and he cannot be divested of such title without due process of law. See § 1582, Code Civ. Proc., as follows: Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and against executors and administrators

in all cases in which the same might have been maintained by or against their respective testators or intestates.

This statute, which is the basis of the rule established by the court that the heir at law is not a necessary party defendant in an action for the foreclosure of a mortgage given by his ancestor during his lifetime, is repugnant to the Fourteenth Amendment.

The general rule is that in actions to foreclose mortgages after the death of the mortgagors, their heirs are necessary parties defendant. *Lane* v. *Erskine*, 13 Illinois, 501; *Harvey* v. *Thornton*, 14 Illinois, 217; *Starke* v. *Brown*, 12 Wisconsin, 572; *Zaegel* v. *Kuster*, 51 Wisconsin, 31; *Johnson* v. *Johnson* (S. C.), 3 S. E. Rep. 606.

This is so even where the mortgagor retains an equitable interest only and the legal title is vested in the mortgagee. *Frazier* v. *Bean, Admr.* (N. C.), 2 S. E. Rep. 159.

Plaintiffs in error were neither made parties to the complaint, nor was any process issued against them by any fictitious or other name. The plaintiff contented himself with suing the administratrix alone. The judgment which was rendered was rendered against her solely. The very existence of the heirs at law was ignored and no account taken of them at any stage of the proceedings. They therefore neither had "notice" nor "opportunity to be heard," both of which, as already suggested, are essential to jurisdiction of the person, and are essential in order that the proceedings shall bind such person. *Holden* v. *Hardy*, 169 U. S. 366; *Davidson* v. *New Orleans*, 96 U. S. 97; *Myers* v. *Shields*, 61 Fed. Rep. 713; *Iowa Cent. R. Co.* v. *Iowa*, 160 U. S. 389; *Calhoon* v. *Fletcher*, 83 Alabama, 574; *Mulligan* v. *Smith*, 59 California, 206; *Clark* v. *Lewis*, 35 Illinois, 417; *Garvin* v. *Dussman*, 114 Indiana, 429; *Highland* v. *Brazil Block Coal Co.*, 128 Indiana, 335; *Happy* v. *Mosier*, 48 N. Y. 313; *Gillman* v. *Tucker*, 128 N. Y. 190; *Zaegler* v. *South &c. Alabama R. Co.*, 58

Alabama, 599; *Brown* v. *Denver*, 7 Colorado, 305; *Citizens' Horse T. Co.* v. *Belleville*, 47 Ill. App. 388.

Mr. Alexander Lyall pro se and for other defendants in error.

Mr. Justice McKenna delivered the opinion of the court.

This writ of error is directed to a judgment of the Supreme Court of the State of California sustaining the title of defendants in error to certain lands in that State derived through a sheriff's sale of the same upon suit for foreclosure of a mortgage. The suit was instituted and prosecuted against the administratrix of the estate of the father of plaintiffs in error, they not having been made parties nor given notice of pendency of the suit.

The facts, as stated in the opinion of the court, are as follows (152 California, 615, 616):

"George McCaughey died intestate on March 1, 1890. The plaintiffs are his children and heirs at law. During his lifetime, on June 6, 1889, the deceased executed a mortgage on certain land to one H. J. Finger to secure a promissory note for five hundred dollars, which was due and unpaid at the death of the decedent. After his death Susan McCaughey was duly appointed and qualified as administratrix of his estate. The note and mortgage were duly presented to the administratrix and were allowed by her and approved by the probate judge. In January, 1894, Finger commenced an action against the administratrix to foreclose the mortgage, but did not make plaintiffs parties to such action. Such proceedings were had that a judgment of foreclosure was regularly rendered under which the land was duly sold by the sheriff on April 10, 1895, to defendant Lyall, who in due time received a sheriff's deed therefor. Several years afterwards this present action was brought by said heirs to have

it adjudicated that they are the owners of an undivided one-half of the said land; that the claim of the defendants thereto be adjudged null and void; that plaintiffs recover the possession of the land, etc. A general demurrer to the complaint was interposed by the defendant Lyall and by other defendants. The demurrers were sustained; and plaintiffs declining to amend, judgment was rendered for defendants."

The judgment was affirmed by Department 2 of the Supreme Court and a petition for rehearing in banc was denied. Thereupon the chief justice of the court granted this writ of error.

The contention of plaintiffs in error is that the law cast upon them the title to the land upon the death of their intestate ancestor and that such title could not be divested in a suit in which they were not parties.

To sustain the contention plaintiffs in error make, as we shall see, one part of the law of the State paramount to another part, certain decisions of the courts of the State paramount to other decisions, putting out of view that necessarily the coördination of the laws of the State and the accommodation of the decisions of its courts is the function and province of the tribunals of the State, legislative and judicial respectively.

For their rights of property plaintiffs adduce § 1384 of the Civil Code of the State, which provides that "the property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of any administrator appointed by that court, for the purposes of administration." And decisions of the Supreme Court are cited holding, it is said, "that upon the death of the ancestor, the title to the real estate vests immediately in the heir." From the code and the decisions it is deduced that the descent being cast at the instant of the death of ancestor, the "right of the heir is

fixed by such positive law and he becomes invested with the measure of title which that law has fixed and cannot be divested of such title without due process of law."

It is admitted that the heir takes subject to administration, but with that limitation only, it being contended further that "he holds precisely the title held by the ancestor." Section 1582 of the Code of Civil Procedure of the State is cited as defining the limitation. It provides that "actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates."

The Supreme Court of the State in a number of decisions has considered that section to mean that an heir is not a necessary party with the administrator. *Cunningham* v. Ashley, 45 California, 485; *Bayly* v. *Muehe*, 65 California, 345; *Finger* v. *McCaughey*, 119 California, 59; *Dickey* v. *Gibson*, 121 California, 276. This is conceded by plaintiffs in error, but they say that because § 1582 of the Code of Civil Procedure "is made the basis of the rule established by the Supreme Court of the State " they complain of it, and respectfully urge that it "is repugnant to the Fourteenth Amendment of the Constitution of the United States, § 1." This is equivalent to saying that the legislative power of the State, being the source of the rights and the remedies, has so dealt with one as to make the other repugnant to the Constitution of the United States; or, if the complaint be of the decisions, that the Supreme Court of the State cannot construe the laws of the State and make of them a consistent system of jurisprudence, accommodating rights and remedies. Both contentions are so clearly untenable that further discussion is unnecessary. *Judgment affirmed.*

WASKEY *v.* CHAMBERS.

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

No. 221. Argued April 23, 24, 1912.—Decided May 13, 1912.

The word "conveyance" as used in § 98 of the act of June 6, 1900, c. 786, 31 Stat. 321, 505, is not to be narrowly construed but includes leases as well as transfers in fee.

One, who under a lease of a mine, enters on the property and expends money in developing it, gives a valuable consideration for the lease and is protected by the recording act.

A deed altered after acknowledgment and having only one witness is not entitled to registration under the recording act of June 6, 1900, and has no effect against persons without actual notice.

172 Fed. Rep. 73; 96 C. C. A. 561, reversed.

THE facts are stated in the opinion.

Mr. Albert Fink, with whom *Mr. W. H. Metson* was on the brief, for petitioner.

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

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the respondent, Chambers, against Waskey and others, to recover possession of a placer mining claim and damages for gold extracted from the same. Waskey defended under two leases from the parties alleged by him to be the owners. The plaintiff had a verdict and a judgment which was affirmed by a majority of the Circuit Court of Appeals, 172 Fed. Rep. 73, 96 C. C. A. 561. The facts as they are to be taken under the

verdict are these. Whittren was the original locator of the claim. He made a deed of a part interest to Chambers, and acknowledged it on April 21, 1902, the notary being the only witness. In May, 1906, the deed was altered by consent of the parties so as to convey one-half, and was filed for recording on June 20 of that year. On September 24, 1905, Whittren conveyed one-half to Eadie, and this deed was recorded. On June 11, 1906, Whittren and Eadie, who were the record owners, made a lease of a part to Waskey for two years, recorded on August 22, 1906, and on June 20, 1906, Whittren made a lease of the other part to Eadie and Waskey, which was recorded on August 30, 1906. Waskey denied the validity of the deed to Chambers and also claimed as purchaser for value without notice. The Circuit Court of Appeals held that the deed to Chambers was good as between the parties and that Waskey was not within the protection of the statute as a purchaser without notice and also that he gave no valuable consideration for his lease, these questions having been raised below by exclusion of evidence and instructions of the court.

The act of Congress reads, "Every conveyance of real property within the district hereafter made which shall not be filed for record as provided in this chapter shall be void against any subsequent innocent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded." Act of June 6, 1900, c. 786, Tit. 3, § 98, 31 Stat. 321, 505. Code, Part V, § 98. The Circuit Court of Appeals went on the ground that a lease creates only a chattel interest and is not a conveyance and therefore is not within the protection of the statute. But it is obvious that in principle the right of a lessee is the same as that of a purchaser in fee, and it would be a great misfortune, especially to mining interests, if a man taking a lease from those whom the record showed and he believed

to be the owners, were liable, after spending large sums of money on the faith of it, to be turned out by an undisclosed claimant on the strength of an unrecorded deed. We find no words in the statute that require such a result. On the contrary, the word "conveyance" is defined, although for other purposes, as embracing every written instrument except a will by which any interest in lands is created. Act of 1900, Tit. 3, § 136, 31 Stat. 510. Code, Part V, § 136. See Tit. 2, § 1046, 31 Stat. 493. Code, Part IV, § 1046. And the statute provides for the recording of leases, as well as of deeds and grants, Act of 1900, Tit. 1, § 15, 31 Stat. 327. Code, Part III, § 15. Blackstone defines a lease as a conveyance, 2 Comm. 317, and in Shepard's Touchstone, 267, leases are ranked under the head of grants,—'as in other grants.' The point does not need authority except to exclude the notion that the statute uses the word in a narrower sense.

It is said that Waskey was not a purchaser for value. By the lease of June 11 he agreed to enter at once and work the mine continuously and to pay thirty per cent of the gold and precious minerals or metals extracted. The other agreement was similar, except that one-eighth was to go to Whittren, one-eighth to Eadie and the remainder, after paying mining expenses, to be divided between Waskey and Eadie. His working the mine was a valuable consideration and none the less so if in the event he was reimbursed for his expenditures and made a profit for his trouble.

Waskey was in possession and at work before the deed to Chambers was filed for recording, but we do not have to consider whether possession under the lease would have the same effect as getting the later instrument recorded before the earlier one under § 98 above quoted. For although the deed to Chambers was filed before the leases, it had no effect as against people without actual notice. It never had but one witness, two being necessary to au-

thorize the recording of a deed, and the only acknowledgment was before the alteration. Therefore it was filed without authority, was not entitled to registration, and, as we have said, had no effect as against the petitioner. Act of 1900, Tit. 1, § 15. Title 3, §§ 82, 95. 31 Stat. 327, 503, 505. Code, Part III, § 15. Part V, §§ 82, 94. *Alaska Exploration Co.* v. *Northern Mining & Trading Co.*, 152 Fed. Rep. 145. 81 C. C. A. 363.

Judgment reversed.

LEARY, ADMINISTRATRIX OF LEARY, *v.* UNITED STATES.

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

No. 508. Argued April 29, 30, 1912.—Decided May 13, 1912.

In a suit brought by the United States to charge the defendant with a trust in respect to funds obtained by another through fraud against the United States, *held* that the personal representative of a third party claiming an interest in the funds under an agreement indemnifying him as bail of the party fraudulently procuring such funds was, under the circumstances of this case, entitled to intervene.

A contract that certain specific assets in the hands of a trustee should be held as security for a specific contingent claim is necessarily express, and is none the less so if conveyed by acts importing it than if stated in words.

Where the intervenor has not legal title and is not claiming against an admitted prior equity as a purchaser without notice, allegations of ignorance of facts not admitted and not finally established are not essential.

Bail no longer is the *mundium*, and distinctions between bail and suretyship are nearly effaced. *Quære;* whether a contract to indemnify bail which is legal by statute in New York where made is void as against the public policy of the United States.

In this case, as the intervenor did not know of the suit or the position taken by defendant, who was legally her trustee, she should not be held guilty of laches.
184 Fed. Rep. 433, 107 C. C. A. 27, reversed.

THE facts are stated in the opinion.

Mr. J. T. Coleman, with whom *Mr. David McClure* and *Mr. A. E. Strode* were on the brief, for appellant:

An express contract to indemnify a person on his becoming bail for a prisoner charged with crime is not illegal in violation of public policy. *United States* v. *Ryder*, 110 U. S. 729, distinguished. That case only holds that where a recognizance in a criminal case is forfeited and paid by the bail, there is no implied contract on the part of the criminal to refund the money to the bail; but it also holds that an express contract to indemnify the bail in such case may be sustained.

In the bill of intervention in this case an express contract was averred. See *Simpson* v. *Robert*, 35 Georgia, 183; Rev. Stat., § 1014; *United States* v. *Rundlett*, 2 Curtis, 44; *United States* v. *Ewing*, 140 U. S. 142; *United States* v. *Horton*, Fed. Cas. No. 15,393; *United States* v. *Evans*, 2 Fed. Rep. 147; *United States* v. *Case*, 8 Blatchf. 250.

In the State of New York, where the contract between Leary and Green was made, a contract to indemnify a bail is not contrary to public policy. *Maloney* v. *Nelson*, 144 N. Y. 189; *S. C.*, 158 N. Y. 355.

The public policy of a State, with respect to contracts made within it and sought to be enforced therein, is obligatory upon the Federal courts whether acting in equity or at law. *Missouri &c. Trust Co.* v. *Krumseig*, 172 U. S. 351.

Indeed, there is no national public policy in cases like the one under consideration. Congress has adopted the statutes, and therefore the policy, of the several States in reference to bailing persons charged with crime, and has

assimilated all proceedings in such cases to the usual proceeding in the State in which the person is let to bail.

For one accused of crime to solicit bail is not immoral. For an accused person to offer indemnity to another to become his bail can hardly be illegal. If a stranger in a strange land could not offer such indemnity, he would, in most cases, have no alternative but to submit to deprivation of his liberty without trial.

Mr. Marion Erwin, Special Assistant to the Attorney General, with whom *The Solicitor General* was on the brief, for the United States:

The petition is without jurisdictional merit, and the appeal is for delay only.

The property in controversy equitably belonged to the United States, from a time antecedent to when it is claimed that Leary acquired the rights in the property relied upon in the petition; the petitioner failed to plead that such rights had been acquired by a *bona fide* purchaser.

It appears from the averments of the intervention, that at the time of the alleged agreement of January 20, 1902, relied upon by the petitioner to create an equitable lien in the stocks in controversy, the stocks were and for months had been held by and in the name of Kellogg for the sole benefit of Greene, and that there was no delivery or change of possession, and it was not provided in the agreement that Leary should ever be given possession, but only that Kellogg should, in the event of Leary's being held liable on the bond, apply the stocks to the payment of Leary's debt, and with the right reserved in Greene to withdraw said securities from Kellogg's possession and substitute others in their place. The facts pleaded do not create a legal or equitable lien on the stock in favor of Leary or constitute an assignment of the fund even in equity. *Christmas* v. *Russell,* 14 Wall. 70; *Trist* v. *Child,* 21 Wall.

447; *Casey* v. *Cavaroe*, 96 U. S. 467; *Third Nat. Bk.* v. *Insurance Co.*, 193 U. S. 581; *Williams* v. *Ingersoll*, 89 N. Y. 508; *Thomas* v. *Railway*, 139 N. Y. 163.

A refusal to grant leave to intervene is not ordinarily considered as finally adjudicating the rights of the parties on the merits. The petitioner may come back with a new petition or ancillary bill, curing defects of pleading and asserting rights not substantially asserted in the former petition.

This case does not fall within the exception to the rule where a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated. *Credits Commutation Co.* v. *United States*, 171 U. S. 311.

Petitioner appealed from the order made on the petition as first presented, without attempting to amend or cure the defects, and by so doing waived all right to amend and made the adjudication of her rights in the subject-matter of the petition final. *The Three Friends*, 166 U. S. 1.

The request to amend here comes too late. *Nat. Bank* v. *Carpenter*, 101 U. S. 567.

This court is without jurisdiction to allow the amendments, or to entertain an appeal, for the mere purpose of allowing amendments not offered in the trial court, where neither the pleadings nor evidence in the trial court states a case.

Failure to aver *bona fide* purchase is fatal. *Smith* v. *Gale*, 144 U. S. 519; *Coffey* v. *Greenfield*, 62 California, 602; 11 Ency. Pl. & Practice, 506; *Minot* v. *Mastin*, 37 C. C. A. 238, 95 Fed. Rep. 839.

An intervenor must set out his demand as clearly and explicitly as a plaintiff. *Clapp* v. *Phelps*, 19 La. Ann. 461; *Davis* v. *Sullivan*, 33 N. J. Eq. 569; *Empire Dist. Co.* v. *McNulta*, 77 Fed. Rep. 703; *Buel* v. *Farmers' L. & T. Co.*, 95 Fed. Rep. 839-842.

It is not enough to say that Leary's claim is superior to the Government's claim, for that is a mere conclusion to be drawn or not drawn from the facts well pleaded. *Gould* v. *R. R. Co.*, 91 U. S. 526.

The failure of an intervenor to make proper averments excusing gross laches apparent on the face of an intervention, as in the case at bar, is fatal. *Lansdale* v. *Smith*, 106 U. S. 391; *Smith* v. *Gale*, 144 U. S. 509; *O'Brien* v. *Wheelock*, 184 U. S. 450; *Buel* v. *F. L. & T. Co.*, 44 C. C. A. 277; *Trust Co.* v. *Toledo &c., Ry.*, 82 Fed. Rep. 642.

The contract as one of indemnity for bail was against public policy.

Uncertain and ambiguous averments in pleadings must be construed most strongly against the pleader. The alleged contract of January 20, 1902, must be taken as asserting only an implied contract of a principal to indemnify bail in a criminal case. If so, the suit is fatally defective. *Ryder* v. *United States*, 110 U. S. 729, 737; *United States* v. *Simmons*, 47 Fed. Rep. 577; *Herman* v. *Jeunchner*, 16 Q. B. Div. 561; 3 A. & E. Ency. Law, p. 684; 16 A. & E. Ency. Law, p. 172.

Whatever may be the public policy of particular States as to the administration of the criminal laws, the public policy of the United States as declared by the Federal courts must control in the case at bar.

Prior to the enactment of the "Cash Deposit Law," the public policy of New York was held to be against such indemnification of bail by the principal in a criminal case, but not against indemnification by third parties. *People* v. *Ingersoll*, 14 Abb. Pr. (N. S.) 23, but see New York Code Crim. Proc., § 586.

This legislation changed the public policy of the State, so that a contract of a principal to indemnify bail is no longer against the public policy of the State. *Maloney* v. *Nelson*, 158 N. Y. 355.

While it is generally true that the public policy of a State with respect to contracts made within the State and sought to be enforced therein is obligatory on the Federal courts, whether acting in equity or at law, these views are not applicable to cases arising out of interstate commerce, where the policy to be enforced is Federal. *Missouri &c. Co.* v. *Kruning*, 172 U. S. 351; *United States* v. *Trans-Missouri Asso.*, 166 U. S. 290.

The provisions of § 33 of the Judiciary Act, § 1014, Rev. Stat., relate to bail as known at common law.

This court goes to the common law for definitions of common-law words, especially in matters of criminal procedure, and criminal procedure in the Federal courts is controlled by the common law. *United States* v. *Reid*, 12 How. 366; *Logan* v. *United States*, 144 U. S. 301; *Shaw* v. *Merchants' N. Bank*, 101 U. S. 557; *Brown* v. *Barry*, 3 Dall. 365; *The Abbotsford*, 98 U. S. 440; *Minot* v. *Mechanics' Bank*, 1 Pet. 46.

In the construction of the laws of Congress the rules of the common law furnish the true guide. *Rice* v. *Minn. R. R. Co.*, 1 Black, 358; *United States* v. *Freeman*, 3 How. 556; *United States* v. *Babbit*, 1 Black, 55; *Harrington* v. *United States*, 11 Wall. 356; *Ryan* v. *Carter*, 93 U. S. 78; *Reiche* v. *Smythe*, 13 Wall. 162.

Among the statutes *in pari materia* with § 1014 are §§ 1018, 1019, Rev. Stat., relating to the right of bail to arrest the principal and the surrender of persons charged with crime by their "bail" and the entry of *exonatur* upon the recognizance, etc. *United States* v. *Burr*, Fed. Cas., No. 14,694.

No law of a State made since 1789 can affect the mode of proceeding or the rules of evidence in criminal cases. *United States* v. *Reid*, 12 How. 366; *Logan* v. *United States*, 144 U. S. 301.

The law of the State allowing the substitution of a different species of security in lieu of bail at the option of

the defendant has no legal effect on Federal cases. *United States* v. *Ryder*, 110 U. S. 729.

A change in the public policy of the State of New York as a result of a legislative enactment, which authorizes the principal to contract to indemnify his surety in criminal cases, and destroys the effective safeguards provided by the interested watchfulness of common bail, is in contravention of the public policy of the United States, and the latter must prevail.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition for leave to intervene in a suit brought by the United States to charge the defendant Kellogg with a trust in respect of funds alleged to have been received by him from Greene and to have been obtained from the plaintiff by Greene through his participation in the well known Carter frauds. The funds specially referred to were certain shares of railroad stock standing in Kellogg's name but held in trust for Greene. The nature of the alleged frauds can be gathered from *United States* v. *Carter*, 217 U. S. 286. See *Greene* v. *Henkel*, 183 U. S. 249. The bill of intervention alleges the indictment of Greene and that the plaintiff's deceased became surety upon Greene's bail bond "upon the understanding and condition that the securities held in trust or on deposit" by Kellogg from Greene, being the above mentioned railroad stock, should remain in Kellogg's hands as security and indemnity to Leary for signing the bond. It goes on to allege Greene's failure to appear, a forfeiture of the bond, a suit upon it brought September 10, 1903, and a judgment for the United States against the intervenor on January 6, 1908. Finally the bill sets forth that the United States not only has got an injunction *pendente lite* forbidding Kellogg to deliver the fund to the intervenor to be used in partial liquidation of the judgment against her but is pressing the collection of the judgment;

and that the United States has no equity unless subject to that which the intervenor claims.

This suit was begun on December 19, 1903. The evidence had been taken and it was ready for final hearing when the petition for leave to intervene was filed, April 18, 1908. But the action on the bond seems to have been contested, and no judgment was entered until January 6, 1908, as we have said. The Circuit Court intimated an opinion that the bill of intervention was defective for want of an allegation that Leary, at the time of his agreement, did not know the facts alleged in the principal bill to raise a trust for the Government, and also that, so far as appears, it might be brought upon a supposed implied contract, whereas no such undertaking of indemnity would be implied by the law, citing *United States* v. *Ryder*, 110 U. S. 729. But observing that the petition might be amended in these respects, it held that amendment would be unavailing, as the contract was against public policy and void. 163 Fed. Rep. 442. The Circuit Court of Appeals, without deciding upon this last point, affirmed the decree on the above mentioned ground that Leary's knowledge was not negatived, and also on that of laches, apparent and unexplained. 184 Fed. Rep. 433. 107 C. C. A. 27.

The result is that the petitioner is denied her chance to be heard for want of amendments which the court that might have allowed them told her that it was no use to make as it was going to decide against her whatever she did. Even if the court would have allowed them, which is a speculation, it is holding a party to very technical rules to say that while one case was being dealt with below, he ought to have contemplated having to meet a different one above. But we need not consider that matter, as we are of opinion that the bill, without amendment, showed a sufficient right to intervene.

We lay on one side the suggestion that the intervention goes only upon an implied contract in its proper sense of

an obligation raised by the law irrespective of any real promise. That would seem to us a perverted interpretation of the words 'upon the understanding and condition' even if the contract were only a general one to indemnify, but a contract that certain specific stock in the hands of a trustee should be held as security for a specific contingent claim could not exist unless it was express. It would be none the less express if it was conveyed by acts importing it than if it was stated in words. The point that Leary's knowledge ought to have been denied impresses us hardly more. The plaintiff has not the legal title and is not claiming against an admitted prior equity as a purchaser without notice. Her position is that she does not know whether the United States has any equity or not, but that whatever rights the United States may have are inferior to hers. She is not called on to allege Leary's ignorance of facts that she does not admit and that are not yet finally established. We are of opinion that any one reading the bill in the same way that he would read an untechnical document would have no doubt that the plaintiff meant to put her case as we have taken it.

The only matters that seem to us to need argument are the questions of public policy and laches. As to the former the ground for declaring the contract invalid rests rather on tradition than on substantial realities of the present day. It is said that the bail contemplated by the Revised Statutes (§ 1014) is common-law bail and that nothing should be done to diminish the interest of the bail in producing the body of his principal. But bail no longer is the *mundium*, although a trace of the old relation remains in the right to arrest. Rev. Stat., § 1018. The distinction between bail and suretyship is pretty nearly forgotten. The interest to produce the body of the principal in court is impersonal and wholly pecuniary. If, as in this case, the bond was for $40,000, that sum was the

measure of the interest on anybody's part, and it did not matter to the Government what person ultimately felt the loss so long as it had the obligation it was content to take. The law of New York recognizes the validity of contracts like the one alleged, and without considering whether the law of New York controls we are content to say merely that the New York decisions strike us as founded in good sense. *Maloney* v. *Nelson*, 144 N. Y. 182, 189. *S. C.*, 158 N. Y. 351, 355.

As to laches, there is no legal presumption that the petitioner knew of this suit and still less that she knew the position taken by Kellogg. He set up that the stock was taken as indemnity to himself for his promise to indemnify Leary, &c., and said nothing about the petitioner's claim. If that claim is well founded and she knew of this suit, it was not laches in her to assume that Kellogg would do his duty as her trustee. She might be bound by a decree against him, but before decree on discovering his conduct she fairly may ask a chance to protect herself. Moreover as she disputed liability on the bond she had an additional reason for not moving until the case against her had gone to judgment. See *Anonymous*, 11 Mod. 2. On the whole matter it seems to us that she was dealt with too technically. She presents a case which unless read with an adverse mind is a good one on its face, and whatever misgivings we may entertain, we are of opinion that she ought to be allowed to try to prove it. In the circumstances it seems to us that the leave to intervene may be granted subject to the condition that the evidence already in shall be taken to be evidence against her subject to her right to recall and cross-examine such witnesses for the Government as she may be advised.

Decree reversed.

MR. JUSTICE MCKENNA and MR. JUSTICE PITNEY dissent.

TEXAS & PACIFIC RAILWAY COMPANY *v.* HOWELL.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 947. Submitted April 22, 1912.—Decided May 13, 1912.

Where the basis for review by this court has no bearing on the questions raised, but is simply plaintiff in error's charter from the United States, this court goes no further than to inquire whether plain error is made out.

In this case *held*, that there was no assumption of risk on the part of an employé working under a coal chute who was struck by a piece of timber falling from above him where other men had been put to work; even if the employé had knowledge of such overhead work, the duty of the employer to provide a reasonably safe place to work remained.

Where the injury actually caused the disease, the injured party may recover even if the disease does not immediately develop; and in this case *held*, that the jury were warranted in finding that Potts disease with which defendant in error was afflicted was the direct cause of the injury, although it did not develop for over a year.

THE facts, which involve the liability of an employer for injury to an employé, are stated in the opinion.

Mr. William L. Hall for plaintiff in error:

The plaintiff below failed to make out a case of negligence on the part of the railroad company, and the jury should have been so instructed.

That portion of the evidence raising a question as to whether the defendant was entitled to peremptory instruction is practically without contradiction.

Temporary imperfections incident to a repair are not within the general rule. Bishop's Non-contract Law, § 649; *Koatz* v. *Chicago R. R.*, 65 Iowa, 224.

The mere happening of the accident did not raise a presumption of negligence. There is no liability in the case unless the railway company was negligent, and the burden was on plaintiff to show negligence. The facts are undisputed that while Howell was doing the work below and his fellow servants were doing the work above, a piece of plank slivered off and fell and struck Howell. The mere happening of this unexpected result cannot be said to condemn the method or plan of the work, without further evidence. If there was no negligence shown on the part of the defendant, the plaintiff assumed the risk and the consequences. *Patton* v. *T. & P. Ry.*, 179 U. S. 658; *H. & T. C. Ry.* v. *Alexander*, 132 S. W. Rep. 119.

The rule requiring a railroad company to furnish a safe place for its employés to work has no application to a case where laborers are sent to repair a defective structure such as a coal chute.

The rule is not applicable to cases in which the very work which the servants are employed to do is of such a nature that its progress is constantly changing the conditions as regards an increase or diminution of safety. Labatt on Master and Servant, § 269.

For instances of this general exception to the "safe place" rule see *Schneider* v. *Quartz Co.*, 220 Pa. St. 548, 69 Atl. Rep. 1035; *C., C., C. & St. L. Ry.* v. *Brown*, 20 C. C. A. 147, 73 Fed. Rep. 970. See, also, *American Bridge Co.* v. *Seeds*, 75 C. C. A. 407, 144 Fed. Rep. 605; *Fortin* v. *Manville Co.*, 128 Fed. Rep. 642; *Montgomery* v. *Robertson*, 229 Illinois, 466, 82 N. E. Rep. 396; *Bedford Quarries Co.* v. *Bough*, 80 N. E. Rep. 529; *Mehan* v. *Railway*, 90 S. W. Rep. 119.

The rule does not apply where the place is undergoing a change by the very work the servants are performing. *G., C. & S. F. Ry.* v. *Jackson*, 65 Fed. Rep. 48; *Moore* v. *Railway*, 31 Atl. Rep. 734.

The safe place rule does not apply in construction

work on buildings; *Richardson* v. *Provision Co.*, 72 Ill. App. 77; *McNeil* v. *Bottsford-Dickinson Co.*, 112 N. Y. Supp. 867; nor in the demolition of a building; *Clark* v. *Liston*, 54 Ill. App. 578; *Kreigh* v. *Westinghouse*, 152 Fed. Rep. 120; *McElwaine-Richards Co.* v. *Wall*, 166 Indiana, 267; *Armour* v. *Hahn*, 111 U. S. 313; *Texas, Armour & Co.* v. *Dumas*, 95 S. W. Rep. 710; *Allen* v. *Ry. Co.* (Texas), 37 S. W. Rep. 171; *Walton* v. *Hotel Co.*, 160 Pa. St. 3; *Clancy* v. *Constr. Co.*, 50 N. Y. Supp. 800; *Walaszewski* v. *Schoknecht*, 120 Wisconsin, 376; 2 Bailey, "Personal Injuries Relating to Master and Servant," Vol. 2, §§ 2993, 3001, and 3022; Dresser's Employer's Liability, 535; *Moon-Anchor Gold Mines* v. *Hopkins*, 111 Fed. Rep. 303; *Finlayson* v. *Milling Co.*, 67 Fed. Rep. 507; *Railway* v. *Jackson*, 65 Fed. Rep. 48; *Railway Co.* v. *Brown*, 73 Fed. Rep. 970.

The employé engaged in making the necessary repairs, or engaged in moving a broken car or engine in order that the same may be repaired, assumes the ordinary risk of danger incident thereto. *Southern Ry. Co.* v. *Lyons*, 169 Fed. Rep. 560; citing *Railroad* v. *Mayo*, 14 Tex. Civ. App. 253; *Railway* v. *O'Hare*, 64 Texas, 603; *Watson* v. *Railway*, 85 Texas, 438; *Florence Railroad* v. *Whipps*, 138 Fed. Rep. 13.

The plaintiff assumed the risk of planks falling from the floor above on to him if he knew the other servants were at work tearing up the floor over him.

It was not negligent for the employer to send men up on to the staging of the coal chute if it be true that no harm would result if the men above carefully performed their work.

The Potts disease of the spine with which the plaintiff is now suffering is too remote a consequence to be chargeable against the defendant as the result of the injury he received. *Crane Elevator Co.* v. *Lippert*, 63 Fed. Rep. 942, can be distinguished.

While Potts disease may not in some cases be such a

direct result of an injury as to be the basis of a recovery, in this case the result is too remote from the injury and too many circumstances have intervened to allow us to look to his present condition.

At common law death must ensue within one year from the injury to make the injury the legal cause of the death.

Mr. S. P. Jones for defendant in error:

The trial court did not err in refusing to direct a verdict in favor of the railway company, in that the evidence was sufficient to justify the jury in finding that the railway company was guilty of negligence which was the proximate and direct cause of the injury to plaintiff below. *Baltimore & Ohio Ry. Co.* v. *Baugh*, 149 U. S. 386; *Mather* v. *Rillston*, 156 U. S. 398; *T. & P. Ry. Co.* v. *Archibald*, 170 U. S. 672; *Choctaw, Oklahoma & Gulf Ry.* v. *McDade*, 191 U. S. 68; *Northern Pacific Ry.* v. *Babcock*, 154 U. S. 190; *Northwestern Fuel Co.* v. *Danielson*, 6 C. C. A. 636; *Chicago Housewrecking Co.* v. *Birney*, 54 C. C. A. 458; *National Steel Co.* v. *Lowe*, 62 C. C. A. 229; 4 Thompson on Negligence, §§ 3809, 3814; 1 Shearman & Redfield, §§ 185*b*, 194.

The trial court did not err in refusing to charge that the plaintiff assumed the risk of planks falling from the floor above him if he knew that the other servants were at work tearing up the floor over him.

The trial judge correctly instructed the jury that plaintiff below, in accepting employment, assumed the risks which were ordinarily incident to that employment, but did not assume risks that were the result of the negligence of the railway company; and that if he was injured by reason of one of the risks ordinarily incident to the employment, that he could not recover. *Northwestern Fuel Co.* v. *Danielson*, 6 C. C. A. 636; *Mather* v. *Rillston*, 156 U. S. 398; *Choctaw, Oklahoma & Gulf Ry.* v. *McDade*, 191

U. S. 68; 1 Sherman & Redfield, § 185*b*; *Chicago Housewrecking Co.* v. *Birney*, 54 C. C. A. 458; see also Texas Assumed Risk Statute. Gen. Laws, 29th Leg., 1905, p. 386.

The trial court correctly authorized a recovery for the injury and suffering brought about by "Potts disease" in the event the jury should find that the same was the direct and proximate result of the injury. *M. & St. P. Ry. Co.* v. *Kellogg*, 94 U. S. 469; *Travelers' Insurance Co. of Hartford* v. *Melich*, 65 Fed. Rep. 178, 12 C. C. A. 544; *Crane Elevator Co.* v. *Lippert*, 63 Fed. Rep. 942, 11 C. C. A. 521; 13 Cyc., pp. 30–31; 15 Century Digest, Title "Damages," §§ 41–43; *H. & T. C. Ry.* v. *Leslie*, 57 Texas, 83.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for personal injuries done to the plaintiff, the defendant in error, Howell, while in the employ of the Railway Company. The plaintiff had a verdict and judgment, subject to exceptions, and the judgment was affirmed without discussion by the Circuit Court of Appeals. The material facts can be stated in a few words. The plaintiff was set to digging a hole for a post under a coal chute. While he was at work the defendant put other men to removing certain timbers and planks from the floor twelve feet or so above him, without his knowledge, as he contends, and a piece of timber fell and struck the plaintiff on the head. The plaintiff now is suffering from tuberculosis of the spine, in consequence, as he says, of the blow. The defendant asked the court to direct a verdict, and also to instruct the jury that if the plaintiff knew that other servants were tearing up the floor above him he took the risk, that if no harm would have resulted but for the negligence of those other servants the defendant was not liable, and that the plaintiff's present disease of the spine was too remote from the blow to be attributed to it as a result.

The case was left to the jury with instructions that if the injury was due to negligence of the defendant in sending men to work above the plaintiff, as a contributing cause, the defendant was liable, but not if it was due only to the negligence of fellow-servants in their way of performing their work. The question also was left to the jury whether the disease was the direct consequence of the blow.

The case was begun in the state court and was removed to the Circuit Court, and is brought here, solely on the ground that the plaintiff in error has a charter from the United States. But for that accident, which has no bearing upon the questions raised, the case would stop with the Circuit Court of Appeals. Under such circumstances we go no further than to inquire whether plain error is made out. *Chicago Junction Railway Co.* v. *King*, 222 U. S. 222. We find nothing that requires us to reverse the judgment. It was open to the jury to find that the usual duty to take reasonable care to furnish a safe place to the plaintiff in his work remained. They well might be of opinion that the general nature of the things to be done gave no notice to the plaintiff that he was asked to take a necessary risk. At the same time they were warranted in saying that if the defendant saw fit to do the work above and below at the same time it did so with notice of the danger to those underneath and took chances that could not be attributed wholly to the hand through which the harm happened. Even if Howell knew that repairs were going on overhead that did not necessarily put him on an equality with his employer, and require a ruling that he took the risk. *Kreigh* v. *Westinghouse, Church, Kerr & Co.*, 214 U. S. 249.

The plaintiff was injured on March 3, 1908. There was ample evidence that the blow occasioned the development of his disease, although it was not discovered to be the Potts disease, as it is called, for over a year.

But it is argued that if such a disease is due to the presence of tubercular germs in a man's system before the accident the defendant ought not to be required to pay more than it would to a normal man. On this point also we are of opinion that the jury were warranted in finding that the disease was the direct result of the injury, as they were required to, by the very conservative instructions to them, before holding the defendant to answer for it. *Crane Elevator Co.* v. *Lippert*, 63 Fed. Rep. 942. 11 C. C. A. 521. *Spade* v. *Lynn & Boston R. R. Co.*, 172 Massachusetts, 488, 491. *Smith* v. *London & South Western Ry. Co.*, L. R. 6 C. P. 14, 21.

Judgment affirmed.

B. ALTMAN & CO. *v.* UNITED STATES.

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

No. 208. Argued April 25, 26, 1912.—Decided May 13, 1912.

This court will entertain a direct review of the judgment of the Circuit Court under § 5 of the Circuit Court of Appeals Act of 1891, in a revenue case which involves not only questions of classification and amount of duty thereunder, but also questions as to the constitutionality of a law of the United States or the validity or construction of a treaty under its authority.

Where the importer throughout has insisted that the merchandise is dutiable at the rate fixed by a reciprocal agreement entered into by the United States under § 3 of the Tariff Act of 1897, there is a direct appeal to this court under § 5 of the Circuit Court of Appeals Act of 1891, provided such agreement is a treaty.

Generally a treaty is a compact between two or more independent nations with a view to the public welfare, but *quære* whether under the provisions of the Constitution of the United States an agreement is a treaty unless made by the President and ratified by two-thirds of the Senate.

In construing the Circuit Court of Appeals Act of 1891, the intent of Congress will be considered, and it was manifestly to permit rights and obligations resting on international compacts and their construction to be passed on by this court.

A reciprocal agreement between the United States and a foreign nation entered into and proclaimed by the President under authority of § 3 of the Tariff Act of 1897 is a treaty within the meaning of § 5 of the Circuit Court of Appeals Act.

A term used in a reciprocal agreement made under § 3 of the Tariff Act of 1897 will be construed in the same way that such term is defined in the act itself; and so *held* that the word "statuary" used in the reciprocal agreement of May 30, 1898, with France of, 30 Stat. 1774, includes only such statuary as is cut, carved, or otherwise wrought by hand as the work of a sculptor.

172 Fed. Rep. 161, affirmed.

THE facts, which involve the construction of the tariff acts and of the reciprocal agreement with France of May 30, 1898, are stated in the opinion.

Mr. Henry J. Webster, with whom *Mr. John K. Maxwell* and *Mr. Howard T. Walden* were on the brief, for plaintiff in error:

The so-called agreement with France is a treaty.

The President and Senate undoubtedly have complete control of the making of treaties, so long as they refuse to join with the House of Representatives in making a treaty by act of Congress. There is a practical limitation to their power of carrying treaties into execution in cases where an act of Congress is necessary for that purpose, but that is a separate matter from their power to *make* treaties, which is unqualified. The House, therefore, has no right to demand any agency or share in the making of treaties, but has only a right to demand a share in the legislation, if any be necessary, to make them effective. If, however, the President and Senate voluntarily join with the House in the enactment of a law which authorizes the making of a treaty, and provides for its taking effect upon proclamation by the President, such action

includes the approval of the President, the advice and consent of the Senate, and the legislation required to put it into execution.

The power to pass a law authorizing the President to make a treaty reducing rates of duty in consideration of reciprocal reductions by a foreign nation, is an exercise of the power conferred by Art. I, § 8, to make all laws necessary and proper for carrying into execution the foregoing powers. *Legal Tender Cases*, 12 Wall. 457, 533, 538; quoting from *Fisher* v. *Blight*, 2 Cranch, 358.

The mere designation of the instrument by another name, even by Congress and the President, does not prevent its being a treaty, if it is such in substance. *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429, quoted with approval in *Fairbank* v. *United States*, 181 U. S. 283.

Treaties have quite frequently been denominated conventions, but that does not change their nature as treaties. *Bartram* v. *Robertson*, 122 U. S. 116, 118.

If a treaty remains a treaty when called a convention, it would seem equally to remain a treaty when called an agreement.

Congress has referred to the Hawaiian treaty in two instances as a convention, and in two others as a treaty. Act Aug. 15, 1875, 19 Stat. 200; Act Mar. 3, 1891, 26 Stat. 844; Act Aug. 27, 1894, par. 182½, 28 Stat. 521; Act July 24, 1897, par. 209, 30 Stat. 168.

In the general sense and without special reference to the Constitution and laws of the United States, the so-called commercial agreement with France is unquestionably a treaty.

There is no decided case involving directly the question whether a certain instrument was a treaty or not. As to what a treaty is, see *Foster* v. *Neilson*, 2 Pet. 253, 314; *Holmes* v. *Jennison*, 14 Pet. 540; *United States* v. *Rauscher*, 119 U. S. 407; *Whitney* v. *Robertson*, 124 U. S. 190.

This contract with France was between two independent nations; it was a formal contract, written in both French and English, signed by both parties and duly proclaimed by the President and also by the Secretary of the Treasury; it was upon consideration—a promise for a promise; it was for a considerable time and furnished a rule for almost daily action during its continuance; it was for the public welfare, and made in the name of the State, and was actually executed for a period of eleven years, its termination having been directed by § 4, act of August 5th, 1909, 36 Stat. 83.

In the Constitution and laws of the United States, the word "treaty" has no special meaning different from the general definition. *Hauenstein* v. *Lynham*, 100 U. S. 483, 489.

The reason for vesting the power to make treaties in the President and Senate appears to have been simply to secure secrecy and despatch, which, it was recognized, were often necessary, and except for this consideration, the power would doubtless have been expressly vested in Congress as a whole. 2 Madison, Journal of Const. Conv. of 1787, edited by Hunt, 327; Chas. Pinckney, 4 Elliott's Debates in State Conventions on Adoption of Federal Constitution, 253–267.

As to executive and legislative construction, see Annals of Congress, 4th Cong., 1st Sess., pp. 759, 771. See discussion in 1816; the question whether legislation was necessary to carry a certain treaty into effect, the House proposing to pass an act to carry a treaty into effect, to which the Senate disagreed; Annals of Congress, 14th Cong., 1st Sess., pp. 1022, 1057.

For legislative interpretation, see law enacted by Congress in 1872 for making postal arrangements, 17 Stat. 304, now § 398, Rev. Stat., in pursuance of which the treaty of Berne was entered into October 9, 1874, 19 Stat. 577, and was ratified by the Postmaster General by and

with the advice and consent of the President (*ib.* 588); *Cotzhausen* v. *Nazro*, 107 U. S. 215, 217. See also act tantamount to an offer to a foreign nation, which, when accepted by it, constituted a treaty in substance, although not incorporated into one document signed by both parties, and which granted certain rights to Canadian vessels in waters of the United States, to become effective when Canada extended the same privilege to American vessels in Canadian waters. Act of June 19, 1878, 20 Stat. 175, amended May 24, 1890, 26 Stat. 120, and again March 3, 1893, 27 Stat. 683. These were acts of Congress passed by both houses and approved by the President.

The Secretary of the Treasury in official documents has frequently referred to this contract with France, and others made in the same manner and by the same authority with other countries, as treaties (Treas. Dec. 19405, 21886, 22277, 22353, 23954). The Board of General Appraisers has done the same (T. D. 23166, 24971, 25442, 26208, 29070, 30490, 31202). This oft-repeated use of the word "treaty" as applied to these so-called commercial agreements indicates a general understanding in the executive departments that they are treaties.

In some court decisions this particular agreement with France has been called a treaty, without discussion as to the exact meaning of the word. *Nicholas* v. *United States*, 122 Fed. Rep. 892; *Migliavacca Wine Co.* v. *United States*, 148 Fed. Rep. 142; *Shaw* v. *United States*, 1 Cust. App. 426, also reported T. D. 31500.

Section 3 of the act of 1897, *supra*, was an expression of the advice and consent not only of the Senate, but also of the House of Representatives.

The Constitution, in conferring the power to make treaties, does not prescribe the time or method of the Senate giving its advice and consent. It can as well be given before negotiations as after, and certainly the con-

sent of the whole Congress is not inferior to the consent of the Senate alone. *Green* v. *Biddle*, 8 Wheat. 1, 85; *Poole* v. *Fleeger*, 11 Pet. 185, 209, affirming 1 McLean, 185; *Virginia* v. *West Virginia*, 11 Wall. 39, 59.

The supreme legislative authority in the United States is Congress. Const., Art. I, § 1. The power of the President and Senate to make treaties is necessarily subordinate in some respects.

A treaty can be repealed by an act of Congress. *Head Money Cases*, 112 U. S. 580, 599.

The more or less general use of the word "agreement" instead of "treaty" as applied to these reciprocal commercial contracts is easily accounted for.

It is within the spirit and intent of the act of March 3, 1891, *supra*, to give this court jurisdiction in this case. *Durousseau* v. *United States*, 6 Cranch, 307, 314.

If the agreement with France is a treaty, this court has jurisdiction of the entire case. *Horner* v. *United States*, 143 U. S. 570, 576.

The term "statuary" in the treaty with France includes all kinds or species of statuary, of any material and made by any process.

A name of an article used in a statute without qualification includes that article in all its forms and species. *Chew Hing Lung* v. *Wise*, 176 U. S. 156, 160; *Schoelkopf* v. *United States*, 71 Fed. Rep. 694.

There is absolutely nothing on the face of the treaty to indicate any limitation of the term "statuary" to a particular class of statuary.

Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred. *Shanks* v. *Dupont*, 3 Pet. 242. Such is the settled rule in this court. *Hauenstein* v. *Lynham*, 100 U. S. 483, 487; *Chow Heong* v. *United States*, 112 U. S. 536, 539; *New York Indians* v. *United States*, 170 U. S. 1, 23.

The published presidential proclamation of the treaty with France, 30 Stat. 1774; T. D. 19405, contains no intimation that the statuary therein referred to was to be only professional productions of sculptors.

Although the particular amendment adopted by the Senate, and not included in the treaty and proclamation, did not have the approval of the President, it was not, therefore, ineffective as an amendment. A strict and technical view would have been that the treaty as finally ratified and proclaimed by the President did not have the full and complete consent of the Senate, and, therefore, was no treaty. But the court apparently did not regard this view with sufficient seriousness to even mention it.

Obviously the treaty must contain the whole contract between the parties. *New York Indians Case, supra; Fourteen Diamond Rings*, 183 U. S. 176; *Meigs* v. *McClung's Lessee*, 9 Cranch, 11.

The intention should not be imputed to Congress to limit the statuary covered by § 3 by a clause "kept in the background," in the midst of a long and involved statute. The provision on which the Government relies is obscurely placed as a proviso to par. 454 of the Tariff Act of 1897 (30 Stat. 194).

The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview. *Minis* v. *United States*, 15 Pet. 423, 445; *United States* v. *Dickson*, 15 Pet. 141, 165; *White* v. *United States*, 191 U. S. 545, 551.

Section 3 is a thing apart. It did not, *ex proprio vigore*, fix any rate of duty, or provide for the free admission of any articles. It could not operate contemporaneously with §§ 1 and 2, as to the same importation. The moment it is effective, §§ 1 and 2 are suspended *pro tanto*. *Barber*

v. *Schell*, 107 U. S. 617, 620; *Nicholas* v. *United States*, 122 Fed. Rep. 892; *United States* v. *Luyties*, 124 Fed. Rep. 977; *United States* v. *Wile*, 124 Fed. Rep. 1023; *S. C.*, 130 Fed. Rep. 331.

The cases of *Richard & Co.* v. *United States*, 158 Fed. Rep. 1019, and *Shaw* v. *United States*, 158 Fed. Rep. 648, 212 U. S. 559, can be distinguished.

Mr. Assistant Attorney General Wemple, with whom *Mr. Charles E. McNabb*, Assistant Attorney, and *Mr. Frank L. Lawrence*, Special Attorney, were on the brief, for the United States:

This court has no jurisdiction of the appeal in any view of the case.

A reciprocal commercial agreement under § 3 of the Tariff Act of 1897 is not a treaty within the meaning of the Constitution of the United States and § 5 of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, 828.

As such agreements cannot legally extend the scope of the law, the agreement with France cannot be construed to embrace statuary not covered by said § 3.

The merchandise in suit, not being wrought by hand from metal and the professional production of a statuary or sculptor only, is excluded from the operation of § 3 by the express limitation in paragraph 454 of the same act.

No question is presented of which this court has jurisdiction upon direct appeal from the Circuit Court.

The sovereign is not suable in its own courts without its expressed consent. This is a suit against the United States, and general acts do not apply to the sovereign unless the sovereign be mentioned therein. *Cheatham* v. *United States*, 92 U. S. 85.

Jurisdiction is unwarranted by the record, and unsupported by the law. The commercial agreement is not a treaty. In a broad sense perhaps all treaties are

agreements or contracts, the word "agreement" being sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects, *Virginia* v. *Tennessee*, 148 U. S. 503, 517, but all agreements or contracts are not treaties. "Treaty" is a word of superior dignity; "agreement" is not to be taken as generic, but as comprehending only what is inferior.

This particular agreement is not a treaty within the meaning of the Constitution and of the Judiciary Act of 1891. *Holmes* v. *Jennison*, 14 Pet. 540, 570.

There is a distinction between a treaty and an act of Congress.

In this country a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land. *Haver* v. *Yaker*, 9 Wall. 32, 35; *Head Money Cases*, 112 U. S. 580, 598; *United States* v. *Rauscher*, 119 U. S. 407.

The commercial agreement was not a law; the law was § 3 of the Tariff Act of 1897. The agreement could legally add nothing to that. *United States* v. *Wile*, 130 Fed. Rep. 331; *Richard* v. *United States*, 151 Fed. Rep. 954; *S. C.*, 158 Fed. Rep. 1019.

Upon its proclamation one rate of duty was substituted for another, the latter being "suspended" by the law during the continuance of the agreement.

Authority to ascertain and declare the event or state of things upon which a law shall take effect may be constitutionally delegated to the President, but he is restricted to that. No legislative power can be delegated. *Field* v. *Clark*, 143 U. S. 649, 682; *Brig Aurora*, 7 Cranch, 382, 388.

It is different with treaties. They are made by the President by and with the advice and consent of the Senate. Concurrence of two-thirds of the Senators present is essential.

It is incompatible with the Constitution to regard an agreement under § 3 of the Tariff Act of 1897 as a treaty upon the theory that the legislative assent was signified in advance rather than after negotiation, when such assent is implied from a majority vote, as in the case of the Tariff Act of 1897. The vote in the Senate stood: Yeas 38, nays 28, not voting 23 (Cong. Rec., 55th Cong., 1st sess., vol. 30, pt. 3, p. 2447). That is less than "two-thirds of the Senators present," and a treaty to be one in the constitutional sense can only thus be made by the President and the Senate. *Head Money Cases*, 112 U. S. 580, 599; *New York Indians* v. *United States*, 170 U. S. 1, 23; *De Lima* v. *Bidwell*, 182 U. S. 1, 194, 195.

A resolution adopted by the Senate by less than two-thirds of a quorum was held without legal significance in respect to the intention of the Senate in the ratification of the treaty of peace with Spain. *Fourteen Diamond Rings* v. *United States*, 183 U. S. 176, 183. *Cotzhausen* v. *Nazro*, 107 U. S. 215, cited by appellants, did not decide that a postal agreement is a treaty within the meaning of the Constitution, and may be made without the concurrence of two-thirds of the Senators present. Whether or not it was a treaty in the constitutional sense was not in issue and not decided.

Improper use of terms is not uncommon in legislation. See § 1955 of the Revised Statutes, where "exportation" to Alaska from any port in the United States is spoken of. There can be no doubt that the word "exportation" was there irregularly used, and should not be deemed a legislative interpretation or use extending it to shipments which are not exportations within the meaning of the Constitution.

The commercial agreement with France was negotiated as an agreement and not as a treaty. The word "treaty" nowhere appears, but the word "agreement" is frequently used. The certificate of the Secretary of State, further-

more, refers to it as a "reciprocal commercial agreement."

There is implied legislative declaration in the very act under discussion that agreements of the sort mentioned in § 3 are not treaties. See § 4 of the same act, 30 Stat. 204, 205.

Both "agreement" and "concession," as far as the President is concerned, had reference only to merchandise imported into the foreign county from the United States. The law designated the articles that might be imported into the United States from the foreign country and specified the duty to be collected in lieu of the ordinary rates, expressly suspended. The President could not add to the articles nor change the rates of duty. Congress left neither to his discretion.

The word "statuary" means the same in § 3 as in paragraph 454 of the Tariff Act of 1897. *Nicholas* v. *United States*, 122 Fed. Rep. 892; *Richard* v. *United States*, 151 Fed. Rep. 954.

The same words occurring in different parts of a statute are to be taken in the same sense. *Swan & Finch Co.* v. *United States*, 190 U. S. 143, 145, 146; 17 Opin. Atty. Gen. 579; 21 *id.* 501; 23 *id.* 418; *Reiche* v. *Smythe*, 13 Wall. 162, 165.

MR. JUSTICE DAY delivered the opinion of the court.

This is an appeal from an order of the Circuit Court of the United States for the Southern District of New York, affirming a decision of the Board of General Appraisers, which sustained an assessment of duty by the collector at the port of New York upon a certain bronze bust imported by the appellants, B. Altman & Co.

The bust was imported from France and was assessed a duty of 45 per cent. ad valorem under paragraph 193 of the Tariff Act of 1897 (30 Stat. 151, 167), which covers articles or wares not specially provided for in the act,

composed wholly or in part of metal, and whether partly or wholly manufactured. A protest was filed by the importers, in which they contended that the bust should be classed as statuary under the commercial reciprocal agreement with France (30 Stat. 1774), which was negotiated under the authority contained in § 3 of the Tariff Act of 1897 to make reciprocal agreements with reference, among other articles, to "paintings in oil or water colors, pastels, pen and ink drawings, and statuary." A considerable amount of testimony was taken before the Board of General Appraisers, and it held that the bust was cast in a foundry by mechanics from a model furnished by the artist, and that the artist did little or no work upon the casting, and overruled the protest, on the authority of *Richard* v. *United States*, 158 Fed. Rep. 1019, and *Tiffany* v. *United States*, 71 Fed. Rep. 691.

The Circuit Court affirmed the order and decision of the Board of General Appraisers on the authority of the same cases, and an appeal was prayed to this court, which was allowed, the Circuit Judge certifying that the questions involved in the case were, in his opinion, of such importance as to require a review of the decision of the court by the Supreme Court of the United States.

Certain errors were assigned, and the following are insisted upon in this court:

"1. In not holding that the commercial agreement between the United States and France, as proclaimed by the President of the United States (T. D. 19405 and 30 Stat. 1774), was to be in full scope according to its language without being in any way restricted or modified by the definition contained in paragraph 454, section 1, of the Tariff Act of July 24, 1897, but which definition was not embodied either in the commercial agreement itself or in the President's proclamation thereof.

"2. In not holding that the term 'statuary' as used in section 3 of the Tariff Act and in said commercial agree-

ment with France or the President's proclamation thereof, was not subject to the definition contained in paragraph 454, Schedule N, Section 1, of said Tariff Act.

"3. In not holding the merchandise dutiable at 15 per cent. ad volorem under section 3 of the Tariff Act and the commercial agreement with France and the President's proclamation thereof.

"7. In holding the merchandise dutiable at 45 per cent. under paragraph 193 as manufactured metal.

"8. In affirming the decision of the Board of General Appraisers.

"9. In not reversing the decision of the Board of General Appraisers and of the Collector of the Port and holding the merchandise dutiable at either 15 per cent. under section 3 and the Commercial Agreement with France, as proclaimed by the President."

A motion was made by the Solicitor General to dismiss the appeal. That motion was postponed for hearing with the case upon its merits. To support the motion it is contended on behalf of the United States that no question is involved which, under § 5 of the Circuit Court of Appeals Act of March 3, 1891, 26 Stat. 826, 827, 828, c. 517, entitles the appellant to a direct appeal from the Circuit Court to this court. By the Circuit Court of Appeals Act that court is given jurisdiction to review appeals in revenue cases and by the sixth section of the act judgments of that court in such cases are made final.

Prior to June 10, 1890, the right to a review of revenue cases was by appeal to this court from the Circuit Court. (R. S., § 699.) By the act of June 10, 1890, 26 Stat. 131, c. 407, special provision was made for the review of revenue cases where the owner, importer, etc., was dissatisfied with the decision of the Board of General Appraisers. Under § 15 of that act an appeal was given from the decision of the Board of General Appraisers "as to the construction of the law and the facts respecting the classi-

fication of such merchandise and the rate of duty imposed thereon under such classification . . . to the circuit court of the United States within the district in which the matter arises, for a review of the questions of law and fact involved in such decision." And it was provided that the decision of the Circuit Court should be final, unless the court should be of the opinion that the question involved was of such importance as to require a review of such decision by the Supreme Court of the United States, in which case an appeal was allowed to this court. It is to be observed that the cases herein referred to are strictly revenue cases, in which the decision concerns the classification of merchandise and the rate of duty imposed thereon under the classification made. This act remained in force until amended by the act of May 27, 1908, 35 Stat. 403, c. 205, to which we shall have occasion to refer later. In the meantime, on March 3, 1891, the Circuit Court of Appeals Act was passed, giving a direct appeal in certain cases to this court. So much of § 5 as is pertinent to this case provides:

"That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:

* * * * * * * *

In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question."

The Circuit Court of Appeals Act did not repeal the revenue act to which we have referred, but broadly provided for direct appeal to this court from the Circuit Court in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty, etc., was drawn in question.

We think the cases show that this court, so far as it has had occasion to deal with the question, has permitted direct appeal to this court in all revenue cases where, in

addition to the objection to classification of merchandise and rate of duty imposed, a real question under § 5 has been involved.

In *Anglo-Californian Bank* v. *United States*, 175 U. S. 37, an attempt was made to take an appeal to this court from a judgment of the Circuit Court of Appeals, affirming the decree of the Circuit Court, which overruled the decision of the Board of General Appraisers, and it was held that the appeal would not lie. In the course of the opinion Mr. Chief Justice Fuller said that under the act of June 10, 1890, a direct appeal would lie to this court if the Circuit Court certified that the question involved was of such importance as to require a review of such decision and decree by this court, but the Chief Justice pointed out that the attempted appeal was not an appeal from the Circuit Court directly to this court, nor did the case fall within any of the classes of cases enumerated in § 5, in which a direct appeal to this court would lie, and, moreover, that the Judiciary Act of March 3, 1891, prescribed a different rule as to the prosecution of appeals. While the question here made was not directly involved in that case, it is to be fairly inferred that the court would have sustained an appeal had the case been brought from the Circuit Court within the terms of § 5 and upon one of the grounds there stated.

In the case of *Spreckels Sugar Ref. Co.* v. *McClain*, 192 U. S. 397, an appeal was allowed from the Circuit Court of Appeals to this court, and, concerning what were revenue cases within the meaning of the Circuit Court of Appeals Act, under the sixth section, making that court's judgment final in cases arising under the revenue laws, this court said (p. 408):

"So far as we now remember, this precise point has not heretofore arisen for our determination. Looking at the purpose and scope of the act of 1891, we are of opinion that the position of the Government on this point cannot be

sustained. It rests upon an interpretation of the act that is too technical and narrow. The meaning of the words 'arising . . . under the revenue laws,' in the sixth section, is satisfied if they are held as embracing a case strictly arising under laws providing for internal revenues and which does not, by reason of any question in it, belong also to the class mentioned in the fifth section of that act."

While the *Spreckels Case* was commented on and limited in some measure in the subsequent case of *Macfadden* v. *United States*, 213 U. S. 288, nothing was said to indicate any disagreement with the definition of this court as to what was a case arising under the revenue laws, and the court said that the *Spreckels Case* was held not to be final in the Circuit Court of Appeals because the original jurisdiction involved the construction of the Constitution of the United States, as well as a strictly revenue question, and that, thus construed, it was consistent with all the decisions.

From the principles laid down in these cases, we think it is plain that this court will entertain a direct review in a revenue case which involves not only questions of classification and amount of duty thereunder, as specified in the revenue act to which we have referred, but also a question under the fifth section as to the constitutionality of a law of the United States or the validity or construction of a treaty under its authority.

Nor did the amendment of the revenue act by the act of May 27, 1908, affect any change in this respect, for its provisions, with respect to the review of the decision of a Circuit Court, are substantially identical with the act of June 10, 1890, except that the decision of a Circuit Court is made final, unless the court certifies that it is of the opinion that the question involved is of such importance as to require a review of such decision by the Circuit Court of Appeals, the decree of which may be reviewed in the

Supreme Court in any of the ways provided in cases arising under the revenue laws by the act approved March 3, 1891, being the Circuit Court of Appeals Act; but that act (Amendment of May 27, 1908), like the act of June 10, 1890, provides only for the review of decisions of the Board of General Appraisers "as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification." We do not think that this act changes the effect of the Circuit Court of Appeals Act and operates to prevent an appeal here in cases really involving the Constitution of the United States or the construction of a treaty.

The Government relies, in support of its motion to dismiss, on *Shaw* v. *United States*, 212 U. S. 559. In that case, however, the appeal was undertaken to be made directly from the Circuit Court because of an alleged deprivation of constitutional right, and because of the construction of a reciprocal agreement made with Italy under the Tariff Act of 1897. The case was dismissed on the authority of *American Sugar Ref. Co.* v. *United States*, 211 U. S. 155, in which it was held that the only real substantial controversy concerned the construction of the Tariff Act of 1897. An examination of the record in the *Shaw Case* shows that no real constitutional question was involved and that the assessment of duty was in accordance with the reciprocal commercial agreement with Italy. See *Shaw* v. *United States*, 158 Fed. Rep. 648.

The report of the *American Sugar Refining Company Case*, to which the court referred in the *Shaw Case* and which was decided at the same term (211 U. S. 155), shows that it was an attempt to appeal directly from the Circuit Court, and that this court did not think that the constitutional question made in the case had any real merit, but that the only question was a construction of the Tariff Act relating to the collection of duty upon sugar, and

therefore this court had no jurisdiction by direct appeal. In this connection this court said (p. 161):

"The present direct appeal to this court is a mere attempt to obtain a reconsideration of questions arising under the revenue laws and already determined by the Circuit Court of Appeals [upon a former appeal] in due course. Such direct appeals [from a circuit court], under § 5 of the act of 1891, cannot be entertained unless the construction or application of the Constitution of the United States is involved."

An examination of the record in the present case shows that the importer throughout insisted that the statuary was dutiable at 15 per cent. ad valorem under the reciprocal agreement between the United States and France entered into under the authority of § 3 of the Tariff Act of 1897. If this contention be correct, then the assessment was wrong, and, if the reciprocal agreement referred to was a treaty within the meaning of § 5 of the Circuit Court of Appeals Act, then there was a right of direct appeal to this court.

Generally, a treaty is defined as "a compact made between two or more independent nations with a view to the public welfare." 2 Bouvier's Dictionary, 1136. True, that under the Constitution of the United States the treaty making power is vested in the President, by and with the advice and consent of the Senate, and a treaty must be ratified by a two-thirds vote of that body (Art. II, § 2), and treaties are declared to be the supreme law of the land (Art. VI); but we are to ascertain, if possible, the intention of Congress in giving direct appeal to this court in cases involving the construction of treaties. As is well known, that act was intended to cut down and limit the jurisdiction of this court, and many cases were made final in the Circuit Court of Appeals which theretofore came to this court, but it was thought best to preserve the right to a review by direct appeal or writ of error from a Circuit Court in certain matters of importance, and, among others,

those involving the construction of treaties. We think that the purpose of Congress was manifestly to permit rights and obligations of that character to be passed upon in the Federal court of final resort, and that matters of such vital importance, arising out of opposing constructions of international compacts, sometimes involving the peace of nations, should be subject to direct and prompt review by the highest court of the Nation. While it may be true that this commercial agreement, made under authority of the Tariff Act of 1897, § 3, was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty under the Circuit Court of Appeals Act, and, where its construction is directly involved, as it is here, there is a right of review by direct appeal to this court.

Coming to the merits, the contention of the importer is that the word "statuary" should receive its popular construction, and that the term should include such a piece of cast bronze as is here involved, but we think the definition and authority of the act cannot be ignored in this connection.

The negotiation was entered into between the representatives of the two countries under the authority of § 3 of the Tariff Act of 1897, as we have seen. In that act the term "statuary" is defined as follows: "The term 'statuary' as used in this act shall be understood to include only such statuary as is cut, carved, or otherwise wrought

by hand from a solid block or mass of marble, stone, or alabaster, or from metal, and as is the professional production of a statuary or sculptor only." The reciprocal agreements were authorized with reference to "paintings in oil or water colors, pastels, pen and ink drawings, and statuary." We think this must have reference to statuary as already defined in the act, which both parties understood was the source of their authority to negotiate the reciprocal commercial agreement in question, for the agreement provides:

"It is reciprocally agreed on the part of the United States, in accordance with the provisions of section 3 of the United States Tariff Act of 1897, that during the continuance in force of this agreement the following articles of commerce, the product of the soil or industry of France, shall be admitted into the United States at rates of duty not exceeding the following, to wit:

* * * * * * * *

"Paintings in oil or water colors, pastels, pen-and-ink drawings, and statuary, fifteen per centum ad valorem."

Thus in its terms the agreement was made under the authority and in accordance with § 3 of the Tariff Act of 1897, in which very act the term statuary, as used therein, was specifically defined, as we have already stated.

We think that it is clear that the Board of General Appraisers and the Circuit Court did not err in finding that this bronze statue was not wrought by hand from metal. On the other hand, the testimony is clear that the statue was cast from metal by artisans employed for that purpose, and was very little touched, if at all, in its finishing, by the professional designer.

The result is that the judgment must be

Affirmed.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY *v.* SCHUBERT.

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

No. 549. Argued April 29, 1912.—Decided May 13, 1912.

Congress has power to impose the liability on the employer defined in the Employers' Liability Act of 1908. *Second Employers' Liability Cases*, 223 U. S. 1.

Where Congress possesses the power to impose a liability it also possesses the power to ensure its efficacy by prohibiting any contract, rule, regulation, or device in evasion of it. *Second Employers' Liability Cases*, 223 U. S. 1, 52.

Congress has power to enforce the regulations, validly prescribed by the Employers' Liability Act of 1908, by the provisions of § 5 of the act providing that exemptions from liability shall be void, and that the acceptance of benefits under a relief contract shall not be a bar to recovery.

In framing the Employers' Liability Acts of 1906 and 1908 Congress well understood the practice of maintaining relief departments, and by the statute of 1908 Congress enlarged the scope of the clause defining contracts for immunity which should not prevail, and included stipulations which made acceptance of benefits from such relief departments a release from liability.

Congress has power, in regulating interstate commerce and commerce in the District of Columbia and in the Territories, to legislate unfettered by any existing arrangements or contracts in conflict with its policy. Prior arrangements are necessarily subject to the paramount authority of Congress. *Louisville & Nashille R. R. Co.* v. *Mottley*, 219 U. S. 467.

The provisions of § 5 of the Employers' Liability Act apply as well to existing as to future contracts.

36 App. D. C. 565, affirmed.

THE facts, which involve the construction of § 5 of the Employers' Liability Act of 1908, are stated in the opinion.

Mr. Frederic D. McKenney, with whom *Mr. John Spalding Flannery* and *Mr. William Hitz* were on the brief, for plaintiff in error:

Section 3 of the Employers' Liability Act of 1906 differs from the provisions of § 5 of the act of 1908, not only substantially, but vitally.

The *Employers' Liability Cases*, 207 U. S. 463, and the cases of *El Paso &c.* v. *Gutierrez*, 215 U. S. 87, and *McNamara* v. *Washington Terminal Co.*, 35 App. D. C. 230, cited and relied upon by defendant in error, if pertinent in any aspect to the pending cause, cannot be said to have foreclosed it, for each of those cases involved provisions of the law of 1906 only, while the pending cause has concern solely with the act of 1908.

Nor is the case foreclosed by *C., B. & Q. R. Co.* v. *McGuire*, 219 U. S. 549, for there the reserved and plenary power of a State determined the judgment, while here the applicability in the circumstances of the delegated and restricted power of the Federal Government is a disputed matter.

The act of 1908 is not applicable to the relief department contract pleaded in this case.

The act of 1906 is aimed at the contract, and says that neither the contract—no matter what its purpose or intent may be or how limited its scope—not any acceptance of benefits thereunder shall be a bar or defense. But when Congress again had this matter before it the criticisms of the former statute and the effect of that statute upon perfectly innocent contracts caused an awakening and Congress was brought to realize that all relief department contracts were not objectionable; that most of them were beneficial to the men, by furnishing to those engaged in the hazardous business of railroading a cheap and secure form of life, accident and disability insurance, which they could not obtain otherwise except by paying almost prohibitive rates to the companies en-

gaged in such business. So that § 3 of the act of 1906 was repealed, modified in many essential particulars, and reënacted as § 5 of the subsequent act of 1908.

In the act of 1908 Congress indicates as plainly as language can express it an intention to strike down not all relief department contracts, but only two classes thereof, namely, those contracts, rules, regulations or devices the purpose or intent of which is to exempt the carrier—not merely restrict, limit or modify the carrier's common-law duties and obligations—and those contracts of exemption the purpose or intent of which is to enable the carrier to evade any liability created by that statute. Contracts of exemption from liability, if the liability arises otherwise than as a result of this act, do not come within its prohibition.

For the distinction between contracts of the character involved in this case and those which have heretofore come under the ban of the courts, see *Johnson* v. *Philadelphia & Reading R. R. Co.*, 163 Pa. St. 127; *Atlantic Coast Line* v. *Dunning*, 166 Fed. Rep. 850; *Day* v. *Atlantic Coast Line Co.*, 179 Fed. Rep. 26.

It is apparent from the foregoing and many other cases that might be cited that at the time the contract in this case was entered into, in October, 1905, and when the Employers' Liability Act of 1908 was passed, relief department contracts like the one pleaded in this case, by the uniform trend of decision in the Federal and state courts of this country, had been held not to be against public policy, and not to be contracts exempting the employer from responsibility for his negligence.

If it had been the intention of Congress to strike down all relief department contracts, whether made prior or subsequent to the passage of the law, is it not reasonable to suppose that the language employed would have been "any contract the *effect* of which, etc.," instead of the words "purpose or intent," which refer to the meaning

in the minds of the parties at the inception of the contract.

Courts uniformly refuse to give to a statute a retrospective operation whereby existing contracts or rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature. *Chew Heong* v. *United States*, 112 U. S. 536; *Twenty Per Cent Cases*, 20 Wall. 179.

The contract in *McNamara* v. *Washington Terminal Co.*, 35 App. D. C. 230, was essentially different. That contract was compulsory and not voluntary as in this case. See Hearings of Committee on the Judiciary on the Employers' Liability Bill of 1908, pp. 195, 196.

Mr. John A. Kratz, Jr., with whom *Mr. M. J. Fulton* and *Mr. Joseph W. Cox* were on the brief, for defendant in error.

Mr. Justice Hughes delivered the opinion of the court.

This action was brought by Schubert, the defendant in error, against the Philadelphia, Baltimore and Washington Railroad Company to recover damages for personal injuries. He received the injuries on May 13, 1908, while in its service as a brakeman within the District, and they were due to the negligence of a fellow-servant.

The company pleaded the general issue and in addition filed a special plea that Schubert was at the time a member of its "Relief Fund" under a contract of membership made in 1905, in which it was agreed that the company should apply as a voluntary contribution from his wages $2.10 a month for the purpose of securing the benefits described in certain regulations. These contributions continued from October 18, 1905, to May 13, 1908, the date of the accident. Among the regulations, by which he agreed to be bound, was the following:

"58. Should a member or his legal representative make claim, or bring suit, against the Company, or against any other corporation which may be at the time associated therewith in administration of the Relief Departments, in accordance with the terms set forth in Regulation No. 6, for damages on account of injury or death of such member, payment of benefits from the Relief Fund on account of the same, shall not be made, until such claim shall be withdrawn or suit discontinued. Any compromise of such claim or suit, or judgment in such suit, shall preclude any claim upon the Relief Fund for benefits on account of such injury or death, and the acceptance of benefits from the Relief Fund by a member or his beneficiary or beneficiaries, on account of injury or death, shall operate as a release and satisfaction of all claims against the Company and any and all of the corporations associated therewith in the administration of their Relief Departments, for damages arising from such injury or death."

A stipulation that the acceptance of benefits should constitute a release from all claims for damages was also incorporated in the application for membership.

The plea further set forth that the relief fund was formed by voluntary contributions from the employés of the defendant Company and other companies in association with it for the purpose, appropriations by the Company whenever necessary to make up any deficit, the income or profit derived from investments of the moneys of the fund and such gifts or legacies as might be made for its use. The companies took general charge of the department, guaranteed the fulfillment of its obligations, became responsible for the safekeeping of its funds, supplied the necessary facilities for conducting the business of the department and paid all its operating expenses. On December 31, 1908, the total number of employés of the defendant Company was 8458, of which 6909 were

members of the "Relief Fund"; during the year 1908 the Company contributed as the cost of administration the sum of $21,557.02, and during the period of the plaintiff's membership its total contribution for this purpose was $57,610.51. In addition, the Company furnished the facilities of its mail, express and telegraph departments free of charge.

It was also alleged that after his injury Schubert (between June, 1908, and August, 1908) had voluntarily accepted benefits amounting to $79; that he had subsequently presented his claim for damages, in view of which no further payments were made, and that the acceptance of the benefits above mentioned was a bar to his action.

The court sustained a demurrer to the special plea and Schubert recovered judgment for $7,500, which was affirmed by the Court of Appeals.

The questions presented by the assignments of error relate to the validity of the Employers' Liability Act of April 22, 1908, c. 149 (35 Stat. 65), under which the action was maintained; and particularly, both to the applicability, and to the validity, if applicable, of § 5 of that act, upon which the court below based its ruling as to the insufficiency of the special plea.

That Congress did not exceed its power, in imposing the liability defined by the statute, has been decided by this court. *Second Employers' Liability Cases*, 223 U. S. 1. Section 5 provides:

"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."

With respect to this section, the court said in the case cited: "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." *Second Employers' Liability Cases, supra*, p. 52.

In *Chicago, Burlington & Quincy Railroad Co.* v. *McGuire, supra*, the court had before it the amendment, made in 1898 (March 8, 1898, Laws of 1898, c. 49, p. 33), of § 2071 of the Code of Iowa. This section, in the cases within its purview, abrogated the fellow-servant rule and the amendment provided:

"Nor shall any contract of insurance, relief, benefit, or indemnity in case of injury or death, entered into prior to the injury, between the person so injured and such corporation, or any other person or association acting for such corporation, nor shall the acceptance of any such insurance relief, benefit, or indemnity by the person injured, his widow, heirs, or legal representatives after the injury, from such corporation, person, or association, constitute any bar or defense to any cause of action brought under the provisions of this section, but nothing contained herein shall be construed to prevent or invalidate

any settlement for damages between the parties subsequent to the injuries received."

It was held that the amendment was valid and hence that the defense based upon the acceptance of benefits could not be sustained. The court said (pp. 564, 572): "Neither the suggested excellence nor the alleged defects of a particular scheme may be permitted to determine the validity of the statute, which is general in its application. . . . Its provision that contracts of insurance relief, benefit or indemnity, and the acceptance of such benefits, should not defeat recovery under the statute, was incidental to the regulation it was intended to enforce. Assuming the right of enforcement, the authority to enact this inhibition cannot be denied. If the legislature had the power to prohibit contracts limiting the liability imposed, it certainly could include in the prohibition stipulations of that sort in contracts of insurance relief, benefit or indemnity, as well as in other agreements. . . . It does not aid the argument to describe the defense as one of accord and satisfaction. The payment of benefits is the performance of the promise to pay contained in the contract of membership. If the legislature may prohibit the acceptance of the promise as a substitution for the statutory liability, it should also be able to prevent the like substitution of its performance."

Upon similar grounds, Congress had the power to enforce the regulations validly prescribed by the act of 1908 by preventing the acceptance of benefits under such relief contracts from operating as a bar to the recovery of damages and by avoiding any agreement to that effect. The question is whether this power has been exercised; that is, whether the stipulation of the contract of membership asserted in defense comes within the interdiction of § 5. The former act of June 11, 1906, c. 3073 (34 Stat. 232), which was valid as to employés engaged in commerce within the District of Columbia (*Hyde* v. *Southern Ry.*

Co., 31 App. D. C. 466; *El Paso & N. E. Ry. Co.* v. *Gutierrez*, 215 U. S. 87, 97, 98), contained explicit provision that such a contract or the acceptance of benefits thereunder should not defeat the action. Section 3 of that act was as follows:

"That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employé, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employé: *Provided, however,* That upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employé, or, in case of his death, to his personal representative."

But it is urged that the substituted provision—of § 5 of the act of 1908—failed to embrace that which the earlier act specifically described. We cannot assent to this view. The evident purpose of Congress was to enlarge the scope of the section and to make it more comprehensive by a generic, rather than a specific, description. It thus brings within its purview "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." It includes every variety of agreement or arrangement of this nature; and stipulations, contained in contracts of membership in relief departments, that the acceptance of benefits thereunder shall bar recovery, are within its terms. The statute provides that "every common carrier by railroad in . . . the District of Columbia . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . 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." That is the liability which the act defines and which this action is brought to enforce. It is to defeat that liability for the damages sustained by Schubert which otherwise the company would be bound under the statute to pay, that it relies upon his contract of membership in the relief fund and upon the regulation which was a part of it. But for the stipulation in that contract, the company must pay; and if the stipulation be upheld, the company is discharged from liability. The conclusion cannot be escaped that such an agreement is one for immunity in the described event, and as such it falls under the condemnation of the statute.

If there could be doubt upon this point, it would be resolved by a consideration of the proviso of § 5, which immediately follows the language condemning contracts, rules, regulations or devices, the purpose of which is to exempt the carrier from liability. It is: "*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." The practice of maintaining relief departments, which had been extensively adopted, and of including in the contract of membership provision for release from liability to employés who accepted benefits, was well known to Congress, as is shown by § 3 of the act of 1906. On specifically providing in that section that neither such contracts, nor their performance, should be a bar to recovery, Congress inserted

a proviso permitting a set-off of any sum the company had contributed toward any benefit paid to the employé. When in the act of 1908 it enlarged the scope of the clause defining the contracts and arrangements for indemnity which should not prevail, Congress retained the proviso in terms substantially the same. This clearly indicates the intent to include within the statute stipulations which made the acceptance of benefits under contracts of membership in relief departments equivalent to a release from liability. Unless the liability survived the acceptance of benefits, there could be no recovery and hence no occasion for set-off.

It is also insisted that the statute does not cover the agreement in this case, as it was made before the statute was enacted. But that the provisions of § 5 were intended to apply as well to existing, as to future, contracts and regulations of the described character cannot be doubted. The words, "the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act," do not refer simply to an actual intent of the parties to circumvent the statute. The "purpose or intent" of the contracts and regulations, within the meaning of the section, is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce. Only by such general application could the statute accomplish the object which it is plain that Congress had in view.

Nor can the further contention be sustained that, if so construed, the section is invalid. The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the Territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the Federal authority to the continuing operation of previous contracts, would be to place,

to this extent, the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which as to future action should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority.

In speaking of the act in question, this court said that "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," there was no doubt that "in making those changes Congress acted within the limits of the discretion confided to it by the Constitution." *Second Employers' Liability Cases, supra,* p. 50. If Congress may compel the use of safety appliances (*Johnson* v. *Southern Pacific Co.*, 196 U. S. 1), or fix the hours of service of employés (*B. & O. R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612), its declared will, within its domain, is not to be thwarted by any previous stipulation to dispense with the one or to extend the other. And so, when it decides to protect the safety of employés by establishing rules of liability of carriers for injuries sustained in the course of their service, it may make the rules uniformly effective. These principles, and the authorities which sustain them, have been so lately reviewed by this court that extended discussion is unnecessary. *Louisville & Nashville Railroad Co.* v. *Mottley*, 219 U. S. 467.

In that case it appeared that in 1871, in settlement of a

claim for damages for personal injuries, the plaintiffs had entered into an agreement with the railroad company by which the latter promised that during their lives they should have free passes upon the railroad and its branches. It was held that the company rightfully refused, after the passage of the act of June 29, 1906, 34 Stat. 584, c. 3591, further to comply with the agreement, and that a decree requiring the continued performance of its provisions was erroneous. The ground for this conclusion was thus stated (pp. 482–486): "The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable. The framers of the Constitution never intended any such state of things to exist. . . . After the commerce act came into effect no contract that was inconsistent with the regulations established by the act of Congress could be enforced in any court. The rule upon this subject is thoroughly established. . . . If that principle be not sound, the result would be that individuals and corporations could, by contracts between themselves, in anticipation of legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce. No power of Congress can be thus restricted. The mischiefs that would result from a different interpretation of the Constitution will be readily perceived." See also *Addyston Pipe & Steel Company* v. *United States*, 175 U. S. 211, 228; *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186.

We find no error in the rulings of which the plaintiff in error complains, and the judgment of the court below is therefore

Affirmed.

GRAHAM *v.* STATE OF WEST VIRGINIA.

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

No. 721. Argued April 17, 1912.—Decided May 13, 1912.

The statute of West Virginia, providing that where a prisoner has been convicted and sentenced to the penitentiary, the question of his identity with one previously convicted one or more times can be tried on information, and if proved, imposing additional imprisonment in case of one prior conviction for five years, and in case of two convictions, for life, is not unconstitutional, as to one twice previously convicted and on whom life imprisonment has been imposed, either as depriving him of his liberty without due process of law, denying him the equal protection of the law, placing him in second jeopardy for the same offense, abridging his privileges and immunities as a citizen of the United States, or inflicting cruel and unusual punishment.

The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England—such increased punishment is not a second punishment for the earlier crime but is justified by the repetition of criminal conduct.

One who has been convicted before is not denied due process of law by having the question of identity passed upon separately from the question of guilt of the second offense.

A State which adopts the policy of heavier punishment for repeated offending may provide for guarding against second offenders escaping by reason of their identity not being known at the time of sentence.

Proceeding by information instead of indictment to ascertain the identity of a convicted criminal with one previously convicted does not deny due process of law or equal protection of the law; and this even if other persons accused of crime are proceeded against by indictment.

The Fourteenth Amendment did not introduce a factitious equality without regard to practical differences that are best met by corresponding differences of treatment, *Standard Oil Co.* v. *Tennessee*, 217 U. S. 413; and a State may make different arrangements for trials under different circumstances of even the same class of offenses, if all in the same class are subject to the same procedure.

Where one has been charged with having been previously convicted of another offense, he is not put in double jeopardy by having the question of his identity determined by a trial, nor are any of his immunities and privileges as a citizen of the United States abridged.

The imposition of a heavier penalty for repeated offenses does not amount to inflicting a cruel and unusual punishment.

Questions of validity of a state penal statute under the state constitution are not open in this court.

68 W. Va. 248, affirmed.

THE facts, which involve the constitutionality of a statute of West Virginia providing for heavier penalties on persons convicted of crime if previously convicted, and for determining the identity of persons formerly convicted, are stated in the opinion.

Mr. D. W. Baker, with whom *Mr. Frank J. Hogan*, *Mr. Everett F. Moore* and *Mr. D. B. Evans* were on the brief, for plaintiff in error:

Defendant is a person within the jurisdiction of the State of West Virginia, and is denied by the said State the equal protection of the laws, because the statute arbitrarily discriminates among persons in the same class and condition. Art. III, § 4, Code, c. 152, § 1. It permits persons of his class to be proceeded against by information while all others have the right to be proceeded against only by indictment; so that the said statute denies even one and the same person the equal protection of the laws, in that if he be out of the penitentiary he is entitled as of right to the protection of the grand jury and its indictment returned and pending against him, but if he be in the prison this right is *ipso facto* taken arbitrarily from him and is replaced by the right to an information only,

presenting and permitting the single issue of identity of person.

The statute requires the said prosecution against him to be by information, and the sentence to be to the penitentiary for life, whereas the constitution and laws of said State (except only this statute) require all acts or omissions punishable by imprisonment in the penitentiary to be prosecuted and punished "on a presentment or indictment of a grand jury," and not otherwise. *Hodgson* v. *Vermont*, 168 U. S. 272; *Bowman* v. *Lewis*, 101 U. S. 22, 33; *In re Lowrie*, 8 Colorado, 499; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

Applying the principles of the last-cited case, the West Virginia statute now in question denies the defendant the equal protection of the laws in the respects and for the reasons which we have already mentioned; and in that each section of the statute is so connected and interwoven with the other sections, the invalidity of any one section destroys the entire act. *Caldwell* v. *Texas*, 137 U. S. 692, 697; *State* v. *Lewin*, 53 Kansas, 697; *Budd* v. *State*, 22 Tennessee, 483; *Rogers* v. *Alabama*, 192 U. S. 226; *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232, 237; *Gulf, Colorado & Sante Fe Railway* v. *Ellis*, 165 U. S. 150, 165; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 293; *Cotting* v. *Kansas City Stock Yards Company*, 183 U. S. 79, 100, 112.

So, in the case at bar, the statute is a positive and direct discrimination between persons in exactly the same class—those who have suffered former convictions—based simply upon the fact that the prisoner is in the penitentiary. *In re Landford*, 57 Fed. Rep. 570.

That the statute violates the equality clause of the Federal Constitution, see *West Virginia* v. *Davis*, 69 S. E. Rep. 639, decided by the same court one week prior to this case.

Thus the laws of West Virginia discriminate, so as to

put plaintiff in error into the penitentiary for life on an unsworn information, simply because he was in the prison, and in favor of Davis, so as to keep him out of the county jail, unless on indictment alleging, and proof showing, a former conviction.

Defendant is deprived of his liberty and property by the State of West Virginia without due process of the law in that the statute which requires the imprisonment of the defendant in the penitentiary for life under the sentence imposed on him under an unsworn information operates a deprivation of his liberty without due process of law. This aspect of the case is not controlled by *Hurtado* v. *California*, 110 U. S. 516, but see *Stoutenburg* v. *Frazier*, 16 App. D. C. 229, 235, 236; *Curry* v. *Dist. of Col.*, 14 App. D. C. 423, 439; *Lappin* v. *Dist. of Col.*, 22 App. D. C. 68, 77.

The statute conclusively presumes the fact and validity of the alleged prior convictions and concludes every defense against the defendant except only that of nonidentity of person; he is precluded from the right to present any defense to the alleged prior convictions—the main fact presumed against him; he cannot show a pardon; nor want of jurisdiction; nor acquittal of the prior charges of former conviction; nor any other defense whatever. *Mobile, J. & K. C. R. R.* v. *Turnipseed*, 219 U. S. 35, 43; *Lindsley* v. *Carbonic Gas Co.*, 220 U. S. 61, 81.

As to what is and is not due process of law, see *In re Kemmler*, 136 U. S. 436, 448; *Holden* v. *Hardy*, 169 U. S. 366, 383.

Defendant's privileges and immunities as a citizen of the United States are abridged in making and enforcing the said statute, as he is thereby denied his immunity from double jeopardy. *Ex parte Lange*, 18 Wall. 163; *In re Butler*, 138 Michigan, 453; *Herndon* v. *Commonwealth*, 105 Kentucky, 197; *Oliver* v. *Commonwealth*, 113 Kentucky, 228; *Commonwealth* v. *Phillips*, 11 Pick. 28; *Satter-*

field v. *Commonwealth*, 105 Virginia, 867; *Scott* v. *Chichester*, 107 Virginia, 933.

The case of *Davis* v. *West Virginia*, *supra*, shows that the statute makes a former conviction an element of the guilt of the defendant on a second offense being committed. Unless this be so, where is the warrant for the infliction of the increased punishment? *Peoples* v. *Sickles*, 156 N. Y. 541. See also *Paetz* v. *State*, 129 Wisconsin, 174, 9 A. & E. Ann. Cas. 767; *Davis* v. *State*, 134 Wisconsin, 632; *People* v. *Craig*, 195 N. Y. 190, and *State* v. *Gordon*, 35 Montana, 458.

The statute and sentence inflict cruel and unusual punishment on the defendant. See *The McDonald Case*, 180 U. S. 311; *The Moore Case*, 159 U. S. 673; *Weems* v. *United States*, 217 U. S. 347, 362; *Stoutenburg* v. *Frazier*, 16 App. D. C. 229; *Howard* v. *North Carolina*, 191 U. S. 126, 136; *In re Kemmler*, 136 U. S. 436; *McElvaine* v. *Brush*, 142 U. S. 155.

Mr. William G. Conley, Attorney General of the State of West Virginia, for defendant in error.

Mr. Justice Hughes delivered the opinion of the court.

In April, 1898, the plaintiff in error, James H. Graham, then known as John H. Ratliff, was indicted for grand larceny in Pocahontas County, West Virginia, pleaded guilty, and was sentenced to the penitentiary for two years. In April, 1901, under the name of Ratliff, he was indicted for burglary in Pocahontas County, West Virginia, pleaded guilty and was sentenced to the penitentiary for ten years. In October, 1906, he was granted a parole by the Governor of West Virginia upon condition that he should pursue the course of a law abiding citizen. In September, 1907, under the name of John H. Graham,

alias J. H. Gray, he was indicted in Wood County, West Virginia, for grand larceny, pleaded guilty and was sentenced to the penitentiary for five years.

In February, 1908, the prosecuting attorney for Marshall County, in which the penitentiary was located, presented an information to the circuit court of that county alleging that the convict Graham was the same man who had twice before been convicted as above stated. Graham was brought before the court, and pleaded that he was not the same person. Later he withdrew his plea, moved to quash the information, and on denial of the motion renewed the plea. A jury was called, and after hearing evidence for the prosecutor, the defendant offering none, returned a verdict identifying him as the person previously convicted. Thereupon the defendant moved for arrest of judgment upon the ground that the proceeding was in violation of the constitution of the State, and also contrary to the Fifth and Fourteenth Amendments of the Constitution of the United States. The motion was overruled and the court sentenced the prisoner to confinement in the penitentiary for life. The judgment was affirmed by the Supreme Court of Appeals of West Virginia. *State* v. *Graham*, 68 W. Va. 248. And the case comes here on error.

The proceeding was taken under §§ 1 to 5 of chapter 165 of the Code of West Virginia, which are as follows:

"1. All criminal proceedings against convicts in the penitentiary shall be in the circuit court of the county of Marshall.

"2. When a prisoner convicted of an offense, and sentenced to confinement therefor in the penitentiary, is received therein, if he was before sentenced to a like punishment, and the record of his conviction does not show that he has been sentenced under the twenty-third or twenty-fourth section of chapter one hundred and fifty-two, the superintendent of the penitentiary shall give

information thereof, without delay, to the said circuit court of the county of Marshall, whether it be alleged or not in the indictment on which he was so convicted, that he had been before sentenced to a like punishment.

"3. The said court shall cause the convict to be brought before it, and upon an information filed, setting forth the several records of conviction, and alleging the identity of the prisoner with the person named in each, shall require the convict named to say whether he is the same person or not.

"4. If he say he is not, or remain silent, his plea, or the fact of his silence, shall be entered of record, and a jury shall be empaneled to inquire whether the convict is the same person mentioned in the several records.

"5. If the jury find that he is not the same person, he shall be remanded to the penitentiary; but if they find that he is the same person, or if he acknowledge in open court, after being duly cautioned, that he is the same person, the court shall sentence him to such further confinement as is prescribed by chapter one hundred and fifty-two, on a second or third conviction, as the case may be."

The provisions of § 23 and 24 of chapter 152, to which the above statute refers, are:

"23. When any person is convicted of an offence and sentenced to confinement therefor in the penitentiary, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found, that he had been before sentenced in the United States to a like punishment, he shall be sentenced to be confined five years in addition to the time to which he is or would be otherwise sentenced.

"24. When any such convict shall have been twice before sentenced in the United States to confinement in a penitentiary, he shall be sentenced to be confined in the penitentiary for life."

These statutes were derived from the laws which were in force in Virginia before West Virginia was created and formed part of the Code of Virginia of 1860, c. 199, which in turn had been taken from the Code of 1849, c. 199.

The plaintiff in error challenges the validity of the legislation and the proceedings which it authorized, upon the grounds (1) that he has been deprived of his liberty without due process of law; (2) that he has been denied the equal protection of the laws; (3) that his privileges and immunities as a citizen of the United States have been abridged, and that he has been denied his immunity from double jeopardy; and (4) that cruel and unusual punishment has been inflicted.

1. The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted. Statutes providing for such increased punishment were enacted in Virginia and New York as early as 1796, and in Massachusetts in 1804; and there have been numerous acts of similar import in many States. This legislation has uniformly been sustained in the state courts (*Ross's Case*, 2 Pick. 165, 170; *Plumbly* v. *Commonwealth*, 2 Met. 413, 415; *Commonwealth* v. *Richardson*, 175 Massachusetts, 202, 205; *Rand* v. *Commonwealth*, 9 Gratt. 738, 740, 741; *King* v. *Lynn*, 90 Virginia, 345, 347; *People* v. *Stanley*, 47 California, 113; *People* v. *Coleman*, 145 California, 609; *Ingalls* v. *State*, 48 Wisconsin, 647; *McGuire* v. *State*, 47 Maryland, 485; *State* v. *Austin*, 113 Missouri, 538), and it has been held by this court not to be repugnant to the Federal Constitution. *Moore* v. *Missouri*, 159 U. S. 673; *McDonald* v. *Massachusetts*, 180 U. S. 311.

In the *McDonald Case*, the statute (Mass. St. 1887, c. 435, § 1) provided that whenever one had been twice

convicted of crime and committed to prison in Massachusetts, or in any other State, he should, upon conviction of a subsequent felony, be deemed to be an "habitual criminal" and should be punished by imprisonment for twenty-five years. In delivering the opinion of the court, Mr. Justice Gray said (p. 312):

"The fundamental mistake of the plaintiff in error is his assumption that the judgment below imposes an additional punishment on crimes for which he had already been convicted and punished in Massachusetts and in New Hampshire.

"But it does no such thing. . . . The punishment is for the new crime only, but is the heavier if he is an habitual criminal. . . . The allegation of previous convictions is not a distinct charge of crimes, but is necessary to bring the case within the statute, and goes to the punishment only."

In the present case, it was not charged in the indictment on which the prisoner was last tried that he had previously been convicted of other offenses, but after judgment he was brought before the court of another county, in a separate proceeding instituted by information, and on the finding of the jury that he was the former convict he was sentenced to the additional punishment which the statute in such case prescribed.

By this proceeding he was not held to answer for an offense; the information did not allege crime. As was said by the Supreme Court of Appeals of West Virginia: "It (the information) alleges that he has been held to answer for crime and that he stands convicted of it through the indictment of the grand jury. It points him out as a convict already held, upon whom rests the general sentence of the law of life imprisonment. . . . The proceedings under the statute are for identification only. They are clearly not for the establishment of guilt. The question of guilt is not reopened." *State* v. *Graham,*

68 W. Va. 248, 251. Full opportunity was accorded to the prisoner to meet the allegation of former conviction. Plainly, the statute contemplated a valid conviction which had not been set aside or the consequences of which had not been removed by absolute pardon. No question as to this can be raised here, for the prisoner in no way sought to contest the validity or unimpaired character of the former judgments, but pleaded that he was not the person who had thus been convicted. On this issue he had due hearing before a jury.

It cannot be said that the prisoner was deprived of due process of law because the question as to former conviction was passed upon separately. While it is familiar practice to set forth in the indictment the fact of prior conviction of another offense, and to submit to the jury the evidence upon that issue together with that relating to the commission of the crime which the indictment charges, still in its nature it is a distinct issue, and it may appropriately be the subject of separate determination. Provision for a separate, and subsequent, determination of his identity with the former convict has not been regarded as a deprivation of any fundamental right. It was established by statute in England that, although the fact was alleged in the indictment, the evidence of the former conviction should not be given to the jury until they had found their verdict on the charge of crime. The act of 6 and 7 Will. IV, c. 111, provided that it should "not be lawful on the trial of any person for any such subsequent felony to charge the jury to inquire concerning such previous conviction until after they shall have inquired concerning such subsequent felony, and shall have found such person guilty of the same; and whenever in any indictment such previous conviction shall be stated, the reading of such statement to the jury as part of the indictment shall be deferred until after such finding as aforesaid." Exception was made in cases where the accused gave evidence

of good character to meet the charge of crime, whereupon the prosecutor might show the former conviction before the verdict of guilty had been returned. And in *Regina* v. *Shuttleworth*, 3 C. & K. 375, 376, Lord Campbell thus stated the practice under the statute: "It is the opinion of all the judges—The prisoner is to be arraigned on the whole indictment, and the jury are to have the new charge only stated to them; and if no evidence is given as to character, nothing is to be read to the jury of the previous conviction till the jury have given a verdict as to the new charge. The jury, without being resworn, are then to have the previous convictions stated to them; and the certificate of it is to be put in, and the prisoner's identity proved." See 24 & 25 Vict., c. 96, § 116.

If a State adopts the policy of imposing heavier punishment for repeated offending, there is manifest propriety in guarding against the escape from this penalty of those whose previous conviction was not suitably made known to the court at the time of their trial. Otherwise, criminals who change their place of operation and successfully conceal their identity would be punished simply as first offenders, although on entering prison they would immediately be recognized as former convicts. It is to prevent such a frustration of its policy that provision is made for alternative methods; either by alleging the fact of prior conviction in the indictment and showing it upon the trial, or by a subsequent proceeding in which the identity of the prisoner may be ascertained and he may be sentenced to the full punishment fixed by law. *Plumbly* v. *Commonwealth*, 2 Met. 413, 415, per Shaw, C. J. In the latter proceeding, as well as in the former, the fundamental rights of the defendant with respect to the ascertainment of his liability to the increased penalty may be fully protected.

Nor is there any reason why such a proceeding should not be prosecuted upon an information presented by a

competent public officer on his oath of office. There is no occasion for an indictment. To repeat, the inquiry is not into the commission of an offense; as to this, indictment has already been found and the accused convicted. There remains simply the question as to the fact of previous conviction. And it cannot be contended, that in proceeding by information instead of by indictment there is any violation of the requirement of due process of law. *Hurtado* v. *California*, 110 U. S. 516; *Brown* v. *New Jersey*, 175 U. S. 172, 175; *Maxwell* v. *Dow*, 176 U. S. 581, 584.

The principles governing a proceeding of this sort, to inquire into the fact of prior conviction, were stated in *Ross's Case* (1824), 2 Pick. 165, 169–171. The legislature of Massachusetts (St. 1817, c. 176, approved February 23, 1818) had provided for increased punishment upon second and third convictions. Reciting that the previous conviction might not be known to the grand jury or to the attorney for the commonwealth at the time of the indictment and trial, the statute contained the following provision closely resembling the one now under consideration:

"That whenever it shall appear to the Warden of the State Prison, . . . that any convict, received into the same, pursuant to the sentence of any Court, shall have before been sentenced, by competent authority of this or any other state, to confinement to hard labor for term of life or years, it shall be the duty of the said Warden, . . . to make representation thereof, as soon as may be, to the Attorney or Solicitor General; and they or either of them shall, by information, or other legal process, cause the same to be made known to the Justices of the Supreme Judicial Court, . . . and the said Justices shall cause the person or persons, so informed against, to be brought before them, in order, that if he deny the fact of a former conviction, it may be tried according to law, whether the charge contained in such

information be true. And if it appear by the confession of the party, by verdict of the jury, or otherwise, according to law, that said information is true, the Court shall forthwith proceed to award against such convict, the residue of the punishment provided in the foregoing section; otherwise the said convict shall be remanded to prison, there to be held on his former sentence." (Laws of Mass., 1815–1818, pp. 602, 603.) Ross, then undergoing sentence for five years was brought before the court pursuant to such an information, and his term of imprisonment was increased. In sustaining this sentence, the court, by Parker, C. J., said (p. 171):

"In regard to the objection made to the process, this is not an information of an offence for which a trial is to be had, but of a fact, namely, that the prisoner has already been convicted of an offence; and this fact must appear, either by his own confession, or by verdict of a jury, or otherwise according to law, before he can be sentenced to the additional punishment. Is he to be sentenced for an offence distinct from the one for which he has been tried upon an indictment? We apprehend not; but the only question is, whether he is such a person as ought to have been sentenced, on his last conviction, to additional punishment, if the fact of a former conviction had been known to the court. There was no need of a presentment by a grand jury, for no offence was to be inquired into. That had been already done. An indictment is confined to the question whether an offence has been committed. Here the question was simply whether the party had been convicted of an offence.

"It is said, that at common law both offences should be stated in the same count. The question upon this is, whether the legislature had not a right to prescribe a different mode; and we think they had."

In the case at bar, the record is silent upon the question whether the fact of the former convictions was known

at the time of the last indictment and trial. This, however, cannot be regarded as important from the constitutional standpoint. The indictment did not allege the prior convictions; the issue was not involved in the trial of the indictment and the court could not have considered these convictions in imposing sentence. *State* v. *Davis*, 68 W. Va. 142, 150, 151. They were not considered until the subsequent proceeding was had. Doubtless, as has been said, the object in providing the alternative proceeding is to make sure that old offenders should not be immune from the increased punishment because their former conviction was not known when they were last tried. But this does not define the limit of state power. Although the State may properly provide for the allegation of the former conviction in the indictment, for a finding by the jury on this point in connection with its verdict as to guilt and thereupon for the imposition of the full sentence prescribed, there is no constitutional mandate which requires the State to adopt this course even where the former conviction is known. It may be convenient practice, but it is not obligatory. This conclusion necessarily follows from the distinct nature of the issue and from the fact, so frequently stated, that it does not relate to the commission of the offense, but goes to the punishment only, and therefore it may be subsequently decided.

2. It is insisted that the plaintiff in error was denied the equal protection of the laws, in that the statute arbitrarily discriminates against the former convict—in a case like the present one—by requiring an information, instead of indictment, for the sole reason that he has been received into the penitentiary; so that, as the plaintiff in error puts it, "if he be out of the penitentiary, the defendant must be prosecuted by indictment in order to inflict the increased penalty, but if he be in the penitentiary, he is denied the right to indictment and must be prosecuted by information."

The argument is without merit. The statute in question applies to all those "convicted of an offense, and sentenced to confinement therefor in the penitentiary," who previously have been sentenced to a like punishment. The fact of such sentence, indicating the gravity of the offense, affords a reasonable basis for classification. Those who have been so sentenced once before, and those who have been so sentenced twice before, are subjected, respectively, to the same measure of increased punishment. In all cases, before the increased punishment can be inflicted, there must be conviction on the new charge; the former conviction must be shown, and there must be a finding by a jury, if the fact is contested, of the identity of the defendant with the former convict. The distinction, upon which the contention is based, has regard simply to the difference in procedure between the case where the fact of former conviction is alleged in the indictment, and determined by the jury on the trial of the charge of crime, and the case where it is charged in the information and determined by a jury in a proceeding thereby instituted. This, in view of the nature of the issue to be determined, cannot be said to give rise to a substantial difference in right or to any inequality within the meaning of the constitutional provision.

The Fourteenth Amendment is not to be construed "as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment." *Standard Oil Company* v. *Tennessee*, 217 U. S. 413, 420. A State may make different arrangements for trials under different circumstances of even the same class of offenses (*Brown* v. *New Jersey*, 175 U. S. 172, 177; *Missouri* v. *Lewis*, 101 U. S. 22, 31; *Hayes* v. *Missouri*, 120 U. S. 68, 71; *Lang* v. *New Jersey*, 209 U. S. 467); and certainly it may suitably adapt to the exigency the method of determining whether a person found guilty of crime has previously been convicted of

other offenses. All who were in like case with the plaintiff in error were subject to the same procedure. He belonged to a class of persons convicted and sentenced to the penitentiary whose identity as former convicts had not been determined at the time of their trial. As to these, it was competent for the State to provide appropriate means for determining such identity.

3. What has been said, and the authorities which have been cited, sufficiently show that there is no basis for the contention that the plaintiff in error has been put in double jeopardy or that any of his privileges or immunities as a citizen of the United States have been abridged. Nor can it be maintained that cruel and unusual punishment has been inflicted. *In re Kemmler*, 136 U. S. 436; *Moore* v. *Missouri*, *supra*; *McDonald* v. *Massachusetts*, *supra*; *Howard* v. *North Carolina*, 191 U. S. 126; *Coffey* v. *Harlan County*, 204 U. S. 659; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 111.

The questions raised under the constitution of the State are not open here, and in no aspect of the case does it appear that any right of the plaintiff in error under the Constitution of the United States has been infringed.

Judgment affirmed.

CROSS LAKE SHOOTING AND FISHING CLUB *v.* STATE OF LOUISIANA.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 46. Argued April 18, 1912.—Decided May 13, 1912.

The contract clause of the Federal Constitution is not directed against all impairment of contract obligations, but only against such as result from a subsequent exertion of the legislative power of the State.

The contract clause does not reach mere errors committed by a state court when passing upon the validity and effect of a contract under the laws existing when it was made; and, even if such errors operated to impair the contract obligation, there is no Federal question, in the absence of a subsequent law, on which to rest the decision of the state court.

Where the state court has decided that the plaintiff in error never acquired title because the grant was not one *in præsenti* but depended upon conditions subsequent which had never been fulfilled, and rests its judgment on that fact alone, and not on the effect of a subsequent statute which might have affected the title had the title of plaintiff in error been perfected, there is no Federal question.

Writ of error to review 123 Louisiana, 208, dismissed.

THE facts are stated in the opinion.

Mr. Edgar H. Farrar, with whom *Mr. John D. Wilkinson* was on the brief, for plaintiff in error.

Mr. W. P. Hall, with whom *Mr. Walter Guion*, Attorney General of the State of Louisiana, was on the brief, for defendant in error.

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

This was a suit by the State of Louisiana against the

Cross Lake Shooting and Fishing Club to recover about 11,000 acres of land, in the Parish of Caddo in that State, of which the fishing club was in possession, and to which it was asserting title, under a sale and deed made to its remote grantors by the Board of Commissioners of the Caddo Levee District. Although defeated in the district court, the State prevailed in the Supreme Court and there obtained a final judgment in its favor. 123 Louisiana, 208. The fishing club has brought the case here, claiming that the judgment gave effect to a state law which impinged upon the contract clause of the Constitution of the United States.

The facts are these: By Act No. 74 of 1892 the legislature of the State created the Caddo Levee District, defined its boundaries, vested the control and management of its affairs in a Board of Commissioners, clothed the Board with corporate powers, and made to it a grant of state lands in the following terms:

"SEC. 9. Be it further enacted, etc., That in order to provide additional means to carry out the purposes of this act, and to furnish resources to enable the said Board to assist in developing, establishing and completing the levee system in the said District, all lands now belonging or that may hereafter belong to the State of Louisiana and embraced within the limits of the Levee District as herein constituted shall be and the same are hereby granted, given, bargained, donated, conveyed, and delivered unto the said Board of Commissioners of the Caddo Levee District, whether the said lands or parts of lands were originally granted by the Congress of the United States to the State of Louisiana or whether the said lands have been or may hereafter be forfeited, or bought in by or for, or sold to the State at tax sale for non-payment of taxes; where the State has or may hereafter become the owner of lands by or through tax sales, conveyances thereof shall only be made to the said Board of Levee Commissioners

after the period of redemption shall have expired; provided, however, any and all former owners of lands which have been forfeited to purchasers by or sold to the State for non-payment of taxes may at any time within six months next ensuing after the passage of this act redeem the said lands or all of them upon paying to the Treasurer of this State all taxes, costs and penalties due thereon, down to the date of the said redemption, but such redemption shall be deemed and be taken to be sales of lands by the State and all and every sum or sums of money so received, shall be placed to the credit of the Caddo Levee District. After the expiration of the said six months it shall be the duty of the Auditor and Register of the State Land Office, on behalf of and in the name of the State to convey to the said board of Levee Commissioners by proper instruments of conveyance, all lands hereby granted or intended to be granted and conveyed to the said Board whenever from time to time the said Auditor or Register of the State Land Office or either of them shall be requested to do so by the said Board of Levee Commissioners or by the President thereof, and thereafter the said President of the said Board shall cause the said conveyances to be properly recorded in the Recorder's office of the respective parishes wherein the said lands are located and when the said conveyances are so recorded the title to the said lands with the possession thereof shall from thenceforth vest absolutely in the said Board of Commissioners, its successors or grantees. The said lands shall be exempted from taxes after being conveyed to, and while they remain in the possession or under the control of the said Board. The said Board of Levee Commissioners shall have the power and authority to sell, mortgage and pledge or otherwise dispose of the said lands in such quantities, and at such times, and at such prices as to the Board may seem proper. But all proceeds derived therefrom shall be deposited in the State Treasury

to the credit of the Caddo Levee District and shall be drawn only upon the warrants of the President of said Board, properly attested as provided in this act."

The lands in question were within the district so created and at the date of the act were owned by the State, but whether it had acquired them as swamp-lands under the legislation of Congress (Acts, March 2, 1849, 9 Stat. 352, c. 87; September 28, 1850, 9 Stat. 519, c. 84) or as the bed of what was a navigable lake when the State was admitted into the Union (see *Pollard* v. *Hagan*, 3 How. 212), is left uncertain. For present purposes, however, this uncertainty may be disregarded and the State's title treated as resting on the swamp-land grant by Congress, as was claimed by the fishing club in the state courts. No instrument conveying the lands to the Board of the Levee District was ever executed by the State Auditor or the Register of the State Land Office or recorded in the recorder's office of the parish. But in 1895 the Board sold and deeded the lands to the remote grantors of the fishing club for the agreed price of $1,100, or 10 cents per acre, which was deposited in a bank under an agreement whereby it would be payable to the Board whenever the latter should perfect the title by obtaining a conveyance from the Auditor and Register. Such a conveyance was not obtained, and in December, 1901, the grantees in the deed requested the Board to complete the title, and in that connection offered to pay $3,500 more for the lands; whereupon the Board adopted a resolution accepting the offer and authorizing its president to take proper steps to perfect the title. But it does not appear that the additional sum was either paid or tendered, or that anything was done under the resolution.

In July, 1902, the legislature of the State passed an act (Laws of 1902, No. 171, p. 324) authorizing the Register of the State Land Office to sell these lands at not less than $5 per acre, nor in greater quantities than 320 acres to

any one person, directing that the proceeds of such sales be placed to the credit of the Board of the Levee District, and containing the following repealing provision:

"Section 4. Be it further enacted, etc., That Act No. 74 of the Acts of the General Assembly of Louisiana for 1892 and Act No. 160 of the Acts of 1900 be and the same are hereby repealed in so far as they may in any way whatever affect any of the lands described herein, the same never having been transferred by the Register of the State Land Office and the State Auditor, nor either of them by any instrument of conveyance from the State as required by said act to complete the title to same."

This suit was brought in 1906. The petition made no mention of the act of 1902, but proceeded upon the theory, among others, that under § 9 of Act No. 74 of 1892, *supra*, the Board of the Levee District was wholly without authority to sell or otherwise dispose of the lands until a proper instrument conveying them to the Board had been executed by the Auditor and Register and duly recorded in the recorder's office of the parish, and that, as no such instrument had been executed or recorded, the sale and deed by the Board, under which the fishing club was asserting title, was unauthorized and void. The answer, which was also silent respecting the act of 1902, alleged, in substance, that the act of 1892 was a grant *in præsenti* of the lands and operated to transfer them to the Board of the Levee District without any conveyance from the Auditor and Register; that the fishing club's grantors purchased on the faith of that act; and that to permit the State to retake the lands would impair the obligation of its contract embraced in the act.

At the hearing in the district court counsel for the State placed some reliance upon the act of 1902, but the court ruled that the act of 1892 was a grant *in præsenti* of all lands falling within its terms other than those acquired through tax sales; that the provision requiring convey-

ances from the Auditor and Register related only to lands acquired through such sales; that, as the lands in suit had not been acquired in that way, the sale and deed by the Board to the fishing club's grantors were authorized and valid, even although there was no conveyance from the Auditor and Register; and that the rights acquired thereby were not divested or affected by the subsequent act of 1902. The record does not disclose that there was any reliance upon that act in the Supreme Court, and yet it was practically conceded in argument here that there was. But, whether relied upon or not, the act was mentioned in the statement preceding the court's opinion and was not otherwise noticed or treated as a factor in the decision. The court held that the act of 1892 was not a grant *in præsenti;* that a conveyance from the Auditor and Register was essential to invest the Board with any disposable title; and that, in the absence of such a conveyance, the sale and deed by the Board were wholly unauthorized and void. Upon that subject the court said (p. 214):

"In our opinion, the levee board acquired no title to the lands in dispute under the act of 1892, because no deed of conveyance thereto was ever executed by the Auditor and Register, or either of them, and, of course, no such deed was ever recorded. . . . This conclusion renders it unnecessary to consider the other issues presented by the pleadings, . . .; and it is wholly immaterial whether the board attempted to sell the land or to give it away, or whether it received an amount agreed to be paid or received nothing. Our reasons for the conclusion that the board acquired no title, and could therefore convey none, predicated on the admitted fact that no deed of conveyance of the lands in question has ever been executed by the auditor or register, are, briefly, as follows:"

Then, after proceeding with an analysis and interpreta-

tion of the provisions of § 9 of the act of 1892, it was further said (p. 217):

"Upon the whole, we are of opinion that the law in question is susceptible of but one interpretation, i. e., that its makers intended that disposable title to all lands granted or intended to be granted by it should vest in the grantee only upon registry, in the parishes where the lands lie, of proper instruments of conveyance executed by the Auditor and Register of the State Land Office. So far as the tax lands are concerned, the reason for thus qualifying the grant is obvious enough. . . . As to the swamp lands, it may well be that in many instances there were pending unsettled claims and controversies of which the land office was advised, with which the Register alone was qualified to deal, and which rendered it inadvisable that new titles should issue save to the knowledge of that officer. But whether these views as to the reasons which inspired the law, be correct or not, the law itself is plain, and it has (in effect) twice received from this court the interpretation which we are now placing on it; once in a case involving lands formerly constituting the bed of a shallow lake, and again in a case involving lands acquired by the state under its tax laws."

With this statement of the case we come to consider whether it presents any question under that clause of the Constitution which declares, "No State shall . . . pass any . . . law impairing the obligation of contracts." This clause, as its terms disclose, is not directed against all impairment of contract obligations, but only against such as results from a subsequent exertion of the legislative power of the State. It does not reach mere errors committed by a state court when passing upon the validity or effect of a contract under the laws in existence when it was made. And so, while such errors may operate to impair the obligation of the contract, they do not give rise to a Federal question. But when the state court,

either expressly or by necessary implication, gives effect to a subsequent law of the State whereby the obligation of the contract is alleged to be impaired, a Federal question is presented. In such a case it becomes our duty to take jurisdiction and to determine the existence and validity of the contract, what obligations arose from it, and whether they are impaired by the subsequent law. But if there be no such law, or if no effect be given to it by the state court, we cannot take jurisdiction, no matter how earnestly it may be insisted that that court erred in its conclusion respecting the validity or effect of the contract; and this is true even where it is asserted, as it is here, that the judgment is not in accord with prior decisions on the faith of which the rights in question were acquired. *Knox* v. *Exchange Bank*, 12 Wall. 379, 383; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 111–112; *Bacon* v. *Texas*, 163 U. S. 207, 220–221; *Turner* v. *Wilkes Co.*, 173 U. S. 461; *National Mutual Building and Loan Ass'n* v. *Brahan*, 193 U. S. 635, 647; *Hubert* v. *New Orleans*, 215 U. S. 170, 175; *Fisher* v. *New Orleans*, 218 U. S. 438; *Interurban Railway Co.* v. *Olathe*, 222 U. S. 187.

It is most earnestly insisted that, even conceding that our jurisdiction is as restricted as just stated, it still includes the present case, because the decision of the state court, although not expressly rested upon the act of 1902, by necessary implication gave effect to it; and in support of this position it is said that but for that act the State could not have maintained the suit. But we do not understand that the State's right to maintain the suit was dependent upon that act, nor do we perceive any reason for believing that the act was an influential, though unmentioned, factor in the decision. Under the construction given to the act of 1892 the State still held the title, no conveyance having been made to the Board of the Levee District, and, of course, the right to maintain the suit was appurtenant to the title.

What has been said sufficiently demonstrates that no effect whatever was given to the act of 1902 and therefore that the case presents no question under the contract clause of the Constitution; and, as there is no suggestion of the presence of any other Federal question, the writ of error is

Dismissed.

GRITTS *v.* FISHER, SECRETARY OF THE INTERIOR, AND MacVEAGH, SECRETARY OF THE TREASURY.

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

No. 896. Argued January 10, 11, 1912.—Decided May 13, 1912.

Children born to enrolled members of the Cherokee tribe after September 1, 1902, and living on March 4, 1906, are entitled to enrollment as members of the tribe and to participation in the allotment and distribution of its lands and funds made under the act of July 1, 1902, 32 Stat. 725, c. 1375, and subsequent acts relating to such allotment and distribution.

Section 2 of the act of April 26, 1906, as amended June 21, 1906, for the enrollment of minor children living March 4, 1906, is not to be construed as excluding those born after September 1, 1902.

Under the act of July 1, 1902, individual members of the Cherokee tribe did not individually acquire any vested rights in the surplus lands and funds of the tribe that disabled Congress from thereafter making provision for admitting newly-born members of the tribe to the allotment and distribution, as it did by the act of April 26, 1906.

The act of July 1, 1902, limiting the allottees and distributees of Cherokee lands and funds, was not a contract but only an act of Congress and can have no greater effect; it was but an exertion of the governmental administrative control over tribal property of tribal Indians, and subject to change by Congress at any time before it was carried into effect and while tribal relations continued.

37 App. D. C. 473, affirmed.

THE facts, which involve the construction and validity of the statutes relating to allotment and distribution of Cherokee lands and funds and the right of children born after September 1, 1902, to participate therein, are stated in the opinion.

Mr. John J. Hemphill and *Mr. W. H. Robeson*, with whom *Mr. C. C. Calhoun* and *Mr. Daniel B. Henderson* were on the brief, for appellants.

The Solicitor General for appellees.

Mr. William W. Hastings, as *amicus curiæ*, filed a brief for the Cherokee Nation.

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

The question presented for decision in this case is, whether children born to enrolled members of the Cherokee tribe of Indians after September 1, 1902, and living on March 4, 1906, are entitled to enrollment as members of the tribe and to participation in the allotment and distribution of its lands and funds now being made under the legislation of Congress. The Secretary of the Interior and the Secretary of the Treasury, who are respectively charged with important duties in that connection, have taken the position, and are proceeding upon the theory, that under the acts of April 26, 1906, and June 21, 1906, *infra*, the right of the controversy is with the children; and the purpose of this suit is to test the accuracy of that position, and, if it be held untenable, to enjoin those officers from giving effect to it. The suit was begun in the Supreme Court of the District of Columbia in 1911, and the plaintiffs are three Indian members of the tribe, duly enrolled as such as of September 1, 1902, under the act of July 1,

1902, *infra*, who sue on behalf of themselves and all others similarly situated. A demurrer to the bill was sustained and a decree of dismissal entered, which was affirmed by the Court of Appeals. 37 App. D. C. 473; 39 Wash. Law Rep. 754. An appeal brought the case here.

During the last twenty years Congress has enacted a series of laws looking to the allotment and distribution of the lands and funds of the Five Civilized Tribes, of which the Cherokee tribe is one, among their respective members, and to the dissolution of the tribal governments. An extended statement of these laws, so far as they concern the Cherokees, as also of the title by which their lands and funds have been held and of the relations of the tribe and its members to the United States, will be found in *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Cherokee Intermarriage Cases*, 203 U. S. 76; *Lowe* v. *Fisher*, 223 U. S. 95, and *Heckman* v. *United States*, *ante*, p. 413.

Anterior to this legislation the lands and funds belonged to the tribe as a community, and not to the members severally or as tenants in common. The right of each individual to participate in the enjoyment of such property depended upon tribal membership, and when that was terminated by death or otherwise the right was at an end. It was not alienable or descendible. And when children were born into the tribe they became thereby members and entitled to all the rights incident to that relation. Under treaties with the United States the tribe maintained a government of its own, with legislative and other powers, but this was a temporary expedient and in time proved inefficient and unsatisfactory. As in the instance of other tribal Indians, the members of this tribe were wards of the United States, which was fully empowered, whenever it seemed wise to do so, to assume full control over them and their affairs, to determine who were such members, to allot and distribute the tribal lands and funds among

them, and to terminate the tribal government. This Congress undertook to do. The undertaking was a large one and difficulties were encountered. The first legislation was largely preliminary and experimental and need not be specially noticed, because no material change in the situation resulted therefrom.

The act of July 1, 1902, 32 Stat. 725, c. 1375, which related only to the Cherokees and is spoken of as the Cherokee Agreement, was quite comprehensive and is the one upon which the plaintiffs here rely. It made provision for ascertaining who were members and permanently enrolling them (§§ 25–30), for reserving certain of the tribal lands for public purposes (§ 24), for appraising the other lands (§§ 9, 10), and for allotting in severalty to each enrolled member land equal in value to 110 acres of the average allottable lands (§ 11). It declared that the enrollment should be made "as of September 1, 1902," and should include "all persons then living" and entitled to enrollment (§ 25); that "no child born thereafter" should be entitled to enrollment or "to participate in the distribution of the tribal property" (§ 26); that during the months of September and October, 1902, applications could be received for the enrollment of infant children born to recognized and enrolled members on or before September 1 of that year, but that the application of no person whomsoever for enrollment should be received after October 31, 1902 (§ 30); that no person not enrolled should be entitled to "participate in the distribution of the common property" of the tribe, and those who were enrolled should "participate in the manner set forth" in the act (§ 31); that the enrollment should be made in partial lists, which, when approved by the Secretary of the Interior, were to constitute parts of the final roll "upon which allotment of land and distribution of other tribal property" should be made, and that when lists embracing all persons lawfully entitled to enrollment were

made and approved the roll should "be deemed complete" (§ 28). There were provisions, that "no allotment of land or other tribal property" should be made on behalf of any enrolled person dying *prior* to September 1, 1902, but that his right in the lands or other tribal property should be deemed extinguished (§ 31), and that if any enrolled person should die *after* September 1, 1902, and before receiving his allotment, the lands to which he would have been entitled if living should be allotted in his name and should, "with his proportionate share of other tribal property," descend to his heirs (§ 20). The act declared that the tribal government should not continue longer than March 4, 1906 (§ 63), directed the payment in full, out of the tribal funds, of the lawful indebtedness of the tribe incurred up to the time of its dissolution, and authorized a *pro rata* distribution, among the enrolled members, of the tribal funds remaining after the dissolution of the tribal government and the payment of its indebtedness (§§ 66, 67). But it made no specific provision for the distribution or disposal of tribal lands remaining after the prescribed reservations and allotments were made.

But the tribal government was not dissolved on March 4, 1906. By joint resolution of March 2, 1906, Congress provided that the tribal existence and the tribal government should continue until all property of the tribe, or the proceeds thereof, should be distributed among the individual members (34 Stat. 822); and by the act of April 26, 1906, they were further continued until otherwise provided by law (34 Stat. 137, 148, c. 1876). On those dates the work contemplated by the act of July 1, 1902, had not been completed. Some of the applications for enrollment, received within the time prescribed in the act, had not been acted upon; some of the enrolled members had not selected their allotments, and litigation was pending which involved the rights of some who had been enrolled and of others whose applications were awaiting

action. In addition to this, some who otherwise were entitled to enrollment had filed applications therefor after the time prescribed, and the tribal council of the Cherokees had requested that children born after September 1, 1902, and before March 4, 1906, who but for the limitation in the act of July 1, 1902, would be entitled to participate in the allotment and distribution of the tribal lands and moneys equally with members born prior thereto, be admitted to such participation, if possible, and if that could not be done, that each child born between those dates be given a sum of money sufficient to place him, as far as possible, on an equal footing with the others.

The act of April 26, 1906, unlike that of July 1, 1902, was not limited to the Cherokees, but it did in express terms include them. By its twenty-eighth section it continued the tribal existence and the tribal government, as just indicated; by its first section it authorized the enrollment of a class of persons whose applications therefor were made prior to December 1, 1905, and were not allowed solely because not made in time; and by its second section, as amended June 21, 1906, 34 Stat. 325, 341, c. 3504, it provided as follows:

"That for ninety days after approval hereof applications shall be received for enrollment of children who were minors living March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek tribes, or have applications for enrollment pending at the approval hereof, and for the purpose of enrollment under this section illegitimate children shall take the status of the mother, and allotments shall be made to children so enrolled. If any citizen of the Cherokee tribe shall fail to receive the full quantity of land to which he is entitled as an allotment, he shall be paid out of any of the funds of such tribe a sum equal to twice the appraised value of the amount of land thus deficient. . . . *Provided,*

That the rolls of the tribes affected by this Act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date: *Provided*, That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment or to be entitled to enrollment in any of said tribes, except for minors the children of Indians by blood, or of freedmen members of said tribes, . . . as herein otherwise provided. . . ."

By its sixteenth and seventeenth sections it further provided that after the making of the allotments provided for in that and other acts, the residue of the lands, not reserved or otherwise disposed of, should be sold by the Secretary of the Interior and the proceeds deposited in the United States Treasury to the credit of the tribe, together with moneys arising from other sources, and that thereafter, and when all the just charges against the tribal funds should be deducted therefrom, the remaining funds should be distributed per capita to the members then living and to the heirs of deceased members named in the finally approved rolls.

The controversy here arises out of the provision in § 2 of the act of April 26, 1906, as amended June 21 following, for the enrollment of "children who were minors living March 4, 1906," which the defendants regard as including children born after September 1, 1902, and living on March 4, 1906. The appellants contend, first, that it does not include children born after September 1, 1902, but only such as were born prior to that date and for whom no application for enrollment was made within the time limited by the act of July 1, 1902, that is, on or before October 31, 1902; and, second, that if it does include children born after September 1, 1902, it arbitrarily takes from the appellants and others similarly situated property

which is theirs and gives it to others, and therefore is violative of due process of law. The last contention rests upon another, viz., that the act of July 1, 1902, vested in the members living on September 1, 1902, who were enrolled under that act, an absolute right to receive all lands of the tribe not reserved or allotted thereunder and all funds of the tribe not used in the payment of tribal debts.

We are unable to assent to the first contention. The provision in question says "children who were minors living March 4, 1906," and those words as naturally and aptly embrace children born after as before September 1, 1902. Had it been intended, as is claimed, merely to extend the time for filing applications on behalf of children living on September 1, 1902, and therefore born on or before that date, it is reasonable to believe that other words more appropriate to the occasion would have been used. Why say "living March 4, 1906," if as to these children the prior requirement expressed in the words "living on September 1, 1902," was not to be affected? Besides, the Cherokee tribal council, as also the Chickasaw legislature (see H. R. Doc. No. 455, 59th Cong., 1st Sess.), had asked that provision be made for the enrollment of children born up to March 4, 1906, and that would shed some light on the provision were its meaning uncertain. But it does not seem to have been regarded as uncertain by those charged with its enforcement, nor by the courts below. On the contrary, they treated it as plainly including children born after September 1, 1902, and we think that is the right view of it.

We come then to the second contention. It is not proposed to disturb the individual allotments made to members living September 1, 1902, and enrolled under the act of 1902, and therefore we are only concerned with whether children born after September 1, 1902, and living on March 4, 1906, should be excluded from the allotment and distribution. The act of 1902 required that they be

excluded, and the legislation in 1906, as we have seen, provides for their inclusion. It is conceded, and properly so, that the later legislation is valid and controlling unless it impairs or destroys rights which the act of 1902 vested in members living September 1, 1902, and enrolled under that act. As has been indicated, their individual allotments are not affected. But it is said that the act of 1902 contemplated that they alone should receive allotments and be the participants in the distribution of the remaining lands, and also of the funds, of the tribe. No doubt such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable Congress from thereafter making provision for admitting newly born members of the tribe to the allotment and distribution. The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when "it is only an act of Congress and can have no greater effect." *Cherokee Intermarriage Cases*, 203 U. S. 76, 93. It was but an exertion of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued. *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 488; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Wallace* v. *Adams*, 204 U. S. 415, 423. It is not to be overlooked that those for whose benefit the change was made in 1906 were not strangers to the tribe, but were children born into it while it was still in existence and while there was still tribal property whereby they could be put on an equal, or approximately equal, plane with other members. The council of the tribe asked that this be done, and we entertain no doubt that Congress in acceding to the request was well within its power.

Decree affirmed.

CITY OF LOUISVILLE, KENTUCKY, *v.* CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY.

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

No. 197. Argued March 7, 8, 1912.—Decided May 13, 1912.

Under the then constitution of Kentucky, in 1886, the legislature had the sole right to create corporations and grant franchises to use the streets of municipalities; a charter granted by the State, subject to conditions to be imposed by the municipality, became, after the acceptance of the conditions, a grant, not of the municipality but of the State, and one which cannot be impaired by an ordinance made by the municipality.

The new constitution of 1891, conferring upon municipalities the right to grant street franchises, and the later statute repealing special corporate privileges, did not and could not, repeal rights vested in corporations nor relieve them of the burdens imposed by prior charter contract.

The constitution of Kentucky of 1891, while limiting the power to sell franchises in the future, distinctly protected previously granted charter rights under which work had in good faith been begun.

While franchises to be are not transferable without express authority, franchises to have and to hold and to use are contractual and proprietary and can be transferred; and, *held* in this case, that the franchise granted to a telephone company was property, taxable and alienable under the conditions on which it was granted, and, under the contract clause of the Constitution, could not be abrogated as against a transferee whose rights had been recognized by the municipality.

Permitting the transferee of a franchise to act thereunder and expend large sums of money and exacting from it a bond to comply with the conditions of the franchise will operate to estop a municipality from denying that the franchise was transferable and the transferee had succeeded to all the rights of the transferring corporation.

Where the State, and not a municipality, has granted an assignable right in perpetuity to use the streets of that municipality, the grant

is not affected by the status of the city being changed so to give it the greater rights than when the grant was made.

In construing the duration of a telephone franchise, the nature of the system to be operated must be considered as well as the facts that the necessary structures are permanent in nature and require large investments, and that revocation of the franchise at will would operate to nullify it and defeat the purpose of the State to procure the system desired; and so *held* that the legislative grant made prior to the adoption of its present constitution by the State of Kentucky to a telephone company to use the streets of Louisville was one in perpetuity, was assignable and could not be revoked by a subsequent ordinance of the city of Louisville as against the assignee of the original corporation.

On April 3, 1886 (Laws 1885–6, c. 511, p. 1174), the legislature of Kentucky chartered the Ohio Valley Telephone Company, fixing no limit to its corporate existence. Its principal office was to be at Louisville, but the company was empowered to construct and maintain within the State and elsewhere telephone lines, exchanges and systems, and authorized "to purchase or to acquire and dispose of real estate, apparatus, patents, licenses, rights and franchises relating to such business; to borrow money, and to issue and sell bonds and to secure the payment of the same by a mortgage on all the property of the company, and on any of its . . . franchises, easements, rights of way and privileges . . ." In § 5 it was enacted that "The said company may construct, equip and maintain said telephone systems and exchanges, erect poles and string wires thereon, and operate its telephone lines over, along or under any highway, street or alley in the city of Louisville, with and by the consent of the General Council of said city." On August 17, 1886, the city council passed an ordinance which, after reciting this section of the charter, ordained that the act of the legislature above mentioned, so far as it refers to the use of the streets of Louisville, "is hereby ratified and confirmed and the right is hereby granted and confirmed to the said Ohio Valley

Telephone Company, its successors and assigns, to maintain a telephone system, and to erect poles and string wires thereon; . . . and to operate its telephone lines over, along or under any street, avenue, alley or sidewalk in the city of Louisville." There were also provisions in this ordinance regulating the manner of erecting poles and stringing wires in the street, and requiring the company to carry the fire and police wires of the city free of charge, and to give a bond in the sum of $50,000, with surety, to save the city harmless against any damage caused by the opening of any street for telephone purposes. This bond was to be renewed from time to time as required by the city. It was declared that nothing in the ordinance should be construed to give the Ohio Valley Telephone Company, its successors or assigns, any exclusive right in the streets.

The ordinance was accepted, the $50,000 bond was given, and the Ohio Valley Telephone Company erected poles, strung wires, and maintained a telephone exchange in the city of Louisville until January 27, 1900, when it consolidated with the Cumberland Telephone and Telegraph Company. By virtue of the Kentucky statute then of force, a new corporation was created under the name of the Cumberland Telephone and Telegraph Company, and the defendant in error was thereafter vested with all the "property . . . of the constituent companies, without deed or transfer, and bound for their debts and liabilities." The statute, at that time, was silent as to the transfer of "franchises," but in 1902 (Ky. Stat. 1909, § 556) it was amended so as to provide that upon the filing of the certificate the consolidated company should be vested "with all the rights, privileges, franchises, exemptions, property, business, credits, assets and effects of the constituent corporations."

Upon this consolidation on January 27, 1900, the Cumberland Telephone and Telegraph Company entered into

possession of all the property of the Ohio Valley Telephone Company and operated the plant, poles and wires in Louisville until April 7, 1902, when the city council passed an ordinance, that the Cumberland Company should execute a bond for $50,000, as required of the Ohio Valley Telephone Company under the ordinance of August 17, 1886. This was done, and, on June 2, 1902, the council passed a resolution that "the bond of the Cumberland Telephone and Telegraph Company, successor of the Ohio Valley Telephone Company, principal, and the American Bonding Company, of Baltimore city, as surety, be and the same is hereby accepted and approved, and the Ohio Valley Telephone Company, and its sureties, are hereby relieved from all liability under their bond of August 28, 1886."

The Cumberland Company fully complied with the agreement as to carrying the police and fire wires of the city free of charge, greatly enlarged the telephone system in the city, and, at an expense of more than a million dollars, improved the plant and trebled the number of subscribers, although there was in the city another telephone company with a large number of patrons.

In 1908 a difference arose between the city and the company, the city claiming that the company's methods were dictatorial and oppressive, that it rendered poor service at high rates and was guilty of discrimination among its patrons. This the company denied, claiming that its service was good, its rates were low and that what was called discrimination consisted in different rates for different classes of service open on equal terms to all members of the public alike.

No proceedings of any sort were instituted to decide the merits of this controversy, or to secure appropriate relief if, after a hearing, the charges were found to be true. But, apparently with the view of having only one telephone system, an ordinance was submitted to the City Council

of Louisville in 1908 providing for the creation of a comprehensive telephone system, repealing all existing rights and granting a new franchise, which was to be sold to the highest bidder.

The Cumberland Company gave notice that it would rely on its existing contract to use the streets, and would not be a bidder at the proposed sale. Thereupon this ordinance was withdrawn, and another introduced and passed, by which the city, on January 23, 1909, repealed the ordinance of August 17, 1886, under which the Ohio Valley Telephone Company had erected poles, strung wires, and conducted a telephone system.

The Cumberland Company thereupon filed its bill in the United States Circuit Court for the Western District of Kentucky, setting out the facts above outlined, alleging that it was the successor to the Ohio Valley Telephone Company, which, in reliance upon the ordinance of August 17, 1886, had erected a telephone system; that the Cumberland Company, as its successor under the terms of the consolidation act, and in accordance with the contract between the city and the Ohio Valley Telephone Company, carried on the telephone business and does now carry upon its poles and underground conduits the fire alarm and police wires of the city free of charge, which wires have been and now are daily used by the city in the conduct of its police and fire departments; that the Cumberland Company has largely extended and improved the plant, appliances and business, and in doing so has expended $1,700,000, "all of which was done upon the faith of and in reliance upon the said ordinance." It alleged that the repealing ordinance of 1909 impaired the obligation of its contract and deprived the company of its business and property without due process of law, and that, unless enjoined, the city would remove the poles and wires, and destroy the company's business, to its irreparable damage.

A temporary injunction was granted, and the city's demurrer to the bill for want of equity was overruled. The case was referred to a Master to take testimony as to the extent of the discrimination and other matters as to which the city made complaint. On consideration of his report the court said: "We find nothing in the answer of the defendant nor in the large mass of testimony heard on the issues made by the pleadings which should in any way change the views expressed in passing on the demurrer and the motion for a temporary injunction." He thereupon entered a final decree making the injunction permanent. The city appealed, alleging generally that the court erred in overruling the demurrer and in granting the injunction. It specifically alleges that the court erred in holding (1) that the charter granted to the Ohio Valley Telephone Company the right, with the consent of the city, to operate a telephone system which could not be repealed by the city council; (2) that the ordinance of August 17, 1886, constituted a valid and binding contract between the city and the company, which could not be repealed by the council; (3) that upon the consolidation of the Ohio Valley Telephone Company with the Cumberland Telephone and Telegraph Company all the rights of the former under its charter and the ordinance passed to and are now owned by and vested in the Cumberland Telephone and Telegraph Company; and (4) that the ordinance of January 23, 1909, repealing that of August 17, 1886, was void and of no effect.

Mr. Clayton B. Blakey and *Mr. Huston Quin*, with whom *Mr. Joseph S. Lawton* was on the brief, for appellant:

Power to grant a franchise does not exist in a city unless expressly conferred. Nellis on Street Railways, § 23; *Louisville Railway Co.* v. *Louisville*, 8 Bush, 415; *East Tennessee Tel. Co.* v. *Russellville*, 106 Kentucky, 669; *Henderson* v. *Covington*, 14 Bush, 312.

While a valid franchise authorizing a telephone company to occupy the streets of a city entitles such telephone company to an absolute and exclusive appropriation of that space in the streets which is occupied by its telephone poles, *St. Louis* v. *West. Un. Tel. Co.*, 148 U. S. 97, where a telephone company acquires from the State authority to use the streets of a city by and with the consent of the city, its franchise to use such streets is acquired from the State.

Under such conditions the grant from the municipality is a mere revocable license. Booth on Street Railways, § 10; Nellis on Street Railways, § 20; *Water Co.* v. *Boise City*, 123 Fed. Rep. 232; *Detroit Citizens' R. Co.* v. *Detroit Ry. Co.*, 171 U. S. 48; *S. C.*, 110 Michigan, 384; *Detroit* v. *City Railway Co.*, 56 Fed. Rep. 867; *Wabash Railroad Co.* v. *Defiance*, 167 U. S. 88; *East Ohio Gas Co.* v. *Akron*, 90 N. E. Rep. (Ohio) 40; *Blair* v. *Chicago*, 201 U. S. 400; *Home Telephone Co.* v. *Los Angeles*, 211 U. S. 273; *Chicago Ry. Co.* v. *People*, 73 Illinois, 541, 547; *People* v. *Chicago Tel. Co.*, 220 Illinois, 338; *Parkhurst* v. *Salem*, 32 Pac. Rep. (Oregon) 304; *Gas Co.* v. *Parkersburg*, 30 W. Va. 435; *New Haven Co.* v. *Hamersley*, 104 U. S. 1.

A franchise granted by a city silent as to the length of time during which it may be exercised is not a perpetual franchise to occupy the streets unless the city had express authority to grant a perpetual franchise. Cases *supra* and *Linden* v. *LaRue*, 23 How. 435; *Charles River Bridge*, 11 Pet. 419; *Fanning* v. *Gregaire*, 16 How. 528; *Wright* v. *Nagel*, 101 U. S. 791; *Buffalo & J. R. R. Co.* v. *Faulkner*, 103 U. S. 821; *Los Angeles* v. *Water Co.*, 177 U. S. 571; *Mills* v. *St. Clair County*, 8 How. 569.

A grant of a franchise irrevocable and permanent in its nature made by a city without express authority from the legislature to make such grant is void. *Milhau* v. *Sharp*, 27 N. Y. 611; *West End &c. Co.* v. *Atlantic &c. Co.*, 49 Georgia, 151, 155; *New York* v. *Mayor*, 3

Duer, 119; *Blaschko* v. *Wurster*, 156 N. Y. 432; *Ampt.* v. *Cincinnati*, 21 O. Cir. Ct. 300; *Birmingham* v. *St. R. Co.*, 79 Alabama, 465, 473; *Westminster Water Co.* v. *City* (Md., 1904), 56 Atl. Rep. 990; *Central Transportation Co.* v. *Pullman P. C. Co.*, 139 U. S. 24, 60.

A void act of a municipal body will not be validated by the adoption of a new state constitution. *East Tennessee Tel. Co.* v. *Russellville*, 106 Kentucky, 673.

When two corporations consolidate a new corporation comes into existence which is *eo instanti* granted by the State only such portion of the rights and privileges of the constituent corporations as the State at the time had the power to grant. Kentucky Statutes, § 566; *Shields* v. *Ohio*, 95 U. S. 319; *Ferguson* v. *Meredith*, 2 Wall. 25; *Atlantic & Gulf R. R. Co.* v. *Georgia*, 98 U. S. 359; *Maine C. R. Co.* v. *Maine*, 96 U. S. 499; *Keokuk & W. R. Co.* v. *Missouri*, 152 U. S. 301; *Pennsylvania College Cases*, 13 Wall. 190; *Yazoo & M. V. R. Co.* v. *Adams*, 180 U. S. 1; *Wright* v. *Georgia Railroad Co.*, 216 U. S. 422; *Shaw* v. *Covington*, 194 U. S. 596.

All charters, franchises and special privileges granted by the Kentucky legislature subsequent to 1856 are subject to revocation. *Louisville Water Co.* v. *Clark*, 143 U. S. 1; *Covington* v. *Kentucky*, 173 U. S. 331.

All franchises and special privileges granted by the State of Kentucky prior to the adoption of the present constitution and which were revocable remain subject to revocation. Kentucky Constitution, § 3.

Before appellee came into existence the legislature of Kentucky revoked the grant which it had made to the Ohio Valley Telephone Company. Kentucky Statutes, § 573.

The legislature is powerless to revoke any franchise or right which the appellee may have acquired to use the streets of the city of Louisville. Kentucky Constitution, §§ 59 and 60.

The State of Kentucky has delegated to the city of Louisville authority to revoke any franchise which the appellee may have acquired to occupy the streets of the city of Louisville. Kentucky Constitution, §§ 156, 163, 164, 199; Kentucky Statutes, §§ 2742, 2783, 2825.

The legislature had authority to delegate to the city the right to revoke any franchise which the appellee may have acquired to use the streets of the city of Louisville. *City Railway Co.* v. *Sioux City*, 138 U. S. 98; *Mo. Pac. R. R. Co.* v. *Kansas*, 216 U. S. 262.

All special privileges or grants made to corporations prior to the adoption of the present constitution and inconsistent with the provisions of that constitution and the laws made pursuant thereto are now repealed. *Hager* v. *Kentucky Title Co.*, 119 Kentucky, 50; *Pearce* v. *Mason County*, 99 Kentucky, 357; *McTigue* v. *Commonwealth*, 99 Kentucky, 72.

Where a city gives its consent for a telephone company to use its streets without limit as to time the right of such telephone company to continue to use the streets expires when the charter of the city expires. *Blair* v. *Chicago*, 201 U. S. 485; *People* v. *Chicago Tel. Co.*, 220 Illinois, 238; *Parsons* v. *Breed*, 126 Kentucky, 765; *Louisville* v. *Vreeland*, 140 Kentucky, 404.

A city cannot convert a license into a contract by calling it a contract. *St. Louis* v. *West. Un. Tel. Co.*, 148 U. S. 97; *Wabash R. R. Co.* v. *Defiance*, 167 U. S. 88.

A city may revoke a grant or a license without notice to the grantee and without assigning reasons therefor. *Calder* v. *Michigan*, 218 U. S. 598; *United States* v. *Des Moines Nav. & R. Co.*, 142 U. S. 510.

Discrimination among its patrons gives a city ample cause for revoking the franchise of the telephone company. Wyman on Public Service Corp., chaps. 27, 28; *Delaware & S. Tel. Co.* v. *Kelly*, 160 Fed. Rep. 517; *Missouri* v. *Bell Tel. Co.*, 23 Fed Rep. 541; *Rudd* v. *New York*, 143

U. S. 517; *L. & N.* v. *Central Stock Yard*, 97 S. W. Rep. 778.

Mr. William L. Granbery and *Mr. Alexander Pope Humphrey*, with whom *Mr. Alexander Pope Humphrey, Jr.*, was on the brief, for appellee.

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

1. Under the present constitution of Kentucky street franchises cannot be granted for longer than twenty years and then only to the highest bidder, after public advertisement by the city authorities. But in 1886, when the Ohio Valley Telephone Company was chartered, the legislature not only had the sole right to create corporations and to grant franchises but, without municipal consent, it could have authorized the company to use any and all streets in the city of Louisville. Instead, however, of exercising this plenary power, the charter declared that the company might maintain its telephone system, erect poles and string wires over the streets and highways of the city, with and by the consent of the General Council. These provisions of the charter gave the municipality ample authority to deal with the subject, and by virtue of this statutory power it could have imposed terms, which the company might have been unable or unwilling to accept—in which event the franchise granted by the State would have been nugatory. But, when the assent was given the condition precedent had been performed, the franchise was perfected and could not thereafter be abrogated by municipal action. For, while the city was given the authority to consent, the statute did not confer upon it the power to withdraw that consent, and no attempt was made to reserve such a right in the collateral contract contained in those provisions of the ordinance relating to the com-

pany's giving a bond and carrying the police and fire wires free of charge. If those or other terms of this independent and separate contract had been broken by the Ohio Valley Company or its successors, the city would have had its cause of action. But the municipality could not by an ordinance impair that contract nor revoke the rights conferred. Those charter franchises had become fully operative when the city's consent was given, and thereafter the company occupied the streets and conducted its business, not under a license from the city of Louisville, but by virtue of a grant from the State of Kentucky. Such franchises granted by the legislature could not, of course, be repealed, nullified or forfeited by any ordinance of a General Council.

2. In 1891 a new constitution was adopted by the State of Kentucky conferring upon municipalities the right to grant street franchises, and later, under the reserve power, a statute was passed repealing all special corporate privileges. It is claimed that in consequence of these laws the street rights granted the Ohio Valley Telephone Company have been withdrawn, or at least made subject to municipal revocation. But we find in the cited sections of the constitution (156, 163, 164 and 199) and the statutes (§§ 573, 2742, 2783 and 2825) nothing which sustains this contention, which, if correct, would lead to the conclusion that all structures theretofore lawfully placed in city streets by water, light, telephone, railway and other public utility companies became nuisances, and as such were removable after September, 1898, to the damage of the community at large and the destruction of property of immense value dedicated to public purposes. The general repeal of all special privileges, referred to in the statute, related to exclusive grants, tax exemptions, monopolies and similar immunities (Ky. Stat. 573; *Covington* v. *Kentucky*, 173 U. S. 231), and not to those corporate powers and property rights needed

and conferred in order to enable the company to perform the duties for which it had been organized. For, while this charter conferred privileges, it also created obligations in favor of the public, and no attempt was made by the general law to repeal the rights which had vested, nor to relieve the company of the burden which had been imposed.

3. The provisions of the constitution and statutes relied on as revoking licenses from municipalities or as conferring power upon cities to repeal grants are in the main prospective and do not in any event support the claim that the General Council can destroy the rights granted the Ohio Valley Telephone Company, whether they be treated as having been acquired under the charter of April 3, 1886, or under the ordinance of August 17, 1886. On the contrary, the constitution of 1891, while limiting for the future the power to sell street franchises, distinctly protected the interests of those public utility companies "whose charters have been heretofore granted, conferring such rights, and work has in good faith been begun thereunder." Inasmuch, therefore, as the charter of the Ohio Valley Telephone Company was granted and as the exchanges were in operation before the adoption of the constitution, that company's rights are expressly preserved by the organic law of the State.

4. The Ohio Valley Company, thus owning the right to use the streets for telephone purposes, was consolidated on January 27, 1900, into the Cumberland Telephone and Telegraph Company, the defendant in error, and the latter claims that, as successor, it acquired and now holds these privileges. This is denied by the city on the ground that while the statute, then of force, provided for the transfer of the "property" of the constituent companies, it was not until the amendment of 1902 that provision was made by which their "franchises" could pass to the consolidated company.

It is not necessary to determine whether that amendment

was intended to supply an omission, remove a doubt or to ratify the transfer and use under this and prior mergers. *City Railway Co.* v. *Citizens' Railroad Co.*, 166 U. S. 557, 569. For while franchises to be are not transferable without express authority, there are other franchises to have, to hold and to use, which are contractual and proprietary in their nature and which confer rights and privileges, which can be sold wherever the company, as here, has power to dispose of its property. In the present case the Ohio Valley Company was by its charter given authority to mortgage and dispose of franchises. Among those thus held was the right to use the streets in the city for the purpose necessary in conducting a telephone business. Such a street franchise has been called by various names—an incorporeal hereditament, an interest in land, an easement, a right of way—but, howsoever designated, it is property. *Detroit* v. *Detroit Street Ry.*, 184 U. S. 368, 394; *Louisville City Ry.* v. *Louisville*, 71 Kentucky (8 Bush), 534; *West River Bridge* v. *Dix*, 6 How. 507, 534; *Board of Morristown* v. *East Tenn. Tel. Co.*, 115 Fed. Rep. 304, 307. Being property, it was taxable, alienable and transferable, and, as property, passed to the Cumberland Telephone and Telegraph Company under the express provisions of the Kentucky statute, which, as of force in 1900, declared that the consolidated company should be "vested with all the property, business, assets and effects of the constituent companies, without deed or transfer, and bound for all their contracts and liabilities."

That the street rights, however designated, passed to the Cumberland Company is the natural and obvious construction of the act. The plant and property of a telephone company are useless when dissevered from the streets, and there would, in effect, have been no property out of which to pay the debts or with which to perform the public duties imposed if the street rights of the constituent companies had not been transferred by the

statute to the consolidated company. The constitution (§§ 199 and 200), in providing for the incorporation and consolidation of telephone companies, evidently contemplated, as did the statute, that on this statutory union there should be a transfer of that franchise, right of way or property, which alone gave value to the plant, thereby preserving the investment which had been made, for purposes of private gain and public use. The city itself so construed the general law, and thereupon demanded from the Cumberland Company, as successor of the Ohio Valley Company, the bond for $50,000 called for in the ordinance of August 17, 1886. The company, in pursuance of the collateral contract contained in the ordinance, and of the requirements of the consolidation statute, carried the police and fire wires of the city free of charge. With the knowledge and acquiescence of the city, and in reliance on the statutory conveyance of the street rights, the Cumberland Company, at an expense of more than a million dollars, erected many new poles, laid additional conduits and strung miles of wire in extending and improving the telephone system. This action of the council could not enlarge the charter grant, but did operate to estop the city (*Boone County* v. *Burlington & M. R. R.*, 139 U. S. 684, 693) from claiming that the ordinance was inoperative and it also prevented the Council from denying that the Cumberland Company had succeeded to every right and obligation of the Ohio Valley Company.

5. The plaintiff in error makes the further contention that its general demurrer should have been sustained and the bill dismissed because the original grant of street rights, having been indefinite as to time, was either void *ab initio*, or revocable at the will of the General Council, or that it expired in 1893 when (Ky. Stat., 1909, § 2742) Louisville was made a city of the first class with new and enlarged power. In support of this proposition numerous

decisions are cited, in some of which it appeared that a State had chartered a public utility corporation, but the city by ordinance had given an exclusive or perpetual grant of a street franchise which was held to be void because made in excess of the statutory power possessed by the municipality. In others the company had been incorporated for thirty years, and the street right was held to have been granted only for that limited period. In others it was decided that such privileges terminated with the corporate existence of the municipality through whose streets the rails and tracks were to be laid. *Detroit Citizens' Street Railway* v. *Detroit Railway*, 171 U. S. 48, 54; *St. Clair County Turnpike Co.* v. *Illinois*, 96 U. S. 63; *Blair* v. *Chicago*, 201 U. S. 400; 3 Dill., Mun. Corp., §§ 1265–1269.

None of these decisions are applicable to a case like the present, where the Ohio Valley Telephone Company, with a perpetual charter, has received, not from the municipality, but from the State of Kentucky, the grant of an assignable right to use the streets of a city which remains the same legal entity, although by a later statute it has been put in the first class and given greater municipal powers. *Vilas* v. *Manila*, 220 U. S. 345, 361.

In considering the duration of such a franchise it is necessary to consider that a telephone system cannot be operated without the use of poles, conduits, wires and fixtures. These structures are permanent in their nature and require a large investment for their erection and construction. To say that the right to maintain these appliances was only a license, which could be revoked at will, would operate to nullify the charter itself, and thus defeat the State's purpose to secure a telephone system for public use. For, manifestly, no one would have been willing to incur the heavy expense of installing these necessary and costly fixures if they were removable at will of the city and the utility and value of the entire plant

be thereby destroyed. Such a construction of the charter cannot be supported, either from a practical or technical standpoint.

This grant was not at will, nor for years, nor for the life of the city. Neither was it made terminable upon the happening of a future event, but it was a necessary and integral part of the other franchises conferred upon the company, all of which were perpetual and none of which could be exercised without this essential right to use the streets. The duration of the public business in which these permanent structures were to be used, the express provision that franchises could be mortgaged and sold, the nature of the grant, and the terms of the charter as a whole, compel a holding that the State of Kentucky conferred upon the Ohio Valley Telephone Company the right to use the streets to the extent and for the period necessary to enable the company to perform the perpetual obligation to maintain and conduct a telephone system in the city of Louisville. Such has been the uniform holding of courts construing similar grants to like corporations. *Milhau* v. *Sharp*, 27 N. Y. 611 (1863); *Hudson Telephone Co.* v. *Jersey City*, 49 N. J. L. 303; *Mobile* v. *L. & N. R. R.*, 84 Alabama, 122; *Seattle* v. *Columbia & P. S. R. R.*, 6 Washington, 379, 392; *People* v. *Deehan*, 153 N. Y. 528. The earlier cases are reviewed in *Detroit St. R. R.* v. *Detroit*, 64 Fed. Rep. 628, 634, which was cited with approval in *Detroit* v. *Detroit St. R. R.*, 184 U. S. 368, 395, this court there saying that "Where the grant to a corporation of a franchise to construct and operate its road is not, by its terms, limited and revocable, the grant is in fee."

The right to conduct a telephone exchange and to use the streets of the city of Louisville, which had been vested by law in the Cumberland Telephone & Telegraph Company, could not be impaired or forfeited by an ordinance of the General Council; nor had it expired by lapse of

time or under any provision of law when the bill was filed. The Circuit Court properly made the injunction permanent, and its decree is

Affirmed.

CHOATE *v.* TRAPP, SECRETARY OF THE STATE BOARD OF EQUALIZATION OF OKLAHOMA.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 809. Argued February 23, 1912.—Decided May 13, 1912.

There is a broad distinction between the power to abrogate a statute and to destroy rights acquired under it; and while Congress, under its plenary power over Indian tribes, can amend or repeal an agreement by a later statute, it cannot destroy actually existing individual rights of property acquired under a former statute or agreement.

The individual Choctaw and Chickasaw Indian had no title or enforcible right in tribal property, but Congress recognized his equitable interest therein in the Curtis Act of June 28, 1898, 30 Stat. 505, and offered to give to him in consideration of his consenting to the distribution an allotment of non-taxable land; and the acceptance of the patent by each member of the tribe was on the consideration of relinquishment of his interest in the unallotted tribal property.

A patent for an Indian allotment containing an agreement assenting to the plan of distribution, like a deed poll, bound the grantee, although not signed by him, and the benefits constituted the consideration for the rights waived.

The tax exemption in the patents for Indian allotments under the Curtis Act was not a mere safeguard against alienation, and did not fall with the removal of restrictions from alienation by the act of May 27, 1908, 35 Stat. 312.

The removal of restrictions on alienation of Indian allotments falls within the power of Congress to regulate Indian affairs, but the provision for non-taxation is a property right and not subject to action by Congress.

The non-taxation provisions as to Indian allotted lands in the Curtis Act gave a property right to the allottees, and was binding on the State of Oklahoma.

Patents issued in pursuance of statute are to be construed in connection with the statute, and those issued to allottee Indians under the Curtis Act gave the allottees as good a title to the exemption from taxation as to the land itself; and the tax exemption constituted property of which the patentees could not, under the Fifth Amendment, be deprived without due process of law.

An exemption from taxation, of land allotted to Indians in pursuance of an agreement to distribute the tribal property, will not be construed strictly, as a gratuitous exemption to a public service corporation is ordinarily construed, but will be construed liberally under the rule that all contracts with Indians are so construed.

The tax exemption provisions of the patents to Indian allottees under the Curtis Act attached to the land for the limited period of the exemption.

Indians are not excepted from the protection guaranteed by the Federal Constitution, but their rights are secured and enforced to the same extent as those of other residents or citizens of the United States.

Tiger v. *Western Investment Co.*, 221 U. S. 286, distinguished as not involving property rights but only the right of Congress to extend the period of disability to alienate the allotments, and as not intimating that Congress could by its wardship lessen any rights of property actually vested in the individual Indian by prior laws or contracts.

Oklahoma by its constitution has recognized the tax exemption in the patents of allottee Indians, and, as a vested right, it cannot be abrogated by statute.

28 Oklahoma, 517, reversed.

THE facts, which involve the taxability of Choctaw and Chickasaw Indian allotted lands in Oklahoma while in possession of the allottees, are stated in the opinion.

Mr. Joseph W. Bailey, with whom *Mr. J. F. McMurray* and *Mr. W. A. Ledbetter* were on the brief, for plaintiff in error.

Mr. Charles West, Attorney General of the State of Oklahoma, for defendants in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

The eight thousand plaintiffs in this case are members of the Choctaw and Chickasaw tribes. Each of them holds a patent to 320 acres of allotted land issued under the terms of the Curtis Act (June 28, 1898, 30 Stat. 495, 507, c. 517), which contained a provision "that the land should be non-taxable" for a limited time. Before the expiration of that period the officers of the State of Oklahoma instituted proceedings with a view of assessing and collecting taxes on these lands lying within that State. The plaintiffs' application for an injunction was denied.

In order to understand the issues presented by the writ of error it is necessary to refer, as briefly as possible, to certain well-known facts, and to material portions of lengthy statutes, under which the tribal property of the Choctaws and Chickasaws was divided in severalty among their members.

The Five Civilized Tribes owned immense tracts of land in territory that is now embraced within the limits of the State of Oklahoma. The legal title was in the Tribes for the common use of their members. But the fact that so extensive an area was held under a system that did not recognize private property in land, presented a serious obstacle to the creation of the State which Congress desired to organize for the government and development of that part of the country. And, with a view of removing these difficulties, it provided (March 3, 1893, 27 Stat. 612, 645, c. 209) for the appointment of the Dawes Commission, authorizing it to enter into negotiations with these Tribes for the extinguishment of their title, either by cession to the United States or by allotment, in severalty, among their members. As might have been anticipated, the Commission found that many of the Indians were greatly opposed to any change. "Some of them held passionately to their institutions from custom

and patriotism, and others held with equal tenacity because of the advantages and privileges they enjoyed." (20 H. R. Doc., 1903–4, p. 1.) After several years of negotiations their opposition was so far overcome that provisional agreements were made which contemplated most radical changes in the political and property rights of the Indians.

On April 23, 1897, the Dawes Commission and the Choctaw and Chickasaw representatives made what is known as the Atoka Agreement. It was incorporated bodily into the Curtis Act of June 28, 1898 (30 Stat. 505), and was modified by the act of July 1, 1902 (32 Stat. 641, 657, c. 1362).

These two acts, containing what is known as the Atoka Agreement and the Supplemental Agreement, provided that Indian laws and courts should be at once abolished; that there should be an enrollment of all the members of the tribe; and that the members of the two tribes should become citizens of the United States.

It was also provided, as appears from extracts copied in the margin,[1] that each member of the tribe should have

[1] That all the lands allotted shall be non-taxable while the title remains in the original allottee, but not to exceed 21 years from date of patent, and each allottee shall select from his allotment a homestead of 160 acres, for which he shall have a separate patent, and which shall be inalienable for 21 years from date of patent. . . . The remainder of the lands allotted to such members shall be alienable for a price to be actually paid . . . one-fourth in one year, one-fourth in three years and the balance of said alienable lands in five years from date of patent. . . . The United States shall put each allottee in possession of his allotment. . . . That, as soon as practicable after the completion of said allotment, the chiefs of the two nations shall deliver to each of the allottees patents conveying to him all the right, title and interest of the Choctaws and Chickasaws in and to the land which shall have been allotted to him in conformity with the requirements of this agreement. . . . Said patent shall be framed in accordance with the provisions of this agreement. . . . And the acceptance of his patent by said allottee shall be operative as an

allotted to him his share of the land—all of which "shall be non-taxable while the title remains in the original allottee;" that a part of the land could be sold after one year and all of it sold after five years; that the patents issued to the allottee "should be framed in conformity with the provisions of the Agreement," and that the acceptance of such patent should be operative as an assent on his part to the allotment of all land of the tribes in accordance with the provisions of the Agreement, and as a relinquishment of all his interest in other parts of the common property.

The complaint does not state when the plaintiffs received their patents, but the report of the Dawes Com-

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assent on his part to the allotment and conveyance of all the lands of the Choctaws and Chickasaws in accordance with the provisions of this agreement, and as a relinquishment of all his right, title and interest in and to any and all parts thereof, excepting the land embraced in said patent, and excepting also his interest in the proceeds of all lands, coal and asphalt herein excepted from allotment. (Atoka Agreement, 30 Stat. 507.)

There shall be allotted to each member of the Choctaw and Chickasaw Tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to 320 acres of the average allottable land of the nation, . . . Each member of said tribes shall at the time of the selection of his allotment, designate as a homestead out of the said allotment land equal in value to 160 acres of the average allottable land of the Choctaw and Chickasaw Nation, as near as may be, which shall be inalienable during the lifetime of the allottee, not exceeding 21 years from the date of the certificate of allotment, and a separate certificate and patent shall issue for said homestead. (642.)

All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after the issuance of patent as follows:

One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from the date of patent; provided that such land shall not be alienable by allottee, or his heirs, at any time before the expiration of the Choctaw and Chickasaw tribal government for less than its appraised value. (643.)

mission for the year ending June 1, 1904 (20 H. R. Doc., 27–42), shows that the enrollment and allotment had so far progressed as to make it fair to assume that most, if not all, of the patents had been issued, and that much of the land was alienable and all of it was non-taxable when, on November 16, 1907, Oklahoma was admitted into the Union. The constitution of that State provided that all existing rights should continue as if no change in government had taken place, and that property exempt from taxation by virtue of treaties and Federal laws should so remain during the force and effect of such treaties or Federal laws.

No taxes were assessed against the lands of the plaintiffs for the year 1907, but on May 27, 1908 (35 Stat. 312, c. 199), Congress passed a general act removing restrictions from the sale and encumbrance of land held by Indians of the class to which the plaintiffs belong. Another section provided that lands from which restrictions had been removed should be subject to taxation.

Thereupon proceedings were instituted by the State of Oklahoma with a view of assessing the plaintiffs' lands for taxes. This they sought to enjoin, but their complaint was dismissed on demurrer. The case was carried to the Supreme Court of the State which held that Oklahoma was not a party to any contract with the Indians; that the United States, by virtue of its governmental power over the Indians, could have substituted title in severalty for ownership in common without plaintiffs' consent and that, for want of a consideration, the provision that the land should be non-taxable was not a contract, but a mere gratuity which could be withdrawn at will. The court thereupon overruled plaintiffs' contention that they had a vested right of exemption which prevented the State from taxing the land at this time and dismissed their suit.

1. There are many cases, some of which are cited in the opinion of the Supreme Court of Oklahoma (*Thomas* v.

Gay, 169 U. S. 264, 271; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565), recognizing that the plenary power of Congress over the Indian Tribes and tribal property cannot be limited by treaties so as to prevent repeal or amendment by a later statute. The Tribes have been regarded as dependent nations, and treaties with them have been looked upon not as contracts, but as public laws which could be abrogated at the will of the United States.

This sovereign and plenary power was exercised and retained in all the dealings and legislation under which the lands of the Choctaws and Chickasaws were divided in severalty among the members of the Tribes. For, although the Atoka Agreement is in the form of a contract it is still an integral part of the Curtis Act, and, if not a treaty, is a public law relating to tribal property, and as such was amendable and repealable at the will of Congress. But there is a broad distinction between tribal property and private property, and between the power to abrogate a statute and the authority to destroy rights acquired under such law. *Reichert* v. *Felps*, 6 Wall. 160. The question in this case, therefore, is not whether the plaintiffs were parties to the Atoka Agreement, but whether they had not acquired rights under the Curtis Act which are now protected by the Constitution of the United States.

2. The individual Indian had no title or enforcible right in the tribal property. But as one of those entitled to occupy the land he did have an equitable interest, which Congress recognized and which it desired to have satisfied and extinguished. The Curtis Act was framed with a view of having every such claim satisfactorily settled. And though it provided for a division of the land in severalty, it offered a patent of non-taxable land only to those who would relinquish their claim in the other property of the Tribe formerly held for their common use. For, the Atoka Agreement, after declaring that "all land

allotted should be non-taxable," stipulated further that each enrolled member of the Tribes should receive a patent framed in conformity with the Agreement, and that each Choctaw and Chickasaw who accepted such patent should be held thereby to assent to the terms of this Agreement and to relinquish all of his right in the property formerly held in common.

There was here, then, an offer of non-taxable land. Acceptance by the party to whom the offer was made, with the consequent relinquishment of all claim to other lands furnished a part of the consideration, if, indeed, any was needed, in such a case, to support either the grant or the exemption. *Wisconsin &c. R. R.* v. *Powers*, 191 U. S. 379, 386; *Home* v. *Rouse*, 8 Wall. 430, 437; *Tomlinson* v. *Jessup*, 15 Wall. 454, 458. Upon delivery of the patent the agreement was executed, and the Indian was thereby vested with all the right conveyed by the patent, and, like a grantee in a deed poll, or a person accepting the benefit of a conveyance, bound by its terms, although it was not actually signed by him. *Keller* v. *Ashford*, 133 U. S. 610, 621; *Hendrick* v. *Lindsay*, 93 U. S. 143.

As the plaintiffs were offered the allotments on the conditions proposed; as they accepted the terms and, in the relinquishment of their claim, furnished a consideration which was sufficient to entitle them to enforce whatever rights were conferred, we are brought to a consideration of the question as to what those rights were.

3. On the part of the State it is argued that there was, in fact, no tax exemption, but that that provision was only intended to guard absolutely against alienation of the land, whether for taxes, or at judicial sale, or by private contract. In other words, it is said that the tax exemption was only an additional prohibition against a sale, so that when the restrictions against alienation were removed by the act of 1908 (35 Stat. 312), the provision as to non-taxability went as a necessary part thereof.

But the exemption and non-alienability were two separate and distinct subjects. One conferred a right and the other imposed a limitation. The defendant's argument also ignores the fact that, in this case, though the land could be sold after five years it might remain non-taxable for 16 years longer, if the Indian retained title during that length of time. Restrictions on alienation were removed by lapse of time. He could sell part after one year, a part after three years and all except homestead after five years. The period of exemption was not co-incident with this five-year limitation. On the contrary the privilege of non-taxability might last for 21 years, thus recognizing that the two subjects related to different periods and that neither was dependent on the other. The right to remove the restriction was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma. *Kansas Indians*, 5 Wall. 737, 756; *United States* v. *Rickert*, 188 U. S. 432.

4. The record contains no copy of any of the patents under which the plaintiffs hold. But the act provided that they should be framed in conformity with the Atoka Agreement. Those who signed the patent could not convey more rights than were granted by that part of the Curtis Act, nor could they, by omission, deprive the patentee of any exemption to which he was thereby entitled. The patent and the legislation of Congress must be construed together, and when so construed they show that Congress, in consideration of the Indians' relinquishment of all claim to the common property, and for other satisfactory reasons, made a grant of land which should be non-taxable for a limited period. The patent issued in

pursuance of those statutes gave the Indian as good a title to the exemption as it did to the land itself. Under the provisions of the Fifth Amendment there was no more power to deprive him of the exemption than of any other right in the property. No statute would have been valid which reduced his fee to a life estate, or attempted to take from him ten acres, or fifty acres, or the timber growing on the land. After he accepted the patent the Indian could not be heard, either at law or in equity, to assert any claim to the common property. If he is bound, so is the tribe and the Government when the patent was issued.

5. It is conceded that no right which was actually conferred on the Indians can be arbitrarily abrogated by statute. But as it is claimed that he, in fact, acquired no valid exemption, since it stands on a different footing from the grant of the land itself; and that, though the provision of non-taxability added to the value of the property, it can be withdrawn because, if not a gratuity, it is at least subject to the general rule that tax exemptions are to be strictly construed and are subject to repeal unless the contrary clearly appears. *Welch* v. *Cook*, 97 U. S. 541; *Christ Church* v. *Philadelphia*, 24 How. 300; *Wisconsin &c. R. R.* v. *Powers*, 191 U. S. 379; *Tucker* v. *Ferguson*, 22 Wall. 527; *West Wisconsin Ry.* v. *Board of Supervisors*, 93 U. S. 595, are cited in support of this proposition. Some of these cases construe general statutes containing, not a grant, but an offer of exemption to such companies as should do certain work or build certain lines of road before a given date. They hold that a statute making such an offer might be repealed even as against those companies which actually built in reliance on its terms. But these rulings are based on the theory that "the legislature was not making promises, but framing a scheme of public revenue and public improvement," (*Wisconsin &c.* v. *Powers*, 191 U. S. 387). The companies gave nothing and the State received nothing in exchange for the offer. There

was no consideration moving from one to the other. Such exemption was a mere bounty, valuable as long as the State chose to concede it, but as tax exemptions are strictly construed, it could be withdrawn at any time the State saw fit.

6. But in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases.

For example, in *Kansas Indians*, 5 Wall. 737, 760, the question was whether a statute prohibiting levy and sale of Indian lands prevented a sale for state taxes. The rule of strict construction would have compelled a holding that the property was liable. But Mr. Justice Davis, in speaking for the court, said that "enlarged rules of construction are adopted in reference to Indian treaties." He quoted from Chief Justice Marshall, who said that "The language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of susceptible of a more extending meaning . . ." Again, in *Jones* v. *Meehan*, 175 U. S. 1, it was held that "Indian treaties must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians." In view of the universality of this rule, Congress is conclusively presumed to have intended that the legislation under which these allotments were made to the Indians should be liberally construed in their favor in determining the rights granted to the Choctaws and Chickasaws.

The provision that "all land shall be non-taxable" naturally indicates that the exemption is attached to the

land—only an artificial rule can make it a personal privilege. But if there is any conflict between the natural meaning and the technical construction,—if there were room for doubt, or if there were any question as to whether this was a personal privilege and repealable, or an incident attached to the land itself for a limited period, that doubt, under this rule, must be resolved in favor of the patentee.

The decision in *New Jersey* v. *Wilson*, 7 Cranch, 164, is directly in point here and especially as to the quality of the exemption. It appeared there that the Delaware Indians had claims to lands in that State lying south of the River Rariton. An agreement for a release of the claim was made between the Commissioners and the Indians, under which the latter were to receive a conveyance to a large body of land in fee. The agreement was approved by the State by an act which, among other things, declared that the land "should not hereafter be subject to any tax." The Indians, after many years, sold the land, and the State subsequently passed a statute repealing the exemption. This court, speaking by Chief Justice Marshall, held that "every requisite to the formation of a contract is found in the proceedings between the then colony of New Jersey and the Indians. The subject was a purchase on the part of the Government of extensive claims of the Indians, the extinguishment of which would quiet the title to a large portion of the province. A proposition to this effect was made, the terms stipulated, the consideration agreed upon, which is a tract of land with the privilege of exemption from taxation; and then, in consideration of the arrangement previously made, one of which this Act of Assembly is stated to be, the Indians executed their deed of cession. This is certainly a contract clothed with forms of unusual solemnity. The privilege, though for the benefit of the Indians, is annexed by the terms which create it, to the land itself, not to their persons." And it was thereupon held that the right was not affected by the

later statute repealing the exemption. The case here is much stronger. For the tax exemption, which adds value to the property, is not perpetual, but is attached to the land only so long as the Indian retains the title, and in no event to exceed twenty-one years. It is property, and entitled to protection as such, unless the fact that the owner is an Indian subject to restrictions as to alienation made a difference.

7. There have been comparatively few cases which discuss the legislative power over private property held by the Indians. But those few all recognize that he is not excepted from the protection guaranteed by the Constitution. His private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States. *In re Heff*, 197 U. S. 488, 504; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307; *Smith* v. *Goodell*, 20 Johns. (N. Y.) 188; *Lowry* v. *Weaver*, 4 McLean, 82; *Whirlwind* v. *Von der Ahe*, 67 Mo. App. 628; *Taylor* v. *Drew*, 21 Arkansas, 485, 487. His right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe and subject to the guardianship of the United States as to his political and personal status. This was clearly recognized in the leading case of *Jones* v. *Meehan*, 175 U. S. 1. There it appeared that an Indian Chief owned in fee land which fronted on a stream. The chief died, and in 1891 his son and heir, during the continuance of the tribal organization, let the land to Meehan for ten years. In 1894 he again let the same property to Jones for twenty years. In that year the Secretary of the Interior was authorized by Congress to approve the lease to Jones if the latter would increase the rental. This he did, and with the assent of the Indian and the Secretary of the Interior a lease was made to Jones. In the litigation which followed Meehan relied on the first contract made in the exercise of the Indian's right of private ownership. Jones relied on that made

under congressional authority, and although the Indian was a member of the tribe and much more subject to legislative power than these plaintiffs, the court held that the subsequent act could not relate back so as to interfere with the right of property which the Indian possessed and conveyed as an owner in fee, and while Congress had power to make treaties, it could not affect titles already granted by the treaty itself.

Nothing that was said in *Tiger* v. *Western Investment Co.*, 221 U. S. 286, is opposed to the same conclusion here. For that case did not involve property rights, but related solely to the power of Congress, to extend the period of the Indian's disability. The statute did not attempt to take his land or any right, member or appurtenance thereunto belonging. It left that as it was. But, having regard to the Indian's inexperience, and desiring to protect him against himself and those who might take advantage of his incapacity, Congress extended the time during which he could not sell. On that subject, after calling attention to the fact that "Tiger was still a ward of the Nation, so far as the alienation of these lands was concerned, and a member of the existing Creek Nation," it was said that "Incompetent persons, though citizens, may not have the full right to control their property," and that there was nothing in citizenship incompatible with guardianship, or with restricting sales by Indians deemed by Congress incapable of managing their estates.

But there was no intimation that the power of wardship conferred authority on Congress to lessen any of the rights of property which had been vested in the individual Indian by prior laws or contracts. Such rights are protected from repeal by the provisions of the Fifth Amendment.

The constitution of the State of Oklahoma itself expressly recognizes that the exemption here granted must be protected until it is lawfully destroyed. We have seen that it was a vested property right which could not be

abrogated by statute. The decree refusing to enjoin the assessment of taxes on the exempt lands of plaintiffs must therefore be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

GLEASON *v.* WOOD, COUNTY TREASURER OF PITTSBURG COUNTY, OKLAHOMA.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 575. Argued February 23, 1912.—Decided May 13, 1912.

Decided on authority of *Choate* v. *Trapp*, *ante*, p. 665.
28 Oklahoma, 502, reversed.

THE facts, which involve the taxability of Choctaw allotments in Oklahoma, are stated in the opinion.

Mr. Willard L. Sturdevant and *Mr. David C. McCurtain*, with whom *Mr. Edward P. Hill* was on the brief, for plaintiffs in error.

Mr. Charles West, Attorney General of the State of Oklahoma, for defendants in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

The complaint alleges that the plaintiffs are Choctaws owning homesteads and surplus granted under the terms of the Atoka Agreement. Their applications to enjoin the officers of the State of Oklahoma from assessing their lands for taxation for the year 1909 was denied. All of the

questions involved are disposed of by the decision in *Choate* v. *Trapp*, *ante*, p. 665. The judgment, therefore, is reversed and the case remanded with directions for further proceedings not inconsistent with that opinion.

Reversed.

ENGLISH *v.* RICHARDSON, TREASURER OF TULSA COUNTY, OKLAHOMA.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 559. Argued February 23, 1912.—Decided May 13, 1912.

Decided on authority of *Choate* v. *Trapp*, *ante*, p. 665.
28 Oklahoma, 408, reversed.

THE facts, which involve the taxability of Creek allotments in Oklahoma, are stated in the opinion.

Mr. Willard L. Sturdevant, with whom *Mr. Grant Foreman* and *Mr. M. L. Mott* were on the brief, for plaintiff in error.

Mr. Charles West, Attorney General of the State of Oklahoma, for defendants in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

The plaintiff holds a patent dated December 12, 1902. It was issued to her as a member of the Creek Nation when the tribal lands were divided in pursuance of the same general policy as that discussed in *Choate* v. *Trapp*, *ante*, p. 665. There were, however, a few differences. The tax exemption covered only the homestead of forty acres,

and there was a restriction on alienability for 21 years. The patent, instead of being "framed in conformity with the Agreement," as in the case of the Choctaws and Chickasaws, bore on its face a provision that the land should be non-taxable; the language of the Agreement incorporated in the act of Congress, being that "Each citizen shall select from his allotment forty acres of land . . . as a homestead, which shall be and remain non-taxable, inalienable and free from any encumbrance whatever for 21 years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear."

These differences are not material. The right of plaintiff to the exemption granted by Congress is protected by the Constitution on principles stated and applied in *Choate* v. *Trapp*. The judgment dismissing her complaint is therefore reversed and the case remanded for proceedings not inconsistent with that opinion.

Reversed.

INDEX.

CERTIFICATE.

See APPEAL AND ERROR, 1;
PRACTICE AND PROCEDURE, 3.

CHATTEL MORTGAGES.

See BANKRUPTCY, 5, 6.

CHEROKEE INDIANS.

See INDIANS, 3, 4, 15, 26, 27, 28.

CHICKASAW INDIANS.

See INDIANS, 5.

CHOCTAW INDIANS.

See INDIANS, 5, 20.

CITIZENSHIP.

See CONSTITUTIONAL LAW, 8;
CORPORATIONS, 1;
INDIANS, 2.

CLAIMS AGAINST THE UNITED STATES.

See PATENTS, 3, 12.

COMBINATIONS IN RESTRAINT OF TRADE.

See RESTRAINT OF TRADE.

COMMERCE.

See CONGRESS, POWERS OF, 2; INTERSTATE COMMERCE;
CONSTITUTIONAL LAW, 24; RESTRAINT OF TRADE;
SAFETY APPLIANCE ACTS.

CONSTITUTIONAL LAW.

CONSTRUCTION OF STATUTES.

See STATUTES, A.

CONTRACTS.

1. *Performance; breach; contract for sale of mine construed.*

The owner of a mine contracted with a purchaser for the latter to go into possession and proceed with the development of, and extract ore from, the mine, and to deposit to the credit of the owner in a designated bank the net proceeds up to a specified amount when deeds to the property, deposited in escrow should be delivered. The purchaser proceeded with the work, but deposited proceeds to his own credit in another bank, whereupon the owner attached such deposit and took forcible possession of the mine. In a suit brought by the purchaser, *held* that the deposit of proceeds of ore in the specified bank was a condition concurrent or precedent to the obligation of the owner to go on with the contract; and, unless the declaration disclosed an excuse for the breach, the owner was justified in retaking possession. That the action of the owner in attaching the deposit was not an excuse for a breach by the purchaser, nor did the declaration disclose any sufficient excuse for the breach. Under the contract the act of the owner in suing for part of the purchase price which belonged to him would not prevent him from terminating the contract for failure to perform; there was no election. *World's Fair Mining Co.* v. *Powers*, 173.

2. *Express; what constitutes; when acts sufficient.*

A contract that certain specific assets in the hands of a trustee should be held as security for a specific contingent claim is necessarily express, and is none the less so if conveyed by acts importing it than if stated in words. *Leary* v. *United States*, 567.

3. *Validity; public policy; quære as to contract to indemnify bail.*

Bail no longer is the *mundium*, and distinctions between bail and suretyship are nearly effaced. *Quære:* whether a contract to indemnify bail which is legal by statute in New York where made is void as against the public policy of the United States. *Ib.*

See BONDS;
CONGRESS, POWERS OF, 2, 6;
CONSTITUTIONAL LAW, 1–5;
EMPLOYERS' LIABILITY ACT, 2, 3, 4;
INDIANS, 4, 11;
INTERSTATE COMMERCE, 11;
LOCAL LAW (KY., 1, 2, 3);
PATENTS, 1, 2, 7, 8;
RESTRAINT OF TRADE, 5.

CONTRIBUTORY INFRINGEMENT.

See PATENTS;
STATUTES, A 1.

CONTRIBUTORY NEGLIGENCE.

See STATES, 2.

CONVEYANCES.

See CONGRESS, POWERS OF, 4, 5; INDIANS;
CONSTITUTIONAL LAW, 1; MINES AND MINING, 1, 2, 3;
PLEADING, 1.

CORPORATIONS.

1. *Citizenship of, for purposes of jurisdiction of Federal courts.*

A corporation of one State, which only becomes a corporation of another by compulsion of the latter so as to do business therein, is not a corporation thereof, but remains, so far as jurisdiction of Federal courts is concerned, a citizen of the State in which it was originally incorporated. (*Southern Railway Co.* v. *Allison*, 190 U. S. 326.) *Missouri Pacific Ry. Co.* v. *Castle*, 541.

2. *Public service; duty to perform service voluntarily assumed.*

Although a public service corporation may not under its charter be required to extend its facilities in certain quarters, if it does so voluntarily, it must render the service for which it obtained its charter to those within reach of its facilities without distinction of persons. *Consumers' Co.* v. *Hatch*, 148.

See CONSTITUTIONAL LAW, 4, 5, 9, 10, 32, 34; LOCAL LAW, (KY. 1, 2, 3); (MINN.)
JURISDICTION, J 2, 3; PRACTICE AND PROCEDURE, 12;
QUO WARRANTO.

COURT AND JURY.

See BONDS, 2;
MALICIOUS PROSECUTION, 3.

COURT OF CLAIMS.

See PATENTS, 2, 3, 13, 14;
PRACTICE AND PROCEDURE, 24, 25.

COURTS.

1. *Functions of.*

If a law is bad, the legislature, and not juries, must change it. *Beutler* v. *Grand Trunk Junction Ry. Co.*, 85.

CRIMINAL LAW.

CRUEL AND UNUSUAL PUNISHMENTS.

ELECTION OF REMEDIES.

See PATENTS, 7.

EMINENT DOMAIN.

See CONSTITUTIONAL LAW, 22, 23, 29, 30;
PATENTS, 3.

EMPLOYER AND EMPLOYEE.

See BONDS, 1; NEGLIGENCE;
MASTER AND SERVANT; STATES, 1, 2, 3.

EMPLOYERS' LIABILITY ACT.

1. *Liability under; power of Congress to impose.*

Congress has power to impose the liability on the employer defined in the Employers' Liability Act of 1908. (*Second Employers' Liability Cases*, 223 U. S. 1.) *Philadelphia, B. & W. R. R. Co.* v. *Schubert*, 603.

2. *Exemptions from liability; power of Congress to prohibit.*

Congress has power to enforce the regulations, validly prescribed by the Employers' Liability Act of 1908, by the provisions of § 5 of the act providing that exemptions from liability shall be void, and that the acceptance of benefits under a relief contract shall not be a bar to recovery. *Ib.*

3. *Contracts for immunity; effect of act of 1908 to enlarge scope of prohibition.*

In framing the Employers' Liability Acts of 1906 and 1908 Congress well understood the practice of maintaining relief departments, and by the statute of 1908 Congress enlarged the scope of the clause defining contracts for immunity which should not prevail, and included stipulations which made acceptance of benefits from such relief departments a release from liability. *Ib.*

4. *Contracts within provisions of § 5.*

The provisions of § 5 of the Employers' Liability Act apply as well to existing as to future contracts. *Ib.*

5. *Right of recovery under; who entitled; effect of local law.*

The National Employers' Liability Act of 1908 gives the right of recovery to the personal representatives and not to the heirs of one killed by the negligence of the employer, and the heirs cannot maintain an action even where the local statute, as in Porto Rico, gives a right to the heirs as well as to the personal representatives to maintain such an action. *American R. R. Co.* v. *Birch*, 547.

FEDERAL QUESTION.

1. *Infringement of patent; involution of Federal question in suit for.*

A suit for infringement which turns upon the scope of the patent and privileges of the patentee thereunder presents a case arising under the patent law. *Henry* v. *A. B. Dick Co.*, 1.

2. *Infringement of patent; when suit for involves no Federal question.*

A patentee who has leased his patent to a licensee under restrictions may waive the tort involved in infringement and sue upon the broken contract; but in that event the case is not one arising under the patent laws and, in absence of diversity of citizenship, a Federal court has no jurisdiction thereof. *Ib.*

3. *Infringement of patent; remedy sought as test of involution.*

Whether the case is one of infringement of which the Federal court has jurisdiction or of contract of which it has not jurisdiction is often determined by the remedy which complainant seeks. *Ib.*

4. *Infringement of patent; test of involution of Federal question.*

The test of jurisdiction is whether complainant does or does not set up a right, title or interest under the patent laws or make it appear that a right or privilege will be defeated by one, or sustained by another, construction of those laws. *Ib.*

5. *Infringement of patent; what constitutes question under patent law.*

Whether a patentee may lawfully impose restrictions on the use of a patent and whether the violation thereof constitutes infringement are questions under the patent law. *Ib.*

6. *Rulings on sufficiency of evidence where pleading sets up Federal statute held not to involve.*

Although the petition may declare under a Federal statute, if it states no cause of action thereunder but at most a right of recovery at common law, rulings on the sufficiency of evidence do not involve Federal questions. *Brinkmeier* v. *Missouri Pacific Ry. Co.*, 268.

7. *What constitutes; when not involved.*

Where the state court has decided that the plaintiff in error never acquired title because the grant was not one *in præsenti* but depended upon conditions subsequent which had never been fulfilled, and rests its judgment on that fact alone, and not on the effect of a subsequent statute which might have affected the title had the title of plaintiff in error been perfected, there is no Federal question. *Cross Lake Club* v. *Louisiana*, 632.

See CONSTITUTIONAL LAW, 3.

INTERSTATE COMMERCE COMMISSION.

INTERVENTION.

Allegations; what not essential.

Where the intervenor has not legal title and is not claiming against an admitted prior equity as a purchaser without notice, allegations of ignorance of facts not admitted and not finally established are not essential. *Leary* v. *United States*, 567.

See TRUSTS AND TRUSTEES, 1, 2.

INVENTION.

See PATENTS.

JEOPARDY.

See CONSTITUTIONAL LAW, 8, 26.

JUDGMENTS AND DECREES.

1. *Essentials to validity; jurisdiction; who to determine.*

It is essential to the validity of a judgment that the court rendering it have jurisdiction of the subject-matter and of the parties; but it is for the highest court of a State to determine its own jurisdiction and that of the local tribunals. *Standard Oil Co.* v. *Missouri*, 270.

2. *Construction of decree declaring state statute unconstitutional in so far as it prohibits or burdens interstate commerce.*

A decree of this court must be read in view of the issues made and the relief sought and granted; and a decree declaring a state statute unconstitutional so far as it prohibits, or is a burden upon, interstate commerce will not be construed as preventing the enforcement of such legislation as is legitimately within the police power of the State and not in conflict with the Federal Constitution. *Haskell* v. *Kansas Natural Gas Co.*, 217.

See BANKRUPTCY, 7; CONSTITUTIONAL LAW, 5, 12, 14; JURISDICTION, H; PRACTICE AND PROCEDURE, 3, 14, 15, 20; QUO WARRANTO

JUDICIAL CODE.

See JURISDICTION, A 5, 6, 7; STATUTES, A 9.

JURISDICTION.

A. OF THIS COURT.

1. *Of appeal involving rights resting on international compact; effect of act of 1891 to confer.*

In construing the Circuit Court of Appeals Act of 1891, the intent of

MALICIOUS PROSECUTION.

MANDAMUS.

MANDATE.

MASTER AND SERVANT.

1. *Fellow-servant rule; application of.*

The fellow-servant rule applies where the character of their respective occupations brings the people engaged in them into necessary and frequent contact even if they have no personal relations. *Beutler* v. *Grand Trunk Junction Ry. Co.*, 85.

2. *Fellow-servants of railroad; who are.*

An employé of a railroad company engaged in work in the repair yard is a fellow-servant of the crew of a switching engine of the same company engaged in running cars needing repairs into the yard. *Ib.*

See EMPLOYERS' LIABILITY ACT;
NEGLIGENCE, 1;
PRACTICE AND PROCEDURE, 4.

MINES AND MINING.

1. *Conveyance within meaning of act of June 6, 1900; lease.*

The word "conveyance" as used in § 98 of the act of June 6, 1900, c. 786, 31 Stat. 321, 505, is not to be narrowly construed but includes leases as well as transfers in fee. *Waskey* v. *Chambers*, 564.

2. *Recording act; right of lessee to protection of.*

One, who under a lease of a mine, enters on the property and expends money in developing it, gives a valuable consideration for the lease and is protected by the recording act. *Ib.*

3. *Recording act; what not entitled to registration under.*

A deed altered after acknowledgment and having only one witness is not entitled to registration under the recording act of June 6, 1900, and has no effect against persons without actual notice. *Ib.*

4. *Withdrawn land; validity of location and discovery on.*

A location and discovery on land withdrawn *quoad hoc* from the public domain by a valid and subsisting mining claim is absolutely void for the purpose of founding a contradictory right; nor does it become valid by reason of the subsequent failure of the right existing when it was filed. *Swanson* v. *Sears*, 180.

See CONTRACTS.

MISJOINDER OF CAUSES OF ACTION.

See INDIANS, 18;
PLEADING, 1.

PATENTS.

1. *Contract for use; when implied.*

In order to find that there was an implied contract for use of a patent, there must be use with patentee's assent and agreement to pay something therefor, *United States* v. *Berdan Fire Arms Company*, 156 U. S. 552, and these elements may be collected from conduct of the parties, even if there are no explicit declarations. *United States* v. *Anciens Etablissements*, 309.

2. *Contract for use; what constitutes; jurisdiction of Court of Claims.*

Where the facts show that the patentee consented that the Government use his invention, and the proper officers of the Department in which it was used have stated that there is a claim for royalties if the patent is a valid one, the claim is founded on contract and the Court of Claims has jurisdiction. *Ib.*

3. *Eminent domain in: remedy of patentee.*

The act of June 25, 1910, having afforded a remedy for a patentee whose property rights have been appropriated by an officer of the United States for the benefit of the Government, such patentee is entitled to maintain an action in the Court of Claims to have his compensation determined, and the statute makes full and adequate provisions for the exercise of power of eminent domain. *Crozier* v. *Krupp*, 290.

4. *Excellence of device; use as test.*

The excellence of an ordnance invention is testified to by its use by the Government in guns for the national defense. *United States* v. *Anciens Etablissements*, 309.

PATENTS FOR LAND.

PARTIES.

PENALTIES AND FORFEITURES.

PLEADING.

QUO WARRANTO.

1. *Nature of proceeding; imposition of fine; quære as to.*

Quære: Whether under general rules, information in the nature of *quo warranto* is a civil, or criminal, proceeding, and whether under general allegations of misuse, with only a prayer for ouster, a fine may be imposed in those jurisdictions where *quo warranto* has ceased to be a criminal proceeding. *Standard Oil Co.* v. *Missouri*, 270.

2. *Money judgment in; rule as to, in Missouri.*

Whatever the rule elsewhere, in Missouri a corporation may in *quo warranto* be subject to a money judgment, whether in nature of fine or damages for breach of implied contract not to violate its franchise. *Ib.*

See CONSTITUTIONAL LAW, 14, 32;
JURISDICTION, H;
PRACTICE AND PROCEDURE, 10.

RAILROADS.

1. *Facilities which may be required of; when question of expense controlling.*

In a proceeding brought to compel a carrier to furnish facilities not included in its absolute duties, the question of expense is of controlling importance. *Oregon R. R. & N. Co.* v. *Fairchild*, 510.

2. *Regulation; requirements by Commission; requisites to validity of order.*

An order of a railroad commission requiring a railroad company to expend money and use its property in a specified manner is not a mere administrative order, but is a taking of property; to be valid there must be more than mere notice and opportunity to be heard; the order itself must be justified by public necessity and not unreasonable or arbitrary. *Ib.*

3. *Track connections; power of state commission to require.*

A State, acting through an administrative body, may require railroad companies to make track connections, *Wisconsin, &c. R. R. Co.* v. *Jacobson*, 179 U. S. 287, but such body cannot compel a company to build branch lines, connect roads lying at a distance from each other, or make connections at every point regardless of necessity; each case depends on the special circumstances involved. *Ib.*

4. *Track connections; justification for order requiring.*

In this case the record does not disclose any public necessity justifying

TAXES AND TAXATION.

1. *Benefits not a test to determine validity.*

Where jurisdiction to tax property exists, the validity of the tax cannot be determined by an inquiry as to the extent to which the property may be benefited. *Gromer* v. *Standard Dredging Co.*, 362.

2. *Exemption; effect of use of property on Government work.*

Property which has acquired a *situs* within the jurisdiction of the Territory of Porto Rico is not exempt from taxation by the Territory simply because it is exclusively used by the owner for carrying out a contract with the Government. *Ib.*

3. *Situs for taxation.*

In this case there is nothing in the record to show that the property taxed had not acquired a *situs* in Porto Rico or that takes it out of the rule that tangible personal property is subject to taxation by the State or Territory in which it is, no matter where the domicile of the owner may be. *Ib.*

See BANKRUPTCY, 3;
INDIANS, 7–14;
LOCAL LAW (PORTO RICO, 1, 2).

TELEGRAPH COMPANIES.

1. *Use of post-roads; rights conferred by act of July 24, 1866.*

The act of July 24, 1866, 14 Stat. 221, c. 230, permitting telegraph companies to occupy post-roads is permissive only and not a source of positive rights; it conveys no title in streets or roads, and does not found one by delegating the power to take by eminent domain. (*West. Un. Tel. Co.* v. *Penna. R. R. Co.*, 195 U. S. 540.) *Western Union Telegraph Co.* v. *Richmond.* 160.

2. *Use of post-roads; right of municipality to impose restrictions on use of streets.*

Prima facie a telegraph company, not having the right of eminent domain, must submit to the terms of the owners of property which it desires to occupy, including those imposed by municipalities for use of streets. *Ib.*

3. *Use of post-roads; quære as to right of municipality to restrict.*

Quære: Whether by reason of such rights as are given by the act of July 24, 1866, a municipality is restricted to only imposing reasonable terms for the use of its streets by telegraph companies. *Ib.*

shall be and remain single and unmarried and on the death or marriage of the last of them then I direct that the said estate shall be sold by my executors and the proceeds thereof be distributed by my said executors among my daughters living at my death and their children and descendants (*per stirpes*)." The testator had three sons and five daughters, all of whom were living when the will was made. The will contained provisions for testator's wife and sons. Four of the daughters married and had children; only one of them married before testator's death, and her children were born subsequently. One daughter remained single and survived all her sisters. Nine years after testator's death, the widow having also died, a decree was entered in a suit in which the daughters alone were parties, directing that the property be sold and proceeds divided among the daughters. In a suit brought subsequently by a purchaser to quiet title against claims of grandchildren of the testator, *held* that the provision in the will for the sale of the homestead was for the protection of testator's daughters, and the words "living at the time of my death" may not be disregarded, and the daughters had a vested remainder in fee not defeasible as to any of them by her death leaving descendants, before the expiration of the preceding estates. Although the clause is elliptical, and the provision for representation is not fully expressed, the court finds from this and other provisions in the will that the intent of the testator is clear, in providing for his daughters and their children and descendants *per stirpes*, to establish the right of those daughters who survived him as of the time of his death and to provide for the representation of any who might previously die. The purchasers under the decree in the previous suit for sale and division of proceeds, acquired a good title under the decree. *Johnson* v. *Washington Loan & Trust Co.*, 224.

WORDS AND PHRASES.

"*Conveyance*" as used in § 98 of act of June 6, 1900, 31 Stat. 321 (see Mines and Mining, 1). *Waskey* v. *Chambers*, 564.

"*Creditors*" as used in § 496, Ky. Stat., 1903 (see Local Law, Ky., 4). *Holt* v. *Crucible Steel Co.*, 262.

"*Current yearly pay*" (see Army and Navy, 7). *Plummer* v. *United States*, 137.

"*Statuary*" as used in reciprocal agreement with France of May 30, 1898 (see Customs Law). *Altman & Co.* v. *United States*, 583.

WRIT AND PROCESS.

See JURISDICTION, J 2, 3;
MANDAMUS;
QUO WARRANTO.