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UNITED STATES REPORTS

VOLUME 227

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1912

CHARLES HENRY BUTLER

REPORTER

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1913

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.[1]

EDWARD DOUGLASS WHITE, CHIEF JUSTICE.
JOSEPH McKENNA, ASSOCIATE JUSTICE.
OLIVER WENDELL HOLMES, ASSOCIATE JUSTICE.
WILLIAM R. DAY, ASSOCIATE JUSTICE.
HORACE HARMON LURTON, ASSOCIATE JUSTICE.
CHARLES EVANS HUGHES, ASSOCIATE JUSTICE.
WILLIS VAN DEVANTER, ASSOCIATE JUSTICE.
JOSEPH RUCKER LAMAR, ASSOCIATE JUSTICE.
MAHLON PITNEY, ASSOCIATE JUSTICE.

GEORGE WOODWARD WICKERSHAM, ATTORNEY GENERAL.[2]
JAMES C. McREYNOLDS, ATTORNEY GENERAL.[3]
WILLIAM MARSHALL BULLITT, SOLICITOR GENERAL.[4]
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] Resigned March 4, 1913.

[3] On March 5, 1913, President Wilson nominated James C. McReynolds of Tennessee as Attorney General to succeed George W. Wickersham, resigned. He was confirmed by the Senate the same day. His commission was filed March 10, 1913.

[4] On July 1, 1912, President Taft nominated William Marshall Bullitt of Kentucky as Solicitor General to succeed Frederick W. Lehmann of Missouri, resigned. He was confirmed by the Senate July 13, 1912. His commission was filed October 15, 1912. He resigned March 11, 1913. The office of Solicitor General was not filled until after the publication of this volume.

SUPREME COURT OF THE UNITED STATES.

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

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

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

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

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

For the Third Circuit, Mahlon Pitney, Associate Justice.

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

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

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

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

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

For the Ninth Circuit, Joseph McKenna, Associate Justice.

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

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1912.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY *v.* GREENWOOD GROCERY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 54. Argued November 14, 1912.—Decided January 20, 1913.

Since Congress has acted, by passing the Hepburn Act of June 29, 1906, in regard to delivery of cars for interstate shipments, all state legislation on that subject has been superseded. *Chicago, R. I. & Pac. Ry.* v. *Hardwick Elevator Co.*, 226 U. S. 426.

A regulation of a state railroad commission that the railroad company must deliver freight to, or place the car in an accessible place for, the consignee of interstate shipments within twenty-four hours after arrival, without allowance for justifiable and unavoidable delay, is an unreasonable interference with and burden on interstate commerce and void under the commerce clause of the Federal Constitution; and so *held* as to a regulation to that effect of the Mississippi Railroad Commission. *Houston & Texas Central R. R.* v. *Mayes*, 201 U. S. 329.

96 Mississippi, 403, reversed.

THE facts, which involve the constitutionality under the commerce clause of the Federal Constitution of certain rules of the Mississippi Railroad Commission relating to delivery of cars for interstate shipments, are stated in the opinion.

Mr. Edward Mayes and *Mr. Charles N. Burch*, with whom *Mr. Blewett Lee* and *Mr. H. D. Minor* were on the brief, for plaintiff in error.

Mr. Harry Peyton for defendant in error

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

The Grocery Company was permitted in the state courts to offset against a claim for demurrage, its claim against the Railroad Company for penalties aggregating $58 for delays in delivering cars to the Grocery Company, the consignee thereof, at the completion of interstate transportation, the right to which penalties arose from certain rules of the Railroad Commission of Mississippi copied in the margin.[1] Eighteen dollars of the penalties accrued after June 29, 1906, the date of the passage of the Hepburn Act.

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[1] Rule I. Railroad Companies shall within twenty-four hours after the arrival of shipments, give notice by mail or otherwise, to consignee of arrival of goods, together with weight and amount of freight charges due thereon and on goods in car load quantities, said notices must contain letters or initials of the car, number of the car, and if transferred in transit, the number and initial of the original car, net weight and the amount of freight charges due on same. No demurrage charge shall be made unless legal notice of arrival is given to consignee.

Any Railroad Company failing to give such notice, *and to deliver such freight at its depots or warehouses, or, in case of shipment for track delivery, to place loaded cars at an accessible place for unloading, within twenty-four hours after arrival, computing from 7 a. m., the day following the arrival, shall forfeit and pay* the consignee, or other party whose interest is affected, the sum of $1.00 per car per day or fraction of a day, on all carload shipments, and one cent per one hundred (100) pounds per day or fraction thereof, on less than car load lots, with a minimum charge of five cents for any one package, after the expiration of said twenty-four hours.

Rule XI. No other charge shall be made for storage or demurrage except as provided in the foregoing rules, and if a railroad company is indebted to a shipper or consignee for delayage, then a claim for demurrage shall be offset by a claim for delayage.

If the case at bar, concerning as it does the delivery of cars at the termination of interstate commerce transportation, be considered as governed by the rule which controls the furnishing of cars for the making of such shipments, the decision recently announced in *Chicago, Rock Island and Pacific Ry. Co.* v. *The Hardwick Farmers Elevator Company*, 226 U. S. 426, decided this term, would be controlling as to the penalties allowed as an offset which accrued after June 29, 1906. As, however, the prior penalties allowed as an offset would in any event be not controlled by the case referred to, we come to consider the validity of the allowance of all of the offset independent of the principle applied in that case. Approaching the subject from this point of view, we think the rule of the State Commission upon which the right to all the so-called "delayage penalties" was based constituted an unreasonable burden upon interstate commerce within the decision in *Houston & T. C. R. R. Co.* v. *Mayes*, 201 U. S. 321, 329, since the requirement as to the delivery of cars within the short period fixed in the rule is absolute, and makes no allowance whatever for any justifiable and unavoidable cause for the failure to deliver. In saying this we do not give controlling effect to the observation contained in the opinion of the court below that no question was made as to the reasonableness of the regulation, since the opinion itself states that the ruling in the *Mayes Case* was the main reliance of the railroad company, and in the argument at bar both sides have discussed the case on the theory that the substantial question to be decided was whether the rule of the Commission which the court below upheld was an unreasonable regulation in view of the decision in the *Mayes Case*.

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

Judgment reversed.

WYNKOOP, HALLENBECK, CRAWFORD COMPANY *v.* GAINES.

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

No. 689. Motion to dismiss submitted January 6, 1913.—Decided January 20, 1913.

Where the question whether the claim against the bankrupt be allowed or not has been settled by an order of the court, questions remaining as to how the order shall be carried out are purely administrative, and as they do not involve the rejection or allowance of a claim this court has no power under § 25*b* of the Bankruptcy Act to review the decision of the Circuit Court of Appeals.

Appeal from 196 Fed. Rep. 357, dismissed.

THE facts, which involve the jurisdiction of this court of appeals under § 25*b* of the Bankruptcy Act, are stated in the opinion.

Mr. William Otis Badger, Jr., *Mr. William H. Hotchkiss* and *Mr. Louis J. Wolff* for appellant.

The appeal is properly taken under § 25*b* (1) of the Bankruptcy Act, Judicial Code, § 252. The present proceeding is one in bankruptcy as distinguished from a controversy arising in bankruptcy proceedings. *Coder* v. *Arts*, 213 U. S. 223; *Hewitt* v. *Berlin Machine Works*, 194 U. S. 296; *Tefft, Weller & Co.* v. *Munsuri*, 222 U. S. 114.

By the filing of its petition the appellant instituted a proceeding in bankruptcy as to the appellee's claim under §§ 2, 7 and 57*k* of the Bankruptcy Act. *In re Mueller*, 135 Fed. Rep. 711.

All the subsequent steps in the proceeding were based directly upon this petition, and the decision appealed from is the final one upon such petition. It will be noted

that Gaines, upon his own appeal to the Circuit Court of Appeals, invoked the jurisdiction of that court first by taking an appeal from the decision of the District Court, procuring the allowance of the same, and filing his assignment of errors within the ten days allotted for that purpose and it was only at a later date, and seemingly as an afterthought, that his petition for review was filed.

No decision was ever made by the Circuit Court of Appeals as to whether the appeal or the petition to review was the proper method to reach that court. Both proceedings were taken by the appellee who was appellant in that court. Neither was the useless formality of a motion to dismiss resorted to, since in any event the controversy would have been adjudicated upon in the proper proceeding. *Fisher* v. *Cushman*, 103 Fed. Rep. 860; *In re Worcester County*, 102 Fed. Rep. 808; *Lockman* v. *Lang*, 132 Fed. Rep. 1; *In re Schoenfeld*, 183 Fed. Rep. 219.

Here the proceeding was directly to disallow the Gaines claim and his only proper method of invoking the jurisdiction of the Circuit Court of Appeals was by appeal under § 25 of the act. *Matter of Loving*, 224 U. S. 183.

The amount in controversy exceeds $2,000 within the definition of this requirement in *Gray* v. *Grand Forks Mercantile Co.*, 138 Fed. Rep. 344.

A Federal question is presented within § 709, Rev. Stat., since a construction of the Bankruptcy Act is involved and the decisions below cannot be sustained without reference to its provisions. *Fidelity Co.* v. *Bray*, 225 U. S. 205.

The appellee, in his brief, tacitly assumes that a Federal question is presented, since nothing is said upon this branch of the subject.

The fact that an incidental question of rank or priority of the claim may be included in this proceeding does not defeat the right of appeal. *Cunningham* v. *German Ins. Bank*, 103 Fed. Rep. 932.

Mr. John J. Crawford for appellee.

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

A corporation known as the Paris Modes Company was adjudicated a bankrupt on March 28, 1910. Gaines, the appellee, owned half of the stock of the company and was its president. His relatives, during the active life of the corporation, made large loans to the company. The claims for these advances were assigned to Gaines shortly before the bankruptcy, and he made proof of the same in the bankruptcy proceeding. Subsequently the Wynkoop, Hallenbeck, Crawford Company, the appellant, a creditor of the bankrupt estate which had proved its claim, filed an intervening petition asking for the reëxamination and disallowance as against it of the Gaines claim. The ground for the relief prayed was that Gaines was equitably estopped from collecting his claim against the bankrupt estate to the prejudice of the petitioner because of misrepresentations and concealment of material facts as to the financial condition of the bankrupt made by him as an officer of the company, upon which the intervening company relied to its injury. The referee found that Gaines had made the representations complained of and that although intentional fraud on his part was not shown, yet if he had been the owner and holder of the notes upon which he had proved at the time of the making of the statements they were of such a character as to cause him to be equitably estopped from asserting the claims to the prejudice of the intervenor. As, however, it was found that Gaines had no interest in the claims embraced in his proof of debt at the time the representations were made by him, because he had acquired the claims by assignments subsequent thereto, the referee concluded that Gaines was entitled to assert the rights of his assignors and was not

estopped as against the Wynkoop, Hallenbeck, Crawford Company. In reviewing the action of the referee the District Court disapproved the same, and, on June 22, 1911, directed that the claim of Gaines, in so far as it represented demands against the bankrupt which were in existence at the time the representations were made by Gaines, should be postponed to the claim of the intervenor. Neither party appealed from this order.

Thereafter, on August 3, 1911, the referee made an order that the dividend on the sum of $199,000 of the claim of Gaines, being the portion representing the indebtedness at the time of the misrepresentations, should be paid to the intervenor. On petition to review, this order was affirmed by the District Court. Gaines then carried the matter, by both appeal and petition for review, to the Circuit Court of Appeals, complaining of the mode of distribution which had been adopted to execute the decree of June 22, 1911. That the controversy was thus limited and that no issue was raised or contention made concerning the decree of June 22, 1911, itself, which had become final, is certain. Thus, in August, 1912, in announcing its decision, the Circuit Court of Appeals thus stated the controversy before it: "There is no occasion to go back of the order of June 22, 1911, or to inquire into its propriety. No appeal was taken or petition to review filed, and appellant here concedes that it lays down the rule for distribution in this case, and announces that he has no criticism to make as to the propriety of that rule. That is to say, although in his opinion the facts did not warrant the adoption of such a rule, he is willing to accept it and let the case be disposed of in conformity to its terms."

The court then considered whether the distribution ordered by the referee and approved by the District Court accorded with the order of June 22, 1911, and held that it did not, and directed distribution of $12,250, the

balance of dividends in the hands of the trustee, in accordance with views expressed in the opinion. 196 Fed. Rep. 357. The Wynkoop Company thereupon prosecuted this appeal, and a motion has been made to dismiss the same for want of jurisdiction.

That the motion to dismiss must be granted is manifest from the statement we have made. Whatever may have been the nature of the original controversy presented by the intervention of the Wynkoop Company, the acquiescence of both parties in the order of June 22, 1911, settled that controversy, and the questions remaining were purely administrative, concerning as they did merely the carrying out of the order according to its true intent and purpose. This being the case, the question whether the order of June 22, 1911, was correctly interpreted by the referee and the District Court in the distribution directed by the subsequent administrative order is not one concerning an allowance or rejection of a claim within § 25*b* of the Bankruptcy Act, but is a matter arising in the administration of the bankrupt estate, which we are not empowered to review.

Appeal dismissed.

VIRTUE *v.* CREAMERY PACKAGE MANUFACTURING COMPANY AND OWATONNA COMPANY.

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

No. 80. Argued December 9, 10, 1912.—Decided January 20, 1913.

To sustain an action under § 7 of the Sherman Act a necessary element is coöperation by some of the defendants in a scheme involving monopoly or restraint of interstate trade and causing the damage complained of.

The owner of a patent has exclusive rights of making, using and selling, which he may keep or transfer in whole or in part.

Patents and patent rights cannot be made a cover for violation of law; but they are not so used when only the rights conferred by law are exercised.

Patent rights can be protected by a party to an illegal combination.

While the combined effect of the separate acts alleged to have made the combination illegal must be regarded as a whole, the strength of each act must be considered separately.

Assertion of patent rights may be so conducted as to constitute malicious prosecution; but failure of plaintiff to maintain the action does not necessarily convict of malice.

Mere coincidence in time in the bringing by separate parties of suits for infringements on patents against the same defendant *held*, in this case, not to indicate a combination on the part of those parties to injure the defendant within the meaning of § 7 of the Sherman Anti-trust Act.

A contract by which a manufacturer of a patented article appoints another who does not manufacture or sell like articles, his exclusive agent for the output of the factory, *held* in this case not to violate the Sherman Act.

Where an action under § 7 of the Sherman Act was tried in the Circuit Court and argued in the Circuit Court of Appeals on the basis of coöperation between the defendants, this court will not consider a contention raised for the first time that one of the defendants was itself a combination offensive to the statute.

In this case it does not appear that the contracts between the defendants were made for the purpose of injuring the plaintiff, and both courts below having so held this court also so holds.

179 Fed. Rep. 115, affirmed.

THE facts, which involve the construction of § 7 of the Sherman Anti-trust Act and what constitutes an illegal combination thereunder, are stated in the opinion.

Mr. Harlan E. Leach, with whom *Mr. James F. Williamson* and *Mr. James A. Tawney* were on the brief, for plaintiff in error:

It is not necessary to prove the commission of any tort, wrongful act or crime on the part of defendants, aside from what is prohibited by the terms of the Sherman Anti-trust Act, in order to make the defendants liable

in damages to the plaintiffs in this action. *Loewe* v. *Lawlor*, 208 U. S. 274; *Montague* v. *Lowry*, 193 U. S. 38; *Chattanooga F. & P. Works* v. *Atlanta*, 203 U. S. 390; *Jayne* v. *Loder*, 149 Fed. Rep. 21; *Wheeler-Stenzel Co.* v. *National Window Glass Ass'n*, 152 Fed. Rep. 864, *S. C.*, 10 L. R. A. (N. S.) 972; *Penn. Sugar Co.* v. *Am. Sugar Co.*, 166 Fed. Rep. 254; *People's Tobacco Co.* v. *Am. Tobacco Co.*, 170 Fed. Rep. 396; *Monarch Tobacco Works* v. *Am. Tobacco Co.*, 165 Fed. Rep. 774; *Swift* v. *United States*, 196 U. S. 395.

The act of combining—the concerted action—is unlawful in itself, and is the basis of a cause of action for damages. *Loewe* v. *Lawlor; Swift* v. *United States; Penn. Sugar Co.* v. *Am. Sugar Co.; Jayne* v. *Loder, supra; Aikens* v. *Wisconsin*, 195 U. S. 194; *Ellis* v. *Inman*, 131 Fed. Rep. 182.

It is not necessary that the act which caused the damage should be anything in itself prohibited by the Anti-trust Act. It is not necessary that it be a step in the formation of the "contract," "combination" or "conspiracy" or a step in the attempt to secure monopoly. It is sufficient if such an act originated in, or was directly associated with, the motives which were the cause of the contract, combination, conspiracy or attempt to secure monopoly. *Chattanooga Works* v. *Atlanta*, 203 U. S. 390.

Plaintiffs in error were engaged in interstate trade and commerce. *Loewe* v. *Lawlor; Montague* v. *Lowry; Penn. Sugar Co.* v. *Am. Sugar Co., supra; Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423.

Every agreement or transaction whose direct effect is to destroy or prevent competition is in restraint of trade. *Northern Securities Co.* v. *United States*, 193 U. S. 197; *United States* v. *American Tobacco Co.*, 164 Fed. Rep. 700; *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423; *United States* v. *Trans. Mo. Freight Ass'n*, 166 U. S. 290; *United States* v. *Joint Traffic Ass'n*, 171 U. S. 505.

A scheme or contract whereby a corporation disposes of its business, and agrees to ever thereafter remain out of business, is illegal and void, under the Sherman Anti-trust Act. *Shawnee Compress Co.* v. *Anderson,* 209 U. S. 423.

A combination has obtained a monopoly when it has reached a position where it can control prices and suppress competition. *United States* v. *Am. Tobacco Co.,* 164 Fed. Rep. 700, 721.

Where the necessary and direct effect of the combination is to restrain trade or effectuate a monopoly, the intent is immaterial. *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211.

But where acts in themselves are not directly in restraint of trade or do not directly tend towards a monopoly, or are only an attempt, the intent of the parties becomes material. *Swift* v. *United States; Loewe* v. *Lawlor, supra; Penn. Sugar Co.* v. *Am. Refining Co.,* 166 Fed. Rep. 254; *Bigelow* v. *Calumet & Hecla Co.,* 167 Fed. Rep. 704, 709.

In cases of conspiracy it is always permissible to allege and prove the history and various steps culminating in the final conspiracy, even though the previous steps were separate and distinct offenses, if they tend to throw light on the present conspiracy and to show the intent with which the final acts were committed. Wharton on Criminal Ev., § 32; Greenleaf on Ev., § 111; 8 Cyc., pp. 677, 678, 684; *Swift* v. *United States,* 196 U. S. 395; *United States* v. *Greene,* 115 Fed. Rep. 344; *Lincoln* v. *Claflin,* 7 Wall. 132; *Mut. Life Ins. Co.* v. *Armstrong,* 117 U. S. 598; *Moline-Milburn Co.* v. *Franklin,* 37 Minnesota, 137.

A person or corporation joining a conspiracy after it is formed, and thereafter aiding in its execution, becomes from that time as much a conspirator as if he originally designed and put it in operation. *United States* v. *Standard*

Oil Co., 152 Fed. Rep. 294; *Lincoln* v. *Claflin*, 7 Wall. 132; *United States* v. *Babcock*, 24 Fed. Cas. 915, No. 14,487; *United States* v. *Cassidy*, 67 Fed. Rep. 698, 702; *The Anarchist Case*, 122 Illinois, 1; *United States* v. *Johnson*, 26 Fed. Rep. 682, 684; *People* v. *Mather*, 4 Wend. 230.

The contract of February 24, 1898, being illegal and void, the defendant Creamery Company obtained no title to the letters patent sued on in the infringement suit brought by it against the plaintiffs herein, it having acquired such patents, if at all, by said illegal and void contract or the assignments executed pursuant to its terms and as a part of the same illegal scheme. *McMullen* v. *Hoffman*, 174 U. S. 639; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227; *Dunbar* v. *Am. Tel. & Tel. Co.*, 87 N. E. Rep. 521; *Thomson* v. *Thomson*, 7 Ves. 468; *Levy* v. *Kansas City*, 168 Fed. Rep. 524.

That the Creamery Company held assignments of the patents valid on their face will avail nothing; the court will look into the whole transaction. *McMullen* v. *Hoffman*, 174 U. S. 639.

The Creamery Company could not establish its cause of action in the infringement suit without relying on the illegal agreement, for it had to set up and prove its title to the patents sued on, and could only do this by bringing in the assignments which were a part of the illegal scheme. *McMullen* v. *Hoffman*, 174 U. S. 639; *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227.

An interlocutory decree in a patent infringement suit, providing for an injunction and ordering an accounting and sending the case to a referee to ascertain the amount of damages, has no force as an adjudication in any other action. The decree must be a final decree to have such effect. The decree in the suit brought by the defendant Creamery Package Manufacturing Company against these

plaintiffs was only interlocutory. Further, the questions of monopoly, restraint of trade and lack of title are new in this action, and were not litigated or at issue in the patent infringement suit, as shown by the pleadings in the patent infringement suit set forth in full in the complaint in this action. *Harmon* v. *Struthers*, 48 Fed. Rep. 260; *Ex parte National Enameling Co.*, 201 U. S. 156; *McGourkey* v. *Toledo & Ohio Ry. Co.*, 146 U. S. 536; *Smith* v. *Vulcan Iron Works*, 165 U. S. 518; *Humiston* v. *Stainthrop*, 2 Wall. 106; *The Keystone Iron Co.* v. *Martin*, 132 U. S. 91; *Water Co.* v. *Hutchinson*, 160 Fed. Rep. 41; *Brush Electric Co.* v. *Western Electric Co.*, 76 Fed. Rep. 761; *Australian Knitting Co.* v. *Gormly*, 138 Fed. Rep. 92; *Roth Tool Co.* v. *New Amsterdam Casualty Co.*, 161 Fed. Rep. 709.

This conspiracy was a continuing offense; every overt act committed in furtherance thereof was a renewal of the same as to all of the parties. The statute of limitations does not begin to run until the commission of the last overt act. Neither can the parties claim a vested right to violate the law. 19 Am. & Eng. Enc. (2d ed.), "Limitations of Actions;" *United States* v. *Green*, 115 Fed. Rep. 343; *Ochs* v. *People*, 124 Illinois, 399; *Spies* v. *People*, 122 Illinois, 1; 8 Cyc., p. 678.

It is an elementary principle of evidence that where two or more persons are associated together for some illegal purpose the acts or declarations of one of them in reference to the common object are admissible against them all. 1 Greenleaf, § 111; 2 Wigmore, § 1079; *American Fur Co.* v. *United States*, 2 Pet. 358; *S. C.*, 8 Curtis, 138; *Clune* v. *United States*, 159 U. S. 593; *Wiborg* v. *United States*, 163 U. S. 656.

A combination between two or more independent and competing corporations engaged in manufacturing and selling under letters patent and having an interstate trade and commerce, to eliminate the competition between

them and create a monopoly, is in violation of the Sherman Anti-trust Act. *Blount Mfg. Co.* v. *Yale*, 166 Fed. Rep. 555; *National Harrow Co.* v. *Hench*, 83 Fed. Rep. 36; *S. C.*, 76 Fed. Rep. 667; *S. C.*, 84 Fed. Rep. 226; *Bobbs-Merrill Co.* v. *Strauss*, 139 Fed. Rep. 155; *Strait* v. *National Harrow Co.*, 18 N. Y. Supp. 224; *National Harrow Co.* v. *Bement*, 47 N. Y. Supp. 462; *Mines* v. *Scribner*, 147 Fed. Rep. 927; *Bement* v. *National Harrow Co.*, 186 U. S. 70.

The court will not render its aid to the carrying out of a scheme prohibited by the Sherman Anti-trust Act. *National Harrow Co.* v. *Hench*, 84 Fed. Rep. 226; *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227; *Levy* v. *Kansas City*, 168 Fed. Rep. 524; *Northern Sec. Co.* v. *United States; McMullen* v. *Hoffman; Thomson* v. *Thomson*, *supra.*

Every combination resulting directly or necessarily in restraint of interstate trade is prohibited. It is immaterial what kind of a combination it is; none is exempt; a combination to prosecute law suits is as much prohibited as any other. See cases cited *supra.*

To wrongfully charge infringement is an actionable wrong. This is true apart from any claim of violation of Sherman Anti-trust Act. (Also to say that a person has no patent, or valid patent.) *Culmer* v. *Canby*, 101 Fed. Rep. 195; 25 Cyc. 263; *Bowsky* v. *Cimiotti Unhairing Co.*, 76 N. Y. Supp. 465; *Watson* v. *Trask*, 6 Ohio, 531; *Cousins* v. *Merrill*, 16 U. C. C. P. 114; *Meyrose* v. *Adams*, 12 Mo. App. 329; 25 Cyc. 559; *Flint* v. *Hutchinson Burner Co.*, 110 Missouri, 492; *Germ Proof Filter Co.* v. *Pasteur Filter Co.*, 81 Hun, 49; *Wren* v. *Weild*, L. R. 4 Q. B. 731; *Swan* v. *Tappan*, 5 Cush. 104; *McElwee* v. *Blackwell*, 94 Nor. Car. 261; *Snow* v. *Judson*, 38 Barb. 210; *Dicks* v. *Brooks*, L. R. 15 Ch. Div. 22; *Barley* v. *Walford*, 9 Q. B. 197.

To take away plaintiff's customers by intimidation and threats renders defendants liable to damages under the Sherman Anti-trust Act. *Loewe* v. *Lawlor*, 208 U. S. 274; *People's Tobacco Co.* v. *Am. Tobacco Co.*, 170 Fed. Rep. 396.

Plaintiffs have a cause of action at common law. The Creamery Package Company not having any title to the patents it sued upon, had no right or authority to prosecute its suit. It is the same as where a person brings a suit in the name of another without any authority for so doing. The person so doing must be charged with knowledge of the kind of a title it had. 38 Cyc. 517; *Bond* v. *Chapin*, 8 Metc. 31; *Moulton* v. *Lowe*, 32 Maine, 466; *Foster* v. *Dow*, 29 Maine, 442; *Smith* v. *Hyndman*, 10 Cush. (Mass.) 554; *Streeper* v. *Ferris*, 64 Texas, 12; *Hackett* v. *McMillan*, 112 Nor. Car. 513; *Metcalf* v. *Alley*, 24 Nor. Car. 38.

The contracts, conspiracy and combination of the two defendant corporations are clearly illegal, under both §§ 1 and 2 of the Anti-trust Act and also at common law. *Continental Wall Paper Co.* v. *Voight &c. Co.*, 212 U. S. 227; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *Am. Tobacco Co.*, 221 U. S. 106; *Minnesota* v. *Creamery Package Co.*, 110 Minnesota, 415, 437; *S. C.*, 115 Minnesota, 207; *Peck* v. *Heurich*, 167 U. S. 624; *Thompson* v. *Thompson* (1802), 7 Ves. 468; *Hilton* v. *Woods* (1867), L. R. 4 Eq. 432; *Scott* v. *Brown* (1892), 2 Q. B. 724; *Clark* v. *Hagar* (1894), 22 Can. Sup. Ct. 510; *Power* v. *Phelan* (1884), 4 Dorion (Quebec) 57; *Little* v. *Hawkins* (1872), 19 Grant Ch. (U. C.) 267 (Ontario); *Colville* v. *Small*, 22 Ont. L. Rep. 426; 19 Ann. Cas. 515, citing *Continental Wall Paper Co. Case, supra; Johnson* v. *Van Wyck*, 4 App. D. C. 294; *Gregerson* v. *Imlay*, 4 Blatchf. 503; 10 Fed. Cas. No. 5795; *Pinney* v. *First Nat. Bank*, 68 Kansas, 223; 75 Pac. Rep. 119; 1 Ann. Cas. 331; *Wehmhoff* v. *Rutherford*, 98 Kentucky, 91; 32 S. W. Rep. 288; *Gilroy* v. *Badger*, 27 Misc. Rep. 640; 58 N. Y. Supp. 392; *Gescheidt* v. *Quirk*, 66 How. Pr. 272; *Roberts* v. *Yancey*, 94 Kentucky, 243; 21 S. W. Rep. 1047; 42 Am. St. Rep. 357; *Miles* v. *Mutual Reserve Fund Life Ass'n*, 108 Wisconsin, 421; 84 N. W. Rep. 159; *Bryn-*

jolfson v. *Dagner* (N. Dak.), 109 N. W. Rep. 320; *Burke* v. *Scharf* (N. Dak.), 124 N. W. Rep. 79; *Keiper* v. *Miller*, 68 Fed. Rep. 627 (affirmed in 70 Fed. Rep. 128; 16 C. C. A. 679).

A plaintiff cannot maintain an action for damages for infringement of letters patent, but his action must be dismissed, when he acquired the title to his cause of action and claim through a contract against public policy because champertous. 6 Cyc. 881, 882, 889; *Stewart* v. *Welch*, 41 Oh. St. 483.

No title to property can be acquired where the act of such acquisition is criminal, or prohibited by statute, or where the transfer is made as a part of, or a step in, or pursuant to, an act prohibited by statute or against public policy. *Pearce* v. *Rice*, 142 U. S. 28; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24; *Miller* v. *Ammon*, 145 U. S. 421; 20 Cyc. 937, 938, and cases cited; *Holman et al.* v. *Ringo*, 36 Mississippi, 690.

The assignment or transfer of a negotiable security upon an illegal consideration is void, and confers no title to the instrument on the assignee; and hence the maker of the note given upon a valid consideration, may defeat a recovery upon it by an assignee who won it at a game of cards. *Drinkall* v. *Movius State Bank*, 11 N. Dak. 10; 14 Am. & Eng. Ency. of Law (2d ed.), 647, 468; *Thomas* v. *First Nat. Bank*, 213 Illinois, 261; *Burke* v. *Buck*, 31 Nevada, 74; 99 Pac. Rep. 1078; 21 Ann. Cas. 625.

Without the active assistance of a willing court, the trust and unlawful object must have failed; with such assistance, it was perfected. A court will not lend its aid to the accomplishment of an unlawful object. *Peck* v. *Heurich*, 167 U. S. 624; *Graham* v. *LaCrosse &c. Co.*, 102 U. S. 148; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24; *Hoffman* v. *Bullock*, 34 Fed. Rep. 248; *Forker* v. *Brown*, 30 N. Y. Supp. 827; *Gruber* v. *Baker*, 20 Nevada, 472; 9 L. R. A. 308.

The object and purpose of a trust must be legal. 28 Am. & Eng. Ency. of Law (2d ed.), 866, 867, and cases cited.

An association formed for an unlawful purpose cannot sue. 30 Cyc. 29.

A corporation cannot be formed for an unlawful purpose. 10 Cyc. 161, and notes.

It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly. *Pope Mfg. Co.* v. *Gormully*, 144 U. S. 238; *Minnesota* v. *Creamery Package Mfg. Co., supra.*

Mr. Emanuel Cohen and *Mr. Amasa C. Paul*, with whom *Mr. John B. Atwater*, *Mr. Frank W. Shaw*, *Mr. George C. Fry* and *Mr. W. A. Sperry* were on the briefs, for defendants in error:

The 1897 contract between the two defendants was not in restraint of trade, nor an attempt to create a monopoly.

In order to condemn an agreement as void under the act of July 2, 1890, its dominant purpose must be an interference with interstate or international commerce. *Cincinnati &c. Packet Company* v. *Bay*, 200 U. S. 179; *Hopkins* v. *United States*, 171 U. S. 578, 592; *United States* v. *Joint Traffic Association*, 171 U. S. 505, 568; *Anderson* v. *United States*, 171 U. S. 604, 615; *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, 229; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 331; *Field* v. *Barber Asphalt Co.*, 194 U. S. 618, 623; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 66; *Union Pacific Coal Co.* v. *United States*, 173 Fed. Rep. 737.

The agreement of June, 1898, between the two defendants was not in violation of the Sherman Act.

Even if the Creamery Company were assumed to be a party to an unlawful combination in restraint of trade, this would not deprive it of its right to sue for infringe-

ment of its patents. *Strait* v. *National Harrow Company*, 51 Fed. Rep. 819; *Connolly* v. *Union Sewer Pipe Company*, 184 U. S. 540. See also *Fritts* v. *Palmer*, 132 U. S. 282; *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181, 190, *South Dakota* v. *North Carolina*, 192 U. S. 286, 311; *Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 291; *In re Metropolitan Railway Receivership*, 208 U. S. 90, 111; *International Harvester Co.* v. *Clements*, 163 Michigan, 55.

None of the contracts contained any provisions for bringing action against alleged infringers of patents for the purpose of driving them out of business.

The evidence did not warrant the jury in finding any agreement or conspiracy between the defendants to bring the patent suits for the purpose of driving the plaintiffs out of business.

The owner of a patent may notify infringers of his claims and warn them that unless they desist, suits will be brought to protect him in his legal rights. The only limitation on the right to issue such warnings is the requirement of good faith. *Kelly* v. *Ypsilanti Dress Stay Co.*, 44 Fed. Rep. 19; *Computing Scales Co.* v. *National Computing Scale Co.*, 79 Fed. Rep. 962; *Farquhar Co.* v. *National Harrow Co.*, 102 Fed. Rep. 714; *Adriance, Platt & Co.* v. *National Harrow Co.*, 121 Fed. Rep. 827; *Warren Featherbone Co.* v. *Landauer*, 151 Fed. Rep. 130; *Mitchell* v. *International &c. Co.*, 169 Fed. Rep. 145; 30 Cyc. 1054.

There is nothing in this case to indicate that any of the warnings issued by the defendants were made in bad faith, and they were promptly followed by the institution of the infringement suits.

The 1897 agreements had to do solely with the settlement of litigation then existing or apprehended, with the result that a large amount of litigation was settled, and the parties relieved from vexation and expense and enabled to proceed with their business. *Bement* v. *National Harrow Co.*, 186 U. S. 70, 93.

None of the 1897 agreements was in restraint of trade.

The restraint of trade was not greater than the circumstances of the transaction required. *Cincinnati &c. Packet Co.* v. *Bay*, 200 U. S. 176; *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423; *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. Rep. 454, 461. Stipulations of the kind involved are frequent and valid. *Littlefield* v. *Perry*, 21 Wall. 205. They do not contravene public policy. *Westinghouse Co.* v. *Chicago &c. Co.*, 85 Fed. Rep. 786; *Reece Co.* v. *Fenwick*, 140 Fed. Rep. 287, 288.

Nor was the June, 1898, agreement in restraint of trade.

The stipulations in the Owatonna Manufacturing Company agreements as to prosecuting infringers were usual covenants, not warranting the inference of a purpose to drive competitors out of business by groundless suits. See collections of forms in Jones' Legal Forms, pp. 735, 739, 741; *Foster* v. *Goldschmidt*, 21 Fed. Rep. 70; *Macon Knitting Co.* v. *Leicester Con. Mills Co.*, 113 Fed. Rep. 844; *Wilfley* v. *New Standard Con. Co.*, 164 Fed. Rep. 421; *Critcher* v. *Linker*, 169 Fed. Rep. 653; *Jackson* v. *Allen*, 120 Massachusetts, 64; *The Forncrook Mfg. Co.* v. *Barnum Wire Co.*, 63 Michigan, 195; *Croninger* v. *Paige*, 48 Wisconsin, 229; *Washburn & Moen Mfg. Co.* v. *Southern Fire Co.*, 37 Fed. Rep. 428.

The Owatonna agreements had to do wholly with manufacture, and were thus beyond the purview of the Sherman law. *United States* v. *Knight Co.*, 156 U. S. 1; *United States* v. *Northern Securities Co.*, 120 Fed. Rep. 721, 728; *Diamond Glue Co.* v. *United States Glue Co.*, 187 U. S. 611, 616; *Cornell* v. *Coyne*, 192 U. S. 418, 428; *Loewe* v. *Lawler*, 208 U. S. 274, 297.

The Owatonna agreements had to do wholly with patented articles and were thus beyond the purview of the Sherman law. *Bement* v. *National Harrow Co.*, 186 U. S. 70, 91; *Henry* v. *Dick Co.*, 224 U. S. 1, 28.

The general agreement had for its purpose the pre-

vention of ruinous competition in churns and the avoidance and settlement of litigation and did not constitute an undue restraint of interstate commerce within the Sherman law, nor does it show a design to drive competitors out of business by groundless suits. *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. Rep. 454; *United States* v. *Standard Oil Co.*, 173 Fed. Rep. 177.

A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts. *Cincinnati Packet Co.* v. *Bay*, 200 U. S. 179, 184.

The subsequent conduct of the Creamery Company in using names other than its own, and in acquiring other concerns, does not tend to show a design to drive competitors out of business.

The Creamery Company has never monopolized or attempted to monopolize any part of interstate commerce within the meaning of the Sherman Act. See Noyes on Corporate Relations, § 389, p. 711; *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115.

Even if the Creamery Company had monopolized a substantial part of interstate commerce, no causal connection is shown between its acts and the damages claimed by plaintiffs. 21 Am. & Eng. Ency. (2d ed.), 480; 29 Cyc., 439.

An executed illegal contract carries title to its subject-matter in the same way as if the contract were legal, unless the law violated declares to the contrary. 15 Am. & Eng. Ency. 932; *McMullen* v. *Hoffman*, 174 U. S. 639; *Fritts* v. *Palmer*, 132 U. S. 282.

The Sherman law does not forbid the passage of title, but on the contrary impliedly sanctions it. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Harriman* v. *Northern Securities Co.*, 197 U. S. 244.

The executed illegal contract is given the same effect as respects the passage of title as would be given to a legal

contract of the same tenor and effect. *Strait* v. *National Harrow Co.*, 51 Fed. Rep. 819; *Edison Electric Light Co.* v. *Sawyer Mann Electric Co.*, 53 Fed. Rep. 592; *Soda Fountain Co.* v. *Green*, 69 Fed. Rep. 333; *Bonsack Machine Co.* v. *Smith*, 70 Fed. Rep. 383; *Saddle Co.* v. *Troxel*, 98 Fed. Rep. 620; *National Folding Box Co.* v. *Robertson*, 99 Fed. Rep. 985; *Otis Elevator Co.* v. *Geiger*, 107 Fed. Rep. 131; *General Electric Co.* v. *Wise*, 119 Fed. Rep. 922; *Fuller* v. *Berger*, 120 Fed. Rep. 274; *Motion Picture Patents Co.* v. *Laemmle*, 178 Fed. Rep. 104; *Motion Picture Patents Co.* v. *Ullman*, 186 Fed. Rep. 174; but see *contra*, *National Harrow Co.* v. *Quick*, 67 Fed. Rep. 130, which was affirmed on a different ground.

The plaintiffs suffered no damage by the successful prosecution of the suit against them.

The system of remedies applied in Federal courts does not permit a pending suit in equity to be used as a ground of recovery at law.

The plaintiffs are in fact prosecuting a suit for malicious prosecution in defiance of the rule that such a suit is not maintainable unless the primary suit has terminated in their favor.

Under the Sherman Act the injury counted on must be of a kind actionable at common law. The statute does not override the rules as to *damnum absque injuria*. *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. Rep. 454, 461; *Pennsylvania R. R. Co.* v. *Marchant*, 119 Pa. St. 561; *Smith* v. *Wilcox*, 47 Vermont, 537, 545; *Hortenstine* v. *Virginia-Carolina Ry. Co.*, 102 Virginia, 914; *Connolly* v. *Western Union Telegraph Co.*, 100 Virginia, 51; *Tyler* v. *West. Un. Tel. Co.*, 54 Fed. Rep. 634; *Crescent Live Stock Co.* v. *Slaughter House Co.*, 120 U. S. 141, 147; 26 Cyc. 55.

According to the weight of authority and reason a suit for the malicious prosecution of a civil action is not maintainable unless there be an interference with person or property. *Willard* v. *Holmes*, 142 N. Y. 492; *Burt* v. *Smith*, 181 N. Y. 1.

The difference of opinion is stated and the cases collected in 21 Am. Law Reg. 281–353 (article by Lawson); 93 Am. St. Rep. 466–469 (article by Freeman); *McCormick Harvester Machine Co.* v. *Willan*, 63 Nebraska, 391; 4 Current Law, pp. 472–474 (article by Longsdorf); 19 Am. & Eng. Ency. 652, 653; 26 Cyc., pp. 14–16; *Wetmore* v. *Mellinger*, 64 Iowa, 741; *Dorr Cattle Co.* v. *Des Moines National Bank*, 127 Iowa, 153; *Smith* v. *Michigan Buggy Co.*, 175 Illinois, 619; *Potts* v. *Imlay*, 4 N. J. L. 377; *Luby* v. *Bennett*, 111 Wisconsin, 613; *contra*, see *Kolka* v. *Jones*, 6 N. Dak. 461; 71 N. W. Rep. 558; *Burnap* v. *Albert*, 4 Fed. Cas. 761 (No. 2170); *Cooper* v. *Armour* (C. C., N. Y.), 42 Fed. Rep. 215; *Bishop* v. *American Preservers Co.* (C. C., Ill.), 51 Fed. Rep. 272; *Wade* v. *National Bank of Commerce* (C. C., Wash.), 114 Fed. Rep. 377; *Tamblyn* v. *Johnston* (C. C. A., 8th Circ.), 126 Fed. Rep. 267, 270; *Wilkinson* v. *Goodfellow-Brooks Shoe Co.* (C. C., Mo.), 141 Fed. Rep. 218.

Even in jurisdictions where a suit may be maintained without interference with persons or property the want of probable cause must be very clearly proven. There is in this case no evidence at all of want of probable cause. *Eickhoff* v. *Fidelity &c. Co.*, 74 Minnesota, 139; Bigelow, Torts, 78; Newall, Mal. Pros. 35; Cooley, Torts, 207; *Ferguson* v. *Arnow*, 142 N. Y. 580, 583.

Even if the prosecution of the Owatonna Manufacturing Company's suit constituted an actionable injury, such injury did not arise from anything forbidden or declared unlawful by the Sherman Act.

The complainants have waived their right to the penalty under the Sherman Act by bringing suit in the state court for malicious prosecution. *Ætna Insurance Co.* v. *Swift*, 12 Minnesota, 437, 445; 7 Ency. Pl. & Pr. 364; 15 Cyc. 260; *Robb* v. *Vos*, 155 U. S. 13; *Bierce* v. *Hutchins*, 205 U. S. 340, 346; *Klipstein & Co.* v. *Grant*, 141 Fed. Rep. 72; *Water Co.* v. *Hutchinson*, 160 Fed. Rep. 41.

A patent owner may notify infringers of his claims and threaten them with a suit unless they desist. If he does this in good faith, believing his claims to be valid, and brings his suit with reasonable diligence he is acting within his rights and incurs no liability. There is no evidence of bad faith in the record. *Kelley* v. *Ypsilanti Mfg. Co.*, 44 Fed. Rep. 119; *Computing Scale Co.* v. *National Scale Co.*, 79 Fed. Rep. 962; *Farquhar Co.* v. *National Harrow Co.*, 102 Fed. Rep. 714; *Adriance, Platt & Co.* v. *National Harrow Co.*, 121 Fed. Rep. 827; *Warren Featherbone Co.* v. *Landauer*, 151 Fed. Rep. 130; *Dittgen* v. *Racine Paper Goods Co.*, 164 Fed. Rep. 84; *Mitchell* v. *International &c. Co.*, 169 Fed. Rep. 145.

The warnings considered as a separate cause of action were barred by the statute of limitations. *Chattanooga Foundry Co.* v. *Atlanta*, 203 U. S. 390; *Huntington* v. *Attrill*, 146 U. S. 657, 608; *Brady* v. *Daly*, 175 U. S. 148, 155, 156.

There is nothing in the evidence to show that either of the defendants had any improper or unlawful connection with the infringement suit brought by the other.

A combination to bring suits is not within the Sherman Act.

The public is not entitled to competition among patent owners or licensees, and therefore combinations relating to United States patents are not within the Sherman Act. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 331; *Board of Trade* v. *Christy Grain Co.*, 198 U. S. 236, 252.

If the Sherman Act applies to combinations among patent owners, the patentee's power of assignment is limited, and to that extent his exclusive rights are destroyed.

Patent owners may lawfully secure for themselves, through a combination of their patents, a traffic, however extensive, in unpatented articles. *Henry* v. *A. B. Dick Company*, 224 U. S. 1.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action for the recovery of damages in the sum of $406,881.60, being the total of certain specific items mentioned in the complaint, and for all other damages sustained by plaintiffs (so designated throughout this opinion) by virtue of the facts stated, including all sums that they are entitled to under the provisions of the Sherman Anti-trust Act, July 2, 1890, 26 Stat. 209, c. 647, together with an attorney's fee. The grounds of recovery are set forth in the complaint, which, inclusive of exhibits, occupies 150 pages of the record, and seems to make impossible any attempt at brevity or condensation. The case, however, is not in wide compass and attention may be concentrated upon certain considerations. The contention of plaintiffs in its most general form is that the defendants entered into a conspiracy or combination in restraint of interstate trade and in execution of it, plaintiff's interstate business was destroyed by defendants wrongfully prosecuting two suits against them for the infringement of patents under which the articles of their trade were manufactured and by circulating slanders and libels to the effect that such articles were infringements of defendants' patents. A cause of action is hence asserted under § 7 of the Anti-trust Act. The section is as follows: "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

To justify recovery, therefore, injury must result from something forbidden or made unlawful by the act, and

what is forbidden or made unlawful is expressed in §§ 1 and 2. Section 1 is as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ."

The acts forbidden are made a misdemeanor. And by § 2 it is also made a misdemeanor for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize, any part of the trade or commerce among the several States, or with foreign nations."

The question occurs, Do the facts of the case show a breach of the law by defendants and injury resulting from it to plaintiffs? The following facts are alleged: On the twenty-fourth of February, 1898, or just prior thereto, certain corporations, and one partnership were engaged in making or selling creamery supplies, including combined churns and butter workers, and transporting them in state and interstate commerce. All of the corporations and the partnership were in direct competition in their lines of business and as the result of it all of the articles manufactured and sold by them were sold at no more than a fair price and legitimate profit. The corporations controlled over 90% of the business of manufacturing and selling creamery and dairy supplies in the States of Michigan and Indiana and in all the States west and in some of the States east thereof, manufacturing the articles in one or more of the States and shipping by the same common carriers from the States where manufactured to other States and distributing and selling such articles there.

On the twenty-fourth of February, 1898, the Creamery Package Manufacturing Company, one of the corporations, and its stockholders, then engaged in the manufacture and sale of dairy and creamery supplies but not of

combined churns and butter workers, it being as to the latter only the agent for their sale, entered into a contract with the other corporations and the partnership by which it was agreed to increase the capital stock of the Creamery Package Manufacturing Company to enable it to purchase the property and business of the other corporations parties to the contract, including in the property all patents and applications for patents.

The contract is very elaborate and verbose, but we need not give its particular covenants as no point is made upon them; it being only alleged and contended that its purpose and effect were that the Creamery Package Manufacturing Company should acquire the property and business of the other corporations, and that while the latter should cease to exist they should be represented as continuing as separate and independent concerns and competitors in the market with the Creamery Package Manufacturing Company and with one another, while in truth and fact there would be no competition between them.

It is alleged that in execution of the purpose of the contract traveling men from the different houses under instructions from the Creamery Package Manufacturing Company met and secretly arranged the bid each should interpose, determining by lot and other ways who should interpose the lowest bid and who the highest.

The Owatonna Company was not a party to that contract, but it is contended that it participated in or is brought into the scheme and purpose of the contract by certain agreements entered into by it with the Creamery Package Manufacturing Company. They are all attached to the complaint as exhibits and may be described as transferring certain patents or the right to use certain patents to the Creamery Package Manufactur-

ing Company. A brief summary of them is given in the margin.[1]

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[1] The first of the agreements between the companies was made April 19, 1897 (that was before the contract of February 24, 1898), and recited that the Owatonna Company was the owner of certain patents covering combined churns and butter workers and was manufacturing the same and that as the Creamery Package Manufacturing Company was desirous of handling the same as sole agents, the agreement was made. It conveyed five patents issued between January, 1893, and August, 1896, and applications for another. There were provisions as to the size, material and other details; also as to royalties to be paid to the Disbrow Manufacturing Company. And the Owatonna Company agreed to protect the Creamery Package Manufacturing Company from all suits for infringement of the patents, or claims for damages arising out of the sales of the churns and promptly and vigorously to attack infringers and to procure patents on all improvements made by it or by any person in its behalf

There was an addition to the contract made June 4, 1897, in regard to the repair parts of the "Winner" churns and the repair and perfection of the same, and the rebate from the billing price.

On January 12, 1898, a supplemental contract was made by the same parties as to the disposition of the royalties received under a license contract made September 30, 1897, with the Cornish, Curtis & Greene Manufacturing Company, of Fort Atkinson, Wisconsin.

On June 4, 1898, another agreement was made between the parties which referred to the agreement of April, 1897, and to the pendency of litigation based on the infringement or charges of infringement of the patents with which that contract was concerned. For the purpose of adjusting all claims growing out of such infringement and settling the litigation between the Owatonna Company and F. B. Fargo & Co., whose rights the Creamery Package Manufacturing Co. had acquired, it was agreed that one of the suits which was named, and in which proofs had been taken, should be brought to a speedy hearing and all other suits dismissed.

The Creamery Package Manufacturing Company agreed not to manufacture the machine known as the "Winner" or the "Disbrow," both referred to in the contract of April, 1897, called the "sales contract," or any other of a described kind made by the Owatonna Company, but was at liberty to manufacture and sell churns and butter workers of any other construction. Satisfaction of all royalties, damages and costs was agreed on.

It is alleged that on July 8, 1904, the Creamery Package Manufacturing Company and the Owatonna Company brought suit separately in the Circuit Court of the United States for the First Division of the State of Minnesota, at Winona, against the plaintiffs, charging infringement of patents for churns and butter workers. The bills in the suits are attached to the complaint in this action and are in the usual form. Process was issued and the plaintiffs here answered. Upon proofs taken a decree was entered in favor of plaintiffs and against the Owatonna Company in the suit brought by it. It is not alleged in the complaint but it is in the answer of the Creamery

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The sales contract was continued in force and there was added to it a provision entitling the Owatonna Company to furnish 55% in value at list price of the churns and butter workers sold by the Creamery Package Manufacturing Company in each year after the date of the contract. If less than that per cent. should be made and furnished by the Owatonna Company certain sums were provided to be paid by the other company. And the latter company agreed not to discriminate against the machines manufactured by the Owatonna Company in favor of machines of its own manufacture or of other manufacturers, and that it would give to the machines of the Owatonna Company the same effort and energy to effect their sale. The Owatonna Company agreed to protect the patents and prosecute infringers and give assistance to the Creamery Package Manufacturing Company in the prosecution of infringers. Permission was given to the Owatonna Company to use the "Disbrow" and "Winner" churns owned by the Creamery Package Manufacturing Company or to be acquired by it. There was also an agreement made on the 4th of June, 1898, between the parties in settlement of claims on account of the use of patents with certain other parties besides F. B. Fargo & Co., whose business the Creamery Package Manufacturing Co. had acquired. There was a provision for paying royalties to the Disbrow Co., with other details not necessary to mention.

On January 1, 1903, another agreement was entered into between the parties which disposed of and adjusted rights and contentions as to patents for a machine called a pasteurizer and cream ripener. By an agreement made January 1, 1903, the prices provided for in the sales contract were changed in certain particulars

Package Manufacturing Company and not denied that it obtained a decree adjudging plaintiffs here infringers of the patents which were the subject of the suit.

It is alleged that the defendants here conspired with one another to commence and prosecute the suits and that they were commenced and prosecuted maliciously and without probable cause, whereby plaintiffs were caused certain items of damages.

The other allegations of the complaint need not be repeated in detail. They are to the effect that the contract of February 24, 1898, was made in violation of law to restrain state and interstate trade and commerce and that all that was done under it was in pursuance and execution of that purpose, including the suits brought against plaintiffs by the Owatonna Company and the Creamery Package Manufacturing Company for the infringement of patents. That prior to the bringing of those suits plaintiffs had a good and established trade and market for their churns and were manufacturing and shipping them in the States of Wisconsin, Iowa and South Dakota, and knowing this and fearing that such trade would be continued in those States and be extended to other States, defendants commenced the suits for infringement, and prior thereto and since have written letters and talked to purchasers and prospective purchasers of plaintiffs' churns, threatening lawsuits and actions for damages for infringement of the patents described in the bills and also threatened suits for injunction, and by this means destroyed plaintiffs' state and interstate trade.

That plaintiff D. E. Virtue and one Martin Deeg were the first joint inventors of a churn and butter worker and that a patent was issued therefor, No. 634,074, under which they manufactured those articles and sold them in state and interstate commerce except as they had been prevented by the suits brought against them as hereinbefore stated. And by elaborate allegations the patents upon

which those suits were brought are attacked for want of invention and novelty.

That the Creamery Package Manufacturing Company has purchased the property and business of other competitive concerns and that it has had during the last several years contracts with many and numerous dealers in the articles sold by which it required them to purchase such goods exclusively of it at certain fixed and maintained prices and to sell only in certain designated territory, the object of which is to secure a monopoly to the Creamery Package Manufacturing Company and to restrain interstate commerce. That all of the acts detailed were done in pursuance of a common scheme and conspiracy on the part of all of the defendants during the years 1897 and 1898 and ever since maintained and carried out, limiting the production of creamery supplies, fixing and determining their prices, restraining trade in them and monopolizing over 90% of their production and sale, of which prior to one year before the bringing of this action plaintiff had no knowledge or notice except the two suits in equity and the contract by which Virtue and Deeg transferred to the Creamery Package Manufacturing Company the exclusive right to manufacture the churn and butter worker under patent No. 634,074 for the period of three years. That they did not know that that contract was procured as part of the schemes of defendants. That they were at no time parties to acts of defendants and did not know of the wrongful contracts and combinations until after the time limited to take the testimony in the two equity suits.

The defendants answered the complaint, admitting some of its allegations and denying others. They alleged performance of the contract between the Creamery Package Manufacturing Company and the plaintiff Virtue and said Deeg and opposed to the charges of the complaint certain affirmative matters, including two actions brought in the state court.

A jury was empaneled to try the issues which, under the instructions of the court, found a verdict for defendants upon which a judgment was duly entered. It was affirmed by the Circuit Court of Appeals, 179 Fed. Rep. 115.

The Circuit Court and the Circuit Court of Appeals both decided, that the damages which plaintiffs alleged they sustained were not a consequence of a violation by defendants of the provisions of the Sherman Anti-trust Act. Both courts assumed for the purpose of their decision that the contract of February 24, 1898, between the Creamery Package Manufacturing Company and the other manufacturers and sellers of churns and butter workers was a combination in restraint of trade, but both courts held that the Owatonna Company was not a party to it nor became associated subsequently in its scheme.

Of the infringement suits the Court of Appeals said they exhibited "a case where two suits are brought, one by a party to a lawful agreement, the other by a party to an unlawful agreement, for the infringement of patents owned by them respectively and where both parties were doing no more than exercising their legal rights." And the court declared in effect that it could see no sinister significance in the suits being simultaneous, and said, further, that after a thorough examination of the record it agreed with the Circuit Court that there was no evidence offered at the trial "'which would warrant the jury in finding that any agreement of that kind existed.'"

The plaintiffs attack this conclusion in twenty-one propositions, some of which are of very broad generality and all, counsel contend, are supported by the decisions of this and other courts. It is quite impossible to consider them in detail without a review and repetition of the cases. The view we take of the case makes this unnecessary. The case is, as we have said, in narrow compass. The complaint charges a violation of the Sherman Act, and, as a means of accomplishing its purpose, the destruction of

plaintiffs' interstate trade by a malicious litigation of their rights. A necessary element of the charge is the coöperation of at least the corporate defendants in the purpose, and this determines our inquiry. In answering it we shall assume, as the lower courts assumed, that by the contract of February, 1898, the Creamery Package Manufacturing Company and the corporations competing with it entered into a combination offensive to the law. Did the Owatonna Company participate in it or subsequently join it or coöperate to execute its purposes? The question must be answered in the negative, as we shall proceed to show.

The Owatonna Company was a manufacturer of churns and butter workers under various patents owned by it, which articles it sold throughout the United States, and by the contract of April 19, 1897, it constituted the Creamery Package Manufacturing Company its sales agent of them, the latter company not making churns and butter workers. The contract was a perfectly legal one and preceded by some time the agreement of the twenty-fourth of February, 1898, entered into between the latter company and other corporations. There were contracts between the Creamery Package Manufacturing Company and the Owatonna Company subsequent to the latter date, but all of them were supplemental to the first one and had no illegal taint, nor did they affect it with illegal taint. It is true they granted rights to the Creamery Package Manufacturing Company, and exclusive rights, but this was no violation of law. The owner of a patent has exclusive rights, rights of making, using and selling. He may keep them or transfer them to another—keep some of them and transfer others. This is elementary; and, keeping it in mind, there is no trouble in estimating the character of such rights or their transfer. Of course, patents and patent rights cannot be made a cover for a violation of law, as we said in *Standard Sanitary Manufacturing Company* v. *United States*, 226 U. S. 20. But

patents are not so used when the rights conferred upon them by law are only exercised. The agreement of the nineteenth of April, 1897, constituted, as we said, the Creamery Package Manufacturing Company a sales agent of the churns and butter workers made by the Owatonna Company and fixed their list price. The patents under which the articles were manufactured were stated, and it was provided that the Owatonna Company should protect the Creamery Package Manufacturing Company from all suits for infringement, defend the validity of the patents and promptly attack infringers. This provision is especially urged by plaintiffs as showing a common and illegal purpose between the companies. It has not that quality. It is but an assurance of title to the rights conveyed.

But it is said that the contract between the companies dated June 4, 1898, exhibits knowledge by the Owatonna Company of the Creamery Package Manufacturing Company's purpose, and "fitted into the scheme of the two defendant corporations to get a monopoly in the United States;" and this, it is said further, "can only be when all of the doings . . . are looked at as a whole from beginning to end." We cannot concur. We have seen that the contract of June 4, 1898 (inserted above in the margin), was but a settlement of claims growing out of reciprocal charges of infringement and it has no other connection with the agreement of February, 1898, than that some of the claims were against corporations which were parties to that agreement. It would be far-fetched to say that the Owatonna Company could not assert rights or protect rights because they were asserted or sought to be protected against corporations which had become members of an illegal combination, without participating in the guilt of such combination and becoming a joint conspirator in its purposes. But it may be said that we are considering the transactions isolatedly and ignoring

their combined effect. That indeed would be a fault, but in order to compute their combined effect we must estimate what strength they have separately, and so far, on the face of the contracts, there is nothing to inculpate the Owatonna Company.

But a united purpose is sought to be established between it and the Creamery Package Manufacturing Company by the testimony of witnesses to the effect that the contract of April 19, 1897, between the Disbrow Manufacturing Company and the Owatonna Company was urged by the president of the Creamery Package Manufacturing Company, who represented that the acceptance of royalties by the Disbrow Company was better than a continuance of competition. It is not practicable to give all the testimony of what preceded and induced that contract. The part most relevant to our inquiry is that which related to the competition which existed between the companies. A witness, who was president of the Owatonna Company at the time, testified that it was suggested to him and other officers of the company by Mr. Gates, president of the Creamery Package Manufacturing Company, that a settlement ought to be brought about by letter or otherwise with the Disbrow Manufacturing Company "so as to get the two churns which were then being manufactured together," and stated that he (Gates) had had some conferences with the Disbrow Company, and he thought that if the officers of the Owatonna Company would go to Mankato "there might be an arrangement made whereby that business could be brought in connection with ours, and in that way eliminate the competition that at that time existed between the Owatonna Manufacturing Company and the Disbrow Manufacturing Company." This object was expressed by the witnesses in different ways.

The president of the Disbrow Manufacturing Company testified that Gates urged that the Disbrow Company should "stop manufacturing and make a contract with

the Owatonna Manufacturing Company, and let them have all our patents on combined churns and butter workers and other things, and combine the whole business under one head, and let them do all of the manufacturing." The witness testified that he at first rejected the proposition and resented the manner in which the proposal was made, Gates going so far as to declare, with a profane accompaniment, "You will do it or we will put you out of business." But subsequently negotiations were resumed and the president of the Creamery Package Manufacturing Company explained that he wanted matters settled, litigation stopped, "and a new arrangement made so that the whole thing should be run under one head and one control," and in that way "control the whole churn business." The witness formulated the terms, which resulted, after some days of negotiation, in the contract of April 19, 1897. But during the negotiations the witness did not see the Owatonna Company's representatives until they reached the point of signing the contract.

These declarations seem to be very arbitrary and unjustifiable when standing alone and to have had no other purpose than the ruthless crushing of a competitor in the same line of business. They take on another character, or rather the object of the negotiations and the contracts which resulted from them, take on another character, when all the testimony is considered. It will be observed from the date of those negotiations and of the contracts that they preceded by nearly a year the contract between the Creamery Package Manufacturing Company and its competitors and could have had no relation to it. And, besides, they had a natural and adequate inducement. They were an adjustment of disputes and litigation growing out of a contract between the Disbrow Company and the Owatonna Company concerning the very same patents. In one suit the Owatonna Company was plaintiff against the Disbrow Company; in another suit the latter

company was plaintiff against the Owatonna Company, and both suits were based on disputes as to rights or obligations arising from the contract of October 2, 1893. The testimony also shows some controversy between the Creamery Package Manufacturing Company and the Disbrow Company in regard to other patents, but the effect of it is not easy to estimate. There was also a contract entered into between the Disbrow Company and the Creamery Package Manufacturing Company on the nineteenth of April, 1897, settling matters growing out of a contract between those companies made on the twelfth of October, 1896, by which the Disbrow Company made the Creamery Package Manufacturing Company its exclusive sales agent for churns and butter workers and mortgaged to the latter company its plant. The other provisions of the contract concern the adjustment of the relations between all of the companies under the contemporaneous contracts, and need not be stated in detail. It is clear, then, as we have already said, that what transpired on the nineteenth of April, 1897—negotiations and contracts—had no relation to the contract of February, 1898, and had for their inducement and object the settlement of controversies and rights growing out of the contract of October 2, 1893, between the Disbrow Company and the Owatonna Company, and that of October 12, 1896, between the Disbrow Company and the Creamery Package Manufacturing Company and the proposition of the latter company to become the sales agent of the churns made by the Owatonna Company. All of this is very complicated in the statement, but is simple enough in the results, and can be definitely estimated as to actual and legal effect. We may therefore sum up by saying that the Disbrow Company, by its contract with the Owatonna Company, did nothing more than confirm or enlarge the rights which the Owatonna Company had obtained, by the contract of 1893, and conveyed to it the exclusive right

in the patents for certain named royalties. This was no violation of law. The Owatonna Company did nothing more in its contract with the Creamery Package Manufacturing Company than to make that Company its exclusive sales agent, and this was no violation of law. Both contracts had natural and adequate legal inducements and conveyed rights that could under the law be conveyed, and, as a necessary incident to the conveyance, one only of the parties could thereafter exercise them. It may be that the Disbrow Company was to an extent in competition with the Owatonna Company, but it was a competition in part, at least, which, it was contended, was illegally conducted against rights which had been transferred in 1893. But, be that as it may, we repeat, patent rights may be conveyed partially or entirely, and the monopoly of use, of manufacture or of sale is not one condemned by law.

It is, however, urged that the infringement suits brought by the Creamery Package Manufacturing Company and the Owatonna Company against plaintiffs were provided for by the contracts between the Owatonna Company and the Disbrow Company, and their coincidence in time is urged as proof of concerted action on the part of defendants and of a conspiracy to destroy plaintiffs' business. The contention is that the bringing of those suits was not a single and isolated act but was a part of the more comprehensive plan and scheme to secure a monopoly in the United States of the business of making and selling creamery supplies, or, more accurately, counsel say, to continue and maintain the monopoly already acquired. And it is contended that the attempt was successful in that it destroyed plaintiffs' business. That these contentions are untenable we have demonstrated. The contracts we have shown were legal conveyances of rights, and the provision for the prosecution of infringement suits was but an assurance of those rights. Patents would be of little

value if infringers of them could not be notified of the consequences of infringement or proceeded against in the courts. Such action considered by itself cannot be said to be illegal. Patent rights, it is true, may be asserted in malicious prosecutions as other rights, or asserted rights, may be. But this is not an action for malicious prosecution. It is an action under the Sherman Anti-trust Act for the violation of the provisions of that act, seeking treble damages. This, indeed, plaintiffs take special pains to allege, that there may be no confusion about the right or grounds or extent of recovery. The testimony shows that no wrong whatever was committed by the Owatonna Company, and the fact that it failed in its suit against plaintiffs does not convict it of any.

This is enough to dispose of the case, for the foundation of the complaint is that the defendants entered into a contract or combination in restraint of trade which caused damage to plaintiffs; and the guilt of the individual defendants and of the two corporations and of all of their officers, servants, and stockholders, is very carefully alleged. It was in this aspect that the case was tried.

But plaintiffs urge that the Creamery Package Manufacturing Company was of itself a combination offensive to the statute and that they were entitled to go to the jury as to that company. But the contention was not made in the Circuit Court nor was it made in the Circuit Court of Appeals. The case was tried and ruled upon, as we have seen, on the ground of the coöperation of the defendants in a scheme of monopoly and restraint of trade. There was no liability asserted in the Circuit Court or in the Circuit Court of Appeals against one of the defendants separately from the others. Concert and coöperation was asserted against all and a ruling was not invoked as to the separate liability of either. One Frank LaBare was a party defendant and as to him plaintiffs made a motion that "the case be dismissed and dropped." The court denied the

motion for some reason and then plaintiffs' counsel said, "We desire to proceed with the case as against the defendants, the Owatonna Manufacturing Company and the Creamery Package Manufacturing Company." The plaintiffs then offered to prove that they had not infringed the patents sued on by the defendants. It is manifest, therefore, that the separate liability of the Creamery Package Manufacturing Company is an afterthought and urged in this court for the first time.

There are twenty-seven errors assigned upon offers of testimony excluded or upon other rulings of the Circuit Court. These we have examined and find that in the view taken by the courts below of the case and that which we take, there was no error of substance committed.

Judgment affirmed.

CAMERON SEPTIC TANK COMPANY *v.* CITY OF KNOXVILLE, IOWA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

No. 82. Argued December 11, 12, 1912.—Decided January 20, 1913.

Although under § 4884, Rev. Stat., a patent is for seventeen years, under the provision of § 4887, Rev. Stat., as it has been judicially construed, the American patent granted for an invention previously patented in another country is limited by law, whether so expressed in the patent itself or not, to expire with the foreign patent previously granted having the shortest term.

Section 4887, Rev. Stat., limiting patents to the period of the same patent previously granted by a foreign country, if any, has not been superseded by Article 4 *bis* of the Treaty of Brussels of 1900.

A most essential attribute of a patent is the term of its duration, which is necessarily fixed by local law, and the Treaty of Brussels will not be construed as breaking down provisions of the local law regulating the issuing of the patent.

The act of 1903 effectuating the provisions of the Brussels Treaty, as construed in the light of surrounding circumstances and of similar legislation in other countries, did not extend an American patent beyond the period prescribed by § 4887, Rev. Stat.

The Brussels Treaty of 1900 should be construed in accordance with the declaration of the Congress at which it was framed and adopted at the instance of the American delegates; and it was the sense of the Congress of the United States that the treaty was not self-executing.

The act of 1903 did not make Article 4 *bis* of the Treaty of Brussels effective or override the provisions of § 4887, Rev. Stat.

THE facts, which involve the construction of §§ 4884 and 4887, Rev. Stat., as affected by the Treaty of Brussels of 1900 and the effect of prior patents in foreign countries on the duration of an American patent, are stated in the opinion.

Mr. Henry Love Clarke for appellant.

Mr. Wallace R. Lane, with whom *Mr. R. L. Welch* and *Mr. Samuel H. Crosby* were on the brief, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

A bill in equity was brought by appellant as successor to the rights of an invention patented under United States letters patent to Edwin Cameron *et al.* for a process and an apparatus for treating sewage, No. 634,423, dated October 3, 1899. The bill contained the usual allegations and prayed for an injunction to restrain appellee from the use of the invention. Appellee filed a plea to the bill in which it alleged that the invention had been previously patented in Great Britain by letters patent dated November 8, 1895, and that that patent had expired on or before the eighth day of November, 1909, being the expiration of

the term for which it was granted, and that therefore the United States patent expired and became terminated by law, and it being stipulated that the bill should be considered as filed as of that date, and as the bill was not filed with the purpose or intention of applying for or obtaining an injunction before the expiration of the British patent, no injunctive or equitable relief could be had. A dismissal of the bill was therefore prayed. The decree of the court recited the facts of the plea and adjudged that the patent had expired as therein alleged and that its expiration was not prevented "by any effect of the Treaty of Brussels of December 14, 1900, which Treaty and the construction thereof was drawn in question on the plea in this cause;" and that therefore the court was without jurisdiction, the complainant having a plain and adequate remedy at law. This appeal was then prosecuted under § 5 of the Circuit Court of Appeals Act, March 3, 1891, 26 Stat. 826, c. 517.

The single question here is whether the United States patent expired with the British patent according to the laws which existed when it was issued or whether its existence was preserved by the Treaty of Brussels.

At the time the patent was issued § 4884, Revised Statutes, made the term of a patent seventeen years, and by § 4887 it was provided that the receiving of a foreign patent did not prevent the granting of a United States patent. It was, however, provided that "every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years."

The section coming up for judicial consideration, it was decided that it assumed that the foreign patent previously granted was one granted for a definite term, that the United States patent should expire with that

term, and that it was not to be limited by any lapsing or forfeiture of any portion of the term of the foreign patent, by means of the operation of a condition subsequent, according to the foreign statute. *Pohl* v. *Anchor Brewing Co.*, 134 U. S. 381, 386. And it was held that the American patent is limited by law, whether it is so expressed or not in the patent itself, to expire with the foreign patent having the shortest term. *Bate Refrigerating Co.* v. *Hammond*, 129 U. S. 151, 167; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 43; *Leeds & Catlin Co.* v. *Victor Co.*, 213 U. S. 301, 325.

Appellee contends that these decisions and the cited sections of the Revised Statutes constituted the law of the United States patent to Cameron and caused it to terminate with the expiration of the term of the British patent. The argument is that it was granted not for seventeen years but for a term to be measured by that of the foreign patent, enduring the full term for which the latter was granted but no longer, though on its face it was to run seventeen years. The appellant, opposing the contention, insists that the Treaty of Brussels has superseded § 4887 and has freed the Cameron patent from subjection to the provisions of that section. It is the effect of the contention that, though the patent was issued for a definite term, as decided by the cited cases, the term was enlarged by the Treaty.

Appellant candidly admits that there are cases adverse to its contention, but seeks to limit their strength of persuasion or authority to one only, and to that one opposes the reasoning and precedent of another. The cases so put in opposition are *United Shoe Machinery Co.* v. *Duplessis Shoe Machinery Co.*, 155 Fed. Rep. 842, decided by the Circuit Court of Appeals of the Second Circuit against the effect of the treaty contended for, and *Hennebique Construction Co.* v. *Myers*, 172 Fed. Rep. 869, decided by the Circuit Court of Appeals of the Third Circuit,

which is asserted to be the other way. But the cases do not present the antagonistic authority of two courts. Judge Archbald, whose views in the latter case are relied on by appellant, stated in a subsequent one (*Union Typewriter Company* v. *L. C. Smith & Bros.*, 173 Fed. Rep. 288, 299) that his opinion was not that of the court.

The other cases in which the Brussels Treaty was considered, and in which it was decided that it did not enlarge the term of an American patent beyond the term of a foreign patent for the same invention, are the following: *Malignani et al* v. *Hill-Wright Electric Co.*, 177 Fed. Rep. 430; *Malignani et al.* v. *Jasper Marsh Consol. Elec. Lamp Co.*, 180 Fed. Rep. 442; *Commercial Acet. Co.* v. *Searchlight Gas Co.*, 197 Fed. Rep. 908. Appellant contends, as we have seen, that these cases do not express independent views but follow *United Shoe Machinery Co.* v. *Duplessis Shoe Co.* as authority. This is not true to the extent contended. In the first two cases an independent judgment was expressed. In the third case (197 Fed. Rep. 908) it was said of *United Shoe Machinery Co.* v. *Duplessis Shoe Company* that it was "well considered and very persuasive" and was "deemed to be the correct expression of the law for the purpose" of the hearing. Judicial opinion must therefore be ranged against appellant's contention and is persuasive, at least, of its unsoundness.

Appellant, however, relies on the words of the treaty, which, it is insisted, have no ambiguity whatever, and which, it is contended, by the proclamation of the President of September 14, 1902, became the "'supreme law of the land.'" The provision relied on reads as follows:

"Art. 4 *bis*. Patents applied for in the different contracting States by persons admitted to the benefit of the convention under the terms of articles 2 and 3 shall be independent of the patents obtained for the same invention in the other States adherents or non-adherents to the Union.

"This provision shall apply to patents existing at the time of its going into effect.

"The same rule applies, in the case of adhesion of new States, to patents already existing on both sides at the time of the adhesion." 32 Stat. 1940.

The Cameron patent existed at the time the treaty went into effect, and the British patent by which it was limited was a patent obtained in one of the States adhering to the treaty, namely, Great Britain. It is hence contended that all of the conditions necessary to the application of the treaty to the Cameron patent existed, and the limitation of its term to that of the British patent as provided by law at the time it was issued was removed, that law being repealed by the treaty, which, it is contended further, was self-executing, and the patent became a grant for seventeen years. Two propositions are involved in the contentions: (1) that the treaty applies to the Cameron patent; (2) that the treaty is self-executing. If either proposition be erroneous, appellant's contentions are untenable.

To say that the text of the treaty is without ambiguity does not carry us far. All of the conditions of a patent are not expressed in it, and when these are considered construction is demanded and must be exercised. What is meant by the independence of a patent for the same invention in different States? It certainly was not intended to break down all of the provisions of law applicable to a patent; in other words, to interfere with the manner of its grant, and, it would seem by necessary implication, the extent of its grant as provided by the local law. A most essential attribute of a patent is the term of its duration, which is necessarily fixed and determined by the local law. And what difference in principle or effect is there if the term be expressed directly by a number of years or by something else, as a foreign patent which has a certain duration? The patent is no

more contingent in one case than in the other. It is complete in both cases at the moment it is issued. In both cases its term has certain definition given by the local law. And this is the declaration of the cases, and that the integrity of its term and its independence were not affected by subsequent conditions which might terminate the foreign patent.

But it is contended that so to confine the treaty is to deprive it of significance and force because the decisions of this court had given to patents such independence. *Pohl* v. *Anchor Brewing Company*, 134 U. S. 381. The answer is not sufficient. It might have been thought worth while to give conventional sanction to the judicial construction and make it applicable to the adhering States whose laws were not uniform; and it is certain that there was an immediate demand of the American delegates so to qualify the provision that it should not extend the term of the monopoly of the patent beyond that which was given by the law under which the patent had been issued.

The details of the conference are set out in *Hennebique Construction Co.* v. *Myers*, *supra*. It appears that Mr. Forbes, one of the American delegates, pointed out that if Article 4 *bis* could be interpreted as applying to patents already issued, which he said it might be, it would encounter opposition in the United States, and he inquired whether it could not be made the subject of a special protocol. A view was expressed that the Article would not produce the apprehended effect, but Mr. Forbes insisted on the necessity of stating the point precisely in order to avoid error of interpretation. After debate, in which different views were expressed, the Director of the International Bureau suggested the following amendment: "This provision shall apply to patents in existence at the time of its being put into force. Its effects are, however, limited to nullities and lapses which

would affect anterior patents." The amendment was not adopted, but, following the suggestion of Mr. Bellamy Storer, one of the delegates from the United States, the President "put to vote the adoption of the text previously adopted for Article 4 *bis*, with the interpretation which the American delegation desired to specifically point out, by proposing to complete the second paragraph by supplementing this explanatory clause: 'However, the term fixed by the initial law of each country remains intact.' Article 4 *bis* is definitely adopted with this condition."

It is, however, urged that the delegate from Great Britain said that he "could only take the indicated act of interpretation as a declaration of the American delegation and not as a decision of the Conference." The proceedings, however, show that the Conference adopted the whole of the first final protocol prepared by the Committee on Reports.

Certain subjects were not disposed of by the Conference but postponed with the comment that "after the exchange of views through diplomatic channels," the Conference would "reassemble anew in the Belgian Capital in order to finish its work."

The American delegates reported to the Secretary of State their understanding of the meaning of Article 4 *bis* and the interpretation which had been given it by the Conference. The unanimous sanction of the Conference, they said, was that the second paragraph of Article 4 *bis*, which reads: "This provision shall apply to all patents existing at the time of its entering into force," was not applicable to existing United States patents but only to those patents whose terms might be shortened by the laws of those States of the Union [for the Protection of Industrial Property] in which provision was made for the shortening of the term on the lapsing of patents for the same invention in other States. Existing United States patents, they further reported, could not be affected by what might take place

in regard to a foreign patent, their terms having been determined by § 4887 at the moment they were issued and that therefore their duration was unaffected by the subsequent expiration of a foreign patent for the same invention by reason of non-payment of taxes or non-working.

There was a second session of the Conference in December, 1900. Article 4 *bis* was not further debated. There was some reference to it as one of three arrangements "concerning retroactivity." Appellant hence insists that having that quality the article necessarily applied to existing patents and was a "plain and simple retroactive ending of the former dependence of existing patents upon the running of the terms allowed to foreign patents." To confine the provision, it is contended further, to "mere future contingencies that might befall patents would be prospective and not 'retroactive.'" In aid of these contentions it is urged that the American delegates, two of whom were new, made no objection to the declaration of the retroactivity of Article 4 *bis*, and that no limiting protocol was annexed to the treaty when it was finally adopted at Brussels in 1900 and that the Article was ratified by the Senate and proclaimed by the President without qualifying it. The considerations have strength, but there are opposing ones. The second session of the Conference was a continuation of the first. The American delegates had secured an interpretation of Article 4 *bis*. It could be accepted by them as final and definite. There was no challenge of it by ascribing retroactivity to Article 4 *bis*, for that Article was recognized to have such effect but not to extend the term of a patent fixed by the initial law. Future contingencies, as said by appellant, would of course be prospective, but whether patents existing at the time of the treaty should be subject to them or independent of them was retroactive.

The action of Congress must be taken into account in estimating appellant's contentions. In *United Shoe*

Machinery Co. v. *Duplessis Shoe Machinery Co., supra,* it was made determinative, and the court decided that what construction should be put on Article 4 *bis,* and what rule should apply as to its becoming effective became academic questions in view of the provisions of the act of Congress of 1903, entitled "An Act to Effectuate the Provisions of the Additional Act of the International Convention for the Protection of Industrial Property." The act of 1903 was preceded by—and probably induced by—a letter which the Chargé d'Affaires of Switzerland addressed to the Secretary of State. The letter was prompted, according to its representations, by the embarrassment to which the International Bureau was subjected on account of the uncertainty of the action of the United States in regard to the Additional Act of Brussels of December 14, 1900, the treaty being so designated. It referred to the Convention of March 20, 1883, and the approval by the Senate of that Convention in 1887, but it stated "that Congress had not brought into the Federal law the changes required to make it consonant with the Convention," and that, "according to the opinion rendered by Attorney General Miller in 1889, American courts have consistently decided that the Convention of 1883 could not be enforced in the United States except so far as it accorded with the law of the country." The opinion was expressed that the difficulties attending this condition of things were not so great as they would have been in some other country, but it was said, however, that the circumstances had changed since the Additional Act of Brussels went into effect. One of the most important of its provisions, it was said, was that which amends Article 4 of the Convention of 1883, extending to one year the priority of six months during which the original applicant for a patent in one of the States of the Union may validly file an application for the same invention in the other contracting States. After some comment on the priority

period, the letter proceeded as follows: "The Bureau is placed in an awkward situation. On the one hand, it cannot say that the United States will not enforce the Additional Act it has ratified and has asked should go into effect. On the other hand, it is without information that the bills relative to industrial property that have been framed in the committee organized under the act of June 4, 1898, have been passed by Congress; and it is constrained to admit that according to judicial precedents the new Treaty provisions could not be enforced until the corresponding legislation shall have been revised." The required legislation was urged.

The Secretary of State replied to the letter, describing it as "in regard to the provisions of the Industrial Property Convention of March 20, 1883, and the Brussels Act of December 14, 1900, modifying it," and said that he was advised by the Secretary of the Interior that he had prepared a bill "to make effective in this country the Convention and modifying Act in question."

The act of 1903 was then enacted, and if there could be any doubt that it expressed the sense of Congress and those concerned with the treaty that it required legislation to become effective, such doubt would be entirely removed by the legislative action of other States. It appears from the report of the Committee on Patents of the Senate and of the House of Representatives on the proposed legislation that thirteen countries had adopted legislation giving full force and effect to the provisions of the Additional Act either in the form of a general law or by specific amendment to other laws providing for carrying into force the provisions of the Additional Act as regards the extension of the "delay and priority" to twelve months. Other countries were mentioned as being expected to do so. In explaining the object of the bill the member in charge of it in the House of Representatives said that it was to carry into effect the Additional Act of the Convention held at

Brussels in December, 1900; and, further, that the Additional Act agreed upon simply extended the period of priority in applications for patents, and that it did not "extend by a single instant the life of any patent now in existence, or any patent that may be granted hereafter." He further said that nearly all of the nations which were represented at Brussels had already passed legislation to give force to the act and that it was but fair that this country should take similar action.

An attempt is made by appellant to distinguish between Article 4 *bis* and the provisions of the treaty expressly dealt with by Congress, and to assign to that Article a more distinct and definite power of execution than the other provisions possess. To account thereby for its omission from the act of 1903, it is urged, that those provisions concern matters of administrative law which might be or thought to be in conflict with statutory provisions, whereas Article 4 *bis* accomplished all that it could accomplish the instant the treaty went into effect and there was nothing further to be done as a matter of administrative law. We are unable to accept the distinction, and appellant is therefore brought to this alternative. If the treaty be construed, as we think it must be construed, in accordance with the declaration of the Conference at the instance of the American delegates, it has no application to the Cameron patent. If it be not self-executing, as it is certainly the sense of Congress that it was not and seems also to be the sense of some of the other contracting nations, and as the act of 1903 did not make effective Article 4 *bis*, the provisions of § 4887 apply to the Cameron patent, and caused it to expire with the British patent for the same invention.

Decree affirmed.

GRAY *v.* TAYLOR ET AL., AND LINCOLN COUNTY, TERRITORY OF NEW MEXICO.

TERRITORY OF NEW MEXICO, BY CLANCY, ATTORNEY GENERAL, ON THE RELATION OF ARAGON *v.* BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY, NEW MEXICO.

APPEALS FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

Nos. 322, 483. Submitted January 6, 1913.—Decided January 20, 1913.

In determining whether a statute is a local act of the nature prohibited by the Constitution, the legislature will not be supposed to be less faithful to its obligations than the court.

A local law means one that in fact even if not in form is directed only to a specific spot.

A law is not necessarily a local law because it happens to affect a particular spot.

The law of New Mexico Territory requiring that changes of county seats shall not be made under certain conditions is not violative of the act of 1886 prohibiting the Territory from passing local laws because those conditions happen to apply to certain localities.

In determining questions from the Territories not based on Federal law this court inclines towards following the local courts, *Treat* v. *Grand Canyon Ry. Co.*, 222 U. S. 448, and so *held* as to questions relating to the passage of an act of the legislature of the Territory.

Following the Supreme Court of the Territory *held* that the act of the legislature was properly passed, and the petition for change of county seat, and the ballots were not irregular.

A statute requiring the appointment for certain elections of a Registration Board sixty days before election does not apply to a special election ordered by a subsequent act to take place within sixty days after presentation of a petition.

15 New Mex. 742 and 16 New Mex. 467, affirmed.

THE facts are stated in the opinion.

Mr. T. B. Catron and *Mr. George B. Barber* for appellant:

Chapter 80 of the Laws of 1909, relied on as the basis of the right to change the county seat in question, is both a local law, and also a special law, and if otherwise legally enacted is in violation of the Springer Act of July 30, 1886, and is illegal and void and conferred no right to change a county seat in New Mexico.

As to what constitutes a local, special act, or private acts, see *People* v. *Supervisors*, 43 N. Y. 16; *Matter* v. *Henneberger*, 155 N. Y. 424–427; *People* v. *O'Brien*, 38 N. Y. 193; *Ferguson* v. *Ross*, 126 N. Y. 464; *Closson* v. *Trenton*, 48 N. J. L. 439; *Commonwealth* v. *Patten*, 88 Pa. St. 260; *Davis* v. *Clark*, 106 Pa. St. 260; *McCarthy* v. *Commonwealth*, 110 Pa. St. 246 *et seq.*; *Montgomery* v. *Commonwealth*, 91 Pa. St. 125; *Devine* v. *Commissioners*, 84 Illinois, 591 *et seq.*; *State* v. *Herrman*, 75 Missouri, 346; *Scowden's Appeal*, 96 Pa. St. 424–425; *Klokke* v. *Dodge*, 103 Illinois, 125; *State* v. *Mitchell*, 21 Oh. St. 592; *State* v. *Judges*, 21 Oh. St. 11; *Strange* v. *Dubuque*, 62 Iowa, 205; Suth. on Stat. Const., §§ 127, 128, 129, and cases cited; Smith's Com., §§ 595, 596; Sedgwick, Const. Law, 32; Potters' Dwarris on Stats. 355; *Ex parte Westerfield*, 55 California, 552; *Desmond* v. *Dunn*, 55 California, 251; Sedgwick on Stat. Cons., § 127; *Van Riper* v. *Parsons*, 40 N. J. L. 123; *Zeigler* v. *Gadis*, 44 N. J. L. 363; *Hammer* v. *State*, 44 N. J. L. 669; *People* v. *Supervisors*, 43 N. Y. 16.

Private acts are those relating to a particular place, or to several particular places, or to one or several particular counties. 1 Kent, Comm. 415; 3 Bouvier Institutes, 95; Jacob's Law Dict. voce Statute; 2 Dwarris on Statutes, 463; *Ferguson* v. *Ross*, 126 N. Y. 464; *Matter* v. *Henneberger*, 155 N. Y. 425; *Van Giessen* v. *Bloomfield*, 47 N. J. L. 442; *Closson* v. *Trenton*, 48 N. J. L. 440; *Davis* v. *Clark*, 106 Pa. St. 384; *McCarthy* v. *Commonwealth*, 110 Pa. St. 246.

It is admitted that classification, even where not specially recognized by nature, custom, the laws of trade, or the Constitution must, in certain cases, be adopted *ex necessitate*, as in the case of cities under the act of May 23, 1874; *Wheeler* v. *Philadelphia*, 27 P. F. S. 338, and *Kilgore* v. *Magee*, 4 Nor. 401. See also *Davis* v. *Clark*, 10 Out. (106 Pa. St.) 377; *Commonwealth* v. *Patten*, 7 Nor. 260, and *Scowden's Appeal*, 15 Nor. 425.

Of all forms of special legislation that under the attempted disguise of a general law is the most vicious. *Devine* v. *Commissioners*, 84 Illinois, 591; *Klokke* v. *Dodge*, 103 Illinois, 126. See also *Codlin* v. *County Commissioners*, 9 New Mex. 577.

Chapter 80 of the Laws of 1909, even if it was not a local or special law, never was legally enacted, was not approved by the governor nor was it ever signed by the president of the council or speaker of the House of Representatives. There is no evidence that it ever reached the governor more than three days before the adjournment of the legislature. See § 1842, Rev. Stat.; *Field* v. *Clark*, 143 U. S. 671; *Panghorn* v. *Young*, 32 N. J. L. 30; Cooley on Const. Lim., 7th ed., 124.

The plaintiff made a prima facie case, and the burden was thrown on defendants to establish the necessary facts to show that Chapter 80 has become a law by legal enactment. *State* v. *Howell*, 26 Nevada, 98; *State* v. *Swift*, 10 Nevada, 182 *et seq.; Sherman* v. *Story*, 30 California, 256.

The provisions of the second clause of § 631 of the Compiled Laws prescribing the form of the ballot is not and cannot be made applicable to the election in question, the ballot as prescribed is in an unintelligible form to the average voter, is deceiving and misleading and makes it uncertain to the average voter how he should vote, and this is also applicable to the order for the election which prescribed the form of the ballot.

The election was void because no petition "asking for

the removal of the county seat of said county to some other designated place," or to Carrizozo was ever presented to or acted on by the Board of County Commissioners of Lincoln county, when they called the election to be held August 17, 1909.

A petition of this kind, which did not inform the signer that he was actually asking for the removal of the county seat to Carrizozo, as the statute required he should do before an election was held, is deceptive; doubtless signers were deceived by believing that the petition only asked for a vote on the proposition, and that the time was opportune for them to vote on it so as to retain it at Lincoln. *Lilly* v. *Lakin*, 56 Alabama, 122; *Tally* v. *Grider*, 66 Alabama, 122; *Lanier* v. *Padgett*, 18 Florida, 843–844; *McKinley* v. *Commissioners*, 26 Florida, 264 *et seq.*; *Zeiler* v. *Chapman*, 53 Missouri, 405–406; *State ex rel. Lexington* v. *Saline Co.*, 45 Missouri, 242; *State* v. *Saline Co. Ct.*, 48 Missouri, 390; *State* v. *Woodson*, 67 Missouri, 336; *State* v. *Albin*, 44 Missouri, 348–349; *Detroit* v. *Bearss*, 39 Indiana, 598; *People's Bank* v. *Pomona*, 48 Kansas, 55; *Culver* v. *Hayden*, 1 Vermont, 359; Blackwell, Tax Titles, 213; *Pitkin* v. *McNair*, 56 Barb. 77–78; *Wheeler* v. *Mills*, 40 Barb. 644; *Brun* v. *Eastman*, 50 Barb. 639; *People* v. *Kopplekom*, 16 Michigan, 342; *Nefzger* v. *Railway*, 36 Iowa, 644; *State* v. *Piper*, 17 Nebraska, 618, 619; *Adrienne* v. *McCafferty*, 2 Rob. (N. Y.) 353.

The order made by the Commissioners for an election did not specify that the election was to be held for any purpose, and was therefore a nullity.

The elction is also void because there was no registration of the voters.

Unless the legislature provides for the special election to be held in such limited time only as will not admit of a registration, and will not be within the power of the Board to give time enough to make the registration, the registration law must be complied with; if it is possible

to comply with it, it must be done. *State* v. *Scarburox*, 110 N. C. P. 232; *Smith* v. *Board of Comm.*, 45 Fed. Rep. 725· McCrary on Elections, 2d ed., § 193.

Mr. John Y. Hewitt and *Mr. Andrew H. Hudspeth* for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

The first of these suits is a bill in equity brought by tax-payers to restrain the County Commissioners of Lincoln County from erecting a court house and jail in the town of Carrizozo, the board assuming that the county seat has been changed from Lincoln to that town. The second is a quo warranto at the relation of a tax-payer against the same board to stop the same and other proceedings taken by the board on the same ground. The Supreme Court of the Territory affirmed a decree dismissing the bill and also a judgment denying the quo warranto. 15 N. Mex. 742. 16 N. Mex. 467. Both cases raised the question whether the attempted change of the county seat was void, and turn on the same facts, which may be stated in connection with the several objections that the appellants take.

In the first place it is said that the statute under which the attempted change took place is void because it is a local law, and the act of Congress of July 30, 1886, c. 818, § 1, 24 Stat. 170, provides that the Legislature of the Territory shall not pass local or special laws in the matter among others of changing county seats. The statute, being c. 80 of the Laws of New Mexico of 1909, is thought to be local because by § 2 it enacts that the place to which it is proposed to remove the county seat 'shall be at least twenty miles distant from the then county seat of said county, and that no proposition to remove a county seat from a place situated on a railroad to one not so situated shall be entertained. It is argued at great length and is obvious that at any given time this enactment does not bear in the same way on every part of the Territory.

In its present form the statute may be specially favorable to the change from Lincoln to Carrizozo, if, as is said, the latter town is on a railroad and Lincoln is not. It may be admitted that a local act could be disguised in general terms, if a legislature would condescend to evading its duties under a constitution or organic act. It may be assumed that general words are not necessarily enough to disguise such an intent. But it is not lightly to be supposed that a legislature is less faithful to its obligations than a court. General words indicate and affirm a general intent, and if the fact that different sections are differently affected is enough to make a law local the field of legislation would be narrowed beyond anything that Congress could have dreamed. It cannot have been intended for instance that no laws should be passed concerning cities or towns, yet such laws would be local in their application. The phrase local law means, primarily at least, a law that in fact if not in form is directed only to a specific spot. If it has a wider meaning it involves questions of degree that cannot be decided by putting cases other than the one before us. We know nothing that would warrant us in declaring that this law was not intended according to its purport to regulate generally the change of county seats. *Ritchie* v. *Franklin County*, 22 Wall. 67.

The full discussion in *Codlin* v. *Kohlhousen*, 9 N. Mex. 565, has lost but little of its force and applicability notwithstanding the later amendment of the statute. The law is shown not to be a local law, and with regard to the twenty-mile limit it is said to be only reasonable to believe that the Legislature intended, in fixing it, "to prevent cities and towns situated within a few miles of each other from engaging in those injurious contests for the supremacy for the location of the county seat, based upon population only. The wisdom of these conditions is apparent, and it is within the power of the legislature to make them."

However it may be as to the foregoing question, which

arises under an act of Congress, the other objections are of a kind as to which we often have intimated our strong leaning toward following the local courts, and therefore will not be discussed at length. *Fox* v. *Haarstick*, 156 U. S. 674, 679. *Treat* v. *Grand Canyon Ry. Co.*, 222 U. S. 448, 453. In the first place it is said that the statute was not approved by the Governor and does not appear to have reached him more than three days before the adjournment of the Legislature so as to have become a law by Rev. Stat., § 1842. Also it is said that the bill was not signed by the President of the Council or the Speaker of the House of Representatives, as required by the respective rules of those bodies. But the act appears in the official copy of the laws of 1909, it passed the two houses in fact, and in ample time to be submitted to the Governor. The Governor returned the bill to the Council with the statement that he had allowed it to become a law by limitation. We agree with the court below that the Governor's message is as good evidence as a note of the date on the bill that the bill had been received long enough before the return to make his statement correct. *Gardner* v. *Collector*, 6 Wall. 499, 508, 509. The journals of the two houses showed the passage of the bill and we certainly should not reverse the local decision that the evidence, if necessary, was admissible and sufficient in aid of the act.

The next objection is to the form of the petition by which the proceedings for the change were begun. The statute provides that the Board of County Commissioners shall order a vote whenever citizens of a county equal in number to at least one-half of the legal votes cast at the last preceding general election in the county shall present a petition asking for the removal of the county seat to some other designated place. The petition asked the Board "to call an election and submit to a vote . . . the proposition to remove the county seat of said Lincoln County to Carrizozo," etc. It is said that this did not ask

for the removal, and if read with extreme technicality it did not, in so many words. But the petition very well might be held to imply that the proposition to remove emanated from those who signed, the only persons from whom it could emanate under the law that the petitioners had in mind.

Again it is said that the ballot was in an unintelligible and misleading form. The Board following the statute, Compiled Laws, 1897, § 631, ordered that "the tickets voted shall contain 'For County Seat' with the name of the place for which the voter desires to cast his ballot, either written or printed thereon." If the court was of opinion that the voters would understand that those in favor of Carrizozo would write that word on the ticket and those opposed to a change would write Lincoln, we could not say that they overrated the intelligence of their fellow citizens. There was no evidence that the voters were deceived. But it is enough that the statute was followed. There is no ground on which the law could be declared void.

It is objected that there was no registration of voters, as required in general terms by § 1709 of the Compiled Laws. But that section required the County Commissioners to appoint a Board of Registration sixty days before any election, and as the statute concerning the change of county seats in case of a special election required it to be called 'at any time within two months of the date of presenting said petition,' it naturally was held that the case was taken out of § 1709 by the latter act.

It is objected that various allegations of the bill were admitted because not denied. If any such matter is open the allegations not denied were mainly if not wholly erroneous conclusions of law from the facts proved at the trial. *Equitable Life Assurance Society* v. *Brown*, 213 U. S. 25, 43. But it is not open. The argument seems to us to need no further or more elaborate reply.

Decree affirmed.

Judgment affirmed.

MICHIGAN CENTRAL RAILROAD COMPANY *v.* VREELAND.

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

No. 242. Argued December 4, 1912.—Decided January 20, 1913.

If the constitutional questions on which the writ of error was based were not foreclosed when the writ was sued out, this court retains jurisdiction to consider other assignments of error even if the constitutional questions have meanwhile been decided in other cases adversely to plaintiff in error.

The Employers' Liability Act of 1908 will not receive such a narrow interpretation as to defeat all liability because the injured employé survived the injury for a brief period.

Congress has always had power under the commerce clause of the Constitution to regulate the liability of interstate carriers to their employés for injuries; but until it did act, the subject was within the police power of the States. Since the passage of the Employers' Liability Act of 1908, that act is paramount and exclusive and so remains unless and until Congress shall again remit the subject to the States. *Reid* v. *Colorado*, 187 U. S. 137.

A Federal statute upon a subject exclusively under Federal control must be construed by itself and cannot be pieced out by state legislation. If a liability does not exist under the Employers' Liability Act of 1908, it does not exist by virtue of any state legislation on the same subject.

At common law the right of action for an injury to the person is extinguished by the death of the party injured whether death be instantaneous or not. As the Employers' Liability Act of 1908 did not provide for any such survival the right was extinguished by death.

At common law loss and damage may accrue and a right of action accrue to persons dependent upon one wrongfully injured; but this cause of action, except for loss of services prior to death, abates at the death.

The evident purpose, however, of Congress, in enacting the Employers' Liability Act of 1908 was to save a right of action to certain relatives dependent upon the employé wrongfully injured for the loss and financial damage resulting from his death, and there is no express or implied limitation of the liability to cases in which death was instantaneous.

This liability is for pecuniary damage only, and the statute should be construed in this respect as Lord Campbell's Act has been construed,

not as granting a continuance of the right the injured employé had, but as granting a new and independent cause of action.

The pecuniary loss recoverable under the Employers' Liability Act of 1908 by one dependent upon the employé wrongfully killed must be a loss which can be measured by some standard, and does not include an inestimable loss such as that of society and companionship of the deceased or of care and advice in case of a husband for his wife.

There is no hard and fast rule by which pecuniary damages may be measured in all cases.

A minor child sustains a loss from the death of a parent of a different kind from that of wife or husband from the death of the spouse; while the former is capable of definite valuation the latter is not.

In this case the judgment under the Employers' Liability Act of 1908, of damages for death of a husband who survived the injury for a brief period, is reversed, because, although the wife was entitled to maintain the action notwithstanding the death was not instantaneous, the damages were not properly estimated as the court charged the jury that they could consider the relation of husband and wife and the care and advice of the former to the latter.

THE facts are stated in the opinion.

Mr. Emery D. Potter, with whom *Mr. Frank E. Robson*, *Mr. Henry Russel* and *Mr. Charles P. Carroll* were on the brief, for plaintiff in error:

The decision in *Mondou* v. *Railroad Company*, 223 U. S. 1, did not deprive this court of its jurisdiction to pass upon other material and substantial questions raised on this record, its jurisdiction having once rightfully vested.

For construction of the act of April 22, 1908, 35 Stat. 65; and the act of April 5, 1910, 36 Stat. 291, see *Adams* v. *Nor. Pac. R. R.*, 116 Fed. Rep. 324; *Alder* v. *Fleming*, 159 Fed. Rep. 593; *American R. R. Co.* v. *Birch*, 224 U. S. 547; *City* v. *Marfield*, 63 Kansas, 794; *Dolson* v. *L. S. & M. S. Ry.*, 128 Michigan, 444; *Ely* v. *Detroit United Ry. Co.*, 162 Michigan, 287; *Holton* v. *Dailey*, 106 Illinois, 131; *Jones* v. *McMillan*, 129 Michigan, 86; *Kellow* v. *Central Iowa Ry. Co.*, 68 Iowa, 470; *Mulcahey* v. *Washburn Car Co.*, 145 Massachusetts, 281; *Nor. Pac. R. R.* v. *Adams*, 192 U. S. 440, 450; *Nourse* v. *Packard*, 138 Massachusetts,

307; *Oliver* v. *Street Ry. Co.*, 134 Michigan, 367; *Railway Co.* v. *Clark*, 152 U. S. 230; *Railway Co.* v. *Dawson*, 68 Arkansas, 1; *Railway Co.* v. *Dixon*, 179 U. S. 131; *Roundtree* v. *Adams Exp. Co.*, 165 Fed. Rep. 156; *Sawyer* v. *Perry*, 88 Maine, 42; *State* v. *Grand Trunk R. R. Co.*, 61 Maine, 144; *Storrie* v. *Grand Trunk Elevator Co.*, 134 Michigan, 297; *Sweetland* v. *R. R. Co.*, 117 Michigan, 329; *West* v. *Detroit United Ry. Co.*, 159 Michigan, 269; see also Michigan Survival Act, p. 16 and Michigan Death Act, p. 17.

There was error in the charge of the court to the jury as to the measure of damages. *Davis* v. *Guarnieri*, 45 Oh. St. 471; *Gas Co.* v. *Rogers*, 135 S. W. Rep. 904; *Holton* v. *Dailey*, 106 Illinois, 132; *May* v. *R. R. Co.*, 62 N. J. L. 63; *McHugh* v. *Schlosser*, 159 Pa. St. 480; *Nelson* v. *R. R.*, 140 Michigan, 582; *Railroad Co.* v. *Bentz*, 108 Tennessee, 670; *Railroad Co.* v. *Johnson*, 78 Texas, 536; *Railroad Co.* v. *Walker*, 125 S. W. Rep. 99; *Railroad Co.* v. *Wilson*, 48 Fed. Rep. 57; *Railway Co.* v. *Altemeier*, 60 Oh. St. 10; *Railway Co.* v. *Austin*, 68 Illinois, 126; *Railway Co.* v. *Golway*, 6 App. D. C. 144; *Railway Co.* v. *Townsend*, 69 Arkansas, 380; *Steel* v. *Kurtz*, 28 Oh. St. 191; *Sternfelds* v. *Railway Co.*, 73 N. Y. App. Div. 494; *Swift & Co.* v. *Johnson*, 138 Fed. Rep. 867; *Walker* v. *R. R. Co.*, 111 Michigan, 518; Webster's Int. Dict. 1895, see "care," "advice."

Mr. John B. Daish, with whom *Mr. Joseph D. Sullivan* was on the brief, for defendant in error.

The constitutional questions were abandoned by the defendant below at the trial of the case, have since been abandoned in its brief on the motion to dismiss or affirm, and pending hearing of the case have been decided adversely to the contentions of the railroad company.

Assuming that all the questions raised by the assignments of error are properly before and can be considered by this court, they will be found upon examination to be without merit.

Unless the provisions of the particular statutes are distinctly and clearly to the contrary, it is the rule of the Federal and many state courts that so long as the death of the injured party is occasioned by acts within the statute, it is immaterial whether or not the death and injury are simultaneous. *Roach* v. *Imperial Min. Co.*, 7 Fed. Rep. 698; *Roach* v. *Cons. Imp. M. Co.*, 7 Sawy. 224, construing Nevada law; *Matz* v. *Chicago &c. R. Co.*, 85 Fed. Rep. 180, construing Missouri law; *Sternenberg* v. *Mailhos* (C. C. A.), 99 Fed. Rep. 43, construing Texas law; *St. Louis &c. R. Co.* v. *Dawson*, 68 Arkansas, 1; *Murphy* v. *N. Y. &c. R. Co.*, 38 Connecticut, 184; *Mallot* v. *Shimer*, 153 Indiana, 35, construing Illinois law; *Conners* v. *Burlington &c. R. Co.*, 71 Iowa, 490; *Warden* v. *Humeston &c. R. Co.*, 72 Iowa, 201; *Brown* v. *Buffalo &c. R. Co.*, 22 N. Y. 191; *Perham* v. *Portland Elec. Co.*, 33 Oregon, 451; *Internat'l &c. R. Co.* v. *Kindred*, 57 Texas, 491; *Boyden* v. *Fetchbury, &c. R. Co.*, 70 Vermont, 125; *Van Amberg* v. *Vicksburg &c. R. Co.*, 37 La. Ann. 651; *Hamilton* v. *Morgan's L. &c. R. Co.*, 42 La. Ann. 824; *Legg* v. *Britton*, 64 Vermont, 652.

Of course, where States have so-called "survival acts" and a statute creating a new cause of action (as in Michigan) it would appear to be a salutary rule that an administrator can recover damages under the latter statute only if death is instantaneous, and if the death is not instantaneous he can recover under the former statute. *Sweetland* v. *Chicago &c. R. Co.*, 117 Michigan, 329; *Dolson* v. *Lake Shore &c. R. Co.*, 128 Michigan, 444; *Kyes* v. *Valley Telephone Co.*, 132 Michigan, 281; *Oliver* v. *Houghton S. R. Co.*, 134 Michigan, 367. Such statutes are clearly distinguishable from the one under consideration; also such statutes as exist in Maine (*Sawyer* v. *Perry*, 88 Maine, 42). In truth, the rule in Michigan and Maine seems to be and justifiably is (by reason of the language of the acts) at variance with the rule elsewhere.

To read into this act (and it is necessary so to do to sus-

tain the propositions in the second and third assignments of error) the word "instantaneous" or "immediate" death would change the plain and unambiguous words of the statute and nullify the beneficent purposes for which it was enacted by the Congress.

There was no error in the instruction that in assessing the pecuniary damages which the widow sustained the jury might consider the relation that was sustained by husband and wife, and draw upon their experience as men, what it would have reasonably been worth to the wife in dollars and cents, to have had during their life together, had he lived, the care and advice of her husband. *Nor. Pac. R. R. Co.* v. *Freeman*, 83 Fed. Rep. 82; *Felt* v. *Puget Sound Co.*, 175 Fed. Rep. 177; *Bollinger* v. *St. Paul & Duluth R. R. Co.*, 35 Minnesota, 418; *Chattanooga R. R. Co.* v. *Clowdis* (Ga.), 17 S. E. Rep. 88; *Mo. Pac. R. Co.* v. *Bond*, 2 Tex. Civ. App. 104.

As to children whose parents are killed, see *Tilley* v. *P. R. R. Co.*, 29 N. Y. 252; *St. Louis &c. R. Co.* v. *Haddry*, 57 Arkansas, 306; *Stoher* v. *St. L., I. M. & S. Ry. Co.*, 91 Missouri, 509; *Walker* v. *McNiell*, 17 Washington, 582.

If the care and guidance and advice of the father is of pecuniary value to the children, likewise is the care and advice of the husband of value to his wife.

MR. JUSTICE LURTON delivered the opinion of the court.

This was an action under the Employers' Liability Act of April 22, 1908, to recover damages for the wrongful death of the intestate, an employé in the service of the railroad company. The constitutionality of the act was drawn in question by the plaintiff in error in the court below and this afforded ground for bringing the case directly to this court. Since the allowance of the writ of error all of the constitutional questions have been decided adversely to the plaintiff in error. *Mondou* v. *Railroad Company*, 223 U. S. 1. But this does not justify

our dismissing the case, since the constitutional questions which gave the right to bring it here were not foreclosed when the writ was allowed, and we, therefore, have jurisdiction to consider other assignments of error.

These relate to the construction of the act and the measure of damages thereunder. Sections 1 and 2 of the act of April 22, 1908, 35 Stat. 65, c. 149, and § 2 of the amendatory act of April 5, 1910, 36 Stat. 291, c. 143, are set out in the margin.[1]

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[1] SEC. 1. That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

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

Section 2 of the Act of April 5, 1910:

That said Act be further amended by adding the following section as section nine of said Act:

This case, however, involves only a construction of the act prior to the amendment referred to.

The decedent survived his injuries for several hours. His personal representative has brought this action not for the injury suffered by his intestate, but for the loss suffered by his widow as a consequence of his wrongful death.

For the railroad company it has been argued that the fact that the injured employé survived his injuries for several hours operates to extinguish its liability for both the wrongful injury and the death which ensued. The view of counsel seems to be that the act declared a single liability and constituted a cause of action in behalf of the injured person if he survived, or, in case his death was instantaneous, a cause of action for the benefit of the specified dependent relatives surviving. This is a narrow interpretation of the act and would operate to defeat all liability unless the injured person should survive long enough to conduct his action to a recovery.

We think the act declares two distinct and independent liabilities, resting, of course, upon the common foundation of a wrongful injury, but based upon altogether different principles. It plainly declares the liability of the carrier to its injured servant. If he had survived he might have recovered such damages as would have compensated him for his expense, loss of time, suffering and diminished earning power. But if he does not live to recover upon his own cause of action, what then? Does any right of action survive his death and pass to his representative? This is a question which depends upon the statute.

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

We may not piece out this act of Congress by resorting to the local statutes of the State of procedure or that of the injury. The act is one which relates to the liability of railroad companies engaged in interstate commerce to their employés while engaged in such commerce. The power of Congress to deal with the subject comes from its power to regulate commerce between the States.

Prior to this act Congress had not deemed it expedient to legislate upon the subject, though its power was ample. "The subject," as observed by this court in *Mondou* v. *Railroad Co.*, 223 U. S. 1, 54, "is one which falls within the police power of the State in the absence of legislation by Congress." *Nashville, C. & St. L. Ry. Co.* v. *Alabama*, 128 U. S. 96, 99. By this act Congress has undertaken to cover the subject of the liability of railroad companies to their employés injured while engaged in interstate commerce. This exertion of a power which is granted in express terms must supersede all legislation over the same subject by the States. Thus, in *Gulf, Colorado & Santa Fe Ry.* v. *Hefley*, 158 U. S. 98, 104, it was said, in reference to state legislation touching freight rates upon interstate freight which conflicted with the legislation of Congress upon the same subject, that:

"Generally it may be said in respect to laws of this character that, though resting upon the police power of the State, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other reserved powers of the States, is subordinate to those in terms conferred by the Constitution upon the Nation. 'No urgency for its use can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.' *Henderson* v. *New York*, 92 U. S. 259, 271. 'Definitions of the police power must, however, be taken, subject to the condition that the State cannot, in its exercise,

for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land.' *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661. 'While it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, where such powers are so exercised as to come within the domain of Federal authority as defined by the Constitution, the latter must prevail.' *Morgan* v. *Louisiana*, 118 U. S. 455, 464."

It therefore follows that in respect of state legislation prescribing the liability of such carriers for injuries to their employés while engaged in interstate commerce this act is paramount and exclusive, and must remain so until Congress shall again remit the subject to the reserved police power of the States. *Reid* v. *Colorado*, 187 U. S. 137, 146.

The statutes of many of the States expressly provide for the survival of the right of action which the injured person might have prosecuted if he had survived. But unless this Federal statute which declares the liability here asserted provides that the right of action shall survive the death of the injured employé, it does not pass to his representative, notwithstanding state legislation. The question of survival is not one of procedure, "but one which depends on the substance of the cause of action." *Schreiber* v. *Sharpless*, 110 U. S. 76, 80; *Martin* v. *Baltimore & Ohio R. R. Co.*, 151 U. S. 673.

Nothing is better settled than that at common law the right of action for an injury to the person is extinguished by the death of the party injured. The rule "*Actio personalis moritur cum persona*" applies, whether the death from the injury be instantaneous or not. The act of 1908 does not provide for any survival of the right of action created in

behalf of an injured employé. That right of action was therefore extinguished. The act has been many times so construed by the Circuit Courts. We cite a few of the cases: *Fulgham* v. *Railway*, 167 Fed. Rep. 660; *Walsh* v. *Railroad*, 173 Fed. Rep. 494.

At common law loss and damage may, in some cases, accrue to persons dependent upon one wrongfully injured and a right of action in some cases arises in their behalf. But this cause of action, except for loss of personal services, before the death, abates at the death.

In *Baker* v. *Bolton*, 1 Campbell, 493, Lord Ellenborough ruled that "in a civil court, the death of a human being could not be complained of as an injury." *Mobile Life Ins. Co.* v. *Brame*, 95 U. S. 754, 756; *The Harrisburg*, 119 U. S. 199, 204.

The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employé wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death. Thus, after declaring the liability of the employer to the injured servant, it adds,—"or in case of the death of such employé, to his or her personal representatives, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, for such injury or death," etc. There is no express or implied limitation of the liability to cases in which the death was instantaneous.

This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had,—one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them and for that only.

The statute in giving an action for the benefit of certain members of the family of the decedent is essentially identical with the first act which ever provided for a cause of action arising out of the death of a human being, that of 9 and 10 Victoria, known as Lord Campbell's Act. This act has been, in its distinguishing features, reënacted in many of the States, and both in the courts of the States and of England has been construed not as operating as a continuance of any right of action which the injured person would have had but for his death, but as a new or independent cause of action for the purpose of compensating certain dependent members of the family for the deprivation, pecuniarily, resulting to them from his wrongful death. For convenience in comparing Lord Campbell's Act with the act of Congress of 1908, the first and second sections of the former are set out in the margin.[1]

In one of the earliest cases which arose under the act, Coleridge, J., said:

"It will be evident that this act does not transfer this right of action to his representative, but gives to the representative a totally new right of action, on different principles." *Blake* v. *Midland Ry. Co.*, 18 Q. B. 93, 109.

In *Seward* v. *The Vera Cruz*, 10 App. Cases, 59, Lord Blackburn said:

[1] Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding such death, etc.

The second section provides that,—

Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought.

"A totally new action is given against the person who would have been responsible to the deceased if the deceased had lived; an action which . . . is new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of the widow, parent, or child, who under such circumstances suffers pecuniary loss."

But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury. Tiffany, Death by Wrongful Act, § 124; *Louisville, E. & St. L. R. R. Co.* v. *Clark*, 152 U. S. 230; *Read* v. *G. E. Ry.*, L. R. 3 Q. B. 555; *Hecht* v. *O. & M. Ry.*, 132 Indiana, 507; *Fowlkes* v. *Nashville & Decatur R. R. Co.*, 9 Heisk. 829; *Littlewood* v. *Mayor*, 89 N. Y. 24; *Southern Bell Tel. Co.* v. *Cassin*, 111 Georgia, 575.

The distinguishing features of that act are identical with the act of Congress of 1908 before its amendment: First, it is grounded upon the original wrongful injury of the person; second, it is for the exclusive benefit of certain specified relatives; third, the damages are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries.

The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived. Compensation for such loss manifestly does not include damages by way of recompense for grief or wounded feelings. Tiffany, Death by Wrongful Act, §§ 153, 154; *Illinois Cent. R. R. Co.* v. *Barron*, 5 Wall. 90, 105, 106; *Davis* v. *Guarnieri*, 45 Oh. St. 470; *Blake* v. *Midland Railway*, cited above; *Hurst* v.

Detroit City Railway, 84 Michigan, 539, 545; *Munro* v. *Pacific Dredging Company*, 84 California, 515.

The word "pecuniary" did not appear in Lord Campbell's Act, nor does it appear in our act of 1908. But the former act and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage.

A pecuniary loss or damage must be one which can be measured by some standard. It is a term employed judicially, "not only to express the character of the loss of the beneficial plaintiff which is the foundation of the recovery, but also to discriminate between a material loss which is susceptible of pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation." Patterson, Railway Accident Law, § 401.

Nevertheless, the word as judicially adopted is not so narrow as to exclude damages for the loss of services of the husband, wife, or child, and, when the beneficiary is a child, for the loss of that care, counsel, training and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the service of another for compensation.

In *Tilley* v. *Hudson River Railroad*, 24 N. Y. 471, and 29 N. Y. 252, the court stated that "the word 'pecuniary' was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though greivous and painful to be borne, cannot be measured or recompensed in money. It excludes, also, those losses which result from the deprivation of the society and companionship, which are equally incapable of being defined by any recognized measure of damages."

To the same effect are the cases of *Schaub* v. *Hannibal & St. J. Railway Company*, 106 Missouri, 74; *S. C.*, 16

S. W. Rep. 924, which was followed by the Circuit Court of Appeals for the Eighth Circuit in *Atchison &c. Ry.* v. *Wilson*, 48 Fed. Rep. 57; *Lett* v. *Railway*, 11 Ontario App. 1; *Pennsylvania Railroad* v. *Goodman*, 62 Pa. St. 329, 339; *Railroad* v. *Rush*, 127 Indiana, 545; Tiffany, Death by Wrongful Act, §§ 154 to 162, inclusive; Patterson, Railway Accident Law, §§ 401 to 406.

No hard and fast rule by which pecuniary damages may in all cases be measured is possible. In *Lett* v. *Railway*, cited above, it was said (p. 29) in the opinion of Patterson, J. A., after a review of all the English cases construing the act of Lord Campbell—

"That there is through them all the same principles of construction applied to the statute. Each fresh state of facts as it arose was dealt with, and furnished a further illustration of the working of the Act. The party claiming was held to be entitled or not to be entitled, the scale of compensation acted upon by the jury was approved or disapproved, in view of the immediate circumstances; but in no case has it been attempted to decide by anticipation what are the limits beyond which the benefit of the statute cannot be claimed."

The rule for the measurement of damages must differ according to the relation between the parties plaintiff and the decedent, "according as the action is brought for the benefit of the husband, wife, minor child or parent of minor child, for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled." Tiffany, Death by Wrongful Act, §§ 158, 160, 161, 162.

The court below instructed the jury that they could not allow damages for the grief and sorrow of the widow, or as a "balm to her feelings." They were directed to confine themselves to a proper compensation for the loss of any pecuniary benefit which would reasonably have

been derived by her from the decedent's earnings. The court did not stop there, but further instructed the jury, that, "In addition to that, independent of what he was receiving from the company, his employer, it is proper to consider the relation that was sustained by Mr. Wisemiller and Mrs. Wisemiller, namely, the relation of husband and wife, and draw upon your experiences as men and measure, as far as you can, what it would have reasonably been worth to Mrs. Wisemiller in dollars and cents to have had, during their life together, had he lived, the care and advice of Mr. Wisemiller, her husband." This threw the door open to the widest speculation. The jury was no longer confined to a consideration of the financial benefits which might reasonably be expected from her husband in a pecuniary way.

A minor child sustains a loss from the death of a parent, and particularly of a mother, of a kind altogether different from that of a wife or husband from the death of the spouse. The loss of society and companionship, and of the acts of kindness which originate in the relation and are not in the nature of services, are not capable of being measured by any material standard. But the duty of the mother to minor children is that of nurture, and of intellectual, moral and physical training, such as when obtained from others must be for financial compensation. In such a case it has been held that the deprivation is such as to admit of definite valuation, if there be evidence of the fitness of the parent and that the child has been actually deprived of such advantages. *Tilley* v. *Railroad Co.* and *Lett* v. *Railway Company*, both cited above. If the case at bar had been of such a character, the loss of "care and advice" might have been a proper matter for compensation.

Neither "care" nor "advice," as used by the court below, can be regarded as synonymous with "support" and "maintenance," for the court said it was a deprivation

to be measured over and above support and maintenance. It is not beyond the bounds of supposition that by the death of the intestate his widow may have been deprived of some actual customary service from him, capable of measurement by some pecuniary standard, and that in some degree that service might include as elements "care and advice." But there was neither allegation nor evidence of such loss of service, care, or advice; and yet, by the instruction given, the jury were left to conjecture and speculation. They were told to estimate the financial value of such "care and advice from their own experiences as men." These experiences which were to be the standard would, of course, be as various as their tastes, habits and opinions. It plainly left it open to the jury to consider the value of the widow's loss of the society and companionship of her husband.

In this part of the charge the court erred. The assignments of error are otherwise overruled. But for this error the judgment must be reversed and a new trial ordered.

MR. JUSTICE HOLMES concurs in the result.

GRANT AND BURLINGAME *v.* UNITED STATES.

APPEAL FROM AND IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 831. Argued January 6, 1913.—Decided January 20, 1913.

A judgment for criminal contempt is reviewable only by writ of error. An appeal will not lie.

Only the person charged with contempt can sue out the writ of error; one who appeared simply to state his claim to the books and papers mentioned in the subpœna does not thereby become a party to the proceeding and he has no standing to sue out a writ of error.

Professional privilege does not relieve an attorney from producing

under subpœna of the Federal grand jury books and papers of a corporation left with him for safe keeping by a client who claimed to be owner thereof.

Independent books and documents of a defunct corporation left with an attorney for safe-keeping by a client claiming to own them are not privileged communications.

Books and documents of a corporation must be produced by an attorney with whom they were left for safe-keeping even if they might incriminate the latter.

Notwithstanding a corporation ceases to do business and transfers its books to an individual, the books retain their essential character and are subject to inspection and examination of the proper authorities and there is no unreasonable search and seizure in requiring their production before the grand jury in a Federal proceeding. *Wheeler* v. *United States*, 226 U. S. 478.

THE facts are stated in the opinion.

Mr. William A. Keener and *Mr. Dallas Flannagan* for appellant and plaintiff in error submitted:

The finding of the court that Grant received the packages and box as a warehouseman is unsupported by the evidence.

The title to the books and letters called for by the subpœna, being in Burlingame personally, the case of *Wilson* v. *United States*, 221 U. S. 361, has no application to the case at bar.

There is no law of Arizona requiring the keeping of such books or papers as is called for by the subpœna and there is no law of the State of New York requiring the keeping of such books or papers by a foreign corporation. The only books required by the laws of the State of New York to be kept by a foreign corporation is a stock book. See Stock Corporation Law, § 33 of the Laws of the State of New York, 1909, Chapter 61.

The packages and box having been left with Mr. Grant as attorney for Burlingame, and the books and letters called for by the subpœna being the personal property of Burlingame, the order appealed from was erroneous.

Should the Government succeed in requiring Grant to open the packages and box and in making him act as a search warrant officer of the Government, then it is proposed to have Grant answer whether or not he has found the books and letters called for by the subpœna. In other words, they propose to prove through him the possession and control of such books and letters as a preliminary to calling for the same.

This is not permissible under the Fifth Amendment within *Ballman* v. *Fagin*, 200 U. S. 186.

The Government having required Grant to learn the whereabouts of the books and letters and having required him to disclose that they are in his possession as attorney, then the Government proposes to require Grant to produce these books and letters before the grand jury. This is in violation of the Fourth and Fifth Amendments to the Constitution. *Boyd* v. *United States*, 116 U. S. 616.

The Solicitor General, with whom *Mr. Loring C. Christie* was on the brief, for the United States.

Mr. Justice Hughes delivered the opinion of the court.

Walter B. Grant and E. E. Burlingame seek, both by appeal and by writ of error, a review of a judgment of the District Court by which Grant was adjudged to be guilty of contempt.

Burlingame was indicted by a Federal grand jury in the Southern District of New York on August 30, 1911, and again on March 15, 1912, the latter indictment being found against him in connection with The Ellsworth Company, a corporation, J. D. Smith and others. Walter B. Grant was one of Burlingame's attorneys. On March 13, 1912, a subpœna *duces tecum* was served upon Grant directing him to appear before the grand jury to testify in regard to an alleged violation of the statutes of the

United States by J. D. Smith, and to produce certain books and papers of The Ellsworth Company for the years 1907, 1908, 1909. In response to the subpœna, Grant appeared before the grand jury but did not produce the documents demanded. On being asked whether he had received from Burlingame any box of books or papers, he declined to answer further than to say that he had received nothing from Burlingame save in his capacity as attorney for the purpose of professional consultation and of preparing for the defense of his client. He said that he had not opened any box received from Burlingame, and he refused to open any such box in order to ascertain whether or not it contained the books or papers called for upon the ground that to do so for the purpose of disclosing the result of his examination would violate his duty and his client's privilege.

The grand jury thereupon presented Grant for contempt. Burlingame appeared in court, set up that the books and papers required to be produced were his individual property and that to produce them or to disclose their contents or whereabouts would tend to incriminate him. The court appointed a referee to take evidence as to the rights and privileges claimed by Grant and as to the ownership of the books and papers, together with such other evidence as might be relevant to the questions raised, and to make report to the court with his conclusions. Much testimony was taken before the referee who submitted an elaborate report upon the facts and the law, embracing the following conclusions: that Burlingame had at all times been the sole stockholder of the Ellsworth Company which, on December 31, 1909, had ceased to do business; that the legal title to the books and papers was in the corporation and not in Burlingame; that if the title had passed to Burlingame prior to the service of the subpœna, nevertheless they would not be privileged for the reason that they were corporate in character;

that, in August or September, 1911, Burlingame had delivered two packages and a box to Grant which the latter had in his possession; that the packages and box were delivered to Grant for safe-keeping in his office and were not delivered to him in his professional capacity as attorney, or for the purpose of consultation with him in such capacity; that their contents were not privileged and that Grant should have searched therein for the books and papers, should have produced them if found, and should have answered the questions put to him before the grand jury; and finally that by reason of his refusals he was in contempt.

Exceptions were filed to the report which was confirmed by the court save as to the finding that the legal title to the books and papers was in the corporation. Grant was thereupon adjudged to be in contempt for failing to examine the contents of the box and packages for the purpose of ascertaining whether they contained the papers specified in the subpœna and for failing to answer the questions put to him concerning them by the grand jury. It was provided that he might purge himself of the contempt by making the examination and by answering such questions and producing the papers, if found, in response to a fresh subpœna. In punishment, he was fined a sum equal to the expenses of the reference.

The appeals, both of Grant and Burlingame, from this judgment must be dismissed. The case was one of criminal contempt reviewable only by writ of error. *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 336–338; *Bucklin* v. *United States*, 159 U. S. 680; *Gompers* v. *Bucks Stove and Range Co.*, 221 U. S. 418, 444; *In re Merchants' Stock Co.*, 223 U. S. 639.

In the writ of error, Burlingame has attempted to join. The subpœna was not directed to him and he was not charged with contempt. It is true that he appeared before the court, when Grant was presented by the grand jury,

and stated his claim to the books and papers. In the subsequent inquiry, the purpose of the court manifestly was to ascertain all the facts in order that it might properly decide the question with respect to the alleged contumacy of Grant. Neither Burlingame's appearance before the court, nor the order of reference, made Burlingame a party to the proceeding, which was in its nature criminal and was instituted and conducted to the final judgment against Grant alone. Burlingame had no standing to sue out a writ of error. *Bayard* v. *Lombard*, 9 How. 530, 551; *Payne* v. *Niles*, 20 How. 219, 221; *Ex parte Cockcroft*, 104 U. S. 578. And the writ must be dismissed as to him.

The judgment is attacked by Grant upon the ground that there has been a denial of constitutional right. It is contended by the Government that the writ should also be dismissed as to Grant because the facts are not open to review and it was found by the court below that he had not received the box and packages in his professional capacity as attorney or for purposes of consultation. While this suffices to show that the questions put to the witness did not invade the professional privilege, the finding does not control the decision of the case with respect to the requirement of the production of the books and papers if in Grant's possession. (See 4 Wigmore on Evidence, § 2307.) These were independent documents. Even if they had been received by Grant as attorney for purposes of consultation, they could not be regarded as privileged communications. And, assuming that they were left with him merely for safe-keeping, they would still be held by Grant as Burlingame's agent. The inquiry thus remains whether in these circumstances Grant could refuse their production if they would tend to incriminate his principal.

Although the merits of the constitutional question are thus before us, it does not require extended discussion in view of the recent decisions of this court. The books

and papers called for by the subpœna were corporate records and documents. Whether or not the title to them had passed to Burlingame when The Ellsworth Company ceased to do business, their essential character was not changed. They remained subject to inspection and examination when required by competent authority, and they could not have been withheld by Burlingame himself upon the ground that they would tend to incriminate him. Nor was there any unreasonable search or seizure. *Wheeler* v. *United States*, 226 U. S. 478; *Wilson* v. *United States*, 221 U. S. 361.

It follows that Grant, from any point of view, was not justified in his refusals, and the judgment is

Affirmed.

DAVIS *v.* LAS OVAS COMPANY, INCORPORATED.

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

No. 87. Argued December 16, 1912.—Decided January 20, 1913.

Where the true consideration of a syndicate purchase is concealed and the property is conveyed at a higher figure in shares of stock to a corporation whose stock is held partly by the members of the syndicate and partly by others and the necessary increase of shares to pay for the property goes to some of the syndicate promoters as a secret profit, the corporation may maintain an action to require those obtaining the shares to surrender them for cancellation.

Fraud in the purchase of property which is to be conveyed to a corporation composed partly of those purchasing the property and partly by others may become operative against the corporation itself and give it a right to maintain an action against some or all of those guilty of the fraud to protect the innocent stockholders who bought in ignorance thereof.

A recovery in such an action is not defeated because the benefits would inure to some of the guilty as well as to the innocent stockholders.

The corporation may sue one or all of those participating in such a fraud, and there is no fatal omission of parties if all are not joined.

Where the fraud on a corporation resulted in the issuing of more stock than would otherwise have been necessary, the proper decree is to compel those who fraudulently obtained the additional stock to surrender it for cancellation.

35 App. D. C. 372, affirmed.

THE facts are stated in the opinion.

Mr. Samuel A. Putman and *Mr. J. K. M. Norton* for appellants.

The company proved no right to the relief prayed for. It was merely a receptacle for the property, a creature erected for the convenience of the syndicate. The syndicate instead of taking the property in their own name put it in a company, which company was themselves, and only themselves, and gave it back to themselves in the shape of a certain number of shares of stock. *Old Dominion Copper Co. &c.* v. *Lewisohn*, 210 U. S. 206; Morowitz on Corporations (2d ed.), § 292.

When directors issue the whole stock of the company for property worth less than the par amount no one is injured. Cook, Corporations (6th ed.) § 651; *Blum* v. *Whitney*, 185 N. Y. 232 (1906); *Stratton* v. *Pines*, 126 Fed. Rep. 968; aff'd 135 Fed. Rep. 449.

When all the stock of a corporation is issued in payment for property the vendor cannot be held liable for misrepresentations as to the value of the property. *Foster* v. *Seymour*, 23 Fed. Rep. 65; *McCracken* v. *Robinson*, 57 Fed. Rep. 375; *Du Pont* v. *Tilden*, 42 Fed. Rep. 87; *Wood* v. *Corry Water Works*, 44 Fed. Rep. 146; *Fort Madison Bank* v. *Alden*, 129 U. S. 373; *Barr* v. *N. Y., L. E. & W. R. Ry. Co.*, 125 N. Y. 263, 273; *Seymore* v.

Spring Forrest Ass'n., 144 N. Y. 333; *Thornton* v. *Wabash Ry. Co.*, 81 N. Y. 462, 467; *Parsons* v. *Hayes*, 14 Abb. N. C. (N. Y.) 419, 434; *King* v. *Barnes*, 109 N. Y. 267, 268; *Insurance Press* v. *Montauk Wire Co.*, 103 App. Div. (N. Y.) 472; *Higgins* v. *Lansing*, 154 Illinois, 301, 331; *Spaulding* v. *North Milwaukee Town Site Co.*, 106 Wisconsin, 481, 488; *Garretson* v. *Pacific Crude Oil Co.*, 146 California, 184; *St. L., F. S. & W. Ry. Co.* v. *Tierman*, 37 Kansas, 606, 633; *Walburne* v. *Chenault*, 43 Kansas, 356, 361; *Arkansas &c. Co.* v. *Farmers &c. Co.*, 13 Colorado, 587; *Tompkins* v. *Sperry Jones*, 96 Maryland, 560, 583; *Swift* v. *Smith*, 65 Maryland, 428, 435; *Merchants & M. S. B.* v. *Burlington C. & I. Co.*, 41 S. E. Rep. (W. Va.) 390; *Clark* v. *American Coal Co.*, 17 L. R. A. 557, 561; *Divine* v. *U. S. M. M. & Co.*, 38 S. W. Rep. 93, 98; *In re Ambrose* L. R. 14 Ch. D. 390, 395; *Salomen* v. *Salomen*, L. R. (1897) A. C. 22.

There is no legal difference between the holder of an option and a full owner of land. *Densmore Oil Co.* v. *Densmore*, 64 Pa. St. 49; *Cummings* v. *Beavers*, 103 Virginia, 230.

Neither Reid, who absolutely controls the company and its directors, nor Sowers can use the company to sue for an alleged wrong done to them by Davis and Phillips.

The syndicate agreement affords no basis of claim on the part of the company. The syndicate agreement was wholly between the parties thereto. *Hutchinson* v. *Simpson*, 92 App. Div. (N. Y.) 382; *Blum* v. *Whitney*, 185 N. Y. 232, 241.

The formation of the company, the taking of all its stock, and the putting of the title to the property in it were all merely the carrying out of the syndicate agreement. 3 Thompson on Corporations, 3d ed., § 3997.

The company has not authorized this suit. No action of a special meeting of the board of directors is valid unless all the directors are notified, even though the presence of

the absent ones could not have changed the result. 3 Thompson on Corp., § 3936.

A power of attorney from one director to another to represent him at meetings of the board is illegal and void. 3 Thompson on Corp., §§ 3909, 3925.

Herbert and Micou should have been made parties.

Here the members of the syndicate, although members of the corporation, are not joined and it is sought to throw the burden of their act upon a single one. See *Shields* v. *Barrow*, 17 How. 130; *Barney* v. *Baltimore*, 6 Wall. 280; *Jessup* v. *Illinois Cent. R. Co.*, 36 Fed. Rep. 738.

It was error to decree cancellation of stock.

Equity will surely not allow the plaintiff to purposely leave out some and make victims of a part without good reason. Thompson on Corp., §§ 465, 473; *Old Dominion Copper Mining Co.* v. *Lewisohn*, *supra*.

The measure of the recovery in equity is only the net secret profits. *McIlhenny's Appeal*, 61 Pa. St. 188; *Emma Silver Mining Co.* v. *Grant*, 11 L. R. Ch. Div. 918; 7 Am. & Eng. Enc., p. 22; *Littel* v. *Julius Lansburgh Furniture Co.*, 96 Virginia, 540. *Yeiser* v. *U. S. Paper Co.*, 107 Fed. Rep. 340, distinguished.

While a promoter may be charged with secret profits he is entitled to his expenses. *McIlhenny's Appeal*, 61 Pa. St. 188.

Parties are not allowed to take inconsistent positions in legal proceedings. 7 Am. & Eng. Enc. Law, p. 22. *Littel* v. *Julius Lansburgh Furniture Co.*, 96 Virginia, 540.

The authorities relied on by the appellee company are unlike the case at bar. They were cases where the public was brought in as subscribers and were deceived or defrauded, as in *Yeiser* v. *U. S. Paper Co.*, 107 Fed. Rep. 340; *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cases, 1218, and *Gluckstein* v. *Barnes* (1900), A. C. 240.

Mr. J. J. Darlington for appellee.

Memorandum opinion by direction of the court. By MR. JUSTICE LURTON.

This is a bill by the appellee to recover from appellants secret profits made by them as promoters of the Las Ovas Company in the purchase of a part of a tract of land known as Las Ovas in the Republic of Cuba, and also for the cancellation of certain shares of stock issued to them as promoters.

The facts essential to judgment are not in serious dispute. They are found clearly and fully stated in the opinion by Mr. Justice Gould of the Supreme Court of the District of Columbia, and again in the opinion of the Court of Appeals of the District by Mr. Justice Robb.

From the facts found by both courts it appears:—

a. That the appellants and certain other persons, not parties to this suit, signed an agreement on March 19, 1904, by which they agreed to purchase for a corporation which they were to organize a specified part of a tract of land in Cuba called the Las Ovas plantation, for the price of $34,000, to which it was later agreed to add another small parcel at an additional price of $1,000.

b. It was further agreed that they should organize a corporation, of which they should be the incorporators, with a capital stock of $150,000, and that 40 % of the shares should be issued to them for service as promoters and that the remaining stock should be subscribed for by them. For this subscribed stock they were to pay an amount sufficient to cover the purchase money of $35,000 and to create an expense fund of $5,000.

c. It was agreed that the property should, when acquired, be placed in the hands of one of the group of promoters until the formation of the company, and then conveyed to it.

d. The scheme was one originated and engineered by

the appellants, who at the time of this agreement had already secretly secured an option for themselves for the purchase of this property at the price of $20,000. To conceal the true consideration from their associates they caused the property to be conveyed by the vendor to one Escalante, a stranger selected by them. The deed to Escalante recited the true consideration. Later, in pursuance of the promoters' agreement, they caused Escalante to convey to the member of the syndicate selected to hold the title until organization, reciting a consideration of $35,000.

The corporation was organized as planned. The promoters' shares were duly issued and the remaining shares taken by the promoters upon the agreed terms, its officers and directors being composed exclusively of the members of the syndicate. Thereupon the property was transferred to the company and paid for, through appellants, out of the proceeds of the subscribed stock.

The result of the transaction was that the corporation was required to pay to those who had assumed to act for and represent it, a secret profit of fifteen thousand dollars and also to compensate them for their services in buying the land and organizing the company by issuing to each of them fifteen thousand dollars in non-assessable shares of its stock.

The decree below required the appellants to account for the profits realized by them, in part traced to certain shares in their hands, and to surrender for cancellation the shares issued to them as promoters.

It is now said that the corporation was "a mere convenient receptacle for the property, erected for the convenience of the syndicate." That the property was bought by the syndicate for their own advantage and that the corporation included only the members of the syndicate. That the stock of the company was all taken by the syndicate, who, for property which was their own, agreed

to pay enough to cover the purchase price and create a small expense fund.

Upon this contention it is urged that the corporation has no right to the relief sought, as the whole transaction was a mere form adopted by the parties for their own convenience as owners of the property and owners of the corporation. It is then said: "If we admit, for the purposes of this point, that appellants did deceive some of the syndicate, what has the company to do with it?" For this they cite *Old Dominion Copper Company* v. *Lewisohn*, 210 U. S. 206, where it was held that a subordinate fraud practiced by some of the promoters of a corporation upon some of their associates was a matter wholly between them and the syndicate which gave rise to no corporate right of action in the absence of innocent incorporators or stockholders.

But that is not this case. Some of those, if not all, interested by appellants in the property and in its purchase for a proposed consideration were ignorant of the real price which they were to pay for it, and were not, therefore, in complicity with their scheme to make a secret profit. These innocent members of the syndicate became stock subscribers and directors of the company, as did appellants. The buyers and sellers were not the same. Those of the syndicate assuming to act for the corporation in acquiring the property were under obligation to disclose the truth and deal openly. In the absence of such disclosure the corporate assent was obtained on false grounds. The wrong was done when those members of the syndicate not in complicity with appellants subscribed to the stock of the company and aided their guilty associate managers in the corporate action necessary to the corporate acquisition of the property at the exaggerated price placed upon it by those who were to realize a secret profit. Thus, the original fraud practiced upon some of those associated with them in the promoters' arrangement became operative against the corporation itself. The standing of the

corporation results from the fact that there were innocent and deceived members of the corporation when the property was taken over by it.

Neither is the corporate right of action defeated by the fact that the recovery will inure to the guilty as well as to the innocent, nor is the fact that all of the parties who may have shared in the secret profits are not sued fatal to the case. The corporation may well sue either one or all of those who received secret profits. There is no want of necessary parties because all are not here sued.

The distinction between a case in which all of the owners of the property and all of the members of the buying corporation are the same persons, and participate in the profit realized, and the case here presented is fully recognized in *Old Dominion Copper Company* v. *Lewisohn*, *supra*, as well as in *Phosphate Company* v. *Erlanger*, 5 Ch. Div. 73, and in the well considered opinion of Judge Severens in *Yeiser* v. *U. S. Paper Co.*, 107 Fed. Rep. 340.

There was no error in cancelling the shares issued to the plaintiffs in error for promotion of the corporation. They and the other members of the syndicate received these shares upon the assumption that they had in good faith served the corporation in the procurement of the property. Obviously appellants were serving themselves to the detriment of the corporation and innocent subscribers to its stock. In such a situation the corporation may recover the shares.

The decree will be affirmed.

INTERSTATE COMMERCE COMMISSION *v.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

No. 600. Argued October 17, 18, 1912.—Decided January 20, 1913.

The Act to Regulate Commerce, as amended by the Hepburn Act, gives a right to a full hearing on the subject of rates, and that confers the privilege of introducing testimony and imposes the duty of deciding in accordance with the facts proved.

A finding without evidence is arbitrary and useless, and an act of Congress granting authority to any body to make a finding without evidence would be inconsistent with justice and an exercise of arbitrary power condemned by the Constitution.

Administrative orders *quasi*-judicial in character are void if a hearing is denied; if the hearing granted is manifestly unfair; if the finding is indisputably contrary to the evidence; or if the facts found do not, as matter of law, support the order made.

Administrative orders can only be reviewed by the court where a justiciable question is presented, and where the act provides for judicial review of such orders it will be construed as providing for a hearing so that the court may consider matters within the scope of judicial power.

Under the Act to Regulate Commerce the carrier retains the primary right to make rates, and the power of the Commission to alter them depends upon the existence of the fact of their unreasonableness, and, in the absence of evidence to that effect, the Commission has no jurisdiction.

The legal effect of evidence is a question of law, and a finding without evidence is beyond the jurisdiction of the Commission.

Where the party affected is entitled to a hearing, the Interstate Commerce Commission cannot base an order establishing a rate on the information which it has gathered for general purposes under the provisions of § 12 of the act. The order must be based on evidence produced in the particular proceeding.

In this case, the Interstate Commerce Commission having found, after

taking evidence, that the new rates were excessive and that the through rate which exceeded the sum of the locals should have been lowered, instead of the locals being raised to equal the through rate, this court holds that the finding, having been based on evidence, should not be disturbed and that the order of the Commission was proper.

The value of evidence in rate proceedings varies, and the weight to be given to it is peculiarly for the body experienced in regard to rates and familiar with the intricacies of rate-making.

When rail rates are advanced with the disappearance of water competition no inference adverse to the railroad can be drawn, but when the old rates had been maintained for several years after such disappearance, there is a presumption, if the rates are raised, that the advance is made for other reasons.

In this case the order of the Commission restoring local rates that had been in force many years between New Orleans and neighboring cities and making a corresponding reduction in through rates was not arbitrary but was sustained by substantial, although conflicting, evidence, and the courts cannot settle such a controversy or put their judgment against that of the Commission which is the rate-making body.

THE facts, which involve the construction of the Act to Regulate Commerce in regard to the provisions of the Hepburn Act for fixing rates, are stated in the opinion.

Mr. Assistant Attorney General Fowler and *Mr. P. J. Farrell*, with whom *Mr. Blackburn Esterline*, Special Assistant to the Attorney General, was on the brief, for appellants.

Mr. Helm Bruce, with whom *Mr. Henry L. Stone* and *Mr. Albert S. Brandeis* were on the brief, for appellee.

MR. JUSTICE LAMAR delivered the opinion of the court.

The New Orleans Board of Trade, in October and November, 1907, brought three separate proceedings against

the Louisville & Nashville Railroad, asking the Commerce Commission to set aside as unfair, unreasonable and discriminatory certain class and commodity rates (local) from New Orleans to (1) Mobile, to (2) Pensacola, and (3) through rates, via those cities, to Montgomery, Selma, and Prattville. The Railroad answered. A hearing was had, the issue as to commodity rates was adjusted by agreement, and on December 31, 1909, the Commission made a single order in which it found the class rates complained of to be unreasonable, directed the old locals to be restored and a corresponding reduction made in the through rates. The Railroad thereupon, on January 26, 1910, filed a bill, in the United States Circuit Court for the Western District of Kentucky, praying that the Commission be enjoined from enforcing this order, which it alleged was arbitrary, oppressive and confiscatory, and deprived the company of its property and right to make rates, without due process of law.

After a hearing before three Circuit Court judges, the carrier's application for a temporary injunction was denied (184 Fed. Rep. 118). Testimony was then taken before an Examiner. Later the suit was transferred to the newly organized Commerce Court—the United States being made a party. There, in addition to the evidence in the Circuit Court, the Railroad exhibited all that had been introduced before the Commission, as a basis for the contention that this evidence utterly failed to show that the rates attacked were unreasonable. This view was sustained by the Commerce Court, which, in a lengthy opinion, held (one judge dissenting) that the order was void because there was no material evidence to support it.

On the appeal here, the Government insisted that while the act of 1887 to regulate commerce (24 Stat. 379, c. 104, §§ 14, 15, 16) made the orders of the Commission only *prima facie* correct, a different result followed from the provision in the Hepburn Act of 1906 (34 Stat. 584, c. 3591,

§ 15) that rates should be set aside if after a hearing the "Commission shall be of the opinion that the charge was unreasonable." In such case it insisted that the order based on such opinion is conclusive, and (though *Int. Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541, 547, was to the contrary) could not be set aside, even if the finding was wholly without substantial evidence to support it.

1. But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the "indisputable character of the evidence." *Tang Tun* v. *Edsell*, 223 U. S. 673, 681; *Chin Yoh* v. *United States*, 208 U. S. 8, 13; *Low Wah Suey* v. *Backus*, 225 U. S. 460, 468; *Zakonaite* v. *Wolf*, 226 U. S. 272; or, if the facts found do not, as a matter of law, support the order made. *United States* v. *B. & O. S. W. R. R.*, 226 U. S. 14. Cf. *Atlantic C. L.* v. *North Carolina Corp. Com.*, 206 U. S. 1, 20; *Wisconsin, M. & P. R. Co.* v. *Jacobson*, 179 U. S. 287, 301;

Oregon Railroad v. *Fairchild*, 224 U. S. 510; *I. C. C.* v. *Illinois Central*, 215 U. S. 452, 470; *Southern Pacific Co.* v. *Interstate Com. Comm.*, 219 U. S. 433; *Muser* v. *Magone*, 155 U. S. 240, 247.

2. The Government's claim is not only opposed to the ruling in *I. C. C.* v. *Union Pacific*, 222 U. S. 541, 547, and the cases there cited, but is contrary to the terms of the Act to Regulate Commerce, which, in its present form, provides (25 Stat. 861, § 17) for methods of procedure before the Commission that "conduce to justice." The statute, instead of making its orders conclusive against a direct attack, expressly declares that "they may be suspended or set aside by a court of competent jurisdiction." 36 Stat. 539 (15). Of course, that can only be done in cases presenting a justiciable question. But whether the order deprives the carrier of a constitutional or statutory right; whether the hearing was adequate and fair, or whether, for any reason, the order is contrary to law—are all matters within the scope of judicial power.

3. Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order. *Int. Com. Comm.* v. *Northern Pacific Ry.*, 216 U. S. 538, 544. In a case like the present the courts will not review the Commission's conclusions of fact (*Int. Com. Comm.* v. *Delaware &c. Ry.*, 220 U. S. 235, 251), by passing upon the credibility of witnesses, or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must, in the language of the statute, "be set aside by a court of competent jurisdiction." 36 Stat. 551.

4. The Government further insists that the Commerce Act (36 Stat. 743) requires the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created, and having been given legislative power to make rates it can act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. But such a construction would nullify the right to a hearing,—for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute. The information gathered under the provisions of § 12 may be used as basis for instituting prosecutions for violations of the law, and for many other purposes, but is not available, as such, in cases where the party is entitled to a hearing. The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. *Int. Com. Comm.* v. *Baird*, 194 U. S. 25. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but

presumptively sufficient information to support the finding. *United States* v. *Baltimore & Ohio S. W. R. R.*, 226 U. S. 14.

As these contentions of the Government must be overruled, it is necessary to examine the record with a view of determining whether there was substantial evidence to support the order.

5. The Louisville & Nashville Railroad ran from New Orleans to Mobile and to Pensacola. From both of these cities it also had lines extending to Montgomery. When the road from Mobile to New Orleans was completed about 1871 there was in operation a boat line carrying freight from the latter city to Mobile and Pensacola. In order to meet this water competition a low rail rate was compelled and was put in force by the rail carrier.

In 1887 the through rate from New Orleans to Montgomery was adjusted so as to conform to an award by Judge Cooley, under which, rates from certain Ohio River points to Montgomery were to be the same, irrespective of any difference in distance. Rates to Montgomery from Kentucky points on the Mississippi were to be two cents lower, and rates to Montgomery from Memphis, Vicksburg and New Orleans were to be two cents lower still. With the exception of a change made necessary by the construction of a short line from Memphis to Birmingham, the class rates in that territory were, as a rule, maintained in conformity with the Cooley award, though, from time to time, commodity rates were made to meet special conditions.

Changes in rates from New Orleans to Mobile, to Pensacola, and from those cities to Montgomery were made in 1907. The carrier insists that the situation at Pensacola was not the same as at Mobile. But the controlling principle is applicable to the rates at all the points involved. And in order to prevent a treble discussion of the three cases the rates from New Orleans to Mobile to Montgom-

ery may be regarded as typical. The increase in Class rates varied from 1 to 13 cents per 100 pounds. The increase in Class 3 was greatest, and it will therefore be taken as affording the best concrete example of the situation before and after the change of 1907.

Under the Cooley award the Tariff on Class 3 had been fixed as follows:

New Orleans to Mobile (local) 25
Mobile to Montgomery (local) 30
Combination of locals. 55

But while these locals aggregated only 55 cents, there was, at the same time, a through rate:

New Orleans to Montgomery 68

The carrier's filed tariffs contained a provision that wherever the rates between two points, on its line, was greater than the sum of the locals between the same places the combination of the two locals should be collected. There was nothing to indicate that shipments from New Orleans to Montgomery were not entitled to this Combination rate; but it seems that the privilege was rarely, if ever, granted to New Orleans merchants who, in order to get the advantage of the low locals (25), were obliged to ship to Mobile, there unload, reload and rebill to Montgomery at the 30 cent rate. By this inconvenient method they could secure the 55-cent rate to Montgomery. Otherwise, they paid the rate of 68 cents on the same goods over the same line between the same points.

The carrier was notified that this practice was in violation of the Commission's ruling that, except in special cases, the through rate must not exceed the sum of the locals. An enforcement of this rule would have compelled the carrier to reduce the through rate (68) to the sum of the locals (55), and so, in less proportion, as to all other class rates involved in this case.

The company, however, met the situation by increasing the local, instead of reducing the through rate. For example, the rate on Class 3 from New Orleans to Mobile was raised from 25 to 38, so that, when added to the 30-cent rate from Mobile to Montgomery the Combination 68 equalled the existing through rate of 68 cents from New Orleans to Montgomery. Similar action was taken as to all other rates between New Orleans and Mobile and New Orleans and Pensacola and thence to Montgomery.

At the hearing the facts thus recited were established. The reports of the carrier, showing its earnings and expenses in detail, were in evidence. Its tariffs and those of other railroads were offered, as a basis for comparing the rates under attack with those charged by this and other companies for similar and longer distances. Numerous merchants from New Orleans testified that since the increase of August 13, 1907, they had been unable to sell in Mobile and Pensacola and that the through rate to Montgomery made it impossible to deal in that city. In its report the Commission found that the rates to Mobile, Pensacola and Montgomery from other and more distant points were actually or relatively higher than those for the shorter distance from New Orleans. That the ton-mile rate on the average of the first six classes was greater from New Orleans to Montgomery than from Memphis; that many departures had been made from the Cooley award; that the company's tariff contained a provision that the through rates should not exceed the sum of the locals; that while increasing the local on eastbound freight from New Orleans to Mobile and Pensacola no corresponding increase had been made on the westbound freight from those points to New Orleans; that the old low local out of New Orleans had been so long in force as to create a presumption that it was reasonable and compensatory. It concluded by entering an order adjudging that the rates in the tariff filed August 13, 1907, were unreasonable and

directing the carrier to restore the old class rates (local) from New Orleans to Mobile and to Pensacola and to make a corresponding reduction in the through rates from New Orleans to Montgomery, Selma and Prattville.

This order was attacked generally and specially by a bill, which, at length and in minute detail, assailed each specific fact stated in the report on the ground, either that the fact found was without evidence to support it, or that it was irrelevant to the issue involved and furnished no basis whatever for the order which followed.

The Commerce Court rendered a lengthy and elaborate opinion in which it reviewed all of the matters referred to in the Commission's Report and held that the findings were irrelevant, or without evidence to support them, or contrary to the uncontradicted testimony; that the fact that rates from more distant points to Montgomery, Pensacola and Mobile were actually or relatively lower than from New Orleans to the same points, furnished no basis for the order, unless it was shown that the conditions were similar while it affirmatively appeared that these lower rates were compelled by water competition; that no conclusion could be drawn from the fact that such rates to Montgomery from other points were lower on the ton-mile basis, in view of the universal rule that the longer the haul the lower the rate. That the departures from the Cooley award related only to commodity rates, which were not involved in this hearing, and that the complaints of the merchants as to inability to sell in Mobile, Pensacola and Montgomery were referable only to Commodity rates and not to Class rates. It found that no legal inference could be drawn from the fact that the low locals had been maintained on westbound shipments after the carrier, on August 13, 1907, raised the locals on eastbound shipments from New Orleans to Mobile and Pensacola, inasmuch as there is no legal objection to having lower rates in one direction than in another. It found that the sole ground

for making the order was the fact that the carrier had raised rates after they had been in force for more than twenty years; although the presumption of reasonableness disappeared in view of the uncontradicted testimony that the old rates had been compelled by water competition.

6. It is unnecessary in this case to review each of the matters discussed, ruled and found by the Commission in its Report and only the more salient facts will be mentioned. For the validity of the order does not necessarily depend upon the correctness of each of these findings, so that the breaking of one or many links by disproof would destroy the chain upon which the order depended. These findings are collateral and if correct might be confirmatory of the ruling, which, however, might still be sustained if some of these statements were eliminated. The question is whether there was substantial evidence to support the order.

7. The pleadings charged that the new rates were unjust in themselves and by comparison with others. This was denied by the carrier. The Commission considered evidence and made findings relating to rates which the carrier insists had been compelled by competition, and were not a proper standard by which to measure those here involved. The value of such evidence necessarily varies according to circumstances, but the weight to be given it is peculiarly for the body experienced in such matters and familiar with the complexities, intricacies and history of rate-making in each section of the country. So, too, the fact that a Commodity rate is low may cast some light on the reasonableness of the higher rate on the Class, from which that Commodity was taken or to which it might legally be restored.

It is true that the old low locals, Mobile (west) to New Orleans were maintained, while those from New Orleans (east) to Mobile were raised is not conclusive against the reasonableness of new tariff put in force in 1907. But it

was a fact tending to support the conclusion unless the difference was shown to have been warranted by proper rate-making rules. Of the sufficiency of the explanation, including the extent of the difference in empty car movement, the Commission was authorized to judge. It also had before it the company's financial statement and general tariff sheets. Against which was the testimony for the carrier, tending to prove that the rate to New Orleans was low in fact, and by comparison with those in force over other parts of the carrier's system, and on other lines in the same territory, even though this particular part of the road ran through a sparsely settled country, with expensive trestles and bridges, frequently damaged by storms from the Gulf and expensive to maintain.

8. But these facts did not stand alone. It appeared that for many years prior to 1907 the carrier had maintained low locals from New Orleans to Mobile and Pensacola. When first put in force they were abnormally low because compelled by water competition, and therefore furnish no just standard of reasonableness. And if when that competition disappeared the rates had been advanced, no inference adverse to the railroad could have been drawn from the increase. *Int. Com. Comm.* v. *Chicago G. W. Ry.*, 209 U. S. 108. The answer of the Railroad Company admits that this water competition had ceased to exist. The date is not definitely stated, but it is fairly inferable that the water competition was not potential for some years before the increase in rates in 1907. When made, the increase was not because of the absence of water competition, but to make the sum of the locals correspond with the through rates. Under the circumstances the maintenance of these low rates, after the water competition disappeared, tends to support the theory that by an increase of business or other cause they had become reasonable and compensatory.

9. From the appellee's standpoint, probably a principal

objection to the order complained of, is that it will upset the Cooley award, under which rates have been adjusted throughout a large section. But that, too, was a matter for consideration by the Commission which by this order has not lost power to restore the old rates, or to make changes in the new if it shall be found that those put in force, unjustly discriminate in favor of New Orleans against other cities.

The order of the Commission, restoring a local rate that had been in force for many years, and making a corresponding reduction in the through rate, was not arbitrary but sustained by substantial, though conflicting evidence. The courts cannot settle the conflict nor put their judgment against that of the rate-making body, and the decree is

Reversed.

GUARDIAN ASSURANCE COMPANY OF LONDON *v.* QUINTANA.

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

No. 280. Argued January 6, 7, 1913.—Decided January 27, 1913.

Ordinarily the granting or refusing of a continuance is within the discretion of the trial court and will only be interfered with by this court in a clear case of abuse; but in this case the assertion of error based upon the refusal to continue has some foundation, and is not merely frivolous, so the motion to affirm is denied.

Section 953, Rev. Stat., confers authority on, and makes it the duty of, a judge of the Federal court to settle controversies concerning the bill of exceptions in a case tried before his successor who is, by reason of death or disability, unable to do so; and this applies to the judge of the District Court of the United States for Porto Rico.

While it is the duty of plaintiff in error to obtain the approval of the bill of exceptions by the judge who tried the case, or, in case of his

death or disability, by his successor, there are circumstances under which delay will be excused; and a motion to dismiss under Rule 9 for failure to file the bill denied, so as to give the plaintiff in error reasonable opportunity to have the bill settled.

In this case, the trial judge having died and neither party having moved for a settlement of the bill by his successor, and there having heretofore been room for doubt as to whether § 953, Rev. Stat., governs this case, the motion to dismiss is denied, but without prejudice to renew if plaintiff in error does not within a reasonable time seek a settlement of the bill.

Where a transcript of record has been filed for purposes of a motion to dismiss for want of bill of exceptions, which is denied without prejudice, the bill when settled, or the reasons for failure to obtain its settlement, can be included in a supplementary transcript.

THE facts are stated in the opinion.

Mr. C. L. Bouvé with whom *Mr. Hector H. Scoville* was on the brief, for defendant in error, in support of motion to dismiss or affirm.

Mr. Frederic D. McKenney, with whom *Mr. J. Spalding Flannery* and *Mr. William Hitz* were on the brief, for plaintiff in error, in opposition thereto.

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

In 1911 defendant in error moved under Rule 9 to docket and dismiss the writ of error for failure to file the record. Plaintiff in error opposed because a bill of exceptions was yet unsettled in the hands of the court below, and the motion was, on April 3, 1911, denied "without prejudice to a renewal of same if case is not docketed within a reasonable time after the bill of exceptions is settled." Shortly thereafter, on May 3, 1911, there was filed as a transcript a paper containing the pleadings and certain journal entries and other documents purporting

to relate to proceedings had in the cause in the court below and to certain steps stated to have been taken concerning a bill of exceptions, there being, however, no such bill in the record. Putting out of view the statements made exhibiting the facts and circumstances which gave rise to the reserving of an exception and the preparation of a bill of exceptions and the effort to settle the same, and looking only at the pleadings and journal entries properly embraced in the record, the following is shown:

The suit, on November 29, 1910, was tried, resulting in a failure of the jury to agree. On December 2, 1910, the case was set for re-trial at 10 A. M. on the following day. When the case was called for trial defendant asked a postponement "on account of the short time at his disposal to prepare the defense in the case." On this request being denied an exception was taken and the counsel for the defendant withdrew. After the introduction of evidence for the plaintiff the jury, as instructed by the court, returned a verdict for the plaintiff, upon which judgment was entered. It is to this judgment that the writ of error is directed, it having been allowed by the trial judge shortly after the trial, a supersedeas bond having been also approved about the same time. The assignment of errors was based solely on error asserted to have been committed in refusing the request to continue the case. It appears also from the record that a bill of exceptions was tendered to the court for approval, which bill presumably contained a statement of the facts connected with the refusal of the continuance which were relied upon to sustain the assignment of error made on that subject.

The matter is again before us on a motion to dismiss because there is nothing within our jurisdiction to review, as there is no bill of exceptions, or to affirm, because of the wholly frivolous and unsubstantial character of the ground of error relied upon, that is, the failure of the court below to grant a continuance.

It is obvious that these propositions, inherently considered, rest upon an identical foundation (*Deming* v. *Carlisle Packing Company*, 226 U. S. 102), and we come to dispose of them in that aspect, considering first the more far-reaching of the two, that is, the asserted frivolous character of the error relied upon. We must of course approach the subject upon the assumption that it is urged upon the hypothesis that the record is in such a state as to justify us in disposing of the matter. This assumption must be indulged because if it is not there would be no way of testing the merits of the contention and it would consequently resolve itself into a mere change in the form of stating the proposition that because there was no bill of exceptions there was nothing for consideration. Coming to test the question of the frivolity of the error relied upon in the light of the assumption just stated, we deem it necessary merely to outline the facts which it is insisted would have been disclosed had a bill of exceptions been settled, as follows: After the failure of the jury to agree, in reliance upon what was asserted to be a practice which had prevailed from the organization of the court, where there had been a disagreement of the jury, to carry a case over for trial before another venire at the following term, the witnesses for the defendant were discharged and allowed to depart for their homes; and on the assigning of the case for a re-trial the request for continuance was based on the physical impossibility of bringing the witnesses back in time to be heard, and to enable that purpose to be accomplished a continuance of five days was prayed and refused. Under this assumed state of facts we content ourselves with saying that there is no room for holding that the assertion of error based upon the refusal to continue was so devoid of foundation as to be merely frivolous in character. We say this because while the elementary rule is that the granting or refusing of a continuance is within the discretion of a trial court, a discre-

tion which will not be lightly interfered with, it is equally elementary that where it is manifest that there has been a plain abuse of discretion the duty to correct arises.

This brings us to the motion to dismiss, and its determination depends on the facts concerning the alleged bill of exceptions and whether there has been such laches on that subject as to require a dismissal.

The mistrial, the assignment for a re-trial, the application for a continuance and its refusal and the reserving of an exception, the verdict and judgment and the allowance of the writ of error and the tendering of a bill of exceptions on the subject for settlement as shown by the record have already been stated in detail and we need not repeat those statements. Certain is it that the bill remained unsettled in the hands of the court when the previous order of this court declining to dismiss for want of filing of the record was entered. Indeed, it is shown by the record that on the fourth of April, 1911, the day after the previous application to dismiss because of the want of a bill of exceptions was by this court denied, the court below entered the following order:

"In view of the illness of the Judge of this Court it is hereby ordered that the allowance and approval of the Bill of Exceptions in the above entitled cause, heretofore under consideration, is hereby continued over to the approaching April term of this Court."

It is conceded by counsel for both parties that Judge Jenkins, who thus continued the hearing of the controversy, never further acted upon the matter, because shortly after he left Porto Rico for the United States, where he remained until his death in the following June. It is likewise conceded that the successor in office to Judge Jenkins—Judge Charlton—was appointed and held the court from August 14, 1911, until October 7, 1911, and a further term from October 9, 1911, until April 13, 1912. There is also a certificate of the clerk contained

in the motion papers to the effect that no steps were taken by anyone to procure action by Judge Charlton looking to the settlement of the bill of exceptions. And it is the neglect during the time stated to press for a settlement of the bill of exceptions by Judge Charlton which forms the basis of the laches which it is insisted requires a dismissal of the writ of error. While insisting on laches, it is admitted (citing *Hume* v. *Bowie*, 148 U. S. 245, 253) that if there was no legal possibility of having the bill of exceptions settled and the right thereto was lost without any fault on the part of the plaintiff in error, the duty would obtain to grant a new trial.

Passing the consideration of whether the provisions of § 219 of the Code of Civil Procedure of Porto Rico, copied in the margin,[1] are applicable to the District Court of the United States for Porto Rico (see *Chateaugay Iron Co., Petitioner*, 128 U. S. 544), and whether, if applicable, the adoption of rules on the subject was essential to give it full efficacy, we are of opinion that § 953 of the Revised Statutes, also copied in the margin,[2] conferred authority

[1] A judge or judicial officer may settle and sign a bill of exceptions after as well as before he ceases to be such judge or judicial officer. If such judge or judicial officer, before the bill of exceptions is settled, dies, is removed from office, becomes disqualified, is absent from said island, or refuses to settle the bill of exceptions, or if no mode is provided by law for the settlement of the same, it shall be settled and certified in such manner as the Supreme Court may by its orders or rules direct. Judges, judicial officers, and the Supreme Court shall respectively possess the same power, in settling and certifying statements, as is by this section conferred upon them in settling and certifying bills of exceptions.

[2] That a bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof if more than one judge sat on the trial of the cause, without any seal of the court or judge annexed thereto. And in case the judge before whom the cause has heretofore been or may hereafter be tried is, by reason of death, sickness, or other disability, unable to hear and pass upon the motion

and made it the duty, if possible, of any judge of the court below, successor in office to Judge Jenkins, to consider and settle the controversy concerning the bill of exceptions. Although of this opinion, we do not think our duty exacts under the circumstances of this case that we dismiss for the want of a bill of exceptions. On the contrary we are of opinion that our duty is to afford an opportunity to the parties to avail of the provisions of Rev. Stat., § 953, so that the record may be completed, to the end that the merits of the writ of error may be disposed of. Briefly stated, we reach this conclusion for the following reasons: 1, because we think there is no just ground for treating our previous order as an affirmative direction to seek the settlement of the bill of exceptions from the successor in office of Judge Jenkins, because at the time that order was entered Judge Jenkins was discharging his duties, and in fact the order, continuing over the term the settlement of the bill of exceptions, was made by him, while the previous motion to dismiss was here under consideration; 2, because there was some reason for considering that the provision of the Porto Rican Code to which we have referred did not apply to proceedings in the court below, and there was also some

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for a new trial and allow and sign said bill of exceptions, then the judge who succeeds said trial judge, or any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in such cause has been or is taken in stenographic notes, or if the said judge is satisfied by any other means that he can pass upon such motion and allow a true bill of exceptions, shall pass upon said motion and allow and sign such bill of exceptions; and his ruling upon such motion and allowance and signing of such bill of exceptions shall be as valid as if such ruling and allowance and signing of such bill of exceptions had been made by the judge before whom such cause was tried; but in case said judge is satisfied that owing to the fact that he did not preside at the trial, or for any other cause, that he cannot fairly pass upon said motion, and allow and sign said bill of exceptions, then he may in his discretion grant a new trial to the party moving therefor.

room for reasonable doubt as to whether the provisions of Rev. Stat., § 953, governed the matter in hand, thereby rebutting the inference that the mere failure to apply to the successor of Judge Jenkins for a settlement of the bill of exceptions was either a waiver of the writ of error or an election to stand upon the imperfect record as filed in this court without reference to the settlement of the bill of exceptions; 3, because the delay in the settling of the bill of exceptions obviously, in part at least, arose from the objection of defendant in error, plaintiff below, who equally with plaintiff in error took no steps after the order of this court overruling the prior motion to dismiss and the death of Judge Jenkins, to have the bill settled by his successor; 4, because the failure of the court to instruct a verdict on the first trial and the disagreement of the jury all serve to indicate that the defense may not have been wholly devoid of merit; and, 5, because if the facts stated extraneous to the record concerning the bill of exceptions, which we have noticed for the purpose of the motion to affirm, be taken as true, it might result that a dismissal for want of a settlement of the bill of exceptions would occasion injustice, amounting to a possible condemnation without a reasonable opportunity to be heard. Indeed, the admonition which arises from this last consideration is cogently reënforced when the subject-matter to which the bill of exceptions related, the mere refusal to grant a continuance, is taken into view, and the long delay and presumed hesitancy which followed in settling the bill of exceptions are borne in mind.

We shall, therefore, refuse the motion both to dismiss and affirm, without prejudice, however, to the right to renew the same unless plaintiff in error within a reasonable time applies to and diligently seeks the settlement of the bill of exceptions at the hands of the successor in office of Judge Jenkins or any judge empowered by assignment

or otherwise to discharge the duties of a judge of the court below.[1] And we further direct that the bill of exceptions when settled shall be promptly included in a supplementary transcript of record, or the reasons for a failure to settle the bill, if the judge below finds it impossible to do so, be certified to this court.

Motion to dismiss or affirm denied without prejudice.

DE BARY & COMPANY *v.* STATE OF LOUISIANA.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 696. Motion to affirm submitted January 10, 1913.—Decided January 27, 1913.

Under the Wilson Act of August 8, 1890, 26 Stat. 313, a State may impose a license for regulating the sale of liquor in original packages brought from foreign countries, as well as that brought from other States.

Where a statute refers to "all" liquors transported into a State or Territory the point of origin is immaterial and the law applies to liquors alike from other States and from foreign countries.

The intent of Congress in enacting the Wilson Act was to give the several States power to deal with all liquors coming from outside to within their respective limits, and this purpose would be defeated if the act were construed so as not to include liquors from foreign countries as well as from other States.

An act of Congress, such as the Wilson Act, will not be so construed as to confer upon foreign producers of an article a right specifically denied to domestic producers of that article.

130 Louisiana, 1090, affirmed.

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[1] See the act of Congress approved January 7, 1913, entitled "An act to provide for holding the District Court of the United States for Porto Rico during the absence from the island of the United States district judge and for the trial of cases in the event of the disqualification of or inability to act by the said judge."

THE facts, which involve the construction of the Wilson Act, are stated in the opinion.

Mr. J. D. Rouse, Mr. William Grant and *Mr. William B. Grant* for plaintiff in error.

Mr. R. G. Pleasant, Attorney General of the State of Louisiana, *Mr. William W. Westerfield* and *Mr. Edward Rightor* for defendant in error.

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

De Bary & Company seek the reversal of a judgment for the amount of a license tax (Act No 176 of 1908, Session Acts of that year, p. 236) for engaging "in the business of disposing of alcoholic liquors in less quantities than five gallons." It was conceded below that the business for which the license was exacted consisted only in the sale in the original packages of foreign wine or liquor, some of which was imported through the port of New York and some through the port of New Orleans, a portion of that which was brought into the port of New York having been there stored and subsequently shipped to New Orleans. The court below held, *first*, that imposing the license was an exertion by the State not only of its revenue powers, but of its police authority brought into play for the purpose of regulating the sale of liquor. In consequence of the provisions of the act of Congress known as the Wilson Act, August 8, 1890, 26 Stat. 313, chap. 728, and the decisions of this court interpreting and applying the same, it was therefore held that the sale of imported liquor in the original packages was subject to state regulation and hence the license was valid; *second*, that even if the Wilson Act did not concern liquor imported from a foreign country, nevertheless the license was valid be-

cause some of the liquor sold had been shipped to Louisiana from the State of New York after its importation from a foreign country.

Without considering the second proposition, we think the construction given to the Wilson Act, upon which the first proposition rests, was so obviously the result of the text of that act as interpreted by the decisions of this court as to leave no room for controversy. *Pabst Brewing Company* v. *Crenshaw*, 198 U. S. 17; *American Express Company* v. *Iowa*, 196 U. S. 133; *Vance* v. *Vandercook Co., No. 1*, 170 U. S. 438; *Rhodes* v. *Iowa*, 170 U. S. 412; *In re Rahrer*, 140 U. S. 545. It is true that the controversies which were passed upon in the cited cases concerned not liquors imported into the United States from foreign countries, but only liquors which had been brought in from one State to another. But this fact cannot be held to distinguish this case from the previous decisions without giving effect to a distinction without a difference. To hold that liquors brought into a State from a foreign country do not become subject to the state police power until sold in the original packages would certainly conflict with the command of the statute that "all" liquors "transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory" be subject "to the operation and effect of the laws of such State or Territory as though such liquors or liquids had been produced in such State or Territory and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." The word "all" causes a consideration of the point of origin of the liquors transported to be wholly negligible, and this irresistible conclusion as to the meaning of the text is rendered if possible clearer by a consideration of the intent of Congress in enacting the Wilson Law. In reason it is certain that the purpose which led to the enactment of the law was to give the several

States power to deal with all liquors coming from outside their limits upon arrival and before sale, thus rendering the state police authority more complete and efficacious on the subject; a purpose which would be plainly set at naught by exempting liquors brought into a State from a foreign country from the operation of the statute. Indeed to adopt the construction urged would not only give rise to the contradictions which the analysis of the contentions thus make plain, but would compel us to say that Congress intended by the Wilson Law to confer upon foreign producers of liquor a right which was specifically denied to liquor of domestic production.

Affirmed.

TEXAS & NEW ORLEANS RAILROAD COMPANY *v.* SABINE TRAM COMPANY.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 93. Argued December 17, 18, 1912.—Decided January 27, 1913.

Shipments of lumber on local bills of lading from one point in a State to another point in the same State destined from the beginning for export, under the circumstances of this case, are foreign and not intrastate commerce. *Southern Pacific Terminal* v. *Interstate Commerce Commission*, 219 U. S. 498; *Ohio Railroad Commission* v. *Worthington*, 225 U. S. 101, followed. *Gulf, Colorado & Santa Fe Ry.* v. *Texas*, 204 U. S. 403, distinguished.

Merchandise destined for export acquires the character of foreign commerce as soon as actually started for its destination or delivered to a carrier for transportation, *Coe* v. *Errol*, 116 U. S. 517, and while the transportation should be continuous it need not be by or through the initial carrier.

It is the nature of the traffic and not its accidents which determines whether it is intrastate or foreign.

Lumber ordered, manufactured and shipped for export, through a port where there is no local trade, held in this case to be foreign and not intrastate commerce although shipped on local bills of lading from a point in Texas to Sabine, Texas, and there shipped to its final destination by a vessel not designated before arrival and after waiting full time allowed on the wharves before shipment.

A continuous line of shipments through the same port to foreign ports, of merchandise in which there is no local trade, shows a continuity of transportation in which the delay and transshipment does not make any break that deprives it of its foreign character. *Swift & Co.* v. *United States*, 196 U. S. 375.

In this case *held* that shipments of lumber although on local bills were foreign commerce and subject only to the rates established by the railroads and filed with the Interstate Commerce Commission and that the railroad company was not subject to penalties for extortion for non-compliance with a rate established by the state law.

THE question in the case is whether shipments of lumber on local bills of lading from one point in Texas to another point in Texas, destined for export under the circumstances presently to be detailed, were intrastate or foreign commerce.

The action was brought by defendant in error, here called the Sabine Company, against the railroad companies (we shall so designate them unless it be necessary to distinguish them) to recover the sum of $1,788.33 alleged to be due for overcharges in freight on thirty-three cars of lumber shipped by the Sabine Company from Ruliff, in the State of Texas, to Sabine, in the same State, the shipments moving from the initial point to Beaumont over one of the roads and from Beaumont to Sabine over the other. It was alleged that the legal rate applicable to the shipments under the orders of the Railroad Commission of Texas was 6½ cents per hundred pounds and that the railroad companies collected, over the protest of the Sabine Company, 15 cents per hundred pounds under tariffs filed with the Interstate Commerce Commission, amounting to an illegal charge of 8½ cents per hundred

pounds. Recovery was also prayed for penalties for extortion under the laws of the State in the sum of $16,500.00, the maximum penalty of $500.00 per car load, upon the assumption that each car was a separate act of extortion, or the sum of $13,000.00 if shipment on different days should be adjudged to be separate acts.

The railroad companies defended on the ground that the shipments were foreign commerce and subject to a charge of 15 cents per hundred pounds and that such rate had been established by them and regularly filed with the Interstate Commerce Commission in accordance with the Act to Regulate Commerce.

The trial court charged against the defense and also that the freight charges collected having been paid in five separate payments, there were five distinct acts of extortion for which the Sabine Company was entitled to recover penalties in the sum of not less than $625.00 nor more than $2,500.00; that is, not less than $125.00 nor more than $500.00 for each act.

The jury returned a verdict for $1,788.33 as overcharges, with interest at 6% per annum from January 1, 1907, and $1,785.00 penalties. Judgment was entered on the verdict. A motion for a new trial was denied, and the case was then taken to the Court of Civil Appeals. There was a cross assignment of errors by the Sabine Company, complaining of the ruling of the trial court in finding that the company was only entitled to five penalties. It consented that if the assignment of errors be sustained the court could render judgment for the lowest penalty, $125.00. The court sustained the assignment and modified the judgment of the trial court and rendered judgment for penalties in the sum of $125.00 for twenty-four shipments, aggregating $3,000.00. A writ of error to review the judgment of the Court of Civil Appeals was denied and the judgment thereby becoming final, this writ of error was prosecuted.

The facts were found by the Court of Civil Appeals and are not in dispute:

"At the date of the transactions in question the Sabine Tram Company was engaged in the manufacture of lumber at its mill at Ruliff, a station in Texas on the line of the Texarkana & Fort Smith Railway Company. W. A. Powell Company, Limited, was engaged in buying lumber for export to different points in Europe, through the ports of Sabine and Port Arthur, both in the State of Texas. On August 28, 1906, having made sales to customers for future delivery in Europe of large amounts of heavy pine lumber, for the carriage of which steamships had in part already been chartered, to fill such contracts, W. A. Powell Co. bought of the Sabine Tram Company 500,000 feet of heavy pine lumber of certain dimensions, to be delivered during the months of September and October. The contract provided for delivery either in the water at Orange, Texas, or f. o. b. cars at Sabine, Texas, at the option of the seller. The seller exercised the option to deliver at Sabine, a station on the line of the Texas & New Orleans Railway. During the months of September and October the lumber purchased was delivered to the Texarkana & Fort Smith Railroad at Ruliff to be by it transported to Beaumont, the terminus of its line, and thence by connecting carrier, the Texas & New Orleans Railway, to Sabine and delivery to the Sabine Tram Company. There were 24 several shipments of the lumber on as many different days, the shipments embracing 33 cars, for which 30 separate bills of lading were executed by the Texarkana & Fort Smith road, for delivery at Sabine to the Sabine Tram Company, 'Notify W. A. Powell Company, Limited.' No other contract or arrangement was made by the Sabine Tram Company for the carriage of the lumber except that evidenced by the bills of lading aforesaid. Way-bills accompanied the shipments upon which were marked in pencil 'for export,'

but the Sabine Tram Company had no connection with, or knowledge of, the making of these way-bills, which was the act of the railway company alone. According to the course of dealing between the parties these bills of lading were endorsed by the Tram Company and sent through a bank to W. A. Powell Company, Limited, at New Orleans, La., attached to a draft for the price of the lumber, which being paid, the bills were delivered to Powell Company and by them transmitted to their agent Flanagan, at Sabine. In case of most of the shipments in question the bills of lading reached Flanagan at Sabine before the arrival of the lumber for which they were given. The lumber was carried under the shipping contracts or bills of lading aforesaid, by the Texarkana & Fort Smith road to Beaumont, and there delivered to the Texas and New Orleans road, by which it was carried to Sabine. Upon arrival at the station of Sabine it was, by direction of the agent of Powell Company carried without delay about a quarter of a mile beyond the station to the dock, where the lumber was to be unloaded. The lumber was unloaded from the cars into water of the slip in reach of ship's tackle, ready for loading onto ships. The Sabine Tram Company had no connection with this further carriage or switching of the lumber to the docks after its arrival at the station of Sabine, but this was done solely at the instance and under the direction of the agent of Powell Company. The transportation from Ruliff to Sabine was entirely within the State of Texas.

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"When the lumber had been switched to the docks, W. A. Powell Company, through their agent, presented the bills of lading, and demanded the lumber, offering to pay the freight charges which according to the course of dealing between the parties they were to pay for the Sabine Tram Company, who owed the same and which

it was to repay to Powell Company. The Texas & New Orleans Company, acting for itself and the Texarkana & Fort Smith Company, demanded the interstate Commission rate of fifteen cents per hundred pounds, having been previously instructed by the Texarkana & Fort Smith Company that ten cents per hundred pounds was its rate from Ruliff to Beaumont. This Powell Company, under instructions of the Sabine Tram Company, at first refused to pay, but after communicating with the Tram Company, finally paid the freight at this rate under protest, in order to get possession of the lumber.

"For switching from Sabine to the docks, the rules and orders of the Texas Railroad Commission would allow a switching charge of $1.50 per car on domestic shipments, and if foreign or interstate shipments, the Interstate Commerce Commission tariffs would allow a switching charge of $2.50 per car, had not the charge for this service been absorbed in the 15 cent rate established as aforesaid.

"Upon shipments of freight not for export, only 48 hours free time was allowed for unloading cars, after which demurrage was charged, and if not removed from railroad premises when unloaded, a storage charge was made in addition. No such charge was made upon any of the lumber involved in this suit.

"W. A. Powell Company, Limited, regarded the shipments in controversy as export shipments, and demanded, expected, and received, the use of terminal facilities, additional free time and other privileges accorded to shippers of export freight under export tariffs.

"The railway company knew, when the freight charges were collected, that the lumber was to be placed in its slips and exported to Europe on incoming ships and the freight was believed by the officers and agents of the railroad company at the time the charges were collected to constitute foreign commerce and to both permit and require the application of the rate fixed by the tariff on file

with the Interstate Commerce Commission, and this rate was applied.

"All the lumber in question was in fact unloaded from the cars by W. A. Powell Company, Limited, into the Texas & New Orleans Railroad Company's slips, or upon its docks, in reach of ships' tackle and loaded into the ships previously chartered for the purpose by W. A. Powell Company, Limited, which steamships carried same thence direct to Europe, where this lumber was applied upon contracts for sale in Europe made before the lumber began to leave Ruliff, and made in fact before the lumber was purchased from the Sabine Tram Company, and before it was sawed, and before the logs from which it was sawed left the State of Louisiana for the Sabine Tram Company's mill at Ruliff, in the State of Texas. One of the ships actually waited at the docks at Sabine for the arrival of part of this lumber which constituted a portion of its cargo.

"The ship which carried the last of this lumber from Sabine to Europe was chartered by W. A. Powell Company, Limited, for this purpose after these lumber shipments began to arrive at Sabine, but before all of the shipments had left Ruliff.

"None of this lumber remained in the slip at Sabine, or on the docks, except for the time necessary to await the arrival of the particular ship which had previously been chartered for the purpose and designated by W. A. Powell Company as the ship which was to carry that particular lumber from the port of Sabine to Europe.

"Any shipment of lumber intended for export to Europe, and in fact shipped from any point in Texas, to and through Sabine as its port of transshipment, could be contracted for, billed to and from Sabine, shipped, transported and handled in every particular just as was this lumber.

"W. A. Powell Company, Limited, before this lumber began to arrive at Sabine, took out a blanket policy of in-

surance, protecting same against loss, from the time this lumber should come into the possession of W. A. Powell Company, Limited, at Sabine until its final delivery by W. A. Powell Company, Limited, in European ports.

"At the time this lumber was shipped it was destined by Powell Company for export to some foreign port, but the particular destination of any particular portion of the lumber was not fixed, although the destination of all of the lumber to certain foreign ports was known and fixed. The Sabine Tram Company had no concern with the destination of the lumber after it came into the hands of Powell Company, and had no particular knowledge thereof. It supposed from the fact that it was known that Powell Company were exporters of lumber, from the character of lumber which was such as was intended for export, from the fact that Sabine was an important place at which very little lumber was used, and from other facts and circumstances, known to millmen generally, that the lumber was intended for export, but gave that matter no concern, being only concerned with the delivery of the lumber to Powell Company at Sabine station, and paying the freight thereon. What was done by the Texas & New Orleans Railroad Company after the arrival of the lumber at Sabine, in the way of switching to the docks, allowance of certain privileges allowed only to export freight, was done at the instance and for the benefit of Powell Company, with which the Tram Company had no concern.

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"Upon the freight bills was a charge for wharfage against the Tram Company which was paid by Powell Company as a proper charge against them and not against the Tram Company. Export freight was entitled to seven days' free time for unloading, and 30 days' free storage on the docks, or in the slips, which privileges were availed of by Powell Company in handling this lumber.

"The freight bills were made out against the Sabine Tram Company and defendants knew that Powell Company were paying the freight for the Tram Company.

"The defendants, in charging the export rate, acted under the advice of their attorneys, that the facts constituted the lumber an export shipment and subjected it to the Interstate Commerce Commission rate."

On motion the court modified its findings as follows:

"Powell & Company purchased lumber from other mills in Texas, with which to supply its said sales in part; it did not know when any particular car or stick of lumber left Ruliff, into which ship or to what particular destination it would ultimately go, or on which sale it would be applied; this not being found out until its agent, Flanagan, inspected the invoice mailed to, and received by, him after shipment. Upon inspection of the invoice, he determined from the character of the lumber described whether it was suited for one cargo or the other. The lumber remained, after arrival, in the slips or on the dock from one to thirty days until a ship chartered by Powell & Company arrived, when that company selected out the lumber suited for that cargo, and shipped it forward to the destination for which Powell & Company intended it.

"We withdraw our finding that the rules and orders of the Texas Railroad Commission would allow a switching charge of $1.50 per car on domestic shipments. The only testimony we can find on this point is that of witness Beard, General Freight Agent of the Texas & New Orleans Railroad Company, that 'the Texas rate for switching these cars would have been $1.50 per car, that is, if Powell Company owned the docks; if it was shipped to the warehouse owned by consignees or his place of business.' This testimony does not authorize the general finding on this point made by us.

"The freight rate due under the tariff on file with the Interstate Commerce Commission and collected on these

shipments was 15 cents per hundred pounds and under this rate, the services rendered without other charge included switching from Sabine station to the docks, seven days' free time exclusive of Sundays within which to unload the lumber from the car and thirty days' free storage of the lumber upon the docks at the wharves or in the slips belonging to the Texas & New Orleans Railroad Company. W. A. Powell & Company, Ltd., availed itself of all these services and privileges which were stipulated for by the Interstate Commerce Commission tariff and included in the 15 cent rate charged on export freight.

"There is not now and was not at the time these shipments moved, any local market for lumber at Sabine, the population of which place does not exceed fifty in number. Appellees have never done any local business at that point. For the year 1905 there was exported through the port of Sabine 14,667,670 feet of lumber; for the year 1906, 39,554,000 feet. The shipments in controversy, together with other shipments of lumber to Sabine and Sabine Pass, constitute a large and constantly recurring course of foreign commerce passing out through the port of Sabine."

Mr. Hiram Glass and *Mr. H. M. Garwood*, with whom *Mr. Maxwell Evarts* and *Mr. S. W. Moore* were on the brief, for plaintiffs in error:

The shipments in question constituted foreign commerce to which the rates prescribed by the Railroad Commission of Texas did not apply. *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Baer Bros. Mer. Co.* v. *Mo. Pac. R. Co.*, 13 I. C. C. Rep. 329; *Coe* v. *Errol*, 116 U. S. 517; *Cosmopolitan Shipping Co.* v. *Hamburg Am. P. Co.*, 13 I. C. C. Rep. 266; *Cotton Rate Advances*, 23 I. C. C. Rep. 404; *Cutting* v. *Navigation Co.*, 46 Fed. Rep. 641; *Denver &c. R. Co.* v. *Int. Com. Comm.*, 195 Fed. Rep. 968; *G., C. & S. F. Ry. Co.* v. *Fort Grain Co.*, 72 S. W. Rep. 419;

S. C., 73 S. W. Rep. 845; *G. W. T. & P. Ry. Co.* v. *Barry*, 45 S. W. Rep. 814; *General Oil Co.* v. *Crain*, 209 U. S. 211; *Houston Nav. Co.* v. *Ins. Co.*, 89 Texas, 1; *La. R. R. Comm.* v. *St. L. S. W. R. Co.*, 23 I. C. C. Rep. 31; *La. R. R. Comm.* v. *T. & P. Ry. Co.*, 144 Fed. Rep. 68; *S. C.*, 184 Fed. Rep. 989; *Ohio R. R. Comm.* v. *Worthington*, 225 U. S. 101; *S. C.*, 187 Fed. Rep. 965; *Re Transportation of Sugar*, 22 I. C. C. Rep. 558; *Shepard* v. *No. Pac. R. Co.*, 184 Fed. Rep. 765; *Southern Pac. Terminal Co.* v. *Int. Com. Comm.*, 219 U. S. 498; *State* v. *G., C. & S. F. R. Co.*, 44 S. W. Rep. 542; *State* v. *I. & G. N. R. Co.*, 71 S. W. Rep. 994; *State* v. *Sou. Kansas R. Co.*, 49 S. W. Rep. 252; *Swift & Co.* v. *United States*, 196 U. S. 375; *T. & N. O. R. Co.* v. *Sabine Tram Co.*, 121 S. W. Rep. 256; *T. & P. Ry. Co.* v. *La. R. R. Comm. of La.*, 183 Fed. Rep. 1005; *The Daniel Ball*, 10 Wall 557; *Wood-Hagenbarth Cattle Co.* v. *G. H. & S. A. Ry. Co.*, 146 S. W. Rep. 538.

G., C. & S. F. Ry. Co. v. *Texas*, 97 Texas, 274; *S. C.*, aff'd, 204 U. S. 403, distinguished.

Mr. George C. Greer for defendant in error:

The shipments were intrastate, and therefore the local state rate applied; and the plaintiffs in error became liable to pay the penalties and suffer the consequences that the Texas laws prescribed for charging a higher rate.

The shipments in question were not a part of foreign commerce for the following reasons:

The lumber shipped was by the only shipment contract, or arrangement provided, destined for Sabine, and no other point when it left Ruliff. Nor was this shipment arrangement changed while the lumber was in transit.

The lumber was not committed to a common carrier for its final and continuous voyage to a foreign point.

There was no known or fixed destination to a foreign point; or any destination beyond Sabine within contemplation of the shipment under discussion.

The parties to each of the shipping contracts in question not only did not contract for a continuous shipment to a foreign point, but on the contrary they did not even intend that, by and through the agency of that shipment, the freight should go beyond Sabine; nor did they then provide any means or arrangements for its movement beyond that point: that being left to an intervening third party by a subsequent act.

The lumber was delivered to Powell Company, as it was intended to be, at Sabine, and it took the intervention of a new and independent shipment arrangement, or contract, to move it beyond that point. *G., C. & S. F. Ry. Co.* v. *Texas*, 204 U. S. 403; *S. C.*, 97 Texas, 274; *Coe* v. *Erroll*, 116 U. S. 524; *Pa. R. R. Co.* v. *Knight*, 192 U. S. 27; *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 94; *Wabash Ry. Co.* v. *Illinois*, 118 U. S. 572; *Houston Direct Nav. Co.* v. *Insurance Co.*, 89 Texas, 6; *The Daniel Ball*, 10 Wall. 565.

After stating the facts as above, MR. JUSTICE MCKENNA delivered the opinion of the court.

If we may regard the essential character of the shipments we can have no hesitation in pronouncing them to have been in interstate commerce. This conclusion seems indeed to be determined by the last finding of fact. It is there declared that "the shipments in controversy, together with other shipments of lumber to Sabine and Sabine Pass, constitute a large and constantly recurring course of foreign commerce passing out through the port of Sabine."

If the shipments were foreign commerce it is hardly necessary to make explicit the principle that the national dominion over them was supreme; and, conversely, if the shipments were not of that character they were subject to the regulating power of the State.

The shipments having the character of foreign commerce when they passed "out through the port of Sabine," when did they acquire it? We have had occasion to express at what point of time a shipment of goods may be ascribed to interstate or foreign commerce and decided it to be when the goods have actually started for their destination in another State or to a foreign country, or delivered to a carrier for transportation. *Coe* v. *Errol,* 116 U. S. 517; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 498, 527.

The Sabine Company, while not denying this general test, urges a more special one as applicable to the case at bar. The company contends that the supreme test is, "Was the lumber when it left Ruliff actually launched on its journey to a point in Europe; that is to say, was it committed, by the contract or by any arrangement, between the shipper and the railroad company, or provided for by either, to a common carrier for transportation on its continuous final journey to a destination beyond Sabine, Texas?" Answering this question in the negative, it is contended that the contract of shipment did not contemplate, provide for, or even intend that the freight should go beyond Sabine "through the agency of that shipment." Nor, it is further contended, were there any means or arrangements for its movement beyond that point, that being left to an intervening third party and a subsequent act after it was delivered to Powell Company, as it was intended to be, at Sabine; and "it took the intervention of a new and independent shipment, arrangement, or contract, to move it beyond that point." Fortifying the contentions, it is said that the existence of the conditions expressed is made the test of foreign commerce by the Interstate Commerce Law, its first section reading: "That the provisions of this Act shall apply . . . to the transportation . . . of property shipped from one place in the United States to a foreign country and carried

from such place to a point of transshipment, or shipped from a port of entry either in the United States or any adjacent foreign country." Freight is never shipped, in the sense of the law, it is further contended, until it is launched upon its final continuous trip to a foreign country. These contentions would seem to be tantamount to saying that a local bill of lading determined the character of the commerce, but counsel especially exclude this conclusion. They admit "that there may be some additional or outside arrangement for a continuous final movement to a destination beyond that named in the bill of lading, or the bill of lading may itself note a forward continuous movement beyond the destination named." It appears, therefore, that continuity of movement is the chief insistence and test of the Sabine Company, not necessarily, it is explained, in point of time or free of delays, but "an unbroken movement, proceeding under the original arrangement, or shipment."

The elements of the contentions are somewhat difficult to estimate. So far as they depend upon the character of a bill of lading and that it had not provision for carriage beyond the local destination, they are answered by *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, and *Ohio Railroad Commission* v. *Worthington*, 225 U. S. 101. They are also answered by the following Texas cases: *State* v. *Southern Kan. Ry. Co.*, 49 S. W. Rep. 252; *State* v. *International & Gt. Nor. R. Co.*, 71 S. W. Rep. 994; *Gulf, C. & S. F. Ry. Co.* v. *Fort Grain Co.*, 72 S. W. Rep. 419; *Same* v. *Same*, 73 S. W. Rep. 845.

That there must be continuity of movement we may concede, and to a foreign destination intended at the time of the shipment. Indeed, all of the elements of the contentions of the Sabine Company are well illustrated by *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission* and *Ohio Railroad Commission* v. *Worthington, supra.*

In the former case we cited *Coe* v. *Errol* and decided that its principle was not defeated by the fact that the shipments were not made on through bills of lading. The case is instructive as well in its facts as in its principle. The product involved was cotton seed cake and cotton seed meal accumulated at the wharves of the Terminal Company at Galveston and the cake there manufactured into meal. The cake and meal were purchased in Texas and neighboring States, but chiefly in Texas, and shipped on bills of lading and way-bills to the purchaser and manufacturer, showing the point of destination to be Galveston. The purchases were made for export, there being no consumption of the products at Galveston. The sales to foreign countries were sometimes for immediate and sometimes for future delivery, irrespective of whether the product was on hand at Galveston. At times it was on hand. At other times orders had to be filled from cake purchased in the interior and then in transit, which, upon reaching Galveston, had to be ground into meal and sacked, and for the meal thus ground and sacked or thus bought ships' bills of lading were made. It was contended that the transit of the cake and meal absolutely ended at Galveston, that point being their final point of concentration and manufacture, the cake being there manufactured and sacked for export. The contention was rejected by the application of the principle which we have expressed. The points of resemblance between that case and the one at bar are obvious. Are the points of difference essential? In both cases the article was intended for export but had no definite foreign destination, nor had it been "committed to a common carrier for its final continuous voyage to a foreign point." In the *Terminal Case* the manufacturer and exporter of the products purchased them at interior points and had them shipped to himself at Galveston. In the present case the Sabine Company was the manufacturer and shipped them to the Powell Company,

the purchaser, who paid the freight charges for the Sabine Company. Upon the arrival of the lumber at Sabine it was carried without delay beyond and unloaded into the water in reach of ship's tackle. The continuity of the shipment was not as much broken as in the cited case. There, there was a delay for manufacturing; here, there was only such delay as was incident to transshipment from rail carriage to water carriage and to the nature of the traffic. It is said, however, that the Sabine Company had no connection with the lumber after its arrival at Sabine and had no concern with its destination after it came into the hands of Powell Company and had no particular knowledge thereof. Like circumstances undoubtedly existed in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission.* It did not prevail there and cannot prevail here. The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped, and to give it a various character by the steps in its transportation would be extremely artificial. Once admit the principle and means will be afforded of evading the national control of foreign commerce from points in the interior of a State. There must be transshipment at the seaboard, and if that may be made the point of ultimate destination by the device of separate bills of lading the commerce will be given local character, though it be essentially foreign.

That it is the nature of the traffic and not its accidents which determines its character is illustrated by *Ohio Railroad Commission* v. *Worthington, supra.* A rate of 70 cents a ton was imposed by the Commission on what was called "Lake-cargo coal" from a coal field in eastern Ohio to the ports of Huron and Cleveland, Ohio, on Lake Erie,

for carriage thence by lake vessels. The shipper transported the coal ordinarily upon bills of lading to himself, or to another for himself, at Huron, and it appeared that the coal might be accumulated in large quantities at Huron and only taken out of the accumulated lots from time to time for the purpose of shipment out of the State. The rate of 70 cents, however, covered not only the transportation of the coal to Huron, but placing it on the vessels and trimming it for its interstate journey. It was held that its transportation to Huron was an interstate carriage.

Much stress was laid in the argument upon the fact that the coal was billed only to Huron. Replying to the contention the court said that the billing of the coal was not necessarily determinative, citing *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, *supra*.

Gulf, Colorado & S. F. Ry. Co. v. *Texas*, 204 U. S. 403, is urged as sustaining all of the contentions of the Sabine Company, and the case was considered so apposite and controlling that the Supreme Court of the State rested its decision entirely upon it. It demands, therefore, a careful review. Its facts were as follows: The Hardin Grain Company, doing business in Kansas City, Missouri, having made a contract with parties at Goldthwaite, Texas, for the delivery of two car loads of corn at that place, in order to comply with their undertaking, contracted to purchase of the Harroun Commission Company, who were also doing business at Kansas City, Missouri, and had an agent at Texarkana, Texas, the same quanity of corn, to be delivered at the latter point. The corn with which the Harroun Commission Company proposed to fulfill their contract was shipped from South Dakota to Texarkana, Texas, through Kansas City, Missouri. It was delivered at Texarkana, Texas, in accordance with the agreement, to the Hardin Grain Company, who thereupon shipped it in the same cars, without breaking bulk,

over the Texas & Pacific Railway and its connecting lines to Goldthwaite, Texas. Commenting on these facts the Supreme Court of the State, when the case was before it, said: "Since the contract of the Hardin Grain Company with the initial carrier at Texarkana was a contract for transportation wholly within this State, the question resolves itself into the inquiry whether the facts just stated changed the character of the transportation and made the carriage from Texarkana to Goldthwaite a part of an interstate shipment." The court decided that the carriage from Texarkana to Goldthwaite "should be deemed independent of and wholly disconnected from its transportation to Texas from South Dakota, or Kansas City." In other words, the court divided the commerce into two parts, one, the carriage from South Dakota and Kansas City to Texarkana, terminating by the delivery of the corn there to the Hardin Grain Company; and, one, which the court regarded as independent of and disconnected from the other, from Texarkana to Goldthwaite upon a bill of lading by which the railway company acknowledged the receipt from the Hardin Grain Company at Texarkana with orders to deliver to Saylor & Burnett at Galveston, Texas. This carriage, being wholly within the State, was pronounced to be a local shipment.

This court affirmed the judgment and decided that the contract between the Hardin Grain Company and the Harroun Commission Company was completed in accordance with its terms when the corn was delivered to the Hardin Company at Texarkana. "Then and not till then," it was said, "did the Hardin Company have full title to and control of the corn, and that was after the first contract of transportation had been completed." Then, and not till then, we may say, did the Hardin Company acquire the means of fulfilling its contract with Saylor & Burnett; and then, and not till then, did it start to fulfill its contract with Saylor & Burnett.

This was the determining circumstance both in the Supreme Court of Texas and in this court. It caused the Supreme Court of Texas to decide that the carriage of the corn from Texarkana to Goldthwaite should be deemed independent of and wholly disconnected from its transportation to Texas from South Dakota, or Kansas City. It caused this court, in effect, to adopt that ruling and to consider the corn not at any time to be that of Saylor & Burnett until it was started from Texarkana to Goldthwaite. It appeared that the corn remained five days in Texarkana, and, considering the bearing of this fact and the other facts, it was said: "The Hardin Company was under no obligation to ship it further. It could in any other way it saw fit have provided corn for delivery to Saylor & Burnett, and unloaded and used that car of corn in Texarkana. It must be remembered that the corn was not paid for by the Hardin Grain Company until its receipt in Texarkana. It was paid for on receipt and delivery to the Hardin Grain Company. Then, and not till then, did the Hardin Grain Company have full title to and control of the corn, and that was after the first contract of transportation had been completed."

It is manifest that these facts were the determining ones, and the history of the corn prior to its arrival at Texarkana was put aside as irrelevant and the controlling fact decided to be that corn belonging to the Hardin Grain Company was shipped from Texarkana to Goldthwaite, a strictly local shipment. This was the view taken of the case in *Ohio Railroad Commission* v. *Worthington*, *supra*. It was there urged to sustain the contention that the manner of billing was controlling of the character of the commerce. The contention was rejected, and, distinguishing the case and speaking of its facts, the court said (p. 109): "The facts showed that the corn was carried upon a bill of lading from Hudson [South Dakota] to Texarkana, and that afterwards, some five days later,

it was shipped from Texarkana to Goldthwaite, both points in the State of Texas. This was held to be an intrastate shipment unaffected by the fact that the shipper intended to reship the corn from Texarkana to Goldthwaite, for, as this court held, the corn had been carried to Texarkana upon a contract for interstate shipment, and the reshipment five days later upon a new contract was an independent intrastate shipment." Distinguishing the case, it was said (p. 109): "It is evident from this statement of facts that the case is quite different from the one under consideration. There a new and independent contract for intrastate shipment was made, the interstate transportation having been completely performed. . . ."

The facts in the case at bar are different. The lumber was ordered, manufactured and shipped for export. And we say shipped, for we regard it of no consequence that the Sabine Company had no concern or connection with it after it reached Sabine. Its relation to the shipment was a perfectly natural one and did not change the relation of the Powell Company to it and make the lumber other than lumber purchased at Ruliff and started from there in transportation to a foreign destination. The findings are explicit and circumstantial as to this. And the shipment was not an isolated one but typical of many others, which constituted a commerce amounting in the year 1905 to 14,667,670 feet of lumber and in the year 1906, 39,554,000 feet. Nor was there a break, in the sense of the Interstate Commerce law and the cited cases, in the continuity of the transportation of the lumber to foreign countries by the delay and its transshipment at Sabine. *Swift & Co.* v. *United States*, 196 U. S. 375. Nor, as we have seen, did the absence of a definite foreign destination alter the character of the shipments.

Judgment reversed and case remanded for further proceedings not inconsistent with this opinion.

HEIKE *v.* UNITED STATES.

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

No. 520. Argued January 9, 1913.—Decided January 27, 1913.

There is a clear distinction between an amnesty for crime committed and the constitutional protection under the Fifth Amendment from being compelled to be a witness against oneself.

The obvious purpose of the act of February 25, 1903, c. 755, 32 Stat. 854, 904, granting to witnesses in investigations of violations of the Sherman Act immunity against prosecution for matters testified to, was to obtain evidence that otherwise could not be obtained; the act was not intended as a gratuity to crime, and is to be construed, as far as possible, as coterminous with the privilege of the person concerned.

Evidence given in an investigation under the Sherman Act does not make a basis under the act of February 25, 1903, for immunity of the witness against prosecutions for crimes with which the matters testified about were only remotely connected.

Granting a separate trial to one of several jointly indicted for conspiracy is within the discretion of the trial judge, reviewable only in case of abuse.

Even if there may have been an abuse in some instances of indicting under § 5440 for conspiracy instead of for the substantive crime itself, liability for conspiracy is not taken away by its success, and in a case such as this, there does not appear to be any abuse.

Evidence showing that a conspiracy had continued before and after the periods specified in the indictment, held in this case not inadmissible against a defendant present at the various times testified to.

192 Fed. Rep. 83, affirmed.

THE facts, which involve the extent of immunity granted under the act of February 25, 1903, c. 755, 32 Stat. 854, 904, are stated in the opinion.

Mr. John B. Stanchfield, with whom *Mr. George S. Graham* and *Mr. Frederick Allis* were on the brief, for petitioner:

The immunity statute herein pleaded in bar is a grant of amnesty from the sovereign, operating by way of a pardon from the Government. It bears no analogy, either in conditions of acquirement or in mode of operation, to the constitutional privilege of the Fifth Amendment.

There is a fundamental distinction between the constitutional privilege and the statutory immunity. It is apparent on the very face thereof.

The first proceeds upon the theory of a shield against compulsory self-incrimination, given by sovereign to citizen.

The second proceeds upon the theory of a pardon or amnesty, given by the Government to the citizen.

Even if the immunity should receive a strict and narrow construction because it is "in derogation of the sovereign power to punish," and public policy may favor a narrow, and is opposed to a broad, view of the immunity provision, on the other hand, the pardon theory of immunity affords a complete refutation of any narrow rule of construction, and public policy requires a broad construction of the immunity provision.

The plain language of the statute itself shows that it confers general amnesty, and should operate as a pardon, and not in the way the old constitutional privilege does. See act of January 24, 1862, § 103, Rev. Stat.; § 859, Rev. Stat.; act of January 24, 1862, c. 11, 12 Stat. 333; § 860, Rev. Stat.; act of February 25, 1868, c. 13, § 1; 15 Stat. 37; act of February 11, 1893, 27 Stat. 443; *Counselman* v. *Hitchcock*, 142 U. S. 547; *Brown* v. *Walker*, 161 U. S. 591.

The absurdity and impossibility of imposing all the conditions and limitations of the constitutional privilege shows that the immunity statute was intended to operate as a grant of amnesty or pardon.

The public policy of the statute shows that it should operate as a grant of amnesty or pardon. *United States* v. *Armour*, 142 Fed. Rep. 819, 826.

The weight of authority shows that the immunity statute is an act of general amnesty, and therefore should operate as a pardon from the Government. *Brown* v. *Walker*, 161 U. S. 591; *Burrell* v. *Montana*, 194 U. S. 572, 578; *Hale* v. *Henkel*, 201 U. S. 43, 67; *United States* v. *Price*, 96 Fed. Rep. 962; *United States* v. *Swift*, 186 Fed. Rep. 1002. *State* v. *Murphy*, 107 N. W. Rep. 470, distinguished.

The pardon or amnesty theory of the immunity statute affords a complete refutation (1) of every argument advanced by the Government, (2) of every ground for the opinion of the learned trial court, save one, (3) and of every ground assigned by the learned Court of Appeals without exception, in opposition to the plea in bar herein.

The authorities cited by the Government for its contentions, or those of the court below, are not in point, if the immunity statute be treated as a statute of amnesty.

There are but three cases in which the witness has pleaded the immunity statute in bar to a prosecution. *United States* v. *Armour*, 142 Fed. Rep. 808; *United States* v. *Swift*, 186 Fed. Rep. 1002; *State* v. *Murphy*, 107 N. W. Rep. 470.

It would seem to follow from this review of cited cases, none of which support the contention of the Government that the immunity statute of 1903 is merely a defense against self-incrimination, requiring to be pleaded as a privilege, and extending no further than the exclusion of testimony given; nor anything against the contention that the statute grants general amnesty to witnesses, as this court has said, operating in every case to which it is applicable, *ex proprio vigore* as a pardon does.

The petitioner's former testimony was "concerning" the "transaction, matter or thing" on account of which he is being prosecuted, within the meaning of the statute; although the particular offence for which he has been indicted was not the direct subject of the inquiry at which

he testified, yet it was incidentally discovered, led up to and prosecuted by means of his testimony.

The word "concerning" should receive the broadest possible construction. *Brown* v. *Walker*, 161 U. S. 623; *United States* v. *Burr*, 25 Fed. Cas. 40; *Counselman* v. *Hitchcock*, 142 U. S. 564, 562; *Hale* v. *Henkel*, 201 U. S. 67; *Boyd* v. *United States*, 116 U. S. 616, 629; *People* v. *Forbes*, 143 N. Y. 219, 228; *Am. Lithographic Co.* v. *Werckmeister*, 221 U. S. 603, 611.

Whether or not the immunity statute should receive a broad application is a political question, and the policy adopted by Congress is final and binding on all.

Public policy is a political question, and it is the province of Congress, in the first place, to determine the public policy of every statute it enacts. *Pennsylvania* v. *Wheeling*, 18 How. 440; *Rhode Island* v. *Massachusetts*, 12 Pet. 737, 738; *Luther* v. *Borden*, 7 How. 42; *William* v. *Suffolk &c.*, 13 Pet. 420; *Foster* v. *Neilson*, 2 Pet. 253; *Head Money Cases*, 112 U. S. 598; *United States* v. *Rauscher*, 119 U. S. 418, 419; *United States* v. *Collins*, 25 Fed. Cas. 550; *United States* v. *Armour*, 142 Fed. Rep. 826.

The pleadings, on the plea in bar, afforded sufficient evidence on the question of relevancy to make it error to direct the verdict on the special trial of the plea.

The Circuit Court of Appeals erred in holding that petitioner was entitled to no immunity because he was subpœnaed and testified as an officer of the corporation under investigation at the anti-trust proceeding, where he gave the evidence he now relies on. *State* v. *Nowell*, 58 N. H. 314; *Brown* v. *Walker*, 161 U. S. 602; *Hale* v. *Henkel*, 201 U. S. 69–70. *Wilson* v. *United States*, 221 U. S. 361, distinguished. And see *B. & O.* v. *Int. Com. Comm.*, 221 U. S. 612; *Am. Lith. Co.* v. *Werckmeister*, 221 U. S. 611; *Int. Com. Comm.* v. *Baird*, 194 U. S. 25.

The court below erred in denying the motion of the defendant Heike for a separate trial. He was unlawfully

prejudiced by being tried together with the other defendants.

No man can receive a fair trial if he is forced to stand in a background of fraud and knavery created by the acts of others but which necessarily throw their dubious gloom over his own conduct and impart a sinister significance to his most innocent acts. *White* v. *The People,* 81 Illinois, 338; *State* v. *Oxendine,* 107 Nor. Car. 783.

In addition, the defendant was greatly prejudiced by the fact that during the course of the trial three of the other defendants pleaded guilty. This turn of events should, it is submitted, have induced the court to grant to the defendant Heike a separate trial. *United States* v. *Matthews,* Fed. Cas. No. 15741*b; Krause* v. *United States,* 147 Fed. Rep. 444.

While the lower court had discretion upon the motion for a severance, *United States* v. *Marchant,* 12 Wheat. 480; *United States* v. *Ball,* 163 U. S. 662, it does not follow, however, that the granting or denial of the motion is not subject to review by this court. *O'Connell* v. *Pennsylvania Co.,* 118 Fed. Rep. 991; *Osborne* v. *The Bank,* 9 Wheat. 738, 866; *Krause* v. *United States,* 147 Fed. Rep. 444; *White* v. *People, supra; Morrow* v. *The State,* 14 Lea (Tenn.), 483; *Watson* v. *The State,* 16 Lea, 604; *State* v. *Desroche,* 47 La. Ann. 651.

It was error to convict petitioner on the sixth count, for conspiracy.

It has become customary for prosecutors to charge conspiracy rather than the commission of actual crime, in their indictments, especially statutory crimes of the class under consideration. Although relying on the same evidence, they find it easier to convince a jury of secret conspiracy than of a palpable crime; it opens the door to metaphysical speculation in place of dry proof; the inquiry is into intentions rather than acts; it is a reversion to all the evils of the old practice when the trial was of a

conspiracy in the minds of the conspirators without overt acts to show it. This is abuse. See *United States* v. *Kissel*, 173 Fed. Rep. 823, 828; Wharton's Criminal Law, § 1402.

The circumstantial evidence, from which alone the jury inferred petitioner's participation in and knowledge of the frauds in question, was not legally sufficient for those purposes; the learned trial court erred in allowing the jury to draw such inference, and the learned Court of Appeals erred in affirming the judgment in that respect.

The learned trial court committed reversible error in admitting in evidence the so-called "pink books." *Chicago Lumbering Co.* v. *Hewitt*, 64 Fed. Rep. 314; *Kent* v. *Garvin*, 1 Gray, 148; *Gould* v. *Hartley*, 187 Massachusetts, 561; *Norwalk* v. *Ireland*, 68 Connecticut, 1; *Swan* v. *Thurman*, 112 Michigan, 416; *People* v. *Mitchell*, 94 California, 550; *Price* v. *Standard Life Co.*, 90 Minnesota, 264; *Chaffee* v. *United States*, 18 Wall. 516.

The admission of hearsay evidence, in addition to the ordinary error, violated the right of accused to be confronted with the witnesses against him. United States Constitution, 6th Amendment; *Motes* v. *United States*, 178 U. S. 458; *Kirby* v. *United States*, 174 U. S. 47; Cooley on Constitutional Limitations, 7th ed., p. 451; *People* v. *Bromwich*, 200 N. Y. 385; *State* v. *Thomas*, 64 Nor. Car. 74; *United States* v. *Angell*, 11 Fed. Rep. 34, 43; *People* v. *Goodrode*, 132 Michigan, 542.

The trial court committed reversible error in allowing in evidence acts and declarations of a co-conspirator thirteen years prior to the conspiracy. *Logan* v. *United States*, 144 U. S. 263; *Train* v. *Taylor*, 51 Hun (N. Y.), 215; *State* v. *Crofford*, 121 Iowa, 395; *Williams* v. *Dickinson*, 28 Florida, 90; *Wilson* v. *People*, 94 Illinois, 299; *People* v. *Irwin*, 77 California, 494; *State* v. *Moberly*, 121 Missouri, 604.

Mr. Assistant Attorney General Denison, with whom *Mr. Henry L. Stimson* and *Mr. Felix Frankfurter* were on the brief, for the United States:

The plea of immunity was not well founded. *Hale* v. *Henkel*, 201 U. S. 43, 69; *Brown* v. *Walker*, 161 U. S. 591; *United States* v. *Swift*, 186 Fed. Rep. 1002; *United States* v. *Armour*, 142 Fed. Rep. 808; *State* v. *Murphy*, 128 Wisconsin, 201; *State* v. *Warner*, 13 Lea (Tenn.), 52, 62–64; *In re Kittle*, 180 Fed. Rep. 946, 948 (So. Dist., N. Y.); *United States* v. *Kimball*, 117 Fed. Rep. 156, 163, 166, 168.

The immunity provisions are statutes in derogation of essential governmental powers, and as such should not be extended beyond the purpose of their enactment. *Louisville Railway* v. *Kentucky*, 161 U. S. 677, 685; *United States* v. *Burr*, 25 Fed. Cas., pp. 39–40; *Hale* v. *Henkel*, *supra; American Lithographic Company* v. *Werckmeister*, 221 U. S. 603; Wigmore on Evidence, § 2192.

The purpose of the immunity statutes, as shown by their structure and their historical evolution, was to prevent the obstruction of the specified prosecutions by the exercise of the constitutional privilege. This purpose was accomplished by an exchange of immunity for the privilege. There is nothing either in the terms of the act or its history to indicate any intention of granting a bonus in addition to this exchange.

The form of the act of February 11, 1893, is a balance indicating an exchange. The clause beginning "But" is in relation to and a plain exchange for the clause which withdraws the "excuse" from testifying on the ground of incrimination.

Also the word "concerning" indicates a real connection with a crime analogous to the connection which would raise the privilege.

The theory of petitioner's brief, that the purpose of Congress was to "encourage volunteer witnesses" and to "persuade" them to testify, by giving them "a reward"

of absolution from all crimes, has nothing whatever to base itself on. It was repudiated by Judge Carpenter in the *Swift Case*, *supra*, and by Wigmore in the passage quoted, *supra*.

Congress has been exceedingly conservative in the enactment of statutes granting immunity. Instead of passing a general immunity statute, it has gone step by step, granting no greater immunity than was necessary for the enforcement of the various commerce laws. Section 860 of the Revised Statutes; *Counselman* v. *Hitchcock*, 142 U. S. 547; act of February 11, 1893 (27 Stat. 443, see appendix); *American Lithographic Co.* v. *Werckmeister*, 221 U. S. 603, 611; *Brown* v. *Walker*, 161 U. S. 591; *Foote* v. *Buchanan*, 113 Fed. Rep. 156; act of February 25, 1903, *supra; Hale* v. *Henkel*, *supra; United States* v. *Armour*, *supra;* act of June 30, 1906 (34 Stat. 798, appendix); act of March 2, 1907, c. 2564, 34 Stat. 1246; *United States* v. *Kimball*, *supra*.

No possible public policy calls for an extension of the immunity statute to the giving of innocent evidence not protected by the constitutional privilege. *State* v. *Murphy*, *supra*.

None of the evidence adduced by Heike was incriminating, and none of it could have been withheld by him under the constitutional privilege. *United States* v. *Burr*, *supra; Brown* v. *Walker*, *supra; Queen* v. *Boyes*, 1 B. & S. 311, 321; *Ex parte Irvine*, 74 Fed. Rep. 960; *United States* v. *Price*, 163 Fed. Rep. 904, 907; *Hickory* v. *United States*, 151 U. S. 303; *Hayden* v. *Williams*, 96 Fed. Rep. 279, 281–282; *Wilson* v. *United States*, 221 U. S. 361; *Dreier* v. *United States*, 221 U. S. 394; *B. & O.* v. *Int. Com. Comm.*, 221 U. S. 612.

The immunity statutes do not grant immunity excepting for offenses under the acts to which they refer. As to evidence tending to incriminate a witness of other offenses entirely unrelated to such acts, he still retains the consti-

tutional privilege. *Beutell* v. *Magone*, 157 U. S. 154, 157, 158; *State* v. *Ellsworth*, 131 Nor. Car. 773; *Commonwealth* v. *Daly*, 4 Gray (Mass.), 209; *Rudolph* v. *State*, 128 Wisconsin, 222, 226.

The admission of the so-called "pink books" on the trial of the plea of not guilty was not error.

An unnecessarily complete foundation was laid for these books. *Chicago Lumbering Co.* v. *Hewitt*, 64 Fed. Rep. 314; *Miss. Logging Co.* v. *Robsen*, 69 Fed. Rep. 773, 781, 782 (C. C. A. 8th C.); *Greene* v. *United States*, 154 Fed. Rep. 401; *Kerrch* v. *United States*, 171 Fed. Rep. 366, 369; *Grunberg* v. *United States*, 145 Fed. Rep. 81, 91; *Bacon* v. *United States*, 97 Fed. Rep. 35, 40–41; 1 Wigmore on Evidence, § 1521, pp. 1888–89, and § 1530, pp. 1895–96; *Continental Bank* v. *National Bank*, 108 Tennessee, 374.

The admission on the main trial of the testimony of Spitzer concerning the early history of the conspiracy was not error. *United States* v. *Kissell*, *supra; Wood* v. *United States*, 16 Pet. 342, 360–361; *Bottomly* v. *United States*, 1 Story, 135; *United States* v. *36 Barrels*, 7 Blatch. 469, 472; *Standard Oil Co.* v. *United States*, 221 U. S. 1; 3 Greenleaf on Evidence, 16th ed., § 93; *State* v. *Walker*, *supra*.

MR. JUSTICE HOLMES delivered the opinion of the court.

The petitioner was indicted for frauds on the revenue, and, in the sixth count, under Rev. Stat., § 5440, for a conspiracy to commit such frauds by effecting entries of raw sugars at less than their true weights by means of false written statements as to the same. Rev. Stat., § 5445. Act of June 10, 1890, c. 407, § 9, 26 Stat. 131, 135. He pleaded in bar that, in 1909 and 1910, answering the Government's subpœna, he had testified and produced documentary evidence before a Federal grand jury investigating alleged breaches of the Sherman Anti-trust Act, that the testimony and documents concerned the subject-

matter of the present indictment and that therefore he was exempted from liability by the act of February 25, 1903, c. 755, 32 Stat. 854, 904, as amended June 30, 1906, c. 3920, 34 Stat. 798. There was a replication; issue was joined; a trial was had upon the plea, in which the court directed a verdict for the Government, 175 Fed. Rep. 852; leave was given to plead over; a premature attempt was made to bring the case before this court, 217 U. S. 423, and then there was a trial on the merits in which the petitioner was found guilty on the sixth count. The Circuit Court of Appeals affirmed the judgment, 192 Fed. Rep. 83, 112 C. C. A. 615. Whereupon a writ of certiorari was granted by this court.

The investigation in which the petitioner testified concerned transactions of the American Sugar Refining Company. See *Pennsylvania Sugar Refining Co.* v. *American Sugar Refining Co.*, 166 Fed. Rep. 254. The petitioner was summoned to produce records of the American Sugar Refining Company and to testify. He appeared, produced the records and testified that he was the person to whom the subpœnas were addressed, secretary of the New York corporation and secretary and treasurer of the New Jersey corporation of the same name. He summed up what the books produced showed as to the formation of the New York company. He identified his signature to four checks of the company in a transaction not in question here—the Kissel-Segal loan mentioned in *United States* v. *Kissel*, 218 U. S. 601, 608. These checks were not used in the present case. He testified as to the ownership of the Havemeyer and Elder Refinery in Brooklyn. Finally he produced a table showing how many pounds of sugar were melted each year from 1887 to 1907 in each refinery, this table of course not purporting to represent the petitioner's personal knowledge, but being a summary of reports furnished by the company's different employés, and, the Government contends, volunteered by him.

The act of February 25, 1903, c. 755, 32 Stat. 854, 904, appropriates $500,000 for the enforcement of the Interstate Commerce and Anti-Trust Acts, "Provided, that no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts; Provided further, that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying." (This last proviso was added only from superfluous caution and throws no light on the construction. *Glickstein* v. *United States*, 222 U. S. 139, 143, 144.) By the amendment of June 30, 1906, c. 3920, 34 Stat. 798, immunity under the foregoing and other provisions "shall extend only to a natural person who, in obedience to a subpœna, gives testimony under oath or produces evidence, documentary or otherwise, under oath."

The petitioner contended that, as soon as he had testified upon a matter under the Sherman Act, he had an amnesty by the statute from liability for any and every offence that was connected with that matter in any degree, or, at least, every offence towards the discovery of which his testimony led up, even if it had no actual effect in bringing the discovery about. At times the argument seemed to suggest that any testimony, although not incriminating, if relevant to the later charge, brought the amnesty into play. In favor of the broadest construction of the immunity act, it is argued that when it was passed there was an imperious popular demand that the inside working of the trusts should be investigated, and that the people and Congress cared so much to secure the necessary evidence that they were willing that some guilty persons should escape, as that reward was necessary to the end. The Government on the other hand maintains that the statute should be limited as nearly as may

be by the boundaries of the constitutional privilege of which it takes the place.

Of course there is a clear distinction between an amnesty and the constitutional protection of a party from being compelled in a criminal case to be a witness against himself. Amendment V. But the obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be got. We see no reason for supposing that the act offered a gratuity to crime. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned. We believe its policy to be the same as that of the earlier act of February 11, 1893, c. 83, 27 Stat. 443, which read "No person shall be excused from attending and testifying," &c. "But no person shall be prosecuted," &c., as now, thus showing the correlation between constitutional right and immunity by the form. That statute was passed because an earlier one, in the language of a late case, 'was not coextensive with the constitutional privilege.' *American Lithographic Co.* v. *Werckmeister*, 221 U. S. 603, 611. Compare act of February 19, 1903, c. 708, § 3, 32 Stat. 847, 848. To illustrate, we think it plain that merely testifying to his own name, although the fact is relevant to the present indictment as well as to the previous investigation, was not enough to give the petitioner the benefit of the act. See 3 Wigmore, Evidence, § 2261.

There is no need to consider exactly how far the parallelism should be carried. It is to be noticed that the testimony most relied upon was the summary made from the books of the company by its servants, at the petitioner's direction, and simply handed over by him; that apart from the statute the petitioner could not have prevented the production of the books or papers of the company, such as the summary was when made, or refused it if

he had the custody of them, and that the decisions that established the duty to produce go upon the absence of constitutional privilege, not upon the ground of statutory immunity in such a case. *Wilson* v. *United States*, 221 U. S. 361, 377 *et seq. Dreier* v. *United States*, 221 U. S. 394, 400. *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 623. *Wheeler* v. *United States*, 226 U. S. 478. *Grant* v. *United States*, *ante*, p. 75. But this consideration does not stand alone, for the evidence given in the former proceeding did not concern the present one and had no such tendency to incriminate the petitioner as to have afforded a ground for refusing to give it, even apart from the statute and the fact that it came from the corporation books. Taking all these considerations together we think it plain that the petitioner could take nothing by his plea.

The evidence did not concern any matter of the present charge. Not only was the general subject of the former investigation wholly different, but the specific things testified to had no connection with the facts now in proof much closer than that they all were dealings of the same sugar company. The frauds on the revenue were accomplished by a secret introduction of springs into some of the scales in such a way as to diminish the apparent weight of some sugar imported from abroad. The table of meltings by the year had no bearing on the frauds, as it was not confined to the sugar fraudulently weighed and it does not appear how the number of pounds was made up. The mere fact that a part of the sugar embraced in the table was the sugar falsely weighed did not make the table evidence concerning the frauds. The same consideration shows that it did not tend to incriminate the witness. It neither led nor could have led to a discovery of his crime. So the admission of his signature to certain checks, although it furnished a possible standard of the petitioner's handwriting if there had

been any dispute about it, which there was not, in the circumstances of this case at least had neither connection nor criminating effect. When the statute speaks of testimony concerning a matter it means concerning it in a substantial way, just as the constitutional protection is confined to real danger and does not extend to remote possibilities out of the ordinary course of law. *Brown* v. *Walker*, 161 U. S. 591, 599, 600. See 5 Wigmore, Evidence, § 2281, p. 238. Other questions would have to be dealt with before the petitioner could prevail upon his plea; but as we consider what we have said sufficient, we shall discuss it at no greater length. There was no dispute as to the facts and a verdict upon it for the Government properly was directed by the court.

The other matters complained of would not have warranted the issue of the writ of certiorari and may be dealt with in few words. The petitioner was denied a separate trial, and this is alleged as error. But it does not appear that the discretion confided to the trial judge was abused. *United States* v. *Ball*, 163 U. S. 662, 672. Again it is said that if the evidence proved the petitioner guilty of a conspiracy it proved him guilty of the substantive offence. It may be that there has been an abuse of indictment for conspiracy, as suggested by Judge Holt in *United States* v. *Kissel*, 173 Fed. Rep. 823, 828, but it hardly is made clear to us that this is an instance. At all events the liability for conspiracy is not taken away by its success—that is, by the accomplishment of the substantive offence at which the conspiracy aims. *Brown* v. *Elliott*, 225 U. S. 392. *Reg.* v. *Button*, 11 Q. B. 929. *Rex* v. *Spragg*, 2 Burr. 993, 999.

An objection is urged to the admission of certain books, called the pink books, in evidence—they being the books in which were entered weights given by one set of weighers—the city weighers—the weighers not having been called. These weights were the higher ones and were introduced as evidence of the discrepancy. They appear

to have been accepted by the company, were checked by the company's tallymen, who testified, and if other evidence than that of the men who made the entries was necessary it was produced. See 2 Wigmore, Evidence, §§ 1521, 1530. Another objection to evidence concerned the admission of testimony that the same course of conduct was going on long before the date in the indictment when it is alleged that the defendants conspired. The indictment of course charged a conspiracy not barred by the statute of limitations, but it was permissible to prove that the course of fraud was entered on long before and kept up. *Wood* v. *United States*, 16 Pet. 342, 360. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 76. The acts and directions of earlier date tended to show that the same conspiracy was on foot. The petitioner was there. The time of his becoming a party to it was uncertain. The longer it had lasted the greater the probability that he knew of it and that his acts that helped it were done with knowledge of their effect. We think it unnecessary to discuss the suggestion that the evidence did not warrant leaving the case to the jury, or to add further to the discussion that the case received below.

Judgment affirmed.

AMERICAN RAILROAD COMPANY OF PORTO RICO *v.* DIDRICKSEN.

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

No. 72. Submitted December 6, 1912.—Decided January 27, 1913.

Where the plaintiffs in an action under the Employers' Liability Act are the sole beneficiaries under the statute, a general verdict in their favor, without instructions on this point, overcomes the objection of lack of capacity to sue.

The Employers' Liability Act extends to Porto Rico, as held in *American Railroad Company* v. *Birch*, 224 U. S. 547, and now *held* that the Safety Appliance Acts also extend to Porto Rico.

While Porto Rico has not for all purposes been fully incorporated into the United States it is not foreign territory nor are its citizens aliens. *Williams* v. *Gonzales*, 192 U. S. 1. Its organization is in most essentials that of a Territory. *Kopel* v. *Bingham*, 211 U. S. 468.

In view of the provisions of § 3 thereof, effect cannot be given to the Employers' Liability Act of 1908 in Porto Rico unless the Safety Appliance Acts referred to in § 3 are in force there also.

Under the Employers' Liability Act of 1908 pecuniary damages only are recoverable and these do not include loss of society or companionship of a son to a parent. *Michigan Central Railroad* v. *Vreeland*, *ante*, p. 59.

5 Porto Rico Fed. Rep. 401, 427, reversed.

THE facts, which involve the construction of the Employers' Liability Act of 1908 before its amendment by the act of 1910, and the application of the act to Porto Rico, are stated in the opinion.

Mr. N. B. K. Pettingill and *Mr. F. L. Cornwell* for plaintiff in error.

There was no brief filed for defendants in error.

MR. JUSTICE LURTON delivered the opinion of the court.

This is an action under the Employers' Liability Act of April 22, 1908, 35 Statutes at Large, 65, c. 149, before its amendment by the act of April 5, 1910, 36 Stat. 291, c. 143. The plaintiffs were the surviving parents of Pedro Didricksen, an employé of the American Railroad of Porto Rico, who died from an injury sustained while in its service.

1. Many errors have been assigned. One assigned, but not noticed in the brief of appellant, goes to the capacity of the plaintiffs to maintain the action.

That the deceased left neither wife nor children is not denied. That the plaintiffs were, therefore, as his surviving parents, the sole beneficiaries under the statute is also conceded.

One of the defenses made by the answer was that the plaintiffs had not been appointed administrators as required by law, and had therefore no right to maintain this suit under the Liability Act of 1908. This was met after the jury had been summoned, by a motion, as shown by the plaintiff's bill of exceptions, "to amend the complaint by making the following interlineation: 'That plaintiffs are the duly appointed personal representatives of the deceased, appointed by the District Court of the Island of Porto Rico,' which leave is granted by the court." To this amendment the defendant excepted. A journal entry of the same date shows that in support of the motion the plaintiffs produced a certain certificate from the District Court of Porto Rico, and that the complaint was amended by interlining the words, after the word "support,"—"They were further the only personal representatives of the deceased."

This certificate is not in the transcript and we have no way of knowing its sufficiency as an appointment. The case went to the jury upon the issue of the capacity of the plaintiffs to sue, as well as upon the other issues. The court neither gave nor refused any instruction upon this point, and there was a general verdict for the plaintiffs.

2. The evidence upon the merits of the case, though obscure and meagre as to the circumstances of the accident, was such as to justify its submission to the jury.

3. The complaint averred that the cars composing the train in charge of the deceased as conductor were not equipped as required by the Safety Appliance Act of March 2, 1903, 32 Stat., 943, c. 976. There was some evidence tending to show that one or more of the couplers were not in repair and some evidence tending

to show that this had a causal connection with the accident. The court instructed the jury that the Safety Appliance Act applied to Porto Rico. Was this error?

The acts of March 2, 1893, 27 Stat., 531, c. 196, and April, 1896, 29 Stat., 85, related only to railroad companies engaged in interstate commerce. The traffic wholly confined to a Territory of the United States was therefore not within either. But the act of March 2, 1903, amended the former acts and extended their provisions to "common carriers by railroad in the Territories and the District of Columbia."

That the Employers' Liability Act of April 22, 1908, 35 Stat., 65, 291, c. 149, does apply to Porto Rico is plain, since it, on its face, extends to the District of Columbia, the Territories, the Panama Canal Zone and other "possessions" of the United States. That it did extend to Porto Rico was expressly decided in *American Railroad Company of Porto Rico* v. *Birch*, 224 U. S. 547. The question as to whether the Safety Appliance Act extended to that Island was reserved in the *Birch Case*.

We are of opinion that the act does extend to Porto Rico. It is true that the term, "possessions" of the United States is not used as in the Liability Act. The act does, however, provide that the former acts of which it is amendatory "shall be held to apply to common carriers by railroad in the Territories and the District of Columbia," etc. Though for all purposes the Island of Porto Rico has not been fully incorporated into the United States, it obviously is not foreign territory, nor its citizens aliens. *Gonzales* v. *Williams*, 192 U. S. 1, 15. Its organization is in most essentials that of those political entities known as Territories. It has a territorial legislature and a territorial system of courts. By the fourteenth section of the Foraker Act of April 12, 1900, 31 Stat., 77, 80, c. 191, "the statute laws of the United States not locally inapplicable . . . have the same

force and effect in Porto Rico as in the United States, except the revenue law."

In *Kopel* v. *Bingham*, 211 U. S. 468, Porto Rico was held to be a Territory within the meaning of § 5278, Revised Statutes, providing for the surrender of fugitive criminals by governors of Territories.

It is not easy to see how effect can be given to the Employers' Liability Act of 1908 in Porto Rico, without concluding that this act of 1903 is also in force there, since the former, as pointed out in the *Birch Case*, 224 U. S. 547, 555, provides in its third section, "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." The fourth section contains a like provision concerning assumption of risk.

These considerations lead to the conclusion that the court below did not err in ruling that the act extended to Porto Rico.

4. There was error in the rule for measuring the damages recoverable.

The cause of action which was created in behalf of the injured employé did not survive his death, nor pass to his representatives. But the act, in case of the death of such an employé from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employé. The damage is limited strictly to the financial loss thus sustained. The court below went beyond this limitation by charging the jury that they might, in estimating the damages, "take into consideration the fact that they are the father and mother of the deceased and the fact that

they are deprived of his society and any care and consideration he might take of them, or have for them during his life."

The loss of the society or companionship of a son is a deprivation not to be measured by any money standard. It is not a pecuniary loss under such a statute as this.

Laying out of consideration the indefiniteness of the term "care and consideration," as elements in addition to the loss and damage of such pecuniary assistance as the parents of the decedent might have reasonably anticipated from their son, it is enough for the purpose of this case to say that there was no allegation of any such loss, nor any evidence relating to the subject, or from which its pecuniary value might have been estimated. The scope of the compensation recoverable under this statute has been so fully considered in *Michigan Central Railroad* v. *Vreeland*, *ante*, p. 59, that we need not say more.

The other assignments of error we pass by without decision. None of them are of either general importance or such as are likely to arise upon a new trial.

Reversed and remanded for a new trial.

MR. JUSTICE HOLMES concurs in the result.

ROSS *v.* STATE OF OREGON.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 75. Argued December 6, 1912.—Decided January 27, 1913.

The prohibition in § 10 of Article I of the Constitution against *ex post facto* laws is a restraint upon the legislative power of the States and concerns the making of laws and not their construction by the courts.

While that prohibition is directed against legislative acts, and reaches every form in which the legislative power acts, and while a judicial decision is the act of an instrumentality of the State, if the purpose of that decision is not to prescribe a new law for the future but only to apply laws in force at the time to completed transactions, the ruling is a judicial and not a legislative act, and no Federal right or

question is involved under the *ex post facto* provision of the Constitution.

The purpose of a judicial inquiry is to enforce laws as they are at present; legislation looks to the future and changes existing conditions by making new laws to be applicable hereafter. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226.

Whether an amendment to the state constitution requiring prosecutions for crime to be based on indictment applies to pending cases is a question of local law and the decision of the state court is not reviewable here; and the decision of that court that such an amendment did not repeal the statute under which a prosecution based on an information already instituted does not deprive plaintiff in error of his liberty without due process of law under the Fourteenth Amendment of the Federal Constitution and no Federal question is involved giving this court jurisdiction to review the judgment of conviction.

Where the record presents no Federal question, the writ of error must be dismissed and this court cannot discuss the merits of the questions presented and determined in the state court.

Writ of error to review 55 Oregon, 450, dismissed.

THE facts, which involve the jurisdiction of this court to review judgments of the state courts under § 709, Rev. Stat., and what constitutes an *ex post facto* law, are stated in the opinion.

Mr. William D. Guthrie, with whom *Mr. Wallace McCamant* was on the brief, for plaintiff in error:

Federal questions were duly raised in the state court. *Beardsley* v. *N. Y., L. E. & W. R. R. Co.*, 162 N. Y. 230; *Baker* v. *Williams & England Banking Co.*, 42 Oregon, 213; *Blythe* v. *Hinckley*, 180 U. S. 333; *Forbes* v. *State Council of Virginia*, 216 U. S. 396; *Gelpcke* v. *Dubuque*, 1 Wall. 175; *Harding* v. *Illinois*, 196 U. S. 78; *McCorquodale* v. *Texas*, 211 U. S. 432; *Muhlker* v. *Harlem R. R. Co.*, 197 U. S. 544; *Water Power Co.* v. *Street Railway Co.*, 172 U. S. 475; *Yazoo & Miss. Rd. Co.* v. *Adams*, 180 U. S. 41.

The decision of a court may constitute an *ex post facto* law. *Bailey* v. *Alabama*, 219 U. S. 219; *Bendey* v. *Townsend*, 109 U. S. 665; *Bors* v. *Preston*, 111 U. S. 252; *Boyd*

v. *United States*, 116 U. S. 616; *Brown* v. *Maryland*, 12 Wheat. 419; *Bucher* v. *Cheshire Rd. Co.*, 125 U. S. 555; *Burgess* v. *Salmon*, 97 U. S. 381; *Butz* v. *City of Muscatine*, 8 Wall. 575; *Capital Traction Co.* v. *Hof*, 174 U. S. 1; *C., B. & Q. R. R.* v. *Chicago*, 166 U. S. 226; *Cross Lake Club* v. *Louisiana*, 224 U. S. 632; *Cummings* v. *Missouri*, 4 Wall. 277; *Douglass* v. *County of Pike*, 101 U. S. 677; *Dreyer* v. *Illinois*, 187 U. S. 71; *Ferris* v. *Higley*, 20 Wall. 375; *Fitzpatrick* v. *Simonson Bros. Mfg. Co.*, 86 Minnesota, 140; *Gelpcke* v. *Dubuque*, 1 Wall. 175; *Hinde* v. *Vattier*, 5 Pet. 398; *Kring* v. *Missouri*, 107 U. S. 221; *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349; *Lorings* v. *Marsh*, 6 Wall. 337; *Louisiana* v. *Pilsbury*, 105 U. S. 278; *Muhlker* v. *Harlem R. R. Co.*, 197 U. S. 544; *Nashua Savings Bank* v. *Anglo-American Co.*, 189 U. S. 221; *Nelson* v. *Kerr*, 2 T. & C., 299; 59 N. Y. 224; *People ex rel. Steward* v. *Railroad Commissioners*, 160 N. Y. 202; *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210; *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20; *Scott* v. *McNeal*, 154 U. S. 34; *Smith* v. *United States*, 1 Gall. 261; *Soliah* v. *Heskin*, 222 U. S. 522; *State* v. *Clark*, 9 Oregon, 466; *State* v. *Dyer*, 67 Vermont, 690; *State* v. *O'Neil*, 147 Iowa, 513; *United States* v. *Wong Kim Ark*, 169 U. S. 649; *Ex parte Virginia*, 100 U. S. 339; *Virginia* v. *Rives*, 100 U. S. 313; *Westinghouse Air Brake Co.* v. *Kansas City So. Ry. Co.*, 137 Fed. Rep. 26; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

There is no room for the construction of a statute if there be no reasonable ambiguity. *Hamilton* v. *Rathbone*, 175 U. S. 414; *Sarlls* v. *United States*, 152 U. S. 570; *State* v. *Mann*, 2 Oregon, 238; *The Ben R.*, 134 Fed. Rep. 784; *United States* v. *Brewer*, 139 U. S. 278; *United States* v. *Chase*, 135 U. S. 255; *United States* v. *Goldenberg*, 168 U. S. 95; *United States* v. *Sharp*, Peters C. C. 118; *United States* v. *Wiltberger*, 5 Wheat. 76.

The facts show the arbitrary character of the statu-

tory construction and the *ex post facto* operation of the law enforced by the court below. *Bank of the Republic* v. *Millard*, 10 Wall. 152; *Baker* v. *Williams & England Banking Co.*, 42 Oregon, 213; *Henry County* v. *Salmon*, 201 Missouri, 136; *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S. 96; *Lloyd* v. *Matthews*, 155 U. S. 222; *Phœnix Bank* v. *Risley*, 111 U. S. 125; *State* v. *Bartley*, 39 Nebraska, 353; *State* v. *Minn. & St. L. Ry. Co.*, 88 Iowa, 689; *State* v. *Vermont Cent. Rd. Co.*, 30 Vermont, 108; *State* v. *Wabash Ry. Co.*, 115 Indiana, 466; *Thompson* v. *Riggs*, 5 Wall. 663.

Jurisdiction is an essential element of due process of law under the Fourteenth Amendment. *Ex parte Bain*, 121 U. S. 1; *Ex parte Bergman*, 130 S. W. Rep. 174; *Bradley* v. *Union Bridge & Construction Co.*, 185 Fed. Rep. 544; *Commonwealth* v. *Duane*, 1 Binney, 601; *Commonwealth* v. *Kimball*, 21 Pick. 373; *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Drinkall* v. *Spiegel*, 68 Connecticut, 411; *Garnsey* v. *State*, 4 Okla. Cr. 547; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Hartung* v. *The People*, 22 N. Y. 95; *Matter of Hope*, 7 N. Y. Cr. 406; *Howard* v. *State*, 5 Indiana, 183; *Hubbard* v. *State*, 2 Tex. App. 506; *Hurtado* v. *California*, 110 U. S. 516; *Keller* v. *State*, 12 Maryland, 322; *Kenyon* v. *State*, 31 Texas Cr. 13; *Montague* v. *State*, 54 Maryland, 481; *People* v. *Tisdale*, 57 California, 104; *Scott* v. *McNeal*, 154 U. S. 34; *Sheppard* v. *State*, 1 Tex. App. 522; *Speckert* v. *City of Louisville*, 78 Kentucky, 287; *State* v. *Allen*, 14 Washington, 103; *State* v. *Daley*, 29 Connecticut, 272; *State* v. *Ingersoll*, 17 Wisconsin, 651; *State* v. *Ju Nun*, 53 Oregon, 1; *State* v. *King*, 12 La. Ann. 593; *State* v. *Kingsly*, 10 Montana, 537; *State* v. *Langworthy*, 55 Oregon, 303; *State* v. *Mason*, 108 Indiana, 48; *State* v. *Schluer*, 59 Oregon, 18; *Tuton* v. *State*, 4 Tex. App. 472; *Twining* v. *New Jersey*, 211 U. S. 78; *United States* v. *London*, 176 Fed. Rep. 976; *Wall* v. *State*, 18 Texas, 682; *Ex parte Wilson*, 114 U. S. 417.

Mr. A. M. Crawford, Attorney General of the State of Oregon, *Mr. George J. Cameron* and *Mr. Martin L. Pipes,* for defendant in error, submitted:

The Supreme Court has no jurisdiction to review the decision of a state court except upon a Federal question specially set up or claimed in the state court. *Mutual Insurance Co. of New York* v. *McGrew,* 188 U. S. 291; *Michigan Sugar Co.* v. *Dix,* 185 U. S. 112; *Oxley Stave Co.* v. *Butler Co.,* 166 U. S. 648.

The construction given to a statute or constitution of the State by the highest court of such State is regarded as part of the statute or constitution, and is as binding as the text upon the Supreme Court of the United States. *Leffingwell* v. *Warren,* 2 Black, 595; *Russell* v. *Ely,* 2 Black, 575; *Oaks* v. *Mace,* 165 U. S. 363; *Stone* v. *Wisconsin,* 94 U. S. 181; *Sumner* v. *Hicks,* 2 Black, 352; *Adams* v. *Nashville,* 95 U. S. 19; *Nobles* v. *Georgia,* 168 U. S. 398; *New York, L. E. & W. R. Co.* v. *Pennsylvania,* 158 U. S. 431; *Baltimore Traction Co.* v. *Baltimore Belt R. Co.,* 151 U. S. 137; *Olcott* v. *Fond du Lac Co.,* 16 Wall. 678; *Missouri, K. & T. R. Co.* v. *McCann,* 174 U. S. 586; *Waters-Pierce Oil Co.* v. *Texas,* 177 U. S. 28; *Tullis* v. *Lake Erie & Western R. Co.,* 175 U. S. 348; *Iacardi* v. *Alabama,* 19 Wall. 635; *Fairfield* v. *Gallatin Co.,* 100 U. S. 47; *Morley* v. *Lake Shore & Michigan Southern R. Co.,* 146 U. S. 162; *Louisiana* v. *Pillsbury,* 105 U. S. 294.

The construction of the state court that a statute under which a person has been convicted is prospective only will be followed in the Federal court on the question whether or not the statute is an *ex post facto* law. *Jaehne* v. *New York,* 128 U. S. 190; *In re Jaehne,* 35 Fed. Rep. 357.

An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed. *Calder* v. *Bull,* 3 Dall. 386; *Mallet* v. *North Carolina,* 181 U. S. 590.

The constitutional provision against *ex post facto* laws applies only to criminal or penal statutes. *Ogden* v. *Sanders*, 12 Wheat. 213; *League* v. *Texas*, 184 U. S. 161; *Calder* v. *Bull, supra; Locke* v. *New Orleans*, 4 Wall. 172.

The constitutional provision that no State shall pass an *ex post facto* law refers to a legislative enactment and not to a judicial decision.

A contract can only be impaired within the meaning of the United States Constitution so as to give this court jurisdiction on writ of error to a state court by some subsequent statute of the State which has been upheld or given effect by the state court. *Bacon* v. *State of Texas*, 163 U. S. 207; *New Orleans Water Works Co.* v. *Louisiana Sugar Ref. Co.*, 125 U. S. 118; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 109; *Turner* v. *Board of Commissioners of Wilkes County*, 173 U. S. 461.

The Federal Supreme Court will not hold a state statute void on the ground that it impairs the obligation of contracts unless it impairs the obligation of the particular contract which is involved in the controversy. *Lehigh Water Co.* v. *Easton*, 121 U. S. 388.

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

This was a criminal prosecution in the State of Oregon, instituted by an information charging the defendants, of whom the plaintiff in error was one, with having converted to their own use a large sum of money belonging to the State's Irreducible School Fund, Agricultural College Fund and University Fund, collectively spoken of as educational funds, then held for safe-keeping in a bank of which the defendants were in control as its officers and directors. Upon a separate trial of the plaintiff in error he was convicted and sentenced to a term of imprisonment and to pay a fine. An appeal to the Supreme Court of the State resulted in the elimination of the fine and in the

affirmance of the judgment in other respects. 55 Oregon, 450. The plaintiff in error then brought the case here, claiming that rights secured to him by the Constitution of the United States, and specially set up in the Supreme Court of the State, were denied by the judgment of affirmance.

Briefly outlined, the case, as we must take it to be, is as follows: In June, 1907, the bank became an "active depository" under a statute of the State presently to be mentioned, and thereupon an account was opened with the bank as such depository in the name of the state treasurer, with the added designation "educational." The deposits going into the account consisted of checks and drafts belonging to the State's educational funds, and the money collected by the bank on these checks and drafts, less what was drawn out by the State, amounted on November 6, 1907, to $288,426.87. On that day the bank failed, and it was then disclosed that on August 21 the total cash in the bank was $296.19 short of the amount called for by the account and that this shortage had continued and increased until the day of the failure, when it reached $274,882.73. The defendants had not literally appropriated any of the money to their personal use, but, knowing that it belonged to the State's educational funds and was received and held by the bank as an active depository, had permitted it to be commingled with other deposits and funds and had sanctioned its use in paying liabilities of the bank.

The prosecution was founded upon § 1807 of Bellinger & Cotton's Codes of Oregon, which declares: "If any person shall receive any money whatever for this State, . . . or shall have in his possession any money whatever belonging to such State, . . . and shall in any way convert to his own use any portion thereof, . . . such person shall be deemed guilty of larceny."

By an act taking effect May 26, 1907, Laws of 1907, c. 135, p. 248, the legislature of the State provided for the designation of "State depositories for the purpose of receiving on deposit funds of this State, and paying out the same on order or checks of the State treasurer" (§§ 1, 2); made it the duty of the treasurer to "deposit and at all times keep on deposit" in such depositories the "money in his hands belonging to the several funds in the State treasury," excepting a reserve of not to exceed $100,000 with which to pay current obligations (§ 3); required each depository to pay interest on deposits of such funds at not less than two per cent. per annum (§§ 3, 4) and to give approved security "for the payment of such deposits and the interest thereon" (§ 5); and made the following declaration relating to educational funds (§ 16): "The word 'funds' used in this act shall apply to all funds in the State treasury except the common school,[1] agricultural college, and university funds."

The same act authorized the designation of "an active depository for the collection of any drafts, checks, certificates of deposit and coupons that may be received by him [the treasurer] on account of any claim due the State" (§ 6); required such depository to give approved security "for the prompt collection of all drafts, checks, certificates of deposit, or coupons that may be delivered to such active depository by the State treasurer for collection; also, for the safekeeping and prompt payment on the State treasurer's order of the proceeds of all such collections" (§ 7); and in that connection provided (§ 8): "The State treasurer, on receipt of any draft, check or certificate of deposit, on account of State dues, may place the same in such active depository for collection, and it shall be the

[1] The common school fund and the irreducible school fund appear to have been identical. Ore. Const., Art. VIII, § 2; Ore. Laws 1907, c. 117, § 36.

duty of such active depository to collect the same without delay, without charge for its services for such collection, or for exchange, and to notify the State treasurer when collected. The compensation to be paid by such active depository shall be fixed by the State treasurer upon the best terms obtainable for the State." The word "funds" particularly defined in § 16, as before quoted, was not used in any of the sections having special relation to the active depository.

Before the passage of the depository act the Supreme Court of the State had occasion to consider and determine, in *Baker* v. *Williams Banking Co.*, 42 Oregon, 213, 222–225, whether, in view of § 1807 of Bellinger & Cotton's Codes (then § 1772, Hill's Ann. Laws), the state treasurer lawfully could make a general deposit in a bank of money of the State belonging to its educational funds, and it was held that he could, the court saying:

"It is made a felony by statute for any person having in his possession any money belonging to the State, county, town, or other municipality to convert to his own use or loan the same, with or without interest (Hill's Ann. Laws, § 1772); and, while a mere deposit in a bank for safe-keeping is not inhibited by this provision, it is manifest that in case of the failure of the bank the officer is not entitled to interest in his own right on the fund so deposited, whatever the right of the State or municipality might be in the premises. If, therefore, the claims are in fact for public money, as the objectors allege, no interest should be allowed thereon. A public officer may not loan, with or without interest, any part of the public funds in his possession, without being guilty of a felony; but he is required to keep such funds safely, and for that purpose may deposit them in a bank, provided they are at all times subject to his order, and there is no fixed period during which he has no right to demand their return. . . . The deposit is made on his own personal responsibility,

however; and if, in the case of the failure of the bank, he makes the loss good, the money deposited must necessarily become his property, and thereafter be considered and treated as such."

After that decision and before the transactions here in question the depository act was passed and put in force, but its construction and operation were not determined by the Supreme Court of the State until it passed upon the case at bar. It was then held (a) that the act made provision for general depositories, wherein moneys of the State, not belonging to the educational funds, were to be placed as general deposits, with the right in the depository to commingle them with other deposits and to loan them in the usual course of business, and with an absolute obligation on the depository to pay interest on them at not less than two per cent. per annum; (b) that the act also made provision for an active depository for the collection of checks, drafts and the like, belonging to any state fund, whether educational or otherwise, and the safe-keeping of the proceeds subject to the treasurer's order, but with no right in the depository to commingle them with other deposits or to loan them, and with no specific or absolute obligation on the depository to pay interest thereon; (c) that by contrasting the provisions relating to general depositories with those relating to the active depository it was evident that deposits in the latter, unlike deposits in the former, were to be special, the title not passing to the depository but remaining in the State; and (d) that the act operated, and the legislature intended, to take the educational funds out of the custom or right of the treasurer to make general deposits which was recognized in *Baker* v. *Williams Banking Co., supra.* Then coming to apply the act, as so construed, together with § 1807, to the facts of the case as reflected by the verdict of the jury, it was further held (1) that the bank held the money as a special deposit, the title being in the State; (2) that the

defendants, being in control of the bank as its officers and directors and knowing of the deposit, were to be regarded as having the money in their possession within the meaning of § 1807; (3) that the commingling of the money with other deposits and the using of it in paying liabilities of the bank constituted an unlawful appropriation of it; and (4) that as the defendants, as controlling officers and directors of the bank, sanctioned that appropriation, knowing that the money belonged to the educational funds of the State and was held by the bank as an active depository, they thereby converted the money to their own use within the meaning of § 1807, even although the appropriation was for the benefit of the bank and not of themselves personally.

It will be perceived that but for the depository act, as so construed, the deposit would have been a general one, merely creating the relation of debtor and creditor between the bank and the State, and the commingling and use of the money in the manner shown would not have been a crime under § 1807.

The record shows that the plaintiff in error contended in the Supreme Court of the State that the depository act was not reasonably susceptible of the construction ultimately adopted, and that to put such a construction upon it would be violative of the prohibition in the Constitution of the United States against *ex post facto* state laws. Both phases of the contention were denied, the second necessarily failing with the first, and the plaintiff in error now assigns error upon that holding and complains that it deprived him of a right secured by the Constitution.

Bearing in mind what has been said, and especially that the depository act and § 1807 were both in force at the time of the alleged offense, it will be perceived that the real complaint which we are asked to consider is, not that the Supreme Court of the State in any wise

rested its judgment upon a statute passed after the time of the alleged offense, but only that it misconstrued a preëxisting statute to the disadvantage of the plaintiff in error and that such a decision is an *ex post facto* law within the meaning of Art. I, § 10, of the Constitution, which declares: "No State . . . shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

But that provision of the Constitution, according to the natural import of its terms, is a restraint upon legislative power and concerns the making of laws, not their construction by the courts. It has been so regarded from the beginning. In *Calder* v. *Bull*, 3 Dall. 386, one of the first cases in which the provision was considered, it was spoken of as reaching legislative, but not judicial, acts; and in *Fletcher* v. *Peck*, 6 Cranch, 87, 138, Chief Justice Marshall said of it: "In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained." True, neither of those cases turned upon the question whether the words "no State shall pass a law" embrace a decision of a court construing a statute, but that question was both presented and decided in *Commercial Bank* v. *Buckingham's Executors*, 5 How. 317. There the Supreme Court of Ohio, in an action upon a contract, had put upon two preëxisting statutes of the State a construction which was claimed to be unreasonable and to impair the obligation of the contract, and it was sought to have that decision reviewed by this court on the ground that it denied a right secured by the Constitution of the United States. But the writ of error was dismissed for want of jurisdiction, because, as was said in the opinion (p. 342): "If this court were to assume jurisdiction of this case, it is evident that the question submitted for our decision would be, not whether the statutes of Ohio are repugnant to the constitution of the United States, but whether the Supreme Court of

Ohio has erred in its construction of them. It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretence that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary." A like question was presented, and similarly disposed of, in *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18, 30, where it was said: "In order to come within the provision of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the State, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals." And in *Brown* v. *Smart*, 145 U. S. 454, 458, where a decision of the Court of Appeals of Maryland, expounding a statute of that State, was challenged as impairing the obligation of a contract made after the statute came into existence, it was held that the decision "was not a law" within the meaning of the provision against the impairment of contractual obligations by state laws. Many other cases give effect to this ruling, but it will suffice to cite, from among them, *Central Land Co.* v. *Laidley*, 159 U. S. 103, 109; *Bacon* v. *Texas*, 163 U. S. 207, 220; *Hanford* v. *Davies, Ibid.* 273, 278; *Turner* v. *Wilkes County*, 173 U. S. 461; *Cross Lake Shooting & Fishing Club* v. *Louisiana*, 224 U. S. 632, 638.

But whilst thus uniformly holding that the provision is directed against legislative, but not judicial, acts, this court with like uniformity has regarded it as reaching

every form in which the legislative power of a State is exerted, whether it be a constitution, a constitutional amendment, an enactment of the legislature, a by-law or ordinance of a municipal corporation, or a regulation or order of some other instrumentality of the State exercising delegated legislative authority. *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co., supra; St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 148; *Davis & Farnum Manufacturing Co.* v. *Los Angeles*, 189 U. S. 207, 216; *Grand Trunk Railway Co.* v. *Railroad Commission of Indiana*, 221 U. S. 400, 403. Of course, the ruling here in question was by an instrumentality of the State, but as its purpose was, not to prescribe a new law for the future, but only to apply to a completed transaction laws which were in force at the time, it is quite plain that the ruling was a judicial act and not an exercise of legislative authority. As was said in *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226: "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."

The plaintiff in error cites the cases of *Kring* v. *Missouri*, 107 U. S. 221; *Muhlker* v. *New York & Harlem Railroad Co.*, 197 U. S. 544; *Louisiana* v. *Pilsbury*, 105 U. S. 278; *Gelpcke* v. *Dubuque*, 1 Wall. 175, and *Butz* v. *City of Muscatine*, 8 Wall. 575, as holding that a judicial decision may be a law in the sense of the constitutional provision which he invokes. But none of those cases, when rightly considered, sustains that position. The first was a criminal case in which a provision in a new constitution was held to be an *ex post facto* law as to an offense theretofore committed; the second presented the question whether a state statute of 1892 impaired contractual obligations

created by deeds of a much earlier date; the third and fourth were explained in *Central Land Co.* v. *Laidley*, 159 U. S. 103, 111–112; *Bacon* v. *Texas*, 163 U. S. 207, 221–223, and *Turner* v. *Wilkes County*, *supra*, and were there shown not to be in conflict with other cases on the subject, and the fifth is in no wise distinguishable from the fourth.

We conclude that no Federal right was involved in the ruling respecting the construction of the depository act.

The prosecution was instituted by an information conformably to a law of the State in force at the time. Bellinger & Cotton's Codes, § 1258. Following the judgment of conviction, and while the case was pending on appeal, a constitutional amendment was adopted, declaring: "No person shall be charged in any circuit court with the commission of any crime or misdemeanor defined or made punishable by any of the laws of this State, except upon an indictment found by a grand jury." The plaintiff in error thereupon advanced the contention that the constitutional amendment worked a repeal of the statute under which the information was filed and made it impossible to enforce the judgment against him without depriving him of his liberty without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States. The state court ruled that the amendment to the state constitution was prospective and did not affect pending cases. Error is now assigned upon that ruling. But it involved nothing more than the construction of the constitutional amendment, which was a question of local law, and its decision by the state court is not reviewable here.

As the record presents no Federal question, we are without jurisdiction to review the judgment, and therefore cannot enter into the merits of the questions that were presented and determined in the state court.

Writ of error dismissed.

UNITED STATES *v.* HARVEY STEEL COMPANY.

MIDVALE STEEL COMPANY *v.* HARVEY STEEL COMPANY.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 615, 616. Submitted January 6, 1913.—Decided February 3, 1913.

The construction given to a contract by this court is either authoritatively controlling or conclusively persuasive in a subsequent suit between the same parties; and so held that the contentions relied on in this case as to the contract heretofore construed in *United States* v. *Harvey Steel Co.*, 196 U. S. 310, are, in the light of that decision, so frivolous that the judgment of the Court of Claims following it should be affirmed without further argument.

United States v. *Harvey Steel Co.*, 196 U. S. 310, followed to effect that the Government is liable for royalties on the Harvey process even though every element thereof was not used on the plates involved in this action, and even though the contractor furnishing the plates and who used the process by permission of the United States was not specifically required to use it.

46 Ct. Cl. 298, affirmed.

THE facts, which involve the construction of a contract with the United States for use of a steel hardening process and the effect of the prior construction thereof by this court in a suit between the same parties, are stated in the opinion.

Mr. James R. Sheffield and *Mr. James J. Cosgrove* for appellee, in support of motion to affirm.

Mr. Assistant Attorney General John Q. Thompson and *Mr. Philip M. Ashford* for the United States, appellant in No. 615, in opposition to the motion.

Mr. A. H. Wintersteen, Mr. Frederic D. McKenney and *Mr. Frank S. Busser* for Midvale Steel Company, appellant in No. 616, also in opposition to the motion.

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

These appeals are from a judgment in favor of the Harvey Steel Company and against the United States for $123,467.23. This was the amount of royalty found to be due to the Harvey Steel Company under a contract, dated April 12, 1893, to pay royalty on all armor plate treated by the Harvey process and used by the United States. The armor plate under which the royalty in question was allowed was manufactured for the United States under four contracts with the Midvale Steel Company. 46 Ct. Cls. 298. The Midvale Steel Company, for the protection of its interests under the contracts, was permitted to intervene, and it was also allowed to appeal from the judgment. The case is before us on a motion to affirm under paragraph 5 of rule 6.

The questions for decision involve the construction of the contract between the United States and the Harvey Steel Company. As the meaning of that contract was passed upon by this court in a previous case between the same parties (196 U. S. 310) and the construction then given to the contract is here either authoritatively controlling or conclusively persuasive, we recur to that case and what was decided in it as the most direct means of not only analyzing and disposing of the issues here presented for decision, but moreover of causing it to be apparent that whatever may have been the original force of the contentions relied on, they are, in the light of the previous decision, "so frivolous as not to need further argument."

Following tests of armor plate treated by the Harvey process an option was given to the Government, at the request of the Navy Department, for the purchase of the right to use the process upon vessels the construction of which had at that time been authorized by Congress. The

option was given on March 3, 1891, and the patent for the process—No. 460,262—did not issue until September 29, 1891. The Harvey Steel Company, appellee, became the owner of the patent on October 7, 1891. The process was defined in the patent as follows:

"1. The herein-described method of producing a decrementally hardened tenacious armor plate, which consists of inclosing a low steel plate between a mass of noncarbonaceous material on one side and a mass of granular carbonaceous material firmly packed upon the other side contained in a compartment formed within the heating chamber of a suitable furnace and in maintaining the said heating chamber for a predetermined period of time at a temperature above the melting point of cast iron, and in subsequently chilling said plate, whereby a stratum of steel of prescribed thickness upon the side of the plate against which said carbonaceous material has been pressed is made to acquire a heterogeneous crystalline structure and a condition of excessive hardness upon its exposed surface and a condition of gradually diminishing hardness as the depth from said surface increases."

After further tests the United States entered into an agreement on March 21, 1892, with the Harvey Steel Company to purchase the right to employ the Harvey process in Harveyizing—as it is sometimes called—the armor for twelve designated vessels. Subsequently, on October 8, 1892, the Harvey process was definitely and formally adopted by the Navy Department; and, as said in the opinion in 196 U. S. p. 314, in pursuance of the contract of March 21, 1892, "the Navy Department required and received from Harvey a revelation of the secret process and improvements" used in the treatment of armor plate by the Harvey process. Subsequently, at the request of the United States, the contract of March 21, 1892, was abrogated and in its stead a contract was entered into on April 12, 1893. By this contract, the United States was

granted the right to use for the treatment of armor plate for its vessels the "Harvey process" and any and all improvements made by the Harvey Steel Company upon such process, and to use and employ the armor plates manufactured according to said process. The United States agreed to pay the Harvey Steel Company a royalty of one-half cent per pound on the finished plate.

The case in 196 U. S. was brought to recover royalties alleged to be due to the Harvey Steel Company under the contract of April 12, 1893, calculated on the weight of armor supplied to the United States by the Bethlehem Iron Company and the Carnegie Steel Company. The Harvey Steel Company obtained judgment in the Court of Claims, and that judgment was affirmed by this court. The questions presented and decided were (a) whether under the contract of 1893 the United States could set up the invalidity of the patent as a defense; and (b) whether the United States ought to have been allowed to show that it had not used the patent, properly construed, although it had used "the process communicated to it and known in common speech as the Harvey process." After answering the first of these propositions in the negative, the court came to consider the claim asserted under the second proposition, viz: "that at the time the contract was made it was supposed that the heat required for the process was greater than that actually used, that the patent was valid only for a process with the greater heat, and that the contract covers no more than the patent." In deciding against this contention, the court said (p. 317):

"But the fact that the parties assumed that the process used and intended to be used was covered by the patent, works both ways. It shows that they thought and meant that the agreement covered and should cover the process actually used. We think that this can be gathered from the agreement itself apart from the mere supposition of the parties. The contract dealt with a process 'known as

the Harvey process.' It imported the speech of the parties and the common speech of the time into the description of the subject matter. The words, Harvey process, commonly are put in quotation marks in the first contract, thus emphasizing the adoption of common speech. They mean the process actually used. The contract states that it is dealing with the same thing that had been the subject of the former agreement. That agreement further identified that subject as a process which was tested at the Naval Ordnance Proving Ground. It also identified it, it is true, as a patented process, but, if the incompatibility of the two marks is more than trivial, as it was regarded by the court which found the facts with which we have to deal, the identification by personal familiarity and by common speech is more pungent and immediate than that by reference to a document couched in technical terms, which the very argument for the United States declares not to have been understood. It is like a reference to monuments in a deed. As we have said, this identification by personal experiment and by common speech is carried forward into the contract in suit. The latter contract manifests on its face that it is dealing with a process actually in use, which requires the communication of practical knowledge and which further experience may improve."

In concluding the opinion it was observed (pp. 318, 319)—:

"But the fuller the statement should be made the more fully it would appear that the United States was dealing with a matter upon which it had all the knowledge that any one had, that it was contracting for the use of a process, which, however much it now may be impugned, the United States would not have used when it did but for the communications of the claimant, and that it was contracting for the process which it actually used—a process which has revolutionized the naval armor of the world."

This decision plainly refutes the contention now again urged that the Harvey process of the contract of 1893 is limited and strictly confined to the method of the patent, and it is here controlling. Furthermore, in no possible view do the findings in the present case present facts which even suggest the possibility of a different construction of the contract than that heretofore given. Those findings may be thus summarized: The method described in the patent for "producing a decrementally hardened tenacious armor plate" consisted in "inclosing a low steel plate between a mass of noncarbonaceous material on one side and a mass of granular carbonaceous material firmly packed upon the other side contained in a compartment formed within the heating chamber of a suitable furnace," etc. The noncarbonaceous material actually used in the "Harvey process" consisted of sand packed at the back of the plate to protect the same from the carbonaceous material and excessive heat, of which the Government was advised by the patentee by an exhibition of the process with the use of sand prior to the contract of April 12, 1893.

The use of sand was gradually discontinued, because the same result could be accomplished without it, and some of the companies manufacturing plates were so advised late in 1893. Since 1904 no sand or other noncarbonaceous material has been used by the Carnegie and Bethlehem companies manufacturing armor plate.

The process used by the Midvale Steel Co. in the manufacture and production of armor plate was as follows: The plate to be carbonized was mounted, face up, on brick piers about 18 inches high, resting on the car bottom, about 1 foot apart. A row of bricks, 2 high, was then placed around the plate and the carbonizing material was put inside of these bricks on the face of the plate and raised about three-fourths of an inch above the bricks. Mortar was edged up on the second bricks. Then the

second plate was placed on the carbonizing material, face down. The plates were then run into the furnace and the fire started.

The brick box containing the carbonaceous material prevented the same from reaching the back and sides of the plates, thus accomplishing the same result as with the sand which was used to protect the back of the plate from the carbonaceous material and excessive heat as aforesaid.

The contention of the appellants on this branch of the case was thus stated by the court below in its opinion:

"In the present case the contention of the defendants and the intervenor is that in the hardening or Harvey process referred to, one of the elements required was the use of sand, a non-carbonaceous material packed in the back of the plates, and that if not so used it cannot be contended that the Harvey process was applied by the Midvale Steel Co. in the process which it used in hardening the plates under its several contracts with the United States, though in other respects it concedes that the Harvey process was substantially used. Its contention is that it did not use sand. That is to say, that it accomplished the same result without, as had been accomplished with sand; and it may be added that the same result was accomplished without the use of any non-carbonaceous material in the back of the plates by confining the carbonaceous material within the brick box, as set forth in the findings."

In view of the construction given to the contract of 1893 by the previous decision, we are of opinion that the court below did not error in deciding as it did that the circumstance that sand was used in the back of the plates in the various tests made by the Government to which reference has been made and was also employed in the treatment of the armor plate which was the subject of the suit decided in 196 U. S., while in the treatment of the armor plate involved in this suit neither sand nor any

other noncarbonaceous material was packed on the side of the plate which was not to be carbonized, did not entitle the United States to claim that the Harvey process of the contract of 1893 was not used. As said by the court below, the Government received all it had bargained for, since it was not only entitled by the contract to a disclosure of the inventor's process, but to his instructions and assistance in the practical application of the patent, and was at liberty to use the process, little or much, in whole or in part.

The unsoundness of the remaining contention becomes apparent from its mere statement. The proposition is that even although the armor plate made for the United States by the Midvale Steel Company was hardened by the Harvey process, the obligation to pay royalty as to such armor does not exist because the United States had not by its contracts with the Midvale Company specifically required that company to use the Harvey process. But under the terms of two of the contracts with the Midvale Company that company was permitted to use the Harvey process if desired, while under the other contracts the process used was required to be satisfactory to the Navy Department, and under all the contracts the United States had the right to inspect the process used. Under the contract of April 12, 1893, the right was conferred upon the United States to use and employ the "aforesaid Harvey process in the treatment of armor plates for vessels which have been since July 18, 1892, or which may hereafter be authorized by Congress, and to use and employ armor plates for such vessels manufactured according to said process, paying therefor to the party of the first part a royalty of one-half of one cent per pound of the finished plate." We think the plain meaning of the contract was that the Government should pay royalty when it used armor plate treated according to the Harvey process of the contract.

Affirmed.

ROBINSON *v.* LUNDRIGAN.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 108. Argued December 19, 20, 1912.—Decided February 3, 1913.

Where an application for public lands is finally rejected on the ground that the soldier on whose claim the application is based had no right thereto, the case is closed and cannot be kept open for perfection by substituting the claim of another soldier, and the instant the application is rejected the land becomes subject to appropriation by another.

An application must depend upon its particular basis; it cannot be kept open for the substitution of another right than that upon which it was made; and if a practice to do so existed in the Department it was wrong. *Moss* v. *Dowman*, 176 U. S. 413.

Even though the Secretary keeps the case open and afterwards rules in favor of the subsequent entryman, the original applicant is not divested of any rights, for no right had attached.

An application based on an invalid claim of a soldier is not an entry valid on its face which segregates the land from the public domain and precludes its appropriation by another until set aside. *McMichael* v. *Murphy*, 197 U. S. 304, distinguished.

THE facts, which involve the right of one filing an application for public lands based on a soldier's claim, to keep it open after final rejection for substitution of the claim of another soldier, and departmental practice in regard thereto, are stated in the opinion.

Mr. C. D. O'Brien, with whom *Mr. P. H. Seymour* was on the brief, for appellants.

Mr. Wm. E. Culkin and *Mr. Luther C. Harris* for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Bill in equity by appellants, who were complainants in the Circuit Court, and we shall so refer to them, and to the appellee as defendant, to adjudge defendant trustee for complainants of the S. W. ¼ of the S. E. ¼ of section 13, Township 55 North, Range 26 West of the Principal Meridian, and to compel a conveyance to them. The Santa Fe Railroad Company was impleaded with defendant, but it filed a disclaimer and the suit proceeded against him alone.

The rights of complainants are based upon an application for the lands as unappropriated public lands of the United States by Robinson, one of the complainants, as assignee of one James Carroll. The application was duly entered of record upon the tract and plat book in the local land office and proof of the claim of Carroll for an additional homestead entry was transmitted to the General Land Office for examination and action. Upon investigation the Land Department decided that Carroll was not entitled to make such entry and held Robinson's application for rejection and ordered a hearing to be had on June 29, 1905. Robinson did not appear and a decision was rendered holding that Carroll was not entitled to an additional homestead entry under § 2306 of the Revised Statutes. Robinson was notified of this action and that he had a right to appeal therefrom.

On the twenty-seventh of July, 1905, Robinson filed with the local land office for transmission to the General Land Office an application for leave to substitute in support of his application for entry of the land another soldier's additional homestead right in lieu of that of Carroll. In his application he said he appealed from the order cancelling Carroll's entry, and excused himself for not appearing at the hearing on June 29, 1905, on account

of the sudden and serious illness of his mother, which prevented his attendance at the hearing and also prevented him from providing a representative thereat. He disclaimed a desire to incommode the Department and expressed a willingness to aid it in the adjustment of all matters in which he should be interested. He further said that he was deeply sensible and appreciated the seriousness of defaulting at the hearing and that he did not want the case reopened. He requested a delay of thirty days and asked that the decision of the Register and Receiver of the Land Office be amended so as to grant him a reasonable time within which to perfect his entry.

An order was made allowing him thirty days after notice to file a proper substitute for the right of Carroll. On October 4, 1905, he, Robinson, filed the additional homestead right of one Justin F. Heath.

On February 15, 1906, the Commissioner of the General Land Office accepted the substitute and directed the local land office that upon the payment by Robinson of the legal fees and commissions within sixty days they should allow the entry made by him. He paid the fees as required, and thereupon final certificate No. 715, Cass Lake, Minnesota, Series, was issued to him.

On July 11, 1905, that is, prior to the filing by Robinson of the homestead right of Heath, the Santa Fe Railroad, through the defendant Lundrigan, its attorney in fact for that purpose, filed in the local land office under the act of Congress of June 4, 1897, its application to select the land. The application was received subject to final action on Robinson's application. Upon the allowance of Robinson's application and the issue to him of a final certificate the local land office rejected the application of the railroad company, from which action the latter appealed to the Commissioner of the General Land Office. The Commissioner held that the application of the railroad company constituted a valid intervening adverse right such as to

bar the substitution by Robinson of the additional homestead right of Heath. On February 25, 1907, the Secretary of the Interior affirmed the decision of the Commissioner. Upon motion for review the decision was affirmed May 13, 1907, and, on petition for re-review, reaffirmed July 18, 1907.

In pursuance of this decision Robinson's entry was cancelled, and a patent for the land was issued to the railroad company. The railroad company subsequently conveyed the land to defendant.

The above facts are not denied. It is alleged by complainants that for many years immediately preceding the decision holding Robinson's application for cancellation there was a rule, regulation and settled practice prevailing in the Department providing that upon the rejection of a soldier's additional homestead right, surrendered by the assignee thereof in support of an application under § 2306 of the Revised Statutes, such applicant might substitute in support thereof a valid additional homestead right in place of that rejected.

The existence and validity of the rule is in dispute between the parties and also the legality of the decision of the Interior Department against Robinson's application.

The Circuit Court dismissed the bill and its decree was affirmed by the Circuit Court of Appeals by a divided court. 178 Fed. Rep. 230.

The question in the case is very direct. Robinson's application had no legal foundation, Carroll, upon whose rights it was made, not being entitled to make an additional homestead entry. The question then is, could Robinson substitute another right and give his application precedence over the intervening claim of the railroad company? An affirmative answer is contended for by complainants upon the practice of the Land Office. The defendant denies the existence of the practice and contends, besides, that, if it be established, it is destitute of legal effect.

We have seen that Robinson was given an opportunity to avert the rejection of his application and support it by proof of a right in Carroll. He defaulted; but he did not ask to reopen the case and establish a legal foundation for his application, but that he be given thirty days to "re-script" the land. To this the Commissioner of the Land Office responded, affirming the decision of the local land office rejecting the application and pronouncing "the case closed." He was, however, given thirty days to "file a proper substitute for the right" rejected, and, if he failed to do so, the local office was directed to hold the tract "subject to entry from that time by the first qualified applicant."

On October 4, 1905, he filed as a substitute the right of Justin F. Heath, but on July 11, 1905, the railroad company had selected the lands as lieu lands. The local land office rejected the application of the railroad company on account of conflict with Robinson's entry, subject, however, to the right of appeal. An appeal was taken and Robinson moved to dismiss it. The motion was denied on the authority of the departmental decision in the case of the *Southern Pacific Railway Co.* v. *Charles P. Maginnis, Assignee of William R. Davis,* in which it was decided, the facts being substantially the same, "that a substitution could not be allowed in the face of an intervening adverse right." The decision was affirmed by Secretary Hitchcock and successively upon review and re-review by Secretary Garfield and Acting Secretary Woodruff.

Against these rulings complainants urge previous departmental practice. This practice Robinson urged in his petition for review, and cited in support of it the case of *Germania Iron Co.* v. *James,* 89 Fed. Rep. 811. To the contention and the case the Acting Secretary replied as follows: "In that case the court held that a just and reasonable rule of administration adopted and applied by the Department, became a rule of property and could not be

altered to the prejudice of those who had initiated rights under such practice. But the rule contended for by counsel as governing the case under consideration is neither reasonable or just. Robinson attempted to initiate a right by relying upon the invalid claim of another, and insists that even though the Department would be unwarranted in recognizing such claim he should be allowed to perfect the right thus asserted to the prejudice of a valid intervening right, of which he had notice, by the substitution of another and different right. The simple statement of the facts destroys all the argument in support of such a practice. There is neither reason nor equity in it. Had Robinson been clothed with a right in himself, independent of any right claimed through his assignor, another question might be presented. But such is not the case, as he was relying solely upon the rights obtained by assignment, and of these the first was worthless and prior to the assertion of the second the right of another had attached. The arbitrary destruction of this intervening right in the manner contended for by counsel would be wholly unwarranted."

Little need be added to this reasoning. We are not disposed to review the cases by which it is contended the practice is established. It could only prevail if it were a reasonable administration of the statute. *Webster* v. *Luther*, 163 U. S. 331, 342.

Under § 2304 of the Revised Statutes every private soldier and officer who had served in the Army or Navy of the United States during the War of the Rebellion is entitled to enter under the homestead laws 160 acres of land. We omit the qualifying conditions. Section 2306 provides that every person mentioned in § 2304 who has entered under the latter section less than 160 acres "shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres." This provision is the foundation of Robin-

son's rights. In *Webster* v. *Luther*, *supra*, these sections were considered and it was decided that the right given by § 2306 was intended as compensation and was assignable. When assigned, however, it is the right of the soldier which is transferred and which must be used to make an entry. Necessarily the right must exist before it can be exerted either by him or his assignee. Or, to put it in another way, a baseless or fraudulent claim cannot initiate or sustain a right. Hence the distinction made by Acting Secretary Woodruff between a right in Robinson and a right in his assignor and the observation that "had Robinson been clothed with a right in himself, independent of any right claimed through his assignor, another question might be presented." Hence, also, the decision of Secretary Garfield that "No right of entry is gained by the filing of an invalid application to enter, and upon the rejection thereof the rights of subsequent applicants attach in the order in which they are asserted. By admitting the rights of substitution, irrespective of the intervening rights, the mere filing of an individual soldier's additional application would in effect amount to a segregation of the land." And again, "The refusal of the Department to adopt such a practice does not prejudice the holder of a valid right. The only value of such right lies in the power of the holder to enter thereunder any land subject to it at the date of filing his application. This right is not denied in the present case, as the land there involved was subject thereto only in event there were no prior adverse claims asserted upon which entry should be allowed. The right itself is not destroyed by refusing to allow entry thereunder of this particular tract. The purchaser still has all that he bargained for, and the mere fact that his purchase may have been made upon the mistaken idea that he would be entitled as a matter of right to exercise it upon a particular tract of land does not entitle him to equitable consideration as against a prior, and therefore superior, right of another."

The ruling was right. Each application must depend upon its particular basis. And it cannot be kept open for the substitution of another right than that upon which it was made. If one substitution can be permitted, successive substitutions can be permitted, and there might arise the condition of things condemned in *Moss* v. *Dowman*, 176 U. S. 413. In that case successive formal entries under the homestead law and successive relinquishments of the entries of a tract of land were made. Dowman, who was not a party to the manipulating process, about one month prior to the last relinquishment settled upon the land. It was held that his right attached immediately upon the filing of the last relinquishment and before the last entry, though the latter was made on the same day the relinquishment was filed. It was recognized that the entry which was given up had segregated the land and that no right could be initiated while it stood of record, but it was decided that the instant its relinquishment was filed in the local office the right of Dowman, the settler on the land, attached and the Moss entry could not defeat it. And so in the case at bar, the instant that Robinson's application was rejected as having no legal foundation the land became subject to appropriation by another. No right, therefore, of Robinson was divested by the ruling of the Department, as contended by complainants, for no right had attached. His application, based on the right of Carroll, was not an entry of the land and is not within the ruling of *McMichael* v. *Murphy*, 197 U. S. 304, that an entry valid on its face segregates the lands from the public domain and precludes their appropriation by another so long as it remains undisturbed.

Decree affirmed.

GUTIERREZ DEL ARROYO *v.* GRAHAM.

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

No. 129. Submitted January 21, 1913.—Decided February 3, 1913.

Held that the instrument involved in this case was an actual contract for purchase and sale of the land described therein and not merely an option which expired at the time specified therein.

Accepting a lease of property described in a contract for sale thereof, does not amount to an estoppel against enforcing the contract, if the instrument recognizes an outstanding dispute and provides that rights on either side shall not be affected.

THE facts, which involve the construction of a contract for sale of real estate in Porto Rico, are stated in the opinion.

Mr. Francis H. Dexter and *Mr. Frederic D. McKenney* for appellants.

Mr. N. B. K. Pettingill for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill for the specific performance of a contract to sell land, made by the defendants Gutierrez. The defendant Robledo claims under a lease from the vendors made since the contract and found to have been taken with notice. The District Court entered a decree for the plaintiff, and the defendants appealed. There is also a motion to dismiss on the ground that the principal appellants have accepted a part of the purchase money paid into court in pursuance of the decree, but we shall not deal

with this because we are of opinion that the decision was right and therefore there is no need to consider whether the appellants are estopped by doing what they say they were compelled to do upon penalty of being held in contempt. The motion to dismiss did not go to the jurisdiction but raised another question on the merits.

The contract was as follows, according to the translation, the original not being in the record:

Memorandum.

"In the city of San Juan, Porto Rico, the 5th day of July, 1906, Don Rafael Gutierrez del Arroyo and Mr. Robert Graham agreed: 1st, Don Rafael Gutierrez del Arroyo compromised himself to sell to Mr. Robert Graham a parcel of his estate in Pueblo Viejo, which both parties have already fixed the boundaries of and which may extend up to 70 or 75 cuerdas, at the price of $40.00 per cuerda. 2nd, he also compromised himself to sell to him another small extension of land, which they also fixed the boundaries of, and which may have an extension, approximately, of 14 cuerdas, at the price of $50.00 per cuerda. 3rd, he also compromised himself to sell to him other 200 or 300 cuerdas of the same estate, in that part of which, which they have also already designated, at the price of $55.00 per cuerda. 4th, the parcels indicated in Nos. 1 and 2 shall be paid in cash. The parcel indicated in the 3rd number shall be paid in installments during the two years following the delivery of the document. Mr. Graham shall not pay any interest for the extended time of payment; but Mr. Arroyo shall remain in possession and usufruct of the part of the estate sold and not paid for, until the payment shall be made. Mr. Graham shall execute a mortgage on the estate to secure the payment. 5th, this contract shall be extended in a public document as soon as Mr. Graham will have ultimated the deal which

is now pending with Doña Felicia Fernandez about the purchase of an undivided part in the same estate. In case that deal should not be carried to effect, this contract will also remain without virtue or effect.

"6th, this contract is also dependent upon the condition that Don Rafael Gutierrez del Arroyo could rescind the contract of lease which he now has with Don Eleuterio Landrau.

"Robert Graham.
"Rafael Gutierrez del Arroyo."

The answer admits and it is found that this agreement was made by Rafael Gutierrez on behalf of himself and his sister, the other principal defendant.

Subsequently the following addition was made:

"On the 27th of April, 1908, the contracting parties make addition to the 3rd clause of this contract in the sense that the excess of price which Mr. Graham may obtain over the $55.00 per cuerda shall be divided between him and Mr. Arroyo at 50 per cent each.

"Robert Graham.
"Rafael Gutierrez del Arroyo."

The burden of the argument for the appellants is that this document only gave an option which expired by time and that the addition converted the option into a revocable agency to sell. But it appears to us that the argument is answered by reading the instruments. They are signed by both parties—the first and second parcels 'shall be paid in cash'—the third 'shall be' paid for as indicated—Mr. Graham 'shall execute a mortgage'—'this contract' shall be extended in a public document as soon, etc. The parties recognized the original agreement as a contract, imposing obligations upon Graham as well as upon Gutierrez, and not merely a promise by the latter. So the addition speaks of 'the contracting parties,' im-

plying that both contract, and is simply an undertaking by Graham to pay more in a certain event. There is no suggestion of agency in it, but, on the contrary, an assumption that Graham is acting on his own behalf. The answer, although setting up the second point, as to the effect of the addition, also recognizes the original agreement as a contract of sale and shows very plainly that calling it an option is an afterthought.

The condition as to the lease to Landrau is admitted not to be material now. Graham was ready to perform the conditions imposed upon him. On August 10, 1909, he accepted a lease of parcels one and two, and this is set up as an estoppel against him, but it is enough to answer that the instrument recognized an outstanding dispute as to the land and provided that the lease should not affect the rights on either side. So far as the defenses urged go they point rather to unwillingness to carry out a bargain than to any reasonable doubt. The most plausible ground for hesitation is the indefiniteness of the boundaries. But no such point was taken. It seems to be a common characteristic of such agreements in Porto Rico, see *Veve* v. *Sanchez*, 226 U. S. 234, 241, and with the aid of local knowledge the surveyor employed by the court seems to have had no difficulty in fixing the line.

Decree affirmed.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY *v.* SCHWYHART.

ERROR TO THE KANSAS CITY COURT OF APPEALS OF THE STATE OF MISSOURI.

No. 132. Argued January 21, 22, 1913.—Decided February 3, 1913.

Whether there was a joint liability of defendants sued jointly for negligence is a matter of state law and this court will not go behind the decision of the highest court of the State to which the question can go. *Southern Railway Co.* v. *Miller*, 217 U. S. 209.

The motive of the plaintiff in joining defendants taken by itself, does not affect the right to remove. If there is a joint liability he has a right to enforce it, whatever his reason may be. *Chicago, Burlington & Quincy Ry. Co.* v. *Willard*, 220 U. S. 413.

The fact that the resident defendant joined in a suit with a rich non-resident corporation is poor does not affect the case, if the cause of action against them actually be joint.

Whether or not a cause of action was stated against the resident defendant is a question of state law, and where the verdict went against that defendant and was affirmed by the highest court of the State to which it could go, this court takes the fact as established.

The fact that the declaration was amended after the petition to remove had been denied *held* immaterial where, as in this case, it merely made the original cause of action more precise.

On the question of removal this court need not consider more than whether there was a real intention to get a joint judgment, and whether the record showed colorable ground for it when the removal was denied.

145 Mo. App. 332, affirmed.

THE facts, which involve the right of separate removal by a non-resident railway company sued jointly with a resident defendant by an employé for damages for negligence, are stated in the opinion.

Mr. Paul E. Walker, with whom *Mr. F. C. Dillard* was on the brief, for plaintiffs in error:

The question for determination in this case is whether the petition for the removal of the suit to the United States court should have been allowed.

The controversy between the plaintiff below and the removing defendant was separable.

No cause of action was stated against either of the resident defendants. *Atlantic Coast Line R. Co.* v. *Bailey*, 151 Fed. Rep. 891; *Central Railroad Co.* v. *Keegan*, 160 U. S. 259; *Cincinnati, N. O. & T. P. Ry. Co.* v. *Robertson*, 115 Kentucky, 858; *Davis* v. *Chesapeake & O. Ry. Co.*, 116 Kentucky, 144; *Gustafson* v. *Chicago, R. I. & P. Ry. Co.*, 128 Fed. Rep. 85; *Nelson* v. *Hennessey*, 33 Fed. Rep. 113;

Potter v. *New York Central R. R. Co.*, 136 N. Y. 77; *Slaughter* v. *Nashville & St. L. Ry. Co.*, 91 S. W. Rep. 744; *Schwyhart* v. *Barrett*, 145 Mo. App. 332.

The statute of Missouri prohibited the joinder of the several causes of action. *Barnes* v. *Metropolitan Ry. Co.*, 119 Mo. App. 303; *Blackmer Pipe Co.* v. *Mobile & O. R. Co.*, 137 Mo. App. 497; *Beattie Mfg. Co.* v. *Gerardi*, 166 Missouri, 142; *Enos* v. *Kentucky Distilleries Co.*, 189 Fed. Rep. 342; *Fernandez* v. *La Mothe*, 147 Mo. App. 644; *Gardner* v. *Robertson*, 208 Missouri, 605; *Hunter* v. *Wethington*, 205 Missouri, 284; *Illinois Central R. Co.* v. *Sheegog*, 215 U. S. 308; *Liney* v. *Martin*, 29 Missouri, 28; *Mann* v. *Doerr*, 222 Missouri, 1; *Martinowsky* v. *Hannibal*, 35 Mo. App. 70; *Mertens* v. *Loenberg*, 69 Missouri, 208; *M'Allister* v. *Chesapeake & O. Ry. Co.*, 198 Fed. Rep. 660; *Nicholas* v. *Chesapeake & O. Ry. Co.*, 195 Fed. Rep. 913; *O'Riley* v. *Diss*, 48 Mo. App. 62; *Scott* v. *Taylor*, 231 Missouri, 654; *Southworth* v. *Lamb*, 82 Missouri, 242.

The removing defendant was liable, if at all, under the terms of a Missouri statute; the resident defendants were liable, if at all, only under the rules of the common law. The causes of action were therefore separable. *Alaska Mining Co.* v. *Whelan*, 168 U. S. 86; *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368; *Butler* v. *Grand Trunk Ry. Co.*, 224 U. S. 85; *Central R. Co.* v. *Keegan*, 160 U. S. 259; *Chi., R. I. & P. Ry. Co.* v. *Stepp*, 151 Fed. Rep. 908; *Henry* v. *Ill. Cent. R. Co.*, 132 Fed. Rep. 715; *Jackson* v. *Chi., R. I. & P. Ry. Co.*, 178 Fed. Rep. 432; *Lockard* v. *St. Louis & S. F. R. Co.*, 167 Fed. Rep. 675; *Martin* v. *Atchison, T. & S. F. R. Co.*, 166 U. S. 399; *Nor. Pac. Ry. Co.* v. *Hambly*, 154 U. S. 349; *Nor. Pac. Ry. Co.* v. *Peterson*, 162 U. S. 346; *Nor. Pac. Ry. Co.* v. *Dixon*, 194 U. S. 338; *New England R. Co.* v. *Conroy*, 175 U. S. 323; *Prince* v. *Ill. Cent. R. Co.*, 98 Fed. Rep. 1; *Swartz* v. *Siegel*, 117 Fed. Rep. 13; *St. Paul & M. Ry. Co.* v. *Sage*, 71 Fed. Rep. 40; *Tex. & Pac. Ry. Co.* v. *Bourman*, 212 U. S. 536; *Union Pac. Ry. Co.* v.

Wyler, 158 U. S. 285; *Webber* v. *St. Paul City Ry. Co.*, 97 Fed. Rep. 140.

Under the decisions of the Missouri courts the defendants were not jointly liable to the plaintiff. *McHugh* v. *St. Louis Transit Co.*, 190 Missouri, 85; *Stanley* v. *Union Depot Ry. Co.*, 114 Missouri, 606; *State* v. *Mossman*, 231 Missouri, 474; *Veariel* v. *United Engineering Co.*, 197 Fed. Rep. 877.

The resident defendants were charged solely with acts of nonfeasance, and under the decision of the Missouri courts, were not personally liable. The only controversy in the petition was between the plaintiff and the removing defendant. *American Bridge Co.* v. *Hunt*, 130 Fed. Rep. 302; *Bell* v. *Catesby*, Roel, Abr. 78, pl. 20; *Bryce* v. *Southern Ry. Co.*, 125 Fed. Rep. 958; *Cameron* v. *Reynolds*, 1 Comp. 403; *Chi., R. I. & P. Ry. Co.* v. *Gustafson*, 128 Fed. Rep. 85; *Chi., R. I. & P. Ry. Co.* v. *Stepp*, 151 Fed. Rep. 908; *Clark* v. *Chi., R. I. & P. Ry. Co.*, 194 Fed. Rep. 505; *Davenport* v. *Southern Ry. Co.*, 124 Fed. Rep. 983, and 135 Fed. Rep. 960; Ewell's Evans on Agency, p. 438; *Feltus* v. *Swan*, 62 Mississippi, 415; *Floyt* v. *Shenango Furnace Co.*, 186 Fed. Rep. 539; *Henshaw* v. *Noble*, 7 Oh. St. 226; *Horner* v. *Lawrence*, 37 N. J. L. 46; *Jewell* v. *Kansas City Bolt Co.*, 231 Missouri, 176; *Kelly* v. *Chi. & Alt. R. Co.*, 122 Fed. Rep. 286; *Lane* v. *Cotton*, 12 Mod. 488; *Marsh and Astrey's Case*, 1 Leon. 146; *Murray* v. *Usher*, 117 N. Y. 542; *McGinnis* v. *Chi., R. I. & P. Ry. Co.*, 200 Missouri, 347; *Prince* v. *Ill. Cent. R. Co.*, 98 Fed. Rep. 1; *Scheller* v. *Silbermintz*, 98 N. Y. Supp. 230; Story on Agency, 9th ed., § 308; *Steinhauser* v. *Spraul*, 127 Missouri, 541; *Shaffer* v. *Union Brick Co.*, 128 Fed. Rep. 97; *Southern Railway Co.* v. *Miller*, 217 U. S. 209.

The decisions of this court do not establish principles in conflict with the contentions of the plaintiffs in error. *Alabama Great Southern Ry. Co.* v. *Thompson*, 200 U. S. 206; *Ches. & O. Ry. Co.* v. *Dixon*, 179 U. S. 131; *Chi., B.*

& Q. R. Co. v. *Willard*, 220 U. S. 413; *Chi., R. I. & P. Ry. Co.* v. *Martin*, 178 U. S. 245; *Cin., N. O. & T. P. Ry. Co.* v. *Bohon*, 200 U. S. 221; *East Tenn., V. & G. R. Co.* v. *Grayson*, 119 U. S. 240; *Ill. Cent. R. Co.* v. *Sheegog*, 215 U. S. 308; *Johnson* v. *St. Joseph Terminal Ry. Co.*, 203 Missouri, 381; *Lanning* v. *Chicago G. W. Ry. Co.*, 196 Missouri, 647; *Little* v. *Giles*, 118 U. S. 596; *Louisville & N. R. Co.* v. *Ide*, 114 U. S. 52; *Louisville & N. R. Co.* v. *Wangelin*, 132 U. S. 599; *Pirie* v. *Tvedt*, 115 U. S. 41; *Plymouth Mining Co.* v. *Amador Canal Co.*, 118 U. S. 264; *Powers* v. *Ches. & O. Ry. Co.*, 169 U. S. 92; *Sloane* v. *Anderson*, 117 U. S. 275; *Southern Ry. Co.* v. *Carson*, 194 U. S. 136; *Southern Ry. Co.* v. *Miller*, 217 U. S. 209; *Stone* v. *South Carolina*, 117 U. S. 430; *Stotler* v. *Chi. & Alt. Ry. Co.*, 200 Missouri, 107; *Torrence* v. *Shedd*, 144 U. S. 527; *Whitcomb* v. *Smithson*, 175 U. S. 635.

The allegations of fact contained in the petition for removal were matters for the exclusive determination of the Federal court. *Burlington, C. R. & N. Ry. Co.* v. *Dunn*, 122 U. S. 513; *Carson* v. *Hyatt*, 118 U. S. 279; *Ches. & O. Ry. Co.* v. *McCabe*, 213 U. S. 207; *Crehore* v. *Ohio & Miss. Ry. Co.*, 131 U. S. 240; *Ill. Cent. R. Co.* v. *Sheegog*, 215 U. S. 308; *Kansas City &c. Co.* v. *Daughtry*, 138 U. S. 298; *Kansas City Belt Ry. Co.* v. *Herman*, 187 U. S. 63; *Louisville & N. R. Co.* v. *Wangelin*, 132 U. S. 599; *Madisonville Traction Co.* v. *Mining Co.*, 196 U. S. 239; *Schwyhart* v. *Barrett*, 145 Mo. App. 332; *Stone* v. *South Carolina*, 117 U. S. 430; *Tex. & Pac. Ry. Co.* v. *Eastin*, 214 U. S. 153; *Wecker* v. *National Enameling Co.*, 204 U. S. 176.

Apart from the allegations of negligence with which the resident defendants were charged, the petition contained another and distinct controversy between the plaintiff and the removing defendant. *Adderson* v. *Southern Ry. Co.*, 177 Fed. Rep. 571; *Barney* v. *Latham*, 103 U. S. 205; *Batey* v. *Nashville, C. & St. L. Ry. Co.*, 95 Fed. Rep. 368; *Beuttel*

v. *Chicago, M. & St. P. Ry. Co.*, 26 Fed. Rep. 50; *Boatmen's Bank* v. *Fritzlen*, 135 Fed. Rep. 650; *S. C.*, 212 U. S. 364; *Chicago & A. Ry. Co.* v. *New York, L. E. & N. R. Co.*, 24 Fed. Rep. 516; *Connell* v. *Smiley*, 156 U. S. 335; *Elkins* v. *Howell*, 140 Fed. Rep. 157; *Fergason* v. *Chicago, M. & St. P. Ry. Co.*, 63 Fed. Rep. 177; *Fraser* v. *Jennison*, 106 U. S. 191; *Geer* v. *Mathieson Alkali Works*, 190 U. S. 428; *Gudger* v. *Western N. C. R. Co.*, 21 Fed. Rep. 81; *Gustafson* v. *Chicago, R. I. & P. Ry. Co.*, 128 Fed. Rep. 85; *Harter* v. *Kernochan*, 103 U. S. 562; *Hartshorn* v. *Atchison, T. & S. F. R. Co.*, 77 Fed. Rep. 9; *Henry* v. *Ill. Cent. R. Co.*, 132 Fed. Rep. 715; *McGuire* v. *G. Nor. R. Co.*, 153 Fed. Rep. 434; *Nichols* v. *Ches. & O. Ry. Co.*, 195 Fed. Rep. 913; *Southern Ry. Co.* v. *Edwards*, 115 Georgia, 1022; *Wheeling Creek Gas Co.* v. *Elder*, 170 Fed. Rep. 215.

For other decisions of this court considering the separable controversy provisions of the removal act, see *Balsley* v. *St. Louis, A. & T. H. R. Co.*, 119 Illinois, 68; *Central of Ga. Ry. Co.* v. *Brown*, 113 Georgia, 414; *Chicago & E. R. Co.* v. *Meech*, 163 Illinois, 305; *Chicago & G. T. Ry. Co.* v. *Hart*, 209 Illinois, 414; *Chicago & W. I. R. Co.* v. *Newell*, 212 Illinois, 332; *McCabe's Admx.* v. *Maysville & Big Sandy R. Co.*, 112 Kentucky, 861; *Murray* v. *Cowherd*, 147 S. W. Rep. 6; *Pennsylvania Co.* v. *Ellet*, 132 Illinois, 654; *Schumfert* v. *Southern Ry. Co.*, 65 So. Car. 332; *Southern Ry. Co.* v. *Grizzle*, 124 Georgia, 735, *Southern Ry. Co.* v. *Miller*, 57 S. E. Rep. 1090; *Williard* v. *Spartanburg, U. & C. R. Co.*, 124 Fed. Rep. 796; *Winston's Admr.* v. *Illinois Central R. Co.*, 111 Kentucky, 954.

Mr. Kendall B. Randolph and *Mr. Boyd Dudley*, with whom *Mr. J. A. Selby* was on the brief, for defendant in error:

This case is not removable. The state court properly retained jurisdiction. *Railroad Co.* v. *Dixon*, 179 U. S. 131;

Railroad Co. v. *Thompson*, 200 U. S. 206; *Railroad Co.* v. *Bohn*, 200 U. S. 221; *Southern Ry. Co.* v. *Miller*, 217 U. S. 209; *Chicago, B. & Q. R. Co.* v. *Willard*, 220 U. S. 413.

The right of removal is wholly statutory and the state court is not ousted of its jurisdiction unless the cause is properly removable. *Hanford* v. *Davis*, 163 U. S. 273; *Bors* v. *Preston*, 111 U. S. 252; *Mansfield* v. *Swan*, 111 U. S. 379; *Grace* v. *Ins. Co.*, 109 U. S. 278; *Steamship Co.* v. *Tugman*, 106 U. S. 118; *Alabama Grt. So. Ry. Co.* v. *Thompson*, 200 U. S. 206; *Southern Ry. Co.* v. *Carson*, 194 U. S. 138.

All doubts are to be resolved in favor of the jurisdiction of the state court. *Mexican Nat. Ry. Co.* v. *Davidson*, 157 U. S. 208; *Hanrick* v. *Hanrick*, 153 U. S. 192; *Shaw* v. *Quincy Mineral Co.*, 145 U. S. 444.

The necessary jurisdictional facts must appear on the face of the pleadings to justify a removal. 18 Enc. Plead. & Prac. 297, and cases cited in Note 11.

The question as to whether there is a separable controversy is to be determined by the condition of the record in the state court, and the facts necessary to give jurisdiction to the Federal court must appear upon the face of the plaintiff's petition. The petition for removal cannot supply same unless fraud be sufficiently and specifically averred and proved. *Arkansas* v. *Kans. & Tex. Coal Co.*, 183 U. S. 189; *Mountview Co.* v. *McFaddin*, 180 U. S. 535; *Alabama & G. S. Ry. Co.* v. *Thompson*, 200 U. S. 206; *Central R. R.* v. *Mills*, 113 U. S. 257; *Tennessee* v. *Union Bank*, 152 U. S. 460; *Chicago, B. & Q. R. Co.* v. *Willard*, 220 U. S. 413.

The allegations of the petition of the plaintiff below are taken as confessed in determining whether the controversy is separable on application for removal. *L. & N. Railway Co.* v. *Wangelin*, 132 U. S. 602; *Railway Co.* v. *Grayson*, 119 U. S. 240; *Railway Co.* v. *Thompson*, 200 U. S. 206.

In the car at bar the allegations of fraud in the petition for removal are insufficient and present no issuable fact. *Little York Gold Co.* v. *Keys*, 96 U. S. 199; *Provident Savs. Bank* v. *Ford*, 114 U. S. 635; *Louisville Ry. Co.* v. *Wangelin*, 132 U. S. 599; *Chesapeake Ry. Co.* v. *Dixon*, 179 U. S. 131; *Carson* v. *Dunham*, 121 U. S. 421; *Chicago, B. & Q. R. Co.* v. *Willard*, 220 U. S. 426; *Plymouth Con. Min. Co.* v. *Amador Canal Co.*, 118 U. S. 264; *St. L. & T. Ry. Co.* v. *McBride*, 141 U. S. 127; *Railway Co.* v. *Thompson*, 200 U. S. 206. *Wecker* v. *National Enameling Co.*, 204 U. S. 176; *Donovan* v. *Wells, Fargo & Co.*, 169 Fed. Rep. 363, *Dixon, Bohon, Willard* and other cases cited distinguished.

In the interpretation of state statutes the United States courts are bound by the decisions of the state court of last resort, and will form an independent judgment as to their meaning, only when no such construction has been had. *Town of Enfield* v. *Jordan*, 119 U. S. 680; *Bank* v. *Pennsylvania*, 167 U. S. 461; *Hartford Ins. Co.* v. *R. R. Co.*, 175 U. S. 91; *McCain* v. *DesMoines*, 174 U. S. 177; *Orr* v. *Gilman*, 183 U. S. 283; *Sioux City R. R. Co.* v. *N. A. Trust Co.*, 173 U. S. 107.

There is no merit in the contention that the petition fails to state a cause of action against defendants, Reed and Barrett, and that therefore the cause is removable.

No question of pleading can arise and be determined in removal proceedings. Any question as to the sufficiency of the petition is a question on the merits to be determined by the court which tries the case. Even if no cause of action were stated, that would furnish no ground for removal and would in no wise affect the jurisdiction of the state courts. *St. Louis & San Francisco Ry.* v. *McBride*, 141 U. S. 127. See also *Hax* v. *Saspar*, 31 Fed. Rep. 499; *Evans* v. *Fulton*, 96 Fed. Rep. 176; *Broadway Ins. Co.* v. *Ry.*, 101 Fed. Rep. 507; *Fogarty* v. *Railroad*, 123 Fed. Rep. 973; *Railroad* v. *McBride*, 141 U. S. 127; *Thomas* v. *G. N. Ry.*

Co., 147 Fed. Rep. 83, 86; *Broadway Ins. Co.* v. *Railway Co.*, 101 Fed. Rep. 510.

Plaintiffs in error, Barrett and Reed, were vice-principals. Rev. Stat. Missouri, § 5435.

Plaintiff in error, Railway Company, waived its petition for removal by filing a separate demurrer to the petition of the plaintiff below, before any order was made by the state court with reference to the petition for removal.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for personal injuries brought by Schwyhart against the railway company and those of its servants to whose immediate negligence the injuries were alleged to have been due. There was a verdict and judgment against the company and the defendant Barrett, but at the proper time a petition had been filed by the railway company for the removal of the action to the Circuit Court of the United States, and it now contends that all subsequent proceedings in the state courts were void. 145 Mo. App. 332.

The declaration alleged that the plaintiff was employed by the company as hostler under Barrett as foreman; that it was his duty under Barrett's direction to uncouple the air brake and signal hose from between the ends of the cars on a specified train; that Barrett ordered him to do so, and that while he was between the cars, owing to their proceeding in an unusual manner that is stated, he was crushed; and further that Barrett negligently ordered him into the dangerous situation without giving him warning of the danger, and by his order and presence assured the plaintiff that the work could be proceeded with safely, when by the exercise of ordinary care on Barrett's part the injury could have been avoided. After the petition

for removal had been overruled the declaration was amended by inserting as to Barrett 'although he well knew of plaintiff's danger and the unusual way by which the said Pullman car was to be switched.'

The defendants other than the railway were residents of Missouri, and the petition for removal charged that they were joined for the sole and fraudulent purpose of preventing a removal. The grounds stated for the charge of fraudulent joinder were that the declaration disclosed no cause of action against those defendants, that the company and they were not jointly liable, and that they were persons of little or no property, while the company was fully able to pay. It will be sufficient to consider these grounds with reference to Barrett alone, the party that ultimately was held.

The joint liability of the defendants under the declaration as amended is a matter of state law, and upon that we shall not attempt to go behind the decision of the highest court of the State before which the question could come. *Southern Ry. Co.* v. *Miller*, 217 U. S. 209, 215, 216. That court might hold that the declaration averred the plaintiff to have been led by Barrett into a trap that was set and snapped by the company, the latter being also liable for Barrett's share in the deed. Again, the motive of the plaintiff, taken by itself, does not affect the right to remove. If there is a joint liability he has an absolute right to enforce it, whatever the reason that makes him wish to assert the right. *Chicago, Burlington & Quincy Ry. Co.* v. *Willard*, 220 U. S. 413, 427. *Illinois Central R. R. Co.* v. *Sheegog*, 215 U. S. 308, 316. Hence the fact that the company is rich and Barrett poor does not affect the case.

The remaining justification for the charge of fraudulent intent is that no cause of action was stated against Barrett. That again is a question of state law, and that the plaintiff had such a cause of action in fact must be taken

now to be established. The suggestion that mere nonfeasance is alleged is shown to be unfounded by the statement that we have made. It is true that the declaration was amended after the petition to remove had been denied, but the amendment if not unnecessary merely made the original cause of action more precise. On the question of removal we have not to consider more than whether there was a real intention to get a joint judgment and whether there was a colorable ground for it shown as the record stood when the removal was denied. We are not to decide whether a flaw could be picked in the declaration on special demurrer. As the record stood Barrett was alleged negligently to have ordered the plaintiff into a dangerous place and by his conduct to have assured the plaintiff of safety, when if Barrett had used ordinary care the plaintiff need not have been hurt. To add that Barrett knew the specific source of the danger is merely to make plainer what evidently was meant before.

Judgment affirmed.

BROOKLYN MINING AND MILLING COMPANY *v.* MILLER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 144. Argued January 23, 24, 1913.—Decided February 3, 1913.

Suit for specific performance dismissed by the courts below for failure of the vendors to comply with the terms of the agreement and judgment affirmed by this court.

The court below properly held appellant to an agreement made in open court as consideration for a continuance that no judgment that might meanwhile be obtained in another State on the same cause of action should be pleaded.

13 Arizona, 217, affirmed.

The facts are stated in the opinion.

Mr. F. S. Howell, with whom *Mr. John J. Hawkins*, *Mr. Thos. C. Job* and *Mr. A. W. Jefferis* were on the brief, for appellant:

Under the issues presented, and the findings of both lower courts that no sale had been consummated of the West Brooklyn claim to the United Verde Copper Company by defendants prior to January 1, 1908, the plaintiff was entitled to specific performance of the contract in suit, without regard to whether it prevented such consummation or not. *Beardsley* v. *Beardsley*, 138 U. S. 261; *Columbia Nat. Bk.* v. *Ger. Nat. Bk.* (Neb.), 77 N. W. Rep. 346; *Keenan* v. *Sic.* (Neb.), 136 N. W. Rep. 841; 2 Kent's Comm. 468; *Micks* v. *Stevenson* (Ind.), 51 N. E. Rep. 492, 493; *Phillip Schneider Brewing Co.* v. *Am. Ice Mach. Co.*, 77 Fed. Rep. 138, 142–144.

Appellant (plaintiff) was guilty of no default, under the terms of the contract set up in its complaint, which would warrant the lower courts in refusing it a decree by way of specific performance ordering a conveyance to it of the West Brooklyn and other mining claims mentioned in its complaint, and the refusal of such relief and the dismissal of plaintiff's (appellant's) complaint was reversible error.

The formal dismissal of the complaint in the case referred to in the contract, the case of the *Brooklyn Company* v. *Miller*, was not a condition precedent to be performed before the consummation of a sale of the "West Brooklyn" claim to the United Verde. If it is to be maintained that the contract itself did not operate to dismiss the case, appellant could formally dismiss at any time before decree for specific enforcement. *King* v. *Gsantner*, 23 Nebraska, 797; Pom. Con., p. 462, § 390; *Seaver* v. *Hall*, 50 Nebraska, 878, 882; Story on Eq. Jur. 777; *Whiteman* v. *Perkins*, 56 Nebraska, 181, 185.

Defendants (appellees) made no proper tender of per-

formance following which plaintiff (appellant) would be obliged to dismiss its suit against Miller *et al.* according to the terms of the contract. *Blight* v. *Schneck*, 10 Pa. St. 285; *Fred* v. *Fred*, 50 Atl. Rep. 776; *Fitch* v. *Bunch*, 30 California, 208–212; *Great Western Tel. Co.* v. *Lowenthal*, 154 Illinois, 261; *MacDonald* v. *Huff*, 77 California, 279; *Tharaldson* v. *Evereth*, 87 Minnesota, 168; *Wittenbrock* v. *Cass*, 110 California, 1.

The undisputed testimony and admissions of appellees (defendants) conclusively show that the failure of appellant to dismiss the suit mentioned in the contract sued on had absolutely nothing to do with and did not cause the failure of appellees to perform the condition precedent of a sale of the West Brooklyn to the United Verde Copper Company. *Halsell* v. *Renfrow*, 202 U. S. 287; *Davis* v. *Williams*, 54 L. R. A. 749; *So. Pine Lumber Co.* v. *Ward*, 208 U. S. 126; *Ward* v. *Sherman*, 192 U. S. 168.

The defendants having taken the position, before litigation was started to compel performance, that the West Brooklyn had in fact been sold to the United Verde Copper Company on or before January 1, 1908, cannot, after suit, change front and assert that a failure to sell was for the fault of plaintiff. *Columbia Nat. Bk.* v. *Ger. Nat. Bk.* (Neb.), 77 N. W. Rep. 346.

The court erred in refusing to give effect to the Nebraska decree, for the reason that it constituted an adjudication of the rights of the plaintiff and certain of the parties defendant by a court of competent jurisdiction, and was therefore conclusive in this case as to such rights and parties as were involved therein. *Bigelow* v. *Old Dominion Copper Min. & Smelt. Co.*, 225 U. S. 111; *Butterfield* v. *Nogales Copper Co.*, 80 Pac. Rep. 345; *Deposit Bank* v. *Frankfort*, 191 U. S. 499; *Estil* v. *Embry*, 112 Fed. Rep. 882; *Fayerweather* v. *Ritch*, 195 U. S. 276; *Harris* v. *Balk*, 198 U. S. 215; *Hilton* v. *Guyot*, 159 U. S. 113; *Heinze* v. *Butte Min. Co.*, 129 Fed. Rep. 274; *The J. R. Langdon*, 163

Fed. Rep. 472; *So. Pac. Ry. Co.* v. *United States*, 168 U. S. 1; *Niles* v. *Lee* (Mich.), 135 N. W. Rep. 274; *No. Pac. Co.* v. *Slaght*, 205 U. S. 122.

Mr. T. G. Norris, with whom *Mr. John M. Ross*, *Mr. Reese M. Ling* and *Mr. E. J. Mitchell* were on the brief, for appellees:

The findings of the District Court adopted by the Supreme Court of the Territory in its judgment of affirmance brought here as a statement of facts in the nature of a special verdict, present the sole question for determination, apart from exceptions duly taken to rulings on the admission or rejection of evidence—do the findings of fact support the judgment? *Stringfellow* v. *Cain*, 99 U. S. 610; *Neslin* v. *Wells Fargo Co.*, 104 U. S. 428; *Eilers* v. *Boatman et al.*, 111 U. S. 356; *Idaho & Oregon Land Imp. Co.* v. *Bradbury*, 132 U. S. 509; *Mammoth Mining Co.* v. *Salt Lake Machine Co.*, 151 U. S. 450; *Haws* v. *Victoria Copper Min. Co.*, 160 U. S. 303; *Gildersleeve* v. *New Mexico Min. Co.*, 161 U. S. 573; *Bear Lake & River Water Works & Irr. Co.* v. *Garland*, 164 U. S. 18; *Harrison* v. *Perea*, 168 U. S. 323.

The contract of August 27, 1907, was in the alternative. Appellant had no right to a choice of its alternatives unless appellees should fail without any fault of appellant. When by its own wrong appellant brought about the condition complained of, it was properly denied specific performance.

Appellant's default in failing and refusing to dismiss action 4541 before January 1, 1908, and its tenacious maintenance of the suit as a pending action with its consequences, was ample and sufficient reason for the court's refusing decree of specific performance. *Whiteman* v. *Perkins*, 56 Nebraska, 181, 185.

The Nebraska decree could not control the court in Arizona. *Ellinwood* v. *Marietta Chair Co.*, 158 U. S. 105,

107; *Fall* v. *Eastin*, 215 U. S. 11; *Watts* v. *Waddle*, 6 Pet. 389; *Watkins* v. *Holman*, 16 Pet. 25; *Fall* v. *Fall*, 113 N. W. Rep. 175; *Enos* v. *Hunter*, 9 Illinois, 214; *Wilson* v. *Braden*, 36 S. E. Rep. 367; *Wimer* v. *Wimer*, 82 Virginia, 890; *Lindley* v. *O'Reilly*, 50 N. J. L. 636; *Bullock* v. *Bullock*, 52 N. J. Eq. 561.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit by the appellant for the specific performance of a contract made between it and C. C. Miller, A. V. Miller, now deceased, and G. B. Lasbury, hereafter called the vendors, for the sale by the latter parties, on certain conditions and terms, of 175,000 shares of stock in the appellant, or in the alternative of all their interest in the West Brooklyn and certain other mining claims. The bill alleges the failure of the condition referred to and seeks a conveyance of the interest in the mining claims and an account. It was dismissed by the court below and the plaintiff appealed.

The facts found, abridged, are these. The vendors owned the mining claims and had given an option to purchase the West Brooklyn claim and another not concerned here to the United Verde Copper Company, which was extended and kept in force up to January 1, 1908. In 1906, a stockholder in the appellant had begun a suit on behalf of himself and others, afterwards amended so as to make the appellant plaintiff, to have the Millers and Lasbury, also stockholders, declared trustees for the appellant of the mining claim now in question. Miller, on the other hand, had sued the appellants for work done upon the Brooklyn claim. By way of compromise the present contract was made. It recited the two suits and the conditional sale of the West Brooklyn claim to the United Verde Copper Company and provided in consideration of the dismissal and settlement of the foregoing

causes of action that if the sale to the United Verde Company was consummated by January 1, 1908, the above mentioned transfer of stock should be made, &c., but that if for any reason the sale should not be consummated then the conveyance now sought for should take place.*

* The contract in full is as follows:

"Whereas, an action is now pending in the District Court of Yavapai County, Arizona, entitled *Brooklyn Mining & Milling Company et al.* v. *Charles C. Miller, Alonzo V. Miller and George B. Lasbury,* which action relates to the title of the West Brooklyn, East Brooklyn and South Brooklyn Mining Claims located in said county and Territory, and relates to an accounting for ores and minerals taken therefrom, and

"Whereas, The said Charles C. Miller, Alonzo V. Miller and George B. Lasbury have made a conditional sale of the above named West Brooklyn Mining claim for the sum of ten thousand dollars to the United Verde Copper Company, and

"Whereas, an action is pending in the District Court of Yavapai County, Arizona, entitled *Charles C. Miller* v. *Brooklyn Mining & Milling Company* for several thousand dollars claimed to be due and owing to the said Charles C. Miller for services performed by him and Alonzo V. Miller for the said Brooklyn Mining & Milling Company, and

"Whereas, It is the desire of the parties connected with the foregoing causes of action to settle same, and to adjust the matters of difference between the parties in connection therewith;

"Therefore, In consideration of the dismissal and settlement of the foregoing causes of action it is hereby stipulated and agreed by and between the Brooklyn Mining & Milling Company and Charles C. Miller, Alonzo V. Miller and George B. Lasbury that if the sale of the West Brooklyn Mining claim to the United Verde Copper Company is consummated on or before the first day of January, 1908, the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to transfer and deliver to the said Brooklyn Mining & Milling Company one hundred seventy-five thousand shares (175,000) of stock in said Brooklyn Mining & Milling Company, free and clear of all liens or incumbrance whatsoever; it being understood that said transfer of stock is to include all of the holdings of the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury in the Brooklyn Mining & Milling Company, and the said parties are to receive therefor the sum of 3 (Three) cents per share for said stock; and in addition thereto Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to pay to the Brooklyn Mining & Milling Company the sum of eight thousand, five hundred

The suit by Miller was dismissed and a dismissal of the company's action was requested, but it was declined. Then on January 2, 1908, the vendors, alleging consummation of the contract with the United Verde Company, tendered performance, which was declined on the ground

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dollars ($8,500.00) out of the proceeds derived from the sale of the said West Brooklyn mining claim; in addition thereto the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to convey all of their right, title and interest in and to the East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims, and said transfer shall contain the warranty that the assessment work has been done for the year 1907 upon the Empress, Midway and North Brooklyn and the said Brooklyn Mining & Milling Company shall pay the said assessment work at its reasonable value. The said Charles C. Miller, Alonzo V. Miller and George B. Lasbury agree to do the assessment work for the year 1907, on the East and South Brooklyn mining claims, and said assessment work so to be performed is to be paid for by the Brooklyn Mining & Milling Company at its reasonable value. It is further stipulated and agreed by and between the parties hereto that if for any reason the sale of the West Brooklyn claim to the United Verde Copper Company by the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury shall not be consummated on or before the first day of January, 1908, then the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to convey to the Brooklyn Mining & Milling Company all of their right, title and interest in and to the West Brooklyn, East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims, and the assessment work on the North Brooklyn, Empress and Midway claims for the year 1907 is to be paid by the said Brooklyn Mining Company at its fair and reasonable value.

"It is understood by and between the parties hereto that the foregoing does not concede or admit any of the allegations contained in the pleadings of said causes of action, but the agreement is entered into for the purpose of adjusting the matters of difference between said parties and avoiding further costs and expenses to the parties hereto.

"In Witness Whereof, We have hereunto set our hands this 27th day of August, A. D. 1907.

"C. C. Miller.
"A. V. Miller.
"G. B. Lasbury.
"Brooklyn Mining & Milling Company.
"By Chas. W. Pearsall, *President.*"

that it did not comply with the terms of the present agreement, and there was a second refusal to dismiss the company's suit. On February 15, however, it did dismiss that suit and ten minutes later began the present one. This was tried in March, 1909, and the court found that the sale to the United Verde Company had not been consummated and that the failure was caused by the refusal of the plaintiff to dismiss its former above mentioned suit, which, it will be remembered, impeached the title of the vendors. (The vendors were not estopped by earlier having alleged consummation.) The court, however, instead of dismissing the bill outright made an alternative decree that it be dismissed if the plaintiff did not assent within thirty days to certain terms looking to a carrying out of the sale to the United Verde Company. The plaintiff refused its assent and the Supreme Court, accepting the finding of the court below, affirmed the dismissal of the bill. This disposes of the case except in one particular to be mentioned. *Harrison* v. *Perea,* 168 U. S. 311, 323.

On January 28, 1908, the appellant brought a suit in Nebraska for specific performance of the same agreement now sued upon here, and on February 8, 1909, it was decided that the vendors must convey their interest in the West Brooklyn claim, as against Ada M. Miller, grantee of A. V. Miller, and Lasbury, the only parties served, and a master appointed by the court executed a conveyance accordingly. The appellant sought to avail itself of this decree and conveyance. But on December 23, 1908, it was agreed in open court in consideration of the defendants allowing a continuance of the present Arizona cause that no judgment that might be obtained in Nebraska should be pleaded. The court properly held the appellant to its agreement. There was a cross complaint by the appellees in the answer to which the decree and conveyance were pleaded, but the Supreme Court, after refer-

ring to *Fall* v. *Eastin*, 215 U. S. 1, disposed of the matter by noticing that no relief was given on the cross complaint and that specific performance was denied on other grounds.

Judgment affirmed.

UNITED STATES *v.* WINSLOW.

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

No. 620. Argued January 10, 1913.—Decided February 3, 1913.

On appeals under the Criminal Appeals Act of 1907 this court has no jurisdiction to review the interpretation of the indictment by the lower court, *United States* v. *Patten*, 226 U. S. 525, and if that court has construed the count as alleging a combination of a particular date to be in violation of the Sherman Law, without regard to subsequent acts, this court cannot pass upon the validity of those acts.

A combination for greater efficiency does not necessarily violate the Sherman Anti-trust Act.

Where each of several groups are carrying on a legal business of making patented machines which do not compete with each other, although the machines of all the groups are used by manufacturers of the same article, such as shoes, a combination of the several groups does not violate the Sherman Anti-trust Act.

Exclusion of competitors from making the patented article is of the very essence of the right conferred by the patent.

Where the share in interstate commerce does not appear in the record, and the machines in question are not alleged to be types of all the machines used in manufacturing the article for which they are made, the Government cannot claim that a specified proportion of the business was put into a single hand.

The disintegration aimed at by the Sherman Anti-trust Act does not extend to reducing all manufacture to isolated units of the lowest degree.

The Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, is a special provision and, as it is not mentioned in the repealing section of the Judicial Code of 1911 and is not superseded by any other regulation of the matter, it was not repealed by the Judicial Code. *United States, Petitioner*, 226 U. S. 420.

The District Court rightly held that the counts under review of the indictment against various persons for combining their businesses of

manufacturing patented machines for making different parts of shoes, and not competing with each other, did not constitute an offense under the Sherman Anti-trust Act.

195 Fed. Rep. 578, affirmed.

THE facts, which involve the construction of the Sherman Anti-trust Act, and determining whether the combination charged in an indictment thereunder of various manufacturers of patented shoe machinery constituted a violation thereof, are stated in the opinion.

The Solicitor General for the United States:

This case presents the question whether it is legal to gather together into one corporation about 80 per cent. of all the interstate trade in some particular line of activity when it is done gradually by legitimate methods and without any unfair competition such as characterized the *Tobacco* and *Standard Oil* cases. If that is legal, the sooner the business world understands it the better.

The indictment alleged that three separate groups of individuals (each controlling a different group of machines essential to the manufacture of shoes), combined together whereby their separate businesses were combined into one under the joint management of these individuals; that each of the separate groups controls about 70 or 80 per cent of the interstate trade in the particular kind of machines manufactured by it; and that by the combination there were placed into one hand from 70 to 80 per cent of all the business in those kinds of shoe machinery manufactured by the defendants.

The constitutionality and sufficiency of the criminal provisions of the Sherman Anti-trust Act are settled. *United States* v. *Kissel*, 218 U. S. 601; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 401; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 69; *United States* v. *Swift*, 188 Fed. Rep. 92.

Individuals are subject to indictment for acts done under the guise of a corporation where the individuals personally so dominate and control the corporation as to immediately direct its action. *United States* v. *Swift*, 188 Fed. Rep. 92, 98; *United States* v. *McAndrews & Forbes Co.*, 149 Fed. Rep. 823; *Crall* v. *Commonwealth*, 103 Virginia, 855, 859, 860; *People* v. *Clark*, 8 N. Y. Crim. Rep. 179, 194, 195, 212; *People* v. *White Lead Works*, 82 Michigan, 471, 479; *People* v. *Duke*, 44 N. Y. Supp. 336, 337–339; *State* v. *Great Works &c. Co.*, 20 Maine, 41; *United States* v. *Durland*, 65 Fed. Rep. 408, 415; *S. C.*, 161 U. S. 306; *Balliet* v. *United States*, 129 Fed. Rep. 689; *Fitzsimmons* v. *United States*, 156 Fed. Rep. 477, 481; *Foster* v. *United States*, 178 Fed. Rep. 165, 173, 176–178; *La Societe Anonyme &c.* v. *Panhard Motor Co.* (1901), 2 Ch. 513, 516–517.

Prior to February 7, 1899, competition with reference to the different kinds of shoe machinery was so distributed between the different groups of defendants and the Independents that a shoe manufacturer had 24 different choices for obtaining shoe machinery.

By the organization of the United Shoe Machinery Company and the coalescence into one of the three groups of businesses formerly carried on separately by the defendants, the variety of choice open to a shoe manufacturer for obtaining the necessary shoe machinery was reduced from 24 ways to 16 ways.

The defendants then adopted what is known as the "tying" clause lease, which provided that any shoe manufacturer using any one class of machines furnished by the defendants should use for all his other machines only those furnished by the defendants; and that if he used any machine made by an Independent, the defendants would forfeit his lease and remove his machines. This form of lease immediately reduced from 16 to 2 the different ways by which a manufacturer could equip his factory, so that he had to get all his machinery from the defendants or get it all from the Independents.

The effect of the combination was to place from 70 to 80 per cent. of all the shoe machinery business (in so far as it related to those essential machines known as the lasting, welt-sewing, heeling and metallic fastening machines) into one hand. This combination into one group of four non-competitive businesses (which, taken together, constitute one complete business) curtailed the customer's liberty of action by compelling him to deal with one and the same group as to all four classes of machinery, whereas formerly he could deal with four separate groups. The question presented, then, is whether the combination into one group of 75 per cent. of the whole business of the country in a particular line is in such restraint of trade as to violate the Sherman law, it being conceded that the combination was not attended by any methods of unfair competition or illegitimate trade practices. Without attempting to determine exactly at what percentage of trade control a combination passes into the region of illegal restraint, the Government insists that when a combination acquires between 70 and 80 per cent. of the total trade in a particular business, the line between legal and illegal combinations has been passed; and that this is so even though the combination is made without resorting to any wrongful methods to coerce anyone to come into the combination. *Swift* v. *United States*, 196 U. S. 375; *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61; *United States* v. *The Reading Co.*, 226 U. S. 324.

The adoption by the United Shoe Machinery Company of the "tying" clause lease whereby a customer was compelled to take all his machines from the defendants or all from the Independents was a direct restraint upon competition and trade (1) of the defendants by limiting their trade to those who would agree to use only the de-

fendants' machines; (2) of the customers by depriving them of the right to use some machines unless they would also use others, (3) of the Independents by preventing them from selling their machines to their former customers. *Montague* v. *Lowry*, 193 U. S. 38; *United States* v. *St. Louis Terminal*, 224 U. S. 383; *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61; *United States* v. *The Reading Co.*, 226 U. S. 324.

The patent laws do not authorize the "tying" clause leases.

The precise point decided in *Henry* v. *Dick Co.*, 224 U. S. 1, was that a patentee might impose a restriction that his machine should be used only in connection with certain supplies which in point of fact bore so direct a relation to the invention that it could not be operated without their use in physical connection with the patented machine.

The doctrine of *Henry* v. *Dick Co.* should not be extended to permit a license restriction beyond the actual use of supplies in connection with the necessary physical operation of the patented machine. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20.

But even if the doctrine of *Henry* v. *Dick Co.* is extended to the extreme limit of permitting any kind of restriction upon the use of a patented machine, yet when such restrictions are a part of one general scheme of combination the patent laws no longer authorize such restrictions. The rights given by the patent laws do not give universal license against the positive prohibitions of the Sherman law, which is a limitation on all rights that might otherwise be pushed to evil consequences. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20; *United States* v. *The Reading Co.*, 226 U. S. 324.

The Criminal Appeals Act, 34 Stat. 1246, was not repealed by the adoption of the Judicial Code.

The defendant's right of appeal to the Supreme Court was given in the fifth and sixth sections of the Circuit Court of Appeals Act which, in the proposed revision of the laws of the United States, was placed in Chapter Ten on the "Supreme Court," in the title called "The Judiciary." The right of the *United States* to appeal to the Supreme Court was contained in the Criminal Appeals Act, which, in the same proposed revision was placed in Chapter Eighteen on "Procedure on Error and Appeal."

Congress, in passing the Judicial Code, did not attempt to cover the whole body of the revision submitted to it, but only adopted the first 14 chapters of the title "The Judiciary"; so that while it incorporated into the Judicial Code Chapter Ten on the "Supreme Court" giving the defendant a right to appeal, it did not attempt to cover any of the field embraced in the later chapters of the revision. Therefore, those subjects, *inter alia*, which were dealt with in proposed Chapter 18 were never even considered by Congress and therefore remained controlled by the former laws governing them—one of which was the Criminal Appeals Act. (Cf. Committee Report of 1907 of "Commission to Codify and Revise the Laws of the United States" and the Joint Committee of Congress' Revision of 1910. See Title XVI, "The Judiciary," Chapters 10 and 18.)

Mr. Frederick P. Fish and *Mr. Charles F. Choate, Jr.*, with whom *Mr. Malcolm Donald* and *Mr. William A. Sargent* were on the brief, for defendants in error:

Only a single question is presented by the case.

The lease question is not before this court, as hereinafter shown.

The fact that the machines manufactured by the United Shoe Machinery Company are protected by letters-patent was not considered by the District Court in its construction of the Sherman Act, and is not open in this court.

The facts alleged in the first and second counts are not brought out or are erroneously stated by the United States.

The second count is almost identical, word for word, with the first count, except as to the allegation in regard to interstate commerce, and changing the charge of combination of defendants' own trade into one of conspiracy to restrain the trade of shoe manufacturers in shoe machinery.

On this writ of error, the question is whether the District Court erred in the construction of the Anti-trust Act in sustaining the demurrers to counts one and two and so far as that act is construed by the District Court in its opinion relating to those two counts.

For construction of the Criminal Appeals Act as applied to the question before this court, see *United States* v. *Bitty*, 208 U. S. 393; *United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Mason*, 213 U. S. 115; *United States* v. *Mescall*, 215 U. S. 26; *United States* v. *Stevenson*, 215 U. S. 190; *United States* v. *Kissel*, 218 U. S. 601; *United States* v. *Barber*, 219 U. S. 72; *United States* v. *Miller*, 223 U. S. 599.

The District Court decided the two counts now before this court were bad for duplicity in pleading, that is to say, on a question of general law not involving the construction of the Sherman Act, and that cannot be reviewed here. *United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Mason*, 213 U. S. 115; *United States* v. *Mescall*, 215 U. S. 26; *United States* v. *Stevenson*, 215 U. S. 190.

The District Court also held the two counts bad on a second ground, namely, that the original organization of the company was neither a combination in restraint of trade nor a conspiracy in restraint of trade under the Sherman Act. By such decision the District Court construed the Sherman Act.

The Criminal Appeals Act of 1907, under which the present writ of error was brought, was repealed by the

Judicial Code which became effective January 1, 1912, and therefore this court has no jurisdiction as the writ of error was filed after that date. *United States* v. *Stevenson*, 215 U. S. 190.

The fact that the machines manufactured by the company are protected by letters-patent was not considered by the District Court in its construction of the Sherman Act, and is not open in this court.

The District Court was not in error in its construction of the Sherman Act in relation to counts one and two.

The organization of the company by said defendants together, and the turning over by said groups of defendants to and the taking over by the company of the stocks and business of the three corporations, was not, and is not, a combination in restraint of defendants' own trade nor a conspiracy in restraint of trade of the shoe manufacturers in shoe machinery. *United States* v. *American Tobacco Co.*, 221 U. S. 106.

By the organization of the United Shoe Machinery Company there was no restriction of competition. The three groups of defendants, prior to the organization of the company, were not engaged in competition with each other. Their businesses were absolutely different, and each business related to a different commodity. *Kokomo Fence Machine Co.* v. *Kitselman*, 189 U. S. 8; *Addyston Pipe Co.* v. *United States*, 175 U. S. 211; *Northern Sec. Co.* v. *United States*, 193 U. S. 197; *Montague* v. *Lowry*, 193 U. S. 38; *Miles Medical Co.* v. *Park Co.*, 220 U. S. 373; *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423; *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227; *U. S. Machinery Co.* v. *La Chapelle*, 212 Massachusetts, 467; *Swift & Co.* v. *United States*, 196 U. S. 375; *United States* v. *John Reardon Co.*, 191 Fed. Rep. 454; *Standard Sanitary Co.* v. *United States*, 226 U. S. 20; *United States* v. *Un. Pac. R. R. Co.*, 226 U. S. 61; *United States* v. *Terminal R. R. Ass'n*, 224 U. S. 383; *United States* v. *Reading Co.*, 226 U. S. 324.

By the organization of the company the defendants, taken individually, or in groups, or together, did not agree to restrain such trade as they had in different commodities, or in any manner to restrain their own trade. *Addyston Pipe Co.* v. *United States*, 175 U. S. 211; *Montague* v. *Lowry*, 193 U. S. 38; *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423; *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227; *Ellis* v. *Inman*, 131 Fed. Rep. 182; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *Blount Mfg. Co.* v. *Yale Mfg. Co.*, 166 Fed. Rep. 555; *United States* v. *Trans-Missouri Ass'n*, 166 U. S. 290; *Swift & Co.* v. *United States*, 196 U. S. 375; *Miles Medical Co.* v. *Park Co.*, 220 U. S. 373; *United States* v. *Standard Sanitary Co.*, 191 Fed. Rep. 172; *Bigelow* v. *Calumet & Hecla Co.*, 167 Fed. Rep. 721.

The combination created by the organization of the United Shoe Machinery Company was purely an economic arrangement, not in violation of any rule in restraint of trade at common law, or which has been announced by the Supreme Court. *Joint Traffic Case*, 171 U. S. 505.

The combination of businesses, each dealing with a different commodity, into one corporation, has never been held a restraint of trade either at common law or under the Sherman Act. *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *Reading Co.*, 226 U. S. 324; *Union Pacific Coal Co.* v. *United States*, 173 Fed. Rep. 737; *United States* v. *Standard Oil Co.*, 173 Fed. Rep. 177.

That the District Court was right in the only construction of the Sherman Act now before this court, to wit, in holding that the organization of the United Shoe Machinery Company was not within the purview of the Sherman Act, is further apparent from the fact that such organization of the United Shoe Machinery Company had no direct or immediate effect upon interstate commerce. If it had any effect at all upon interstate com-

merce, such effect was accidental, secondary, remote, and not even probable. *Bigelow* v. *Calumet & Hecla Co.*, 167 Fed. Rep. 721; *Anderson* v. *United States*, 171 U. S. 604; *Field* v. *Barber Asphalt Paving Co.*, 194 U. S. 618; *Standard Oil Co.* v. *United States*, 221 U. S. 1.

Whether these lease provisions are or are not in restraint of trade is not before this court for several reasons: these defendants are not indicted for making these lease provisions; the language of the indictment in regard to these leases shows it; the act of the defendants in relation to these lease provisions is only an overt act, and only one of three or four overt acts named in the same paragraph of indictment; the combination and conspiracy are each absolutely complete without this overt act; the leases are not a part of the combination or conspiracy. No original intent to change leases is shown or any agreement to do so; the leases are not part of the original combination or conspiracy because between different parties; the question is one of duplicity on the theory of the United States; the lease provisions in these two counts were not construed or passed upon by the District Court; if the lease provisions had been involved here, the District Court would have considered the patent law.

The entire argument of the United States in regard to the business of these defendants and of the corporation is based on the erroneous view that the machines of the defendants were all the machines used in shoe making, and as a corollary to the above, the United States says that the defendants control between seventy and eighty per cent. of the entire shoe machinery business in the United States.

On this record the particular form of the organization of the company, and the taking over of the capital stocks and business of the three original corporations is immaterial.

Indictment 113 was dismissed by the District Court for

duplicity and it should be explained why the second count of indictment 114 was not brought to this court by the United States.

The defendants are not indicted for dominating the supply of shoe machinery. *Reading R. R. Case*, 226 U. S. 324.

The argument of the United States fails absolutely, because the defendants are not indicted for dominating the supply of shoe machinery; so also as to the alleged competition before the date of the organization of the company and the alleged competition thereafter.

The argument of the United States, as to the effect of the organization of the United Shoe Machinery Company, is absolutely fallacious.

The particular patented machines of these defendants are not indispensable to the manufacturer of shoes by the admission of the United States in its brief; in fact the dissatisfied shoe manufacturer mentioned by the United States is better off after the organization of this company than before.

The organization of the company did not compel the customer to deal with the same group as to the four classes of machinery. All of the cases cited by the United States in this section of its brief relate to combinations of competitors dealing in the same commodity.

It is to be remembered that defendants are not indicted for monopolizing; that defendants' machines are patented and they are entitled to one hundred per cent. of the trade therein.

The merger of the three companies was lawful and proper.

The leases form no part of the merger and are not pertinent to this discussion.

No express agreement to restrain trade is alleged, and, therefore, the Government is compelled to contend that the natural, necessary and inevitable effect of the merger was to restrain trade.

In every prior case, except *Loewe* v. *Lawlor*, 208 U. S. 274, the combination complained of has been a combination of competitors or a combination formed to eliminate competition.

As to the character of conduct condemned by the Sherman Act see *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *Joint Traffic Asso.*, 171 U. S. 505; *Anderson* v. *United States*, 171 U. S. 604.

The merger did not produce, was not designed to produce, and its natural or necessary effect was not to produce any restraint of trade, for defendants were not personally restrained; defendants' business was not restrained; shoe manufacturers were not restrained; other shoe machinery manufacturers were not restrained.

The Government's contention that the shoe manufacturer's liberty of action was restrained because the number of concerns with which he could disagree was reduced, is unsound.

No greater power to restrain trade resulted from the merger, and if it could be held that any such power did result, it would not naturally or inevitably restrain trade.

No such power did result. If it did, the probability that it would produce a restraint of trade is too remote. *Swift & Co.* v. *United States*, 196 U. S. 375; *Commonwealth* v. *Peaslee*, 177 Massachusetts, 267.

If any restraint of trade could result from the merger it would be purely incidental to the accomplishment of a lawful purpose. *Bigelow* v. *Calumet & Hecla Co.*, 167 Fed. Rep. 721; *Anderson* v. *United States*, 171 U. S. 604; *Field* v. *Barber Asphalt Paving Co.*, 194 U. S. 618; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *Joint Traffic Asso.*, 171 U. S. 505.

The concentration of manufacturing at Beverly produced no restraint of trade.

The leases made by the defendants were clearly lawful

whether considered separately or in connection with the merger.

The general rule is that all restrictions imposed by patentees not in their very nature illegal are lawful. *Bement* v. *National Harrow Co.*, 186 U. S. 70.

Considerations of public policy not recognized in the patent law are irrelevant; the right to grant restricted licenses is given by the patent law. *Henry* v. *Dick Co.*, 224 U. S. 1.

This right, like other rights under the patent law, should be construed liberally. *Ames* v. *Howard*, 1 Sumner, 482; *Henry* v. *Dick Co.*, 224 U. S. 1.

If general considerations of public policy can be considered as relevant, the right to impose such restrictions should be favored.

The Sherman Act is not applicable to restrictions which are reasonable when considered with due regard for the patentee's lawful monopoly. *Bement* v. *National Harrow Co.*, 186 U. S. 70; *Henry* v. *Dick Co.*, 224 U. S. 1; *Standard Sanitary Co.* v. *United States*, 226 U. S. 20.

The public have no right to have an unrestrained trade in or use of patented articles. *United States* v. *American Bell Tel. Co.*, 167 U. S. 224; *Park* v. *Hartmann*, 153 Fed. Rep. 24; *Rubber Tire Wheel Co.* v. *Milwaukee Rubber Works Co.*, 154 Fed. Rep. 358; *Cilley* v. *U. S. Machinery Co.*, 152 Fed. Rep. 726.

If trade is affected by reason of such conditions or restrictions imposed by patentees, such effect is incidental to the exercise of lawful rights, and therefore is itself lawful. The patentee's compensation need not be direct but may come from the sale or use of some other article. *Button-Fastener Case*, 77 Fed. Rep. 288; *Henry* v. *Dick Co.*, 224 U. S. 1.

Mr. Justice Holmes delivered the opinion of the court.

This is a writ of error to determine whether two counts in an indictment as construed by the District Court charge offences under the Sherman Act of July 2, 1890, c. 647. 26 Stat. 209. They were held bad, on demurrer, by the District Court. 195 Fed. Rep. 578. The two counts allege substantially the same facts; the first laying them as a combination in restraint of the trade of the defendants themselves, the second as a conspiracy in restraint of the trade of others, shoe manufacturers.

The facts alleged are as follows: For the last twenty-five years practically all the shoes worn in the United States have been made by the help of machines, grouped as lasting machines, welt-sewing machines and outsole-stitching machines, heeling machines and metallic fastening machines, there being a large variety of machines in each group. (These machines of course are not alleged to do all the work of making finished shoes.) There is a great number of shoe factories, and because the machines are expensive and the best of them patented, the manufacturers have had to get them principally from the defendants. Before and up to February 7, 1899, the defendants Winslow, Hurd and Brown, through the Consolidated and McKay Lasting Machine Company, under letters patent, made sixty per cent. of all the lasting machines made in the United States; the defendants Barbour and Howe, through the Goodyear Shoe Machinery Company, in like manner made eighty per cent. of all the welt-sewing machines and outsole-stitching machines, and ten per cent. of all the lasting machines; and the defendant Storrow, (against whom the indictment has been dismissed), through the McKay Shoe Manufacturing Company, made seventy per cent. of all the heeling machines and eighty per cent. of all the metallic fastening machines made in the United States. The defendants all were carrying on commerce among the States with such of the

shoe manufacturers as are outside Massachusetts, the State where the defendants made their machines.

On February 7, 1899, the three groups of defendants above named, up to that time separate, organized the United Shoe Machinery Company and turned over to that company the stocks and business of the several corporations that they respectively controlled. The new company now makes all the machines that had been made in different places, at a single new factory at Beverly, Massachusetts, and directly, or through subsidiary companies, carries on all the commerce among the States that had been carried on independently by the constituent companies before. The defendants have ceased to sell shoe machinery to the shoe manufacturers. Instead, they only let machines, and on the condition that unless the shoe manufacturers use only machines of the kinds mentioned furnished by the defendants, or if they use any such machines furnished by other machinery makers, then all machines let by the defendants shall be taken away. This condition they constantly have enforced. The defendants are alleged to have done the acts recited with intent unreasonably to extend their monopolies, rights and control over commerce among the States; to enhance the value of the same at the expense of the public, and to discourage others from inventing and manufacturing machines for the work done by those of the defendants. The organization of the new company and the turning over of the stocks and business to it are alleged to constitute a breach of the Sherman Act.

It is to be observed that the conditions now inserted in the leases are not alleged to have been contemporaneous with the combination, or to have been contemplated when it was made. The District Court construed the indictment as confined to the combination of February 7, that is, simply to the merger of the companies without regard to the leases subsequently made, 195 Fed. Rep. 592, 594;

and we have no jurisdiction to review this interpretation of the indictment. *United States* v. *Patten*, 226 U. S. 525. Hence the only question before us is whether that combination taken by itself was within the penalties of the Sherman Act. The validity of the leases or of a combination contemplating them cannot be passed upon in this case.

Thus limited the question does not require lengthy discussion, and a large part of the argument addressed to us concerned matters not open here. On the face of it the combination was simply an effort after greater efficiency. The business of the several groups that combined, as it existed before the combination, is assumed to have been legal. The machines are patented, making them is a monopoly in any case, the exclusion of competitors from the use of them is of the very essence of the right conferred by the patents, *Paper Bag Patent Case*, 210 U. S. 405, 429, and it may be assumed that the success of the several groups was due to their patents having been the best. As, by the interpretation of the indictment below, 195 Fed. Rep. 591, and by the admission in argument before us, they did not compete with one another, it is hard to see why the collective business should be any worse than its component parts. It is said that from seventy to eighty per cent. of all the shoe machinery business was put into a single hand. This is inaccurate, since the machines in question are not alleged to be types of all the machines used in making shoes, and since the defendants' share in commerce among the States does not appear. But taking it as true we can see no greater objection to one corporation manufacturing seventy per cent. of three non-competing groups of patented machines collectively used for making a single product than to three corporations making the same proportion of one group each. The disintegration aimed at by the statute does not extend to reducing all manufacture to isolated units of the lowest degree.

It is as lawful for one corporation to make every part of a steam engine and to put the machine together as it would be for one to make the boilers and another to make the wheels. Until the one intent is nearer accomplishment than it is by such a juxtaposition alone, no intent could raise the conduct to the dignity of an attempt. See *Virtue* v. *Creamery Package Manufacturing Co.*, *ante*, p. 8. *Swift & Co.* v. *United States*, 196 U. S. 375, 396.

It was argued as an afterthought that the act of March 2, 1907, c. 2564, 34 Stat. 1246, under which the United States took this writ of error, was repealed by the Judicial Code of March 3, 1911, c. 231. 36 Stat. 1087, 1168. But it is not mentioned among the statutes expressly repealed by § 297 of the latter act, it is not superseded by any other regulations of the matter, it is a special provision, and on principles similar to those discussed in *Ex parte United States, Petitioner*, 226 U. S. 420, it must be held not to have been repealed. See further *Johnson* v. *United States*, 225 U. S. 405, 419; *Petri* v. *Creelman Lumber Co.*, 199 U. S. 487, 497.

Judgment affirmed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS *v.* ALEXANDER.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 738. Submitted December 2, 1912.—Decided February 3, 1913.

In order to hold a corporation personally liable in a foreign jurisdiction it must appear that the corporation was within the jurisdiction and that process was duly served upon one of its authorized agents.

A corporation is not amenable to service of process in a foreign jurisdiction unless it is transacting business therein to such an extent as to subject itself to the jurisdiction and laws thereof.

Under the Carmack Amendment the initial carrier is not liable to suit in a foreign district unless it is carrying on business in the sense which would render other foreign corporations amenable to process.

No all embracing rule has been laid down as to what constitutes the manner of doing business by a foreign corporation to subject it to process in a given jurisdiction. Each case must be determined by its own facts.

The business done by a foreign corporation must be such in character and extent as to warrant the inference that it has subjected itself to the jurisdiction.

Where a railroad company establishes an office in a foreign district and its agents there attend to claims presented for settlement, as was done in this case, it is carrying on business to such an extent as to render it amenable to process under the law of that State.

Service of process on a resident director of a foreign corporation actually doing business in the State of New York is sufficient to give the court jurisdiction of the corporation.

THE facts, which involve the construction of the Carmack Amendment as to the place where the initial carrier may be sued, and also as to what constitutes carrying on business within a district so as to make the initial carrier amenable to process therein, are stated in the opinion.

Mr. Lawrence Greer and *Mr. F. C. Nicodemus, Jr.*, for plaintiff in error:

The requirements of due process of law forbid that a corporation be held amenable to service of process in a foreign jurisdiction unless engaged in business therein of such character and in such a manner and to such an extent as to bring itself within the jurisdiction so that service of process upon an agent directly representing the authority of the corporation would constitute reasonable notice to the corporation to appear and defend. *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100; *Conley* v. *Mathieson Alkali Works*,

190 U. S. 46; *Connecticut Mutual Life Insurance Co.* v. *Spratley*, 172 U. S. 602; *Denver & Rio Grande R. R. Co.* v. *Roller*, 100 Fed. Rep. 738; *Earle* v. *Chesapeake & Ohio Ry. Co.*, 127 Fed. Rep. 235; *Ex parte Schollenberger*, 96 U. S. 369; *Fairbank & Co.* v. *Cincinnati, New Orleans & Texas Pac. Ry. Co.*, 54 Fed. Rep. 420; *Fitzgerald & Mallory Construction Co.* v. *Fitzgerald*, 137 U. S. 98; *Geer* v. *Mathieson Alkali Works*, 190 U. S. 428; *Green* v. *C., B. & Q. Ry. Co.*, 205 U. S. 530; *Goldey* v. *Morning News*, 156 U. S. 518; *Herndon-Carter Co.* v. *Norris, Son & Co.*, 224 U. S. 496; *In re Hohorst, Petitioner*, 150 U. S. 653; *Lafayette Ins. Co.* v. *French*, 18 How. 405; *Maxwell* v. *Atchison, Topeka & Santa Fe R. R. Co.*, 34 Fed. Rep. 286; *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437; *Merchants' Mfg. Co.* v. *Grand Trunk Ry. Co.*, 13 Fed. Rep. 358; *Mexican Central Ry. Co.* v. *Pinkney*, 149 U. S. 194; *New England Mutual Life Ins. Co* v. *Woodworth*, 111 U. S. 138; *Pennsylvania Lumbermen's Ins. Co.* v. *Meyer*, 197 U. S. 407; *Peterson* v. *Chic., Rock Island & Pac. Ry. Co.*, 205 U. S. 364; *Societe Fonciere et Agricole des Etats Unis* v. *Milliken*, 135 U. S. 304; *St. Clair* v. *Cox*, 106 U. S. 350; *Tuchband* v. *Chic. & Alton R. R. Co.*, 115 N. Y. 437; *Union Associated Press* v. *Times-Star Co.*, 84 Fed. Rep. 419.

Although engaged in business within the State of New York, and elsewhere throughout the United States, in the usual and customary course of interstate commerce conducted in obedience to the provisions of the act of Congress regulating trade and commerce among the several States, the plaintiff in error is not engaged in business within the State of New York, so as to be amenable to service of process therein. *Conley* v. *Mathieson Alkali Works*, 190 U. S. 46; *Pennsylvania Lumbermen's Ins. Co.* v. *Meyer*, 197 U. S. 407; § 1, act of Congress approved February 4, 1887, as amended by act of Congress approved June 10, 1910; § 20, act of Congress approved February 4, 1887, as amended by act of Congress approved January 20,

1906; *Allen* v. *Pullman Co.*, 191 U. S. 171; *Hall* v. *DeCuir*, 95 U. S. 485; *Pullman Co.* v. *Adams*, 189 U. S. 420.

Mr. Phelan Beale for defendant in error:

The cause of action herein arose within the State of New York and certain acts were to be performed there which bring the case within the purview of *Pennsylvania Lumbermen's Ins. Co.* v. *Meyer*, 197 U. S. 407, therefore the service herein must be sustained. *Burckle* v. *Eckhardt*, 3 N. Y. 132; *Childs* v. *Harris*, 104 N. Y. 480; *Coghlan* v. *S. C. R. R. Co.*, 142 N. Y. 101; *Connecticut Mutual Life Assurance Co.* v. *Cleveland, Columbus & Cincinnati R. R. Co.*, 28 How. Pr. 180; *Ellis* v. *Willard*, 9 N. Y. 529; *Hiller* v. *Burlington & Missouri R. R. Co.*, 70 N. Y. 228; *Illinois Central R. R. Co.* v. *Beebe*, 174 Illinois, 13; *Scudder* v. *Union Nat. Bank of Chicago*, 91 U. S. 406; *State Tax on Foreign Bonds*, 15 Wall. 300; *Sprawn* v. *Brandt-Dent. Co.*, 71 App. Div. 236, aff'd. 175 N. Y. 463; *Union Nat. Bank* v. *Chapman*, 169 U. S. 538; *Waldron* v. *Canadian Pac. R. R. Co.*, 22 Washington, 353; § 432, New York Code of Civil Procedure.

The decisions in the cases of *Atlantic Coast Line* v. *Riverside Mills*, construing the Carmack Amendment to the Hepburn Act, show conclusively that the plaintiff in error was actually engaged in doing business within the State of New York. *Atlantic Coast Line R. Co.* v. *Riverside Mills*, 219 U. S. 186; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Wallace*, and *Same* v. *Crow*, 223 U. S. 481; *Pennsylvania Lumbermen's Ins. Co.* v. *Meyer*, 190 U. S. 407; 34 Stat. L. 74, Chap. 3591, § 20.

Mr. Justice Day delivered the opinion of the court.

The defendant in error, Alexander, filed his complaint against the plaintiff in error, St. Louis Southwestern Rail-

way Company of Texas, a Texas corporation, in the Supreme Court of New York County to recover damages for loss sustained by him arising from the alleged negligence of the railway company in failing to properly ice and re-ice certain poultry shipped from Waco, Texas, to New York City under a bill of lading given by the railway company to the shipper, the Texas Packing Company. Upon the petition of the railway company the case was removed to the Circuit Court of the United States for the Southern District of New York. That court denied a motion to vacate and quash service of summons and to dismiss for want of jurisdiction, and upon trial judgment was entered for the defendant in error. The District Court, succeeding to the jurisdiction of the Circuit Court, allowed a writ of error and certified to this court the question of jurisdiction under § 238 of the Judicial Code (March 3, 1911, c. 231, 36 Stat. 1087).

When the plaintiff in error received the poultry from the Texas Packing Company at Waco on November 25, 1910, for shipment to New York City, it delivered to the packing company a through bill of lading in which it acknowledged receipt of the property and agreed to carry the freight "to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination," and in which was set out, among others, the following conditions:

"SEC. 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

"SEC. 3. Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property. . . . Unless claims are so made the carrier shall not be liable."

The route, as shown by the bill of lading, was "Cotton

Belt to East St. Louis, care of Big 4 E. St. Louis, care of Nickel Plate Route." On December 5, 1910, the freight was delivered in a damaged condition to the defendant in error, to whom the bill of lading had been endorsed.

Alexander brought suit on July 10, 1911, against the plaintiff in error in the Supreme Court of New York County and caused summons to be served upon Lawrence Greer, one of the directors of the plaintiff in error residing in New York, in accordance with the laws of New York. Subsequently the case was removed to the United States Circuit Court on the ground of diversity of citizenship. The plaintiff in error filed a motion to vacate and quash the attempted service of summons and to dismiss the cause "for want of jurisdiction over the person of said St. Louis Southwestern Railway Company of Texas, for the reason that said St. Louis Southwestern Railway Company of Texas is a foreign corporation, organized and existing under the laws of the State of Texas, is not doing business within the State of New York, is not found within said State and is not amenable to service therein, and has not waived due service of summons herein by voluntary appearance or otherwise." The Circuit Court denied the motion, holding that the service was in accordance with the New York laws, provided the action arose in that State, and that the action did so arise, for, although the contract was made in Texas, it called for delivery in New York, and the bill of lading required that the claim be presented to the carrier at the point of delivery; and holding further that, upon the authority of *Atlantic Coast Line R. R. Co.* v. *Riverside Mills*, 219 U. S. 186, and *Pennsylvania Lumbermen's Mutual Fire Insurance Company* v. *Meyer*, 197 U. S. 407, under the Carmack Amendment to the Hepburn Act (June 29, 1906, 34 Stat. 584, 595, c. 3591, § 20), the plaintiff in error was doing business in the State of New York to the extent that the Federal courts acquired

jurisdiction of a removed cause in which summons had been served in accordance with the state laws.

After an answer had been filed by the plaintiff in error, trial was had in the District Court (the Judicial Code having become effective), the plaintiff in error duly renewing, at the opening of the trial and subsequent stages, its motion to vacate and quash the service and to dismiss the action for want of jurisdiction, which was denied upon the authority of the prior order. After final judgment had been entered upon the verdict for the plaintiff, the District Court certified to this court the question of jurisdiction.

The record discloses the following facts in regard to the relationship existing between the plaintiff in error and the St. Louis Southwestern Railway Company and their activities in the State of New York: The St. Louis Southwestern Railway Company, a Missouri corporation, and the plaintiff in error comprise what is commonly known as the "Cotton Belt Route," running from St. Louis, Missouri, through the States of Illinois, Missouri, Tennessee, Arkansas and Louisiana into Texas, with nearly one-half of the mileage in Texas. A map of the two roads contained in their "Official List," showing the route of the system, makes no distinction whatsoever between the trackage routes of the two lines.

All the stock of the plaintiff in error, save qualifying shares, is owned by the Missouri company, and the funded debt, mortgages and other obligations and assets of the plaintiff in error are owned and controlled by the Missouri company. In a certain application to the New York Stock Exchange requesting it to list securities of the Missouri company made by the secretary of that company it was stated that the proceeds were to be used for equipping and extending certain branches of the plaintiff in error. Certain banks and trust companies in New York City act as registrars, trustees, transfer agents and agents

for the two companies, the obligations being secured by mortgages upon the properties of both corporations.

The general officers and agents of one company hold similar positions with the other. The annual report of the plaintiff in error and the Missouri company are combined, and the Texas company is referred to therein as a part or division of the Missouri corporation. Throughout the report reference is made to the "entire system," and in various respects the two lines are treated as one system.

It further is shown that upon the door of an office in New York City there appears the sign "Cotton Belt Route," which words are also found on the stationery of the plaintiff in error and the Missouri company, and that beneath the symbol appears "St. Louis Southwestern Lines," and underneath the names P. H. Coombs, General Eastern Freight and Passenger Agent and C. W. Braden, Travelling Freight Agent. In official pamphlets of the two roads the names of the plaintiff in error and the St. Louis Southwestern Railway Company are bracketed together to show that they constitute the Cotton Belt Route.

Before the action was commenced the defendant in error had considerable correspondence in regard to the claim with P. H. Coombs, of the New York office, in which the defendant in error stated that the plaintiff in error was the initial carrier and as such would be held liable for the amount of the damage. Replies were received to all such letters, acknowledging receipt and showing the attention and investigation which the claim was receiving and stating that all claims were handled by the general offices at either St. Louis or Tyler, Texas, and that the letters were being sent to the St. Louis office of the Missouri company and that it was hoped a satisfactory reply from the St. Louis office would be received at an early date. One letter was forwarded to S. C. Johnson, Auditor of the Missouri Company, Freight Claim Division, and General

Adjuster of all freight claims of the Cotton Belt Route, who replied that he would review the matter and write fully regarding the company's position.

In this class of cases, where it is undertaken to hold a corporation personally liable in a foreign jurisdiction, two questions ordinarily arise: the first, Was the corporation within the jurisdiction in which it is sued? the second, Was process duly served upon an authorized agent of the corporation? As to the latter question, there is little difficulty in this case. The cause of action having accrued in New York by the failure to keep the contract for the safe delivery of the goods there, the service could be properly made under the New York statute, in the absence of other designated officials, upon the resident director. *Pennsylvania Lumbermen's Mutual Fire Insurance Company* v. *Meyer*, 197 U. S. 407.

The other question as to the presence of the corporation within the jurisdiction of the court in which it was sued raises more difficulty. A long line of decisions in this court has established that in order to render a corporation amenable to service of process in a foreign jurisdiction it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof. *The Lafayette Ins. Co.* v. *French*, 18 How. 404; *St. Clair* v. *Cox*, 106 U. S. 350; *Goldey* v. *Morning News*, 156 U. S. 518; *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406; *Geer* v. *Mathieson Alkali Works*, 190 U. S. 428; *Peterson* v. *Chicago, Rock Island & Pac. Ry. Co.*, 205 U. S. 364; *Green* v. *Chicago, Burlington & Quincy Ry. Co.*, 205 U. S. 530; *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437; *Herndon-Carter Co.* v. *Norris, Son & Co.*, 224 U. S. 496.

In the court below it was adjudged that the so-called Carmack Amendment, under the circumstances here detailed, had had the effect of making the corporation liable to suit in New York and, because of the agency within

New York of the connecting carrier, effected by that statute, must be held to be there present and subject to service of process. In view of the recent consideration of the Carmack Amendment in this court it is unnecessary to now enter upon any extended discussion of it. The object of the statute was to require the initial carrier receiving freight for transportation in interstate commerce to obligate itself to carry to the point of destination, using the lines of connecting carriers as its agencies, thus securing for the benefit of the shipper unity of transporation and responsibility. *Atlantic Coast Line R. R. Co.* v. *Riverside Mills*, 219 U. S. p. 203. The provisions of the amendment had the effect of facilitating the remedy of the shipper by making the initial carrier responsible for the entire carriage, but the amendment was not intended, as we view it, to make foreign corporations through connecting carriers liable to suit in a district where they were not carrying on business in the sense which has heretofore been held necessary to confer jurisdiction.

We reach the conclusion that this case is to be decided upon the principles which have heretofore prevailed in determining whether a foreign corporation is doing business within the district in such sense as to subject it to suit therein. This court has decided each case of this character upon the facts brought before it and has laid down no all-embracing rule by which it may be determined what constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction. In a general way it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served and in which it is bound to appear when a proper agent has been served with process. *Lafayette Ins. Co.* v. *French*, *supra*, p. 407; *Green* v. *Chicago, Burlington & Quincy Ry. Co.*, *supra*, p. 532. Applying the general princi-

ples which we regard as settled by this court, Was this company doing business in the State of New York in that sense?

The testimony discloses that the two roads together constitute a continuous line from St. Louis, through the States of Illinois, Missouri, Tennessee, Arkansas and Louisiana into Texas, and are together known as the "Cotton Belt Route." This combination has an office in the city of New York, upon the door of which, as upon the stationery and literature of the companies, the symbol, "Cotton Belt Route," is found in use. Underneath appears the general description, "St. Louis Southwestern Lines," and there is also named a general eastern freight agent and traveling freight agent of the lines. With this joint freight agent at the office in New York the matter of the plaintiff's claim was taken up and considered, and correspondence concerning it was had through his office, and a settlement of the claim attempted. It was only after such negotiations for a settlement had failed that this action was brought. Here, then, was an authorized agent attending to this and presumably other matters of a kindred character, undertaking to act for and represent the company, negotiating for it and in its behalf declining to adjust the claim made against it. In this situation we think this was the transaction of business in behalf of the company by its authorized agent in such manner as to bring it within the District of New York, in which it was sued, and to make it subject to the service of process there. See in this connection, *Pennsylvania Lumbermen's Mutual Fire Insurance Company* v. *Meyer*, 197 U. S. 415; *Commercial Mutual Accident Co.* v. *Davis*, 213 U. S. 245, 255.

In our opinion the court did not err in holding the corporation subject to process and duly served in this case.

Judgment affirmed.

SCOTT *v.* LATTIG.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 86. Argued December 13, 1912.—Decided February 3, 1913.

An error in omitting an island in a navigable stream does not divest the United States of the title or interpose any obstacle to surveying it at a later time.

Purchasers of fractional interests of subdivisions on the bank of a navigable stream do not acquire title to an island on the other side of the channel merely because the island was omitted from the survey.

Lands underlying navigable waters within the several States belong to the respective States in virtue of their sovereignty, subject to the paramount power of Congress to control navigation between the States and with foreign powers.

Each new State, upon its admission to the Union, becomes endowed with the same rights and powers in regard to sovereignty over lands under navigable waters as the older States.

An island within the public domain in a navigable stream and actually in existence at the time of the survey of the banks of the stream, and also in existence when the State within which it was situated is admitted to the Union, remains property of the United States, and even though omitted from the survey it does not become part of the fractional subdivisions on the opposite bank of the stream; and so *held* as to an island in Snake River, Idaho. *United States* v. *Mission Rock Co.*, 189 U. S. 391, followed; *Whitaker* v. *McBride*, 197 U. S. 510, distinguished.

17 Idaho, 506, reversed.

THE facts, which involve the title to an island in a navigable river and whether it remained public land after the survey, are stated in the opinion.

Mr. Oliver O. Haga, with whom *Mr. James H. Richards* and *Mr. McKeen F. Morrow* were on the brief, for plaintiff in error:

Public grants convey nothing by implication; they are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants. Nothing passes by a public grant but that which is necessarily or expressly embraced in its terms. *United States* v. *Arredondo*, 6 Pet. 691; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 546; *Shively* v. *Bowlby*, 152 U. S. 1; *Martin* v. *Waddell*, 16 Pet. 367, 411; *Central Trans. Co.* v. *Pullman Pal. Car Co.*, 139 U. S. 24, 49.

Whenever the question in any court, state or Federal, is whether the title to land which has once been the property of the United States has passed from the Federal Government, that question must be resolved by the laws of the United States. *Wilcox* v. *Jackson*, 13 Pet. 498, 517; *Irvine* v. *Marshall*, 20 How. 558; *Gibson* v. *Chouteau*, 13 Wall. 92.

Congress alone has, under Art. IV, § 3 of the Constitution, the power to determine the manner of disposing of the public lands, and it has the sole power to declare the dignity and effect of titles emanating from the United States. *United States* v. *Gratiot*, 14 Pet. 526; *Bagnell* v. *Broderick*, 13 Pet. 436; *Downes* v. *Bidwell*, 182 U. S. 268; *Kean* v. *Calumet Canal & Imp. Co.*, 190 U. S. 466.

The United States holds the title to the beds, below high water mark, of the navigable streams within a Territory for the benefit of the whole people, and in trust for the State or States to be ultimately created out of such Territory. *Shively* v. *Bowlby*, 152 U. S. 1, 28; *Weber* v. *State Harbor Comrs.*, 18 Wall. 57; *Packer* v. *Bird*, 137 U. S. 661; *Knight* v. *United Land Ass'n*, 142 U. S. 161; *San Francisco* v. *Le Roy*, 138 U. S. 656; *McGilvra* v. *Ross*, 215 U. S. 70.

In the United States the law does not distinguish be-

tween tidal streams and non-tidal streams which are navigable in fact. *McGilvra* v. *Ross*, 215 U. S. 70; *Barney* v. *Keokuk*, 94 U. S. 324; *The Genessee Chief* v. *Fitzhugh*, 12 How. 443; *Shively* v. *Bowlby*, 152 U. S. 1.

Grants by Congress of portions of the public lands within a Territory to settlers thereon, though bordering on or bounded by navigable waters, convey of their own force title to the upland only, or what lies above ordinary high water mark. And such grants do not impair the title and dominion of the future State, when created, to the bed of the stream below ordinary high water mark. *Shively* v. *Bowlby*, 152 U. S. 1; *McGilvra* v. *Ross*, 215 U. S. 70; *Eldridge* v. *Tresevant*, 160 U. S. 452, 467.

The use of the shores of navigable streams and the right, title or interest of riparian proprietors, or the owners of the upland, to such shores and to the beds of the streams must be determined by the laws of the several States, subject only to the rights vested by the Constitution in the United States. *Shively* v. *Bowlby*, *supra; St. Anthony Falls Co.* v. *St. Paul*, 168 U. S. 349, 361; *St. Clair County* v. *Lovingston*, 23 Wall. 46, 68; *Barney* v. *Keokuk*, 94 U. S. 338; *Ill. Cent. R. Co.* v. *Chicago*, 176 U. S. 646, 660; *Pollard* v. *Kibbe*, 9 How. 471; *Packer* v. *Bird*, 137 U. S. 671; *Scranton* v. *Wheeler*, 179 U. S. 141, 187; *Mobile Trans. Co.* v. *Mobile*, 187 U. S. 479; *Pollard* v. *Hagan*, 3 How. 212.

The courts of the United States will construe the grants of the general Government without reference to the rules of construction adopted by the States for their grants, but whatever incidents or rights to the soil under navigable waters, or below high water mark, attach to the ownership of the upland conveyed by the Government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use or enjoyment of the property by the grantee. *Shively* v. *Bowlby; St. Anthony &c. Co.* v. *St. Paul*, and *McGilvra* v. *Ross*, *supra*.

Snake River in southern Idaho is a navigable stream. *Johnson* v. *Johnson*, 14 Idaho, 561; *Moss* v. *Ramey*, 14 Idaho, 598.

Whether a riparian owner holds title in fee to the center of a navigable stream, or to low water mark or high water mark must be determined by the laws of the State in which the upland is situated. *McGilvra* v. *Ross* and *Shively* v. *Bowlby*, *supra*.

The title to the bed and shores of non-navigable streams is vested in the owner of the upland, and where the opposite banks of a stream, not navigable, belong to different persons the stream and the bed thereof is common to both. Rev. Stat., U. S., § 2476.

The owner in fee of the bed of the river, or other submerged land, is the owner of any bar, island or dry land which may be subsequently formed thereon. *St. Louis* v. *Rutz*, 138 U. S. 226.

Islands formed in the stream before the admission of the State into the Union are subject to disposal by the Federal Government the same as other public lands. If they are formed after the admission of the State, the question whether they belong to the riparian owner, or are the property of the State, is governed by local law. 1 Farnum on Waters, p. 50; *United States* v. *Mission Rock Co.*, 189 U. S. 391; *Mission Rock* v. *United States*, 109 Fed. Rep. 763; *Steinbuchel* v. *Lane* (Kan.) 51 Pac. Rep. 886; *Shoemaker* v. *Hatch*, 13 Nevada, 261; *Granger* v. *Swart*, Fed. Cas. No. 5685.

Public agents cannot bind the Government beyond the terms of the statute under which they act. The Government is not bound. *Moffat* v. *United States*, 112 U. S. 34; *Kirwan* v. *Murphy*, 189 U. S. 35; *Horne* v. *Smith*, 159 U. S. 40.

The failure of a public land surveyor to survey an island of 138.15 acres of high and valuable agricultural land, not subject to inundation or overflow, does not enlarge the

title conveyed by the patents to the upland situated across a 400 foot channel from the island. *Horne* v. *Smith*, 159 U. S. 40; *Niles* v. *Cedar Point Club*, 175 U. S. 300; *Barnhart* v. *Ehrhart*, 33 Oregon, 274; *French-Glenn Live Stock Co.* v. *Springer*, 185 U. S. 47; *Security Land Co.* v. *Burns*, 193 U. S. 167; *Steinbuchel* v. *Lane* (Kan.) 51 Pac. Rep. 886; *Shoemaker* v. *Hatch*, 13 Nevada, 261; *Whiteside* v. *United States*, 93 U. S. 247; *In re Peterson*, 39 Land Dec. 566.

One receiving a patent for the full acreage of upland paid for will not be heard to insist that, by reason of the failure of the surveyor to note on the official plat the existence of an island of 138.15 acres of agricultural land, not subject to overflow, and situated across a 400 foot channel from the upland, he is entitled to the island also. Cases *supra* and *Lammers* v. *Nissen*, 4 Nebraska, 245; *Bissel* v. *Fletcher*, 19 Nebraska, 725; *Harrison* v. *Stipes*, 34 Nebraska, 431.

An island in existence at the time of the admission of the State into the Union, consisting of 138.15 acres of dry land not subject to overflow and adapted to ordinary agricultural uses, is not part of the river bed, and title thereto does not pass by implication or legal intendment to either the State or the riparian owner, but it may be claimed, surveyed and sold by the Government as other public lands. See *Re Peterson; Steinbuchel* v. *Lane* and *Shoemaker* v. *Hatch*, *supra*.

The Government as the original proprietor has the right to survey and sell any lands, including islands in the rivers or other bodies of water; and the failure of the surveyor to show an island on the official plat does not estop the Government from claiming it when its attention is directed to it. Cases *supra*.

Whether an island is open to homestead entry and settlement, and should therefore be surveyed, is a matter within executive judgment or discretion. *Carrick* v. *Lamar*, 116

U. S. 423; *St. Louis* v. *Rutz*, 138 U. S. 251; *Kirwan* v. *Murphy*, 189 U. S. 35, 56.

The Land Department is a tribunal appointed by Congress to decide certain questions relating to the public lands; and its decision upon matters of fact cognizable by it, in the absence of fraud or imposition, is conclusive everywhere else. *Lee* v. *Johnson*, 116 U. S. 48; *Marquez* v. *Frisbie*, 101 U. S. 473; *St. Louis Smelting & Ref. Co.* v. *Kemp*, 104 U. S. 636; *Moore* v. *Robbins*, 96 U. S. 530; *Baldwin* v. *Starks*, 107 U. S. 463; *United States* v. *Minor*, 114 U. S. 233; *Burfenning* v. *Chicago, St. P., M. & O. R. Co.*, 163 U. S. 321; *Johnson* v. *Drew*, 171 U. S. 93; *Moss* v. *Dowman*, 176 U. S. 413; *Gertgens* v. *O'Connor*, 191 U. S. 237.

The Land Department in issuing a patent must necessarily consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. *Steel* v. *St. Louis Smelting Co.*, 106 U. S. 447; *Johnson* v. *Towsley*, 13 Wall. 72, 83; *French* v. *Fyan*, 93 U. S. 169, 172; *Quinby* v. *Conlan*, 104 U. S. 420, 426.

A decision rendered by the officers of the Land Department upon a question of fact is conclusive and not subject to be reviewed by the courts in the absence of a showing that such decision was rendered in consequence of fraud or imposition or mistake other than an error of judgment in estimating the value or effect of evidence, regardless of whether or not it was consistent with the preponderance of the evidence, so long as there is some evidence upon which the finding in question could be made. *Hartwell* v. *Havighorst*, 196 U. S. 635; *Jordan* v. *Smith*, 12 Oklahoma, 703; *Wiseman* v. *Eastman*, 21 Washington, 163; *Love* v. *Flahive*, 33 Montana, 348; *Parsons* v. *Venzke*, 4 Nor. Dak.

452; aff'd 164 U. S. 89; *Shepley* v. *Cowan*, 91 U. S. 330; 32 Cyc, 1020 *et seq.*; *Le Fevre* v. *Amonson*, 11 Idaho, 45; *White* v. *Whitcomb*, 13 Idaho, 490; aff'd 214 U. S. 15.

The decisions of the Land Department on the construction of the land laws are entitled to great respect at the hands of the court and should not be overruled unless they are clearly erroneous. *United States* v. *Healy*, 160 U. S. 136; *Robertson* v. *Downing*, 127 U. S. 607; *Hahn* v. *Cook*, 29 Nevada, 518; *Lavagnino* v. *Uhlig*, 26 Utah, 1; *O'Reilly* v. *Nixon* (Colo.), 113 Pac. Rep. 486.

The general rules as to the conclusiveness of decisions of the Land Department apply to decisions of the Commissioner of the General Land Office. *Rutledge* v. *Murphy*, 51 California, 388; *Shelton* v. *Keirn*, 45 Mississippi, 106; *Perry* v. *O'Hanlon*, 11 Missouri, 585; *Hartman* v. *Smith*, 7 Montana, 19; *Parsons* v. *Venzke*, 4 Nor. Dak. 452; aff'd 164 U. S. 89; *Glidden* v. *Union Pac. R. R. Co.*, 30 Fed. Rep. 660.

Courts will not entertain an inquiry as to the extent of the investigation by the Secretary of the Interior and his knowledge of the points involved in his decision of a contest in the Land Department, nor as to the methods by which he reached his determination. *De Cambra* v. *Rogers*, 189 U. S. 119.

When the Land Department accepted the application of plaintiff in error for a survey of the island in question and directed that said island be surveyed, platted and offered for sale as public land, it held in effect that it had not been the intention of the Government to surrender its title to said island under the patents to defendants in error, or their predecessors in interest, for the fractional lots situated across the channel from the island. And the decision of the Department on those questions has become *res adjudicata*, at least so far as the power of that Department extends. *In re Peterson*, 39 L. D. 566; *Case* v. *Church*, 17 L. D. 578; *Gowdy* v. *Gilbert*, 19 L. D. 17; *In re Palmer*, 26 L. D. 24; *In re Kuhlam*, 27 L. D. 68.

Mr. Karl Paine, with whom *Mr. Ira W. Kenward*, was on the brief, for defendants in error:

The common law of England, so far as it is not repugnant to, or inconsistent with, the Constitution or laws of the United States, in all cases not provided for in these revised codes, is the rule of decision in all the courts of Idaho. Section 18, Rev. Codes Idaho. This has been the law since 1864.

The decision in the present case is based upon the common-law doctrine of riparian ownership in subaqueous land. *Lattig* v. *Scott*, 17 Idaho, 506; following *Johnson* v. *Johnson*, 14 Idaho, 561; *Moss* v. *Ramey*, 14 Idaho, 598; *Fischer* v. *Davis*, 19 Idaho, 493; *Ulbright* v. *Baslington*, 20 Idaho, 539; *Donovan Co.* v. *Hope Lumber Co.*, 194 Fed. Rep. 643.

At common law "the owners of the banks prima facie own the beds of all fresh water rivers above the ebb and flow of the tide, even if actually navigable, to the thread of the stream, *usque ad filum aquæ*." *Shively* v. *Bowlby*, 152 U. S. 1; *Hardin* v. *Jordan*, 140 U. S. 371; *Kinkead* v. *Turgeon*, 74 Nebraska, 580; Farnum on Waters, pp. 104–118; *Johnson* v. *Johnson*, *supra*, and case note, 24 L. R. A. (N. S.) 1240; *Goff* v. *Cougle*, 118 Michigan, 307.

The rights of a riparian owner upon a navigable stream in this country are governed by the laws of the State in which the stream is situated. *Weems Steamboat Co.* v. *People's Steamboat Co.*, 214 U. S. 345; *McGilvra* v. *Ross*, 215 U. S. 70; *Kansas* v. *Colorado*, 206 U. S. 46; *Iowa* v. *Carr*, 191 Fed. Rep. 257; Weil on Water Rights, 3d ed., § 898, n. 11.

A grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the center of the thread thereof. The bed of the river could not be conveyed by the patent of the United States alone, but, if such is the law of the State, the bed will pass to the patentee by the help of that law, unless there is some special reason to the contrary as in *Ill. Cent. R. Co.* v.

Illinois, 146 U. S. 387. The fact that the river is a boundary between different States makes no difference. *United States* v. *Chandler-Dunbar Water Co.*, 209 U. S. 447; *Johnson* v. *Johnson*, *supra*; *Lattig* v. *Scott*, *supra*.

Grants by the United States of public lands bounded on streams, without any reservation or restriction of terms, are to be construed, as to their effect, according to the law of the State in which the land lies. *Grand Rapids & I. R. Co.* v. *Butler*, 159 U. S. 87; *Hardin* v. *Jordan*, *supra*; *Packer* v. *Bird*, 137 U. S. 661; *Johnson* v. *Johnson*, and *Lattig* v. *Scott*, *supra*.

Unsurveyed islands between the bank and the thread of the main channel of the river not omitted from survey by fraud or mistake pass with the mainland to the riparian patentee. *Johnson* v. *Johnson*; *Moss* v. *Ramey*; *Lattig* v. *Scott*; *Hardin* v. *Jordan*; *Grand Rapids & I. R. Co.* v. *Butler*, and *United States* v. *Chandler-Dunbar Co.*, *supra*; *Whitaker* v. *McBride*, 197 U. S. 510; *St. Paul & P. R. Co.* v. *Schurmeier*, 7 Wall. 272; *United States* v. *Stinson*, 197 U. S. 200; *Mitchell* v. *Smale*, 140 U. S. 406.

For cases passing on the question of the ownership of islands in a navigable stream, when not necessarily dependent upon the question of whether the adjoining owner takes to the thread of the stream or merely to the shore, see *Holman* v. *Hodges*, 58 L. R. A. 673; *Webber* v. *Axtell*, 6 L. R. A. (N. S.), 194, note.

Private ownership of the bed of the stream or of the island, subject to the public rights, will not impair the interest of the public in the waters of Snake river. *United States* v. *Chandler-Dunbar Co.*; *Johnson* v. *Johnson*; *Lattig* v. *Scott*, *supra*.

Snake river is a navigable river and as such is a public highway and subject to the use of the public, not only to low-water mark, but to high-water mark, and the riparian owner can in no way interfere with this use. *Johnson* v. *Johnson*, *supra*.

Except in cases of omission by accident, fraud or mistake, the United States has no authority to make surveys subsequent to patent of any land between the meander line and the thread of the main channel. *St. Paul & P. R. Co.* v. *Schurmeier*, 7 Wall. 272, 289; *Hardin* v. *Jordan*, 140 U. S. 371, 383; *Mitchell* v. *Smale*, 140 U. S. 406, 412, 413; *Moore* v. *Robbins*, 96 U. S. 530, 533; *Davis* v. *Wiebold*, 139 U. S. 507; *Grand Rapids R. Co.* v. *Butler*, 159 U. S. 87; *St. Louis Smelting Co.* v. *Kemp*, 104 U. S. 636, 646; *Lindsey* v. *Hawes*, 2 Black, 554, 560; *Cragin* v. *Powell*, 128 U. S. 691; *Webber* v. *Pere Marquette Boom Co.*, 62 Michigan, 635; *Shufeldt* v. *Spaulding*, 37 Wisconsin, 662; *State* v. *Lake St. Clair Fishing Club*, 127 Michigan, 587.

In cases of this kind, the meander line is not the boundary. *Johnson* v. *Hurst*, 10 Idaho, 308; *St. Paul & P. R. Co.* v. *Schurmeier*, 7 Wall. 272.

Ordinarily, the Government is bound by its own plats, and a patent issued referring to the official plats amounts to an adoption of such plats as a part of the description, and the natural monuments therein designated and shown are ordinarily controlling as to the boundary line. *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178.

At common law islands formed in a fresh water river, if altogether on one side of the dividing line, the *filum aquæ*, belong to him who owns the bank on that side. *Ingraham* v. *Wilkinson*, 4 Pick. 268; *Branham* v. *Turnpike Co.*, 1 Lea, 704.

Parties purchasing property shown by the United States surveys and plats to be riparian property should not be excluded from the water front. Cases *supra*, and *Bartlett Land Co.* v. *Saunders*, 103 U. S. 316, 319; *Lindsey* v. *Hawes*, 2 Black, 554; *St. Clair* v. *Lovingston*, 23 Wall. 46, 63; *Brown* v. *Huger*, 21 How. 305; *Mitchell* v. *Smale*, 140 U. S. 406; *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178, 195; *Boorman* v. *Sunnuchs*, 42 Wisconsin, 233; *Wright* v. *Day*, 33 Wisconsin, 264; *Watson* v. *Peters*, 26 Michigan,

517; *Richardson* v. *Prentiss*, 48 Michigan, 91; *Grand Rapids Ice Co.* v. *South Grand Rapids Ice Co.*, 102 Michigan, 236.

Where lands are bounded by streams, and monuments on the banks are stated to be corners, the true corner is held to be the point in the middle thread of the stream opposite the given monument. *Luce* v. *Carley*, 24 Wend. 453; *Seneca Nation* v. *Knight*, 23 N. Y. 498; *St. Clair* v. *Lovingston*, 23 Wall. 46, 63; *Cold Spring Iron Works* v. *Tolland*, 9 Cush. 495; *Newton* v. *Eddy*, 23 Vermont, 319; *McCullock* v. *Aten*, 2 Ohio, 307; *Handly* v. *Anthony*, 5 Wheat. 375, 380; *Buck* v. *Squires*, 22 Vermont, 494.

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

This was a suit in the District Court of Canyon County, Idaho, to quiet the title to Poole Island in the Snake river. The plaintiff, Lattig, claimed the northern part by reason of his ownership of lands on the east bank of the river and rested his claim to the southern part upon adverse possession. One of the defendants, Scott, claimed the entire island under the homestead law of the United States, and the other defendant, Green, claimed the southern part by reason of his ownership of lands on the east bank of the river, adjoining those of Lattig. Following a trial of the issues, a decree was entered sustaining Lattig's claim to the northern part and Green's to the southern, and quieting their titles against the claim of Scott. The Supreme Court of the State affirmed the decree, 17 Idaho, 506, and the case was then brought here.

The material facts are as follows: Snake river is a navigable stream and at the place in question is the boundary between the States of Oregon and Idaho. It flows northward past Poole Island in two channels, one on either side, and has a fall of 6 feet from one end of the island to the

other. The channel on the western or Oregon side is about 1,000 feet wide, and the one on the eastern or Idaho side is approximately 300 feet. The island is on the Idaho side of the thread of the stream, is over a mile in length, is from 500 to 1,200 feet in width, and has an area of 138.15 acres. It has well-defined banks extending from 3 to 5 feet above high water, is mostly covered with a growth of wild grass, sage brush and small timber, bears undoubted evidence of permanency and of having been there many years, and concededly was in the same condition as now in 1880, which was several years before Idaho was admitted into the Union and before the lands on the east bank of the river passed into private ownership. Those lands were surveyed in 1868, and the field notes and plat of the survey showed that the bank on that side of the river was meandered in the usual way and that the sections and subdivisions bordering thereon were fractional. The island was not mentioned in the field notes or plat. Lattig and Green severally own the fractional subdivisions on the east bank opposite the island under United States patents issued in 1894 and 1895, which describe them as containing 73.30 and 98.75 acres, respectively, "according to the official plat of the survey of said lands returned to the General Land Office by the surveyor general." The northern part of the island, which is opposite the lands of Lattig, contains 54.75 acres, and the southern part, which is opposite the lands of Green, contains 83.40 acres. Scott settled upon the island, as unsurveyed public land, in the early part of 1904, with the purpose of acquiring the title under the homestead law of the United States (see act May 14, 1880, 21 Stat. 141, c. 89, § 3; Rev. Stat., § 2266), and has ever since resided on and occupied the island and improved and cultivated portions of it. In 1906 it was surveyed as public land by direction of the Commissioner of the General Land Office, and after this survey was approved and the plat

filed Scott tendered, in the regular way at the proper land office, an application to enter the island as a homestead in virtue of his prior settlement, and the application was duly accepted. It is said in the brief in his behalf that after the trial in the District Court his homestead claim was carried to completion and a patent was issued to him, but as this is not shown on the record it may be passed without other notice.

As it is manifest that the island, if in existence at the time of the survey in 1868, was then public land of the United States, and also that, if it continued to be public land in 1904, Scott initiated and acquired a valid claim to it under the homestead law, we will come at once to the reasons advanced for holding, as did the state court, that it ceased to be public land before 1904, viz., its omission from the survey of 1868, the admission of Idaho as a State in 1890, and the disposal of the lands on the east bank of the river in 1894 and 1895.

In making the survey of 1868 it was the duty of the surveyor, if the island was there at the time, to ascertain its exact location, to meander its exterior boundary, and to enter both in the field notes (Manual of Surveying Instructions of 1855, pp. 12–14; Act of May 30, 1862, 12 Stat. 409, c. 86), and therefore the absence of such an entry, as also of any representation of the island on the plat constructed from the field notes, naturally suggests that the island may not then have been in existence. But this suggestion is effectually refuted by the size, elevation and appearance of the island, the character and extent of the vegetation thereon, and the conceded fact that in 1880, only 12 years after the survey, it was in the same condition as now. That it was there at the time of the survey seems certain, although that is not so important as its existence when Idaho became a State. Of course, the error in omitting it from the survey did not divest the United States of the title or interpose any obstacle to sur-

veying it at a later time. Neither was the error calculated to induce purchasers of the fractional subdivisions on the east bank to believe that by paying for the 73.30 and 98.75 acres in those tracts they would get, respectively, 54.75 and 83.40 acres more on the island on the other side of the 300-foot channel. *Horne* v. *Smith*, 159 U. S. 40; *Niles* v. *Cedar Point Club*, 175 U. S. 300, 306.

Coming to the effect to be given to the admission of Idaho as a State and to the disposal of the fractional subdivisions on the east bank, it is well to repeat that Snake river is a navigable stream, for there is an important difference between navigable and non-navigable waters in such a connection. Thus, Rev. Stat., § 2476, which is but a continuation of early statutes on the subject (Acts May 18, 1796, 1 Stat. 468, c. 29, § 9; March 3, 1803, 2 Stat. 229, c. 27, § 17), declares: "All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both;" and of this provision it was said in *Railroad Company* v. *Schurmeir*, 7 Wall. 272, 288, "the court does not hesitate to decide, that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be, and remain public highways." Besides, it was settled long ago by this court, upon a consideration of the relative rights and powers of the Federal and state governments under the Constitution, that lands underlying navigable waters within the several States belong to the respective States in virtue of their sovereignty and may be used and disposed of as they may direct, subject always to the rights

of the public in such waters and to the paramount power of Congress to control their navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations, and that each new State, upon its admission to the Union, becomes endowed with the same rights and powers in this regard as the older ones. *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 68; *Barney* v. *Keokuk*, 94 U. S. 324, 338; *Illinois Central Railroad Co.* v. *Illinois*, 146 U. S. 387, 434–437; *Shively* v. *Bowlby*, 152 U. S. 1, 48–50, 58; *McGilvra* v. *Ross*, 215 U. S. 70.

Bearing in mind, then, that Snake river is a navigable stream, it is apparent, first, that on the admission of Idaho to statehood the ownership of the bed of the river on the Idaho side of the thread of the stream—the thread being the true boundary of the State—passed from the United States to the State, subject to the limitations just indicated, and, second, that the subsequent disposal by the former of the fractional subdivisions on the east bank carried with it no right to the bed of the river, save as the law of Idaho may have attached such a right to private riparian ownership. This is illustrated by the statement in *Hardin* v. *Shedd*, 190 U. S. 508, 519: "When land is conveyed by the United States bounded on a non-navigable lake belonging to it, the grounds for the decision must be quite different from the considerations affecting a conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the State by its admission to the Union. . . . When land under navigable water passes to the riparian proprietor, along with the grant of the shore by the United States, it does not pass by force of the grant alone, because the United States does not own it, but it passes by force of the declaration of the State which does own it that it is attached to the shore." *United States* v. *Chandler-Dunbar Co.*, 209 U. S. 447, 451, is to the same effect.

But the island, which we have seen was in existence when Idaho became a State, was not part of the bed of the stream or land under the water, and therefore its ownership did not pass to the State or come within the disposing influence of its laws. On the contrary, although surrounded by the waters of the river and widely separated from the shore, it was fast dry land, and therefore remained the property of the United States and subject to disposal under its laws, as did the island which was in controversy in *Mission Rock Co.* v. *United States*, 109 Fed. Rep. 763, 769–770, and *United States* v. *Mission Rock Co.*, 189 U. S. 391.

We think the cases relied upon by the defendants in error do not make for a contrary conclusion. *Railroad Company* v. *Schurmeir*, 7 Wall. 288, expressly recognizes "that proprietors of lands bordering on navigable rivers, under titles derived from the United States, hold only to the stream." In *Grand Rapids & Indiana Railroad Co.* v. *Butler*, 159 U. S. 87, the evidence left it uncertain whether the so-called island was more than "a low sand bar, covered a good part of the year with water," at the time of the survey of the adjacent lands, which was in the year of the State's admission to the Union, and the court said (p. 95): "We have no doubt upon the evidence that the circumstances were such at the time of the survey as naturally induced the surveyor to decline to survey this particular spot as an island. There is nothing to indicate mistake or fraud." *United States* v. *Chandler-Dunbar Co.*, 209 U. S. 447, 451, is sufficiently distinguished by the following excerpt from the opinion: "The islands are little more than rocks rising very slightly above the level of the water, and contain respectively a small fraction of an acre and a little more than an acre. They were unsurveyed and of no apparent value. We cannot think that these provisions excepted such islands from the admitted transfer to the State of the bed of the streams surrounding them." And *Whitaker* v. *McBride*, 197 U. S. 510, which

related to a small island, in a non-navigable river, which the Land Department of the United States had expressly refused to survey, requires no other notice than to quote the following from the opinion (p. 515): "It must also be noticed that the Government is not a party to this litigation, and nothing we have said is to be construed as a determination of the power of the Government to order a survey of this island or of the rights which would result in case it did make such survey. . . . Our conclusion, therefore, is that by the law of Nebraska, as interpreted by its highest court, the riparian proprietors are the owners of the bed of a stream to the center of the channel; that the Government, as original proprietor, has the right to survey and sell any lands, including islands in a river or other body of water; that if it omits to survey an island in a stream and refuses, when its attention is called to the matter, to make any survey thereof, no citizen can overrule the action of the Department, assume that the island ought to have been surveyed, and proceed to occupy it for the purposes of homestead or preëmption entry. In such a case the rights of riparian proprietors are to be preferred to the claims of the settler."

For the reasons given the decree is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

JOHNSON *v.* HOY, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF ILLINOIS.

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

No. 842. Argued January 7, 8, 1913.—Decided February 3, 1913.

The writ of *habeas corpus* is not intended to serve the office of a writ of error even after verdict, and for stronger reasons is not available before trial except in rare and exceptional cases.

The orderly course of a trial should be pursued and usual remedies exhausted even where petitioner attacks the constitutionality of the act under which he is held. *Glasgow* v. *Moyer*, 225 U. S. 420.

Where petitioner bases his petition on the ground that excessive bail is required, and before decision on the writ furnishes the bail, as the court can only grant the same relief that the writ was intended to afford, the appeal from the judgment denying the writ must be dismissed.

THE facts are stated in the opinion.

Mr. Benjamin C. Bachrach for appellant.

Mr. Assistant Attorney General Harr, with whom *The Solicitor General* was on the brief, for appellee.

MR. JUSTICE LAMAR delivered the opinion of the court.

On November 7, 1912, Johnson was indicted for a violation of the White Slave Traffic Act (June 25, 1910, 36 Stat. 825, c. 395). He was arrested and the court fixed his bail at $30,000 but declined to accept as surety any one who was indemnified against loss, or to permit the defendant to deposit cash in lieu of bond. The defendant thereupon applied for a writ of *habeas corpus* on the ground (1) that excessive bail was required, on terms onerous and prohibitive, and (2) that the act under which he had been indicted was unconstitutional and void. After a hearing the petition was denied and he appealed to this court, where a motion was made that he be admitted to bail pending the hearing. This was resisted by the Solicitor General and, before a decision thereon, was abandoned. On appellant's motion the case was advanced to be heard with others involving the constitutionality of the same act. The defendant's counsel took part in the argument of that question, January 6, 1913. From an affidavit attached to the brief of the Government, submitted at that time, it ap-

pears that, on November 15, 1912, Johnson had given a bond, which had been approved by the district judge, and had been released from arrest under the indictment. The petitioner insists that the release on bail was known to the Government when the motion to advance was made, and not then having been urged he is now entitled to a decision on the constitutional question argued, so that if in his favor he would avoid re-arrest and trial.

The writ of *habeas corpus* is not intended to serve the office of a writ of error even after verdict, and, for still stronger reasons, it is not available to a defendant before trial, except in rare and exceptional cases as pointed out in *Ex parte Royall*, 117 U. S. 241. This is an effort to nullify that rule and to depart from the regular course of criminal proceedings by securing from this court, in advance, a decision on an issue of law which the defendant can raise in the District Court, with the right, if convicted, to a writ of error on any ruling adverse to his contention. That the orderly course of a trial must be pursued and the usual remedies exhausted, even where the petitioner attacks on *habeas corpus* the constitutionality of the statute under which he was indicted, was decided in *Glasgow* v. *Moyer*, 225 U. S. 420. That and other similar decisions have so definitely established the general principle as to leave no room for further discussion. *Riggins* v. *United States*, 199 U. S. 547.

It is claimed, however, that the defendant was required to give excessive bail, on prohibitive conditions, and that this fact, in connection with the attack on the validity of the statute, takes the case out of the general rule and brings it within the exceptional cases referred to in *Ex parte Royall*, 117 U. S. 241, so as to give petitioner the right to this hearing in advance of a trial. But even if it could be claimed that the facts relied on presented any reason for allowing him a hearing on the constitutionality of the act at this time, the defendant would not be entitled

to the benefit of the writ, because since the appeal he has given bond in the District Court and has been released from arrest under the warrant issued on the indictment. He is no longer in the custody of the marshal to whom the writ is addressed, and from whose custody he seeks to be discharged. The defendant is now at liberty, and having secured the very relief which the writ of *habeas corpus* was intended to afford to those held under warrants issued on indictments, the appeal must be

Dismissed.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY *v.* BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON.

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

No. 50. Argued November 13, 1912.—Decided February 24, 1913.

Congress, by passing the Act to Regulate Commerce, has taken control of interstate railroads, and having expressly included ferries used in connection therewith, has destroyed the power of the States to regulate such ferries. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, distinguished.

Quære: Whether *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204, overruled *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196.

An assertion of power by Congress over a subject within its domain must be treated as coterminous with its authority over the subject, and leaves no element of the subject to control of the State.

The operation at one time of both the power of Congress and that of the State over a matter of interstate commerce is inconceivable; the execution of the greater power takes possession of the field and leaves nothing upon which the lesser power can operate.

No portion of the business of a ferry which is part of an interstate railway is under the control of the State; and so *held* that the state authorities have no power to regulate the fare of passengers, whether railroad passengers or not, on the ferry between Weehawken, New Jersey, and New York City, known as the West Shore Ferry and operated by the New York Central & Hudson River Railroad.
76 N. J. L. 664, reversed.

THE facts, which involve the constitutionality under the commerce clause of an ordinance of Hudson County, New Jersey, fixing rates of ferriage across the Hudson river to New York City on the ferry operated by the New York Central & Hudson River Railroad as lessee of the West Shore Railroad Company, are stated in the opinion.

Mr. Albert C. Wall and *Mr. Frank Bergen*, with whom *Mr. James B. Vredenburgh* and *Mr. Thomas Emery* were on the brief, for plaintiff in error:

The regulation of the rates and fares for transportation via these ferries is inoperative because it conflicts with the commerce clause of the Constitution of the United States. *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204.

Commerce national in character is for Congress to regulate. Non-action implies it shall be unregulated. *Wabash Railway* v. *Illinois*, 118 U. S. 557.

The *Covington Bridge Case* has been cited many times by the court. See *The Lottery Case*, 188 U. S. 352; *The Gloucester Ferry Case*, 114 U. S. 196; *Hanley* v. *Kansas City Ry. Co.*, 187 U. S. 617; *St. Clair County* v. *Interstate Transfer Co.*, 192 U. S. 454.

While *Chosen Freeholders* v. *State*, 3 Zab. 206, affirmed, 4 Zab. 718, purports to sustain the right and power of the state authorities to regulate the rates and fares chargeable for interstate ferry transportation, the cases cited as authority for the conclusion there announced did not involve and were not authoritative upon the point decided, and the absence of Federal legislation upon the

subject was superseded by the act of Congress of 1866, ch. 124, and of 1887, ch. 104, regulating interstate transportation. *People* v. *Babcock*, 11 Wend. 586; *Gibbons* v. *Ogden*, 9 Wheat. 203; *Smith* v. *Turner*, 7 How. 393; *Cooley* v. *Board of Wardens*, 12 How. 319, do not support the conclusion of that case.

Congress has legislated concerning ferries operated in connection with railroads. See § 1, Int. Comm. Act of February 4, 1887.

The Hepburn Amendment of 1906 leaves this language unchanged.

The railroad company has filed a copy of its tariff with the Commission.

By the requirement of the act of Congress of the filing of this tariff, and the filing of the tariff in obedience thereto, the tariff became a law governing the transportation precisely as if the tariff itself had been enacted by Congress in the same words and figures. *Gulf, Colorado & Santa Fe R. Co.* v. *Hefley & Lewis*, 158 U. S. 98; *Texas & Pacific R. Co.* v. *Dryden*, 202 U. S. 242; *Missouri Pacific R. Co.* v. *Larabee Mills Co.*, 211 U. S. 612, 623; *Poor* v. *C., B. & Q. R. Co.*, 12 I. C. C. Rep. 418, 422; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 80.

The exercise of the power which the Board of Freeholders here asserts is in conflict with the exclusive power of regulation of the same subject-matter by Federal authority. *Sinnott* v. *Davenport*, 22 How. 227.

The ferryboats are subjects of admiralty jurisdiction. *The St. Louis*, 48 Fed. Rep. 312; *Railroad Co.* v. *Richmond*, 19 Wall. 584; *Bowman* v. *Chi. & N. W. Ry. Co.*, 125 U. S. 465, 484; *Illinois Cent. R. R. Co.* v. *Illinois*, 163 U. S. 142.

The resolutions contain no provision in respect of the time at which they are to go into effect.

Obedience thereto would have been violative of the express inhibitions of the interstate commerce acts and

subjected the railroad company to the penalties therein prescribed in respect of such violation.

Exercise by the State of its power to create corporations and confer upon them charter powers to maintain and operate instrumentalities of interstate transportation does not draw to the State the power of regulation of the rates of fares or tolls for such transportation.

Considering the ferry as the landing, the license and regulation of its maintenance and operation may be of state cognizance, and nevertheless, if the ferry be interstate the ferriage fare is the subject of United States governance.

The Board of Freeholders of the County of Hudson has not the power to fix the rates of ferriage of foot-passengers on these ferries over the Hudson river, from New York to New Jersey.

Mr. E. Parmalee Prentice, with whom *Mr. John Griffin* and *Mr. George Welwood Murray* were on the brief, for defendant in error:

The resolutions of the Board of Freeholders are not invalid as a regulation of commerce among the States.

Federal power over commerce among the States is exclusive only in matters of general concern.

In all local matters state statutes are valid until superseded by Congress. *Cooley* v. *Port Wardens*, 12 How. 310; *Mobile* v. *Kimball*, 102 U. S. 691, 702; *Atlantic &c. Company* v. *Philadelphia*, 190 U. S. 160; *Bowman* v. *Railroad Co.*, 125 U. S. 465, 507; *Leisy* v. *Hardin*, 135 U. S. 100; *Stoughtenburgh* v. *Hennick*, 129 U. S. 141; *Telegraph Co.* v. *Pendleton*, 122 U. S. 347; *Ouachita Packet Co.* v. *Aiken*, 121 U. S. 444; *Robbins* v. *Taxing District*, 120 U. S. 489; *Wabash Railway* v. *Illinois*, 118 U. S. 557; *Morgan* v. *Louisiana*, 118 U. S. 455; *Cardwell* v. *Bridge Co.*, 113 U. S. 205, 210; Willoughby on the Fed. Const., § 309.

The power to regulate commerce is given to Congress,

not to the courts. The question whether a particular statute of a State is prohibited by congressional silence, is a question for Congress. State laws should not be held void except in cases so clear that Congress could not overrule the judicial decision. Thayer, Cases on Const. Law, 2190–2191.

Regulation of ferry rates is a matter of local concern within state jurisdiction.

The States always have regulated ferriage alike over intrastate and boundary streams.

The existing statutes under which the States now regulate ferriage over intrastate and boundary streams support this proposition.

The subject is one which demands intimate knowledge of local conditions. State legislatures have never been able to deal with ferriage by general law, and have turned the subject over to local town and county authorities. It would be impossible for Congress to perform the work now done by supervisors, county commissioners, boards of freeholders, etc. Vermont Act of Feb. 27, 1787; Session Laws, p. 70.

The decisions of this court and of the state courts support the existing practice which recognizes state jurisdiction.

A practical and long-continued construction of the Constitution by the States and by Congress is conclusive in this court. *Stuart* v. *Laird*, 1 Cranch, 299; *License Cases*, 5 How. 507, 607; *Conway* v. *Taylor*, 1 Black, 603; *Carroll* v. *Campbell*, 108 Missouri, 550, 564–565.

This practice, continued now for an additional half-century, is no less conclusive in the case at bar. Unless this rule be followed and the course of governmental administration by other branches of government and by the States be recognized, the separation of powers, and government by three coördinate departments would be impossible.

Regulation of ferries on intrastate and boundary streams was, until 1885, considered a matter of state police jurisdiction beyond Federal authority. *Gibbons* v. *Ogden*, 9 Wheat. 1. (See Mr. Webster's statement on pp. 18, 20); *Conway* v. *Taylor*, 1 Black, 603; *Fanning* v. *Gregoire*, 16 How. 524; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365, aff'g 102 Illinois, 560; *Mills* v. *St Clair County*, 2 Gilm. (Ill.) 197; aff'd 8 How. (U. S.) 569; *People* v. *Babcock*, 11 Wend. 586; *Ferry Co.* v. *United States*, 5 Blatchf. 198; *Chilvers* v. *People*, 11 Michigan, 43; *Marshall* v. *Grimes*, 41 Mississippi, 27; *Mayor &c.* v. *Longstreet*, 64 How. Pr. 30; Gould on Waters, § 35.

The decision of the *Gloucester Ferry Case*, 114 U. S. 196, decided in 1885, established Federal jurisdiction to legislate concerning ferriage over boundary streams, but did not turn what had been an exclusive state jurisdiction into an exclusive Federal jurisdiction. State laws on this subject are still valid until superseded by a Federal statute.

The legal definition of a ferry refers to the point of departure as the situs of the ferry. The ferry franchise consists in the right of transporting from that point. *Conway* v. *Taylor*, 1 Black, 603; *Memphis* v. *Overton*, 3 Yerg. (Tenn.) 387, 390; *State* v. *Faudre*, 54 W. Va. 122; *Power* v. *Village of Athens*, 99 N. Y. 592; Massachusetts, Act of 1641, Laws 1792–1800, p. 965; West Virginia Code, 1906, Chap. 44, § 15.

Under this definition no conflict of laws can arise upon boundary streams, for a municipality or State upon one side of the stream has complete control of ferriage from its own shore, and cannot interfere with ferriage from the opposite shore.

The franchise to leave a State comes from state law, which imposes also the duty of the carrier to receive, carry and deliver. *Louisville Ferry Co.* v. *Kentucky*, 188 U. S. 385, 394; *Bowman* v. *Chicago &c. Railway*, 115 U. S. 611, 615.

The Constitution does not confer the right of intercourse between State and State. *Gibbons* v. *Ogden*, 9 Wheat. 211; Federal Common Law and Interstate Carriers, 9 Columbia Law Rev. 375; Federal Power over Carriers and Corporations (Macmillan, 1907), pp. 23–37; 124–130; *Re Transportation of Fruit*, 10 I. C. C. Rep. 360.

Some recent cases suggest that there is also a Federal right to engage in interstate commerce, but this proposition has never been advanced without dissent, and in any event does not deny the right derived from state law. The state franchise is the historic right upon which the common law of carriers is built. *Crouch* v. *London & N. W. Ry.*, 14 C. B. 255.

The privilege of keeping a ferry over boundary streams, with the right to take toll for passengers and freight, is grantable by the State, to be exercised within such limits and under such regulations as may be required for the safety, comfort and convenience of the public. *Gloucester Ferry Case*, 114 U. S. 196, 217; *State* v. *Faudre*, 54 W. Va. 122; *Ferry Co.* v. *Russell*, 52 W. Va. 356; *Cross* v. *Hopkins*, 6 W. Va. 323; *Carroll* v. *Campbell*, 108 Missouri, 550; *State* v. *Sickmann*, 65 Mo. App. 499; *Tugwell* v. *Eagle Pass Ferry Co.*, 74 Texas, 480; *Parsons* v. *Hunt*, 98 Texas, 420; *Nixon* v. *Reid*, 8 So. Dak. 507; *Hatten* v. *Turman*, 123 Kentucky, 844.

The majority opinion in the *Covington Bridge Case*, 154 U. S. 204, considered in connection with the facts before the court, announced no new rule.

The cases which recognize state power to regulate ferries over boundary streams are still authoritative. *Williams* v. *Wing*, 177 U. S. 601.

Louisville Ferry Case, 188 U. S. 385, approves *Conway* v. *Taylor*, 1 Black, 603. See, also, *St. Clair County* v. *Transfer Co.*, 192 U. S. 454; *Burlington &c. Ferry Co.* v. *Davies*, 48 Iowa, 133; *Phillips* v. *Bloomington*, 1 Greene (Iowa), 498, 502; *Bowman* v. *Walthen*, 2 Mc-

Lean, 370; *Challiss* v. *Davis*, 56 Missouri, 25; *Columbia &c. Bridge Co.* v. *Geisse*, 38 N. J. L. 39; *Gear* v. *Bullerdike*, 34 Illinois, 74.

The second resolution, regulating rates for a round trip starting from the New Jersey side, is within the jurisdiction of New Jersey. *State* v. *Sickmann*, 65 Mo. App. 499.

There is no Federal statute which supersedes state jurisdiction to regulate ferries.

The New Jersey courts have construed the regulations involved in the case at bar as applying only to such ferry service as is disconnected from railroad transportation.

The distinction between ordinary ferriage and ferriage which is connected with railroad transportation is well recognized. Interstate Commerce Act, § 1; *St. Clair County* v. *Transfer Co.*, 192 U. S. 454.

The construction of a state law by the state courts is accepted in this court as final. *Collins* v. *Texas*, 223 U. S. 288; *Missouri Pacific Ry. Co.* v. *Larabee Mills*, 211 U. S. 612; *Louisville &c. R. Co.* v. *Mississippi*, 133 U. S. 587; *Provident Institution* v. *Massachusetts*, 6 Wall. 611; *Randall* v. *Brigham*, 7 Wall. 523; *Gut* v. *State*, 9 Wall. 35; *Richmond* v. *Smith*, 15 Wall. 429; *Leffingwell* v. *Warren*, 2 Black, 599.

The Interstate Commerce Act is not involved.

The statute applies only to transportation wholly by railroad, or partly by railroad and partly by water when both are used under a common control.

Ferriage disconnected from railroad transportation is not affected. *Goodrich Co.* v. *Int. Com. Comm.*, 190 Fed. Rep. 943; *Int. Com. Comm.* v. *Goodrich Co.*, 224 U. S. 194.

Federal statutes concerning enrollment and inspection of vessel, licensing officers, etc., are not involved. *Conway* v. *Taylor*, 1 Black, 603; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365; *Mayor &c.* v. *Starin*, 106 N. Y. 1; *Mayor &c.* v. *Longstreet*, 64 How. Pr. 30; *Midland Ferry*

Co. v. *Wilson*, 28 N. J. Eq. 537; *Carroll* v. *Campbell*, 108 Missouri, 550, 562–563; *Marshall* v. *Grimes*, 41 Mississippi, 27; *People* v. *Babcock*, 11 Wend. 586; *Chilvers* v. *People*, 11 Michigan, 43.

These statutes govern all boats navigating public waters of the United States, whether crossing state lines or not. To give them the effect for which counsel contend would deprive the States of all power over ferries—even across intrastate streams.

The Federal statute of 1866 is not involved.

The history of the statute as well as its express provisions show that, like the Interstate Commerce Act, this is a railroad statute. It has been in force forty-six years, and has never been applied to ferriage disconnected from railroad transportation. Federal Power over Carriers and Corporations (Macmillan, 1907), pp. 95, 209.

The rates established by the Board of Freeholders are not invalid as taking the property of plaintiff in error without compensation.

Argument supporting this proposition will be based upon the facts shown in the record.

The rates have been in existence for several years, and should not now be disturbed without considering the results of this practical test. *Willcox* v. *Gas Company*, 212 U. S. 19, 44.

Mr. Henry E. Bodman, by leave of the court, filed a brief as *amicus curiæ*. *Mr. Alexis C. Angell* and *Mr. Herbert E. Boynton* were on the brief.

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

The rails of the main line of the West Shore Railroad Company extend from Buffalo to Albany, New York, and beyond through the State of New York into New Jersey to the terminus of the road at Weehawken on the west

bank of the Hudson river. From Weehawken steam ferries known as the West Shore Railroad ferries are operated over the river to several terminal points in New York City for the purpose of carrying railroad passengers and traffic from Weehawken to New York and from New York to Weehawken. Although these ferries are known as West Shore Railroad ferries and are operated as railroad ferries, their business is not limited to incoming persons or traffic carried over the lines of the railroad or to persons or traffic conveyed from New York to Weehawken to be transported from there over the railroad. Indeed, from both directions a very large number of persons besides considerable traffic "constantly move to and fro between the two States, not having used or intending to use the lines of the West Shore Railroad."

In 1905 the Board of Chosen Freeholders of Hudson County, New Jersey, adopted two ordinances, one fixing the rate for foot passengers ferried from New Jersey to New York and the other for a round trip commencing on the New Jersey shore, which rates were applicable to the ferries in question. The New York Central & Hudson River Railroad, engaged as a lessee in operating the lines of the West Shore Railroad and its railroad ferries, commenced this proceeding to prevent the enforcement of the rates fixed by the ordinances. The contention was that the ordinances were an unwarranted interference with the interstate business of the company and that the enforcement of the ordinances would constitute a direct burden on interstate commerce, which could not be done consistently with the Constitution. The Supreme Court of New Jersey maintained the contentions of the railroad company. The Court of Errors and Appeals reversed the judgment of the Supreme Court. 76 N. J. Law, 664. The case is now here, the writ of error having been directed to the Supreme Court, to which the record was remitted from the Court of Errors and Appeals.

At the outset it is to be observed that the contentions pressed in argument by both parties take a wider range than the necessities of the case require. We make a very brief reference to certain decisions of this court referred to in argument by both parties in order that they may aid us to plainly mark the boundaries of the real issues required to be decided, thus enabling us to put out of view irrelevant considerations and confine our attention to things essential.

Fanning v. *Gregoire*, 16 How. 524, required a consideration of the right of the legislature of Iowa to authorize a ferry across the Mississippi river at Dubuque. Without going into details it suffices to say that the subject was elaborately considered and the power of the State to grant the ferry right was sustained. In *Conway* v. *Taylor's Executors*, 1 Black, 603, the right of the State of Kentucky to grant franchises for ferrying across the Ohio river, was considered and the power was upheld, the general reasoning stated in *Fanning* v. *Gregoire* being reiterated and approved. It is undoubtedly true that in the course of the reasoning of both the cases just referred to expressions were made use of which give some support to the view that the power to regulate ferriage, even as to a stream bounding two States, was purely local, not transferred by the States to Congress, and therefore not within the grant of power to Congress to regulate commerce.

Gloucester Ferry Co. v. *Pennsylvania*, 114 U. S. 196, concerned the validity of a tax imposed by the State of Pennsylvania on a ferry company operating between Gloucester, New Jersey, and the city of Philadelphia. The tax was resisted on the ground that it was a direct burden on interstate commerce and therefore void as an interference with the power of Congress to regulate commerce. The contention was sustained. The whole subject of ferriage was elaborately considered, and in the course of the opinion it was expressly declared, after

considering the decisions in *Fanning* v. *Gregoire* and *Conway* v. *Taylor's Executors*, that ferriage over a stream constituting a boundary between two States was within the grant to Congress to regulate commerce, and therefore not subject to be directly burdened by a State. It was also, however, held that in view of the character of such ferries and the diversity of regulation which might be required, the right to regulate them came within that class of subjects which although within the power of Congress the States had the right to deal with until Congress had manifested its paramount and exclusive authority.

In *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204, the right of the State of Kentucky to impose tolls for use of a bridge across the Ohio river, was challenged on the ground that the State had no authority to fix the tolls, because to do so was the assertion of a power to regulate commerce and therefore was an interference with the exclusive power of Congress on that subject. The tolls were held to be invalid. The opinion beyond question reasserted the principle enforced in the *Gloucester Ferry Case* that the movement across a stream, the boundary between two States, was within the grant of power to Congress to regulate commerce and therefore, generically speaking, not subject to the exertion of state authority. Indeed, in view of the fact that there was no act of Congress dealing with the subject of the tolls which were under review in the *Covington Case*, it is true to say that there are expressions in the opinion in that case which have been considered, whether rightly or wrongly we do not feel called upon to say, as qualifying or overruling the conclusion expressed in the *Gloucester Case* as to the power of a State to regulate ferries upon a stream bordering two States until Congress had manifested its purpose to exert its authority over the subject.

In *St. Clair County* v. *Interstate Transfer Co.*, 192 U. S. 454, the question considered was the liability of the

Transfer Company to penalties imposed by the County of St. Clair, a municipal corporation of the State of Illinois, for having failed to obtain a license "for carrying on a ferry for transferring railroad cars, loaded or unloaded, over the county of St. Clair in Illinois to the Missouri shore and from the Missouri shore to the county of St. Clair." It was decided that there was no liability for the penalty (a) because the business of transferring freight cars in the sense disclosed was not ferriage in the proper meaning of that word, and was the transaction of interstate commerce not in any view subject to state control; and (b) because the particular ordinance relied upon as the basis for imposing the penalty was void because of provisions discriminating against interstate commerce which it contained. The cases of *Fanning* v. *Gregoire*, *Conway* v. *Taylor's Executors*, *Gloucester Ferry Co.* v. *Pennsylvania* and *Covington Bridge Co.* v. *Kentucky* were referred to. It was expressly declared in view of the special grounds upon which the case was decided that it was unnecessary to consider whether the decision in the *Covington Bridge Case* had established the doctrine that the interstate business of ferrying over navigable rivers bordering two States was exclusively within the authority of Congress to regulate, and therefore was not, as declared in the *Gloucester Ferry Case*, subject to state regulation until Congress had exerted its authority over the matter.

In the light of this statement we come to state the contentions of the parties. The plaintiff in error insists, not following the exact order of its argument, *a*, that the assailed ordinances are repugnant to the commerce clause because Congress has legislated concerning railroad ferries and thereby manifested its purpose that there should be no longer room for the exertion of state power on the subject; and, *b*, that if this is not so it is now necessary to pass on the question reserved in the *St. Clair Case*, and to decide that the ruling in the *Covington Bridge Case*

affirmatively established that interstate ferriage like that here in question is so absolutely within the power of Congress as to exclude even in case of the inaction of Congress the presumption of a license for the exercise of state power. On the other hand, the argument for the defendant in error is this: That the carrying on of the business of ferriage on navigable rivers constituting a boundary between States is not interstate commerce, that the power to regulate it was not surrendered by the States and consequently no authority was given over the subject to Congress. This is sought to be shown by a copious review of adjudged cases, and by an analysis of what it is urged was the clear intendment of the opinion in *Gibbons* v. *Ogden*, especially as elucidated by the opinions in *Fanning* v. *Gregoire* and *Conway* v. *Taylor's Executors*. It is not denied that these theories are directly contrary to the ruling in the *Gloucester Ferry Case*, but it is urged that that case for the first time announced the doctrine of a national power over interstate ferriage and therefore practically amounted to making a new constitutional provision on the subject. Obviously, however, the views just stated are advanced in a mere academic sense, since the argument admits that the ruling in the *Gloucester Ferry Case* is now conclusive and has settled the significance of the Constitution contrary to the views mentioned. Thus, at the very outset of the argument, after stating and elaborating the theory of exclusive state power over interstate ferriage, it is said: "The decision of the *Gloucester Ferry Case*, 114 U. S. 196, decided in 1885, established Federal jurisdiction to legislate concerning ferriage over boundary streams, but did not turn what had been an exclusive state jurisdiction into an exclusive Federal jurisdiction. State laws on this subject are still valid until superseded by a Federal statute." Again, after copiously reiterating the conceptions as to the novelty of the ruling in the *Gloucester Ferry Case* and its assumed

conflict with what had gone before, it is said: "The result of the *Gloucester Ferry Case*, therefore, with the other cases which have followed, has probably been to so extend the Federal authority over interstate ferriage as to bring the subject within the concurrent jurisdiction of Congress and of the States. It is a concurrent jurisdiction only, however, which has been established. In the absence of Federal legislation the States have all the power that they have been accustomed to exercise." Thus conceding the controlling force of the *Gloucester Ferry Case* and therefore not questioning the power of Congress which that case upheld, it is urged that the *Covington Bridge Case* should not be now held to have overruled or qualified the *Gloucester Ferry Case* so as to exclude the States from any right to regulate interstate ferriage before and until Congress has manifested its intention to exert its authority by dealing with the subject. Upon the assumption thus stated it is insisted that the court below rightly upheld the assailed ordinances because there has been no action by Congress exerting its authority over the subject with which the ordinances deal and therefore no room for the contention that it was not within the power of the State to enact them.

It is therefore apparent that the contentions of the plaintiff in error primarily invoke only the controlling effect of the ruling in the *Gloucester Ferry Case*, and insist that there has been action by Congress which destroys the presumption of authority in the State to act. It follows that the proposition that the *Covington Bridge Case* overruled the *Gloucester Ferry Case* is merely subordinate, and need not be considered unless it becomes necessary in consequence of an adverse ruling on the primary contention concerning the application of the *Gloucester Ferry Case*.

It is equally clear that the contention of the defendant in error as to the absence of all power in Congress over

interstate ferries is merely academic. From this it necessarily arises that the only ground relied upon to sustain the judgment below is the ruling in the *Gloucester Ferry Case*, and the further proposition that there has been no action of Congress over the subject of the ferriage here involved which authorizes the holding that state power no longer obtains. As, therefore, the claim on the one side of an all-embracing and exclusive Federal power may be, temporarily at least, put out of view and the assertion on the other of an absolutely exclusive state power may also be eliminated from consideration because not relied upon or because it is both demonstrated and admitted to be without foundation, it follows that to dispose of the case we are called upon only, following the ruling in the *Gloucester Ferry Case*, to determine the single and simple question whether there has been such action by Congress as to destroy the presumption as to the existence in the State of vicarious and revocable authority over the subject. We say simple question because its decision is, we think, free from difficulty, in view of the express provision of the first section of the Act to Regulate Commerce (act of February 4, 1887, c. 104, 24 Stat. 379), subjecting railroads as therein defined to the authority of Congress, and expressly declaring that "the term railroad as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease. . . ." The inclusion of railroad ferries within the text is so certain and so direct as to require nothing but a consideration of the text itself. Indeed, this inevitable conclusion is not disputed in the argument for the defendant in error, but it is insisted that as the text only embraces railroad ferries and the ordinances were expressly decided by the court below only to apply to persons other than railroad passengers, therefore the action by Congress does not ex-

tend to the subject embraced by the ordinances. But as all the business of the ferries between the two States was interstate commerce within the power of Congress to control and subject in any event to regulation by the State as long only as no action was taken by Congress, the result of the action by Congress leaves the subject, that is, the interstate commerce carried on by means of the ferries, free from control by the State. We think the argument by which it is sought to limit the operation of the act of Congress to certain elements only of the interstate commerce embraced in the business of ferriage from State to State is wanting in merit. In the absence of an express exclusion of some of the elements of interstate commerce entering into the ferriage, the assertion of power on the part of Congress must be treated as being coterminous with the authority over the subject as to which the purpose of Congress to take control was manifested. Indeed, this conclusion is inevitable since the assumption of a purpose on the part of Congress to divide its authority over the elements of interstate commerce intermingled in the movement of the regulated interstate ferriage would be to render the national authority inefficacious by the confusion and conflict which would result. The conception of the operation at one and the same time of both the power of Congress and the power of the States over a matter of interstate commerce is inconceivable, since the exertion of the greater power necessarily takes possession of the field, and leaves nothing upon which the lesser power may operate. To concede that the right of a State to regulate interstate ferriage exists "only in the absence of Federal legislation" and at the same time to assert that the state and Federal power over such subject is concurrent is a contradiction in terms. But this view has been so often applied as to cause the subject to be no longer open to controversy. *Chicago, Rock Island & Pacific Ry. Co.* v. *Hardwick Farmers' Elevator Company*, 226 U. S.

426. Because in the *St. Clair Case, supra,* it was decided that a particular character of transportation of interstate commerce was not ferriage and not within state power, even where there had been no action by Congress, affords no reason for in this case extending state authority to a subject to which, consistently with the action of Congress, it cannot be held to apply.

The judgment of the Supreme Court of the State of New Jersey will be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* EDWARDS.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 123. Submitted January 20, 1913.—Decided February 24, 1913.

Action by Congress on a subject within its domain under the commerce clause of the Constitution results in excluding the States from acting on that subject.

As applied to interstate shipments, the State cannot now impose penalties for delay in delivery to consignee, as Congress has acted on that subject by the passage of the Hepburn Act. *Chicago, R. I. & Pac. Ry. Co.* v. *Hardwick Elevator Co.*, 226 U. S. 426.

The so-called Demurrage Statute of 1907 of Arkansas requiring railroad companies to give notice to consignees of arrival of shipments and penalizing them for non-compliance is an unconstitutional interference with interstate commerce so far as interstate shipments are concerned.

94 Arkansas, 394, reversed.

THE facts, which involve the constitutionality under the commerce clause of the Constitution of the United

States of the Arkansas Demurrage Statute, are stated in the opinion.

Mr. Martin L. Clardy, Mr. H. G. Herbel, Mr. Lovick P. Miles and *Mr. Thos. B. Pryor* for plaintiff in error:

The act is an attempt to exercise jurisdiction over interstate commerce in matters which have been the subject of action by Congress and also by the Interstate Commerce Commission. Section 17 of the act expressly provides that interstate railroads shall furnish cars on application for interstate shipments, the same in all respects as other cars are to be furnished by interstate railroads under the provisions of this act. This section is merely referred to to emphasize the fact that the entire act makes no distinction between commerce within the State and that between States. The validity of this act is now involved in the case of *Hampton* v. *St. Louis, I. M. & S. Ry. Co.*, (see *post*, p. 458) which has been submitted to this court, and the authorities to sustain the contention of the invalidity of the act are collated in the brief filed on behalf of defendant in error in that case. The case cited by the Supreme Court of Arkansas, 12 I. C. C. Rep. 61, is certainly overruled by the case of *Wilson Produce Co.* v. *Railway*, 14 I. C. C. Rep. 170, and in the later case of *Peel & Co.* v. *Railway*, 18 I. C. C. Rep. 33, and the rule adopted by the commission above referred to. The other cases cited in the opinion below are not controlling as the same question was not involved.

The act in question finds no support in the decisions referred to in the opinion of the Supreme Court of Arkansas; and see the opinion of that court when this act was for the first time under consideration correctly stating the law in *Oliver* v. *C., R. I. & P. Ry. Co.*, 89 Arkansas, 468.

Congress has legislated upon the question involved; the Interstate Commerce Commission has exercised jurisdic-

tion thereof, and all state statutes affecting the subject when applied to interstate commerce must give way. *Shephard* v. *Northern Pacific Ry. Co.*, 184 Fed. Rep. 770; *Rhodes* v. *State of Iowa*, 170 U. S. 412; *McNeill* v. *Railway Co.*, 202 U. S. 561. See Barnes on Interstate Transp., § 276.

No appearance for defendant in error.

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

This writ of error is prosecuted to secure the reversal of a judgment for seventy-five dollars, the amount of penalties imposed upon the plaintiff in error for delay in giving notice to the consignee, defendant in error, of the arrival of a carload of freight at the termination of an interstate commerce shipment. The exaction was authorized by § 3 of a law of the State of Arkansas, approved April 19, 1907 (Act 193, Acts of 1907, p. 453), entitled "An Act to regulate freight transportation of railroad companies doing business in the State of Arkansas." The section is copied in the margin.[1]

[1] SEC. 3. Railroad companies shall, within twenty-four hours after the arrival of shipments, give notice, by mail or otherwise, to consignee of the arrival of shipments, together with the weight and amount of freight charges due thereof; and where goods or freight in carload quantities arrive, such notices shall contain also identifying numbers, letters and initials of the car or cars, and if transferred in transit, the number and initials of the car in which originally shipped. Any railroad company failing to give such notice shall forfeit and pay to the shipper, or other party whose interest is affected, the sum of five dollars per car per day, or fraction of a day's delay, on all carload shipments, and one cent per hundred pounds per day, or fraction thereof, on freight in less than carloads, with a minimum charge of five cents for any one package, after the expiration of the said twenty-four hours; *provided*, that not more than five dollars per day be charged for any one consignment not in excess of a carload.

The right to impose the penalty was challenged and the validity of the section of the statute authorizing it was assailed by demurrer on the ground of repugnancy to the commerce clause of the Constitution of the United States. The question here for decision is whether the court below was right in overruling the Federal defense which was thus relied upon. 94 Arkansas, 394.

The Arkansas statute is styled in the opinion of the court below "the Demurrage Statute," and the penalty imposed by § 3 is referred to as a "demurrage charge." And in the same connection it is observed "There are other sections of the statute imposing demurrage charges on consignees for failure to remove freight, thus making the burdens of the whole statute reciprocal." It follows that the section under consideration was but intended to subject carriers to the penalties which the section provides because of a failure to make prompt delivery of freight on arrival at destination. As applied to interstate commerce, however, we think such penalties were not enforceable because of a want of power in the State to impose them in view of the legislation of Congress existing at the time the alleged duty to give notice arose. Recently in *Chicago, Rock Island & Pacific Railway Co.* v. *Hardwick Farmers' Elevator Company*, 226 U. S. 426, a regulation of the State of Minnesota enacted after the passage of the Hepburn Act imposing penalties on carriers for failing on demand to furnish a supply of cars for the movement of interstate traffic was held invalid because of the absence of power in a State in consequence of the Hepburn Act to provide for such penalties. While the case before us concerns the power of a State over the delivery of cars in consummation of an interstate shipment, we nevertheless think that the *Hardwick Case* is controlling because the legislation of Congress as clearly excludes the right of a State to penalize for failure to deliver interstate freight at the termination of an interstate shipment as it was

found to prevent a State from penalizing for failure to furnish cars for the initiation of the movement of interstate traffic. This conclusion is necessary since the amendment to § 1 of the Act to Regulate Commerce by which a definition is given to the term transportation and which in the *Hardwick Case* was held to exclude the right of a State to penalize for the non-delivery of cars to initiate the movement of an interstate shipment, by its very terms embraces the obligation of a carrier to deliver to the consignee, and therefore by the same token excludes the right of a State to penalize on that subject. The provision of the Hepburn Act in question is copied in the margin.[1]

We are referred in argument to no other provision of the act tending in the slightest degree to indicate that the duties which were united by the provisions of one section of the act were divorced by another and were made therefore subject to the possibility of varying and it may be conflicting state penalties. On the contrary, in this instance as in the one considered in the *Hardwick Case*, the context of the act adds strength to the conviction produced by the definition of the first section, and therefore gives rise to the conviction that the context of the statute, not only as was held in the *Hardwick Case*, excludes the right of a State to regulate by penalties or demurrage charges the obligation of furnishing the means of interstate transportation, but also excludes power in a State to impose penalties as a means of compelling the per-

[1] . . . the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.

formance of the duty to promptly deliver in consummation of such transportation.

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

Reversed.

PEOPLE OF PORTO RICO *v.* ROSALY Y CASTILLO.

APPEAL FROM THE SUPREME COURT OF PORTO RICO.

No. 145. Submitted January 24, 1913.—Decided February 24, 1913.

The government of Porto Rico cannot be sued without its consent.

The government of Porto Rico, as established by the Organic Act, with some possible exceptions, comes within the general rule exempting a government sovereign in its attributes.

That government of Porto Rico, as established by the Organic Act of April 12, 1900, is a strong likeness of that established for Hawaii which has immunity from suit. *Kawananakoa* v. *Polyblank*, 205 U. S. 349.

The provision in § 7 of the Organic Act of Porto Rico that the people of Porto Rico shall have power to sue and be sued is not to be construed as destroying the grant of sovereignty given by the act itself.

Like words may have one significance in one context and a different signification in another.

In construing an organic act of a Territory this court will consider that Congress intended to create a government conforming to the American system of divided powers—legislative, executive and judicial—and did not intend to give to any one branch of that government power by which the government itself so created could be destroyed.

The words "to sue and be sued" as used in § 7 of the Organic Act of Porto Rico, when construed in connection with the grant of governmental powers therein contained, amount only to a recognition of a liability to be sued in case of consent duly given.

16 Porto Rico, 481, reversed.

THE facts, which involve the construction of § 7 of the Organic Act of Porto Rico and whether the Government of that Island can be sued without its consent, are stated in the opinion.

Mr. Felix Frankfurter and *Mr. Wolcott H. Pitkin, Jr.*, Attorney General of Porto Rico, for appellants:

Although this is an action at law, as it was not tried by jury it is rightly brought here by appeal, according to the provisions of § 35 of the act of April 12, 1900, 31 Stat. 85, and § 2 of the act of April 7, 1874, 18 Stat. 27. *Garzot* v. *de Rubio*, 209 U. S. 283; *Murphy* v. *Ramsey*, 114 U. S. 15, 35.

The body politic known as The People of Porto Rico, by virtue of the government established by its Organic Act, enjoys exemption from suit without its own permission, which extends to this case. *Elkins* v. *Porto Rico*, 5 P. R. Fed. Rep. 103; *Richmond* v. *Porto Rico*, 99 N. Y. Supp. 743.

Kawananakoa v. *Polyblank*, 205 U. S. 319, controls this case, for there is no difference whatever in the structure of their governments, in the actual exercise of governmental powers, and the relation of independence of the local governments to the National Government, between Hawaii and Porto Rico.

The Organic Act of Porto Rico created a self-governing sovereignty for purposes of immunity from suit without consent.

The purpose of the act is to give local self-government, conferring an autonomy similar to that of the States and Territories. *Gromer* v. *Standard Dredging Co.*, 224 U. S. 362, 370.

Only for political reasons has the technical designation of "Territory" been withheld by Congress—but every attribute of sovereignty that any of the Territories possess has been conferred. *Kopel* v. *Bingham*, 211 U. S. 468, 476; *In re Kopel*, 148 Fed. Rep. 505, 507.

Thus far United States citizenship, in name, has been withheld, but the granting of it, in view of the status of Porto Rico has been urged by the Executive and a bill conferring it has passed the House of Representatives and is now before the Senate (see H. Rep. 20048, 62d Cong., 2d sess.; H. Rep. 341, 62d Cong., 2d sess.; President's message of December 6, 1912, and Annual Report of Secretary of War for 1911, p. 40).

Porto Rico's immunity from suit, by virtue of its Organic Act creating a sovereign body politic, was not limited by the specific provision conferring upon the Island "power to sue and be sued as such." Section 7 of the Foraker Act does not amount to a blanket authority to sue *ad libitum* the government established by the Organic Act. Nor is it for Porto Rico not only a Tucker Act of March 3, 1887, 24 Stat. 505, giving specific permission of the sovereign (using the term in the qualified sense as covering the sovereign's immunity here under discussion) to be sued in a definite class of cases and in a manner and subject to the restrictions that it may see fit to impose (see *Reid* v. *United States*, 211 U. S. 529, 538), but an unlimited permission, subjecting the sovereign to the same amenability to suit as its individual citizens.

The provision merely confers the attribute of individuality and does not enlarge the jurisdiction of courts. *Bank* v. *Deveaux*, 5 Cranch, 61, 85–86.

Section 7 merely labeled the sovereignty created by the whole scope of the Foraker Act, and did not impair the sovereignty created by the rest of that act.

Consent to be sued has been granted by the Porto Rican legislature in certain cases not here applicable (§ 404, Political Code of Porto Rico, and sub-sec. 5 of § 1804 of the Civil Code, in connection with § 80 of the Code of Civil Procedure.

No appearance for appellee.

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

The appellee was plaintiff in the first instance. The defendants were The People of Porto Rico (the Government of the Island) and several named individuals. Recovery was sought of property in possession of the defendants and for rents and profits. The individual defendants defaulted. The Government defended and from a judgment ousting it from the property and for rents and profits appealed to the Supreme Court. The court, giving its reasons for affirmance, thus stated the only issue presented and which was decided: "The appeal was taken by The People of Porto Rico, and the only ground alleged in support thereof was that, inasmuch as The People of Porto Rico could not be sued without its consent, and such consent not appearing to have been given in this case, the District Court had acted without jurisdiction, and the judgment rendered by it was null and void." The court did not overlook the importance of the question, as is shown by its careful and perspicuous opinion. A member of the court fully stated his reasons for dissenting. On this appeal, taken by The People of Porto Rico, the case having been tried without a jury, the question for decision is narrower than would seem to be the case regarding alone the general terms in which the question is mentioned in the passage previously quoted from the opinion of the court below.

It is not open to controversy that aside from the existence of some exception the government which the organic act established in Porto Rico is of such nature as to come within the general rule exempting a government sovereign in its attributes from being sued without its consent. In the first place, this is true because in a general sense so far as concerns the frame work of the Porto Rican government and the legislative, judicial and executive authority with which it is endowed there is, if not a com-

plete identity, at least in all essential matters, a strong likeness to the powers usually given to organized Territories and moreover a striking similarity to the Organic Act of the Hawaiian Islands (Act of April 30, 1900, chap. 339, §§ 6, 55; 31 Stat. 141, 142 and 150). But as the incorporated Territories have always been held to possess an immunity from suit and as it has been moreover settled that the government created for Hawaii is of such a character as to give it immunity from suit without its consent, it follows that this is also the case as to Porto Rico. *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 353. This, moreover, is additionally beyond question because in considering the nature and character of the government of Porto Rico in *Kopel* v. *Bingham*, 211 U. S. 468, it was said (p. 476): "It may be justly asserted that Porto Rico is a completely organized Territory, although not a Territory incorporated into the United States, and that there is no reason why Porto Rico should not be held to be such a Territory. . . ." Besides, in *Gromer* v. *Standard Dredging Company*, 224 U. S. 362, in considering the subject and giving due weight to "the precaution against abuse" of the Porto Rican legislative power and after calling attention to the reservation made by Congress of the right to repeal any Porto Rican act of legislation, it was nevertheless declared (p. 370): "The purpose of the act is to give local self-government, conferring an autonomy similar to that of the States. . . ." There being, then, no doubt that immunity from suit without its consent is necessarily inferable from a mere consideration of the nature of the Porto Rican government, the issue is whether there is any ground which removes Porto Rico from the general rule. That such an exception is the result of the concluding portion of § 7 of the Organic Act was the sole basis upon which the court below rested its conclusion and the correctness of that view is the only issue we are called upon to decide.

The section in question, § 7, is the one which enumerates the classes of persons who by the act are made constituent elements of the government for which the act provides, and after making such enumeration the section declares that the persons embraced in its provisions "shall constitute a body politic under the name of The People of Porto Rico with governmental powers as hereinafter conferred and with power to sue and be sued as such."

Unquestionably the provision disconnected from its context would sustain the conclusion that there exists a general liability to be sued without reference to consent. Indeed, the words to sue and be sued are but a crystallized form of expression resorted to for the purpose of aptly stating the right to sue and the liability to be sued, which springs from a grant of corporate existence, private or public. But this does not solve the question here arising, which is the meaning of the words in the act under consideration, for it may be that like words may have one significance in one context and a different signification in another. And this is made clear by bearing in mind that as usually applied the words to sue and be sued but express implications as to the existence of powers flowing from the matter to which they relate, while here if the words have the meaning insisted on they serve, if not to destroy, at least to seriously modify or greatly restrict the grant of powers conferred by the organic act. The destructive potency of the words if given the meaning insisted upon is self-evident, since the claim here is that they denature the government created by the organic act by depriving it of an immunity which has been frequently decided by this court would otherwise necessarily arise from the scope of the powers conferred. As, however, a full appreciation of the operation of the words, if they are interpreted as insisted upon, affords the truest means of ascertaining their real signification, we do not rest content with that which is self-evident, but pursue the subject further.

The proposition is that by giving to the words the meaning insisted upon it has come to pass that the existence of claims of every kind and nature, whether in contract or in tort against the government, is a matter for exclusive judicial determination. But as the essence of paramount judicial power over a subject confers the authority and imposes the duty to enforce a judgment rendered in the exercise of such power (*Gordon* v. *United States*, 117 U. S. 697, 702; *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423, 457; *District of Columbia* v. *Eslin*, 183 U. S. 62, 65), it follows that the contention is that the government created by the Organic Act is not the character of government which this court has declared it to be in the cases to which we have referred, that is, one founded upon the American system, but is, on the contrary, one in which the legislative power concerning claims of every kind against the government is subordinated to the judicial. That such was the view taken by the court below of the result of the meaning which it affixed to the clause in question was plainly stated in the opinion as follows (16 Porto Rico, 487):

"The presence of the words 'with power to sue and be sued,' in our Organic Act, cannot be ascribed to an oversight of Congress, but, on the contrary, it may be presumed that Congress employed them having in mind the obligations contracted in the Treaty of Paris, and with the desire of giving to the persons included in its stipulations ready access to courts of justice, against any invasion of their rights by governmental action. And indeed, there should be no fear of entrusting to the courts the protection, not only of the persons mentioned in the treaty, but of any other persons, without excluding The People of Porto Rico. This has been demonstrated sufficiently by an experience of more than ten years."

In view, however, of the terms of the Organic Act, of the prior decisions recognizing that the purpose of Con-

gress in adopting it was to follow the plan applied from the beginning to the organized Territories by creating a government conforming to the American system with defined and divided powers, legislative, executive and judicial, in further view of the fact that the exercise of the judicial power here claimed would be destructive of that system, we are of opinion that it cannot be supposed that Congress intended by the clause in question to destroy the government which it was its purpose to create. In a sense the words "to sue and be sued," applied, as they normally have been, in grants of private or public charters, are redundant, since they but express the existence of powers which would naturally be implied. It may be true also to say that if they be likewise confined in the case before us they will also be in a sense redundant. Despite this, we think they should be construed with reference to the powers conferred by the provisions to which they relate, and therefore cannot be treated as destructive of the authority otherwise conferred by the act. Thus interpreting the clause, it is but an expression of the power to sue arising from the terms of the Organic Act and a recognition of a liability to be sued consistently with the nature and character of the government, that is, only in case of consent duly given. The words, "shall have the governmental powers hereinafter conferred and with the power to sue," etc., exclude the possibility in reason of holding that the right to sue and be sued which was given "and with," that is, because of or along with the powers conferred—was intended to or does distort or limit the powers of government which the act conferred.

Reversed.

HOME TELEPHONE AND TELEGRAPH COMPANY *v.* CITY OF LOS ANGELES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 610. Submitted October 28, 1912.—Decided February 24, 1913.

One, whose rights protected by a provision of the Federal Constitution which is identical with a provision of the state constitution are invaded by state officers claiming to act under a state statute, is not debarred from seeking relief in the Federal court under the Federal Constitution until after the state court has declared that the acts were authorized by the statute.

The provisions of the Fourteenth Amendment are generic in terms and are addressed not only to the States but to every person, whether natural or judicial, who is the repository of state power.

The reach of the Fourteenth Amendment is coextensive with any exercise by a State of power in whatever form exerted.

Under the Fourteenth Amendment the Federal judicial power can redress the wrong done by a state officer misusing the authority of the State with which he is clothed; under such circumstances inquiry whether the State has authorized the wrong is irrelevant. *Ex parte Young*, 209 U. S. 123, followed. *Barney* v. *New York*, 193 U. S. 430, distinguished.

Acts done under the authority of a municipal ordinance passed in virtue of power conferred by the State are embraced by the Fourteenth Amendment.

The power which exists to enforce the guarantees of the Fourteenth Amendment is typified by the immediate and efficient Federal right to enforce the contract clause of the Constitution as against those violating or attempting to violate its provision.

THE facts, which involve the jurisdiction of the District Court of a suit arising under the due process clause of the Fourteenth Amendment and the validity of an ordinance of Los Angeles, California, establishing telephone rates, are stated in the opinion.

Mr. James A. Gibson for appellant.

Mr. John W. Shenk and *Mr. George E. Cryer* for appellees:

The Fourteenth Amendment is directed against action by the States themselves and the State of California has taken no action.

The city of Los Angeles is an agent of the State of California with limited powers, which do not include authority to pass or enforce a confiscatory rate ordinance.

Action by the city of Los Angeles in the exercise of a state agency, but not within the limits of its authority from the State, is not state action. *Mechanics' Bank of Alexandria* v. *Bank of Columbia*, 5 Wheat. 326; *Louisville* v. *Telephone Co.*, 155 Fed. Rep. 725.

An unauthorized act of a state agent is not, under the authorities, state action, within the meaning of the Fourteenth Amendment to the Constitution of the United States. *Huntington* v. *New York*, 118 Fed. Rep. 683; aff'd 193 U. S. 440; *Civil Rights Cases*, 109 U. S. 3; *Barney* v. *New York*, 193 U. S. 430; *Missouri* v. *Dockery*, 191 U. S. 165; *Virginia* v. *Rives*, 100 U. S. 313; *Louisville* v. *Telephone Co.*, 155 Fed. Rep. 725; *San Francisco* v. *United Railroads*, 190 Fed. Rep. 507; *Memphis* v. *Telephone Co.*, 218 U. S. 624; *Hamilton Gas Co.* v. *Hamilton*, 146 U. S. 258; *United States* v. *Peralto*, 99 Fed. Rep. 624; *Farley* v. *Kitson*, 120 U. S. 314.

The result of this suit does not depend upon the effect or construction of the Fourteenth Amendment: hence the suit is not one arising under the Constitution or laws of the United States. *Memphis* v. *Telephone Co.*, 218 U. S. 624; *West. Un. Tel. Co.* v. *Ann Arbor R. R. Co.*, 178 U. S. 239; *San Francisco* v. *United Railroads*, 190 Fed. Rep. 507; *Seattle Elec. Co.* v. *Seattle &c. R. Co.*, 185 Fed. Rep. 365.

Appellant's arguments considered, defendant is not estopped to question jurisdiction.

That a suitor has his choice of forum is not denied.

The guaranty of due process contained in the constitution of California has not been impaired by judicial construction. *Seattle Elec. Co.* v. *Seattle &c. R. Co.*, 185 Fed. Rep. 365.

The conclusion does not follow that the adoption of defendant's contention herein would mean the destruction of Federal jurisdiction to enforce the guaranties of the Fourteenth Amendment. *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20.

The penal provisions of the ordinance do not operate to deny to appellant the equal protection of the law, nor does that phase of the case present an independent ground for Federal jurisdiction. *Ex parte Young*, 209 U. S. 123.

Appellant's authorities do not support its contention that action by a city, in violation of the state constitution, is state action. *Dobbins* v. *Los Angeles*, 195 U. S. 223; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Ex parte Virginia*, 100 U. S. 339; *Strauder* v. *West Virginia*, 100 U. S. 303; *Virginia* v. *Rives*, 100 U. S. 313; *Neal* v. *Delaware*, 103 U. S. 370; *Scott* v. *McNeal*, 154 U. S. 34; *Chicago &c. R. Co.* v. *Chicago*, 166 U. S. 226; *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20; *Memphis* v. *Telephone Co.*, 218 U. S. 624; *San Francisco* v. *Union Railroads*, 190 Fed. Rep. 507; *Seattle Elec. Co.* v. *Seattle &c. R. Co.*, 185 Fed. Rep. 365; *Louisville* v. *Telephone Co.*, 155 Fed. Rep. 725.

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

The appellant, a California corporation furnishing telephone service in the city of Los Angeles, sued the city and certain of its officials to prevent the putting into effect of a city ordinance establishing telephone rates for the year commencing July 1, 1911.

It was alleged that by the constitution and laws of the

State the city was given a right to fix telephone rates and had passed the assailed ordinance in the exercise of the general authority thus conferred. It was charged that the rates fixed were so unreasonably low that their enforcement would bring about the confiscation of the property of the corporation, and hence the ordinance was repugnant to the due process clause of the Fourteenth Amendment. The averments as to the confiscatory character of the rates were as ample as they could possibly have been made. The charge of confiscation was supported by statements as to the value of the property, and the sum which might reasonably be expected from the business upon the application of the rates assailed. The confiscatory character of the rates, it was moreover alleged, had been demonstrated by the putting into effect during the previous year of rates of the same amount as those assailed which it was charged the corporation at great sacrifice had after protest submitted to in order to afford a practical illustration of the confiscation which would result.

Being of the opinion that no jurisdiction was disclosed by the bill, the court refused to grant a restraining order or allow a preliminary injunction, and thereafter, on the filing of a formal plea to the jurisdiction, the bill was dismissed for want of power as a Federal court to consider it. This direct appeal was then taken.

The plea to the jurisdiction was as follows:

" . . . that this Court ought not to take jurisdiction of this suit for that the said suit does not really or substantially involve a dispute or controversy properly within the jurisdiction of this Court, for as much as the Constitution of the State of California, in Article 1, section 13 thereof, provides that 'No person shall be . . . deprived of life, liberty, or property without due process of law'; that this complainant, a citizen of the State of California, has never invoked the aid or protection of its said State to prevent the alleged taking of its prop-

erty, nor has complainant appealed to the courts of said State, nor to any of them, to enforce the law of said State."

The ground of challenge to the jurisdiction advanced by the plea may be thus stated: As the acts of the state officials (the city government) complained of were alleged to be wanting in due process of law and therefore repugnant to the Fourteenth Amendment—a ground which on the face of the bill, if well founded, also presumptively caused the action complained of to be repugnant to the due process clause of the state constitution—there being no diversity of citizenship, there was no Federal jurisdiction. In other words, the plea asserted that where, in a given case, taking the facts averred to be true, the acts of state officials violated the Constitution of the United States and likewise because of the coincidence of a state constitutional prohibition were presumptively repugnant to the state constitution, such acts could not be treated as acts of the State within the Fourteenth Amendment, and hence no power existed in a Federal court to consider the subject until by final action of an appropriate state court it was decided that such acts were authorized by the State and were therefore not repugnant to the state constitution. There is no room for doubt that it was upon this interpretation of the plea that the court held it had no power as a Federal court. The court said:

"It is true that the bill in the present case alleges, that, if the ordinance complained of 'is enforced, and your complainant thereby prevented from charging and receiving higher rates than the rates fixed by said ordinance, the State of California will thereby deprive your complainant of its property without due process of law,' etc. This charge, however, that the ordinance complained of is state action, is but a legal conclusion, while the facts alleged are, that the ordinance, if confiscatory, as shown by the bill, is directly prohibited by the Constitution of

the State, which, in article 1, section 13, expressly provides, among other things:

"No person shall . . . be deprived of life, liberty or property without due process of law.

"Thus, the case at bar comes within the rulings of the Circuit Court of Appeals in the Seattle and San Francisco cases, and is precisely covered by the conclusions of the court in the latter case as follows:

"'What we hold is that the averments of the bill itself exclude the case from the cognizance of the Federal Court as a case arising under the Constitution of the United States by alleging that the very ordinances which the appellees relied upon as constituting a violation of its contracts have been enacted in violation of the positive law of the state.'"

It is true that in passages of the opinion subsequent to those just quoted there are forms of expression which when separated from their context might tend to justify the inference that the court thought city ordinances of the character of the one assailed could not in any event be treated as state action. But when the passages referred to are considered in connection with the context of the opinion, it is certain that those expressions were but a reiteration in a changed form of statement of the previous ground, that is to say that state action could not be predicated upon the ordinance because if it was treated as repugnant to the due process clause of the Constitution of the United States it would also have to be considered as in conflict with the state constitution. Under this hypothesis the decision was that it could not be assumed that the State had authorized its officers to do acts in violation of the state constitution until the court of last resort of the State had determined that such acts were authorized.

Coming to consider the real significance of this doctrine, we think it is so clearly in conflict with the decisions of this

court as to leave no doubt that plain error was committed in announcing and applying it. In view, however, of the fact that the proposition was sanctioned by the court below and was by it deemed to be supported by the persuasive authority of two opinions of the Circuit Court of Appeals for the Ninth Circuit, before coming to consider the decided cases we analyze some of the conceptions upon which the proposition must rest in order to show its inherent unsoundness, to make its destructive character manifest, and to indicate its departure from the substantially unanimous view which has prevailed from the beginning.

In the first place the proposition addresses itself not to the mere distribution of the judicial power granted by the Constitution, but substantially denies the existence of power under the Constitution over the subject with which the proposition is concerned. It follows that the limitation which it imposes would be beyond possible correction by legislation. Its restriction would, moreover, attach to the exercise of Federal judicial power under all circumstances, whether the issue concerned original jurisdiction or arose in the course of a controversy to which otherwise jurisdiction would extend. Thus, being applicable equally to all Federal courts under all circumstances in every stage of a proceeding, the enforcement of the doctrine would hence render impossible the performance of the duty with which the Federal courts are charged under the Constitution. Such paralysis would inevitably ensue, since the consequence would be that, at least in every case where there was a coincidence between a national safeguard or prohibition and a state one, the power of the Federal court to afford protection to a claim of right under the Constitution of the United States, as against the action of a State or its officers, would depend on the ultimate determination of the state courts and would therefore require a stay of all action to await such determination. While

this would be obviously true as to cases where there was a coincident constitutional guarantee, in reason it is clear that the principle if sound could not be confined to a case of coincident Federal and state guarantee or prohibition, since, as the Constitution of the United States is the paramount law, as much applicable to States, or their officers, as to others, it would come to pass that in every case where action of a state officer was complained of as violating the Constitution of the United States, the Federal courts in any form of procedure, or in any stage of the controversy, would have to await the determination of a state court as to the operation of the Constitution of the United States. It is manifest that in necessary operation the doctrine which was sustained would in substance cause the state courts to become the primary source for applying and enforcing the Constitution of the United States in all cases covered by the Fourteenth Amendment.

It would certainly be open to controversy if the proposition were carried to its logical result whether the only right under the Fourteenth Amendment, which the proposition admits, to exert Federal judicial power growing out of wrongful acts of state officers would not be unavailing. This naturally suggests itself since if there be no right to exert such power until by the final action of a state court of last resort the act of a state officer has been declared rightful and to be the lawful act of the State as a governmental entity, the inquiry naturally comes whether under such circumstances a suit against the officer would not be a suit against the State within the purview of the Eleventh Amendment. The possibility of such a result moreover at once engenders a further inquiry, that is, whether the effect of the proposition would not be to cause the Fourteenth Amendment to narrow Federal judicial power instead of enlarging it and making it more efficacious. It must be borne in mind also that the limitations which the proposition if adopted would impose upon

Federal judicial power would not be in reason solely applicable to an exertion of such power as to the persons and subjects covered by the Fourteenth Amendment, but would equally govern controversies concerning the contract and possibly other clauses of the Constitution.

The vice which not only underlies but permeates the proposition is not far to seek. It consists first in causing by an artificial construction the provisions of the Fourteenth Amendment not to reach those to whom they are addressed when reasonably construed; and second in wholly misconceiving the scope and operation of the Fourteenth Amendment, thereby removing from the control of that Amendment the great body of rights which it was intended it should safeguard and in taking out of reach of its prohibitions the wrongs which it was the purpose of the Amendment to condemn.

Before demonstrating the accuracy of the statement just made as to the essential result of the proposition relied upon by a reference to decided cases, in order that the appreciation of the cases may be made more salient we contrast the meaning as above stated which the Fourteenth Amendment would have if the proposition was maintained with the undoubted significance of that Amendment as established by many decisions of this court.

1. By the proposition the prohibitions and guarantees of the Amendment are addressed to and control the States only in their complete governmental capacity, and as a result give no authority to exert Federal judicial power until by the decision of a court of last resort of a State, acts complained of under the Fourteenth Amendment have been held valid and therefore state acts in the fullest sense. To the contrary the provisions of the Amendment as conclusively fixed by previous decisions are generic in their terms, are addressed, of course, to the States, but also to every person whether natural or juridical who is the repository of state power. By this construction the

reach of the Amendment is shown to be coextensive with any exercise by a State of power, in whatever form exerted.

2. As previously stated, the proposition relied upon presupposes that the terms of the Fourteenth Amendment reach only acts done by State officers which are within the scope of the power conferred by the State. The proposition hence applies to the prohibitions of the Amendment the law of principal and agent governing contracts between individuals and consequently assumes that no act done by an officer of a State is within the reach of the Amendment unless such act can be held to be the act of the State by the application of such law of agency. In other words, the proposition is that the Amendment deals only with the acts of state officers within the strict scope of the public powers possessed by them and does not include an abuse of power by an officer as the result of a wrong done in excess of the power delegated. Here again the settled construction of the Amendment is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed and deals with such a contingency. It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids even although the consummation of the wrong may not be within the powers possessed if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power.

To speak broadly, the difference between the proposi-

tion insisted upon and the true meaning of the Amendment is this, that the one assumes that the Amendment virtually contemplates alone wrongs authorized by a State and gives only power accordingly, while in truth the Amendment contemplates the possibility of state officers abusing the powers lawfully conferred upon them by doing wrongs prohibited by the Amendment. In other words, the Amendment, looking to the enforcement of the rights which it guarantees and to the prevention of the wrongs which it prohibits, proceeds not merely upon the assumption that States acting in their governmental capacity in a complete sense may do acts which conflict with its provisions, but, also conceiving, which was more normally to be contemplated, that state powers might be abused by those who possessed them and as a result might be used as the instrument for doing wrongs, provided against all and every such possible contingency. Thus the completeness of the Amendment in this regard is but the complement of its comprehensive inclusiveness from the point of view of those to whom its prohibitions are addressed. Under these circumstances it may not be doubted that where a state officer under an assertion of power from the State is doing an act which could only be done upon the predicate that there was such power, the inquiry as to the repugnancy of the act to the Fourteenth Amendment cannot be avoided by insisting that there is a want of power. That is to say, a state officer cannot on the one hand as a means of doing a wrong forbidden by the Amendment proceed upon the assumption of the possession of state power and at the same time for the purpose of avoiding the application of the Amendment, deny the power and thus accomplish the wrong. To repeat, for the purpose of enforcing the rights guaranteed by the Amendment when it is alleged that a state officer in virtue of state power is doing an act which if permitted to be done *prima facie* would violate the Amendment, the subject must be

tested by assuming that the officer possessed power if the act be one which there would not be opportunity to perform but for the possession of some state authority.

Let us consider the decided cases in order to demonstrate how plainly they refute the contention here made by the court below and how clearly they establish the converse doctrine which we have formulated in the two propositions previously stated. As to both the propositions, the cases are so numerous that we do not propose to review them all, but simply to select a few of the leading cases as types, concluding with a brief consideration of a few cases which are supposed to give support to a contrary view.

In *Virginia* v. *Rives*, 100 U. S. 313, the case briefly was this: An accused person sought to remove from a state to a Federal court the trial of an indictment pending against him on the ground that he was a colored person and although by the state statute he had a right to have people of his race serve on juries, that in practice on account of race prejudice they were excluded and thereby he was denied the equal protection of the laws. Two questions arose for decision—first, was the alleged exclusion a violation of the Fourteenth Amendment, and second, if it was did it afford ground for a removal of the case? Considering the first, the court said (p. 318):

"The provisions of the Fourteenth Amendment of the Constitution we have quoted all have reference to State action exclusively, and not to any action of private individuals. . . ."

Determining whether the enforcement by the state officer of a non-discriminating statute in a discriminatory manner was within the Amendment, it was said (p. 318):

"It is doubtless true that a State may act through different agencies, either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal pro-

tection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive, or the Judicial Department of the State. The mode of enforcement is left to its discretion. It may secure the right, that is, enforce its recognition, by removing the case from a State court in which it is denied, into a Federal court where it will be acknowledged."

Thus holding that the enforcement by a state official of a statute in a discriminatory manner although the statute might not be inherently discriminating was within the Amendment, the question of the right to remove was considered and it was decided that the removal act of Congress was narrower than the Constitutional Amendment and did not confer the right to remove.

In *Ex parte Virginia*, 100 U. S. 339, the case was this: A judge of a Virginia county court was indicted under the Civil Rights Act for excluding negroes from juries on account of their race, color, etc. The accused applied to this court for a writ of *habeas corpus* and a writ of *certiorari* to bring up the record and a like petition was presented on behalf of the State of Virginia, and both applications were disposed of at the same time. The first issue to be determined was the meaning of the Fourteenth Amendment. The ruling in *Virginia* v. *Rives* was reiterated, the court saying (p. 346):

"They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue

of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."

Answering the claim that there was no power to punish a state judge for judicial action and therefore that the charge made was not within the Fourteenth Amendment, it was said that the duty concerning the summoning of jurors upon which the charge of discrimination was predicated was not a judicial but merely a ministerial one. It was, however, pointed out that even if this was not the case, as the state statute gave no power to make the discrimination, it was therefore such an abuse of state power as to cause the act complained of to be not within the state judicial authority, but a mere abuse thereof, and that it was "idle" under such circumstances to say that the offense was not within the Amendment (p. 348).

In *Neal* v. *Delaware*, 103 U. S. 370, a discriminating enforcement in practice of laws which were in their terms undiscriminating was again held to be within the Amendment, the language which we have quoted from *Ex parte Virginia* being reiterated.

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, the enforcement of certain city ordinances was prohibited on the ground that they were within the reach of the Fourteenth Amendment. The court, reiterating the doctrine of *Virginia* v. *Rives* and *Ex parte Virginia*, held that this conclusion was sustained from a two-fold point of view—first, the terms of the ordinances, and second, in any event from the discriminatory manner in which the ordinances were applied by the officers.

In *Raymond* v. *Traction Company*, 207 U. S. p. 20, the whole subject—almost in the identical aspect which is here involved—came under consideration. The case concerned the repugnancy to the Fourteenth Amendment of a reassessment made by a state board of equalization, and the suit was originally commenced in a Federal court. It was pressed that as the claim of the complainant was in effect that the board in the reassessment had violated an express requirement of the state constitution in that the board had "disobeyed the authentic command of the State by failing to make its valuations in such a way that every person shall pay a tax in proportion to the value of his property," the act of the subordinate board could not be deemed the act of the State. This contention was held to be unsound and it was decided that even although the act of the board was wrongful from the point of view of the state constitution or law, it was nevertheless an act of a state officer within the intendment of the Fourteenth Amendment. It was pointed out that as the result of the enforcement of the reassessment would be an assertion of state power accomplishing a wrong which the Fourteenth Amendment forbade, the claim of right to prevent such act under the Fourteenth Amendment "constitutes a Federal question beyond all controversy." It was then said (pp. 35–36):

"The state board of equalization is one of the instrumentalities provided by the State for the purpose of raising the public revenue by way of taxation. . . . Acting under the constitution and laws of the State, the board therefore represents the State, and its action is the action of the State. The provisions of the Fourteenth Amendment are not confined to the action of the State through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the State acts, and so it has been held that, whoever by virtue of public position under a

state government, deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the name of the State and for the State, and is clothed with the State's powers, his act is that of the State."

Referring to some reliance to the contrary placed upon a decided case, it was said (p. 37):

"*Barney* v. *City of New York*, 193 U. S. 430, holds that where the act complained of was forbidden by the state legislature, it could not be said to be the act of the State. Such is not the case here."

The reassessment complained of was held to be repugnant to the Fourteenth Amendment.

Finally the subject was elaborately considered in *Ex parte Young*, 209 U. S. 123. Without attempting to fully state the case it suffices to say that although the proceeding was one in *habeas corpus*, the controversy in its ultimate aspect concerned the power of a Federal court to prevent the enforcement of railroad rates fixed under state legislative authority which were confiscatory. In the course of an opinion reviewing the whole field it was said (p. 155):

"The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."

Although every contention pressed and authority now relied upon in favor of affirmance is disposed of by the general principles which we have previously stated, before concluding we specially advert to some of the contentions

urged to the contrary. 1. Much reliance is placed upon the decisions in *Barney* v. *New York*, 193 U. S. 430, and *Memphis* v. *Telephone Co.*, 218 U. S. 624. The latter we at once put out of view with the statement that on its face the question involved was one of pleading and in no sense of substantive Federal power. As to the other—the *Barney Case*—it might suffice to say, as we have already pointed out, it was considered in the *Raymond Case* and if it conflicted with the doctrine in that case and the doctrine of the subsequent and leading case of *Ex parte Young*, it is now so distinguished or qualified as not to be here authoritative or even persuasive. But on the face of the *Barney Case* it is to be observed that however much room there may be for the contention that the facts in that case justified a different conclusion, as the doctrine which we have stated in this case was plainly recognized in the *Barney Case* and the decision there rendered proceeded upon the hypothesis that the facts presented took the case out of the established rule, there is no ground for saying that that case is authority for overruling the settled doctrine which, abstractly at least, it recognized. If there were room for such conclusion in view of what we have said it would be our plain duty to qualify and restrict the *Barney Case* in so far as it might be found to conflict with the rule here applied. 2. In the opinion of the court below, there is a suggestion that even though the Fourteenth Amendment embraces acts of state officers to the extent and scope which we have stated, nevertheless the case here presented is not controlled by the Amendment since the case concerns not acts of officers done under state authority, but merely acts of city officials done under the authority of a municipal ordinance. But, as we have already pointed out, it was long since settled that acts done under the authority of a municipal ordinance passed in virtue of power conferred by a State are embraced by the Fourteenth Amendment.

Apart, however, from the controlling effect of the decisions rendered in cases concerning the enforcement of the Fourteenth Amendment, the unsoundness of the contention is plainly demonstrated by applying the established principle that the exercise of municipal legislative authority under the sanction of a state law is the exertion of state legislative power within the purview of the contract clause of the Constitution (Article I, § 10), declaring: "No State . . . shall pass any . . . law impairing the obligation of contracts." That this interpretation is here conclusive must be apparent, since it cannot be said that an act which is the exertion of state legislative power for the purpose of one provision of the Constitution is not the exertion of state legislative power under the operation of another constitutional provision, both being addressed to the same subject, that is, state legislative power.

And this gives rise at once to a demonstration from another and more final point of view of the incongruity which would result from maintaining the contention insisted upon. While the guarantees of the Fourteenth Amendment cover subjects not included in the contract clause, since the former embraces every manifestation of state power and the latter is concerned only with legislative power when exerted so as to impair contracts, yet the fundamental assertion of Federal power made by each Amendment is the same when the different subjects to which each is applicable are put out of view. To illustrate: The command of the Fourteenth Amendment "No State shall make any law abridging . . . nor shall any State deprive any person," etc., is in substance a manifestation of the same power exerted in the contract clause, saying "No State shall pass," etc. This being true, as it must be, the fact that from the foundation of the Government the contract clause has been enforced without any intimation that the power manifested by the

clause was restricted by limitations such as those which it is here insisted limit the power to enforce the guarantees of the Fourteenth Amendment, affords the most conclusive demonstration of the unsoundness of the contentions here made. The immediate and efficient Federal right to enforce the contract clause of the Constitution as against those who violate or attempt to violate its prohibition, which has always been exerted without question, is but typical of the power which exists to enforce the guarantees of the Fourteenth Amendment. See authorities as to the contract clause referred to in the opinion in *Ross* v. *Oregon*, *ante*, p. 150.

Reversed.

WINFREE, AS ADMINISTRATOR OF PHIPPS, *v.* NORTHERN PACIFIC RAILWAY COMPANY.

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

No. 139. Submitted January 23, 1913.—Decided February 24, 1913.

While there are exceptions, especially in the case of remedial statutes, the general rule is that statutes are addressed to the future and not to the past; and, in the absence of explicit words to that effect, statutes are not retroactive in their application.

The Employers' Liability Act of 1908 introduced a new policy and radically changed existing law and will not be construed as a remedial statute having retrospective effect.

An action brought under the Employers' Liability Act of 1908 by the personal representative of the person who was killed prior to the passage of the act cannot be sustained as stating a cause of action under the law of the State, where that law gives the action to the parents.

Damages to the estate of one killed by negligence is a distinct cause of action, under the laws of the State of Washington, from damages to the parents of the person so killed.

173 Fed. Rep. 65, affirmed.

THE facts, which involve the construction of the Employers' Liability Act of 1908 and whether it had a retroactive effect, are stated in the opinion.

Mr. B. C. Mosby for plaintiff in error:

The act was retroactive. It is a remedial measure, designed to supply a remedy for wrongs for which the law had offered no adequate redress or, as in the case at bar, no redress whatever.

If the meaning of the statute were doubtful, judicial construction ought not to lean towards the wrongdoer but should rather give the benefit of the doubt to the victims of the wrong. There is no sound reason to favor the common carrier. *Stewart* v. *B. & O. R. R. Co.*, 168 U. S. 448; *Spain* v. *St. L. & S. F. R. Co.*, 151 Fed. Rep. 529; *Hayes* v. *Williams*, 17 Colorado, 467; *Employers' Liability Cases*, 207 U. S. 447.

To correct the imperfections of the former act, Congress passed the act of 1908. The second is, like the first, clearly remedial, and should accordingly receive a catholic construction. 36 Cyc. 1173, 1174, 1188; 13 Cyc. 312, n. 9; 1 Chitty's Blackstone's Comm., 19th London ed., side p. 88, n. 30; Black's Const. Prohibitions, 1st ed., 1887, § 134, p. 160; 2 Lewis' Suth. Stat. Const., 2d ed., 1904, pp. 643, 1291, § 519; *Stewart* v. *Balt. & Ohio R. R. Co.*, 168 U. S. 448; *Soule* v. *New York &c. R. R. Co.*, 24 Connecticut, 575; *Lamphear* v. *Buckingham*, 33 Connecticut, 237; *Wabash R. R. Co.* v. *Shacklett*, 10 Ill. App. 404; *Merkle* v. *Bennington*, 58 Michigan, 156; *Bolinger* v. *St. Paul R. R. Co.*, 36 Minnesota, 418; *Vance* v. *Southern R. R. Co.*, 138 N. C. 839; *Haggerty* v. *Central R. R. Co.*, 31 N. J. L. 349; *Beach* v. *Bay State Co.*, 27 Barb. (N. Y.) 248.

The act of 1908, being then of a remedial nature, should be construed as retroactive if such construction is not precluded by its terms. *Larkins* v. *Saffarans*, 15 Fed. Rep. 147. Its terms, however, so far from precluding that

construction rather force it. 36 Cyc., p. 1209, 1213; Wade on Retroactive Laws, 1st ed., § 24; Myer on Vested Rights, 1st ed., 1891, § 25, p. 18; Black on Interp. Laws, 1st ed., 1896, p. 261; Black's Const. Prohib., 1st ed., 1887, pp. 176, 276, 277.

See also: 8 Cyc., p. 910, n. 68; p. 1021, n. 62; *Jefferson City Light Co.* v. *Clark*, 95 U. S. 644; *Lycoming* v. *Union County*, 15 Pa. St. 166; *Barbour* v. *Horn*, 48 Alabama, 659; *Sedgwick County* v. *Bunker*, 16 Kansas, 498; *Plummer* v. *Northern Pacific Railway Co.*, 152 Fed. Rep. 206.

Remedial statutes were retroactively applied in actions for injuries in *Chapman* v. *State*, 104 California, 690; *Cannon* v. *Rowland*, 34 Georgia, 422; *Bevier* v. *Dillingham*, 18 Wisconsin, 556; *Rouge* v. *Rouge*, 36 N. Y. Supp. 436; *Brower* v. *Bowers*, 1 Abb. Dec. 214; *Kuehn* v. *Paroni*, 20 Nevada, 203.

The act of 1908 is shown, by its entire phraseology, to relate to past as well as to future occurrences. *Sohn* v. *Waterson*, 17 Wall. 599.

The limitation of two years is an extension of the one year period provided by the act of 1906. Thus an evident purpose of Congress in its later legislation was to save the rights of those persons whose suits had abated in consequence of the decision in the *Employers' Liability Cases*, 207 U. S. 463.

Expired and repealed acts *in pari materia* with the statute to be construed may also be considered in the interpretation thereof. *United States* v. *Bowen*, 100 U. S. 508; *Viterbo* v. *Friedlander*, 120 U. S. 707; *People* v. *Essex County*, 70 N. Y. 236; *People* v. *Columbia County*, 43 N. Y. 132.

The rule against retrospective operation of law allows the introduction of remedies where none existed before, and their equitable application to existing causes of action. Cooley, Const. Lim. 347, 436, 442, 454, 477, 478; 1 Hare Const. Law, 421; *Gage* v. *Gage*, 66 N. H. 294; *Milne* v. *Huber*, 3 McLean, 217.

The legislature cannot make contracts for individuals, and they cannot impose an obligation which does not equitably arise out of the transaction. But they may give a remedy where there is none, and where in good conscience there should be one. A remedy being general applies to previous as well as subsequent cases.

As to contention of defendant in error that to apply the act of 1908 in the present instance, would be to destroy vested rights of the railway company, under the common law, see *Second Employers' Liability Cases*, 223 U. S. 50, holding that a person has no property, no vested interest, in any rule of the common law; *Walker* v. *Ware, Hadham &c. Rail Co.*, 12 Jur. (N. S.) 18; Cooley, Const. Lim., 6th ed., p. 438; *Gibbons* v. *Ogden*, 9 Wheat. 1, 196.

Under the rule of *stare decisis*, this case is disposed of by *Phil. Balt. & Wash. R. R. Co.* v. *Schubert*, 224 U. S. 603.

In the case at bar, the complaint alleged, *inter alia*, that on the part of the deceased there was no contributory negligence and no assumption of risk. Neither of these allegations was controverted. There was no answer of any kind. Yet the district judge considered that the facts were just the opposite of what was alleged. At least for the purposes of the demurrer, the complaint should have been taken as true.

The ruling of the district court was based upon matter not simply *dehors* the record but contrary to the record.

Irrespective of the act of Congress, implied contracts disregarding comparative negligence in cases of homicide should be deemed void as in contravention of public policy. 26 Cyc., pp. 609, 1094.

Apart from the act of 1908, the complaint presents a case for Federal cognizance. It states a cause of action under the statutes of the State of Washington, but not under the common law. Also that plaintiff in error is a citizen of the State of Washington; the parents of the decedent are citizens of the State of Wyoming; the de-

fendant in error is a corporation resident in the State of Wisconsin; and the amount involved in the action exceeds $2,000, exclusive of interest and costs.

Under the laws of Washington, when the death of a minor has been caused by wrongful act, the father may compel compensation for the loss of the child's services, but he cannot recover a solatium. *Noble* v. *Seattle*, 19 Washington, 133.

The compensation received, however, belongs, under the community system, to the mother as well as to the father. 2 Rem. & Bal. Code, § 5917. See also *Kleps* v. *Bristol Manfg. Co.*, 81 N. E. Rep. 765.

In England a declaration may fail to show a cause of action under a statute, and yet may state a good case, a negligent breach of duty under the unwritten law. *Parnaby* v. *Lancaster Canal Co.*, 11 Ad. & El. 223; *S. C.*, Nev. & P. 223; 3 Per. & Dav. 162.

Mr. Charles W. Bunn for defendant in error.

Mr. Justice McKenna delivered the opinion of the court.

This action was brought in the Circuit Court of the United States for the Eastern District of Washington, Eastern Division, by plaintiff in error (herein referred to as plaintiff) as administrator of the estate of Albert E. Phipps, deceased, against defendant in error (herein referred to as defendant) for the wrongful death, it is alleged, of Albert E. Phipps, a minor, of the age of eighteen years and five months, while acting as fireman upon a freight locomotive of the defendant in the State of Washington. The negligence of defendant is alleged and that defendant was engaged in interstate commerce; that decedent had not been emancipated nor had his parents knowledge of his employment; that they lived in the State of Wyoming

and that the action was brought for their benefit under the provisions of the act of Congress of April 22, 1908, (35 Stat. 65, c. 149), entitled "An Act Relating to the Liability of Common Carriers by Railroads to their Employees in Certain Cases."

Defendant demurred to the complaint on the ground, among others, that the act of Congress upon which plaintiff relied was passed, approved and became a law after plaintiff's alleged cause of action accrued and imposed no liability, therefore, on defendant by reason of the facts set forth in the complaint. The demurrer was sustained, and, plaintiff refusing to plead further, judgment was entered dismissing the complaint and for costs. The Court of Appeals affirmed the judgment. 173 Fed. Rep. 65.

Plaintiff, to support his contention that the act of Congress has retroactive operation, presents a very elaborate argument based on the extensive effect which courts have given to remedial statutes, applying them, it is contended, to the past as well as to the future. The Court of Appeals met the argument, as we think it should be met, by saying that statutes that had received such extensive application were "such as were intended to remedy a mischief, to promote public justice, to correct innocent mistakes, to cure irregularities in judicial proceedings or to give effect to acts and contracts of individuals according to the intention thereof." It is hardly necessary to say that such statutes are exceptions to the almost universal rule that statutes are addressed to the future, not to the past. They usually constitute a new factor in the affairs and relations of men and should not be held to affect what has happened unless, indeed, explicit words be used or by clear implication that construction be required. It is true that it is said that there was liability on the part of the defendant for its negligence before the passage of the act of Congress and the act has only given a more efficient and

a more complete remedy. It, however, takes away material defenses, defenses which did something more than resist the remedy; they disproved the right of action. Such defenses the statute takes away, and that none may exist in the present case is immaterial. It is the operation of the statute which determines its character. The Court of Appeals aptly characterized it, and we may quote from its opinion (173 Fed. Rep. 66): "It is a statute which permits recovery, in cases where recovery could not be had before, and takes from the defendant defenses which formerly were available, defenses which in this instance existed at the time when the contract of service was entered into and at the time when the accident occurred." Such a statute, under the rule of the cases, should not be construed as retrospective. It introduced a new policy and quite radically changed the existing law.

It is contended that apart from the act of Congress the complaint "states a cause of action under the statutes of the State of Washington." This does not avail plaintiff. He admits that the statutes of Washington give the right of action to the father of the deceased minor, not to a personal representative. He, however, to justify his right of action says that the compensation recovered in an action by the father of the minor belongs under the community system to the mother as well as to the father. But we are not informed how this, if true, gives a right of action in the administrator of the minor's estate. Damages to his estate would be a distinct cause of action from damages to his parents. *Hedrick* v. *Ilwaco Ry. & Nav. Co.*, 4 Washington, 400.

Judgment affirmed.

HUTCHINSON *v.* CITY OF VALDOSTA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

No. 146. Submitted January 24, 1913.—Decided February 24, 1913.

Where the charter gives the municipality power to enact through the mayor and council such rules and regulations for its welfare and government as they may deem best, and the highest court of the State has decided that an ordinance providing for a system of sewerage is within this delegation of power, this court will not declare such ordinance a violation of the due process or equal protection provisions of the Fourteenth Amendment, where the record does not show that the city was induced by anything other than the public good or that such was not its effect.

One of the commonest exercises of the police power of the State or municipality is to provide for a system of sewers and to compel property owners to connect therewith, and this duty may be enforced by criminal penalties without violating the due process or equal protection clauses of the Fourteenth Amendment.

The Federal court will not interfere with the exercise of a salutary power and one necessary to the public health unless it is so palpably arbitrary as to justify the interference.

THE facts, which involve the constitutionality under the due process and equal protection clauses of the Fourteenth Amendment of a police ordinance of the City of Valdosta, Georgia, are stated in the opinion.

Sarah M. Hutchinson pro se, and *Mr. Charles S. Morgan*, for appellant.

No appearance for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Bill in equity brought by appellant to restrain appellees from proceeding against her for the alleged violation of an ordinance of the City of Valdosta.

The facts as alleged are these:

The City of Valdosta is a municipal corporation under the laws of Georgia and the appellees, Varnedoe and Dampier, are respectively the recorder of the mayor's court of the city and marshal. Appellant owns and resides with her husband and children on a lot of land containing about one acre, more or less, situated near three-quarters of a mile from the main business part of the city. The lot is elevated and dry, with good natural surface drainage, clean and clear of garbage or anything which would create a nuisance, free from miasmatic conditions and is healthy, with a wide street on three sides and a railroad right-of-way and almost open country in the rear. She has lived on the lot for more than twenty years.

The city is an inland town, built and standing upon a high pine ridge about seventy-five miles from the Gulf of Mexico "and not one hundred miles from the Atlantic Ocean," with no swamp near. The city has a population of not exceeding five or six thousand white inhabitants and covers an area two miles in extent. It was incorporated by an act of the legislature of Georgia on the twenty-first of November, 1901, under the name and style of the City of Valdosta, and under that name may sue and be sued through its mayor and council, and enact such rules and regulations for the transaction of its business and for the welfare and proper government thereof as said mayor and council may deem best, not inconsistent with the laws of Georgia and of the United States.

On the first of September, 1909, the city passed an ordinance requiring persons and property owners residing upon any street along which sewer mains have been laid, within thirty days after the passage of the ordinance, to install water closets in their houses and connect the same

with the main sewer pipe and to provide the closets with water so that they may be ready for use in the ordinary and usual way, and such persons shall not be permitted to use or keep on their premises a surface closet.

A house without a closet, situated as stated above, is by the passage of the ordinance condemned as a menace to the public health, and the owner of the premises who does not comply with the ordinance is subject to a fine of not exceeding two hundred dollars or to labor on the streets or public works, or to be confined in the guard house of the city for not exceeding ninety days.

Appellant's house is a wooden building, with rooms only sufficient for the immediate use of herself and family, and to comply with the ordinance she would be compelled to build an addition to the house which, with connection to the sewer and payment for the necessary water, would cost her a considerable sum of money.

The personal appellees are threatening to arrest her for the purpose of fine and imprisonment or labor on the streets for not complying with the ordinance, and to avoid arrest she has at several times left her home and family, to her great inconvenience, mortification and wounded feelings.

That part of the city where her residence is situated is thinly settled and there is no necessity on account of health or sanitary conditions of the city or any part thereof to force her against her wish to connect a water closet in her house by a pipe to the main sewer, and would subject her and her family to the noxious gases, odors and noisome smells from the sewer, thereby endangering her health and impairing her comfort and that of her family, and thereby creating a nuisance.

She had no notice nor opportunity to be heard before the commencement of proceedings to force her before the recorder to answer to the charge of violating the ordinance. For that reason she alleges that the proceedings

were in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, in that the proceedings deprived her of liberty and property without due process of law and denied to her the equal protection of the laws.

She alleges that the act of the legislature of Georgia incorporating the city, and under which the ordinance was passed and the proceedings against her taken, violates the Fourteenth Amendment to the Constitution because it provides neither for notice nor an opportunity to be heard before the premises are condemned and the owner required to comply with its provisions.

She further alleges that there is a conspiracy against her to force her against her desire to connect with the sewer under color of the act and the ordinance, in violation of the Fourteenth Amendment and the statute laws passed by Congress in pursuance thereof, to her damage in the sum of $10,000.

That at the time of the commencement of the proceedings against her she applied to the Superior Court of the County of Lowndes, State of Georgia, for an injunction restraining the proceedings and, upon the refusal of the court to grant the injunction, carried the case to the Supreme Court of the State, which court refused to require the granting of an injunction.

And, finally, she alleges that the proceedings are discriminating because all of the inhabitants and owners of property are not required to comply with the ordinance and that, therefore, her property is taken without compensation and without due process of law, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, and that she is without a remedy at law. She prayed an injunction.

Appellees demurred to the bill, alleging a want of equity, that appellant had a remedy at law, that she was attempting to restrain the prosecution of the city's penal ordi-

nances passed under its police powers for the protection of the public health, and that it appears from the bill that the matters and things set out are *res judicata*. The appellees also by plea set up the defense of *res judicata* based on the proceedings in the state court referred to in the bill. A copy of the proceedings was attached to the plea, from which it appears that she set out in her petition and amendment to it in the state court the same grounds of action as in her bill in the case at bar, varying somewhat in details and expression, including the violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

A writ of subpœna was prayed against the City of Valdosta, requiring it, by and through its mayor and council, naming them, to appear and answer the petition. In the present suit the injunction is prayed against the city and the recorder and marshal.

The appellees also filed an answer, which appellant moved to strike out. The motion was denied. The demurrer, then coming on to be heard, was sustained "on each and every ground thereof," and the bill dismissed. This appeal was then taken.

There was no oral argument of the case, and in her brief appellant says that "the jurisdiction of the United States Circuit Court to take cognizance of the case depends largely upon the Fourteenth Amendment to the Constitution of the United States," and then discusses the power of the court to restrain unconstitutional exercise of power by States and their officers and municipalities. On that proposition we need not waste any time. We have seen that the Circuit Court sustained the demurrer not only on the ground that the ordinance did not violate the Constitution of the United States but also on the ground that the suit in the state court which appellant alleges was brought and which was determined against her was *res judicata*. But passing that ground, we

think the court's ruling was right on the other ground; that is, the ordinance does not violate the Fourteenth Amendment of the Constitution of the United States. According to the bill, the city is given the power through its mayor and council "to enact such rules and regulations for the transaction of its business and for the welfare and proper government thereof," as the mayor and council may deem best, and the bill shows that the courts of the State decided that the ordinance was within this delegation of power. It is the commonest exercise of the police power of a State or city to provide for a system of sewers and to compel property owners to connect therewith. And this duty may be enforced by criminal penalties. *District of Columbia* v. *Brooke,* 214 U. S. 138. It may be that an arbitrary exercise of the power could be restrained, but it would have to be palpably so to justify a court in interfering with so salutary a power and one so necessary to the public health. There is certainly nothing in the facts alleged in the bill to justify the conclusion that the city was induced by anything in the enactment of the ordinance other than the public good or that such was not its effect.

Decree affirmed.

HOKE AND ECONOMIDES *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

No. 381. Argued January 7, 8, 1913.—Decided February 24, 1913.

The power given to Congress by the Constitution over interstate commerce is direct, without limitation and far reaching. *Hipolite Egg Co.* v. *United States,* 220 U. S. 45.

Commerce among the States consists of intercourse and traffic between their citizens and includes the transportation of persons as well as property.

While our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction, we are one people and the powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral.

While women are not articles of merchandise, the power of Congress to regulate their transportation in interstate commerce is the same, and it may prohibit such transportation if for immoral purposes.

The right to be transported in interstate commerce is not a right to employ interstate transportation as a facility to do wrong, and Congress may prohibit such transportation to the extent of the White Slave Traffic Act of 1910.

Congress may adopt not only the necessary, but the convenient, means necessary to exercise its power over a subject completely within its power, and such means may have the quality of police regulations. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196.

The White Slave Traffic Act of June 25, 1910, c. 395, 36 Stat. 825, is a legal exercise of the power of Congress under the commerce clause of the Constitution and does not abridge the privileges or immunities of citizens of the States or interfere with the reserved powers of the States, especially those in regard to regulation of immoralities of persons within their several jurisdictions.

A variance which is merely verbal as to the name of the railroad over which transportation was obtained in violation of the White Slave Traffic Act and which did not prejudice the defense, *held* in this case not to be reversible error.

It is for the jury to determine the sufficiency of the evidence tending to show that defendants induced women to become passengers in interstate commerce in violation of the Act, and in this case it does not appear that their judgment was not justified.

One can violate the White Slave Traffic Act through a third party acting for him.

Evidence of acts of defendants after the end of the journey *held* in this case to be admissible to show the action of defendants in inducing the transportation of women in interstate commerce in violation of the White Slave Traffic Act.

There was no error in the various instructions of the court in this case.

187 Fed. Rep. 992, affirmed.

THE facts, which involve the constitutionality under various provisions of the Federal Constitution of the act of June 25, 1910, prohibiting transportation in interstate and

foreign commerce of women and girls for immoral purposes, known as the White Slave Act, are stated in the opinion.

Mr. C. W. Howth, with whom *Mr. Hal W. Greer*, *Mr. T. H. Bowers* and *Mr. C. C. Luzenberg* were on the brief, for plaintiffs in error:

The act is contrary to and contravenes Art. IV, § 2, of the Constitution in this: That though they are generally and justly deemed immoral, yet prostitutes, both male and female, are citizens of their respective States, with all the "privileges and immunities" possessed by any other citizen; and one of their "privileges" is to travel interstate; and so long as this privilege exists as a lawful right, it is the "privilege" and lawful right of any other citizen to aid and assist, persuade and entice, them to take the journey, regardless of their motive or purpose and regardless of the motive and purpose of the one rendering the aid, as to what they shall do or intend to do at the end of their journey. *Paul* v. *Virginia*, 8 Wall. 168; *United States* v. *Harris*, 106 U. S. 629.

The right to travel interstate is a fundamental privilege and immunity of citizenship, regardless of moral or immoral intent of the traveler at the end of the journey.

The White Slave Act does not in itself attempt to define or make a crime of prostitution.

The act does not forbid the carriage interstate of prostitutes, even though they be known as such.

The act does not prohibit the carriage interstate of a woman or girl who intends to ply the avocation of prostitution at the end of her journey, if she furnishes her own money or means of transportation. This is because Congress realized that it did not have power to include that, either because it would abrogate Art. IV, § 2, or the reserved powers of the States individually.

Congress has no power to define and punish as a crime the acts of one who aids another to do a lawful thing.

As to Economides it is presumed that the verdict of the jury will be held conclusive on the facts, and they are therefore stated as established.

Defendants although engaged in a very disreputable, but lawful, business, had the privilege and immunity as a citizen of a State, to argue with, persuade, and prevail, upon three other citizens of that State to go to a point in another State, he in no other respect rendering any actual aid or assistance.

In the absence of an allegation in the indictment that these women were being carried under duress, or against their wills, or in some other involuntary form, or by some fraudulent device were induced to go, they had these rights:

They could have stopped off at any place in Louisiana where the train stopped and have thus broken the interstate feature of the indictment.

Even after reaching Beaumont and before going to the place of prostitution they could have purchased transportation and returned to Louisiana, or have gone to some other place than Beaumont.

After reaching their destination at Beaumont and before going into the house of prostitution, they could have hired out for domestic service, or changed their occupation into some other than prostitution.

In either of these three events, the criminality of the acts charged in the indictment would have been completely destroyed.

The act is void in that it conflicts with the reserved police powers of the States individually to regulate or prohibit prostitution or any other immoralities, of their citizens. Amendments IX and X of the Constitution; *Keller* v. *United States*, 213 U. S. 143; *Fairbank* v. *United States*, 181 U. S. 283; *Barron* v. *Baltimore*, 7 Pet. 243.

The Congress of these United States, as a legislative body, is one of limited powers prescribed by the Consti-

tution, and can pass no valid enactment unless it comes strictly within some one or more of the provisions conferring the power; and all powers not so expressly granted to Congress, by the Constitution, were reserved to the States individually.

The act is unconstitutional in that it does not come within the terms of Art. I, § 8, subd. 2, relating to the power to regulate commerce among the States, or any other grant of power in this: that while the carrying of passengers interstate comes within the power to regulate commerce, the motive or intent of the passenger either before beginning the journey, or during, or after completing it, is not a matter of interstate commerce. *Keller* v. *United States*, 213 U. S. 143; *Lottery Case*, 188 U. S. 32; *The Popper Case*, 98 Fed. Rep. 423; *Fairbank* v. *United States*, 181 U. S. 283.

Prostitution is not a crime against the Federal Government as such except in Territories exclusively under Congressional control, but of the States individually.

In every offense save this one a conviction for crime must depend upon the intent to commit the crime; but here the intention is the crime where no real crime may in fact be committed.

In all other cases the shipment of the forbidden commodity interstate, as well as its receipt, constitutes the crime; but here though the aid of the passenger may be lawful, yet if the person giving it intends the recipient shall do an immoral thing at the end of her journey, whether she does it or not, makes the person rendering the aid a felon.

Congress has not the constitutional power to make prostitution a crime within the limits of any State.

The power to regulate interstate commerce does not confer upon Congress the power to regulate the morality or any other immorality (a phrase broad enough to reach drinking, gambling, exposure of person, fighting, lying,

profanity—in fact any frailty which the flesh is heir to) of citizens individually.

If so there is no such thing reserved to the States *per se* as police powers, for any other immorality is broad enough to cover every crime defined in the criminal codes and codes of criminal procedure in every State in the Union.

Where both the right to interstate carriage and the fact of carriage are lawful within themselves, there is nothing of "commerce between the States" which Congress can prohibit.

The defendants should have been acquitted on the merits.

Mr. Assistant Attorney General Harr for the United States: [1]

Section 8 of the act provides that it shall be known and referred to as the "White Slave Traffic Act," and the several provisions of the act show that its underlying purpose is the suppression of traffic in women and girls for immoral purposes so far as such traffic comes within the jurisdiction of Congress over interstate and foreign commerce. This purpose was also plainly stated by the committees of Congress in recommending the passage of the bill (H. Rept., No. 47, 61st Cong., 2d Sess.; S. Rept., No. 886, 61st Cong., 2d Sess.).

That the act is intended as a regulation of the transportation of persons as passengers appears from § 5, which provides that violations of §§ 2, 3 and 4 may be prosecuted in any district from, through or into which any such woman or girl may have been carried or transported as a passenger.

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[1] The brief of the Government is entitled not only in No. 381, but also in the other *White Slave Traffic Cases* argued simultaneously therewith, to wit, No. 588, *Athanasaw* v. *United States*, *post*, p. 326; No. 603, *Bennett* v. *United States*, *post*, p. 333; and No. 602, *Harris* v. *United States*, post, p. 340.

The act reaches procurers and panderers and those engaged in conducting immoral houses, shows, etc., who, treating women and girls as subjects of barter and gain, transport or cause them to be transported, or facilitate their transportation, from one State to another, or to a foreign country, for immoral purposes. It does not penalize either the voluntary going or coming of women for the purpose of prostitution, nor the act of one who, for charitable or philanthropic reasons, extends aid to an unfortunate female by purchasing transportation for her. Nor would a common carrier or its agents be guilty of violating the act simply by transporting a woman or girl who may intend to engage in prostitution.

The act is constitutional as a regulation of interstate and foreign commerce.

Transportation and transit of persons is commerce, persons being both the subject and the means of commercial intercourse.

The statement of Mr. Justice Barbour, in *New York* v. *Miln*, 11 Pet. 102, 136, that persons "are not the subject of commerce," has never received the sanction of the court, but has been expressly refuted. *Passenger Cases*, 7 How. 282, 429; *Henderson* v. *New York*, 92 U. S. 259; *Mobile* v. *Kimball*, 102 U. S. 691; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Pickard* v. *Pullman Car Co.*, 117 U. S. 34; *McCall* v. *California*, 136 U. S. 104; *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204.

We are concerned here only with the matter of transportation, which, so far as interstate or foreign, is clearly traffic and subject to the regulative power of Congress; although the decisions of this court are also to the effect that transit of persons, interstate or foreign, is also within the jurisdiction of Congress.

The regulative power of Congress extends to the absolute prohibition of the transportation and transit in interstate or foreign commerce of certain subjects of commerce.

See *The Lottery Case*, 188 U. S. 321, establishing the principle that it is equally within the power of Congress, in regulating interstate commerce, to protect the public morals as it is to protect the public health or the economic welfare of the people, and it is upon this principle that the White Slave Traffic Act rests.

Congress has also enacted quarantine legislation for the purpose of preventing persons from introducing contagious diseases into the United States from foreign countries or spreading the same from State to State, and its authority to do so has been repeatedly recognized by this court. *Morgan* v. *Louisiana*, 118 U. S. 455, 464; *Louisiana* v. *Texas*, 176 U. S. 1, 21; *Compagnie Francaise, &c.*, v. *Board of Health*, 186 U. S. 380, 387, 389.

Necessarily, such legislation can only rest upon the theory that Congress can regulate the transportation and transit of persons in interstate or foreign commerce, to the extent of prohibition, if the public welfare demands it.

The transportation of women and girls for the purpose of prostitution or debauchery or other immoral purpose is one of the kinds of interstate or foreign commerce that may be suppressed by Congress.

The act is not an encroachment upon the police powers of the States. It merely aids the States in the enforcement of their own laws on the subject of immorality.

While the States alone can regulate the practice of prostitution therein, *Keller* v. *United States*, 213 U. S. 138, so far as it is conducted through the channels of interstate or foreign commerce, it becomes a matter of congressional regulation.

Even if the States may, under their police powers, prohibit prostitutes or other immoral persons from coming or being transported into their limits, that fact does not remove the subject from congressional control. See, as to quarantine laws, *Compagnie Francaise* v. *Board of Health*,

186 U. S. 387, 389; *Reid* v. *Colorado*, 187 U. S. 137; *Lottery Case*, 188 U. S. 358.

The act is not an unwarranted invasion of personal liberty. *Addyston Pipe Co.* v. *United States*, 175 U. S. 229; *Lottery Case, supra; Reid* v. *Colorado*, 187 U. S. 151.

Having the power to prohibit the transportation of women and girls in interstate and foreign commerce for immoral purposes, and having exercised such power, Congress may make the prohibition effectual by punishing any person who knowingly induces, solicits, or facilitates such illegal transportation.

As to the power of Congress effectively to regulate interstate commerce by reaching unlawful acts in their very inception, see *Hipolite Egg Co.* v. *United States*, 220 U. S. 45.

So, because the solicitation of interstate commerce is a matter of Federal regulation exclusively, the State cannot impose a license tax thereon. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Asher* v. *Texas*, 128 U. S. 129; *McCall* v. *California*, 136 U. S. 104.

The provision of the act with reference to persons purchasing tickets for women and girls for the purpose of being transported in interstate or foreign commerce for immoral purposes, and those relating to the persuasion, inducement, enticement, or coercion of women and girls to go and be transported in such commerce, are similar to the provisions in the immigration laws making it an offense to assist, encourage, or solicit the importation or migration of alien contract laborers, upheld in *United States* v. *Craig*, 28 Fed. Rep. 795.

Mr. Justice McKenna delivered the opinion of the court.

Error to review a judgment of conviction under the act of Congress of June 25, 1910, entitled "An Act to

further regulate interstate and foreign commerce by prohibiting the transportation therein for immoral purposes of women and girls, and for other purposes." 36 Stat. 825, c. 395. It is commonly known as the White Slave Act.

The constitutionality of the act was assailed by demurrer, and as its sufficiency otherwise was not questioned a brief summary of its allegations is all that is necessary.

The charge against Effie Hoke is that she "did, on the fourteenth day of November, A. D. 1910, in the City of New Orleans and State of Louisiana, unlawfully, feloniously and knowingly persuade, induce and entice one Annette Baden, alias Annette Hays, a woman, to go from New Orleans, a city in the State of Louisiana, to Beaumont, a city in the State of Texas, in interstate commerce for the purpose of prostitution," etc.

The charge against Basile Economides is that he "did unlawfully, feloniously and knowingly aid and assist the said Effie Hoke to persuade, induce and entice the said Annette Baden . . . to go in interstate commerce . . . for the purpose of prostitution," with the intent and purpose that the said woman "should engage in the practice of prostitution in the said city of Beaumont, Texas."

The second and third counts make the same charge against the defendants as to another woman, the one named in the third count being under eighteen years.

The demurrers were overruled and after trial the defendants were convicted and sentenced, each to two years imprisonment on each count. 187 Fed. Rep. 992.

The indictment was drawn under §§ 2, 3 and 4 of the act, which sections are as follows:

"SEC. 2. That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prosti-

tution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court."

Section 3 is directed against the persuasion, inducement and enticement of any woman or girl to go from one place to another in interstate or foreign commerce, whether with or without her consent, to engage in the practices and for the purposes stated in the first section, and provides that "any one who shall thereby knowingly cause or aid or assist in causing such woman or girl to go or to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any Territory or the District of Columbia," shall be punished as prescribed in the first section.

Section 4 makes criminal the pursuasion, inducement and enticement of a woman or girl under the age of eight-

een years from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia to engage in the immoral practices enumerated. The person guilty thereof and who shall in furtherance thereof knowingly induce or cause such woman or girl to be carried or transported as a passenger in interstate commerce shall be deemed guilty of a felony and on conviction the offender's punishment may be a fine of ten thousand dollars or imprisonment for ten years, or by both fine and imprisonment, in the discretion of the court.

The grounds of attack upon the constitutionality of the statute are expressed by counsel as follows:

"1. Because it is contrary to and contravenes Art. IV, § 2, of the Constitution of the United States, which reads: 'The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.'

"2. Because it is contrary to and contravenes the following two amendments to the Constitution:

"Art. IX. The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

"Art. X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

"3. Because that clause of the Constitution which reserves to Congress the power (Art. I, Sec. 8, Subdiv. 2) 'To regulate Commerce with foreign Nations, and among the several States,' etc., is not broad enough to include the power to regulate prostitution or any other immorality of citizens of the several States as a condition precedent (or subsequent) to their right to travel interstate or to aid or assist another to so travel.

"4. Because the right and power to regulate and control prostitution, or any other immoralities of citizens, comes within the reserved police power of the several States,

and under the Constitution Congress cannot interfere therewith, either directly or indirectly, under the grant of power 'to regulate commerce between the States.'"

We shall discuss at length but one of these grounds; the others will be referred to incidentally. The power of Congress under the commerce clause of the Constitution is the ultimate determining question. If the statute be a valid exercise of that power, how it may affect persons or States is not material to be considered. It is the supreme law of the land and persons and States are subject to it.

Congress is given power "to regulate commerce with foreign nations and among the several States." The power is direct; there is no word of limitation in it, and its broad and universal scope has been so often declared as to make repetition unnecessary. And, besides, it has had so much illustration by cases that it would seem as if there could be no instance of its exercise that does not find an admitted example in some one of them. Experience, however, is the other way, and in almost every instance of the exercise of the power differences are asserted from previous exercises of it and made a ground of attack. The present case is an example.

Commerce among the States, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property. There may be, therefore, a movement of persons as well as of property; that is, a person may move or be moved in interstate commerce. And the act under consideration was drawn in view of that possibility. What the act condemns is transportation obtained or aided or transportation induced in interstate commerce for the immoral purposes mentioned. But an objection is made and urged with earnestness. It is said that it is the right and privilege of a person to move between States and that such being the right, another cannot be made guilty of the crime of inducing or assisting or aiding in the exercise of it and "that the

motive or intention of the passenger, either before beginning the journey, or during or after completing it, is not a matter of interstate commerce." The contentions confound things important to be distinguished. It urges a right exercised in morality to sustain a right to be exercised in immorality. It is the same right which attacked the law of Congress which prohibits the carrying of obscene literature and articles designed for indecent and immoral use from one State to another. Act of February 8, 1897, 29 Stat. 512, c. 172. *United States* v. *Popper*, 98 Fed. Rep. 423. It is the same right which was excluded as an element as affecting the constitutionality of the act for the suppression of lottery traffic through national and interstate commerce. *Lottery Case*, 188 U. S. 321, 357. It is the right given for beneficial exercise which is attempted to be perverted to and justify baneful exercise as in the instances stated and which finds further illustration in *Reid* v. *Colorado*, 187 U. S. 137. This constitutes the supreme fallacy of plaintiffs' error. It pervades and vitiates their contentions.

Plaintiffs in error admit that the States may control the immoralities of its citizens. Indeed, this is their chief insistence, and they especially condemn the act under review as a subterfuge and an attempt to interfere with the police power of the States to regulate the morals of their citizens and assert that it is in consequence an invasion of the reserved powers of the States. There is unquestionably a control in the States over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime. It is a control, however, which can be exercised only within the jurisdiction of the States, but there is a domain which the States cannot reach and over which Congress alone has power; and if such power be exerted to control what the States cannot it is an argument for—not against—its legality. Its exertion does not encroach upon the jurisdiction of the States. We have

cited examples; others may be adduced. The Pure Food and Drugs Act (June 30, 1906, 34 Stat. 768, c. 3915) is a conspicuous instance. In all of the instances a clash of national legislation with the power of the States was urged, and in all rejected.

Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. This is the effect of the decisions, and surely if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls.

This is the aim of the law expressed in broad generalization; and motives are made of determining consequence. Motives executed by actions may make it the concern of Government to exert its powers. Right purpose and fair trading need no restrictive regulation, but let them be transgressed and penalties and prohibitions must be applied. We may illustrate again by the Pure Food and Drugs Act. Let an article be debased by adulteration, let it be misrepresented by false branding, and Congress may exercise its prohibitive power. It may be that Congress could not prohibit the manufacture of the article in a State. It may be that Congress could not prohibit in all of its conditions its sale within a State. But Congress may prohibit its transportation between the States, and by that means defeat the motive and evils of its manufacture. How far-reaching are the power and the

means which may be used to secure its complete exercise we have expressed in *Hipolite Egg Co.* v. *United States*, 220 U. S. 45. There, in emphasis of the purpose of the law, we denominated adulterated articles as "outlaws of commerce" and said that the confiscation of them enjoined by the law was appropriate to the right to bar them from interstate transportation and completed the purpose of the law by not merely preventing their physical movement but preventing trade in them between the States. It was urged in that case as it is urged here that the law was an invasion of the power of the States.

Of course it will be said that women are not articles of merchandise, but this does not affect the analogy of the cases; the substance of the congressional power is the same, only the manner of its exercise must be accommodated to the difference in its objects. It is misleading to say that men and women have rights. Their rights cannot fortify or sanction their wrongs; and if they employ interstate transportation as a facility of their wrongs, it may be forbidden to them to the extent of the act of June 25, 1910, and we need go no farther in the present case.

The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation "among the several States"; that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 215; Cooley, Constitutional Limitations, 7th ed. 856. We have no hesitation, therefore, in pronouncing the act of June 25, 1910, a legal exercise of the power of Congress.

There are assignments of error based upon rulings on the admission and rejection of evidence and upon the instructions to the jury and the refusing of instructions.

The asserted errors are set forth in twenty-five bills of exceptions and the special assignment of errors in this court occupy twenty-eight pages of the record, and present the constitutional objections to the law in all the aspects that counsels' ingenuity can devise. A like ingenuity has been exercised to represent the many ways in which the conduct of the accused can be viewed and shown to be inconsistent with a guilty purpose. To discuss them all is unnecessary. We shall pass more or less rapidly over those we consider to be worthy of attention.

1. It is contended that there is variance between the indictment and the proof in that the indictment charges that the women were transported over the Texas & New Orleans Railroad Company's road and that the Government failed to prove that such road was a line extending from New Orleans to Beaumont, Texas, these places marking the beginning and end of the transportation of the women. Further, that the proof showed that their tickets were purchased over the Southern Pacific Road. The indictment alleges that the Texas & New Orleans Railroad was a part of the Southern Pacific System, and was commonly known as the "Sunset Route," and there was through transportation. The variance is not much more than verbal, and that it prejudiced their defense in any way is not shown. If it is error at all it does not appear to have caused even embarrassment to the defense. But was it error? See *Westmoreland* v. *United States*, 155 U. S. 545, 549. Also § 1025, R. S.

2. The evidence does not show that the defendants or either of them induced, etc., the women to become passengers in interstate commerce. The particulars are recited wherein it is contended that the evidence is deficient. It is not necessary to review them. It was for the jury to consider and determine the sufficiency of the evidence, and we cannot say they were not justified by it in the judgment they pronounced.

3. It is contended that Florence Baden persuaded her sister Gertrude to go to Beaumont and an instruction of the court is attacked on the ground that it declared the charge of the indictment was satisfied against the defendants if Florence acted for them. There was no error in the instruction under the circumstances shown by the record.

4. Error is assigned on the refusal of the court to give certain instructions requested by defendants. To consider them in detail would require a lengthy review of the evidence, for they present arguments on certain phases of it as to the degree of persuasion used or its sufficiency to induce or entice the women. There was no error in refusing the instructions.

5. The court permitted the women to testify as to the acts of Effie Hoke at her house at Beaumont restraining the liberty of the women and coercing their stay with her. Such testimony was relevant. The acts illustrated and constituted a completion of what was done at New Orleans. They were part of the same scheme and made clear its purpose.

There were other instructions asked by which the jury was charged that they could not convict Effie Hoke for the character of the house she kept or Economides for the business he conducted. The charge of the court sufficiently excluded both views. It explained the act of Congress and the offenses it condemned and directed the attention of the jury to them.

6. Defendants complain that they were not permitted to show that the women named in the indictment were public prostitutes in New Orleans. Such proof they contend was relevant upon the charge of persuasion or enticement. This may be admitted, but there was sufficient evidence, as the court said, of the fact of the immorality of their lives and explicitly ruled that they could be shown to be public prostitutes. The court, however, excluded

certain details sought to be proved. Under the circumstances there was no error in the ruling.

In conclusion we say, after consideration of all errors assigned, that there was no ruling made which was prejudicial to defendants.

Judgment affirmed.

ATHANASAW AND SAMPSON *v.* UNITED STATES.

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

No. 588. Argued January 7, 8, 1913.—Decided February 24, 1913.

Hoke v. *United States*, *ante*, p. 308, followed to effect that the White Slave Traffic Act of June 25, 1910, is constitutional.

The White Slave Traffic Act of 1910 against inducing women and girls to enter upon a life of prostitution or debauchery covers acts which might ultimately lead to that phase of debauchery which consists in sexual actions; and in this case *held* that there was no error in refusing to charge that the gist of the offense is the intention of the person when the transportation is procured, or that the word "debauchery" as used in the statute means sexual intercourse or that the act does not extend to any vice or immorality other than that applicable to sexual actions.

THE facts, which involve the constitutionality and construction of the White Slave Act and validity of an indictment and conviction thereunder, are stated in the opinion.

Mr. W. A. Carter and *John P. Wall* filed a brief for plaintiffs in error:

The White Slave Act is unconstitutional, because it violates § 2, Art. IV, of the Constitution of the United

States. *Crandall* v. *State of Nevada*, 6 Wall. 35; *Joseph* v. *Randolph*, 71 Alabama, 499; *Paul* v. *Virginia*, 8 Wall. 168; 2 Tucker on the Constitution, 256, 530, paragraph D; *United States* v. *Harris*, 106 U. S. 629.

Power to pass the White Slave Act is not granted to the Federal Congress by the commerce clause of the Constitution. See Tucker on the Constitution, p. 528.

The White Slave Act conflicts with the Ninth and Tenth Amendments to the Constitution and infringes on the reserved police powers of the State. *City of New York* v. *Miln*, 11 Pet. 102; *Howard* v. *I. C. R. Co.*, 207 U. S. 463; *Keller* v. *United States*, 213 U. S. 138; *Lottery Cases*, 188 U. S. 22; *State* v. *Ry. Co.*, 27 W. Va. 783.

In their decisions sustaining the act, the lower Federal courts in *Bennett* v. *United States*, 194 Fed. Rep. 630; *Kalen* v. *United States*, 196 Fed. Rep. 888; *United States* v. *Westman*, 182 Fed. Rep. 1017; *United States* v. *Warner*, 188 Fed. Rep. 682, have misconstrued the commerce clause of the Constitution.

As to the errors assigned upon the charges given and refused by the court, see Anderson's Law Dict. 314; 1 Abbott's Law Dict. 348; 2 Lewis' Suth. Stat. Const., 2d ed., § 442.

Mr. Assistant Attorney General Harr for the United States.[1]

Mr. Justice McKenna delivered the opinion of the court.

Indictment for violating the act of Congress of June 25, 1910, known as the White Slave Act. 36 Stat. 825, c. 395.

The charge is that the defendant transported or caused to be transported, or aided in the transportation of a girl

[1] See abstract of argument for the United States in *Hoke* v. *United States*, *ante*, p. 313.

by the name of Agnes Couch from Atlanta, Georgia, to Tampa, Florida, for the purpose of debauchery.

A crime is variously charged against §§ 2 and 3 of the act in thirty-nine counts, alleging that the transportation was for "the purpose of debauchery" or "to give herself up to debauchery."

A demurrer was filed to the indictment, alleging as grounds thereof the unconstitutionality of the act and that the indictment was insufficient in certain particulars of fact. The demurrer was overruled, and after a trial upon a plea of not guilty defendants were convicted. Defendant Athanasaw was sentenced to imprisonment for two years and six months and the defendant Sampson for one year and three months. The contentions of the defendants are that the act of Congress is unconstitutional and that errors were committed by the District Court in giving and refusing to give certain instructions to the jury.

1. This case was argued and submitted with No. 381, *Hoke* v. *United States*, *ante*, p. 308. The constitutionality of the law was sustained in that case, and further discussion is unnecessary.

2. To understand the ruling of the court on the instructions an outline of the facts must be stated. Agnes Couch was a girl of seventeen years. She lived at Suwanee, Georgia; but, being in Atlanta in September, 1911, and seeing an advertisement by one Sam Massel for chorus girls, she applied at his office and signed a contract to appear with the Imperial Musical Comedy Company at the Imperial Theatre, Tampa, Florida, as a chorus girl at a salary of $20 a week for the first four weeks and $15 a week thereafter, she to room and board in the theatre. The theatre was operated by the defendants, and Massel acted as their booking representative at Atlanta. After she signed the contract Massel gave her a railroad ticket which had been provided by the defendants for that

purpose. She arrived at Tampa about 6:30 a. m. and met the defendant Athanasaw at seven o'clock.

As to what then took place, the girl testified as follows: "He showed me my room, and took the check to get my trunk. I went to sleep and slept until 2 o'clock in the afternoon. At that hour one of the girls awoke me up to rehearse. I went down in the theatre and stayed there about an hour rehearsing, singing; and then went to lunch in the dining room. All of the girls were there, and several boys. I had never had any stage experience. At lunch they were all smoking, cursing, and using such language I couldn't eat. After lunch I went to my room, and about 6 o'clock Louis Athanasaw, one of the defendants, came and said to me I would like it all right; that I was good looking and would make a hit, and not to let any of the boys fool me, and not be any of the boys' girl; to be his. He wanted me to be his girl; to talk to the boys and make a hit, and get all of the money I could out of them. His room was next to mine, and he told me he was coming in my room that night and sleep with me; and he kissed and caressed me. He told me to dress for the show that night and come down into the boxes. I went into the box about 9 o'clock. About that time Louis Athanasaw's son knocked on my door and told me to come to the boxes. In the box where I went there were four boys; they were smoking, cursing, and drinking. I sat down and the boys asked me what was the matter, I looked scared. I told them I was ashamed of being in a place like that; and Arthur Schlemann, one of the boys, said he would take me out. The others insisted on my staying, and said I would like it when I got broke in. I tried to go out with Schlemann, but a boy named Gilbert pulled me back, saying 'Let that cheap guy alone.' Schlemann said he would send a policeman, and in about 15 minutes Mr. Thompson and Mr. Evans came in for me."

Athanasaw denied that he made improper proposals to the girl, and it was testified that at the preliminary hearing she did not charge him with such. In all else, however, her testimony was not contradicted and it was supported as to the character of the house and as to what took place.

Three propositions are presented by defendants: (1) The gist of the offense is the intention of the person when the transportation was procured or aided to be procured. (2) The word "debauchery" as used in the statute means sexual intercourse. (3) The act did not intend to prohibit the transportation of women for the purpose of any other vice or immorality than that applicable to sexual actions.

The instructions requested by the defendants presented these propositions, and by refusing them and giving others inconsistent with them it is contended that the court erred. The ruling of the court is sufficiently exhibited by the instructions which it gave, and they can be made the basis as well of a consideration of the errors assigned by the refusal of the instructions requested by defendants.

The instructions given by the court are as follows:

"The intent and purpose of the defendants at the time of the furnishing of this transportation for Agnes Couch is the very gist and question of this case. Did they intend to induce or entice or influence her to give herself up to debauchery? It makes no difference whether the profits which would be made by the defendants came from the sale of liquor or other immoral purpose. The question here is of intent; what was the intent with which they brought her; that she should live an honest, moral and proper life? or that she came and they engaged and contracted with her for the purpose of her entering upon a condition which might be termed debauchery, or tends to or would necessarily and naturally lead her to a condition of debauchery just referred to?

"The term debauchery is not a legal or technical term. There is no allegation that the defendants brought her

here with the purpose or with the intent to debauch her; but to induce her or entice her, or influence her to enter upon a course of debauchery. The term debauchery is not a legal or technical term. To debauch is to corrupt in morals or principles; to lead astray morally into dishonest and vicious practices; to corrupt; to lead into unchastity; to debauch. Debauchery then, is an excessive indulgence of the body; licentiousness, drunkenness, corruption of innocence, taking up vicious habits. The term debauchery, as used in this statute, has an idea of sexual immorality; that is, it has the idea of a life which will lead eventually or tends to lead to sexual immorality; not necessarily drunkenness or immorality, but here it leads to the question in this case as to whether or not the influences in which this girl was surrounded by the employment which they called her to, did not tend to induce her to give herself up to a condition of debauchery which eventually, necessarily and naturally would lead to a course of immorality sexually. That is the question for you to determine, and it is a question that you alone can determine. You have heard the testimony in the case in regard to the circumstances in which she was placed. You have viewed the scene where she was employed. You have examined by the testimony and your observation what was the character and what was the condition or influences in which the girl was placed by the defendants. Was or was not it a condition that would necessarily and naturally lead to a life of debauchery of a carnal nature relating to sexual intercourse between man and woman?

"Now, it is contended that they must have had a deliberate intent to debauch her when she came here; that either one or the other intended to debauch her or to get somebody else to debauch her. Now that term debauch is used in a great many instances in law, and the usual connection is to have carnal intercourse with; but there is no such language in this statute, nor is it the language of

the indictment. The charge of the indictment in substance is that they induced or influenced her to enter into a life or condition of debauchery,—'to induce or compel her to give herself up to debauchery.' ''

The language of the statute is directed against the transportation "of any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice."

The instructions of the court were justified by the statute. It is true that the court did not give to the word debauchery or to the purpose of the statute the limited definition and extent contended for by defendants, nor did the court make the guilt of the defendants to depend upon having the intent themselves to debauch the girl or to intend that some one else should do so. In the view of the court the statute had a more comprehensive prohibition and was designed to reach acts which might ultimately lead to that phase of debauchery which consisted in "sexual actions." The general expressions of the court, however, were qualified to meet and not go beyond the conduct of the defendants. The court put it to the jury to consider whether the employment to which the defendants called the girl and the influences with which they surrounded her tended "to induce her to give herself up to a condition of debauchery which eventually and naturally would lead to a course of immorality sexually." That question, the court said, the jury should determine, and further "You have heard the testimony in the case in regard to the circumstances in which she was placed. You have viewed the scene where she was employed. You have examined by the testimony and your observation what was the character and what was the condition or influence in which the girl was placed by the defendants.

Was or was not it a condition that would necessarily and naturally lead to a life of debauchery of a carnal nature relating to sexual intercourse between man and woman?" The plan and place justified the instructions. The plan might have succeeded if the coarse precipitancy of one of the defendants and the ribaldry of the habitues of the place had not shocked the modesty of the girl. And granting the testimony to be true, of which the jury was the judge, the employment to which she was enticed was an efficient school of debauchery of the special immorality which defendants contend the statute was designed to cover.

Judgment affirmed.

BENNETT *v.* UNITED STATES.

ERROR AND CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 603. Argued January 8, 1913.—Decided February 24, 1913.

Hoke v. *United States*, *ante*, p. 308, followed to effect that the White Slave Traffic Act of June 25, 1910, is constitutional.

A variance in names cannot prejudice defendant if the allegation in the indictment and the proof so correspond that the defendant is informed of the charge and protected against another prosecution for the same offense.

Variances as to the name of the woman transported or in the place where the tickets were procured or as to the number transported, between the indictment and proof of offenses under the White Slave Traffic Act *held* not to have prejudiced the defendants and not to be reversible error.

Instructions to the jury that there is testimony tending to corroborate the testimony of a witness charged with being an accomplice and that it is for the jury to consider the force and value of the testimony and the weight to be given to it, is sufficient to properly leave the matter with the jury.

194 Fed. Rep. 630, affirmed.

THE facts, which involve the constitutionality and construction of the White Slave Act and the validity of an indictment and conviction thereunder, are stated in the opinion.

Mr. Max Levy for plaintiff in error:

The only authority that Congress could have to enact the statute in question is the commerce clause in Art. I, par. 2 of § 8 of the Constitution of the United States.

A careful analysis of the statute develops—First, that it is not a crime for a common carrier to carry a person from place to place for the purpose of prostitution, or for any other purpose.

Second. The person traveling, or being carried, cannot be punished for traveling on the common carrier, notwithstanding the fact that she may be traveling voluntarily for the purpose of prostitution.

Third. It is only the person who purchases the ticket, etc., or in any way advises a woman or girl to travel interstate who is punished. In other words, the accessory is punished, and not the principal.

The power to regulate interstate commerce cannot infringe upon the police powers of the State; persons are not subjects of commerce. *New York* v. *Miln*, 11 Pet. 102.

The true test as to whether an article or thing is a proper subject of commerce and can be considered as a commercial article is whether the said article or thing is merchantable. *Bowman* v. *Chicago & C. Ry. Co.*, 125 U. S. 489; *Boyce* v. *Anderson*, 2 Pet. 149; *The License Cases*, 5 How. 599.

Under power to regulate commerce, Congress has no power to declare the status which any person shall sustain while in a State. 17 Amer. & Eng. Ency. of Law, 2d ed., p. 52; *Lemmon* v. *People*, 26 Barb. (N. Y.) 270, aff'd 20 N. Y. 562.

The intent in a case of this character does not govern, but it is the condition in which each article or subject is found. *United States* v. *E. C. Knight & Co.*, 156 U. S. 1.

Congress has no right to regulate or punish prostitutes.

The crime of prostitution, or the procuring of prostitution in any of the States of the Union, if committed in any of them, comes under the police powers of the various States with which Congress has no right to interfere.

The various States of the Union have not delegated to Congress the right to interfere with their police powers, such as the regulation of prostitution, etc.

The Government of the United States is one of enumerated powers, and all powers not granted are reserved to the people. *Kansas* v. *Colorado*, 206 U. S. 46, 89; *Fairbanks* v. *United States*, 181 U. S. 283.

An unconstitutional act is not a law. It is in legal contemplation as though it had never been passed. *Norton* v. *Shelby County*, 118 U. S. 425.

Congress, under the commerce clause of the Constitution, has power to regulate the commerce and perhaps forbid commerce in any commodity, or to forbid any particular form of commerce, and when it has exercised that power of regulation, then, and not until then, the power to enact a criminal statute as a convenient means of carrying into execution the power to forbid under the commerce clause arises.

The non-exercise by Congress of its power to regulate commerce among the several States is equivalent to a declaration by that body that such commerce shall be free from restrictions. *Welton* v. *Missouri*, 91 U. S. 275; *Hall* v. *De Cuir*, 95 U. S. 485; *Webber* v. *Virginia*, 103 U. S. 344, 351; *Smith* v. *Alabama*, 124 U. S. 465, 473.

Now, then, Congress having passed no act making it unlawful for women to travel from State to State for any purpose, it is equivalent to the declaration of Congress

that such travel by such person shall be free and untrammelled. *United States* v. *Dewitt*, 9 Wall. 41.

Congress not having passed a law prohibiting women from traveling for any purpose, it cannot be a crime to aid such women in traveling from place to place.

Congress has not exercised its power to direct that no woman or girl shall travel from place to place for any purpose whatever, moral or immoral, but, on the contrary, by its failure to so legislate, by its very negative act, has declared that right to exist.

There is a clear distinction between lottery dealing and the white slavery traffic, and the *Lottery Cases*, 188 U. S. 321, do not apply, as they do not refer to transportation of persons but only of things.

Congress has no right to keep any person from traveling from State to State, because the person arriving at his destination intends to commit a crime upon his arrival. And if such person did commit a crime upon his arrival in a sister State, the Government of the United States could not assume jurisdiction because such person had traveled in interstate commerce for a criminal purpose. The police power of the State is supreme in such a case.

Even aliens come under the regulation of the police powers of a State as soon as they mingle with and become a part and parcel of the population of the State, and are then subject to the penal laws of such State. *Keller* v. *United States*, 213 U. S. 138.

Freedom of travel and intercourse cannot be infringed. *The Passenger Cases*, 7 How. 283, 426.

The statute is unconstitutional as denying equal protection of the laws.

The various States have never surrendered the police power to Congress, and, therefore, the law in question is an infringement upon the police powers of the State. *King* v. *American Transportation Co.*, 14 Fed. Cases, 512.

It is not within the province of Congress, or of any

legislative body, to restrict or restrain the migration of any person, or their social intercourse. Freund on Police Power, pp. 487, 528, 720; *Ex parte Smith*, 135 Missouri, 223; *Paralee* v. *Camden*, 49 Arkansas, 165; *Millikin* v. *Weatherford*, 54 Texas, 388; *In re Lee Sing et al.*, 43 Fed. Rep. 359.

Mr. Assistant Attorney General Harr for the United States.[1]

Mr. Justice McKenna delivered the opinion of the court.

Plaintiff in error and petitioner was indicted in the District Court for the Southern District of Ohio for the violation of the act of June 25, 1910. She filed a motion to quash and a demurrer to the indictment, which were overruled, and upon a plea of not guilty she was tried, convicted, and sentenced to eleven months imprisonment in the county jail of Miami County, Ohio, and to pay the costs of the prosecution.

She made motions for a new trial and in arrest of judgment, which were overruled, and she then prosecuted error to the Circuit Court of Appeals, where the judgment against her was affirmed. 194 Fed. Rep. 630.

The demurrer and the motion in arrest of judgment raised the question of the constitutionality of the statute, and the decision of the Circuit Court of Appeals sustaining the ruling of the District Court is assigned as error. The constitutionality of the law was decided in No. 381, *Hoke* v. *United States*, *ante*, p. 308, and the reasons there given need not be repeated.

Rulings of the District Court and the decision of the Circuit Court of Appeals upon them are also assigned as error.

[1] See abstract of argument for the United States in *Hoke* v. *United States*, *ante*, p. 313.

(1) Defendant was indicted for having caused the transportation of Opal Clarke, and, it is said, the testimony showed that her correct name was Jeanette but that she had gone by the names of Opal and Nellie, her real name, however, being Jeanette Laplante. A variance is hence asserted between the allegation and the proof. The Court of Appeals rightly disposed of the contention. As the court said, the essential thing in the requirement of correspondence between the allegation of the name of the woman transported and the proof is that the record be in such shape as to inform the defendant of the charge against her and to protect her against another prosecution for the same offense. The record is sufficient for both purposes. As the Court of Appeals said, "This leaves no possible ground for prejudice resulting from the double variance between the name used in the indictment and the name known to the respondent and the real name."

(2) The defendant, at the conclusion of the testimony, moved the court to instruct the jury to return a verdict of not guilty on the second count of the indictment for the reason that the indictment alleged that the tickets were procured at Chicago, Illinois, whereas the testimony showed that they were procured in Cincinnati, Ohio. The Circuit Court of Appeals did not pass on that assignment. It was either not made or it was considered to have no substantial support by the testimony. The only testimony referred to is that the tickets were purchased in Cincinnati and sent to the depot at Chicago, where the women transported got them and used them for transportation from there. It is not possible to imagine that the variance caused any prejudice, and the assignment may be passed without further comment.

(3) Another variance is asserted, in that the indictment charged the transportation of two women and the proof established the transportation of one. This again is a contention which has more of technicality than substance.

How what the defendant did not do can be considered material description of what she did do is not easy to imagine.

(4) There are errors assigned on instructions requested and instructions refused. The contention of defendant apparently is that both women charged to have been transported should have been objects of her intention and purpose. That aspect of the contention we have disposed of. So far as the instructions refused directed the attention of the jury to the intent and purpose alleged, they were covered by the general charge of the court.

(5) The basis of this contention is that Opal Clarke was the accomplice of defendant as to Ella Parks and that hence the court erred in its instructions to the jury in regard to the extent of the corroboration Opal Clarke's testimony had received.

The instruction complained of submitted to the jury the fact and warned against a conviction upon the uncorroborated testimony of an accomplice and said: "Necessarily, if you find that she was an accomplice with respect to these charges or any of them, you will then necessarily have to inquire into the facts as to whether or not there is corroborating testimony. There is evidence tending to corroborate her testimony and it is for you to consider its force and value and the weight to give to it." The contention is that this was error, "as the court instructed the jury that there *was* corroborating evidence, when the court should have charged the jury that it was for them to ascertain from the testimony whether or not there was corroborating testimony." The objection is hypercritical. The court did not instruct the jury that there was corroborating testimony, but testimony of that tendency, and added that the force and weight of its corroborating power was for the jury to determine.

The record presents no error and the judgment is

Affirmed.

HARRIS, ALIAS SMITH, AND GREEN *v.* UNITED STATES.

ERROR AND CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 602. Argued January 7, 8, 1913.—Decided February 24, 1913.

Hoke v. *United States*, *ante*, p. 308, followed to effect that the White Slave Traffic Act of 1910 is constitutional.

Bennett v. *United States*, *ante*, p. 333, followed to effect that variances between the indictment and proof which did not prejudice defendants as to names of women transported for immoral purposes in violation of the White Slave Traffic Act, are not fatal.

The point of variance between indictment and proof relied on in this case not having been made in the trial court or Circuit Court of Appeals, comes too late when made in this court.

194 Fed. Rep. 634, affirmed.

THE facts, which involve the constitutionality and construction of the White Slave Act and the validity of an indictment and conviction thereunder, are stated in the opinion.

Mr. Max Levy for plaintiff in error.[1]

Mr. Assistant Attorney General Harr for the United States.[2]

MR. JUSTICE MCKENNA delivered the opinion of the court.

Indictment under the act of June 25, 1910. It contains three counts charging defendants (we shall so call plaintiffs

[1] See abstract of argument for plaintiffs in error in *Bennett* v. *United States*, *ante*, p. 334.

[2] See abstract of argument for United States in *Hoke* v. *United States*, *ante*, p. 313.

in error and petitioners) with transporting and causing to be transported in interstate commerce certain named women, for the purpose of prostitution.

After a demurrer to the indictment was overruled and trial upon the plea of not guilty, defendants were convicted, and defendant Harris was sentenced to four years' imprisonment and defendant Green for one year, both to pay costs of prosecution, and judgment was entered accordingly. The judgment was affirmed by the Circuit Court of Appeals. 194 Fed. Rep. 634.

The question of the constitutionality of the law was raised as in the cases which we have just decided, and nothing need be added to the opinion expressed in No. 381, *Hoke* v. *United States*, *ante*, p. 308, and we will pass to the errors assigned.

It is contended that there is a variance between the allegations and proof, in that the women transported were named in the indictment as Nellie Stover and Stella Larkins and that the proof shows the latter's name was Estelle Bowles and the right name of Nellie Stover was Myrtie Watson. The point was not made either in the trial court or in the Court of Appeals. It comes, therefore, too late. But see, however, the opinion in No. 603, *Bennett* v. *United States*, *ante*, p. 333.

The next point made by defendants is that defendant Harris was entitled to an acquittal because of the insufficiency of the evidence to support a verdict of guilty. In passing on this contention the Court of Appeals reviewed the evidence and added its judgment of its sufficiency to that of the jury. We refer to the opinion of the court and concur in its comment and conclusion.

Judgment affirmed.

STUART *v.* UNION PACIFIC RAILROAD COMPANY.

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

No. 135. Argued January 22, 1913.—Decided February 24, 1913.

It has already been decided by this court that the Kansas Pacific Railway Company had a right to build west of the one hundredth meridian.

It has also been heretofore decided that the Pacific Railroad Acts of July 1, 1862, and July 2, 1864, should be considered and construed as one act.

A right of way is a substantial and obvious benefit and if a railroad is entitled to a right of way under an act, it is entitled thereto under a later act extending the route and granting all benefits given under the earlier act.

Even though the record may not show that all the maps of definite location had been filed, a railroad company may acquire under the acts of 1862 and 1864 a right of way by actual construction of the road.

A railroad obtaining a right of way under the acts of 1862 and 1864 retains title thereto whether occupied by it or not.

All persons acquiring public lands after the passage of the Pacific Railroad Acts took the same subject to the right of way conferred by them on the proposed roads. *Railroad Co.* v. *Baldwin*, 103 U. S. 426.

Where the claimants to the same land have both paid the taxes thereon continuously, they stand on equal footing, and the payment does not establish adverse possession.

Under the acts of 1862 and 1864 the Kansas Pacific Railway Company had authority to build west of the one hundredth meridian to Denver and was entitled to a right of way two hundred feet from the center of the track, and that right is superior to claims initiated after the act of 1864, even if prior to the construction of the road; and this right is not defeated by adverse possession.

178 Fed. Rep. 753, affirmed.

THE facts, which involve the title to certain portions of the right of way of the Kansas Pacific Railway now

owned by the Union Pacific Railroad, are stated in the opinion.

Mr. Charles A. Murray, with whom *Mr. Thomas B. Stuart*, *Mr. Louis T. Michener*, *Mr. Perry G. Michener* and *Mr. Joseph C. Helm* were on the brief, for petitioners.

Mr. Clayton C. Dorsey for respondent.

Mr. Joseph C. Ewing, by leave of the court, filed a brief as *amicus curiæ*.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit to quiet title to the E. ½ of the N. W. ¼ and the N. E. ¼ of the S. W. ¼ and the N. W. ¼ of the S. E. ¼ of Section 20, Township 38, Range 67 West, situated in the city and county of Denver (formerly in Arapahoe County), State of Colorado.

The suit was brought in the District Court of the city and county of Denver against the Kansas Pacific Railway Company, the Colorado Eastern Railroad Company and the Union Pacific Railroad Company and removed on the petition of the latter company to the United States Circuit Court for the District of Colorado, on the ground of a separable controversy. A motion to remand was made and denied. The railroad company answered, joining issue as to so much of the lands as constituted a tract 200 feet in width on each side of its road. It asserted title as successor of the Kansas Pacific Railway Company, which had been granted the tract as a right of way, it was alleged, by the acts of Congress generally denominated the Pacific Railroad Acts.

The discussion in the case will turn upon the title of the railroad rather than upon the title of petitioners. There is

no question of their title if that of the respondent company be not good. The Circuit Court held that the title of the company was good and dismissed the bill. The Circuit Court of Appeals decided that the dismissal of the bill was error; that the court should have recognized the company's title to the right of way and have quieted petitioners' title to the remainder. The decree of the Circuit Court was modified accordingly. 178 Fed. Rep. 753.

The Pacific Railroad Acts have been before this court so many times that it seems unnecessary to make further quotation from them. The first of them was passed July 1, 1862 (12 Stat. 489, c. 120): the second one, July 2, 1864 (13 Stat. 356, c. 216), and two others respectively on July 3, 1866 (14 Stat. 79, c. 159), and March 3, 1869 (15 Stat. 324, c. 127). Their relation constitutes the controversy in the case, and, simply stated, it is whether the right of way granted to the Leavenworth, Pawnee & Western Railroad Company, the name of which was changed in 1863 to Union Pacific Railway Company, Eastern Division, and in 1864 to the Kansas Pacific Railway Company, terminated at the one hundredth meridian or extended westward of that point to Denver. The petitioners contend for the former; the railroad company, for the latter.

The explicit contention of petitioners is that the right of way granted to the Kansas Pacific Railway Company (we use the latest name) does not extend to the lands in question, for that company, under its first name of Leavenworth, Pawnee & Western Railroad Company, and all other eastern branches of the main line were authorized to build only to the one hundredth meridian, and no farther.

The main line was, under the act of July 1, 1862, authorized to be constructed by the Union Pacific Railroad Company westward through Cheyenne to the western boundary of Nevada and possibly farther to meet the Central Pacific Railroad, which was authorized to

build from the coast eastward. To the main line so constituted grants of land and bonds were made and a right of way was granted through all public lands "200 feet in width on each side of said railroad where it may pass over public lands." The initial point of the Union Pacific was to be the "100th meridian . . . between the south margin of the valley of the Republican and the north margin of the valley of the Platte, in the Territory of Nebraska."

Section 9 of the act authorized the Leavenworth, Pawnee & Western Railroad to construct a road from the Missouri river at the mouth of the Kansas "to the aforesaid point on the 100th meridian . . . upon the same terms and conditions in all respects" as provided for the main line. The road was required to be so located through Kansas as to be between the mouth of the Kansas river and the designated point on the one hundredth meridian, and, it was provided, that the several roads from Missouri and Iowa authorized by the act to connect with the same could make the connection within the limits prescribed in the act, providing it could be done without deviating from the general direction of the whole line to the Pacific coast.

There is no uncertainty in the act of 1862. The initial point of the main line was the one hundredth meridian, and at that point the Leavenworth, Pawnee and Western Railroad Company (now the Kansas Pacific Railway) and other eastern branches were to connect with the main line.

The next act is that of July 2, 1864, and on its provisions arise the principal controversy in the case. It is contended by the respondent railroad company that the act authorized the Kansas Pacific road (then, as we shall see, the Union Pacific Railroad, Eastern Division) to build westward of the one hundredth meridian, and granted it, besides certain sections of the public lands, a right of way

400 feet wide, 200 feet either side of the center of its track. Petitioners oppose the contention and insist that the act only aimed to provide for the convenient connection of certain branch roads with the main trunk line at or near the one hundredth meridian and did not extend a right of way to any branch beyond the one-hundredth meridian. Comparing the two acts, petitioners say that the act of 1862 referred solely to the right of way through *public* lands. The act of 1864 referred solely to condemnation of right of way through *private* lands and to granting facilities of connection with the Union Pacific through ferries and bridges over navigable rivers. The permission to build westwardly, it is further urged, was not given to all branches but only to such as were made branches by the act of 1864. The contentions are earnestly argued and are made to rest mainly on § 9 of the act.

The act of 1864 was entitled "An Act to amend" the act of 1862, and it was provided by § 9 that " . . . any company authorized by *this* act to construct its road and telegraph line from the Missouri river to the initial point aforesaid [100th meridian] may construct its road and telegraph line so as to connect with the Union Pacific Railroad *at any point westwardly of such initial point*, in case such company shall deem such westward connection more practicable or desirable; and in aid of the construction of so much of its road and telegraph line as shall be a departure from the route hereinbefore provided for its road, *such company shall be entitled to all the benefits*, and be subject to all the conditions and restrictions, of this act: Provided further, however, That the bonds of the United States shall not be issued to such company for a greater amount than is hereinbefore provided, if the same had united with the Union Pacific Railroad on the one hundredth degree of longitude; nor shall such company be entitled to receive any greater amount of alternate sections of public lands than are also herein provided." (Italics ours.)

At the time of the passage of that act the Leavenworth, Pawnee & Western Railroad Company (now the Kansas Pacific Railway Company) was known as the Union Pacific Railroad Company, Eastern Division, in accordance with lawful authority given in 1863. The time for the completion of its line was extended, and by the act of July 3, 1866, it was given until December 1, 1866, to file the map of general route. Upon filing the map the lands along the entire line of the general route were to be reserved by the Secretary of the Interior. It was provided that the company should be entitled only to the same amount of bonds "as they would have been entitled to if they had connected their said line with the Union Pacific Railroad on the 100th degree of longitude as now required by law. And, provided further, that said company shall connect their line of railroad and telegraph with the Union Pacific Railroad, but not at a point more than fifty miles westwardly from the meridian of Denver in Colorado."

By applying very simple rules of construction to these acts and from a consideration of their purpose and the means which were deemed necessary to accomplish that purpose, we should have to reject the contention of plaintiffs. We are relieved, however, of the necessity of a lengthy discussion and one which we might consider necessary, in deference to the earnestness of counsel, by the previous decisions of this court and may rest our judgment on their authority.

The acts of Congress came up for consideration and construction in *Missouri, K. & T. Ry. Co.* v. *Kansas Pacific Ry. Co.*, 97 U. S. 491, 494, upon the very points now involved. The contest was between the two railroad companies as to which was entitled to certain lands, whether the Kansas Pacific Railway Company took them under the act of 1862 as amended in 1864, or whether the Missouri &c. Railway Company was entitled to them under a grant to it made July 26, 1866. It is mani-

fest that the issue presented was an important one and had important consequences. The court intimated that principles and considerations upon which it should be decided affected other rights as well as those contested and necessarily gave them a proportional consideration. The opinion demonstrated it. It was decided that the act of 1862 and that of 1864 practically constituted one act, and the enlargement by the latter of the grant made by the former took effect at the date of the former; and "this was done," it was said, "not by words of a new and additional grant, but by a change of words in the original act, substituting for those there used words of larger import." It was further decided that the act of 1864 "authorized the plaintiff [the Kansas Pacific Railway Company] to construct its road and telegraph line so as to connect with the Union Pacific Railroad at any point westwardly of its initial point, in case it deemed such westward connection more practicable or desirable." This is the language, it will be observed, of § 9 of the act of 1864. The court used it as the best means of expressing the purpose of the act.

In *United States* v. *Kansas Pacific Ry. Co.*, 99 U. S. 455, the extent of the grant made by the acts of 1862 and 1864 again came up for decision, and upon issues more pertinent to the present controversy, if possible, than those in the other case. The case concerned the extent of the lien of the Government and the liability of the company for 5% of the net earnings of that portion of the road of the company west of the one hundredth meridian. The answer was considered as turning on the construction of § 9, *supra*. Commenting on its provisions, the court said (p. 457): "It thus appears that whilst the company was authorized to extend its road west of the one hundredth meridian, if it saw fit so to do, it was entirely in its option; and if it did, it was not to expect, or have, any subsidy of government bonds for such extension."

The road was actually built to Denver, 245 miles beyond the one hundredth meridian, and upon this part of the road the Government claimed a lien as well as upon the road east of the meridian. Passing on the claim, the court said (p. 457): "A material question in this case is, whether the whole line to Denver, or only the line which the company was first authorized to construct (which terminated at the one hundredth meridian), is liable to the lien for the government subsidy, and the payment of five per cent. of net earnings." Answering the question, it was observed (p. 458): "From a careful examination of the statutes relating to this subject, we are of opinion that, whilst, as to its entire line, the company, in the words of the ninth section of the act of 1864, is 'entitled to all the benefits and subject to all the conditions and restrictions of the act,' and is bound to furnish transportation and telegraphic accommodations to the government on the usual terms; yet that the subsidy bonds granted to the company, being granted only in respect of the original road, terminating at the one hundredth meridian, are a lien on that portion only; and that the five per cent. of the net earnings is only demandable on the net earnings of said portion." See also *United States* v. *Union Pacific Railway*, 148 U. S. 562; *Kansas Pacific Ry. Co.* v. *Dunmeyer*, 113 U. S. 629.

It may be said that *Union Pacific Railroad Co.* v. *Harris*, 215 U. S. 386, puts a different construction upon the acts of 1862 and 1864 from that received in the cases cited, and, it must be admitted, there is language in the opinion which may be so understood, but that it was not so intended is made clear by *Kindred* v. *Union Pacific Railroad Co.*, 225 U. S. 582, where it is again declared that under congressional authority the route of the road was changed so that its connection with the Union Pacific Railroad would be made at a point farther west than was originally intended.

These cases decided that the Kansas Pacific Railway Company had a right to build west of the one hundredth meridian. It is not necessary, therefore, to consider the special features of the acts upon which petitioners rest their contention that the Kansas Pacific had no such right. The basic one, however, we will mention, lest it be thought that we have overlooked it or have not properly estimated its force. It is that the acts of 1862 and 1864 should not be considered and construed as one act; that though their provisions had relation in some instances, in others they had independent effect. Section 9, it is contended, is of the latter character, and is given a specific application by the proviso which is in the following words: "And provided further, That any company authorized by *this act* [italics ours] to construct its road and telegraph line from the Missouri river to the initial point aforesaid, may construct its road and telegraph line so as to connect with the Union Pacific Railroad at any point westwardly of such initial point." It is contended that these words exclude the Kansas Pacific Railway Company because the only two railroads authorized by "this act" to be constructed were the Sioux City Railroad (section 17) and the Burlington & Missouri River Railroad (section 18). But that the words "this act" should have such limited application was necessarily involved in the other cases and was adversely decided.

We have seen that the act of July 3, 1866, extended the time of the Union Pacific Railroad Company, Eastern Division (now the Kansas Pacific), to file its map of general route and provided for a reservation of land all along the route; but it also provided that the company should be entitled only to the same amount of bonds as it would have been entitled to if it had connected its line "with the Union Pacific Railroad on the 100th degree of longitude *as now required by law.*" (Italics ours.) It is insisted by petitioners that this provision is a legislative construction

of the act of 1864 and "conclusive upon the point that it was defendant's [Kansas Pacific Railway, then Union Pacific Railroad, Eastern Division], duty at the date of said act to unite with the Union Pacific Railroad at the 100th meridian, and has the same effect as a special enactment of that date to that effect." The Court of Appeals rejected this contention, and construed the provision not as requiring the connection of the roads to be at the given meridian but as declaring that there should not be issued to the company bonds for a greater amount than if there had been a union with the Union Pacific at that point. And this necessarily must have been determined to be the true construction in the cited cases. We have said, perhaps with unnecessary repetition, that all the acts were under consideration in those cases and their true relation and meaning decided.

There are specific contentions addressed to the grant of the right of way. Some of them involve the element that the acts of Congress granted no right to the Kansas Pacific Railway Company to build west of the one hundredth meridian. That we have disposed of. Some of them are based on the following propositions: (1) that a grant of the right of way cannot be implied; it must actually exist in express words; (2) it cannot be implied from the use of the word " 'benefits,' " as there are many other benefits in the same act to which that word more aptly applies; (3) it is shown by the act that it never was intended to apply to the right of way. The last two contentions may be immediately rejected. The act manifestly applies to a right of way, and there is no distinction made between "benefits," for the language is "shall be entitled to all the benefits," save that of receiving bonds. A right of way is a substantial and obvious benefit. *Railroad Co.* v. *Baldwin*, 103 U. S. 426, 430.

There are two other contentions which deserve more extended comment. They are, (a) "that the act of 1864,

being simply an option offered to certain roads to build westwardly," etc., it must be shown that they accepted said option by filing maps thereunder, changing the old route and designating the new one. (b) "That the grant of a right of way is necessarily in the nature of a float, although a grant *in præsenti*, like a military land warrant. It becomes fixed only by filing a map of definite location or by actual construction."

In reply to these contentions the respondent company insists that neither a map of general location nor of general route was necessary to the acquisition of a right of way; that actual construction would secure it. The evidence as to filing maps is somewhat uncertain. The Court of Appeals in its opinion says: "There was some evidence indicating that a map, showing the general route of the railroad westwardly to the eastern Colorado line, was filed with the Secretary of the Interior prior to November 30, 1866, the date not being more definitely stated; that a map showing the general route from the eastern Colorado line to Denver was accepted by that officer November 30, 1866, and that a map showing the definite location of the railroad to Denver was filed in the land office at Denver September 24, 1870; but none of these maps, nor any better statement of what was shown thereon, was offered in evidence."

It is, however, admitted by petitioners that a right of way could be acquired by actual construction of the road, and the railroad company finally rests its title on actual construction of the road under the granting acts. It admits that "the line of railroad was not definitely located until the actual construction thereof." But it is contended that upon its construction "the right of way attached to the line as so constructed, but took effect as of the date of the act of 1864." In other words, it is contended that the right of way granted by the acts is given definite location and precision by the construction of the road and

extends to the width of 200 feet from the center line of the track. This contention is supported by the decisions of this court. *Northern Pacific Railroad Co.* v. *Smith*, 171 U. S. 260. See also *Northern Pacific Ry. Co.* v. *Townsend*, 190 U. S. 267. The road was actually constructed through Denver and to a connection with the Union Pacific at Cheyenne and over the lands in controversy in 1870, and has been in operation ever since. But the right of way to its full width has not been occupied and used. This, however, makes no difference. See cases cited immediately above and *Northern Pac. Ry. Co.* v. *Hasse*, 197 U. S. 9; *Missouri, Kansas & Texas Ry. Co.* v. *Cook*, 163 U. S. 491, 497.

In this connection it is to be remembered that the grant of the right of way differed from the grant of alternate odd-numbered sections in that, while both were expressed in the words of a grant *in præsenti*, the former was without limitation or exception, while the latter was expressly made subject to the limitation or exception that it should not include any lands which, although public at the date of the grant, were sold, reserved or otherwise disposed of by the United States, or to which a preëmption or homestead claim had attached, at the date of definite location. Of such a difference between an unconditional grant of a right of way and a qualified grant of alternate odd-numbered sections this court said, in *Railroad Co.* v. *Baldwin*, 103 U. S. 426, 430: "The uncertainty as to the ultimate location of the line of the road is recognized throughout the act, and where any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists. We see no reason, therefore, for not giving to the words of present grant with respect to the

right of way the same construction which we should be compelled to give, according to our repeated decisions, to the grant of lands had no limitation been expressed. We are of opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road."

Petitioners rely upon adverse possession, established, as it is contended, under the statute of Colorado by the payment of taxes, and invoke in connection with such adverse possession the act of June 24, 1912, 37 Stat. 138, c. 181, entitled "An Act legalizing certain conveyances heretofore made by the Union Pacific Railroad Company."

Section 1 of the act legalizes all conveyances made by the railroad and railway companies to which grants of a right of way have been made, as we have stated, to the extent that the conveyances "would have been legal or valid if the land involved therein had been held by the corporation making such conveyance or agreement under absolute or fee simple title." It is further provided that where adverse possession is claimed of any part of such right of way under the laws of the State where the land is situated, such adverse possession shall have the same effect as though the right of way had been granted absolutely or in fee simple instead of being granted as a right of way. Of the effect of this act we are not called upon to express an opinion other than to say that it cannot avail petitioners, for the record shows that the respondent company also returned the right of way for taxation and paid the taxes thereon. In that respect the parties are on an equal footing.

Decree affirmed.

MR. JUSTICE HOLMES and MR. JUSTICE PITNEY took no part in the decision.

NORTHERN PACIFIC RAILWAY COMPANY *v.* UNITED STATES.

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

No. 500. Argued January 8, 9, 1913.—Decided February 24, 1913.

While punctuation is a fallible standard of the meaning of a statute, the location of commas in the description of a boundary line may be considered.

Where there is confusion in the calls bounding land described in a treaty, the effort of this court should be to execute the intention of the treaty makers.

In construing a treaty with Indians ceding lands the court will consider the differences in power and intelligence of the Indians and will not so construe it as to make it an instrument of fraud to deprive the Indians of more than they understood they were ceding.

The western boundary of the reservation of the Yakima Indians reserved by treaty of 1855 is defined by the greater boundaries of nature which the Indians understood and estimated, and so *held* that the main ridge of the Cascade Mountains is the western boundary and not the inferior ridges and spurs.

The action of the Land Department in approving a survey of a treaty reservation must be given strong consideration, but is not always controlling, and *quære* whether the rule that such action should only be disturbed for clear and convincing reason applies when the Government is proceeding in behalf of the Indians.

The rule that resolves doubts in favor of patents issued by the United States does not apply to those issued for land within the boundaries of an Indian reservation fixed by treaty.

The act of March 2, 1896, 29 Stat. 42, was one of a series of acts and applies only to public lands open to entry and not to lands within an Indian reservation.

Purchasers from railroads, even though in good faith, are not *bona fide* purchasers under the public land laws.

191 Fed. Rep. 947, affirmed.

THE facts, which involve the validity of certain patents for land issued to the Northern Pacific Railroad Company and the construction of the treaty of 1855 with the Yakima Indians, are stated in the opinion.

Mr. Charles Donnelly, with whom *Mr. Charles W. Bunn* was on the brief, for appellants.

Mr. Assistant Attorney General Knaebel, with whom *Mr. S. W. Williams* was on the brief, for the United States.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Bill in equity by the United States to annul patents issued May 10, 1895, and January 6, 1896, to the Northern Pacific Railroad Company, and March 5, 1901, and January 4, 1904, to its successor, the Northern Pacific Railway Company, for certain described lands. The foundation of the bill is that the patents were issued by mistake as public lands granted to the railroad company under the act of Congress dated July 2, 1864 (13 Stat. 365, c. 217), the lands actually being, it is alleged by the Government, part of the Yakima Indian Reservation under a treaty with the Yakimas of June 9, 1855 (12 Stat. 951), ratified March 8, 1859, and proclaimed by the President April 18, 1859.

There is no question made of the title of the railroad and railway companies or of their respective vendees other than as the lands fall within or without the reservation. If they were within the boundaries of the reservation they were lands of the Indians; otherwise, public lands of the United States and passed to the companies, respectively, under the act of Congress and the patents issued in pursuance thereof.

The question then is, What were the boundaries of the reservation, or—to use the present tense as the more convenient—what are the boundaries of the reservation?

By article 1 of the treaty the Indians ceded, relinquished and conveyed to the United States a tract of land which was explicitly described, reserving by article 2, from the tract the land included within the following boundaries:

"Commencing on the Yakima River, at the mouth of the Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickitat and Pisco rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning."

All of this tract, it is provided, "shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit" of the Indians, as an Indian reservation.

It will be observed that the calls in the description of the tract reserved are very confident and seem to assure certainty by prominent and unmistakable natural monuments. Controversies, however, almost immediately arose, the Indians contending for one location of the calls and enterprising settlers contending for another. The Interior Department ordered a survey, which was made and which is known in this record as the Schwartz survey. Upon this the title of appellants depends. The discontent of the Indians continued and another survey was ordered by the Interior Department to be made by E. C. Barnard. This survey is the foundation of the bill and of the contention of the Government. It was made and reported to the Interior Department with a map delineating the exterior boundaries of the reservation. This report was transmitted to the Speaker of the House of Representatives with a draft of a bill granting authority for the detail by the Secretary of the Interior of an Indian inspector to negotiate an agreement with the Indians for the adjust-

ment of their claim for the lands embraced in the tract claimed by them, containing 293,837 acres, as shown by the Barnard report, that is, for lands without the Schwartz but within the Barnard survey.

In pursuance of the recommendation of the Secretary of the Interior, Congress, on December 21, 1904, enacted the statute quoted in the margin.[1] (33 Stat. 595, c. 22.)

After the passage of the act the Government demanded a reconveyance of the lands, which was refused. This suit was then brought.

The controversy in the case, therefore, turns upon which of the surveys, Schwartz' or Barnard's, correctly marks the boundaries of the reservation. The difference in the surveys amounts to 293,837 acres. The Circuit Court accepted the Barnard survey and entered a decree cancelling the patents. The decree was affirmed by the Circuit Court of Appeals. 191 Fed. Rep. 947.

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[1] SEC. 1. That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of unallotted lands embraced in the Yakima Indian Reservation proper, in the State of Washington, set aside and established by treaty with the Yakima Nation of Indians, dated June eight, eighteen hundred and fifty-five: *Provided*, That the claim of said Indians to the tract of land adjoining their present reservation on the west, excluded by erroneous boundary survey and containing approximately two hundred and ninety-three thousand eight hundred and thirty-seven acres, according to the findings, after examination, of Mr. E. C. Barnard, topographer of the Geological Survey, approved by the Secretary of the Interior April seventh, nineteen hundred, is hereby recognized, and the said tract shall be regarded as a part of the Yakima Indian Reservation for the purposes of this Act: *Provided further*, That where valid rights have been acquired prior to March fifth, nineteen hundred and four, to lands within said tract by *bona fide* settlers or purchasers under the public land laws, such rights shall not be abridged, and any claim of said Indians to these lands is hereby declared to be fully compensated for by the expenditure of money heretofore made for their benefit and in the construction of irrigation works on the Yakima Indian Reservation.

The special controversy in the case is the location of the western boundary of the reservation. But as partly determinative of that the western point of the northern boundary must be considered. The northern boundary of the reservation commences at the junction of the Yakima and Attahnam rivers and proceeds to the forks of the latter and along its southern tributary to the "Cascade Mountains." What constitutes the Cascade Mountains is the first serious dispute in the case. The appellants contend that the mountains are given location by the termination of the southern tributary of the Attahnam River. In other words, the headwaters of that tributary mark the Cascade Mountains. But the next call is to be considered. By that call the line is to run "southerly along the main ridge of said mountains," and as said by the Circuit Court, the line must reach the main ridge to run southerly along it. The court erred, appellants contend, by assuming that the treaty makers meant to designate the *main ridge* of the mountains instead of *a ridge* of the mountains. We cannot, of course, reproduce all of the argument of counsel. It is, in effect, that the treaty makers meant what they said, that their knowledge was not imperfect, that they knew where the waters of the Attahnam River terminated and they turned south from there along "that ridge of those mountains" in which they found themselves. Assuming this, it is said, "every difficulty in following the calls of the treaty at once disappears." But the difficulties do not disappear; they multiply, and mountains and rivers appear to conflict in their testimony. The next call must be changed to be accommodated to counsels' view. That call, in full, is this: "Thence southerly along the main ridge of said mountains [Cascade Mountains], passing south and east of Mount Adams, to the spur whence flows the waters of the Klickitat and Pisco Rivers." Counsel would strike out the comma after the word "mountains" and the

comma after the word "Adams," asserting then the main ridge to be that which passes (passing) south and east of Mount Adams to the spur whence flows the waters of the Klickitat and Pisco rivers. In other words, the call primarily locates and defines the ridge and not the boundary line. And so change the call, it is further said, and there is intelligible continuity between it and the next call, which reads, "thence down said spur (whence flow the waters of the Klickitat and Pisco rivers) to the divide between the waters of said rivers." Punctuation, it may be admitted, is a fallible standard of the meaning of a statute (*Ewing* v. *Burnet*, 11 Pet. 41, 54; *Hammock* v. *Loan & Trust Co.*, 105 U. S. 77, 84, 85). It is, however, not without force, and in the present case the location of the commas is consistent with the purpose of simply marking the course of the boundary line. But even without changing the punctuation, counsel contend "that the words 'passing south and east of Mount Adams' qualify the word 'mountains' and indicate which ridge was intended, namely *a* main ridge (as distinguished from spurs or 'subdivides') which should pass south and east of Mount Adams." We cannot assume a plurality of main ridges and that the treaty meant to distinguish one from the others. The main ridge necessarily had a definite and conspicuous individuality and needed no identification. It is used in Article 1 of the treaty to mark the course of the boundary line of the tract ceded by the Indians to the United States. The Indians always claimed it as the western boundary of the reservation and the earliest maps confirmed the claim. Schwartz had no difficulty in determining it. He did not run his line to it because he considered other calls were more controlling. He was in no uncertainty as to its location. It was and is a natural and conspicuous landmark and was selected to define the immense area of land ceded by the Indians to the United States and the lesser though extensive tract

reserved by them for their own use. We must keep in mind their situation—what they gave and what they reserved. They were not deeding, as the Government forcibly says, acres or even townships. They gave up a principality. They reserved, it is true, a much lesser tract, but it was natural and inevitable that "the greater boundaries of nature" should be selected to define both. These the Indians could understand and estimate. "The inferior ridges or spurs, connected with but leading away from the main ridge," could not be so definitely intelligible. The Indians had to be satisfied. They entered into negotiations with the representative of the Government reluctantly, their chief testified. They feared the encroachments of the white man. Their fears were allayed by adapting the treaty to their understanding, by delineating the land they conveyed and the land they reserved by great and commanding objects. They have never indicated by word or act that the main ridge was not single and distinct in their minds or that it was at any time confounded by them with lesser ridges. They never have wavered in the expression of their understanding and their insistence that it constituted the western boundary of the reservation and that it extended to the base of Mount Adams on the south. They always had, as we shall see, an intelligible conception of the western boundary and its definition by natural objects. It is only by regarding this understanding and the more prominent natural objects that the calls of the treaty can be accommodated to the topography of the country.

Some of the natural objects, considered by themselves, it may be admitted support the contention of appellants. The most important of these is that mentioned in the fifth call of the treaty. According to the fourth call the line runs southerly along the main ridge to the spur whence flow the waters of the Klickitat and Pisco rivers, and (5th) "thence down said spur *to the divide between the waters*

of said rivers." (Italics ours.) It was this call which determined Schwartz' survey. He knew that the main ridge of the Cascades is west of the tributary of the Attahnam River, but he put it out of consideration or effect. He regarded what he conceived to be the divide between the waters of the Klickitat and Pisco rivers as dominating all other calls, although he was directed to confer with the agent at the Yakima Agency, with other white persons and with Indians familiar with the country, and obtain all the information possible and that would tend to a proper location and establishment, according to the provisions of the treaty, of the section of the boundary line he was directed to survey. He did not run his line to the main ridge of the mountains, because, as he said, he "could not do it without crossing the Klickitat River, and the treaty did not call for that." This was his error. He gave too much strength to some of the calls of the treaty and against other calls without attempting to give them all effect from a consideration of the topography of the country and the testimony he was directed to take. In this attitude of mind he made his survey and seems to have rejected everything which would disturb it.

We realize that there is confusion in the calls, irreconcilability, it may be from some points of view; but our effort must be to ascertain and execute the intention of the treaty makers, and as an element in the effort we have declared that concession must be made to the understanding of the Indians in redress of the differences in the power and intelligence of the contracting parties. *United States* v. *Winans,* 198 U. S. 371. The present case invokes in special degree the principle.

As we have seen, there were certain conspicuous landmarks which would attract the attention and be intelligible to the understanding of the Indians. Lesser marks would be given no significance. We have already observed the importance in this regard of the main ridge of the

mountains, and it was given emphasis besides by such a conspicuous object as Mount Adams. Mr. Barnard testified that Goat Rocks are prominent points on the main ridge and that Indian Chief Spencer told him that the northern line extended westward from the head of the Attahnam River to a sharp point east of Goat Rocks, which point was plainly visible and a well-marked feature in the landscape, and that the boundary line extended to a conical hump on the southeast slope of Mount Adams, which is well defined and plainly visible. The map made by the direction of Governor Stevens in 1857, to show the Indian reservations in Washington Territory at that time, and also the White Swan map show that the northern boundary runs to the main ridge of the mountains.

The Stevens map, though vouched for by him to be accurate, has many inaccuracies, as now demonstrated by a better knowledge of the country, and adds to the confusion if we seek to extend its testimony beyond a confirmation of the Indians' claim that the main ridge of the mountains is the western line of the reservation. By it the south fork of the Attahnam River is made to reach the summit of the Cascade far west of Mount Adams, and the line is run thence for some distance south on the ridge; thence southeasterly to the divide between the Satass and Columbia rivers. The tract delineated is relatively narrow from north to south, due probably, as the Government says, to a misunderstanding of the true situation of the Satass-Columbia divide and a failure to bring the west line down the main ridge to the southeasterly slope of Mount Adams as required by the treaty. There is another inaccuracy. The map shows the Klickitat River as heading west of the spur upon which Mount Adams is represented as rising. The mistake, now known to be such, shows how imperfect knowledge of the country was and the importance of giving effect to the more commanding features of the landscape.

Schwartz turned from the 51st mile post sharply north, deeming, as we have seen, the divide between the waters of the Klickitat and Pisco rivers as controlling. But to the west of the 51st mile post there is a mountain called Grayback, which the Indians claim was on the boundary line of the reservation. Schwartz disregarded it, although he testified that there was a ridge running westerly from a point a little south of the 51st mile post terminating in the Grayback mountain. He did not follow that ridge, he says, because it formed the divide between the waters of the Klickitat and Columbia rivers and did not form the watershed of the waters flowing into the Satass River. And yet Barnard, considering the calls of the treaty and in adaptation of them to the topography of the country, followed that ridge as part of the southern boundary, and in 1861 it was surveyed as part of the southern boundary. The survey is called the Berry & Lodge survey and was made by the direction of the Superintendent of Indian Affairs for the Territory of Washington. He directed them to proceed from the Yakima River westerly along the divide between the Satass and Columbia rivers and along the divide between the Klickitat and Pisco rivers until they arrived at the source of either the latter or the former, where they should terminate the survey. He added: "Should you find before arriving at the source of either of these rivers that the 'divide' has assumed the character of a perfect natural boundary, you will terminate your survey at the point where this description of boundary is attained." The plat of the survey indicates that the south boundary was run to a point on or near the Klickitat River and marks that stream as originating on the south slope of Mount Adams and flowing thence southwesterly. It also shows a tributary of the Pisco River as headed near the east side of the mountain and a spur of hills projecting between them southeasterly to meet the ridge constituting the Satass-Columbia divide. The field notes of the survey

are attached to the Government's brief and have this note: "South boundary only was surveyed, in accordance with the instructions of the Superintendent. The other boundaries are defined naturally." Some of the marks and posts of this survey were found by Barnard.

One other piece of evidence needs only to be adduced. Two Indians, one of them Chief Spencer, told him that in 1860 they accompanied certain Government agents of Governor Stevens along the southern boundary of the reservation, proceeding along a well defined ridge to Grayback Peak, upon the summit of which a marked wooden post was found set in the ground. From there, the agents told them, after sighting through an instrument pointed at a conical hump on the southeast slope of Mount Adams, that the line went straight to that point. This account was subsequently repeated. Chief Spencer (it was to this chief that Governor Stevens addressed himself in regard to the Indians removing to the reservation) testified that Governor Stevens promised to stake out the reservation and that some Government men, while standing with him at the junction of an Indian trail on a road called the Goldendale Road and which is marked on the Barnard map as being between Mount Adams and Grayback, told him that the line ran from one to the other and that Goat Rocks would be the northwest corner. He further testified that at the forks of the road and the trail there was a blazed tree on one side and a pile of rocks on the other. The statement received corroboration from Barnard, who testified that he discovered a blaze forty years old upon one of two large pine trees at the place indicated, both of which had been anciently blazed.

There is evidence which may be adduced in corroboration of the testimony of the respective witnesses, but we have referred to enough to indicate the character and relative strength of that which makes for or against the contentions of the parties, and, considerately weighing

it, we think it establishes the correctness of the Barnard survey. And we have arrived at and announce this conclusion with full sense of the weight which should be given to the action of the Land Department in approving the Schwartz survey and the issue of the patents. The action of the Land Department is necessarily a strong consideration. But it is opposed by later action and also by congressional action. At any rate, the action of the department has been brought in controversy, and because it may be supported by plausible or even strong arguments, it does not follow that the opposing claim becomes immediately so doubtful as to determine judgment against it. On the contrary, the question must be examined and decided with due regard to the entire situation, keeping in mind the action of the department as an element to be considered and applying the rule of the cases that it should not be disturbed except for reasons that are clear and convincing, assuming, without deciding, that the rule applies to a case in which the Government is proceeding in the right of the Indians.

The Court of Appeals expressed the view that the rule that resolves doubts in favor of the patent issued by the United States does not apply in such case, citing *Leavenworth Railroad Co.* v. *United States*, 92 U. S. 733; *Stewart* v. *United States*, 206 U. S. 185; *Minnesota* v. *Hitchcock*, 185 U. S. 373. Much can be said in support of that view. It must be borne in mind that the Indians had the primary right. The rights the Government has are derived through the cession from the Indians. If the Government may control the cession and control the survey and by the action of its agents foreclose inquiry or determine it, an easy means of rapacity is afforded, much quieter but as effectual as fraud. We should hesitate to put the Government in that attitude. It rejects that attitude and accepts a greater responsibility. It yields to the rule which this court has declared—that it "will

construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right without regard to technical rules,' 119 U. S. 1; 175 U. S. 1." *United States* v. *Winans, supra.*

It is contended that the Northern Pacific Railway Company and the individual appellants are *bona fide* purchasers and, as such, entitled to protection under the act of March 2, 1896 (29 Stat. 42, c. 39). Section 1 of that act provides that suits brought by the United States to vacate and annul any patent to lands theretofore erroneously issued under a railroad or wagon road grant should only be brought within five years from the passage of the act, and suits brought to annul patents issued after the passage of the act should be brought within six years. And it is provided "That no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed." The act was one of a series of acts and manifestly applies only to the public lands of the United States subject to acquisition under the laws enacted for the disposition of the public domain.

We have seen that the act of December 21, 1904, protects rights acquired prior to March 5, 1904, to lands within the Barnard survey "by *bona fide* settlers or purchasers under the public land laws."

The appellants are not within that class, nor for the reasons we have stated can they avail themselves of the defense of the statute of limitations under § 8 of the acts of March 3, 1891. 26 Stat. 1093, 1099, cc. 559, 561.

Decree affirmed.

WADKINS *v.* PRODUCERS OIL COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 638. Argued January 31, 1913.—Decided February 24, 1913.

Where defendant's claim to land formerly part of the public domain is based on his grantor's rights under the statutes governing the disposition thereof, and sustained by the construction given to such statutes by the state court, the decision against the plaintiff involves the denial of a Federal right as asserted by him.

Under §§ 2291, 2292, Rev. Stat., no rights accrue to the wife of an entryman who dies before the entry is perfected, and nothing passes under the inheritance laws of the State in which the land is situated.

Under § 3 of the act of May 14, 1880, providing that settlers might file homestead entries and that their rights should relate back to date of settlement; the inchoate right is initiated by the settlement and the perfected right when evidenced by patent finally obtained relates back to that date, but no vested right is obtained until full compliance with the provisions of the act.

Where a statute of the United States gives definite rights on the happening of certain contingencies, no rights can vest until such contingencies happen, and unless the wife survives the entryman and becomes his widow she acquires no rights to the land, whether the entry was made before or after her marriage to the entryman.

Prior to patent the rights of the entryman are essentially inchoate and exclusively within the operation of the laws of the United States, and where those laws designate the beneficiaries of a compliance therewith, state laws are excluded. *McCune* v. *Essig*, 199 U. S. 382.

An entryman, prior to marriage, settled on the land but made his entry after marriage; prior to perfection and patent his wife died leaving children; after perfecting and obtaining a patent he sold. *Held* that he perfected the entry in his own right and under §§ 2291, 2293, his wife had acquired no interest therein which descended to her children under the law of the State.

129 Louisiana, 484, affirmed.

THE facts, which involve the construction of the Homestead Entry Law of the United States and the rights of an entryman and of his wife, are stated in the opinion.

Mr. S. L. Herold, with whom *Mr. W. P. Hall* and *Mr. J. A. Thigpen* were on the brief, for plaintiff in error.

Mr. Amos L. Beaty for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action brought in the First Judicial District Court of Louisiana, in and for the Parish of Caddo, by plaintiff in error (and as he was plaintiff below we shall so call him) against the defendants in error (herein referred to as defendants) for the recognition of Effie Bell Wadkins, represented by him as her natural tutor, as owner of an undivided one-half interest in and to the S. E. ¼ of section 3, township 20 North, range 16 West, Caddo Parish, Louisiana, and to put her in possession thereof, and to require the defendants to pay for all the oil and other minerals extracted therefrom, and, as tutor of said minor, to have judgment against them *in solido* for market value of one-half of all oil, gas and other minerals that have been produced up to date and which may be produced.

Judgment was entered recognizing the minor as the owner of an undivided one-half interest in the land, as prayed, and for $86,328.24, the value of the oil extracted therefrom, with interest and costs. The right of the minor to a further accounting was also reserved. The judgment was reversed by the Supreme Court of the State. 129 Louisiana, 484.

The question in the case is whether a homestead entry made by the father of the minor is community property, her mother having died before the perfection of the entry.

The facts, as taken from the opinion of the Supreme Court, are as follows: In June, 1893, W. H. Wadkins, father of Effie, the minor, settled on the land with the view of acquiring it as a homestead. On February 25, 1895, he made application for and obtained a preliminary homestead entry at the proper local land office. At the end of five years, to wit, on September 8, 1898, he made final proof and secured a final homestead entry, upon which he subsequently obtained a patent.

Wadkins married the mother of the minor on June 24, 1894; she died December 5, 1896. Two children were born of this marriage, one of whom died at the age of two years; the other is the plaintiff.

The defendants are oil and gas companies operating in the Caddo oil and gas fields, the Producers Oil Company operating under a lease from the other company. The property has produced and is still producing a large amount of oil.

A motion is made to dismiss. As pertinent to the motion the answer of the Producers Oil Company must be considered. It alleges that Wadkins actually settled upon the land on or before December 12, 1893, under the homestead laws of the United States, the land then being public land of the United States and subject to settlement and entry under those laws, and did not marry the mother of plaintiff until several months later; that the patent was issued as early as December 12, 1898, thereby fixing and determining the date of settlement as being at least five years prior thereto; that defendant is the lessee of its co-defendant, who claims to own and does own the land in fee simple by regular conveyance from Wadkins, and that defendant, therefore, claims a right, title, privilege and immunity under the statutes of the United States, and particularly under the acts of Congress governing homestead entries on the public lands of the United States, and that under those statutes plaintiff has no right, title or interest in the lands.

The answer of the Atlanta & Shreveport Oil and Gas Company alleges substantially the same facts and that "all allegations of its co-defendant as to Federal questions are adopted and made part" of defendant's answer.

It will appear in our discussion of the case that the Federal right thus invoked was passed on by the Supreme Court of the State and was an element in its decision against plaintiff. The motion to dismiss is therefore overruled.

Under the laws of the United States every person who is the head of a family, and having certain other qualifications not necessary to mention, shall be entitled to enter a quarter-section or less of the public lands.

By §§ 2291 and 2292 of the Revised Statutes it is provided as follows:

"SEC. 2291. No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or, if he be dead, his widow; or, in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two creditable witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land had been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the Government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent as in other cases provided by law. . . .

"SEC. 2292. . . . In case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children. . . ."

In *McCune* v. *Essig*, 199 U. S. 382, we decided that the beneficiaries of the statute were (1) the entryman, (2) his widow, she performing and proving the performance of the conditions, to-wit, residence and cultivation of the land for the time prescribed; and (3)—§ 2292—a child or children under 21 years of age. And the rights are independent; or, in other words and in illustration, as we said in *McCune* v. *Essig* (p. 389), the homestead claimant "may reside upon and cultivate the land, and by doing so

is entitled to a patent. If he die his widow is given the right of residence and cultivation, and 'shall be entitled to a patent as in other cases.' He can make no devolution of the land against her. The statute which gives him a right gives her a right. She is as much a beneficiary of the statute as he."

Her rights therefore are derived from the statute but necessarily depend upon the contingency mentioned, that is, his death before perfecting his entry. If she die before then, if she does not become a widow before then, necessarily no right vests in her under the statute. And such was the fact in the case at bar. The mother of the minor died before any right could accrue to her. To express it another way, the entry of Wadkins was perfected in his own right.

But it is said that his right has relation to the date of his entry and must be considered as having vested then. A like contention was rejected in *McCune* v. *Essig*. A title derived from a widow was there sustained against the contention that by the entry of her husband the land involved had become community property under the state law and an undivided one-half thereof passed at his death to his daughter. The ruling is directly in point.

It appears that Wadkins settled on the land before his marriage but did not make a formal homestead entry of it until after his marriage, and it is hence argued that an inchoate right vested in him by his entry only; and that the entry having been made "during the regime of the community of acquets and gains incidental to the marriage," the patent under the jurisprudence of Louisiana conveyed the "full title of the Government to the community." And this, it is contended, the Supreme Court decided to be the law of the State but considered that it could not be applied in the case at bar because the court erroneously decided that Wadkins' settlement, which occurred before his marriage, was the commencement of

his right, and not the entry at the land office, which occurred after his marriage.

The court did decide that the right of Wadkins began with his settlement and not by his entry and applied the law of the State in accordance with that view, yielding to it, as the court said, "as an effect of the act of Congress of 1880" and of the codal provisions of the State "touching the retrospective operation of the accomplishment of suspensive conditions."

The provision of the act of May 14, 1880 referred to is as follows: "Sec. 3. That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the preëmption laws to put their claims on record, *and his right shall relate back to the date of settlement, the same as if he settled under the preëmption laws.*" (Italics ours) 21 Stat. 140, c. 89.

The Supreme Court, to sustain its view, cited *Maddox* v. *Burnham*, 156 U. S. 544; *St. Paul, Minneapolis & Man. Ry. Co.* v. *Donohue*, 210 U. S. 21.

In *Sturr* v. *Beck*, 133 U. S. 541, 547, the court said, through Chief Justice Fuller, that "the ruling of the Land Department has been that if the homestead settler shall fully comply with the law as to continuous residence and cultivation, the settlement defeats all claims intervening between its date and the date of filing his homestead entry, and in making final proof his five years of residence and cultivation will commence from the date of actual settlement."

In *Maddox* v. *Burnham*, the act of 1880 was commented on and it was decided (p. 547) that by that act "for the first time the right of a party entering land under the

homestead law was made to relate back to the time of settlement."

In *St. P., Minn. & Man. Ry. Co.* v. *Donohue*, 210 U. S. 30, it was held it was not until May 14, 1880, that a homestead entry was permitted to be made upon unsurveyed public lands and "for the first time, both as to the surveyed and unsurveyed public lands, the right of the homestead settler was allowed to be initiated by and to arise from the act of settlement, and not from the record of the claim made in the Land Office." 21 Stat. 140.

There can be no doubt that Wadkins' inchoate right was initiated by his settlement and that as between him and any intervening claimant his perfected right evidenced by the patent related back to the time of his settlement, (*Shepley* v. *Cowan*, 91 U. S. 330, 338; *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 388–390), but he did not acquire any vested interest in the land until he had fully complied with the provisions of the homestead law and submitted proof thereof at the local office. Prior to that time his right was essentially inchoate and exclusively within the operation of the laws of the United States, and those laws, as we have seen, fully dealt with the subject of who should be the beneficiary of a compliance with them, thereby excluding state laws from that field. This is a manifest deduction from *McCune* v. *Essig*. There might be a curious and confusing result from an opposite ruling, as pointed out by the Supreme Court of the State in its first opinion. Suppose Wadkins had married again and died before perfecting his claim. Could his widow have continued the required residence upon and cultivation of the land? And if so, in what right—her own, or that of the first wife, or in both rights? Section 2291 precludes such confusion. It is a definite grant of rights, and who shall be its beneficiaries are explicitly designated and upon what contingencies and upon the performance of what conditions. Until such contingencies happen and until

such performance no rights vest. It follows that the mother of Effie Bell Wadkins acquired no interest in the land.

Judgment affirmed.

CORDOVA *v.* FOLGUERAS Y RIJOS.

DUMEY *v.* HERNANDEZ Y BELLO.

APPEAL FROM THE SUPREME COURT OF PORTO RICO.

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

Nos. 141, 160. Argued January 23, 1913.—Decided February 24, 1913.

During the lifetime of the ancestor no heir has a vested right to inherit from him; and heirs only have such rights of inheritance as are given to them by the laws in force at their ancestor's death.

It is not an interference with vested rights to prescribe the mode of procedure, or the time within which to enforce them, provided reasonable time be given therefor.

Under the laws of Porto Rico, while Law Eleven of Toro as to effect of acts of recognition of rights of natural children may be in force, the provisions of §§ 133 and 137 of the Code of 1902 must be complied with in order to enforce such rights; and this applies to persons whose alleged parent died prior to the enactment of the Code.

Decisions of the courts of Spain rendered after 1898, construing Spanish law applicable to possessions ceded to the United States, although entitled to great consideration, do not preclude the local court from reaching an independent judgment.

16 Porto Rico, 593, affirmed.

5 Porto Rico Fed. Rep. 191, affirmed.

THE facts, which involve the construction of the law of Porto Rico in regard to actions for acknowledgment of natural children, are stated in the opinion.

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

No appearance for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

The first of these suits was brought by the appellant, in 1908, it would seem, to have herself declared a natural daughter and entitled to a share of the estate of Don Santiago Rijos Correa, who died on April 29, 1869. The appellees demurred to the complaint on the grounds adverted to in *Burnet* v. *Desmornes*, 226 U. S. 145. By the Civil Code of 1889, Art. 137, actions for the acknowledgment of natural children can be instituted only during the life of the presumed parents, or if the parent dies during the minority of the child within the first four years of its majority. If the appellant was not of age at the death of Correa, she reached majority at the latest in 1893, and the action was barred in 1897. (Under the Code of 1902, § 199, the action is allowed only for two years after coming of age.) The Supreme Court sustained the demurrer and dismissed the complaint.

The second suit, begun in June, 1909, had a similar object. The appellant alleged that she was born on August 4, 1875, and was a natural child of Damian Morell; that he left her mother and married in 1880; in 1889 removed to Mallorca, and died on December 29, 1899. On demurrer the bill was dismissed by the District Court, following the authority of the foregoing decision of the Supreme Court. (We may assume that as the plaintiff retained her domicil in Porto Rico and as a considerable part of the estate consisted of land in the same place, the possible bearing on the case of the removal of Morell to Spain need not be considered.)

The appellants say that at the time of their birth the

law in force was Law Eleven of Toro (Law 1, Title 5, Book 10, Novisima Recopilacion); that under that law they acquired the status and rights of natural children by the facts alleged in their complaints, without the need of acknowledgment by public document or judicial approval as required in the Civil Code of 1889, Art. 133, and so that they were entitled to sue for their share of the inheritance at once.

So far as the second case goes, perhaps it would be a sufficient answer to say that during the lifetime of an ancestor no heir has a vested right to inherit from him; that the Civil Code of 1889 confines the right of natural children to inherit to those children that are acknowledged, § 134, that is, presumably, to those that are acknowledged as it provides; and since heirs have only such rights of inheritance as are given to them by the laws in force at their ancestor's death, that there is no reason why the appellant should take greater ones because she had been informally acknowledged before 1889.

But in the first case the alleged parent died before the Civil Code was enacted, and so it would seem that the plaintiff had ground for claiming rights by inheritance vested before that date. But this claim was met by the Supreme Court by a reference to the statement of motives for the Civil Code which reads that if it was proper to give effect to rights acquired under prior legislation, no consideration of justice required that the subsequent exercise of them 'as well as their duration and the proceedings for enforcing them should be exempted from the provisions of the Code;' and by the interpretation of the fourth Transitory Provision (following Art. 1976). This reads in the official translation, "Actions and rights arising before this Code became operative, and not exercised, shall continue with the extension and according to the terms recognized by prior legislation, but shall be subject, with regard to the exercise, duration, and proceedings

for enforcing them, to the provisions of this Code." The court interpreted these words as meaning that, in order to enforce the rights of a natural child when there was not a solemn recognition, but only acts tending to establish paternity under the Laws of Toro, an action of filiation must be brought as required by Articles 133 and 137 of the Code.

In other words, while, under the Laws of Toro, the acts of recognition alleged, although not amounting to a solemn recognition, may have entitled a natural child to sue for her share of the inheritance and to prove the acts in the same suit, the Code requires a preliminary proceeding to prove those acts and to declare their effect, and limits the time within which such proceeding can be brought. This hardly can be called an interference with vested rights, when a reasonable time for bringing the preliminary proceeding is allowed. In the present case it does not appear that the plaintiff had not reasonable time for an action after the Code went into effect.

It is objected that the Supreme Court of Spain has construed the fourth Transitory Provision otherwise, as has been recognized by the Supreme Court of Porto Rico, *Gual* v. *Bonafoux*, 15 Porto Rico, 545, 555, referring to a judgment of April 11, 1906, but citing as contradictory one of December 19, 1902, that it deemed correct. The Spanish decisions, however, have not the same effect as do those construing a statute subsequently copied by another State. They were rendered after Porto Rico had ceased to be subject to Spanish jurisdiction, and although entitled to great consideration, which no doubt they received, they do not preclude the local court from exercising an independent judgment. The construction adopted in Porto Rico at least does no violence to the words of the statute; it concerns local affairs under a system with which the court of the Island is called on constantly to deal, and we are not prepared, as against the weight prop-

erly attributed to the local decision, to say that it is wrong. *Gray* v. *Taylor*, *ante*, p. 51. How the first case should have been dealt with if it had appeared in the record that the plaintiff came of age before the Code went into effect we are not called upon to consider. The construction adopted might give trouble unless a right to bring an action of filiation within a reasonable time were implied. But we have to remember that the law-making power of Spain was not restricted in the way familiar to us.

141. *Judgment affirmed.*

160. *Decree affirmed.*

LUKE *v.* SMITH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 150. Argued January 27, 1913.—Decided February 24, 1913.

The Supreme Court of the Territory of Arizona having, in construing the recording statute, followed the decisions of the courts of Texas from whose laws the statute was copied, and held that one buying with notice that the holder of the legal title held it in trust for others took with notice notwithstanding the act, this court sees no reason for not following the general rule that it will follow the construction given by the local court to a local statute.

Service of the complaint in an action brought to establish an equitable lien on property superior to the rights of all parties defendant is notice to a defendant having knowledge of the suit.

13 Arizona, 155, affirmed.

THE facts, which involve the construction of the recording act of Arizona and what constitutes notice of lien to a purchaser of real estate, are stated in the opinion.

Mr. Walter Bennett for appellants.

Mr. Lewis M. Ogden for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill brought by the appellee to establish and foreclose a lien on certain land, and already has been before this court. *Smith* v. *Rainey*, 209 U. S. 53. At that hearing the land was decided to be partnership assets as between Smith and Rainey and as such subject to a lien for repayment of advances made to the firm by Smith. The present appellants claim a right in Rainey's interest, paramount to Smith's, by virtue of an execution sale on a judgment against Rainey. The material facts are few. The title to the land by deed on record stood in Smith as to two undivided thirds and in Rainey as to the other third. About April 29, 1897, Smith and Rainey made the agreement construed in 209 U. S. 53, out of which arose the partnership and the consequent lien before mentioned. On June 11, 1902, the appellants began a suit against Rainey upon an individual debt of his and attached his interest in the land. On June 11, 1903, they got judgment. On July 18, 1903, Smith began the present action making Frank Luke a defendant as claiming some lien alleged by Smith to be subordinate to his own. On August 6, 1903, an order of sale was issued in the suit of the appellants, on September 8 the land was sold to the Lukes for the amount of their judgment, on December 29 the sheriff made return, and on June 20, 1904, there having been no redemption, executed a deed to the Lukes. The Lukes had no notice of Smith's rights earlier or other than that derived from the beginning of the present suit.

The statute of Arizona makes all conveyances of land and all deeds of trust and mortgages void, as against creditors and subsequent purchasers for value without notice, unless recorded, but leaves them valid as against purchasers with notice or without valuable consideration.

Rev. Stat., 1901, Paragraph 749. The Supreme Court of Arizona, starting from the admitted fact that the statute was copied from the laws of Texas, after examining the Texas decisions concluded that when the debtor holds the legal title in trust for others with whose funds and for whose use it was purchased, a purchaser at a sale on execution who has notice of their rights before his purchase will take subject to them notwithstanding the foregoing act. The court thought that the principle applied to such equitable rights as Smith was decided to have, in 209 U. S. 53, and hence concluded that if the Lukes had notice before the sale on September 8, 1903, from the original complaint in the present suit, Smith must prevail. On this construction of a local statute as well as on some subordinate matters of construction not so much pressed, we see no reason for not following the local court in accordance with a leaning many times declared. *Jones* v. *Springer*, 226 U. S. 148, 157. *Gray* v. *Taylor*, *ante*, p. 51. It is perhaps doubtful whether the instrument creating the partnership and making the land partnership assets could have been recorded; assuming, as the appellants urge, that the test of trusts that are outside of Paragraph 749 is that they do not arise from an instrument that might be put on record—a test not definitely accepted by the Arizona court. Some mention was made of a mortgage executed by Rainey and afterwards discharged as giving additional color to Rainey's record title. But it is enough to say that the Lukes do not appear to have known of it before the execution sale to them.

Hence the only question is whether the complaint as originally filed gave notice of Smith's rights. It did not set forth the contract, but alleged it to have been made in writing and alleged that it was agreed that the plaintiff should advance all the money necessary for the improvement of the land and should be repaid all sums advanced by him for that purpose or for the purchase of the land,

&c., with interest, from sales of the land. It prayed that the plaintiff be declared to have an equitable mortgage lien upon Rainey's interest, paramount to Luke's title whatever it might be. This obviously was enough to put the Lukes upon inquiry as to the precise character of a contract that was alleged, and truly alleged as it turns out, to lay the foundation for an equitable interest superior to theirs.

Judgment affirmed.

PEOPLE OF PORTO RICO *v.* TITLE GUARANTY AND SURETY COMPANY.

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

No. 154. Argued January 30, 1913.—Decided February 24, 1913.

In this case *held* that a bond given in pursuance of an ordinance, for faithful performance of a contract, was solely for the complete result at the end of the period specified, and that it did not permit a recovery of the whole penalty upon any intermediate breach.

Breaches of subordinate requirements, which are specified in a contract for a public utility and bond for performance and are simply means to an end, cannot be made the basis of recovering the whole penalty after final completion or after cancellation by the obligee of the franchise.

If within time for completion of a public utility authorized by ordinance, the municipality itself makes performance impossible, it cannot, under any system of law in Porto Rico or elsewhere, recover upon the bond for failure to perform.

180 Fed. Rep. 641, affirmed.

THE facts, which involve the liability of a surety company on a bond given for faithful performance of a contract, are stated in the opinion.

Mr. William Jessup Hand for plaintiffs in error.

Mr. John G. Johnson and *Mr. Everett Warren* for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit upon a joint and several bond executed by the defendant in error as surety for the Vandegrift Construction Company. In the Circuit Court a nonsuit was ordered and the order was affirmed by the Circuit Court of Appeals on the ground that the plaintiff by its own act had made performance of the condition impossible. 103 C. C. A. 607; 180 Fed. Rep. 641. The facts are these:

By an ordinance of March 2, 1903, Porto Rico granted to the Vandegrift Company the right to build and operate an electric railway and also a power plant in specified places in the island. Within one year from acceptance of the grant the grantee was to have its roadbed completely graded between the Island of San Juan and the urban portion of the municipality of Caguas, and the foundations and approaches of a certain bridge completed. Section 15. Within two years it was to have the parts of the railway lying between the urban portion of San Juan and Caguas and certain other points finished and ready for service. Section 16. Within three years it was to have the whole line completed and in operation. Section 17. It was stated to be expressly understood and agreed that upon the grantee's failure to have the line in full operation within the time limited, *i. e.* three years, the grantee's right to operate any part of it or to sell electric light and power should cease unless the failure should be declared by the Executive Council to be due to one of certain excuses, such as the act of God. Section 16.

A power dam at Comerio Falls was to be completed in one year and the greater part of the electric apparatus

contracted for; the whole power plant and transmission lines necessary for operating the railway to be completed within three years. Section 18. The grantee was to pay the government two per cent. of its gross receipts from the sale of light and power to private consumers, § 23, was not to charge above certain maxima fixed for passengers and freight, § 25, and was to carry certain persons, such as prisoners and police on duty, free of charge. Sections 27, 28. The rights, privileges and concessions granted by the ordinance were expressed to be subject to amendment, alteration or repeal by the Executive Council. Section 30. Then it was provided that the rights granted "shall be accepted by the grantee in writing and by executing a bond in favor of the People of Porto Rico, in the sum of one hundred thousand dollars satisfactory etc., . . . and conditioned upon the full completion of the work herein authorized within three years after such acceptance and in accordance with the conditions herein contained, and in accordance with the plans and specifications therefor approved as herein provided; and conditioned also upon the payment by the grantee to the People of Porto Rico of any loss or damage or costs accruing against the People of Porto Rico, by reason of the construction of the works herein authorized, at any time during the period of construction herein limited" &c. Section 34.

Upon presentation of a certificate of completion from the Commissioner of the Interior, "and upon the full compliance with the terms of this ordinance to the satisfaction of the Executive Council, and upon the full payment by the grantee of any loss, damage and costs accruing against the People of Porto Rico as in said bond provided, the said bond shall be cancelled." Section 35. Finally the ordinance is to "take effect immediately upon the acceptance by the grantee of the terms and conditions hereof as above provided." Section 38.

The bond in suit was executed, referring to and annexing the ordinance, and conditioned among other things that the principal, within three years from the date of the acceptance by it of the ordinance should fully complete the work 'in accordance with the conditions therein contained;' and again that it should 'duly perform within the said period of three (3) years, all other terms and conditions in said ordinance required to be performed by the principal within the said period.' [1]

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[1] The whole condition of the bond was as follows:

"Now, therefore, the condition of this obligation is such that if the said Principal shall within three years from the date of the acceptance by it of said ordinance fully complete the work therein authorized in accordance with the conditions therein contained and in accordance with the plans and specifications therefor approved as therein provided; and within the said period of three (3) years from the date of the acceptance by it of the said ordinance shall build, complete and have in operation the entire line of railway authorized therein for such terminal in the Municipality of San Juan as may be determined by the said Executive Council to its terminal on the Playa of Ponce on a route from Ponce to be determined by the said Executive Council in accordance with the conditions in said ordinance contained, and in accordance with the plans and specifications therefor approved, as in said ordinance provided, and within the said period of three (3) years from the date of the acceptance by it of the said ordinance, shall also complete and have in operation the entire power plant and transmission lines necessary for operation the said entire line of railway, in accordance with the conditions therein contained, and in accordance with the plans and specifications therefor approved as therein provided; and shall duly perform within the said period of three (3) years, all other terms and conditions in said ordinance required to be performed by the Principal within the said period; and shall pay to the obligee any loss or damage accruing against the said obligee by reason of the construction of the works in said ordinance authorized at any time during the period of construction therein limited and before the completion of said work shall have been certified by the Commissioner of the Interior, as in Section 35 of said ordinance provided—then this obligation shall be void, otherwise to remain in full force and effect.

"Provided, however, and upon the following express conditions.

The principal failed to do within the year the work required by § 15 to be completed in that time as has been stated, and a little more than two months after the year elapsed, in July, 1904, the Executive Council passed an ordinance amending §§ 15, 18 and 30 of the former one, the amendment being approved by the President on August 2. The time allowed in § 15 was extended to January 1, 1905, provided that the number of men employed on or before August 7 should be not less than 250 and that the number should be increased up to 500 or thereabouts, the intent expressed being that as many men should be engaged as was necessary to complete the work, and provided that the men should be paid weekly, and provided further that upon failure to comply with the terms and conditions of the amendment the franchise should be subject to immediate forfeiture. The requirement in § 18 as to the power-dam at Comerio Falls, &c., also was extended to January 1, 1905. Finally to the provision in § 30 as to amendment, &c., of the concession there was added the express requirement of the approval of the Governor of Porto Rico and of the President of the United States, and the statement that it was subject to the power of Congress to annul or modify the same. This amendment seems to have been sought and accepted

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"First: That no extension of the time or times limited in said ordinance for the completion of the work therein authorized or any part thereof, whether granted with or without the knowledge and consent of the Sureties, shall in any way discharge the Sureties from liability upon this bond; and,

"Second: That no suit, action or proceeding shall be brought or instituted against the Sureties after the period of five (5) years from the date hereof upon or by reason of any default on the part of the Principal in the performance of any of the terms, covenants or conditions of this bond. But all extensions of time granted under the term of the franchise shall be added to the term of five (5) years, so that the life of the bond shall be kept in full force for the five (5) years, and so much additional time as shall be covered by the extension granted."

by the principal, but was not known to the defendant Surety Company, so far as appears.

In February, 1905, a further ordinance was passed, approved by the Governor in March and by the President on May 12, which recited a failure by the Company to comply with the terms of §§ 15 and 18, either in their original form or as amended, and therefore repealed and revoked the grant and declared all "sureties or obligations . . . given by the said grantee as a guaranty . . . forfeited to the People of Porto Rico to all and whatsoever extent the same shall be liable under the law." In September, 1906, this suit was begun.

The main question is the scope of the condition of the bond. The plaintiff says that it was for the due performance of all the terms required by the ordinance, and, since the bond was a contract made in Porto Rico, as no doubt it was, at least as between these parties, that upon any breach of condition the whole penalty became due by the local law. Civil Code, §§ 1120, 1121. The Circuit Court of Appeals on the other hand assumed that the bond was only for the result at the end of three years.

After some hesitation we have come to the conclusion that the court was right. It is true that the bond is to be read in connection with the original ordinance and that the latter contained terms that were not complied with. But the ordinance only required a bond for the full completion of the work within three years and in accordance with the conditions therein contained and the plans. Section 34. In the ordinance the only condition properly so called, the only fact that warranted a revocation of the grant apart from the general power to repeal, was by § 16 a failure to have the whole railway in operation as required by § 17. There was no forfeiture for falling short of the requirements in §§ 15 and 16 as to the progress to be made in one and two years. The bond in like manner has for its principal condition the completion of the work within

three years. It is true that the completion was to be in accordance with the terms contained in the ordinance, but this clause cannot mean that if the road and works were in satisfactory operation within three years the obligee could recur to the history of events and, if it found that some item was not finished within the time allowed for it, could set up that fact as a breach and, by its interpretation of Porto Rican law, recover the whole penalty of the bond. The subordinate requirements were simply means to an end, and if the end was reached their importance disappeared. The very contentions of the plaintiff as to the liability incurred upon any breach are arguments against supposing that such incidental failures to be on time had such a consequence attached.

There is a further provision for the principal performing, 'within the said period of three (3) years, all other terms and conditions in said ordinance required to be performed by the principal within the said period.' This perhaps affords the plaintiff its strongest argument. But this is a residuary clause to cover matters that may have escaped consideration. The building of the road and works already have been dealt with, and this clause as to 'other' terms hardly can be supposed to have reference to them. If it does, however, it would seem to us that the limitation of time should be construed as looking to the end of the three years and allowing that period, rather than distributively and as meaning from time to time during three years. The same considerations that apply to the construction of the principal condition apply to this, and it appears to us that the provision for the cancellation of the bond upon certificate showing the completion of the work, 'and upon the full compliance with the terms of this ordinance to the satisfaction of the Executive Council' is not enough to change what we understand to be the import of the instrument upon its face. Finally the proviso that no extension of the time or times limited for

the completion of the work 'or any part thereof' shall discharge the surety at most merely recognizes that the principal by accepting the ordinance contracted to do the parts of the work as required, as well as the whole, and with natural caution saves the rights of the obligee against the surety in case of any extension of time, a matter that obligees have learned to fear.

If our construction of the bond is right it does not need much argument to show that the plaintiff is not entitled to recover, seeing that within three years it took the franchise back. It was said at the bar, though not admitted, that the principal had given up work. But there had been no repudiation of the contract, and the plaintiff could not accelerate the forfeiture simply on the ground that it was likely to come about. If, within the time allowed for performance the plaintiff made performance impossible, it is unimaginable that any civilized system of law would allow it to recover upon the bond for a failure to perform. 2 Bl. Comm. 340, 341. *United States* v. *Arredondo*, 6 Pet. 691, 745, 746.

Judgment affirmed.

CRENSHAW *v.* STATE OF ARKANSAS.

GANNAWAY *v.* SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

Nos. 127, 128. Argued January 20, 21, 1913.—Decided February 24, 1913.

The negotiation of sales of goods which are in another State, for the purpose of introducing them in the State in which the negotiation is made, is interstate commerce. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489.

The police power of a State cannot obstruct foreign or interstate

commerce beyond the necessity for its exercise; nor can objects not within its scope be secured under color of the police power at the expense of the protection afforded by the Federal Constitution. *Railroad Co.* v. *Husen*, 95 U. S. 465.

While a tax on peddlers who sell and forthwith deliver goods is within the police power of the State, a tax on one who travels and solicits orders for goods to be shipped from without the State is a burden on interstate commerce and unconstitutional. *Emert* v. *Missouri*, 156 U. S. 296, distinguished.

Peddlers, at common law, and under those statutes regulating them which have been sustained, are such as travel from place to place selling goods carried with them, and not such as take orders for delivery of goods to be shipped in the course of commerce.

This court in dealing with rights created and conserved by the Federal Constitution looks to the substance of things and not the names by which they are labeled.

A State cannot, by defining a business subject to its own police power as including a class which is not subject to that power, deprive such class of rights protected by the Federal Constitution.

A state statute, imposing a license on those who solicit orders, from samples which they do not sell, of articles to be shipped from another State and which are afterwards delivered to the purchaser by the manufacturer, is an unconstitutional burden on interstate commerce beyond the police power of the State, and cannot be justified as a license tax on peddlers even though the state statute defines the persons soliciting the orders as peddlers; and so *held* as to the law of Arkansas of April 1, 1909, regulating the sale of certain specified articles within the State.

95 Arkansas, 464, reversed.

THE facts, which involve the constitutionality under the commerce clause of the Federal Constitution of a law of the State of Arkansas imposing a license on persons making sales within that State as applied to articles delivered from other States, are stated in the opinion.

Mr. J. Merrick Moore for plaintiff in error:[1]

The act of Arkansas of 1909 in so far as it applies to the business engaged in by plaintiff in error is an unauthorized

[1] See also argument for plaintiff in error in *Rogers* v. *Arkansas*, *post*, p. 402.

regulation of interstate commerce, and as such is in conflict with Art. I, § 8, of the Constitution of the United States. *Brown* v. *Maryland*, 12 Wheat. 419; *Robbins* v. *Shelby Co. Taxing Dist.*, 120 U. S. 489; *Leloup* v. *Port of Mobile*, 127 U. S. 640; *Asher* v. *Texas*, 128 U. S. 129; *Leisy* v. *Hardin*, 135 U. S. 100; *Brennan* v. *Titusville*, 153 U. S. 289; *Stockard* v. *Morgan*, 183 U. S. 27; *Caldwell* v. *North Carolina*, 187 U. S. 632; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Dozier* v. *Alabama*, 218 U. S. 124.

It is immaterial whether the act of Arkansas of 1909 be intended as a regulation of peddling, and not as a regulation or license upon soliciting orders; or whether it be regarded as a police or a revenue measure. *Brown* v. *Maryland*, 12 Wheat. 419, 444; *Robbins* v. *Shelby Co. Taxing Dist.*, 120 U. S. 489; *Leloup* v. *Port of Mobile*, 127 U. S. 640; *Brennan* v. *Titusville*, 153 U. S. 289; *West. Un. Tel. Co.* v. *State*, 82 Arkansas, 314, 315; *Welton* v. *Missouri*, 91 U. S. 275; *Crutcher* v. *Kentucky*, 141 U. S. 47.

It is immaterial whether the contract of sale of the goods ordered be executed in the State where the purchaser resides, or in the State from which the goods are shipped; and it is immaterial where title to the goods passes. *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Dozier* v. *Alabama*, 218 U. S. 124; *Caldwell* v. *North Carolina*, 187 U. S. 632; *Brennan* v. *Titusville*, 153 U. S. 289.

Mr. William H. Rector, with whom *Mr. Hal L. Norwood*, Attorney General of Arkansas, *Mr. T. M. Mehaffy* and *Mr. Charles C. Reid* were on the brief, for defendants in error: [1]

The Supreme Court of Arkansas has construed the act of 1909 as an exercise of the police power inherent in the State—that construction is conclusive upon this court. *Barnhill* v. *State*, 144 S. W. Rep. (Ark.) 211; *Pabst Brew-*

[1] See also abstract of argument in *Rogers* v. *Arkansas*, *post*, p. 405.

ing Co. v. *Crenshaw*, 198 U. S. 17; *Cargill Co.* v. *Minnesota*, 180 U. S. 452; *Delamater* v. *South Dakota*, 205 U. S. 93; *Atlantic Coast Line* v. *Mazursky*, 216 U. S. 122; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322; *Armour Packing Co.* v. *Lacey*, 200 U. S. 226; *Kahrer* v. *Stewart*, 197 U. S. 60; *Pullman Co.* v. *Adams*, 189 U. S. 426; *Osborne* v. *Florida*, 164 U. S. 650.

The Peddling Act of 1909 as applied to the facts in this case is in no just sense a regulation of interstate commerce, but is a rightful and proper exercise of the police power inherent in the State and is neither arbitrary, unreasonable nor contrary to Art. I, § 8, of the Constitution of the United States. *Sherlock* v. *Alling*, 93 U. S. 99; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Nashville &c. Ry. Co.* v. *Alabama*, 128 U. S. 96; *Chi., Mil. &c. Ry. Co.* v. *Solan*, 169 U. S. 133; *Hennington* v. *Georgia*, 163 U. S. 299; *L. S. & M. S. Ry. Co.* v. *Ohio*, 133 U. S. 286; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 27; *Asbell* v. *Kansas*, 209 U. S. 251; *M., K. & T. Ry. Co.* v. *Haber*, 169 U. S. 613; *G., C. & S. F. Ry. Co.* v. *Hefley*, 158 U. S. 98; *C., R. I. & P. Ry. Co.* v. *Arkansas*, 219 U. S. 126; *Emert* v. *Missouri*, 156 U. S. 298; *Allen* v. *Riley*, 203 U. S. 347; *Woods* v. *Karl*, 203 U. S. 358; *Ozan Lumber Co.* v. *Union County Bank*, 207 U. S. 251.

This case can be clearly distinguished from the cases cited by plaintiff in error.

MR. JUSTICE DAY delivered the opinion of the court.

The plaintiffs in error were convicted under a law of the State of Arkansas approved April 1, 1909 (Act 97, Acts of 1909, p. 292), undertaking to regulate the sale of lightning rods, steel stove ranges, clocks, pumps, and vehicles in the several counties of the State. The judgment of conviction was affirmed, 95 Arkansas, 464, and the case is here upon questions arising under the Federal Constitution.

The act provides:

"Section 1. That hereafter before any person, either as owner, manufacturer or agent, shall travel over and through any County and peddle or sell any lightning rod, steel stove range, clock, pump, buggy, carriage or other vehicle or either of said articles, he shall procure a license as hereinafter provided from the County Clerk of such County, authorizing such person to conduct such business.

"Section 2. That before any person shall travel over or through any County and peddle or sell any of the articles mentioned above he shall pay into the County Treasury of such County the sum of Two Hundred ($200) Dollars, taking the receipt of the Treasurer therefor, which receipt shall state for what purpose the money was paid. The County Clerk of such County upon the presentation of such receipt shall take up the same and issue to such person a certificate or license, authorizing such person to travel over such County and sell such articles or article for a period of one year from the first day of January preceding the date of such license.

"Section 3. Any person who shall travel over or through any County in this State and peddle or sell, or offer to peddle or sell any of the above enumerated articles without first procuring the license herein provided for shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than two hundred ($200) dollars nor more than five hundred ($500) dollars.

"Section 4. That any person who shall travel over or through any County in this State and peddle or sell any of the articles mentioned above, shall be deemed and held to be a peddler, under the provisions of this Act."

The case was considered upon an agreed statement of facts, of which the following is an abridgment:

The Range Company, a corporation organized under the laws of Missouri with its principal offices and factory

at St. Louis, manufactures ranges which are sold by traveling salesmen in the United States, and among other places in the counties of Arkansas. The business is conducted in Union and other counties in Arkansas as follows: R. L. Sutton, an employé of the Range Company and division superintendent, has general supervision of the company's business in that district, with four other employés, two known as sample men or salesmen and two as delivery men, under his direction. The employés are paid stipulated compensation for their services, and none of them has any financial or monetary interest in the property of the company in Union county or in the sales or proceeds of sales made by them in that county or elsewhere in Arkansas other than the compensation above referred to. The salesmen are furnished with a sample range, and a wagon and team, and are sent into such territory in Union or other counties of Arkansas as may be designated by Sutton to solicit orders for ranges. Where orders are taken the purchaser signs a note providing for the payment of the purchase price. The note or order contains a stipulation that it shall be void as against the purchaser in the event the company fails to deliver the range ordered within sixty days from date. All orders so taken are forwarded to Sutton, who investigates the credit of the purchasers, and, if found satisfactory, proceeds to have the orders filled within the sixty days' limit. Deliveries are made through or by the employés of the company known as delivery men, each of whom is furnished with a delivery wagon and team by the company for that purpose. The ranges, wagons and teams are the property of the company. The sample ranges entrusted to the salesmen by the company are not sold by them. Under no circumstances do the salesmen deliver to the purchasers the ranges for which orders are taken; under no circumstances do the delivery men sell or offer to sell or take orders for ranges or deliver any ranges other than those

for which orders have previously been taken by the salesmen. All ranges ordered and manufactured are shipped in carload lots to Union and other counties, each car containing sixty separate ranges and being consigned by the company to itself in care of Sutton, its employé. At the end of each month Sutton settles with the company's employés, salesmen and delivery men and sends their reports and his own report to the company, together with all notes taken by the salesmen during the month, and all cash in hand over $500, which amount is retained as expense money.

A carload of ranges was thus shipped from St. Louis to Eldorado, Arkansas, for the purpose of filling orders previously secured by the soliciting agents or traveling salesmen. Upon the arrival of the car at Eldorado the ranges were taken therefrom, loaded on delivery wagons and delivered by the delivery men to purchasers in the precise shape, form, condition and packages in which they were delivered to the common carrier at St. Louis.

It was agreed that Gannaway was a salesman of the Range Company and had exhibited sample ranges and solicited and taken orders and secured notes for them, and that Crenshaw acted as a delivery man and delivered ranges to parties in Union county, who had previously given orders to salesmen.

This law is attacked and the conviction of Crenshaw and Gannaway alleged to be unlawful because, among other reasons, the law imposes a direct burden upon interstate commerce, exclusively within Federal control, and therefore beyond the power of the State to regulate. Under the facts which we have stated and upon which the court below decided the case, we think the law applicable to the present situation is well settled by previous decisions of this court.

The leading case is *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, in which it was undertaken in the

State of Tennessee to impose by statute a license tax upon drummers and persons not having a regular, licensed house of business in the taxing district, offering to sell or selling goods, wares or merchandise by sample. Robbins was a resident of Cincinnati, Ohio, and was convicted of having offered for sale articles of merchandise belonging to a firm in Cincinnati to be shipped into Tennessee, without having secured the license required by statute. In that case, while this court recognized the power of the State to pass inspection laws to secure the due quality and measure of products and commodities and laws to regulate or restrict the sale of articles deemed injurious to the health or morals, the principle was laid down (p. 497) that "the negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce," and it was held beyond the power of the State to impose a license tax upon the privilege of conducting such business. That case has been strictly adhered to in this court since its decision, and it is only necessary to notice a few of the many cases in which it has been applied.

In *Brennan* v. *Titusville*, 153 U. S. 289, an ordinance of the State of Pennsylvania was held invalid as imposing a tax on interstate commerce, where the tax was sought to be imposed upon a manufacturer of pictures residing in Chicago, having his factory and place of business there, whose agents solicited orders in Pennsylvania and other States by going personally from house to house with samples of pictures and frames. Upon the receipt of the orders they were forwarded to Chicago, where the goods were made and whence they were shipped to the purchasers in Pennsylvania and elsewhere. This court reviewed the previous cases at length and, in the course of the discussion, said (p. 302):

"Even if it be that we are concluded by the opinion of the Supreme Court of the State that this ordinance was

enacted in the exercise of the police power, we are still confronted with the difficult question as to how far an act held to be a police regulation, but which in fact affects interstate commerce, can be sustained. It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the State; but we think it must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon interstate commerce can be imposed by the State without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free."

In *Caldwell* v. *North Carolina*, 187 U. S. 622, a taxing ordinance of the city of Greensboro was held invalid as an unlawful interference with interstate commerce, where a portrait company engaged in making pictures and frames in Chicago sold them upon orders solicited in North Carolina, shipping the pictures and frames in separate packages to its own agent, who placed the pictures in their proper frames and delivered them to the persons ordering them. This was held to be a transaction in interstate commerce and beyond the taxing power of the State, and it was held to make no difference that the pictures and frames were shipped to the company itself at Greensboro, where the agent of the company received them from the railroad at its depot, carried them to his room in Greensboro, opened the packages, took out and assorted them and put them together and in this form delivered them to the purchasers in the city of Greensboro, who had previously ordered them. Of this feature of the case, which had been held in the Supreme Court of North Carolina to differentiate the case from the former cases, this court said (p. 632):

"Nor does the fact that these articles were not shipped

separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that, if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation."

In *Rearick* v. *Pennsylvania*, 203 U. S. 507, an ordinance of the Borough of Sunbury in the State of Pennsylvania was held invalid which undertook to make it unlawful to solicit on the streets or by traveling from house to house, orders for the sale or delivery at retail, of foreign or domestic goods not of the parties' own manufacture or production without a license, for which a fee was charged. It was undertaken in that case to apply the ordinance to Rearick, who solicited orders for brooms which were shipped from Columbus, Ohio, to fill the orders solicited, the brooms being tagged and marked according to the number ordered, and tied together in bundles of about a dozen for shipment. It was held that the brooms were specifically appropriated to the keeping of contracts the fulfilling of which required the transportation of the brooms for delivery in interstate commerce.

In *Dozier* v. *Alabama*, 218 U. S. 124, where pictures were sold to be transported and delivered in interstate commerce and at the time they were ordered an option was taken fixing the specific price of a frame in which the picture was to be delivered, both picture and frame being manufactured in another State and to remain the property of the vendor until sold, the sale of the frame was held to be part of a transaction protected by the commerce clause of the Constitution, although the purchasers were not bound to take the frames unless they saw fit. Applying the previous cases, this court held the license tax for

soliciting orders for the pictures and frames could not be applied to persons taking such orders to be fulfilled by shipments from another State which constituted interstate commerce and which could not be taxed under the law of the State.

Nor does the fact that the law now in question was alleged to have been passed in the exercise of the police power of the State make it lawful. In *Railroad Co.* v. *Husen*, 95 U. S. 465, 473, this court said that "the police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution." To the same effect, *Walling* v. *Michigan*, 116 U. S. 446, 460; *Leisy* v. *Hardin*, 135 U. S. 100, 108; *Brennan* v. *Titusville*, 153 U. S. 289, 302, 303.

In the opinion delivered for the majority of the Supreme Court of Arkansas, the law in question was upheld, notwithstanding the decisions of this court, which were recognized, because of the distinguishing feature of the ordinance as a valid exercise of the police power of the State in taxing the occupation of peddling, and to sustain that conclusion *Emert* v. *Missouri*, 156 U. S. 296, was relied upon. In that case a tax upon peddlers within the State of Missouri by a statute of the State by which peddlers of goods going from place to place in the State were required to take out a license, was sustained. The cases were fully considered by Mr. Justice Gray, who delivered the opinion of the court, and the right to tax peddlers from early times in England and America was stated, and a history of much of the legislation given. The law was sustained as against the contention that it violated the interstate commerce clause of the Constitution, because it was shown that Emert, who was convicted, carried the machines with him in a wagon, and upon mak-

ing a sale delivered the machine to the purchaser. He was not merely soliciting orders for machines, but selling and delivering them. Upon this ground the Supreme Court of Missouri and this court placed its decision (p. 310), and Mr. Justice Gray said (p. 311):

"The defendant's occupation was offering for sale and selling sewing machines, by going from place to place in the State of Missouri, in a wagon, without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer, from one State to another; and were neither interstate commerce in themselves, nor were they in any way directly connected with such commerce."

In the *Emert Case*, therefore, there was no movement of goods in interstate commerce because of orders taken for their sale, but the specific articles carried about by the peddler, and none other, were sold and delivered by him. In the majority opinion of the Supreme Court of Arkansas the definition of hawkers and peddlers as understood at common law was recognized—as one who goes from house to house or place to place carrying his merchandise with him which he concurrently sells and delivers, 2 Bouvier, 642—but it was said that the legislature of Arkansas might define the word peddlers so as to include such as traveled from place to place and took orders for goods from other States and that such persons, because of the statute declaring them so, were peddlers and liable to be taxed under the lawful exercise of the police power of the State. We must look, however, to the substance of things, not the names by which they are labelled, particularly in dealing with rights created and conserved by the Federal Constitution and finding their ultimate protection in the decisions of this court. At common law and under the statutes which have been sustained concerning peddlers

they are such as travel from place to place selling the goods carried about with them, not such as take orders for the delivery of goods to be shipped in the course of commerce. Here, as the facts show, the sample ranges carried about from place to place are not sold. Orders are taken and transmitted to the manufacturer in another State for ranges to be delivered in fulfillment of such orders, which are in fact shipped in interstate commerce and delivered to the persons who ordered them. Business of this character, as well settled by the decisions of this court, constitutes interstate commerce, and the privilege of doing it cannot be taxed by the State.

It follows that the judgments of the Supreme Court of Arkansas must be reversed and the cases remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

ROGERS *v.* STATE OF ARKANSAS.

BARNHILL *v.* SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

Nos. 576, 577. Argued January 21, 1913.—Decided February 24, 1913.

Crenshaw v. *Arkansas*, *ante*, p. 389, followed to effect that the license tax required by the Arkansas act of April 1, 1909, regulating the sale of certain specified articles, is unconstitutional under the commerce clause as applied to persons soliciting orders for articles to be shipped from without the State.

144 S. W. Rep. 211, reversed.

THE facts, which involve the constitutionality under the commerce clause of the Federal Constitution of a law

of the State of Arkansas imposing a license on persons making sales within the State as applied to articles delivered from without the State, are stated in the opinion.

Mr. A. C. Lyon for plaintiff in error: [1]

The Arkansas statute, correctly construed, does not apply to an interstate commerce transaction such as the agreed statement of facts in this case shows. Plaintiff in error was not engaged in peddling and his acts do not come within the scope of the Arkansas statute. *Commonwealth* v. *Farnum*, 114 Massachusetts, 267; *St. Paul* v. *Briggs*, 85 Minnesota, 290; *State* v. *Moorhead*, 20 S. E. Rep. 544; *Kansas* v. *Collins*, 8 Pac. Rep. 865; *Davenport* v. *Rice*, 75 Iowa, 74; *Spencer* v. *Whiting*, 68 Iowa, 678; *Potts* v. *Texas*, 74 S. W. Rep. 31; *State* v. *Ivey*, 50 S. E. Rep. 428; *Kennedy* v. *People*, 9 Colo. App. 290; *Hewson* v. *Englewood*, 27 Atl. Rep. 904; *State* v. *Franks*, 130 Nor. Car. 724; *Wausaw* v. *Heideman*, 96 N. W. Rep. 549; *Cerro Gordo* v. *Rawlings*, 135 Illinois, 36; *Stamford* v. *Fisher*, 140 N. Y. 187; *State* v. *Wells*, 45 Atl. Rep. 143; *Kimmel* v. *Americus*, 105 Georgia, 694; *Clements* v. *Casper*, 4 Wyoming, 494; *Brookfield* v. *Kitchen*, 163 Missouri, 546; *Pegues* v. *Ray*, 50 La. Ann. 574; *Hynes* v. *Briggs*, 41 Fed. Rep. 468; *In re Kimmel*, 41 Fed. Rep. 775; *In re Spain*, 47 Fed. Rep. 208; *In re Houston*, 47 Fed. Rep. 539; *In re Flynn*, 57 Fed. Rep. 496; *Chicago Portrait Co.* v. *Macon*, 147 Fed. Rep. 967; *State* v. *Gruber*, 133 N. W. Rep. 571; *Clark* v. *State*, 59 So. Rep. 236.

The Arkansas Supreme Court, however, in *Crenshaw* v. *Arkansas*, 130 S. W. Rep. 569, and *Rogers* v. *Arkansas*, 144 S. W. Rep. 211, have construed the statute to apply to strict interstate commerce transactions. Whether correctly construed or not, this does not raise a Federal

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[1] See also argument for plaintiff in error in *Crenshaw* v. *Arkansas*, *ante*, p. 390.

question, and this court will follow the interpretation of the Arkansas Supreme Court.

Plaintiff in error was engaged in interstate commerce. *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 203; *Addyston Pipe Co.* v. *United States,* 175 U. S. 211, 241; *Kidd* v. *Pearson,* 128 U. S. 1, 20; *Robbins* v. *Shelby Taxing District,* 120 U. S. 489, 497; *Asher* v. *Texas,* 128 U. S. 129; *Leisy* v. *Hardin,* 135 U. S. 100; *Brennan* v. *Titusville,* 153 U. S. 287; *Stockard* v. *Morgan,* 185 U. S. 27; *Caldwell* v. *North Carolina,* 187 U. S. 622; *Rearick* v. *Pennsylvania,* 203 U. S. 507; *Dozier* v. *Alabama,* 218 U. S. 124.

The Arkansas statute attempts to regulate and impose a burden upon interstate commerce, and is, therefore, unconstitutional and void.

The act of Arkansas is invalid because, in its effect and operation it practically applies only to non-residents and hence abridges the privileges and immunities of the citizens of the several States. None of the articles named are manufactured to any great extent, if at all, in Arkansas. Taxing those who peddle or sell these articles, therefore, imposes a burden upon non-resident manufacturers who must furnish all the necessary supply, and limits and prescribes the methods by which they can sell their product in Arkansas. Statutes in which such a discrimination or any discrimination against non-residents results from express terms, are plainly unconstitutional. *Ward* v. *Maryland,* 12 Wall. 418; *Welton* v. *Missouri,* 91 U. S. 275; *Guy* v. *Baltimore,* 100 U. S. 434; *Webber* v. *Virginia,* 103 U. S. 344.

Statutes which have the effect and operation of discriminating against the citizens of outside States are equally as invalid and unconstitutional as those which expressly so discriminate. *Utah* v. *Bayer,* 97 Pac. Rep. 129; *Oregon* v. *Wright,* 100 Pac. Rep. 296; *Smith* v. *Farr,* 104 Pac. Rep. 401; *Minnesota* v. *Barber,* 136 U. S. 313; *Brimmer* v. *Rebman,* 138 U. S. 78; *Robbins* v. *Shelby Taxing Dist.,* 120 U. S. 489.

The act of Arkansas is prohibitive and confiscatory, and deprives persons of life, liberty or property without due process of law, and hence is unconstitutional and invalid. The statute is intended to destroy and annihilate the business covered by its terms. *In re McCoy*, 101 Pac. Rep. 419; *Laundry License Case*, 22 Fed. Rep. 701; *Postal Tel. Co.* v. *Taylor*, 192 U. S. 64; *Cache County* v. *Jensen*, 21 Utah, 207; *Spaulding* v. *Evenson*, 149 Fed. Rep. 913; *Utah* v. *Bayer*, 97 Pac. Rep. 129; *Smith* v. *Farr*, 104 Pac. Rep. 401; *Iowa City* v. *Glassman*, 136 N. W. Rep. 899; *Carrollton* v. *Bazzette*, 159 Illinois, 284; *People* v. *Jenkins*, 94 N. E. Rep. 1065; 1 Tiedeman State and Fed. Control, 505.

The act unreasonably discriminates between persons who are substantially in the same position and creates an arbitrary classification, and, therefore, denies the equal protection of the laws to those against whom it discriminates and is in contravention of the Fourteenth Amendment. *Oregon* v. *Wright*, 100 Pac. Rep. 296; *Utah* v. *Bayer*, 97 Pac. Rep. 129; *Smith* v. *Farr*, 104 Pac. Rep. 401; *Ex parte Jones*, 43 S. W. Rep. 513; *State* v. *Wagener*, 72 N. W. Rep. 67; *Spokane* v. *Macho*, 98 Pac. Rep. 755; *Jackson* v. *State*, 117 S. W. Rep. 818; *State* v. *Gardner*, 51 N. E. Rep. 136; *State* v. *Justus*, 97 N. W. Rep. 124; *State* v. *Smith*, 84 Pac. Rep. 851; *Henry* v. *Campbell*, 67 S. E. Rep. 390; *State* v. *Miksicek*, 125 S. W. Rep. 507; *People* v. *Wilber*, 90 N. E. Rep. 1140; *In re Van Horne*, 70 Atl. Rep. 986; *Tacoma* v. *Krech*, 46 Pac. Rep. 255; *Denver* v. *Bach*, 58 Pac. Rep. 1089; *Seaboard Ry.* v. *Simon*, 47 So. Rep. 1001; *State* v. *Ashbrook*, 55 S. W. Rep. 627; *Gulf &c. Railway* v. *Ellis*, 165 U. S. 150; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *In re Grice*, 79 Fed. Rep. 627; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79.

The statute is a type of similar laws enacted in many States, all of which are trade laws pure and simple. They are not passed in a *bona fide* attempt to exert the police

power of the State to remedy a public evil. As a matter of common knowledge, they are passed at the instance and request of a certain kind or class of dealers or traders in order to build up and strengthen their own business, and to keep out the competition of those whose business would interfere with their own. *People* v. *Ringe*, 90 N. E. Rep. 451; *State* v. *Rice*, 80 Atl. Rep. 1026; *Wyeth* v. *Cambridge*, 86 N. E. Rep. 925; *Great Atl. & Pac. Tea Co.* v. *Tippecanoe*, 96 N. E. Rep. 1092; *People* v. *Jenkins*, 94 N. E. Rep. 1065; *Jewel Tea Co.* v. *Lee's Summit*, 189 Fed. Rep. 280; *State* v. *Smith*, 84 Pac. Rep. 851; *State* v. *Ashbrook*, 55 S. W. Rep. 627; *People* v. *Marx*, 2 N. E. Rep. 29; *People* v. *Gilson*, 17 N. E. Rep. 343; *Lochner* v. *New York*, 198 U. S. 45; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Denver Jobbers Ass'n* v. *People*, 122 Pac. Rep. 404; *Oregon* v. *Wright*, 100 Pac. Rep. 296; *Smith* v. *Farr*, 104 Pac. Rep. 401; *Utah* v. *Bayer*, 97 Pac. Rep. 129; *Ex parte Deeds*, 75 Arkansas, 542; *Ex parte Eaglesfield*, 180 Fed. Rep. 558; *Potts* v. *State*, 74 S. W. Rep. 31; *Spaulding* v. *Evenson*, 149 Fed. Rep. 913; *In re Kinyon*, 75 Pac. Rep. 268; *In re Jarvis*, 71 Pac. Rep. 576; *State* v. *Wagener*, 72 N. W. Rep. 67; *State* v. *Parr*, 123 N. W. Rep. 408; *Bacon* v. *Locke*, 83 Pac. Rep. 721; *Stratton* v. *State*, 137 N. W. Rep. 903; *State* v. *Garbroski*, 111 Iowa, 296.

Mr. Charles C. Reid, with whom *Mr. Hal L. Norwood*, Attorney General of Arkansas, *Mr. Wm. H. Rector*, Assistant Attorney General, and *Mr. T. M. Mehaffy* were on the brief, for defendant in error: [1]

The act neither in terms nor by fair implication can be confined to non-residents of Arkansas, but is applicable to all engaged in the occupation of peddling regardless of whether they are residents. The statute does not have

[1] See also abstract of argument in *Crenshaw* v. *Arkansas*, *ante*, p. 389.

the effect of discriminating against the citizens outside of the State. *Ex parte Byles*, 93 Arkansas, p. 620.

Counsel are in error in insisting that the statute selects a few articles not manufactured in this State and imposes a prohibitive tax on the sale thereof, thus excluding foreign manufactured articles and preventing non-resident merchants from selling them here. Even if none of these articles are manufactured in the State, that does not affect the validity of the statute, nor is the tax or license fee of $200 per annum prohibitive. *Armour Packing Co.* v. *Lacy*, 200 U. S. 226; *Machine Co.* v. *Gage*, 100 U. S. 676; *Emert* v. *Missouri*, 156 U. S. 296; *In re Watson*, 17 S. Dak. 468; *State* v. *Webber*, 214 Missouri, 272; *Singer Mfg. Co.* v. *Wright*, 97 Georgia, 114; *State* v. *Montgomery*, 92 Maine, 433; *Hays* v. *Commission*, 107 Kentucky, 655; *People* v. *Smith*, 147 Michigan, 391; *State* v. *Stevenson*, 109 Nor. Car. 730; *Ex parte Haylman*, 92 California, 492.

As to the classification features of the statute, see also *Brown-Forman Co.* v. *Kentucky*, 217 U. S. p. 571; *S. W. Oil Co.* v. *Texas*, 217 U. S. p. 126.

Except as restrained by its own constitution or by the Constitution of the United States, a State by its legislature has full power to prescribe any system of taxation which, in its judgment, is best or necessary for its people and government.

Whether the enactment of a statute is really adapted to bring about the result desired from its passage and calculated to promote the general welfare, are all matters with which the state court is familiar, but a like familiarity cannot be ascribed to this court. *Welsh* v. *Swasey*, 214 U. S. p. 105; *McLean* v. *Arkansas*, 211 U. S. p. 547; *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Mugler* v. *Kansas*, 123 U. S. 623; *Minnesota* v. *Barber*, 136 U. S. 313, 320; *Atkins* v. *Kansas*, 191 U. S. 207–223; *Williams* v. *Arkansas*, 217 U. S. p. 90; *M., K. & T. Ry. Co.* v. *May*, 194 U. S. 267.

The statute is not in contravention of the Fourteenth

Amendment. The statute in respect of the particular class of wholesale dealers mentioned in it is to be referred to the governmental power of the State, in its discretion, to classify occupations for purposes of taxation. The State, keeping within the limits of its own fundamental law, can adopt any system of taxation or any classification that is deemed best by it for the common good and the maintenance of its government, provided such classification be not in violation of the Fourteenth Amendment. *Bell's Gap Rd. Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 562. For other cases in which the court considered the meaning and scope of the equal protection clause, see *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 294; *Am. Sugar R. Co.* v. *Louisiana*, 179 U. S. 89; *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452; *Cook* v. *Marshall Co.*, 196 U. S. 268.

It is no objection to a statute that a discrimination is made in favor of or against a given class so long as the discrimination is based upon a reasonable foundation in fact pertaining to the duties of the class as citizens or as taxpayers. *Am. Sugar R. Co.* v. *Louisiana*, 179 U. S. 89.

The regulation of the business of itinerant peddlers is very ancient. *State* v. *Webber*, 214 Missouri, 272, and see statement of Baron Graham, in *Attorney General* v. *Tongue*, 12 Price, 51, that such acts are to protect, on the one hand, fair traders, particularly established shopkeepers, resident permanently in towns and other places, and paying rent and taxes there for local privileges, from the mischiefs of being undersold by itinerant persons, to their injury, and, on the other hand, to guard the public from the impositions practiced by such persons in the course of their dealings, who, having no known residence, carry on a trade by means of vending goods conveyed from place to place by horse or cart. See also *Graffty* v. *Rushville*, 107 Indiana, 502.

MR. JUSTICE DAY delivered the opinion of the court.

The plaintiffs in error were convicted of peddling buggies in Greene County, Arkansas, without having paid the license or privilege tax required by an act of the Arkansas legislature approved April 1, 1909 (Act 97, Acts of 1909, p. 292), regulating the sale of lightning rods, steel stove ranges, clocks, pumps and vehicles in the counties of that State. (The provisions of such statute are set out in the case just decided, *Crenshaw* v. *Arkansas*.) The Supreme Court of Arkansas affirmed the judgments upon the authority of *Crenshaw* v. *State*, 95 Arkansas, 464 (144 S. W. Rep. 211), and the cases are here upon writ of error.

The cases were submitted upon an agreed statement of facts, the gist of which is that the Spaulding Manufacturing Company, a partnership, with its principal place of business and factory at Grinnell, Iowa, manufactures buggies and automobiles which are sold directly to the consumers throughout the United States. It has no permanent place of business in Arkansas, but sends a force of salesmen or canvassers, in charge of a superintendent, into Greene and other counties of Arkansas, who travel about exhibiting their sample buggies and taking orders for future delivery. Where orders are taken, a memorandum is signed by the purchaser, stipulating for the delivery of the vehicle within a certain time, and a note for the purchase price is secured. The orders are turned over to the superintendent, who, if he finds the financial responsibility of the customers satisfactory, transmits the orders to an agent of the company at Memphis, Tennessee, where vehicles of the company of various grades and kinds are stored. Vehicles to fill the orders are selected, tagged with the name of the purchaser, and shipped in car-load lots to a place near where they are to be delivered, consigned to the company. An employé of the company, usually

a different person from the salesman, called a deliveryman, receives the vehicles and delivers them to the respective purchasers, no storage house being maintained at that point. It was further agreed that no vehicles, save the samples, which are never sold, are brought into or stored in Arkansas, except for the purpose of delivery upon orders previously taken; and no vehicles are sold other than upon orders taken before they are brought into the State. The plaintiffs in error were salesmen and transacted the business above described.

The manner in which the business of soliciting orders for and delivering vehicles was done by the Spaulding Manufacturing Company, differs in no practical or material particular from that employed by the Wrought Iron Range Company in the case just decided (*Crenshaw* v. *Arkansas*). In fact, the only difference is that the ranges were shipped to the company, bearing no marks to identify the purchasers, and were delivered to the purchasers by the deliverymen without distinction, while the vehicles were tagged at Memphis and upon arrival in Arkansas were delivered by the deliverymen to the purchasers whose names appeared upon the tags attached to the vehicles. This is merely a matter of detail in the manner in which the business is conducted and does not affect its character. The decision in *Crenshaw* v. *Arkansas*, *ante*, p. 389, has dealt with precisely the same statute and substantially the same facts and controls the present cases.

The judgments of the Supreme Court of Arkansas must therefore be reversed and the cases remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

JAMES, A BANKRUPT, *v.* STONE & COMPANY.

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

No. 142. Submitted January 23, 1913.—Decided February 24, 1913.

Under the Bankruptcy Act the only appeal from a judgment granting or refusing a discharge is from the Bankruptcy Court to the Circuit Court of Appeals. There is no appeal from the Circuit Court of Appeals to this court.

Appeal from 181 Fed. Rep. 476, dismissed.

THE facts, which involve the jurisdiction of this court of appeals from orders granting or refusing discharges in bankruptcy proceedings, are stated in the opinion.

Mr. H. L. Stevens and *Mr. Henry R. Miller* for appellant.

No appearance for appellees.

MR. JUSTICE DAY delivered the opinion of the court.

This is an appeal from the judgment of the Circuit Court of Appeals for the Fourth Circuit, affirming the judgment of the District Court of the United States for the Eastern District of North Carolina refusing to grant a discharge in bankruptcy to John L. James, Bankrupt.

So much of § 14 of the Bankruptcy Act, which provides for the granting of discharges in bankruptcy, as is applicable to this case reads as follows:

"The judge shall hear the application for a discharge, . . . and discharge the applicant unless he has . . . at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed . . .

any of his property with intent to hinder, delay, or defraud his creditors."

The District Court held that the bankrupt had concealed property with intent to hinder and delay his creditors subsequently to the first day of the four months immediately preceding the filing of the petition and entered an order refusing to grant the discharge. 175 Fed. Rep. 894. Upon appeal, the Circuit Court of Appeals affirmed that order. 181 Fed. Rep. 476. The case was then brought to this court by appeal.

We are unable to discover anything in the Bankruptcy Act which permits an appeal in such a case from the Circuit Court of Appeals to this court. Under § 24*a* this court is given appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which there is appellate jurisdiction in other cases. This section has been the subject of adjudication in this court in a number of cases, and it is held that controversies in bankruptcy proceedings, as the terms are therein used, do not mean mere steps in proceedings in bankruptcy but embrace controversies which are not of that inherent character, although arising in the course of proceedings in bankruptcy. *Hewit* v. *Berlin Machine Works*, 194 U. S. 296, 300; *Coder* v. *Arts*, 213 U. S. 223, 234; *Tefft, Weller & Co.* v. *Munsuri*, 222 U. S. 114, 118.

Subdivision *b* of § 24 gives the Circuit Courts of Appeal jurisdiction to superintend and revise in matters of law the proceedings of courts of bankruptcy within their jurisdiction. Section 25 concerns appeals in bankruptcy proceedings of which an application for discharge is one. By the terms of subdivision *a* of that section an appeal is given to the Circuit Court of Appeals, first, from a judgment adjudging or refusing to adjudge the defendant a bankrupt; second, from a judgment granting or denying a discharge, and third, from a judgment allowing or

rejecting a claim of $500 or over. Subdivision *b* of § 25 regulates appeals from the Circuit Court of Appeals to this court, and is confined to decisions of the Circuit Courts of Appeals allowing or rejecting a claim under the act, first, where the amount in controversy exceeds the sum of $2,000 and the question involved is one which might have been taken on appeal or error to this court from the highest court of a State; or, second, where a Justice of this court shall certify that in his opinion the determination of the question involved in the allowance or rejection of the claim is essential to a uniform construction of the act. Section 25 further provides that controversies may be certified to the Supreme Court from other courts of the United States and that the Supreme Court may exercise jurisdiction thereof and issue writs of *certiorari* pursuant to the laws of the United States.

It will be noticed that the only appeal in bankruptcy proceedings from a judgment granting or refusing a discharge is from the bankruptcy court to the Circuit Court of Appeals.

The present appeal must therefore be dismissed.

LOVELL, TRUSTEE IN BANKRUPTCY OF KNIGHT, *v.* NEWMAN & SON.

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

No. 593. Submitted January 13, 1913.—Decided February 24, 1913.

Where the jurisdiction of the Federal court of a suit brought by a trustee in bankruptcy rests upon diverse citizenship alone the judgment of the Circuit Court of Appeals is final; if, however, the petition also discloses as an additional ground of jurisdiction that the case arises under the laws of the United States, the judgment of the Circuit Court of Appeals is not final but can be reviewed by this court.

Whether the case is one arising under the laws of the United States must be determined upon the statements in the petition itself and not upon questions subsequently arising in the progress of the case. *Macfadden* v. *United States*, 213 U. S. 288.

Section 23 of the Bankruptcy Act as amended by the act of February 5, 1903, conferring jurisdiction on the Circuit Courts of certain classes of cases was not intended to increase the jurisdiction of those courts in bankruptcy matters but rather to limit it to the classes of cases over which those courts are given jurisdiction by the acts creating them.

Whether the Federal court had jurisdiction on grounds other than diverse citizenship must be determined from complainants' own statement as set forth in the bill affirmatively and distinctly, regardless of questions subsequently arising; grounds of jurisdiction may not be inferred argumentatively.

A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws. There must be a controversy respecting the validity, construction or effect of such a law upon the determination of which the result depends.

Where a trustee in bankruptcy sues in the Federal court on the ground that the property, or bond representing the value thereof, belonged to the bankrupt, and diverse citizenship exists, the suit does not depend upon the validity, construction or effect of any law of the United States, and the judgment of the Circuit Court of Appeals is final.

Where a trustee permits a bond to be given for value of goods and sues on the bond as merely representing the goods, and not as required by any statute, the case is not one arising under the laws of the United States, and jurisdiction is not conferred on the Federal court by reason of the existence of such a bond.

Where diversity of citizenship exists, the trustee can sue in the Federal court without consent of defendant and if consent be given, it does not, where such diversity exists, create an independent ground of jurisdiction.

Writ of error to review 192 Fed. Rep. 753, dismissed.

THE facts, which involve the jurisdiction of this court on appeals from and error to the Circuit Court of Appeals in cases brought by trustees in bankruptcy, are stated in the opinion.

Mr. John W. Griffin and *Mr. Everett P. Wheeler*, for defendants in error, in support of motion to dismiss or affirm.

Mr. W. A. Blount, Mr. H. Generes Dufour and *Mr. Walker Percy*, for plaintiff in error, in opposition thereto.

MR. JUSTICE DAY delivered the opinion of the court.

This case is submitted upon motion to dismiss or affirm. The action was brought by William S. Lovell, Trustee of Knight, Yancey & Company, against Isidore Newman & Son and others in the United States Circuit Court for the Eastern District of Louisiana, to recover stipulated damages in the sum of $98,500 on a certain bond. Issues were joined and the case was tried and a judgment rendered in favor of the defendants. 188 Fed. Rep. 534. On writ of error the Circuit Court of Appeals affirmed that judgment. 192 Fed. Rep. 753.

A writ of *certiorari* to the judgment of the Circuit Court of Appeals was prayed and denied. (December 23, 1912.)

The question of jurisdiction presented is, Was the judgment of the Circuit Court of Appeals final or is it subject to review by writ of error in this court? As the present suit was upon a bond and concerns the right of the trustee to recover thereon, it presents a controversy arising in a bankruptcy proceeding, the finality of which in the Circuit Court of Appeals depends upon the application of the Circuit Court of Appeals Act to the case. *Hewit* v. *Berlin Machine Works*, 194 U. S. 296; *Coder* v. *Arts*, 213 U. S. 223, 233; *Knapp* v. *Milwaukee Trust Co.*, 216 U. S. 545, 553; *Tefft, Weller & Co.* v. *Munsuri*, 222 U. S. 114, 118. If the jurisdiction in the present case rests alone upon diverse citizenship, then, under the Circuit Court of Appeals Act, the judgment of the Circuit Court of Appeals is final; if, as contended by the plaintiff in error, the peti-

tion in the case discloses, as a ground of jurisdiction in addition to that of diverse citizenship, that the case arises under the laws of the United States, then the judgment of the Circuit Court of Appeals is not final and the case can come here from that court. And it is well settled that this question must be decided, not because of questions which may have arisen or which might arise in the subsequent progress of the case, but upon the grounds of jurisdiction asserted in the petition. *Macfadden* v. *United States*, 213 U. S. 288.

Turning then to the petition for the assertion of the cause of action upon which this suit was brought, we find from its averments that Knight, Yancey & Company, partners, doing business in Decatur, Alabama, were adjudicated bankrupts by the District Court of the United States for the Northern District of Alabama on the twentieth of April, 1910; that Lovell, the trustee in bankruptcy, is a citizen of the State of Alabama, and also that the members of the partnership and each of them are citizens of other States than Louisiana. It appears in the petition that on the third of May, 1910, C. E. Frost and Lovell, who were then receivers in bankruptcy of Knight, Yancey & Company, filed, as such receivers, in the United States District Court for the Eastern District of Louisiana, their petition, which is attached to and made part of the petition in this case, setting forth that certain cotton was in the possession of the master of the Steamer Ingelfingen at the port of New Orleans, and would, unless restrained, be shipped beyond the jurisdiction of the court; that certain persons in Italy held spurious bills of lading upon which they would seek to obtain possession of such cotton; that the original bills of lading had been destroyed or made away with and were not in the hands of bona fide holders; that therefore the legal title to the cotton was in the petitioners and that any attempt to ship the cotton to a foreign country would result in depriving the

bankrupt estate of that asset and would subject it to the claims of foreign creditors, and would constitute an unlawful preference within the meaning and intendment of the Bankruptcy Act in favor of the foreign holders of the spurious bills of lading, and they prayed for an injunction or that in the alternative the court would order the United States Marshal to seize and take possession of the cotton, and prayed for an order upon the master of the Steamer Ingelfingen, its owners and agents, to show cause, if any they could, why the relief prayed for should not be granted. A restraining order was issued by the District Court, the master of the Ingelfingen appeared, excepted to the petition, alleging that the receivers had no right or capacity to institute suit and that the court was without jurisdiction, and afterwards filed an answer in which he set up that the partnership had sold cotton to various Italian purchasers under contracts in the usual mercantile course, that is, it had shipped the cotton to Italy to its order upon through bills of lading, and drafts for the price of the cotton with the bills of lading attached had been discounted, the Italian purchasers finally taking up the drafts and securing the cotton covered by the bills of lading; that in February, 1910, the partnership discounted, and the Italian purchasers subsequently paid, certain drafts with bills of lading attached, alleged in the petition to be forged, covering 1400 bales of cotton bearing certain marks, and they acquired the bills of lading in the regular course of business, prior to the filing of the petition in bankruptcy, for value and in ignorance of the forgery; that in March and April of that year the partnership shipped the cotton called for by the bills of lading, the cotton bearing the same marks and the bills of lading being substantially identical with the alleged forged bills of lading, and being the bills of lading alleged in the petition to have been made away with, and that 89 bales of the cotton were previously exported and the 1311 remain-

ing bales were on board the Ingelfingen. The master further alleged that the cotton was the property of the Italian purchasers and rightfully in his possession as bailee and that the bankrupt estate had no interest in the cotton; that if the bills of lading in the hands of the purchasers were spurious they were forged by the partnership and that the cotton was shipped under genuine bills of lading which were not now outstanding but of which the alleged forged bills of lading were duplicates; that the partnership was paid for the cotton, which was apportioned to cover the bills of lading held by the purchasers in good faith and at a time when the partnership was not known to be insolvent; that the purchasers and their agents were ignorant of the forgery or that the shipment was other than in regular course, and that no preference was given them. The master also alleged that the partnership had for some time been following this practice and that the purchasers had been securing their cotton under forged bills of lading, of which practice they were ignorant until after the filing of the petition in bankruptcy. The master further alleged that he was the bailee under regular bills of lading and bound to deliver to the true owners, for whom he was obliged to protect the cotton for which he had issued receipt, and was entitled to earn his freight, for which and other charges he had a lien on the cotton, and that the charges would be increased by further delay. He denied the inadequacy of a remedy at law. The agent of the steamer also appeared and adopted the answer of the master of the Ingelfingen as his own. The court, upon a hearing, ordered a temporary injunction upon the receivers giving bond in the sum of $10,000, and thereupon, the bond having been given and the temporary injunction awarded, the bond now in suit was executed and delivered, running to the Receivers and such Trustee as might be elected or appointed, which after reciting the order of injunction, provided:

"Whereas, it was further provided in said order or injunction that said cotton might be removed out of said jurisdiction upon the filing by the Respondents in said proceeding, or either of them, of a bond for the value of said cotton, which has been fixed by agreement for purposes of bonding at the sum above mentioned.

"Now, therefore, the condition of this obligation is such that if said Th. Ruhne and Isidore Newman and Son, New Orleans, La. above mentioned shall well and truly pay to said obligees the said sum of Ninety-eight thousand Five hundred ($98,500.00) Dollars, or such part thereof as the Court may direct, if, in a suit or action at law or in equity that may or shall hereafter be brought on this bond by said Receivers, or by said Trustee or Trustees, or by said Estate in bankruptcy against the obligors herein, or either of them, in the Circuit or District Court of the United States for the Eastern District of Louisiana, it shall be adjudged that said Receivers, or said Trustee or Trustees of said Knight, Yancey & Company, or the Bankrupt Estate of said Knight, Yancey & Company have the right, title or interest in or to said cotton, or any part thereof, then and in such case this obligation shall be null, void and of no effect; otherwise the same shall remain in full force and effect."

From this recital it is apparent that the proceeding in the United States District Court for the Eastern District of Louisiana was ancillary to the original proceeding in the Court of Bankruptcy in Alabama, where the adjudication was had. It was long in doubt whether under the act of 1898 such ancillary proceeding would lie in another District Court, but the matter was settled in favor of such jurisdiction in aid of the original jurisdiction by the decisions of this court in *Babbitt* v. *Dutcher*, 216 U. S. 102, and in *Elkus, Petitioner*, 216 U. S. 115. Later, after this ancillary suit was brought, the Congress removed all doubt concerning the matter by passing the act of June 25,

1910 (36 Stat. 838), expressly conferring such ancillary jurisdiction in aid of the jurisdiction of the Bankruptcy Court which had appointed the receiver or trustee.

The present action was brought upon the bond in the United States Circuit Court and was taken by writ of error to the Circuit Court of Appeals, and the appellate jurisdiction to review that court is the one now in question. Section 23 of the Bankruptcy Act must be consulted to determine the jurisdiction of the Circuit Court. That section provides:

"SEC. 23. *a.* The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"*b.* Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e" [the exception being added by the amendment of February 5, 1903].

That section gives jurisdiction to the Circuit Courts of the United States of controversies at law or in equity, as distinguished from bankruptcy proceedings, between the trustee and adverse claimants in the same manner and to the same extent as though bankruptcy proceedings had not been instituted. It is also provided that suits by the trustee can only be brought in courts where the bankrupt might have brought them, if proceedings in bankruptcy

had not been instituted, unless by consent of the proposed defendant. Later when Congress enlarged the jurisdiction of the District Court by the act of February 5, 1903, exception was made in favor of certain suits for the recovery of property in fraud of the act, but this did not affect suits of the present character. The cases in this court which have considered this section have determined that it was not intended to increase the jurisdiction of the United States Circuit Courts in bankruptcy matters, but rather to limit it to such suits and controversies as are within the jurisdiction given such courts by the acts creating them, that is, controversies in law and in equity with adverse claimants where the amount involved is in excess of $2,000 where diverse citizenship exists (the citizenship test being, because of the Bankruptcy Act, that of the bankrupt and not that of the trustee), or there is a cause of action arising under the Constitution or laws of the United States. *Bush* v. *Elliott*, 202 U. S. 477; 1 Loveland on Bankruptcy, 4th ed., §§ 74 *et seq.;* 1 Remington on Bankruptcy, § 1686.

The present suit, so far as the ground of diverse citizenship is concerned, conforms to the requirement of the Bankruptcy Act as construed in *Bush* v. *Elliott*, *supra*, for the citizenship of the bankrupts is other than that of Louisiana, and the amount in controversy exceeds the sum of $2,000. But it is contended that the petition also discloses a ground of jurisdiction other than diverse citizenship, and upon the solution of that question the present jurisdiction depends. This court had recent occasion to summarize the principles upon which such jurisdiction rests in *Shulthis* v. *McDougal*, 225 U. S. 561, and we can do no better than to recur to that summary for a statement of the principles which must control in deciding the present case (p. 569):

"1. Whether the jurisdiction depended on diverse citizenship alone, or on other grounds as well, must be determined from the complainant's statement of his own

cause of action as set forth in the bill, regardless of questions that may have been brought into the suit by the answers or in the course of the subsequent proceedings. *Colorado Central Mining Co.* v. *Turck*, 150 U. S. 138; *Tennessee* v. *Union and Planters' Bank*, 152 U. S. 454; *Spencer* v. *Duplan Silk Co.*, 191 U. S. 526; *Devine* v. *Los Angeles*, 202 U. S. 313, 333.

"2. It is not enough that grounds of jurisdiction other than diverse citizenship may be inferred argumentatively from the statements in the bill, for jurisdiction cannot rest on any ground that is not affirmatively and distinctly set forth. *Hanford* v. *Davies*, 163 U. S. 273, 279; *Mountain View Mining Co.* v. *McFadden*, 180 U. S. 533; *Bankers' Casualty Co.* v. *Minneapolis &c. Co.*, 192 U. S. 371, 383, 385.

"3. A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends."

Does it then appear in the petition in the present case, in addition to averments of diverse citizenship, that the petitioner has asserted a ground of jurisdiction which "really and substantially involves a dispute or controversy respecting the validity, construction or effect of a law of the United States and upon which his right to recover depends?" Such a cause of action was not asserted simply because the action was brought by an assignee in bankruptcy. Mr. Justice Gray, speaking for the court, said, in *Bardes* v. *Hawarden Bank*, 178 U. S. 524, 536:

"The first clause provides that 'The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy' (thus clearly recognizing the essential

difference between proceedings in bankruptcy, on the one hand, and suits at law or in equity, on the other), 'between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees,' restricting that jurisdiction, however, by the further words, 'in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants.' This clause, while relating to the Circuit Courts only, and not to the District Courts of the United States, indicates the intention of Congress that the ascertainment, as between the trustees in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdiction of the national courts solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy."

This was also held in *Spencer* v. *Duplan Silk Co.*, 191 U. S. 526, in which the assignee brought an action in the state court in trover for the conversion of goods alleged to belong to the estate. Diversity of citizenship was shown, and upon that ground the case was removed to the Circuit Court of the United States. It went to the Circuit Court of Appeals, and it was then contended that it might be reviewed here, but the writ of error was dismissed for lack of jurisdiction, Mr. Chief Justice Fuller saying (p. 530):

"But a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution, or validity or construction of the laws or treaties of the United States, upon the determination of which the result depends, and which appears in the record by plaintiff's pleading. . . .

"Plaintiff's declaration set forth no matter raising any

controversy under the Constitution, laws or treaties of the United States. It is true that if the lumber and materials belonged to Bennett and Rothrock on January 13, 1900, plaintiff in error succeeded to the title of the firm on the adjudication, but the question of Bennett and Rothrock's ownership on that day in itself involved no Federal controversy, and the mere fact that plaintiff was trustee in bankruptcy did not give jurisdiction. *Bardes* v. *Bank*, 178 U. S. 524. Indeed if the case had not been removed and had gone to judgment in the Court of Common Pleas, and that judgment had been affirmed by the Supreme Court of Pennsylvania on the same grounds as those on which the Circuit Court of Appeals proceeded, a writ of error could not have been brought under § 709 of the Revised Statutes, for the case would not have fallen within either of the classes enumerated in that section as the basis of our jurisdiction. The validity of the bankruptcy act was conceded, and no right specially set up or claimed under it was denied."

That case has frequently been cited approvingly since. *Warder* v. *Loomis*, 197 U. S. 619; *Watkins* v. *American Nat'l Bank of Denver*, 199 U. S. 599; *Mobile Transportation Co.* v. *Mobile*, 199 U. S. 604; *Montana Catholic Missions* v. *Missoula County*, 200 U. S. 118, 126; *Empire State-Idaho Mining and Developing Co.* v. *Bunker Hill and Sullivan Mining Co.*, 200 U. S. 613; *Russell* v. *Russell*, 200 U. S. 613; *Bush* v. *Elliott*, *supra*; *Warder* v. *Cotton and Grant*, 207 U. S. 582; *Shulthis* v. *McDougal*, *supra*.

The trustee, for his recovery upon the bond, did not rely upon any right specially conferred upon him under the Federal statute which was the subject of controversy, and therefore a ground of jurisdiction. He sued to recover upon the bond solely because of his claim that the 1311 bales of cotton were at the time of the bankruptcy proceeding the property of Knight, Yancey & Company. He alleged in the petition that:

"Your petitioner further avers that the said 1311 bales of cotton were at the time of the bankruptcy proceedings and have ever since been the property of Knight, Yancey & Company, and that as Trustee in bankruptcy of the said Knight, Yancey & Company, your petitioner as aforesaid is the owner of and has the right, title and interest in and to the said 1311 bales of cotton, and that your petitioner is therefore entitled to proceed against and to demand, collect and receive the principal sum of the bond filed by the said Th. Ruhne with the said Isidore Newman & Son as surety. . . ."

And in the amended petition he again averred:

"Your petitioner further avers that the statements in said petition contained with reference to said bills of lading are not true in point of fact, and that the bills of lading for all of said cotton described in the original petition herein, and in the petition in said suit No. 14,129, were in the possession and under the control of the Receivers of Knight, Yancey & Company, Bankrupt, and have since come into the possession and are now under the control of your petitioner as Trustee of Knight, Yancey & Company, Bankrupt, and your petitioner reiterates that the title to all of the cotton described in said original petition was in said Knight, Yancey & Company, Bankrupt, and is in said bankrupt estate and in your petitioner as the Trustee in Bankruptcy of Knight, Yancey & Company, Bankrupt."

And the Circuit Court in determining the character of the action said:

"As this case stood on the original petition, in view of some of the allegations of the petition in the district court referred to, there might have been some doubts as to plaintiff's right to proceed at law but, considering the supplemental petition whereby the plaintiff has eliminated those pleadings from the instant case and stands solely on his claim of absolute ownership of the cotton, it is clear

the action is properly at law. If anything were needed to strengthen this, the statement of plaintiff's counsel in open court that he disavows any intention of claiming a voidable preference against any one, in regard to the shipment of the cotton, is sufficient."

It therefore appears that the action, as outlined in the petition, made the plaintiff's right to recover depend upon the ownership of the property by the bankrupt as its own before the bankruptcy proceeding. The investigation of this question involved only matters of general law, and did not depend upon any right conferred by the Bankruptcy Act upon the trustee.

The cases cited by the plaintiff to the effect that actions upon marshals' bonds, etc., under statutes of the United States, give jurisdiction to the Circuit Court because they arise under the laws of the United States, are not in point; no more are cases in which this court has held that the decision of a state court might be reviewed when the construction of the Bankruptcy Act claimed by a party in interest as a Federal right has been denied. The bond here was not required by any law of the United States. It was permitted to be given that the property might be removed upon the steamer upon which it was about to be carried abroad. Under the allegations of his complaint the trustee could recover if he could show that the bankrupt owned this property before the bankruptcy proceedings. It is said that this bond could not be recovered upon unless the trustee could show that the property was such as had passed to the trustee and was liable to execution at the suit of his creditors. But there is nothing in the petition to show any lien upon the property or any averments which would have prevented its being made the subject of levy by creditors if it was owned by the bankrupt. The fact that such matters might have been brought up by the defendants or that questions may arise in the subsequent progress of the action which involve laws of

the United States, it has frequently been held, does not give jurisdiction. The petition must assert grounds of recovery which involve a controversy concerning such laws.

It is also asserted that this case shows not only diversity of citizenship giving jurisdiction to the Circuit Court under § 23 of the Bankruptcy Act, but the bond itself gives consent that the suit may be brought in the Circuit Court, and that this is an independent ground of jurisdiction. But in this case diversity of citizenship between the bankrupt and the defendants existed and no consent was required to enable the plaintiff to sue in the Circuit Court. Furthermore, the consent provided for in § 23b certainly was not intended to enlarge the jurisdiction of the Circuit Courts of the United States so as to give them a jurisdiction which they would not have because of diverse citizenship and a requisite amount in controversy or by reason of a cause of action arising under the Constitution or laws of the United States. 1 Remington on Bankruptcy, § 1686. *Bush* v. *Elliott, supra.*

We reach the conclusion that the jurisdiction of the Circuit Court asserted in the petition in this case rested alone upon diverse citizenship, and therefore under the Circuit Court of Appeals Act the case is one of those made final in the Circuit Court of Appeals.

Writ of error dismissed.

BARTELL *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

No. 691. Argued January 14, 1913.—Decided February 24, 1913.

An indictment to be good under the Constitution and laws of the United States must advise the accused of the nature and cause of the accusation sufficiently to enable him to meet the accusation and prepare for trial and so that, after judgment, he may be able to plead the record and judgment in bar of further prosecution for the same offense.

While ordinarily documents essential to the charge of crime must be sufficiently described to make known the contents thereof, matter too obscene or indecent to be spread on the record may be referred to in a manner sufficient to identify it and advise the accused of the document intended without setting forth its contents; and so held as to an indictment under § 3893 Rev. Stat. for sending obscene matter through the mails.

The accused may demand a bill of particulars if the reference in the indictment to a letter too obscene to be published does not sufficiently identify it, and in the absence of such demand a detailed reference is sufficient.

The accused is entitled to resort to parol evidence on a prosecution for sending obscene matter through the mail to show that the letter on which the indictment is based had been the subject-matter of a former prosecution, and therefore if the letter is too obscene to be spread on the record it is sufficient if a reference is made thereto in such detail that it may be identified.

THE facts, which involve the construction of § 3893, Rev. Stat., and the validity of an indictment and conviction thereunder for depositing obscene matter in a post-office of the United States, are stated in the opinion.

Mr. Joe Kirby for plaintiff in error submitted:

Under the Fifth and Sixth Amendments the indictment

must inform the accused of the charge with the definiteness and certainty recognized by law at the time this provision was adopted into the Constitution, and must be sufficient to protect, by the record, the defendant from a second jeopardy for the same offense.

The defendant must be tried for the offense, and that alone, of which the grand jury saw fit to accuse him. It cannot be a blanket indictment so that the prosecuting officer can select from a series of offenses, where only one is presented in the indictment, which he will attempt to prove.

The indictment in this respect does not meet these requirements.

The defendant must be tried, if at all, for the same specific offense that the grand jury had in mind when they returned the indictment, and this must appear from the record and cannot be left to the sense of honesty of the prosecution, or the honor of any court official. *In re Bain*, 121 U. S. 1.

The indictment must inform him of the nature and cause of the accusation, and this information must be so definite as to contain every ingredient of which the crime is composed so that he may be able, with his witnesses, to combat the prosecution at every point and, when the case is concluded, to invoke the protection provided by Article V against being again placed in jeopardy for the same offense. *United States* v. *Cruikshank*, 92 U. S. 542. See *State* v. *Terry*, 19 S. W. Rep. 206; *Rosen* v. *United States*, 161 U. S. 29.

The date of the alleged offense, as set forth in the indictment, is not in any manner an identification of the objectionable document which was presented to the grand jury. The date was wholly immaterial so long as the time sought to be proven was within the statute of limitations. *United States* v. *Potter*, 56 Fed. Rep. 95.

While the statement that the envelope containing the

letter was addressed to a particular person at a particular place might be some possible identification of the envelope, it would seem if it were in the mails something more definite could appear. Was it stamped, postmarked, or otherwise distinguishable? But how would this in any manner indentify the letter that is said to have been objectionable. It must be true that some part of the letter was not too filthy to appear on the records of the court. It is reasonable to assume that at least so much of a description of the document as is found in the *Rosen Case* could have been presented.

How is it to be known that the document ultimately presented to the trial court was the one that was before the grand jury? To hold such an indictment good, is for all practical purposes to abolish the constitutional safeguards. If they can be torn down in this case they can be destroyed in any other, and blanket indictments would probably become the rule. *United States* v. *Harmon*, 34 Fed. Rep. 872; *United States* v. *Read*, 73 Fed. Rep. 289.

The Solicitor General for the United States:

It is unnecessary to set forth the obscene matter. *Rosen* v. *United States*, 161 U. S. 29, 34, 40.

Identification by the date of mailing and the address upon the envelope is sufficient. *Tubbs* v. *United States*, 105 Fed. Rep. 59, 60, 61.

There is no danger of a second jeopardy, as it can always be established by parol evidence what letter was the subject of the prior conviction or acquittal. *Bowers* v. *United States*, 148 Fed. Rep. 379; *Dunbar* v. *United States*, 156 U. S. 185, 191; *Durland* v. *United States*, 161 U. S. 315; *Tubbs* v. *United States*, 105 Fed. Rep. 59.

The defendant failed to demand a bill of particulars, which would have cleared up any uncertainty as to what letter was the subject of the indictment. *Durland* v. *United States*, 161 U. S. 306, 315; *Rosen* v. *United States*,

161 U. S. 29, 35, 41; *Shaw* v. *United States*, 180 Fed. Rep. 348, 352.

There was no difficulty in demurring to the indictment. *United States* v. *Bennett*, 16 Blatchf. 338, 351.

The letter was sufficiently identified, and the suggestion that a defendant might be indicted on one indictment and tried on another is without merit. *Price* v. *United States*, 165 U. S. 311, 315.

MR. JUSTICE DAY delivered the opinion of the court.

The plaintiff in error was indicted under § 3893 of the Revised Statutes, which declares certain matter unmailable, for depositing a letter alleged to be obscene in a post-office of the United States. Upon trial he was convicted, and was sentenced to a term in the penitentiary. The case is brought here to review alleged errors in failing to sustain objections made to the indictment in the court below.

The indictment charged that Bartell did on the twenty-fourth of November, 1911, at Sioux Falls, in the County of Minnehaha, State of South Dakota, unlawfully, wilfully, knowingly and feloniously deposit in the United States post-office at Sioux Falls aforesaid, for mailing and delivery by the post-office establishment of the United States, certain nonmailable matter, to wit: "A letter enclosed in an envelope, which said letter was then and there filthy, obscene, lewd, lascivious and of an indecent character, and is too filthy, obscene, lewd, offensive and of such indecent character as to be unfit to be set forth in this indictment and to be spread at length upon the records of this Honorable Court. Therefore the Grand Jurors, aforesaid, do not set forth the same in this indictment; and which said envelope containing said letter was then and there directed to and addressed as follows: Miss Zella Delleree, Stevens Point, Wis., he, the said Lester P.

Bartell, then and there well knowing the contents of said letter and the character thereof, and well knowing the same to be filthy, obscene, lewd and lascivious and of an indecent character."

The plaintiff in error appeared and demurred to this indictment for the reasons following:

"I. That the facts stated in said indictment are not sufficient to and do not constitute a crime.

"II. That no facts are stated sufficient to notify this defendant of the nature and cause of the accusation for which he is now placed on trial, as required by Article VI of the Amendments to the Constitution of the United States."

The court overruled the demurrer. The same objection, in substance, was taken by motion in arrest of judgment after conviction, and the question presented here is the alleged insufficiency of the indictment.

It is elementary that an indictment, in order to be good under the Federal Constitution and laws, shall advise the accused of the nature and cause of the accusation against him in order that he may meet the accusation and prepare for his trial and that, after judgment, he may be able to plead the record and judgment in bar of further prosecution for the same offense.

While it is true that ordinarily a document or writing essential to the charge of crime must be sufficiently described to make known its contents or the substance thereof, there is a well recognized exception in the pleading of printed or written matter which is alleged to be too obscene or indecent to be spread upon the records of the court. It is well settled that such matter may be identified by a reference sufficient to advise the accused of the letter or document intended without setting forth its contents. *United States* v. *Bennett,* 16 Blatchf. 338, Federal Cases, vol. 24, p. 1093, No. 14,571; *Rosen* v. *United States,* 161 U. S. 29.

The cases were fully reviewed by Mr. Justice Harlan, speaking for the court, in the *Rosen Case*, and after stating the right of the accused to be advised of the nature and cause of the accusation against him with such reasonable certainty that he can make his defense and protect himself against further prosecution, the doctrine was thus summarized (p. 40):

"This right is not infringed by the omission from the indictment of indecent and obscene matter, alleged as not proper to be spread upon the records of the court, provided the crime charged, however general the language used, is yet so described as reasonably to inform the accused of the nature of the charge sought to be established against him; and . . . in such case, the accused may apply to the court before the trial is entered upon for a bill of particulars, showing what parts of the paper would be relied on by the prosecution as being obscene, lewd, and lascivious, which motion will be granted or refused, as the court, in the exercise of a sound legal discretion, may find necessary to the ends of justice."

We find, upon applying this doctrine to the instant case, that it was specifically charged that the letter was mailed by the accused in violation of the statute upon a day named at the post-office in a town and county named and within the District; that its contents were well known to the accused and were so filthy, obscene, lewd and offensive and of such indecent character as to be unfit to be spread upon the record of the court, and that the letter was enclosed in an envelope which was addressed to the person and place specified in the indictment. There was no attempt on the part of the accused to require a bill of particulars, giving a more specific description of the letter or any further identification of it, if that was necessary to his defense. Under the Federal practice he had a right to apply for such bill of particulars, and it was within the judicial discretion of the court to grant such order, if

necessary for the protection of the rights of the accused, and to order that the contents of the letter be more fully brought to the attention of the court, with a view to ascertaining whether a verdict upon such matter as obscene would be set aside by the court. *United States* v. *Bennett*, *supra; Rosen* v. *United States*, *supra*. In *Durland* v. *United States*, 161 U. S. 306, 315, it was held that a general description of a letter identified by the time and place of mailing, when it was mailed in pursuance of a scheme to defraud, was sufficient, in the absence of a demand for a bill of particulars.

As to the objection that the charge was so indefinite that the accused could not plead the record and conviction in bar of another prosecution, it is sufficient to say that in such cases it is the right of the accused to resort to parol testimony to show the subject-matter of the former conviction, and such practice is not infrequently necessary. *United States* v. *Claflin*, 13 Blatchf. 178, 25 Federal Cases, 433, No. 14,798; *Dunbar* v. *United States*, 156 U. S. 185; *Tubbs* v. *United States*, 105 Fed. Rep. 59. In the *Dunbar Case* it was stated that other proof beside the record might be required to identify the subject-matter of two indictments, and the rule was laid down as follows (p. 191):

"The rule is that if the description brings the property, in respect to which the offence is charged, clearly within the scope of the statute creating the offence, and at the same time so identifies it as to enable the defendant to fully prepare his defence, it is sufficient."

The present indictment specifically charged that the accused had knowingly violated the laws of the United States by depositing on a day named, in the post-office specifically named, a letter of such indecent character as to render it unfit to be set forth in detail, enclosed in an envelope bearing a definite address. In the absence of a demand for a bill of particulars we think this description sufficiently advised the accused of the nature and cause of

the accusation against him. This fact is made more evident when it is found that this record shows no surprise to the accused in the production of the letter at the trial and no exception to its introduction in evidence, and there is no indication that the contents of the letter, when it was produced, did not warrant the description of it given in the indictment.

Judgment affirmed.

TROXELL, ADMINISTRATRIX, *v.* DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY.

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

No. 854. Argued January 14, 1913.—Decided February 24, 1913.

Where the second suit is upon the same cause of action set up in the first suit, an estoppel by judgment arises in respect to every matter offered or received in evidence or which might have been offered to sustain or defeat the claim in controversy; but where the second suit is upon a different claim or demand, the prior judgment operates as an estoppel only as to matters in issue or points controverted and actually determined in the original suit.

To work an estoppel, the first proceeding and judgment must be a bar to the second one because it is a matter already adjudicated between the parties, and there must be identity of parties in the two actions.

A suit for damages for causing death brought by the widow and surviving children of the deceased under the state law is not on the same cause of action as one subsequently brought by the widow as administratrix against the same defendant under the Employers' Liability Act, and the judgment dismissing the complaint in the first action is not a bar as *res judicata* to the second suit.

After a plea of *res judicata* has been filed and considered and the case

tried, it is too late for defendant to raise the objection in this court for the first time that the case was not at issue and should not have been tried until after plaintiff had filed a replication to the plea.

200 Fed. Rep. 44, reversed.

THE facts, which involve the construction of the Employers' Liability Acts of 1906 and 1908 and the validity of a judgment recovered thereunder, are stated in the opinion.

Mr. George Demming for plaintiff in error.

Mr. James F. Campbell, with whom *Mr. J. Hayden Oliver*, *Mr. Daniel R. Reese* and *Mr. William S. Jenney* were on the brief, for defendant in error:

The former action brought by plaintiff in error as widow for the benefit of herself and children, which she lost in the Circuit Court of Appeals, completely bars the present action brought by her as administratrix for the benefit of herself and children.

The Circuit Court of Appeals had the right to consider the record of the former appeal because it was not only before them, without objection, but was a part of their own records. 3 Cyc. 179; *Schneider* v. *Hesse*, 9 Ky. L. R. 1814.

An appellate court takes notice of its own records so far as they pertain to a case under consideration. That court, therefore, would judicially know that the judgment appealed from was affirmed upon a former appeal to which all the parties to the present appeal were parties, and such judgment is consequently a bar to the prosecution of the present appeal. *Thornton* v. *Webb*, 13 Minnesota, 498; *Butler* v. *Eaton*, 141 U. S. 240; *Aspen Mining Co.* v. *Billings*, 150 U. S. 31; *Craemer* v. *Washington*, 168 U. S. 124; *Thompson* v. *Maxwell Land Grant Co.*, 168 U. S. 451; *In re Durrant*, 169 U. S. 39; *Bienville Water Supply Co.* v.

Mobile, 186 U. S. 212, 217; *Dimmick* v. *Tompkins*, 194 U. S. 540.

Plaintiff in error must have tried the former action under the Federal Employers' Liability Act, and as the administratrix was a mere formal party, she could have been substituted at any time as nominal plaintiff, by amendment. *St. Louis & S. F. R. R.* v. *Herr*, 193 Fed. Rep. 950; *Van Doren* v. *Pa. R. R.*, 93 Fed. Rep. 260, 268; *Reardon* v. *Balaklala Con. Copper Co.*, 193 Fed. Rep. 189.

The parties were identical or in privity.

The Pennsylvania statutes give the right to a widow to sue in her own name, for the benefit of herself and children, for the wrongful death of her husband by violence or negligence. Act of April 26, 1855, § 1, P. L. 309.

The Federal Employers' Liability Act of 1908 provides that the action shall be brought by the administrator for the benefit of the widow and children.

The former action was brought by plaintiff in error, under the Pennsylvania acts, to recover damages against the defendant by reason of its alleged negligence causing the death of her husband, for the benefit of herself and minor children.

In the present action she sues as administratrix under the Federal Employers' Liability Act of 1908, to recover damages, for the same death, from the same accident and for the benefit of the same parties, viz., herself and minor children.

These parties are the same in both actions, and in privity with each other. *Butler* v. *Eaton*, 141 U. S. 240.

The cause of action is the same and the parties are the same. It conclusively follows, therefore, that the first action is *res judicata* of the second.

The two actions were brought by the same parties against the same defendant, in the same court, tried before the same judge, to recover damages for the same death in the same accident.

If the matter was adjudicated as to part, it was adjudicated entirely. *MacDonald* v. *Grand Trunk R. Co.*, 71 N. H. 448; *Columb* v. *Webster Mfg. Co.*, 84 Fed. Rep. 259.

To the same effect are the following cases: *Marshall* v. *Bryant Electric Co.*, 185 Fed. Rep. 499; *Hein* v. *Westinghouse Co.*, 172 Fed. Rep. 524; *Forsythe* v. *Hammond*, 166 U. S. 506; *Cromwell* v. *Sac*, 94 U. S. 351; *Clare* v. *N. Y. & N. E. R. R.*, 172 Massachusetts, 211; *The New Brunswick*, 125 Fed. Rep. 567; *Hubbell* v. *United States*, 171 U. S. 203; 23 Cyc. 1170.

The question of the negligence of a fellow-workman was adjudicated in the prior case, because even under the Pennsylvania statute recovery is permitted against the common employer whose alleged negligence (in the present instance in not furnishing a derailing switch) concurred with the negligence of a fellow-servant to cause harm to the plaintiff.

The fact as to whether or not the cars were left properly on the siding was directly in issue as a defense in the former suit and was directly decided therein so as to be *res judicata*.

The Federal Employers' Liability Act is not exclusive in the case at bar. *Second Employers' Liability Cases*, 223 U. S. 1. In this case the facts are entirely different and the Pennsylvania acts are not in conflict with the Federal act.

The mere fact that in his train are some cars destined to points without the State does not make an employé engaged in interstate commerce so as to exclude the applicability of the state acts when he was also engaged in intrastate commerce.

Plaintiff in error was not exclusively engaged in interstate commerce but only incidentally, and his employment was far more intrastate than interstate. *M., K. & T. Ry. Co.* v. *Haber*, 169 U. S. 613; *Sinnott* v. *Davenport*, 22 How. 227, 243.

There is no repugnance or conflict between the state act and the Federal act.

MR. JUSTICE DAY delivered the opinion of the court.

This case was brought in the Circuit Court of the United States for the Eastern District of Pennsylvania under the Federal Employers' Liability Act, as amended (35 Stat. 65, c. 149; 36 Stat. 291, c. 143) by Lizzie M. Troxell, administratrix of the estate of Joseph Daniel Troxell, deceased, against The Delaware, Lackawanna & Western Railroad Company to recover for the alleged wrongful death of decedent. A verdict was rendered by the District Court, which had succeeded the Circuit Court, in favor of the plaintiff, and judgment entered accordingly, which, on writ of error, was reversed by the Circuit Court of Appeals for the Third Circuit. 200 Fed. Rep. 44. The case was then brought here upon writ of error.

It appears from the record that the defendant railroad company operates a line of road running from Nazareth to Portland, Pennsylvania, and that a branch road, known as the Pen Argyl Branch, puts off in a northeasterly direction from Pen Argyl Junction, a point on the defendant's line. Between 100 and 150 yards northeast of Pen Argyl Junction there is a switch running off the Pen Argyl Branch, called Albion Siding No. 2, which extends to certain quarries in that vicinity. The switch track is level, or practically so, for the first 100 feet, and then rises towards the northeast with a grade of one foot in 100 feet. From the place where the Albion switch connects with the Pen Argyl Branch down to the main track and then westward on the main track there is a down grade. Six gondola cars, each about thirty-six feet in length, loaded with ashes, had been placed on the Albion spur by the

train crew of which Troxell was the fireman, he at that particular time acting as engineer, two days before the happening of the injury hereinafter described. The night before the injury the yard shifter and crew had moved the cars a considerable distance further on the spur from the junction of the siding with the branch and on the up grade. The next morning, at about half past seven o'clock, these cars were seen to be running rapidly down grade toward the point where the collision occurred. The decedent Troxell, then engaged as fireman in propelling a train eastwardly, consisting in part of interstate cars and freight, was at the time working on the tender of the engine, and when the runaway cars, going at great speed, collided with the locomotive he was buried under the wreck and killed.

Lizzie M. Troxell (now the administratrix of his estate) brought a previous action, suing as surviving widow and joining the two living children, against the defendant railroad company for damages, stating that at the time of the injury, July 21, 1909, the deceased was engaged in the capacity of fireman on a locomotive hauling one of the defendant's trains in interstate and foreign commerce and that while so engaged, without fault on his part and because of the negligence of defendant and its failure to supply and keep in good condition proper and safe devices, instruments and apparatus, the locomotive and train came into violent collision with several runaway cars, resulting in the death of Troxell, and she prayed damages on account of herself and the children. She recovered a verdict and judgment was rendered in her favor, which upon writ of error, was reversed by the Circuit Court of Appeals for the Third Circuit. 183 Fed. Rep. 373.

Thereafter, having been appointed administratrix of the estate of her husband, Lizzie M. Troxell began the present action in the Circuit Court of the United States.

This action was specifically brought under the Federal Employers' Liability Act. The petition charged that the defendant was a common carrier engaged in interstate transportation; that Troxell, deceased, was a fireman, engaged in that capacity upon a locomotive and train engaged in carrying interstate and foreign commerce, and charged that because of the negligence, carelessness and oversight of the defendant, and its failure to supply and keep in good condition proper, necessary and safe devices, instruments and appliances, the locomotive and train came into violent collision with several loose and runaway cars, causing Troxell's death, and the plaintiff, administratrix as aforesaid, prayed damages, setting forth that she was the widow of the decedent and that there were two minor children of the parties. The case was tried to a jury, and again resulted in a verdict and judgment in the District Court, successor to the Circuit Court, in favor of the administratrix. Upon writ of error the Circuit Court of Appeals for the Third Circuit reversed the judgment, holding that the first proceeding and judgment was a bar to a recovery in the second action.

Where the second suit is upon the same cause of action set up in the first suit, an estoppel by judgment arises in respect to every matter offered or received in evidence, or which might have been offered, to sustain or defeat the claim in controversy; but, where the second suit is upon a different claim or demand, the prior judgment operates as an estoppel only as to matters in issue or points controverted and actually determined in the original suit. *Cromwell* v. *Sac County*, 94 U. S. 351, 352, 353; *Southern Pacific Railroad Co.* v. *United States*, 168 U. S. 1, 50; *Virginia-Carolina Chemical Co.* v. *Kirven*, 215 U. S. 252, 257.

An inspection of the record shows that upon the trial of the first action the judge of the District Court held that the Employers' Liability Act prevented Lizzie M. Troxell

from maintaining the suit in her individual capacity for herself and children and that the Federal act should not be considered in determining the case and that it was brought under the statutes of the State of Pennsylvania authorizing a widow to bring suit for herself and children, not as administratrix, but in her individual capacity, to recover damages for the death of the decedent. In such an action there could be no recovery because of the negligence of the fellow-workmen of Troxell. The record shows that in the first action the trial court held that no question of the negligence of the fellow-servants was submitted, and the jury was confined to the question of responsibility for failing to provide proper safety appliances to prevent the cars from running down the grade in the manner in which they did, if left unbraked or on becoming unbraked on the siding. The Circuit Court of Appeals in reversing the case distinctly stated that in its view the case might be brought under the state act, notwithstanding the Employers' Liability Act, and reached the conclusion that the judgment below should be reversed.

The second action was brought under the Federal Liability Act, under which there might be a recovery for the negligence of the fellow-servants of the deceased, and the judge of the District Court, holding that the former case had adjudicated matters as to defects in cars, engines and rails, submitted to the jury only the question of the negligence of fellow-servants in failing to properly brake and block the cars on the siding. Upon the issue thus submitted a verdict was rendered and recovery had in the trial court, as we have already said.

In the Circuit Court of Appeals, however, it was held that the judgment in the first case was a bar to the second proceeding because, in view of the decision of this court in *Second Employers' Liability Cases*, 223 U. S. 1, an action of this kind for injury to one engaged in interstate commerce could only be maintained under the Federal Em-

ployers' Liability Act; and that, although the plaintiff undertook in the first action to abandon the charge as to the negligence of fellow-servants and relied only on the want of a proper derailing switch on Albion Siding No. 2, nevertheless the first judgment was a bar because in the second action she was merely offering to prove additional facts which might have been proved in the first trial.

We think it is apparent from what we have said that the first case was prosecuted and tried on the theory that it involved a cause of action under the state law of Pennsylvania. It was so submitted to the jury, and they were told that they were not to consider the Federal law, but recovery should be based upon the right under the state act. If the Circuit Court of Appeals was right in its second decision that no action could have been maintained under the state law, in view of the Employers' Liability Act, the fact that the plaintiff attempted to recover under that law and pursued the supposed remedy until the court adjudged that it never had existed would not of itself preclude the subsequent pursuit of a remedy for relief to which in law she is entitled. *Wm. W. Bierce, Limited,* v. *Hutchins,* 205 U. S. 340; *Snow* v. *Alley,* 156 Massachusetts, 193, 195; *Water, Light & Gas Co.* v. *City of Hutchinson,* 90 C. C. A. 547, 551. Whether the plaintiff could properly have thus recovered is not the question now before the court. To work an estoppel the first proceeding and judgment must be a bar to the second one because it is a matter already adjudicated between the parties. The cause of action under the state law, if it could be prosecuted to recover for the wrongful death alleged in this case, was based upon a different theory of the right to recover than prevails under the Federal statute. Under the Pennsylvania law there could be no recovery for the negligence of the fellow-servants of the deceased. This was the issue upon which the case was submitted at the second trial

and a recovery had. Whether the plaintiff could recover under the Pennsylvania statute was not involved in the second action, and the plaintiff's right to recover because of the injury occasioned by the negligence of the fellow servants was not involved in or concluded by the first suit.

Furthermore, it is well settled that to work an estoppel by judgment there must have been identity of parties in the two actions. *Brown* v. *Fletcher's Estate*, 210 U. S. 82; *Ingersoll* v. *Coram*, 211 U. S. 335. The Circuit Court of Appeals in the present case, while recognizing this rule, disposed of the contention upon the ground that the parties were essentially the same in both actions—the first action was for the benefit of Lizzie M. Troxell and the two minor children, and the present case, although the action was brought by the administratrix, is for the benefit of herself and children—and held that, except in mere form, the actions were for the benefit of the same persons and therefore the parties were practically the same; and that the omission to sue as administratrix was merely technical and would have been curable by amendment. This conclusion was reached before this court announced its decision in *American Railroad Co.* v. *Birch*, 224 U. S. 547. That action was brought under the Federal Employers' Liability Act by the widow and son of the decedent and not by the administrator. The lower court held that the requirement of the act that the suit should be brought in case of death by the personal representative of the deceased did not prevent a suit in the name of the persons entitled to the benefit of the recovery. In other words, the court ruled, as did the Circuit Court of Appeals in this case, that where it was shown that the widow and child were the sole beneficiaries, they might maintain the action without the appointment of a personal representative. This court denied the contention, and held that Congress, doubtless for good reasons, had specifically pro-

vided that an action under the Employers' Liability Act could be brought only by the personal representative, and the judgment was reversed without prejudice to the rights of such personal representative. We think that under the ruling in the *Birch Case* there was not that identity of parties in the former action by the widow and the present case, properly brought by the administratrix under the Employers' Liability Act, which renders the former suit and judgment a bar to the present action.

It is further urged that even if this court should hold that the sole ground upon which the Circuit Court of Appeals proceeded, namely, that the former judgment is a bar to this action, was untenable, nevertheless the judgment of the District Court ought not to be affirmed, because there is no testimony in the record adequate to sustain the verdict and judgment of that court. The case in the appellate court must be determined, not by considering and weighing conflicting testimony, but upon a decision of the question as to the presence of testimony in the record fairly tending to sustain the verdict. An examination of the record satisfies us that the district judge in his charge fairly stated the conflicting testimony adduced as to the negligence of the fellow-servants in securing and blocking the cars on the siding, and that there was testimony to sustain the verdict of the jury adverse to the defendant. It is also contended that certain testimony was inadmissible. We have examined this assignment and, without going into detail, find that it, too, must be denied. It is also urged that the record shows that the case when tried was not at issue, at least under the rules of the lower court was not triable, until after issue joined, and this objection is set up because of the failure of the plaintiff to file a replication after the court had decided that the plea of *res judicata* was a correct plea under the local practice. The case was at issue, and the plea of *res judicata* was considered and decided in both

courts, and it is too late to make a technical objection of that character in this court.

Judgment of the Circuit Court of Appeals reversed, and that of the District Court affirmed, and the case remanded to the District Court.

Upon the issue of *res judicata*, MR. JUSTICE LURTON concurs solely because of the lack of identity of parties in the two actions.

UNITED STATES EX REL. CHAMPION LUMBER COMPANY *v.* FISHER, SECRETARY OF THE INTERIOR.

PETITION FOR WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Submitted January 27, 1913.—Decided February 24, 1913.

Under subd. 5 of § 250 of the Judicial Code of 1911 a final judgment of the Court of Appeals of the District of Columbia can only be reviewed by this court in cases where the validity of any authority exercised under the United States, or the existence or scope of any power or duty of any officer of the United States, is drawn in question.

The meaning of the phrase "drawn in question" as it occurs in § 250 of the Judicial Code is the same as in § 709, Rev. Stat.; § 5 of the Circuit Court of Appeals Act, and other statutes regulating territorial appeals.

A statute of the United States authorizing an officer to act in a certain manner under certain conditions is not drawn in question nor is the scope or validity of authority of the officer acting thereunder drawn in question, simply because there is a controversy as to whether the specified conditions do or do not exist.

Where the Secretary of the Interior refused to issue a patent because a protest was pending, the denial of a petition for a writ of mandamus

directed to him to issue the patent on the ground that there was no protest, does not draw in question the validity or scope of his authority but only the question of fact as to existence of a protest and there is no jurisdiction in this court under § 250 of the Judicial Code to review the judgment.

Writ of error to review 40 Wash. Law Reporter, 780, denied.

THE facts, which involve the construction of § 250 of the Judicial Code of 1911 and the jurisdiction of this court to review judgments of the Court of Appeals of the District of Columbia, are stated in the opinion.

Mr. Patrick H. Loughran for petitioner.

The Solicitor General and *Mr. Assistant Attorney General Cobb* in opposition.

MR. JUSTICE DAY delivered the opinion of the court

This is a petition for the allowance of a writ of error to the Court of Appeals of the District of Columbia to review the judgment of that court affirming the judgment of the Supreme Court of the District of Columbia, dismissing the petition of the Champion Lumber Company against the Secretary of the Interior and the Commissioner of the General Land Office.

It appears that on April 26, 1910, a petition was filed by the petitioner in the Supreme Court of the District of Columbia praying for a writ of mandamus against the Secretary of the Interior and the Commissioner of the General Land Office to issue a patent for the land hereinafter referred to. The grounds of the petition were that the Lumber Company was the owner of certain lands which had been finally entered under the homestead laws by one Lucy Johns, from whom the petitioner derived title; that the only authority left in the Land Department on the facts set forth was to issue a patent for the land,

and further that the ruling of the Secretary of the Interior and the Commissioner of the General Land Office that a protest, made within two years from the date of the issuance of the receiver's receipt, was pending, whereby the patent was withheld in accordance with the provisions of § 7 of the act of March 3, 1891 (26 Stat. 1095, 1098, c. 561), was an arbitrary and capricious ruling, made without legal authority. The respondents answered and denied the allegations of the petition in this respect, and averred the pendency of a protest which justified the holding up of the patent under the provisions of the statute. The case was tried upon an agreed statement of facts, of which the following is an abridgment:

On September 17, 1897, Lucy Johns made entry under the homestead laws at Jackson, Mississippi, of certain land subject to entry, the papers showing that she was qualified to make the entry, which showing has not been questioned; on September 24, 1902, she having made *prima facie* proof of compliance with the requirements of the homestead laws, final certificate and receipt were issued to her, and the proof was forwarded to the Commissioner of the General Land Office at Washington during October of that year. On January 15, 1903, she conveyed all her interest in the entry to the petitioner, which subsequently conveyed it to one Hines, who later conveyed it back to the petitioner. On November 19, 1902, a special agent of the General Land Office named Hammer wrote the Commissioner that he had reason to believe that ninety per cent. of the proofs in the territory where petitioner's land is situated were fraudulent, and that he had under investigation certain entries, including the one in question, and requested that all patents be withheld until a full report was made; on November 28, 1902, Hammer informed the Commissioner that the investigation so far made had disclosed flagrant frauds, and renewed his request to withhold patents to such lands, and on

December 13th of that year the Commissioner directed the register and receiver at Jackson to suspend action on commutations and proofs until Hammer had reported; and on June 24, 1904, Hammer, in response to a letter from the Commissioner inquiring as to the necessity of an investigation, replied in the affirmative. On May 12, 1906, another special agent reported that the entry of Lucy Johns "was made for speculative purposes, with no attempt to comply with the requirements of the law, and recommended that the entry be canceled on the ground of non-residence, non-cultivation, non-improvement and abandonment." Thereupon the Commissioner directed that a hearing be had. The petitioner moved for a stay of proceedings, claiming that under § 7, *supra*, the entry should be patented without further proceedings. The motion was denied by the Commissioner and this denial affirmed by the Secretary of the Interior, who later denied a motion to review his decision, finding that a protest had been filed against the patent of Lucy Johns' homestead entry within two years from the issuance of the receiver's receipt and holding that the case should proceed to hearing on the special agent's charge.

The Supreme Court of the District of Columbia dismissed the petition. Upon appeal to the Court of Appeals that court affirmed the judgment of the Supreme Court. 40 Washington Law Reporter, 780. In the course of the opinion the Court of Appeals said (p. 781):

"Every point advanced by appellant in this case is, in our view, settled by the following very recent decisions: *Fisher* v. *Grand Rapids Timber Co.*, 37 App. D. C. 436; *Ness* v. *Fisher*, 223 U. S. 683; *McKensie* v. *Fisher*, 39 App. D. C. 7. In *Fisher* v. *Grand Rapids Timber Co.*, which involved the interpretation of the very statute upon which appellant here relies, this court, speaking through Mr. Justice Van Orsdel, said: 'While it is true that ar-

bitrary power resides nowhere in our system of government, and while the supervisory authority vested in the Secretary of the Interior and the Commissioner of the General Land Office over the disposition of the public lands is neither unlimited nor arbitrary, yet the question here presented as to whether or not the communication and order amounted to a protest, which we regard as exceedingly close, was one clearly within the power of the Commissioner to decide. To say that he was mistaken would require us to review a matter exclusively confided by law to his discretion and judgment. This proceeding will not admit of such a review.'

"The communications of Special Agent Hammer respecting this entry were made within the two years contemplated by said act of March 3, 1891, as was the communication of June 18, 1904, from the Commissioner to said agent. It is apparent that these communications resulted in the withholding of a patent; in other words, that the Commissioner regarded the right to that patent as dependent upon the outcome of the investigation which was to ensue. The subsequent decision of the Secretary that what was done within the two-year period constituted a protest against the patenting of the entry, was not arbitrary or capricious, but was based upon evidence; and the sufficiency of that evidence was for his and not our determination."

The writ of error is asked for under § 250 of the Judicial Code, which provides:

"Sec. 250. Any final judgment or decree of the court of appeals of the District of Columbia may be reëxamined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases:

* * * * * * * *

"Fifth. In cases in which the validity of any authority exercised under the United States, or the existence or

scope of any power or duty of an officer of the United States is drawn in question."

The case therefore to be appealable to this court from the Court of Appeals of the District of Columbia must be one in which the validity of the authority exercised or the existence or scope of the authority of the officer named is drawn in question.

"Drawn in question" is a phrase long used in other statutes of the United States regulating appellate jurisdiction. It is found in § 709 of the Revised Statutes, governing appeals from state courts to this court. It is in the fifth section of the Circuit Court of Appeals Act of March 3, 1891 (26 Stat. 826, 828, c. 517). It is in the statute regulating territorial appeals, (March 3, 1885, 23 Stat. 443, c. 355). The meaning of this phrase has been the subject of frequent consideration in this court, and it is unnecessary to review the numerous cases in which it has been interpreted.

As we have said, it is in the Circuit Court of Appeals Act, which provides that cases may be brought directly to this court from the Circuit Court in which, among other things, the validity or construction of any treaty made under the authority of the United States is drawn in question. In *Muse* v. *Arlington Hotel Co.*, 168 U. S. 430, in considering whether the provisions of a certain treaty were drawn in question, so far as the validity or construction thereof was concerned, with a view to the exercise of the appellate jurisdiction of this court, Mr. Chief Justice Fuller, delivering the opinion of the court, reviewed the cases in this court and stated as the conclusion of the matter that in order to involve the validity or construction of a treaty "some right, title, privilege or immunity dependent on the treaty must be so set up or claimed as to require the Circuit Court to pass on the question of validity or construction in disposing of the right asserted." In *Pettit* v. *Walshe*, 194 U. S. 205, 216, the construction of a

treaty was held to be drawn in question where the petition for a writ of *habeas corpus* and the warrant under which the accused was arrested referred to the treaty, and the court below proceeded on the ground that the determination of the questions involved in the case depended in part upon the meaning of certain provisions of that treaty, these provisions having been duly brought to the attention of the court. It has also been held that the validity of a statute of the United States or authority exercised thereunder is drawn in question when the existence or constitutionality or legality of such law is denied and the denial forms the subject of direct inquiry in the case. *United States* v. *Lynch*, 137 U. S. 280; *Linford* v. *Ellison*, 155 U. S. 503; *Snow* v. *United States*, 118 U. S. 346, 353; *McLean* v. *R. R. Co.*, 203 U. S. 38.

In clause five of § 250, under consideration, the added ground of appeal is given if the existence or scope of any power or duty of an officer of the United States is drawn in question. Within the meaning of this statute, was any such validity or existence or scope of authority drawn in question? It appears that the petitioner contended that no protest was pending in the Department which could rightfully justify the withholding of the patent. The officers of the United States took issue upon this allegation, and the Court of Appeals decided that there was testimony before the Secretary authorizing the exercise of the discretion conferred by law to withhold the patent, and upon that ground affirmed the decision, refusing the writ. The case was therefore submitted and decided upon the issue whether the action of the Secretary was justified in the exercise of his lawful discretion because of the facts disclosed in the record. The petitioner did not challenge, nor did the court pass upon, the validity of any authority exercised under the United States, nor was the existence or extent of the authority or duty of an officer of the United States drawn in question in the sense in which it is

used in the statute, that is, brought forward and made a ground of decision. The statutes under which the officers of the United States acted were concededly valid, and the authority exerted was lawful and within the powers of the officers, if the facts justified their action. The petitioner's real attack upon the action of the Secretary and Commissioner was because the facts shown did not warrant the exercise of the power given by law. The decision of that issue, upon which it is clear the case turned, neither involved nor decided the questions which make the case appealable to this court under the fifth clause of § 250 of the Judicial Code.

It follows that the petition for writ of error must be denied.

UNITED STATES EX REL. FOREMAN *v.* MEYER, SECRETARY OF THE NAVY.

PETITION FOR WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Submitted January 27, 1913.—Decided February 24, 1913.

Champion Lumber Co. v. *Fisher*, *ante*, p. 445, followed as to the construction of subd. 5 of § 250 of Judicial Code regulating the review by this court of judgments of the Court of Appeals of the District of Columbia.

The validity and scope of the authority of an officer of the United States is not drawn in question where the controversy is confined to determining whether the facts under which he can exercise that authority do or do not exist.

Writ of error to review 38 App. D. C. 472, denied.

THE facts, which involve the construction of § 250 of the Judicial Code of 1911 and the jurisdiction of this

court to review judgments of the Court of Appeals of the District of Columbia, are stated in the opinion.

Mr. Patrick H. Loughran for petitioner.

The Solicitor General, Mr. Clarence R. Wilson, United States Attorney, and *Mr. Reginald S. Huidekoper* in opposition.

Mr. Justice Day delivered the opinion of the court.

Foreman filed a petition in the Supreme Court of the District of Columbia for a writ of mandamus to compel the Secretary of the Navy to record his name upon the register of retired officers of the Navy as a paymaster's clerk from the twenty-seventh of June, 1910. An answer having been filed, to which the petitioner interposed a demurrer, the Supreme Court, upon the petitioner electing to stand on his demurrer, entered an order of dismissal, which was affirmed by the Court of Appeals (38 App. D. C. 472). A writ of error to this court having been refused by the Court of Appeals, this petition was filed here.

The petitioner claimed that he was an officer below the rank of vice-admiral, sixty-two years old, and entitled, under § 1444 of the Revised Statutes, to be retired from active service, and also claimed that he was entitled to the benefits of the act of June 24, 1910 (36 Stat. 605, 606, c. 378), providing that all paymasters' clerks shall, while holding appointment in accordance with law, receive pay and allowance and have the same rights of retirement as warrant officers of like length of service in the Navy.

It appears that the petitioner was appointed paymaster's clerk in 1893 for duty at the Navy Pay Office at

San Francisco, California, which was and is a purchasing paymaster's office, where he continued until November 20, 1908, receiving an annual compensation of $2,000, which was paid from the appropriation entitled "Pay, Miscellaneous," when he was notified by the Acting Secretary of the Navy of his promotion to chief clerk in the same pay office, which position the petitioner accepted and in which he served until April 17, 1909, when he filed his application for retirement as an officer of the Navy under § 1444, having attained the age of sixty-two years on July 1, 1906. This application was denied. On November 14, 1910, he petitioned for retirement under the act of June 24, 1910. This petition also was denied. On December 14, 1910, the petitioner's request for leave without pay was approved by the Department, and he was notified that if he was unable to report for duty by December 31, 1910, his resignation would be accepted, otherwise he would be discharged. On January 7, 1911, petitioner tendered his resignation, under protest, which was accepted.

After considering the various statutes the Court of Appeals reached the conclusion that the petitioner was not a paymaster's clerk within the meaning of the law, and said (p. 476):

"Appellant was appointed 'for duty at the Navy Pay Office' at San Francisco, a purchasing paymaster's office. He received an annual salary of $2,000 from 1893 to 1908, instead of $1,300, to which he would have been entitled had he been appointed under the provisions of sec. 1386 [which provides for the appointment of regular paymaster's clerks]. His promotion in 1908 did not affect his status, since he was at no time a paymaster's clerk in the technical sense, but at all times attached to the particular office. He was no more an officer of the Navy than any one of the many employés of the Navy Department at Washington.

"We rule therefore that he never possessed any right to retirement. Upon the other questions suggested, it is unnecessary to express an opinion."

The decision therefore rested upon the denial of the contention that petitioner was a paymaster's clerk and entitled to the benefit of the statutes governing such cases.

This case, like the one just decided, *Champion Lumber Co.* v. *Fisher*, *ante*, p. 445, is sought to be brought here under § 250 of the Judicial Code because it is said to be a case in which the validity of an authority exercised under the United States or the existence or scope of the power or duty of an officer of the United States is drawn in question. From what we have said of the character of the case made and decided, we think it is apparent that no such validity was drawn in question, nor was the existence or the extent or scope of the power or duty of an officer of the United States challenged or decided.

The case was made and a decision was had in the Court of Appeals upon the issue whether under the statutes invoked by the petitioner as the ground of his right to the relief sought, he was or was not a paymaster's clerk entitled to be entered upon the register of retired officers of the Navy. Applying the principles just announced in deciding the case of *Champion Lumber Co.* v. *Fisher*, *ante*, p. 445, *the petition for writ of error in this case must be denied.*

HAMPTON *v.* ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

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

No. 3. Argued October 29, 30, 1912.—Decided February 24, 1913.

A provision in a state statute that interstate railroads shall furnish cars for interstate shipments which regulates the furnishing of cars is invalid by reason of the Hepburn Act; but if it only means that there shall be no discrimination against interstate shipments, it might not invalidate an act, otherwise valid, as to intrastate shipments.

The fact that an act requiring railroads to furnish cars includes no exceptions is not conclusive of its meaning and intent; and an act cannot be construed as not permitting any exceptions where, as in this case, the state court has held that the penalties are enforceable only in an action at law, and that as such a provision is declaratory of the common law, any reasonable excuse may be interposed.

This court will not entertain a case where the party setting up the unconstitutionality of a statute does not belong to the class for whose sake the constitutional protection is given or to the class primarily affected; nor will it, at the instance of a party not belonging to a class affected, go into an imaginary case on the ground that the law if unconstitutional as to one is so as to all. *Hatch* v. *Reardon*, 204 U. S. 152.

Where there was an agreement of the parties to confine the case wholly to the question of constitutionality of the statute attacked, and complainant does not show that his rights protected under the Constitution have actually been invaded, but the objections suggested are conjectural, the bill should be dismissed; and so *held* as to an action brought to test the constitutionality under the commerce clause of a statute of Arkansas requiring railroads to promptly furnish cars.

162 Fed. Rep. 693, reversed.

THIS bill was filed for the purpose of enjoining the bringing of actions in the state courts, in the name of the State, to recover penalties declared by the Railroad Com-

mission of the State for the violation of a statute requiring railroads to furnish cars upon the application of shippers, and forbidding discrimination between shippers in furnishing such cars.

The facts necessary to be stated are these:

Upon a complaint duly filed, and after a full hearing, the Railroad Commission of the State found that the railroad company had, during every day between September 20th and September 30th, 1907, inclusive, refused to furnish cars upon statutory notice and request of the operators of several coal companies operating along the line of its railroad in the State of Arkansas, and had also, during the same period discriminated in favor of a coal company which it controlled, by furnishing it with an adequate supply of cars, although part of the coal so carried was for sale upon the market. The requests for cars so refused were for shipments from the mines within the State to destinations in the same State, and were not for the purpose of interstate transportation.

The bill charged that the Railroad Commission was about to transmit a transcript of its proceedings to the several state prosecuting attorneys in counties where the railroad was situated, with an order that action should be brought in the name of the State for the enforcement of the penalties as provided by §§ 11 and 18 of an act of the Arkansas Legislature of March 11, 1899 (Act 53, Laws of 1899, pp. 82, 89, 93), being § 6804, Kirby's Digest.

The bill alleges that although engaged in operating a railroad within the State of Arkansas, the company's lines extended into adjacent States, and that it is therefore an interstate carrier subject to the act of Congress of February 4, 1887, and its amendments. It charges that by an act of the legislature of the State of Arkansas passed April 19, 1907 (Act 193, Acts of 1907, p. 453), the Railroad Commission of the State is vested with authority to regulate railroads within the State, in respect to the duty of

furnishing cars to shippers, and that it has under that authority promulgated order No. 346, which follows in phraseology the provisions of § 1 of the act referred to. It is then contended that this act of April 19, 1907, and the order of the commission in pursuance of said first section, constitute an exertion of the power of the State over interstate commerce and as such are invalid. It was averred that if the bringing of the threatened suits was not enjoined complainant would be subjected to a multitude of actions and to a liability for the excessive penalties imposed by the eighteenth section of the act of 1899, being a minimum of not less than $500 for each offense, and a maximum of as much as $3,000.

The bill denied any liability under the act, even if valid, and presented various reasons why it had not supplied the cars requested.

Answer was filed and issue taken upon every material defense set up upon the merits. The cause was heard upon bill and answer, there being no evidence upon the matters of defense touching the merits of the case.

The Circuit Court held the entire act of April 19, 1907, to be null and void as an invalid invasion of the field of interstate commerce, and accordingly enjoined its enforcement and the bringing of the actions which the commission had ordered.

Mr. Hal L. Norwood, Attorney General of Arkansas, and *Mr. Maurice M. Cohn* for appellants, submitted:

Although the transportation of cars in interstate hauls constitutes a very large percentage of the railroad business of the country, the furnishing of cars, as contemplated by the act, is still within the state power, even though the matter of directing supply of cars for intrastate traffic may, directly or indirectly, affect interstate transportation.

No matter, however, how extensive interstate traffic

may be as compared with state traffic, Congress cannot legislate upon matters committed to the States, even though the law would tend to become more uniform if this were done. *Employers' Liability Cases*, 207 U. S. 463; *Adair* v. *United States*, 208 U. S. 176, 180; *Railway Company* v. *McKendree*, 203 U. S. 514.

Congress has not undertaken to cover the whole subject of supply of cars.

Appellee is entitled only to raise the question of unconstitutionality of the act of April 19, 1907, so far as that is material to its case. *Gas Illuminating Co.* v. *Lungren*, 152 U. S. 200; *Howard* v. *Stillwell*, 139 U. S. 199; *Telegraph Co.* v. *Hall*, 124 U. S. 444; *Phillips Construction Co.* v. *Seymour*, 91 U. S. 646; *Smith* v. *Cowdry*, 1 How. 28; *The Appollon*, 9 Wheat. 362.

The mere imposition of penalties by a statute does not, of itself, furnish a cause of action to every citizen or corporation which, in time to come, may be affected by it. Penalties in large sums have been upheld where they were justified by the course of conduct of the complaining party. Corporations, especially powerful ones, can only be reached by means of large penalties. *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 111; *Armour Packing Co.* v. *United States*, 208 U. S. 274; *Loewe* v. *Lawlor*, 208 U. S. 274; *Seaboard Air Line* v. *Seegers*, 207 U. S. 73; *Chattanooga F. Co.* v. *Atlanta*, 203 U. S. 390; *Marvin* v. *Trout*, 199 U. S. 22; *National Oil Co.* v. *Texas*, 197 U. S. 115; *Railway Co.* v. *May*, 194 U. S. 267; *Addyston Pipe Co.* v. *United States*, 175 U. S. 211; *N. Y. Cent. R. R.* v. *United States*, 212 U. S. 481, 495.

Ex parte Young, 209 U. S. 125, does not apply, as in that case there was an oppressive use of state power, amounting to a denial of justice.

The decree and the bills deal with imaginary evils which are made the basis of need for relief. Imaginary evils will not be considered in the determination of causes.

Commodities Clause Cases, 213 U. S. 366, 407, 408; *Employers' Liability Cases*, 207 U. S. 463; *Angle* v. *Railroad Co.*, 151 U. S. 1; *Amy* v. *Watertown*, 130 U. S. 301; *Doyle* v. *Insurance Co.*, 94 U. S. 535; *Brewer* v. *Bougher*, 14 Pet. 178; *Fletcher* v. *Peck*, 6 Cr. 87; *Calder* v. *Bull*, 3 Dall. 386.

The interpretation which will sustain an act rather than the contrary will be adopted. *Commodities Clause Cases*, 213 U. S. 366, 407, 408; *Knights Templar Co.* v. *Jarman*, 187 U. S. 197, 205.

The construction put upon the act by the state court will be followed by this court. *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 347; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *Henry* v. *Nicholay*, 95 U. S. 619; *Railroad Co.* v. *Adams*, 181 U. S. 580.

The States and their Railroad Commissions may deal with the subject of furnishing cars, even though some or all of the cars to be furnished are destined for interstate transportation. *Houston & Texas Cent. R. R.* v. *Mayes*, 201 U. S. 321; *Mo. Pac. Ry.* v. *Larabee Milling Co.*, 211 U. S. 612.

Even though Congress has the power to deal with the whole subject of interstate commerce, in all of its phases, down to the local supply of cars in all parts of the country, yet there may be state police direction in reference to matters which may eventually be covered by congressional legislation, so long as Congress has not dealt with the matter and the state action may not amount to an undue burden upon interstate commerce. *Brig James Gray* v. *Ship John Fraser*, 21 How. 184; *Railroad Co.* v. *Fuller*, 17 Wall. 560; *Smith* v. *Alabama*, 124 U. S. 465; *Railway Co.* v. *Alabama*, 128 U. S. 96; *Railway Co.* v. *Ohio*, 173 U. S. 285; *Railway Co.* v. *Illinois*, 163 U. S. 142; *Railway Co.* v. *Illinois*, 177 U. S. 514; *Gladsen* v. *Minnesota*, 193 U. S. 53; *Atlantic Coast Line* v. *Wharton*, 207 U. S. 335. See Amer. Law Rev., Sept.–Oct., 1908, 666.

In no point of view was the Circuit Court justified in holding that the act was unconstitutional.

So long as the cars are not loaded they are not so committed to interstate or intrastate commerce that their destination may not be changed; and therefore the States ought to properly deal therewith. *Coe* v. *Errol*, 116 U. S. 517; *American &c. Co.* v. *Speed*, 192 U. S. 500; *Railroad Co.* v. *Mayes*, 201 U. S. 321; *Missouri Pac. Ry. Co.* v. *Larabee Milling Co.*, 211 U. S. 612.

Mr. Lovick P. Miles, with whom *Mr. Martin L. Clardy* was on the brief, for appellee:

If the power be conceded to a State to require, under heavy penalties, the furnishing of cars by an interstate carrier for intrastate shipments, then, as between the States served by such common carrier, the State exacting the heaviest penalties will bring to its intrastate shippers an undue proportion of the cars available to such carrier; and likewise, if States are conceded the power to require the furnishing of cars by interstate carriers, under heavy penalties, to intrastate shippers, then, if the penalties imposed by Federal authority for failure to furnish cars for interstate traffic are less than those imposed by the States, the carriers will devote to intrastate traffic an undue proportion of their available cars. Section 3 of Int. Comm. Act. See *Southern Railway Co.* v. *United States*, 222 U. S. 20, holding that all cars of any railroad engaged in interstate commerce were subject to the provisions of the Safety Appliance Act.

The Hepburn Act defines transportation as including cars and other vehicles and all instrumentalities and facilities of shipment or carriage. *Shepard* v. *Nor. Pac. Ry. Co.*, 184 Fed. Rep. 770.

See also *Henderson* v. *New York*, 92 U. S. 259, 268; *Hall* v. *De Cuir*, 95 U. S. 485; *West. Un. Tel. Co.* v. *Pendleton*, 122 U. S. 347; *Wabash &c. Ry. Co.* v. *Illinois*, 118 U. S.

557, 573; *Bowman* v. *Chicago &c. Ry. Co.*, 125 U. S. 465; *Minnesota* v. *Barber*, 136 U. S. 313, 322; *Brimmer* v. *Rebman*, 138 U. S. 78, 81; *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204; *Houston &c. Ry. Co.* v. *Mayes*, 201 U. S. 321, 327; *Cleveland &c. Ry. Co.* v. *Illinois*, 177 U. S. 514; *Atlantic Coast Line R. R. Co.* v. *Wharton*, 207 U. S. 328, 334; *Galv., Har. &c. Ry. Co.* v. *Texas*, 210 U. S. 217, 227; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56; *Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 146, 162.

It is the effect and not the terms or purpose of state regulations of its local commerce that determines whether or not they so substantially burden interstate commerce that they violate the commercial clause of the Constitution. *Shepard* v. *Nor. Pac. Ry. Co.*, *supra*.

Mr. Justice Lurton, after making the above statement, delivered the opinion of the court.

The single purpose of this case is to prevent the bringing of actions at law in the name of the State and by order of the State Railroad Commission to recover penalties prescribed by the Arkansas act of March 11, 1899, §§ 11 and 18, for the violation of the provisions of § 11 of the act referred to, and of § 1 of the act of April 19, 1907. The case turned below upon the single question of the constitutionality of the act of April 19, 1907, being an act entitled, "An Act to regulate freight transportation by railroad companies doing business in the State of Arkansas." The only parts of that act here in any way involved are the first paragraph of the first section, and the last clause in the seventeenth section. The paragraph of the first section is the legislative authority under which the Commission finds power to make its order No. 346, concerning the duty of carriers to furnish cars upon the demand of shippers, its said order being in the very words of that paragraph, as follows:

"That when a shipper makes a written application to the station agent of a railroad company for a car or cars, to be loaded with any kind of freight embraced in the tariff of said company, stating in said application the character of freight, and its final destination, the railroad company shall furnish same at the place of shipment within six days from 7 o'clock A. M. the day following such application."

The clause concluding the seventeenth section of the act is in these words:

"Interstate railroads shall furnish cars on application for interstate shipments the same in all respects as other cars to be furnished by intrastate railroads under the provisions of this Act."

The order of the Commission directed the bringing of actions against the defendant in error for the wilful violation of the provisions of § 1, set out above, and also for an illegal discrimination under § 11 of the act of March 11, 1899, referred to above. That section forbids any discrimination or preference in furnishing cars and requires equal facilities to all under like circumstances and conditions.

By agreement of the parties, recited in the decree below, and repeated in the memorandum opinion filed by the Circuit Judge, every question was eliminated from the case except the constitutionality of the act of 1907. The issue for our consideration by this action of the parties is very succinctly stated by Judge Treiber, who presided in the Circuit Court, in these words (p. 694):

"In the argument counsel agreed that the only question necessary for a final determination of this cause is the constitutionality of the act of the General Assembly of the State of Arkansas, No. 193, approved April 19, 1907, entitled, 'An Act to regulate freight transportation by railroad companies doing business in the state of Arkansas,' and, if unconstitutional, that the injunction may be made perpetual."

The court then adds:

"The court holds the act is unconstitutional upon two grounds: 1. By the last sentence of section 17 it is clearly shown that the intention of the Legislature was to apply its provisions to interstate shipments as fully as to intrastate shipments, and there is nothing in the act to indicate that the act would have been passed unless it could thus be made applicable. This is clearly an interference with interstate commerce, and, as this provision cannot be disregarded without defeating one of the main objects of the act, it is unconstitutional. 2. The requirement to furnish the cars is absolute and makes no exceptions for cases of a sudden congestion of traffic, actual inability to furnish cars by reason of their temporary detention in other states or in other places within the same state, none for interference of traffic occasioned by wrecks, accidents, or strikes. *Houston &c. R. R.* v. *Mayes*, 201 U. S. 321 is conclusive.

"For these reasons the temporary injunction heretofore granted will be made perpetual as to proceedings by defendants under the act of April 19, 1907, but the injunction is not to apply to any acts by defendants under any other statutes of the State. Let there be a decree accordingly."

Neither have counsel for appellees in this court presented any question other than that of the unconstitutionality of the act of 1907. We shall, therefore, for the purposes of this case assume that the railroad company did fail and refuse to furnish cars as requested and that it also favored a coal company in which it was interested, and that it rests its defense upon the invalidity of the act of 1907.

The attack upon that act turned upon two propositions.

a. That the clause of the seventeenth section, set out above, manifests an intention that the act shall apply as well to interstate shipments as to intrastate shipments, and that this purpose invalidates the whole act, as there

is nothing to justify the court in saying that the valid parts of the act would have been passed without the invalid parts.

b. That the requirement to furnish cars found in the first section is absolute and that no excuse arising from the detention of the company's cars upon other and connecting lines of railroad in and out of the State, nor for delays due to sudden emergencies, unusual congestion of traffic, catastrophes or other unavoidable and unusual conditions without fault, is a defense against the penalty imposed for failure to supply cars as required.

Coming first to the clause in the seventeenth section which the court below held invalidated the whole act:

That clause probably means no more than that there shall be no discrimination against demands for cars for interstate shipments. If, however, it be construed as extending the act so as to regulate the furnishing of cars for interstate shipments, it would be invalid by reason of the provisions of the Hepburn Amendment to the act to regulate commerce of June 29, 1906: *Chicago, R. I. & P. R. Co.* v. *Hardwick Elevator Co.*, 226 U. S. 426.

The effect of this upon the remainder of the act has not been considered in the briefs of appellee, further than to say that in *Oliver* v. *Chicago, R. I. & P. R. Co.*, 89 Arkansas, 466, decided pending this appeal, the Supreme Court of the State has held the act valid as including an elaborate and workable scheme for the regulation of intrastate railroad traffic, irrespective of the invalidity of the clause referred to. We shall therefore assume the remainder of the act to be valid, although the clause in question be regarded as invalid.

Neither is the requirement of the act as to the duty of furnishing cars absolute, as held by the court below. That the act upon its face includes no exceptions or excuses is not conclusive of its meaning and intent. The case of *Houston & T. C. R. Co.* v. *Mayes*, 201 U. S. 321, is not

controlling. The dereliction there involved was in the failure to furnish cars for an interstate shipment, under a Texas statute which required the carrier to furnish cars upon six days' notice, with a provision that the law should not "apply in cases of strikes or other calamity." This court concluded that the inclusion of a particular exception, excluded all others, and that an absolute requirement that a railroad shall furnish a certain number of cars at a specific day, regardless of every other consideration "except strikes and other public calamities" amounted to a burden upon interstate commerce. The court added (p. 329), "It makes no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other States, or in other places within the same State," etc.

But the penalties imposed by the act here involved are enforceable only in an action at law, and in such an action the Supreme Court of the State has held that such a statutory provision is but declarative of the common law, and that any reasonable excuse for a failure to furnish cars upon the requirement of a shipper, may be interposed. *St. Louis S. W. Railway* v. *Clay County Gin Co.*, 77 Arkansas, 357; *St. Louis S. W. R. Co.* v. *State*, 85 Arkansas, 311; *Oliver* v. *Railroad*, 89 Arkansas, 466, 470. In the case last cited the Arkansas court said of this provision of the act of 1907, that,

"The failure to furnish cars under the terms of the act under investigation will establish *prima facie* a breach of duty on the part of the railroad companies. This will not preclude their right to set up such defense as will excuse or justify the failure. That a fair division of cars with interstate business made it impossible to answer all demands made for cars for intrastate business would apparently be within the limit of proper defenses in cases of demands too unusual to be foreseen; and, viewed in this

way, the act is relieved of the imputation of burdening interstate commerce."

In the case of *Railroad* v. *State*, cited above, the excuse for failure to furnish cars upon the requirement of a shipper was that it was unable to do so because, while its car equipment was ample for all the demands of its traffic, it had, at the time when it made default, lost control of a majority of its cars through the fact that they had been sent beyond its own line in interstate commerce, and it had been unable to secure their prompt return through the inefficiency of the rules and regulations of the American Railway Association, of which it was a member. Although it appeared that ninety per cent. of all the railroad companies in the United States were members of that association and permitted interchange of cars with connecting railroads, and the company was powerless to correct the rules and regulations of that association or supervise their enforcement, the Arkansas court held that the detention of its cars upon other lines of railroad in the course of its interstate business afforded no reason for its failure to supply cars in the particular case under consideration. The case was reversed by this court, 217 U. S. 136, 147; when the court, among other things, said:

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

And the court further said (p. 149):

"The ruling of the court below involved necessarily the assertion of power in the State to absolutely forbid the efficacious carrying on of interstate commerce, or, what is equivalent thereto, to cause the right to efficiently conduct such commerce to depend upon the willingness of the company to be subjected to enormous pecuniary penalties as a condition of the exercise of the right."

The cases referred to make it clear that the statutory duty of furnishing cars upon the reasonable notice of a shipper is not absolute, and that the legislature did not intend to impose upon railroad companies the duty of furnishing cars to a particular shipper regardless of its equal duty to other shippers, state and interstate, or to a situation due to some unusual and unavoidable condition which made it unreasonable that it should be penalized for non-compliance; and also that if in the administration of the statute a ruling is made by the state court in respect to an excuse for non-compliance which operates as a restraint upon interstate commerce, a Federal question arises which may be reviewed by this court.

The conclusion we reach is that the railroad company, as the case is presented by the pleadings, the agreement of the parties and the ruling of the court below, is making an effort to test the constitutionality of the act of 1907, without showing that in the operation of the act interstate commerce has been illegally restrained or burdened, or that any defense which it may have for the neglect to comply with the provisions of the act as to furnishing cars has been or will be denied by virtue of its obligation as an interstate railroad. The objections which are suggested in the bill are conjectural and academic. The excuse made by the bill for its refusal to furnish the cars requested and for its illegal discrimination were put in issue by the answer and not proved. In *Hatch* v. *Reardon*, 204 U. S. 152, 160, it is said:

"That unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all. *Supervisors* v. *Stanley*, 105 U. S. 305, 311; *Clark* v. *Kansas City*, 176 U. S. 114, 118; *Lampasas* v. *Bell*, 180 U. S. 276, 283, 284; *Cronin* v. *Adams*, 192 U. S. 108, 114. If the law is valid when confined to the class of the party before the court, it may be more or less of a speculation to inquire what exceptions the state court may read into general words, or how far it may sustain an act that partially fails."

This principle has been applied in many cases, among them: *Turpin* v. *Lemon*, 187 U. S. 51, 60; *The Winnebago*, 205 U. S. 354, 360; *Citizens Bank* v. *Kentucky*, 217 U. S. 443; *Southern Railway* v. *King*, 217 U. S. 524, 534; *Rosenthal* v. *New York*, 226 U. S. 260, 271.

The result is that the decree must be reversed and the case remanded with direction to dismiss the bill.

WELLS, FARGO & COMPANY *v.* NEIMAN-MARCUS COMPANY.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 29. Argued November 5, 1912.—Decided February 24, 1913.

Whether void or not under the state statute, a provision in an express receipt limiting recovery in case of loss or negligence, is valid as to interstate shipments under the Carmack Amendment if fairly made for the purpose of applying to the shipment the lower of two rates

based upon valuation. *Adams Express Co.* v. *Croninger*, 226 U. S. 491.

A statement filed in the case that a clause in a contract is void under a statute is a concession for purposes of argument as to a matter of law and cannot conclude anyone, as it does not operate to withdraw the contract from the case nor its validity from the court's consideration.

The reasonable and just consequence of misrepresentation of value to get the lower rate of shipment is not that the shipper recover nothing but that he is estopped to recover more than the value declared to obtain the rate.

A shipper by accepting a receipt reciting that the carrier is not to be held liable beyond a specified amount at which the property is thereby valued unless a different value than that is so stated, and thus obtaining a lower rate than that which he would have been obliged to pay had he declared the full value, declares and represents that the value does not exceed the specified amount.

There is no substantial distinction between a value stated on inquiry and one agreed upon or declared voluntarily.

THE facts, which involve the liability of an express company on goods of undeclared value and also the construction of the Carmack Amendment, are stated in the opinion.

Mr. Charles W. Pierson, with whom *Mr. William W. Green* was on the brief, for plaintiffs in error:

The case was tried below on the theory of a breach of contract and must therefore be determined in this court on the same theory. Having elected to try the case on one theory, a litigant is restricted to the same theory on appeal. *Tex. & Pac. Ry. Co.* v. *Abilene Oil Co.*, 204 U. S. 426.

The contract upon which plaintiff sued and was permitted to recover involved a violation of the Elkins Act. The contract therefore was invalid and no action can be maintained for a breach thereof.

The shipper, not the carrier, was responsible for this discrimination. The express receipt was filled out and tendered for signature by the shipper, who must be deemed

to have been acting as plaintiff's agent in the matter. *McMillan* v. *Railroad Co.*, 16 Michigan, 79; *Chicago & Alton R. R. Co.* v. *Kirby*, 225 U. S. 155; *Armour Packing Co.* v. *United States*, 209 U. S. 57, 72; *Ellison* v. *Adams Express Co.*, 245 Illinois, 410.

Nothing in the case of *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477, is inconsistent with this position. In that case no Federal question was presented. The present case, of course, does present a Federal question: the construction and effect of the Elkins Act.

Mr. Rhodes S. Baker, for defendant in error, submitted:

It being conceded that the limitation of liability contained in the receipt is void as such, and it appearing that no contract violative of the Interstate Commerce Act was ever made, the shipper's right to compensation for the value of the lost merchandise is unobstructed.

In this case no Federal question is fairly comprehended, either in the cause of action of the defendant in error or the grounds of defense of the plaintiff in error.

The judgment does not require the plaintiff in error to pay a greater amount than the value of the merchandise. The contrary appears from the evidence.

The judgment does not require the plaintiff in error to pay for the merchandise a greater amount than its value as fixed by the rate of transportation assessed against it. No rate of transportation was assessed against this merchandise by the defendant in error. It is true that the rate of transportation is in a sense dependent upon declared valuations, but in this case no valuation was declared nor inquiry even made, and it may be fairly presumed that the carrier would have done its legal and voluntarily assumed duty at destination upon delivery of the merchandise to the consignee. It assessed no rate of transportation and placed no valuation upon the receipt, the package of merchandise, or the way bill.

The proof does not show that the defendant in error was required by the judgment to transport the merchandise in question at an illegal rate of transportation.

The judgment does not require the defendant in error to violate any acts of Congress regulating interstate commerce.

On the contrary, it enforces the statutory duty of the carrier to make settlement with the shipper upon a basis of actual values, without discount or immunity under the void and illegal exemptions in the receipt given to the shipper. See *Pennsylvania Railroad Company* v. *Hughes*, 191 U. S. 477; *Kissenger* v. *Fitzgerald*, 152 Nor. Car. 247.

Under *Tex. & Pac. Ry. Co.* v. *Mugg*, 202 U. S. 242, the lawful rate is read into the contract in question as effectively as if printed therein.

The whole defense in this case depends upon the ability of the carrier to establish fraud on the part of the shipper. If fraud were shown it would be a defense, regardless of the Federal law. Nothing is added to the efficacy of the defense by attributing its value to Federal law. The courts of Texas give full recognition in proper case to the defense of fraud and the consequent estoppel that results therefrom.

The issue of fraud does not present a Federal question, and moreover, as a debatable issue here, has been foreclosed by the decision adverse to it in the state courts empowered to resolve issues of fact. *Southern Pacific Co.* v. *Anderson*, 63 S. W. Rep. 102; *Int. & G. N. R. R. Co.* v. *Van deVenter*, 107 S. W. Rep. 560; *Pacific Exp. Co.* v. *Hertzberg*, 42 S. W. Rep. 795; *Head* v. *Pacific Exp. Co.*, 126 S. W. Rep. 683; *Bynum* v. *Preston*, 69 Texas, 291; *St. L. S. W. Ry. Co.* v. *McIntyre*, 82 S. W. Rep. 346.

Confessedly there has been no false representation—no unlawful concealment. Neither the law nor the rules of the express company imposed on the shipping clerk the duty to volunteer information about the value of the ship-

ment in question when he was making no bargain as to rates and when the contents of the package of merchandise were not concealed from the carrier by some artifice calculated to induce it to make no inquiry.

It does not appear that the express company was misled into believing the property to be of not exceeding the minimum valuation. Nothing appears in the evidence indicating its purpose not to pursue the inquiry at destination. It fails to appear that the carrier did, in fact, act upon any such misrepresentation, or that it did, in fact, sustain any injury.

MR. JUSTICE LURTON delivered the opinion of the court.

Action by a shipper against an express company to recover for the loss of a package of furs shipped from New York to Dallas, Texas, and never delivered.

The receipt executed by the express company contained a clause exempting it from loss or damage not due to its fraud or negligence, and providing that it should in no event be held liable "beyond the sum of fifty dollars, at not exceeding which sum said property is hereby valued, unless a different value is hereinabove stated." No different value was declared. The package weighed seven pounds. It contained furs enclosed in a paper box which was securely wrapped and tied with cord.

The defendants in error were permitted to prove that the actual value of the furs was four hundred dollars. That the consignors kept in their shipping office an express book containing blank express receipts. One of these was filled out in their office by their shipping clerk. When the wagon of the express company called at the office, the agent signed the receipt, and the package was delivered to him by a boy assistant to the shipping clerk. No questions were asked as to the value and no value declared other than as shown in the receipt. It was also shown

that the clerk who wrapped and marked the package did not know the value and had no actual knowledge of the graduated rates of the express company, and that he had had nothing to do with the selling or buying of the furs. One of the consignors, Abraham Jacobson, sold the furs personally and testified as to their value. He testified that he knew that if the value had been declared to be four hundred dollars, the express rate would have been higher, and that if no value was especially declared, they would be carried under the express rate applying to a package valued at not in excess of fifty dollars.

There was put in evidence the table of graduated rate sheets on file with the Interstate Commerce Commission. These showed that the rates were graduated by weight and value. The rate from New York to Dallas upon a package weighing between five and seven pounds and valued at not over fifty dollars was one dollar, which was the rate applicable to and charged upon the package in question. If the value had been declared at four hundred dollars, the rate would have been increased fifteen cents for each additional hundred dollars of value.

One of the provisions of the filed tariff sheets contained this direction, "Always ask shipper to declare the value, and when given insert it in the receipt, mark it on the package and enter amount on way bill. If shipper refuses to state value, write or stamp on the receipt, 'value asked and not given.'"

A jury was waived, and there was a judgment for the plaintiff below for the full value of the package.

The contract of shipment, including the clause for the limitation of any recovery in case of loss or negligence, is substantially like the contract upheld in *Adams Express Company* v. *Croninger*, 226 U. S. 491. To take this case without the controlling influence of that case counsel say that no Federal question based upon the validity of the shipping contract was raised in the state court, and

for this they rely upon a paragraph in the brief of one of the counsel for the express company filed in the court below in which it is said: "For the purpose of this case, we are willing to concede that said provision in so far as it limits the liabilities of the company for $50.00, is void both under a statute of the State of Texas," and under the provisions of the Carmack Amendment of § 20 of the act to regulate commerce of June 29, 1906.

That such a clause may be void under the legislation of Texas may be true. But that it is valid, if fairly made for the purpose of applying to the shipment the lower of the two rates based upon valuation, is not now an open question. *Adams Express Company* v. *Croninger*, cited above.

That case had not been decided when this case was heard in the state court, and there was much diversity of opinion as to the meaning of that section when counsel made the concession. At most it was a concession for purposes of argument as to a matter of law and could not conclude any one, since it did not operate to withdraw the shipping contract from the case, nor its validity from the court's consideration.

It is undoubtedly true that the principal defense upon which the defendants seem to have relied in the state court was, that by intentional misrepresentation the plaintiff had obtained a rate based upon a valuation of fifty dollars, and that they had thereby secured transportation of the property, for which they sue, at a less rate than that named in the tariffs published and filed by the carrier as required by the acts of Congress regulating commerce, and thus obtained an illegal advantage and caused an illegal discrimination forbidden by the acts referred to. But this defense rested upon the misrepresentation as to real value declared only in the carrier's receipt, and, therefore, involved the consequence of the undervaluation by which an unlawful rate had been obtained. The question at last would be shall the shipper or owner recover nothing

because of that misrepresentation, or only the valuation declared to obtain the rate upon which the goods were carried? The latter would seem to be the more reasonable and just consequence of the estoppel. The ground upon which the validity of a limitation upon a recovery for loss or damage due to negligence depends is that of estoppel.

But it is a mistake to assume that the company did not rely upon the stipulation limiting a recovery in case of loss or damage to the value agreed upon or declared. In the twelfth paragraph of its answer it asserted that if liable at all its liability "should be limited to $50.00, as provided in said contract of shipment, which $50.00 has heretofore been tendered to plaintiff." By its eighth and ninth assignments of error in the Court of Civil Appeals error was assigned upon the refusal of the trial court to hold that the defendants in error were estopped, by the valuation declared, to recover any amount in excess of $50.00. The Court of Civil Appeals, while not in express terms denying the validity of such a stipulation limiting recovery, did so in effect, for it seems to have placed its judgment of affirmance upon the rule requiring the company's agents to ask the shipper to declare the value and if no value is stated that the package should be stamped "value asked and not given." This was not done. Therefore, said the court, "the company's agent failed to perform a plain duty . . . and it is in no attitude to complain that the shipper did not state the value."

But the shipper in accepting the receipt reciting that the company "is not to be held liable beyond the sum of fifty dollars, at not exceeding which sum said property is hereby valued, unless a different value is hereinabove stated," did declare and represent that the value did not exceed that sum, and did obtain a rate which he is to be assumed to have known was based upon that as the actual value. There is no substantial distinction between

a value stated upon inquiry, and one agreed upon or declared voluntarily. The rate of freight was based upon the valuation thus fixed, and the liability should not exceed the amount so made the rate basis. *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331, 338.

Judgment reversed and remanded for further proceedings not inconsistent with this opinion.

BRADLEY *v.* CITY OF RICHMOND.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 38. Submitted November 6, 1912.—Decided February 24, 1913.

A privilege tax may perform the double function of regulating the business under the police power and of producing revenue if authorized by the law of the State.

Under the Fourteenth Amendment, neither the State nor its municipality can confer or exercise arbitrary power in classifying for purpose of regulating, licensing or taxing.

Whether the power of classifying be exercised by the State directly or by the municipality, it is the exercise of legislative discretion and subject to the guarantee of the Fourteenth Amendment.

The power of the State to determine what occupations shall be subject to license and tax is subject to no limitations save those of the due process and equal protection clauses of the Fourteenth Amendment, and nothing in the Fourteenth Amendment prohibits the State from delegating this power. *Gundling* v. *Chicago*, 177 U. S. 183.

An ordinance imposing a license on business, dividing it into several classes and giving the power of classification to a committee of the council with power of review by the entire council, is not an arbitrary exercise of power within the prohibitions of the Fourteenth Amendment, and so *held* as to the banker's license tax of Richmond, Virginia.

An ordinance imposing license taxes and authorizing classification which provides for a review will not be held unconstitutional because

the reviewing power might approve of an unjust classification—such an objection would apply to any tribunal.

The presumptions are that the tribunal charged with the duty of determining whether a classification is proper will not perform its duty unjustly.

If the right to be heard and obtain a review does not avail to protect rights under the Constitution, the right to judicial review remains under the general principles of jurisprudence. *Kentucky Railroad Tax Cases*, 115 U. S. 321.

The burden is on the one who complains of his classification under a legal ordinance to show that he was denied equal protection of the law by such classification.

Where errors of administration in classifying for taxation can be corrected on review, one complaining that he was denied equal protection of the laws must avail of the method provided before applying to the Federal courts for protection under the Fourteenth Amendment.

Where it is a clearly apparent error, this court will take notice of evident omission in the transcript of record of the word "not."

110 Virginia, 521, affirmed.

THE facts, which involve the constitutionality under the due process and equal protection provisions of the Fourteenth Amendment of a license ordinance of the city of Richmond, Virginia, are stated in the opinion.

Mr. I. Henry Harris for plaintiff in error:

The ordinances and the tax imposed on the plaintiff in error were void as in violation of the due process and equal protection provisions of the Fourteenth Amendment. The power given to the Committee on Finance to tax and classify the persons or businesses mentioned, and the tax imposed by it was a naked and arbitrary power, neither restrained nor guided, and offends those provisions.

The guaranty of the Constitution prohibits laws which are capable of being exercised arbitrarily and with discrimination and unjustly and without regard to legal discretion. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Gulf &c. R. R.* v. *Ellis*.

165 U. S. 150; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232–237; *Morton* v. *Macon*, 111 Georgia, 162. See also *Richmond* v. *Model Steam Laundry*, 111 Va. Rep. 758. The cases which hold that certain laws apply only to a certain class of the people or businesses are not applicable to the facts and the ordinance in question, because the ordinance in this case does not provide for any classification of persons or businesses mentioned therein, but delegates such classification to the Finance Committee. This distinguishes *Kentucky Railroad Tax Cases*, 115 U. S. 321; *McMillan* v. *Anderson*, 95 U. S. 37; *Clark* v. *Titusville*, 184 U. S. 329; *Gundling* v. *Chicago*, 177 U. S. 183; *Noble State Bank* v. *Haskell*, 219 U. S. 104; *Engel* v. *O'Malley*, 209 U. S. 128.

There the statute fixed the terms and conditions and the fee on which the license should be issued and the comptroller who issued them had no arbitrary power. See also *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114; *Brown-Forman Case*, 217 U. S. 563.

See *contra Gulf &c. Ry. Co.* v. *Ellis*, 165 U. S. 150; *Boyd* v. *United States*, 116 U. S. 616, 635; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 561.

In urging that the tax is not unconstitutional, the defendant in error claims that the plaintiffs in error could have appealed to the council if any error was made. But such right to appeal is entirely irrelevant to the question here presented. What the committee could do under the ordinance the council could do. There is no difference whether the council or its committee fixed the class in which the plaintiffs in error were placed. The ordinance is impregnated with the vice already shown whether the council or its committee acted and the right to appeal could not save it from that vice.

Mr. H. R. Pollard for defendant in error.

MR. JUSTICE LURTON delivered the opinion of the court.

Appellant was convicted in the Hustings Court of Richmond for the violation of an ordinance forbidding the carrying on of the business of a "private banker" without a license. This judgment was affirmed by the Supreme Court of the State.

Numerous objections to the ordinance and to the tax, arising under the law and constitution of the State, were decided adversely to the plaintiff in error. With these we have no concern. The case comes here upon the claim made in the state court, and denied, that the ordinance denies both the equal protection of the law and due process as guaranteed by the Fourteenth Amendment.

The ordinance in question requires all persons desiring to pursue certain businesses and occupations to pay a special license tax for the privilege of prosecuting such business. Many pursuits are named, among them real estate agents, commission merchants, brokers, auctioneers, private bankers, etc. The persons required to pay such special license tax are to be divided by the finance committee of the city council into thirteen classes. The amount required to be paid by each class is as follows: First class, $800; second class, $600; third class, $400; fourth class, $300; fifth class, $250; and so on in decreasing amounts to the thirteenth class which is required to pay only $10. This classification by the finance committee is to be made with the advice and assistance of "the commissioner of revenue, the city tax collector, or any city officer."

The tax imposed is not merely an exercise of the police power regulating a business, but is a tax assessed as a condition upon which the license issues. Though it fulfills the double function of both regulating the business and producing revenue, it was fully authorized by the law of the State as adjudged by the very judgment under review:

Gundling v. *Chicago*, 177 U. S. 183, 189. Since the purpose of the statute is double, it is plain that to exact the same amount from each person or firm subject to the tax might result in inequality of burden under like circumstances and conditions. Therefore it was that the ordinance provided for a division into classes, those in each class paying the same tax.

The objection to the ordinance does not grow out of any contention that there may not exist just and reasonable distinctions justifying a greater tax upon some of these persons or firms engaged in doing what is called a "private banking" business than upon others engaged in the same general business; but arises from the fact that the law provides no rule by which some are to be placed in one class and some in another. An ordinance which commits to a board, committee or single official the power to make an *arbitrary* classification for purposes of taxation, would meet neither the requirement of due process, nor that of the equal protection of the law.

But this ordinance does not authorize any arbitrary classification, nor could the State or the council legally confer or exercise arbitrary power in classifying for the purpose of either regulating or licensing or taxing. The guarantee of the Fourteenth Amendment would forbid.

But whether the power of classifying be exercised by the State directly or by a city council authorized to require the payment of such a tax as a condition to the issuance of a license, it is at last the exercise of legislative discretion and is subject, in either case, to the guarantee referred to.

But when the matter concerns the determination of the business or occupation which may be required to take out a license and pay a tax as a condition of obtaining such a license, the power of the State is subject to no limitations, save those found in the guarantee of due process and the equal protection of the law. In the present instance, the State has delegated this power of selecting the businesses

and occupations carried on within the city of Richmond, and of dividing them into classes and determining the amount of the tax to be paid by the members of each class. The state Supreme Court has decided that there can be no objection under the constitution of the State to such delegation. Neither do we see any reason under the Fourteenth Amendment why the State may not delegate to either the council of the city or to a board appointed for that purpose the power to divide such occupations or privileges into classes or sub-classes, and prescribe the tax to be paid by the members of each such class. *Gundling* v. *Chicago*, 177 U. S. 183; *Fischer* v. *St. Louis*, 194 U. S. 361, 372; *Lieberman* v. *Van De Carr*, 199 U. S. 552, 560. In the case last cited, this court said:

"That this court will not interfere because the States have seen fit to give administrative discretion to local boards to grant or withhold licenses or permits to carry on trades or occupations, or perform acts which are properly the subject of regulation in the exercise of the reserved power of the States to protect the health and safety of its people there can be no doubt."

That this ordinance does not contemplate any arbitrary discrimination between the persons or firms subject to the license tax is evident from the direction that they shall be divided into thirteen classes, the members of each class to pay the particular amount named as a condition to the issuance of a license. It is also evident from the provisions in respect of notice, right to be heard and a right to a review by the council itself. These are obvious guards against unjust and capricious inequalities.

The authority to classify is given to the finance committee of the city council. That was a committee of eleven members of a city council composed of forty members. The ordinance required this committee to make a tentative classification with the advice and assistance of certain city officials supposed to be acquainted with the general

subject. When made the classification is required to be filed in the office of the city auditor for public inspection. The auditor is then required to give notice through two city newspapers that the tentative assessment is so filed in his office for examination and that all persons affected may be heard by the finance committee at times and places specified. From the final classification made by the committee the ordinance permits any aggrieved person to appeal to the full city council and there obtain a review.

But it is said that after all there is no security that the city council will not in the end approve of a scheme of classification operating most unjustly. The same objection might be made with reference to any tribunal required to determine such a matter. The presumptions which must be indulged run counter to the suggestion made.

If the right to appear and be heard and to obtain a review should prove illusory, there would, under general principles of jurisprudence, remain the right to judicial review, if the result should violate either a right secured under the law of the State or that of the United States. This is the right which plaintiff in error has in this very case asserted. *Kentucky Railroad Tax Cases*, 115 U. S. 321, 335, 336.

There was obviously no want of due process of law in the imposition of the tax.

Finally, the plaintiff in error says that the actual operation of the ordinance has brought about an unjust and illegal discrimination in that he has been classified in such manner as to subject him and his business to a higher tax, as a condition of issuing to him a license, than that required of many other private bankers. This was a defense made in the state court. But that court, after saying that it was competent for the council to assign private bankers to different classes, and that the plaintiff in error

had been required to pay no greater license tax than all others in the same class, said:

"In order to render the classification illegal, the party assailing it must show that the business discriminated against is precisely the same as that included in the class which is alleged to be favored. *Norfolk &c.* v. *Norfolk*, 105 Virginia, 139. That has not been shown in the present case; on the contrary, it appears that the business of the plaintiff in error is not precisely the same with that of other private bankers who are put in a different class and assessed with a less license tax."

That some private bankers were put into classes which subjected them to less taxation than the class into which the plaintiff in error was placed is the only allegation which would tend to show discrimination. But there was evidence tending to show that the business done by the plaintiff in error and ten other persons or firms was that of lending money at high rates upon salaries and household furniture, while the kind of business done by others in the same general business was the lending of money upon commercial securities. Obviously the burden was upon the plaintiff in error to show an illegal and capricious classification. The state court said that he had failed to show that these private bankers favored in the classification were doing the same business.

In *Home Telephone Company* v. *Los Angeles*, 211 U. S. 265, 280, 281, the complaint was that the city, under an authority to regulate the charges for telephone service, had given a more favorable rate to a rival company and had thereby illegally discriminated. After saying that the allegation of such difference was "too vague to pass upon," this court said:

"Whether the two companies operated in the same territory, or afforded equal facilities for communication, or rendered the same services does not appear. For aught that appears, the other company may have brought its

patrons into communication with a very much larger number of persons, dwelling in a much more widely extended territory, and rendered very much more valuable services. In other words, a just ground for classification may have existed. Every presumption should be indulged in favor of the constitutionality of the legislation."

See also *Sweet* v. *Rechel*, 159 U. S. 380, 392.

But it is not necessary to rest our judgment upon the question as to whether the plaintiff in error was rightly or erroneously classified, because we are of opinion that he is not in a situation to complain. There was obviously no want of due process of law in the scheme of the ordinance. The occupations to be subjected to the tax were defined. There was a maximum and minimum limitation as to the amount of the tax, dependent upon the classification. The classification was to be made after notice and a hearing and an appeal from the final action of the committee was permissible. The plaintiff in error might have appeared and shown the character and extent of the business he was doing and compared it with that of others more favored in classification. He did nothing of the kind. He seems to have stood by and let the matter of classification go by without contest. It is no answer to say that it would have been unavailing. The presumption is otherwise. The authority to classify was committed primarily to the finance committee, subject to review by the council. It was expected to use its judgment and knowledge. If it erred there was ample opportunity to show that by an appeal to the council. Of the right to appear and to be heard plaintiff in error elected not to avail himself. Under the circumstances he is not warranted in resorting to the extraordinary jurisdiction of this court to arrest an administrative error susceptible of correction by an appeal to the council. *Gundling* v. *Chicago*, 177 U. S. 183, 186; *Chicago, B. & Q. Rd.* v. *Babcock*, 204 U. S. 585, 598.

It is true that in the opinion of the Hustings Court it is inadvertently said that of the opportunities afforded by the act for curing any wrong he had "availed himself." It is likely that the word "not" has been accidentally omitted. This we say because the brief of the defendant in error says that he did not appeal to the city council and in the brief of the plaintiff in error this is admitted. In addition, we add that there is no evidence that he in any way appeared or pointed out any injustice done him.

Judgment affirmed.

MR. JUSTICE LAMAR concurs in the result.

UNITED STATES *v.* MASON, EXECUTOR.

APPEAL FROM THE COURT OF CLAIMS.

No. 537. Submitted December 20, 1912.—Decided February 24, 1913.

Section 5 of the act of April 16, 1908, 35 Stat. 61, c. 345, providing for rank and pay of retired officers of the Revenue-Cutter Service *held* not to give in this case an additional step forward to a retired officer who had already been advanced one step gratuitously.

The court in this case follows the construction of the statute by the officers of the Treasury Department.

46 Ct. Cl. 393, reversed.

THE facts, which involve the construction of the act of April 16, 1908, and the amount of pay due thereunder to an officer in the Revenue-Cutter Service, are stated in the opinion.

Mr. Assistant Attorney General John Q. Thompson and *Mr. George M. Anderson* for the United States.

Mr. Francis P. B. Sands for appellee.

Memorandum opinion, by direction of the court, by MR. JUSTICE LURTON.

This is an appeal from a judgment of the Court of Claims allowing the executor of the late Captain Thomas Mason the difference between his pay as retired Junior Captain in the Revenue-Cutter Service and the pay of a Senior Captain in the same service, for the time between the passage of the act of April 16, 1908, 35 Stat. 61, c. 145, and his death, September 10, 1910.

The provision of the fifth section of the act referred to is in these words:

"That any officer of the Revenue-Cutter Service with a creditable record who served during the civil war in the land or naval forces of the United States shall, when retired, have the rank and receive three-fourths of the duty pay and increase of the next higher grade; and the provisions of this section shall apply to officers of the said Service now on the retired list."

Mason had served with credit during the Civil War in the naval service of the United States. He was therefore within the provision of the section set out, and the only question is whether under that provision his advance in grade and in pay is to be made upon the grade he held when he was retired or upon the grade and pay he had when this act was approved.

He had been retired as of May 3, 1895, while holding the rank of First Lieutenant in the Revenue-Cutter Service, with one-half of the pay of a First Lieutenant on the active list, under the act of March 2, 1895, 28 Stat. 910, 920, c. 189. By the act of April 12, 1902, § 9, 32 Stat. 100, 101, c. 501, he and all other officers upon the retired or permanent waiting list, were given seventy-five per cent. of the duty pay of the rank they had when retired. By a special act of February 25, 1905, 33 Stat. 813, c. 796, he was advanced "one grade from first lieu-

tenant to that of captain," for meritorious acts while in the service of the navy and of the Revenue-Cutter Service of the United States, but with no increase in pay by the advance in grade thereby authorized.

The only trouble about the meaning of the act arises out of the exceptional fact that the decedent had after his retirement been advanced one grade in rank but without any advance in pay by reason of that advancement. The act obviously meant to provide that every Revenue-Cutter officer then on the active list should upon retirement advance one step in grade with three-fourths of the duty pay of the advanced grade. The same benefit was also extended to officers already on the retired list. But in both cases the advance in grade is to be based upon that held at the date of retirement with three-fourths of the pay of the advanced grade.

The claim that the decedent's advance in grade and pay is to be upon the grade to which he had been advanced without additional pay, is without merit. To concede it would be to conclude that Congress intended to advance him not upon the grade he had at retirement but upon the gratuitous advancement, and that Congress purposed to advance him one other step over that which he had at retirement and two steps in pay. The basis of the gratuity of Congress was the grade and pay at retirement. This was the construction placed upon the act by the Auditor of the Treasury Department and the Comptroller of the Treasury.

Judgment reversed and case remanded with direction to dismiss the petition.

ZIMMERMAN *v.* HARDING.

HARDING *v.* ZIMMERMAN.

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

Nos. 771, 894. Submitted January 10, 1913.—Decided February 24, 1913.

A partnership formed to run a hotel for which a lease is obtained *held* in the absence of any stipulation as to duration to be for the term of the lease.

Where partnerships are regulated by statute, as in Porto Rico, the rights of one attempting to dissolve depend upon the statute rather than on general law applicable elsewhere.

The right to dissolve under § 1607, Civil Code Porto Rico, is confined to partnerships the duration of which has not been fixed; under § 1609 a partnership for fixed duration can only be dissolved for sufficient cause shown to the court, and one attempting to dissolve before the fixed termination and to exclude the other from participation must account to the latter for his share of the profits until the court decrees a dissolution in a suit brought to dissolve.

Partnership property continues to be such after as well as before dissolution.

Where one party attempts to illegally dissolve a partnership without suit and subsequently the other brings a suit for dissolution in accordance with the statute the former must account for all profits until the final decree of dissolution.

The doctrine of election is applicable as between inconsistent remedies; but does not apply to a partner wrongfully excluded from participation. He does not lose his right to an accounting because he first starts an action at law which he subsequently dismisses.

There may be a recovery at law for damages resulting from a breach of the partnership agreement as well as an action for accounting in equity for the same breach, and a partner wrongfully excluded from management and profits need not wait for the end of the period but may show in an action at law his probable profits.

One who wrongfully excludes the other partner from management of the partnership affairs is not entitled to a salary for managing them during such period of exclusion.

This court can only review an improper allowance of salary to a partner where an exception has been filed to such allowance.

Where the case has been tried in an irregular manner and items are allowed in the final decree which do not appear in the auditor's or master's report, this court cannot attempt to correct errors assigned here and will presume that the decree so far as it stands upon questions of fact is supported by evidence not objected to.

THE case in substance is this:

The appellee, Harding, undertook to obtain a lease from the owner of a hotel property situated in a suburb of San Juan, Porto Rico, and an option of purchase. The parties agreed upon the rental, term of the lease and upon an option of purchase during the term of the lease, but the owners required Harding to associate himself with another person, as co-lessee, satisfactory to them. After some negotiations Harding arranged with the appellant, Mrs. Zimmerman, to join him in the lease and option and to form a partnership to operate the hotel. Each agreed to contribute one-half of an agreed capital, their personal services and to share in the profits and losses, equally. The agreement of partnership was never reduced to writing, and there was no express stipuation as to its duration.

Under date of February 1, 1911, the owners of the hotel property executed a lease to the partnership for the term of two years, with right of renewal for another term of two years at an advanced rental. This lease included an option of purchase during the term at a price named. Thereupon the partnership took possession of the property and its operation as a hotel. Harding undertook the office side of affairs and Mrs. Zimmerman the other departments. The business seems to have run along smoothly and with profit until about August 9, 1911, when Mrs. Zimmerman, who was in sole charge by reason of the temporary absence of Harding upon a vacation in the United States, assumed of her own motion to dissolve the partnership. To this end she notified Harding by letter that she had dissolved the relation and published a card in the local papers that the partnership had been

dissolved, and that she would thenceforth conduct the business for her own benefit. From that moment she assumed the entire ownership and possession of the partnership business and property. Harding was excluded from all possession, control or voice, and all benefits which had accrued, she claiming that he had drawn more than his share upon an accounting.

When Harding returned to San Juan, he at once brought an action at law against Mrs. Zimmerman to recover damages for the breach of the partnership contract. This suit was removed by Mrs. Zimmerman to the District Court of the United States for the District of Porto Rico. Thereupon Harding obtained leave to dismiss his action at law, without prejudice, and filed this bill. Its object was to obtain a decree of dissolution and an accounting of the partnership affairs. The appointment of a receiver to manage the business pending the litigation was at once sought by Harding under the averments of the bill. This was resisted, and denied by the court. Upon the coming in of her answer an auditor was appointed to report upon the partnership accounts. Mrs. Zimmerman remained in full control of the hotel business down to the date of final decree, May 18, 1912, by which the partnership was dissolved. At that date a special master was put in charge of the business to conduct it until a sale of the assets should be had and distribution made. The partnership property, including the unexpired term of the lease, was sold and the auditor and master's report confirmed. The final result was that the share of Harding in the proceeds of the business, including profits realized to date of sale was fixed at $3,008.02, and that of Mrs. Zimmerman at $4,878.22. From this decree both parties have appealed.

Mr. N. B. K. Pettingill for Zimmerman.

Mr. H. H. Scoville and *Mr. Willis Sweet* for Harding.

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

We agree with the court below that although there was no express stipulation as to the duration of the partnership agreement, it was by implication to continue during the term of the lease of the hotel property. The term had, therefore, not expired when on August 9, 1911, Mrs. Zimmerman, of her own motion, declared it at an end. Her right to withdraw or terminate the agreement at her own will, the agreement being for the term of the lease, depends primarily upon the law of Porto Rico, rather than the general law applicable elsewhere. The matter is regulated by §§ 1607 and 1609 of the Civil Code of Porto Rico. These sections are set out in the margin.[1]

The suggestion is that § 1607 applies only to a case where one partner desires to turn over the business and responsibility to the other. This is too narrow. The plain mandate is that a dissolution shall occur at the will or withdrawal of one partner only when the duration of the partnership has not been fixed. Section 1609 obviously deals with a dissolution upon application to a court for sufficient reason shown. But whether a dissolution declared on the motion of one of the members might be justified when later challenged, if sufficient reason for the

[1] Section 1607. The dissolution of the partnership by the will or withdrawal of one of the partners shall only take place when a term for its duration has not been fixed, or if this term does not appear from the nature of the business. In order that the withdrawal may be of effect, it must be made in good faith at the proper time; notice thereof shall also be given to the other partners.

Section 1609. No partner can demand the dissolution of a partnership which either, by a provision of the articles or by the nature of the business, has been constituted for a specified time unless there should exist sufficient reason, such as when one of the partners fails to comply with his obligations, or when he becomes incapacitated for the partnership business, or any other similar cause, in the judgment of the courts.

act was shown, is academic, so far as this appeal is affected, because the court below upon oral evidence, including that of both parties, found that no good reason in law or fact existed for the dissolution declared on August 9, 1911 by Mrs. Zimmerman. The oral evidence heard by the court in relation to the matter has not been sent up and we must presume the conclusion sound. We shall therefore assume that the partnership continued in law, until dissolved by decree for sufficient reason on May 18, 1912. As the court refused to appoint a receiver *pendente lite* upon Harding's application when his bill was filed and permitted Mr. Zimmerman to continue to conduct the partnership business, she was justly held accountable for Harding's share in the profits made during that time.

The principal argument has turned upon the consequence to be attached to the action at law brought by Harding. The claim made by the appellant, Mrs. Zimmerman, is that the bringing of that action was a conclusive election between two inconsistent remedies, and that it operated as a bar to any remedy under the present bill. If this is the case the result must be deplored, for the dismissal of this bill would leave Mrs. Zimmerman in full possession of the fruits of her lawless conduct in excluding Harding from all interest and control of the joint business, with only the right to begin over again an action at law to recover his damages.

But we think the doctrine of the election of remedies has no proper application here. The essential element of that rule is that there must have been a right of choice between two remedies which are inconsistent with each other. *Bierce* v. *Hutchins*, 205 U. S. 340. The argument is that the bringing of the suit at law was an election to treat the contract of partnership as at an end, and to recover damages for the breach, including profits prevented, while the bill in equity was based upon the theory that the partnership was continuing.

But that is a misconception of the bill. It states the same facts stated in the suit at law and alleges the illegality of the defendant's declaration of dissolution and the plaintiff's illegal exclusion from the control and possession of the joint property. But the bill does not seek a restoration of the partnership relation, nor a restoration to the joint possession or management of the partnership business. Upon the contrary, it states that a continuance of such relation is impossible. It therefore asked to have the business placed at once in the hands of a receiver and the partnership affairs liquidated and the partnership dissolved. This latter relief is but an incident to the liquidation sought of a precautionary character.

Whether the partnership had been effectually dissolved by the declaration of Mrs. Zimmerman on August 9, 1911, or not, her action in excluding Harding from joint possession and control until the affairs had been wound up was, upon either hypothesis, wholly indefensible. The partnership property continued to be partnership property after as well as before dissolution.

When she assumed the right to take possession for herself and to carry on the business with the partnership property, Harding had a clear right to call her to account for his share in all of the joint property and at his election to require her to account for the profits, by way of damages or otherwise, which he had been prevented from making by his wrongful exclusion from the business. *Ambler* v. *Whipple*, 20 Wall. 546; *Pearce* v. *Ham*, 113 U. S. 585, 593; *Karrick* v. *Hannaman*, 168 U. S. 328, 337; *Holmes* v. *Gilman*, 138 N. Y. 369.

Neither is the remedy in equity for a breach of a partnership agreement exclusive. There may be at law a recovery of all the damages which result, including damages for profits prevented by a wrongful dissolution. Thus if one member assumes to dissolve a partnership before the end of the term, the other may bring an action for

damages for the breach and recover not only his interest, but also his share of the profits which might have been made during the term. He need not wait until the expiration of the period and need not go into equity for an accounting, but may at law show the probable profits which he has been deprived of. *Bagley* v. *Smith*, 10 N. Y. 489; *Dennis* v. *Maxfield*, 10 Allen (Mass.), 138; *Karrick* v. *Hannaman*, 168 U. S. 328, 337.

The remedy at law was in every substantial feature consistent with that sought by his bill in equity, and no other form of suit was admissible in the local court. Both suits were pecuniary. Both sought compensation upon the same facts. In one Harding sought a judgment for damages which would include all that he could have in equity as the result of an accounting. The jurisdiction in equity in suits for winding up partnerships is based upon its jurisdiction in matters of complicated accounts. A dissolution, or a receivership, are mere incidents to its principal ground of jurisdiction. That in his equity suit Harding sought relief in respect to some matters not involved in or beyond the jurisdiction of the law court does not affect the question of election. That he asked to have the partnership formally declared dissolved by reason of the conduct of Mrs. Zimmerman was not antagonistic to any position he assumed in his suit at law. It was a mere incident to his right to hold her to an accounting for his share in the business. He sought to have the business wound up by a receiver. This Mrs. Zimmerman prevented and she was suffered to remain in sole possession. If she has been held to account for the profits made during that time, she cannot complain.

It has been assigned as error that Mrs. Zimmerman was allowed salary for her service in the management of the business after she assumed to be managing for herself. The partnership contract made no provision for the allowance of salaries to either partner. In the view

of the court below the exclusion of Harding from joint possession and management was without authority. In such circumstances it seems inconsistent that Mrs. Zimmerman should be allowed for services which she wrongfully took upon herself because she had unlawfully excluded Harding from participation. Probably upon the theory that her management had resulted in profit in which Harding was permitted to share it was thought equitable that she should be compensated. However this may be and reluctant as we are to its allowance (*Karrick* v. *Hannaman*, cited above) we are unable to find that any exception was filed to the allowance in the auditor's report. It does appear that the court directed the auditor to reduce the amount, which was done. But whether that was done upon an exception to the amount as excessive, or to any allowance at all, we have no information.

There is also an objection to a charge against Harding of $618 on account of some trouble with his accounts for bar receipts. The credit was made by order of the court in the final decree. There is no trace of the item in either the auditor's or master's reports. This would be ordinarily enough to justify us in shutting the item out. But this case seems to have been proceeded with in a most irregular way. There are references in the opinion and in the auditor's report to oral evidence and oral statements which have not been made a part of the transcript. If the parties elect to try a case in such an irregular way, we must presume that the decree, so far as it stands upon questions of fact, was supported by evidence not objected to.

All of the assignments must be overruled and the decree affirmed.

SUPREME RULING OF THE FRATERNAL MYSTIC CIRCLE *v.* SNYDER.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 34. Submitted December 16, 1912.—Decided February 24, 1913.

The State is entitled at all times to prevent the perversion of its legal machinery, and may require that it be availed of only *bona fide*.

To impose a penalty on those who unsuccessfully and not in good faith defend their liability on contracts does not violate the obligation of the contract: *Quære* whether the State could impose such a penalty as to prior contracts as a mere consequence of unsuccessful defense.

This court will not construe a state statute as including that which it expressly excludes on the ground that the statute's practical effect will be to include cases which are so excluded therefrom.

A state statute, imposing on insurance companies an additional specified proportionate amount of the policy where there has been an unsuccessful defense interposed not in good faith, is not unconstitutional as violating the contract clause of the Constitution; and so *held* as to a statute of Tennessee to that effect.

122 Tennessee, 248, affirmed.

THE facts, which involve the constitutionality under the contract clause of the Federal Constitution of a statute of Tennessee permitting the court to add certain amounts to the recovery on insurance policies where refusal to pay was not in good faith, are stated in the opinion.

Mr. F. Zimmerman for plaintiff in error:

The contract involved here was entered into in 1887. In 1901, the "added liability" act was passed. The State had no power to pass a law affecting preëxisting contracts under Art. I, § 10, of the Federal Constitution. *Bedford* v. *Eastern B. & L. Ass'n*, 181 U. S. 227.

This question has been before the court repeatedly on

attacks based on the "due process of law" and "the equal protection of the law" clauses of the Fourteenth Amendment. Such cases are no precedent here. Nor can the same reasoning be applied. Many of these cases arose out of tort and not out of contract. *Railroad Co.* v. *Ellis*, 165 U. S. 150; *Atchison &c. R. R. Co.* v. *Matthews*, 174 U. S. 96.

In all cases upheld against attack based on the Fourteenth Amendment it appeared that the statute was in existence at the time the contract was made. Hence the statute was impliedly written into the contract, and that was the paramount reason why the statute was upheld. *Mutual Life Ass'n* v. *Mettler*, 185 U. S. 308; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557; *St. Louis &c. R. R.* v. *Paul*, 173 U. S. 409; *John Hancock Ins. Co.* v. *Warren*, 181 U. S. 73; *New York Life* v. *Craven*, 187 U. S. 389; *Iowa Life* v. *Lewis*, 187 U. S. 344; *Farmers' Ins. Co.* v. *Dabney*, 189 U. S. 301.

In the case at bar, there was no statute imposing added liability to be written into the contract, but only the constitutional provision of Tennessee that the court should be open to every man without sale, denial or delay.

Nor is compelling the payment of debts a police regulation. *Atchison &c. R. R.* v. *Matthews*, 174 U. S. 96.

Hence the statute of Tennessee, if applied to the case at bar, could not be sustained under the Fourteenth Amendment.

When the statute of 1901 was passed, adding $750 to the obligation of the contract, defendant had a right to withdraw from the State and refuse to make new contracts. But it could not withdraw from contracts then in existence. As to these contracts, the imposition of added liability was an impairment of the contract. *Bedford* v. *Eastern B. & L. Ass'n*, 181 U. S. 227.

Defendant does not claim a vested right in any particular remedy or mode of procedure, but a right to an existing defense is property in the sense that it is incompetent for

the legislature to take it away. *Pritchard* v. *Norton*, 106 U. S. 124.

If the legislature can arbitrarily add twenty-five per cent. to the obligation of an existing contract it may, under the same authority, add five hundred per cent. *Barnitz* v. *Beverly*, 163 U. S. 118.

The power to tax involves the power to destroy. The power to modify at discretion the remedial part of a contract is the same thing. *Edwards* v. *Kearzey*, 96 U. S. 595.

Defendant does not deny that the legislature may change remedies. Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that result is produced, it is immaterial whether it is done by acting on the remedy, or on the contract itself. In either case, it is prohibited by the Constitution. *Bronson* v. *Kinzie*, 1 How. 311; *McCracken* v. *Haywood*, 2 How. 608; *Howard* v. *Bugbee*, 24 How. 461; *Brine* v. *Hartford F. Ins. Co.*, 96 U. S. 627; *Shapley* v. *San Angelo*, 167 U. S. 657; *Edwards* v. *Kearzey*, 96 U. S. 595; *Seibert* v. *Lewis*, 122 U. S. 284; *Re City Bank of New Orleans*, 3 How. 272.

Among the multitude of state cases supporting this principle, see *Commoner's Court* v. *Rather*, 48 Alabama, 447; *County Com. Court* v. *King*, 13 Florida, 476; *Robinson* v. *Magee*, 9 California, 85; *Wilder* v. *Lumpkin*, 4 Georgia, 220; *Temple* v. *Hays*, Morris, 12; *Long* v. *Walker*, 105 Nor. Car. 98; *State* v. *McPeak*, 31 Nebraska, 143; *Foltz* v. *Huntley*, 7 Wend. 216; *Bank of Dom.* v. *McVeigh*, 20 Gratt. 466; *Roberts* v. *Cocke*, 28 Gratt. 215; *Mundy* v. *Monroe*, 1 Michigan, 71; *Swinburne* v. *Mills*, 17 Washington, 619; *Goggans* v. *Turnipseed*, 1 S. Car. 82; *Jacoway* v. *Denton*, 25 Arkansas, 641; *Homestead Cases*, 22 Gratt. 287.

The fact that the act tends to enforce the contract is immaterial if thereby the contract is impaired. Both parties have fixed rights under a contract, and the rights

of neither party can be impaired. *McCracken* v. *Haywood*, 2 How. 608; *Bedford* v. *Eastern B. & L. Ass'n*, 181 U. S. 227; Wade on Retroactive Laws, § 115.

It is one of the highest duties of the Supreme Court to take care that the constitutional prohibition against States impairing the obligations of contracts shall neither be evaded nor frittered away. *Murray* v. *Charleston*, 96 U. S. 432; *New Orleans Waterworks Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 31; *Spencer* v. *Merchant*, 125 U. S. 352.

A law given a retroactive effect is unconstitutional if it so changes the existing remedies as materially to impair the rights and interests of a party to a contract. *Re City Bank of New Orleans*, 3 How. 292; *Auffm'ordt* v. *Rasin*, 102 U. S. 620.

The court will look beyond the wording of a statute, apparently fair upon its face, and consider the effect. The result of the present statute is that all insurance companies who defend a suit unsuccessfully are mulcted, while plaintiff is not. *Yick Wo* v. *Hopkins*, 118 U. S. 356.

An additional remedy can be given only where it does not impair any substantial right of the other party. *New Orleans &c. R. R.* v. *Louisiana*, 157 U. S. 219.

Mr. J. B. Sizer and *Mr. Robert Pritchard* for defendant in error.

Mr. Justice Hughes delivered the opinion of the court.

In 1887, the plaintiff in error issued a certificate or policy of insurance for three thousand dollars upon the life of Charles C. Snyder. His wife, the defendant in error, was the beneficiary. He died in 1908, and liability upon the policy having been denied by the company this suit was brought by Mrs. Snyder in the Chancery Court of Tennessee to compel payment. The court gave judg-

ment in her favor and finding that the refusal to pay was not in good faith added to the recovery twenty-five per cent. of the principal, or $750, which was adjudged to be "reasonable compensation and reimbursement to the complainant" for the "additional loss, expense and injury" which had been inflicted upon her as the holder of the policy by the refusal. This addition was made pursuant to an act passed by the legislature of Tennessee in 1901 (April 18, 1901, Acts of 1901, c. 141, p. 248). The Supreme Court of the State, sustaining the statute, affirmed the judgment and the insurance company has sued out this writ of error. 122 Tennessee, 248.

The sole Federal question for decision is whether the above-mentioned statute, as applied, impaired the obligation of the contract in suit and thus violated Art. I, § 10, of the Constitution of the United States.

The act in question provides:

"SECTION 1. . . . That the several insurance companies of this State, and foreign insurance companies and other corporations, firms or persons doing an insurance business in this State, in all cases when a loss occurs and they refuse to pay the same within sixty days after a demand shall have been made by the holder of said policy on which said loss occurred, shall be liable to pay the holder of said policy, in addition to the loss and interest thereon, a sum not exceeding twenty-five per cent. on the liability for said loss; Provided, that it shall be made to appear to the Court or Jury trying the case that the refusal to pay said loss was not in good faith, and that such failure to pay inflicted additional expense, loss or injury upon the holder of said policy; and, provided, further, that such additional liability within the limit prescribed shall, in the discretion of the Court or Jury trying the case, be measured by the additional expense, loss and injury thus entailed.

"SECTION 2. . . . That in the event it shall be made

to appear to the Court or Jury trying the cause that the action of said policy holder in bringing said suit was not in good faith, and recovery under said policy shall not be had, said policy holder shall be liable to such insurance companies, corporations, firms or persons in a sum not exceeding twenty-five per cent. of the amount of the loss claimed under said policy; Provided, that such liability, within the limits prescribed shall, in the discretion of the Court or Jury trying the cause, be measured by the additional expense, loss or injury inflicted upon said insurance companies, corporations, firms or persons by reason of said suit."

The contention is that the provision for added liability placed a burden upon the assertion of the rights which the contract secured and thus in effect changed the contract by allowing a recovery to which the parties had not agreed and which was not sanctioned by the law as it existed at the time the contract was made. *Bronson* v. *Kinzie*, 1 How. 311, 317; *Barnitz* v. *Beverly*, 163 U. S. 118; *Bedford* v. *Eastern Building & Loan Ass'n*, 181 U. S. 227; *Oshkosh Water Works Co.* v. *Oshkosh*, 187 U. S. 437, 439. It is pointed out that in the cases in which statutes have been sustained providing for the addition to the recovery of attorneys' fees or damages, or penalties, the question arose under the Fourteenth Amendment, and that, so far as they applied to suits upon contracts, the latter had been made after the enactments. *Atchison, T. & S. F. R. R. Co.* v. *Matthews*, 174 U. S. 96; *Fidelity Mutual Life Ass'n* v. *Mettler*, 185 U. S. 308, 322; *Iowa Life Insurance Co.* v. *Lewis*, 187 U. S. 335, 355; *Farmers' &c. Insurance Co.* v. *Dobney*, 189 U. S. 301, 304, 305; *Seaboard Air Line Railway* v. *Seegers*, 207 U. S. 73; *Yazoo & Miss. Valley R. R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217.

What, then, is the effect of the statute with respect to preëxisting contracts? It is at once apparent that it does not purport to affect the obligation of the contract in

any way. It does not attempt to change or to render nugatory any of the terms or conditions of the policy of insurance, or to relieve the insured from compliance with any stipulation it contained. It does not seek to give a right of action where none would otherwise exist or to deprive the company of any defense it might have. If the company is not liable according to its contract, it is not required to pay. Nor does the statute permit a recovery of expenses or added damages as a mere consequence of success in the suit. The question whether the State may so provide as to prior contracts is not before us, and we express no opinion upon it.

The statute is aimed not at the rights secured by the contract but at dishonest methods employed to defeat them. The additional liability is attached to bad faith alone. This is the necessary effect of the proviso. It is only when it is "made to appear to the court or jury trying the case that the refusal to pay said loss was not in good faith" that the added recovery may be had. It must also appear that such refusal inflicted "additional expense, loss or injury" upon the policy holder, and it is this further expense, loss or injury that measures the amount to be allowed, which is not to exceed twenty-five per cent. of the liability on the policy.

It cannot be said that this effort to give indemnity for the injuries which would be sustained through perverse methods and through an abuse of the privileges accorded to honest litigants imposed a burden upon the enforcement of the contract. Neither the contract, nor the existing law which entered into it, contemplated contests promoted in bad faith or justified the infliction of loss by such means. The State was entitled at all times to take proper measures to prevent the perversion of its legal machinery, and there was no denial or burdening, in any proper sense, of the existing remedies applicable to the contract by the demand that they be availed of *bona fide*.

But we are asked to look behind the language of the statute and to assume that its effect is to impose the additional liability in the absence of bad faith. That is, we are to take the statute as including what it expressly excludes—as allowing what it explicitly denies. The act does not make the mere refusal to pay sufficient evidence of bad faith so as to justify the added recovery; it requires that the bad faith be shown and that the consequent additional loss be shown. And the state court so construed the statute in the application that was made of it in the present case.

The trial court adjudged that the refusal of the company to pay the amount of the policy was not in good faith, and the amount allowed was determined to be a reasonable compensation for the resulting damage. The evidence before the court—save a small portion of it—is not in the record. The fact must be taken to be as found. The statute, judged by its provisions as they have been construed and applied, cannot be regarded as an impairment of the obligation of the contract.

Judgment affirmed.

BACON, DOING BUSINESS AS WABASH ELEVATOR, *v.* PEOPLE OF THE STATE OF ILLINOIS.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 76. Argued December 6, 1912.—Decided February 24, 1913.

The denial to the States of the power to tax articles actually moving in interstate commerce rests upon the supremacy of the Federal power to regulate that commerce, and its postulate is necessary freedom of that commerce from the burden of local taxation.

The State cannot impose a tax upon articles moving in interstate commerce on the ground that such articles belong to its own citizens.

They, as well as others, are under the protection of the commerce clause of the Constitution.

The test of exemption from state taxation is not citizenship of the owner but whether or not the articles attempted to be taxed are actually moving in interstate commerce.

Property brought from another State and withdrawn from the carrier and held by the owner with full power of disposition becomes subject to the local taxing power notwithstanding the owner may intend to ultimately forward it to a destination beyond the State.

Goods within the State may be made the subject of a non-discriminatory tax though brought from another State and held by the consignee in the original package. *Woodruff* v. *Parham*, 8 Wall. 123.

243 Illinois, 313, affirmed.

THIS is a writ of error to review a judgment of the Supreme Court of the State of Illinois, which affirmed a judgment for the amount of a tax assessed against the plaintiff in error for personal property in the year 1907. The contention that the assessment was in violation of Art. I, § 8, clause 3, of the Federal Constitution in that it was laid upon a subject of interstate commerce, was overruled by the state court. 243 Illinois, 313.

The facts were agreed to, as follows:

"That the defendant, E. R. Bacon, had on the 1st day of April, 1907, and for many years prior to said date, his residence and domicile in the Town of Lake View in the County of Cook and State of Illinois; that the defendant E. R. Bacon, on the 1st day of April, 1907, and prior thereto occupied and controlled a certain private grain elevator known as Wabash Elevator and that the said grain elevator was located at 33rd and Waterville Streets in the Town of South Town in the City of Chicago, County of Cook and State of Illinois; that the only personal property in the Town of South Town owned by the defendant on the 1st day of April, 1907, was certain grain stored in the said elevator above mentioned and certain personal property used by him in his business office located at 234 La Salle street in the City of Chicago,

Illinois, and that the said business office and the said personal property used by said defendant therein was not then a part of or in any way connected with said grain elevator; that the said defendant, E. R. Bacon, has paid the tax assessed on April 1st, 1907, on all the personal property used by him in his said business office located at 234 La Salle street in the City of Chicago, Illinois; that the said defendant, E. R. Bacon, has paid the tax assessed on April 1st, 1907, on all his personal property located in the Town of South Town, except the tax assessed on the grain, which was stored in the said Wabash Elevator on the 1st day of April, 1907; that all of said grain stored in the said Wabash Elevator on the 1st of April, 1907, was sold to the defendant, E. R. Bacon, by various persons domiciled in and residents of various States in the southern and western portions of the United States, and that the said persons who sold the said grain to the said defendant, E. R. Bacon, did, prior to the said sale, and the shipment of said grain as hereinafter mentioned, enter into certain contracts with certain railroad companies for the transportation of said grain to the cities of New York and Philadelphia and various other cities in the eastern portions of the United States, all of said cities being outside of the State of Illinois, in and by which said contracts the said persons reserved the right to the owners of the said grain to remove said grain from the cars of the said railroad companies at the City of Chicago, Illinois, for the mere temporary purposes of inspecting, weighing, cleaning, clipping, drying, sacking, grading or mixing, or changing the ownership, consignee or destination of said grain; that after the making of the said contracts by the original vendors of the said grain and the said railroad companies, the said original vendors delivered to the said railroad companies, under and in accordance with the said contracts, the said grain for transportation to said cities of New York, Philadelphia and the said

divers other cities specified in the said contracts of shipment.

"That the said E. R. Bacon was, prior to and on April 1st, 1907, represented in the cities of New York, Philadelphia, and the said divers other cities in the said eastern portions of the United States by various agents, by and through whom he disposed of grain and other commodities on the eastern markets, and that all of the said grain above mentioned was purchased by him as aforesaid for the sole and only purpose of being sold and disposed of by and through his said agents in the aforesaid eastern cities, and that the said grain or any portion thereof was not at any time intended, by said original owners nor by said E. R. Bacon, for use, sale or disposition in the State of Illinois.

"That at the time the said grain was sold to the said defendant, E. R. Bacon, by the said original vendors thereof domiciled in and residents of said southern and western portions of the United States, his sole and only intention regarding the said grain was that all of the said grain should be transported and carried from the place of its said original consignment to said railroad companies to the said points of destination named in the said contracts of shipment entered into between the said original vendors of said grain and the said railroad companies, as hereinbefore mentioned;

"That the said grain was sold to the defendant, E. R. Bacon, by the original vendors of said grain along with the existing contracts of shipment between the said original vendors and the said railroad companies, and along with the said privilege of removing said grain from the said cars of the said railroad companies, which said privilege was reserved to the owner of the said grain in the manner and for the purposes hereinbefore mentioned; that in pursuance of the privilege which the defendant, E. R. Bacon, was entitled to under said contracts of shipment,

as the owner of said grain, he removed said grain from the said railroad cars and placed the same in his said private Wabash Elevator for the sole purposes of inspecting, weighing, cleaning, clipping, drying, sacking, grading and mixing, as specified in said contracts of shipment, and not for the purposes of changing the ownership, consignee or destination of said grain; and that said grain remained in said elevator for only such time as was reasonably necessary for the purposes of inspecting, weighing, cleaning, clipping, drying, sacking, grading and mixing; and that immediately after said grain had been inspected, weighed, cleaned, clipped, dried, sacked, graded and mixed, it was turned over again to the said railroad companies for shipment to the said eastern cities in accordance with the said provisions of the said original contracts of shipment entered into between the said original vendors of said grain and the said railroad companies, and that the said grain was thereupon forwarded by said railroad companies to its said original points of destination.

"That the said grain so placed and contained in the said elevator was not, nor was any part thereof, at any time on, before or after the 1st day of April, 1907, sold or disposed of or consumed in the State of Illinois, but that said grain and each and every part thereof, was transported out of said State to the points of destination, and in the manner and form aforesaid;

"That on the 1st day of April, 1907, the Board of Assessors of Cook County, Illinois, assessed a tax against the said E. R. Bacon on the said grain contained in the said Wabash Elevator on the said 1st day of April, 1907, on a valuation of $5,000 which was established by the Board of Review and which was equalized by the State Board of Equalization and that the tax levied thereon against the defendant, E. R. Bacon, for the year 1907, amounts to $360; which is the tax to recover which this suit is brought; that the defendant owns certain personal

property in the town of Lake View, County of Cook and State of Illinois, and that said personal property is contained in his said domicile and residence, and that the said defendant has heretofore paid all the taxes assessed on the said personal property on the said 1st day of April, 1907, and that the said defendant, E. R. Bacon, owned, on the 1st day of April, 1907, no other personal property taxable by the taxing bodies of the State of Illinois other than that above mentioned."

Mr. Walter Bachrach, with whom *Mr. Moritz Rosenthal* and *Mr. Joseph W. Moses* were on the brief, for plaintiff in error:

The grain taxed was a subject of interstate commerce at the time the assessment was made and was, therefore, by virtue of Art. I, § 8, clause 3, of the Constitution of the United States, immune from taxation by the state taxing bodies.

The temporary detention of the grain while in transit without the intention of abandoning the original movement beyond the limits of the State, which movement was ultimately completed, did not deprive the transportation of the character of interstate commerce. *Coe* v. *Errol*, 62 N. H. 303, aff'd 116 U. S. 517; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Kelley* v. *Rhoads*, 188 U. S. 1; *Conn. River Lumber Co.* v. *Columbia*, 62 N. H. 286; *Prairie Oil Co.* v. *Ehrhardt*, 244 Illinois, 634; *State* v. *Engle*, 5 Vroom (N. J.), 425; *State* v. *Carrigan*, 10 Vroom (N. J.), 36; *Berwind Coal Co.* v. *Jersey City*, 75 N. J. L. 76; *Burlington Lumber Co.* v. *Willets*, 118 Illinois, 559.

The character of a shipment, whether local or interstate, is not affected by a transfer of the title during the transportation. *Gulf, Colo. &c. R. R. Co.* v. *Texas*, 204 U. S. 403; *Conn. River Lumber Co.* v. *Columbia*, 62 N. H. 286.

Cases holding that property which is detained within

the State on its interstate journey is taxable, are distinguishable from the one at bar and may be classified as follows:

Where the produce was grown in the taxing State and had never been out of that State but was intended for exportation by the owner. *Coe* v. *Errol, supra; Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82.

Where the property, though coming from another State, was being held in actual storage to be removed for use at a more profitable time.

To be held until orders for it were taken. *Susquehanna Coal Co.* v. *South Amboy*, 184 Fed. Rep. 941; *Lehigh Coal Co.* v. *Junction*, 75 N. J. L. 922.

Until the owner desired to use it in his own business. *Diamond Match Co.* v. *Ontonagon, supra; Burlington Lumber Co.* v. *Willets*, 118 Illinois, 559.

Until customers made their selection from goods being detained. *Am. Steel & Wire Co.* v. *Speed*, 192 U. S. 500.

Where there was not a through shipment and any further movement required a new specification of the goods and new forwarding orders. *General Oil Co.* v. *Crain*, 209 U. S. 211.

Where the goods were partially for sale within the taxing State and the part to be there sold was unascertained. *Am. Steel & Wire Co.* v. *Speed, supra.*

Where the goods had come to rest in the State of their ultimate destination. *Brown* v. *Houston*, 114 U. S. 622; *Pittsburg Coal Co.* v. *Bates*, 156 U. S. 577.

Mr. Louis J. Behan and *Mr. Gustavus J. Tatge*, with whom *Mr. Francis S. Wilson* was on the brief, for defendant in error.

Mr. Justice Hughes, after making the above statement, delivered the opinion of the court.

Did the enforcement of the local tax upon the grain in the elevator of the plaintiff in error amount to an unconstitutional interference with interstate commerce?

The Supreme Court of Illinois was of the view that if the grain was in transit in interstate commerce it was exempt from local taxation. In its opinion, that court said: "The sole question presented by this record is, was the grain upon which the tax was levied in transit on April 1, 1907? If it was so in transit it was not liable to be taxed while passing through the State to its destination. On the other hand, if it was not in transit but had a situs in this State it was subject to taxation under state authority." In this view of the issue, the court sustained the recovery of the amount of the tax.

It is now contended, however, by the defendant in error that the question thus defined was an immaterial one; that even if the property was in transit and was the subject of interstate commerce, it was nevertheless liable to assessment, in common with the other personal property of the plaintiff in error, because he was a resident of the State and the property was within the limits of the county where the assessment was made.

This argument proceeds upon a misconception of the ground upon which the power to tax articles actually moving in interstate transportation is denied to the States. That denial rests upon the supremacy of the Federal power to regulate interstate commerce. Its postulate is the necessary freedom of that commerce from the burden of such local exactions as are inconsistent with the control and protection of that power. The fact that such a burden is sought to be imposed by the State of the domicile of the owner, upon property moving in interstate commerce, creates no exception. That State enjoys no prerogative to make levy upon such property passing through it, because it may belong to its citizens. They, as well as others, are under the shelter of the commerce

clause. The question is determined not by the residence of the owner but by the nature and effect of the particular state action with respect to a subject which has come under the sway of a paramount authority.

This is clearly shown by the reasoning of the decisions which define the limits of the state taxing power with respect to property about to leave the State of its origin or while it is on its way to its destination in another State. In *Coe* v. *Errol*, 116 U. S. 517, the question was whether the products of a State, in that case timber cut in the forests of New Hampshire, though intended for exportation to another State and partially prepared for that purpose by being deposited at a place or port of shipment, was liable to be taxed like other property within the State. The claim of immunity by reason of the fact that it was owned by non-residents was at once disposed of. "If not exempt from taxation for other reasons," said the court (*id.*, p. 524), "it cannot be exempt by reason of being owned by non-residents of the State. We take it to be a point settled beyond all contradiction or question, that a State has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction." The case was put upon the same basis as though the timber had been owned by residents of New Hampshire, and the question was treated as being one with respect to the point of time at which goods produced within the State, which are the subject of exportation to another State, cease to be liable to state taxation. It was concluded that these articles could be taxed by the State until, but not after, they had been actually started in the course of transportation to another State or had been committed to a carrier for that purpose.

The court said: "This question does not present the predicament of goods in course of transportation through a State, though detained for a time within the State by low water or other causes of delay, as was the case of the

logs cut in the State of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation, and are clearly under the protection of the Constitution. And so, we think, would the goods in question be when actually started in the course or transportation to another State, or delivered to a carrier for such transportation." (*Id.*, p. 525.)

After pointing out the importance of clearly defining, so as to avoid all question, the time when state jurisdiction over the commodities of commerce begins and ends, and after commenting on the established rule as to the power of taxation with respect to goods which had come to their place of rest within the State, for disposal and use (*Woodruff* v. *Parham*, 8 Wall. 123; *Brown* v. *Houston*, 114 U. S. 622), the court thus restated its conclusion, in language applicable generally to the products of the State without distinction with respect to ownership by residents or non-residents: "But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State. What we have already said, however, in relation to the products of a State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule in many States there would be nothing but the lands and real

estate to bear the taxes. Some of the Western States produce very little except wheat and corn, most of which is intended for export; and so of cotton in the Southern States. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the State. And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State." (*Id.*, pp. 527, 528.)

In *General Oil Company* v. *Crain*, 209 U. S. 211, the owner of the property, which was sought to be subjected to an inspection tax in Tennessee, was a Tennessee corporation. The property was oil contained in the company's tanks at Memphis. It was contended that the oil in these tanks was in transit from the place of manufacture in Pennsylvania to the place of sale in Arkansas and that the holding of it in Memphis was merely for the purpose of separation, distribution and reshipment, and was for no longer time than required by the nature of the business and the exigencies of transportation. The court considered the question from the standpoint of the general power of the State to tax. The oil was held to be taxable, but not upon the ground that its owner was domiciled in Tennessee. It was recognized that if the oil were actually in transit it would not be taxable. But it was found not to be in movement through the State; it had reached the destination of its first shipment and was held at Memphis for the business purposes and profits of the company. The principle applied was that announced in *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500. See *Kelley* v. *Rhoads*, 188 U. S. 1, 5, 7; *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82, 93–96.

We come then to the question whether the grain, here involved, was moving in interstate commerce so that the imposition of the local tax may be said to be repugnant to the Federal power.

The following facts are shown by the agreed statement: The grain had been shipped by the original owners who were residents of southern and western States, under contracts for its transportation to New York, Philadelphia and other eastern cities which reserved to the owners the right to remove it from the cars at Chicago "for the mere temporary purposes of inspecting, weighing, cleaning, clipping, drying, sacking, grading or mixing, or changing the ownership, consignee or destination" thereof. While the grain was in transit it was purchased by Bacon, the plaintiff in error, who succeeded to the rights of the vendors under the contracts of shipment. He was represented at the points of destination by agents through whom he disposed of grain and other commodities on the eastern markets, and the grain in question was purchased by him solely for the purpose of being sold in this way and with the intention to forward it according to the shipping contracts; it was not his intention to dispose of it in Illinois. Upon the arrival of the grain in Chicago, Bacon availed himself of the privilege reserved and removed it from the cars to his private elevator. This removal, it is said in the agreed statement of facts, was for the sole purposes of inspecting, weighing, grading, mixing, etc., and not for the purpose of changing its ownership, consignee or destination. It is added that the grain remained in the elevator only for such time as was reasonably necessary for the purposes above mentioned, and that immediately after these had been accomplished it was turned over to the railroad companies and was forwarded by them to the eastern cities in accordance with the original contracts of transportation. No part of the grain was sold or consumed in Illinois. It was while it was in Bacon's elevator in Chicago that it was included in the assessment as a part of his personal property.

But neither the fact that the grain had come from outside the State nor the intention of the owner to send it to

another State and there to dispose of it can be deemed controlling when the taxing power of the State of Illinois is concerned. The property was held by the plaintiff in error in Chicago for his own purposes and with full power of disposition. It was not being actually transported and it was not held by carriers for transportation. The plaintiff in error had withdrawn it from the carriers. The purpose of the withdrawal did not alter the fact that it had ceased to be transported and had been placed in his hands. He had the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not as he chose. He might sell the grain in Illinois or forward it as he saw fit. It was in his possession with the control of absolute ownership. He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation. He had established a local facility in Chicago for his own benefit and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the State in an assessment for taxation which was made in the usual way without discrimination. *Woodruff* v. *Parham, supra; Brown* v. *Houston, supra; Coe* v. *Errol, supra; Pittsburgh & Southern Coal Co.* v. *Bates*, 156 U. S. 577; *Diamond Match Co.* v. *Ontonagon, supra; American Steel & Wire Co.* v. *Speed, supra; General Oil Co.* v. *Crain, supra.*

The question, it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority. *American Steel & Wire Co.* v. *Speed, supra*, pp. 521, 522. Thus, goods within the State may be made the subject of a

non-discriminatory tax though brought from another State and held by the consignee for sale in the original packages. *Woodruff* v. *Parham, supra.* In *Brown* v. *Houston, supra,* the coal on which the local tax was sustained had not been unloaded, but was lying in the boats in which it had been brought into the State and from which it was offered for sale. In *Pittsburgh & Southern Coal Co.* v. *Bates, supra,* coal had been shipped from Pittsburgh to Baton Rouge in barges which, to accommodate the owner's business, had been moored about nine miles above the point of destination. The coal while remaining on the barges under these conditions was held subject to taxation. In *General Oil Co.* v. *Crain, supra,* the oil which had been brought from Pennsylvania to Memphis, a distributing point, was held in tanks, one of which was kept for oil for which orders had been received from Arkansas, Louisiana and Mississippi prior to the shipment from Pennsylvania, and which had been shipped especially to fill such orders. The tank was marked "Oil Already Sold in Arkansas, Louisiana and Mississippi." The local tax upon this oil, which remained in Tennessee only long enough (a few days) to be properly distributed according to the orders, was sustained.

In the present case the property was held within the State for purposes deemed by the owner to be beneficial; it was not in actual transportation; and there was nothing inconsistent with the Federal authority in compelling the plaintiff in error to bear with respect to it, in common with other property in the State, his share of the expenses of the local government.

Judgment affirmed.

SMOOT *v.* HEYL.

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

No. 85. Argued December 13, 16, 1912.—Decided February 24, 1913.

Under § 233 of the Code of the District of Columbia this court has jurisdiction of an appeal from a judgment of the Court of Appeals of the District of Columbia where the validity of a regulation promulgated by the Commissioners under an act of Congress is drawn in question, irrespective of the conclusion reached by the court below.

The fundamental idea of a party wall is that of mutual benefit.

In the absence of plain error this court will accept the decision of the Court of Appeals of the District of Columbia determining whether a particular structure comes within the definition of a party wall under the building regulations promulgated by the Commissioners.

In this case this court affirms the judgment of the Court of Appeals that the wall of a bay-window which can serve no mutual purpose is not a party wall within the meaning of the building regulations in force in the District of Columbia.

34 App. D. C. 480, affirmed.

THE facts, which involve the jurisdiction of this court to review judgments of the Court of Appeals of the District of Columbia under § 250 of the Judicial Code of 1911 and also the construction of the act of 1878 authorizing the Commissioners of the District of Columbia to make building regulations and the determination of what is a party wall under such regulations, are stated in the opinion.

Mr. William G. Johnson for appellant:

The building regulations extend to all lands within the District of Columbia. Act of June 14, 1878, 20 Stat., p. 131.

The regulation is constitutional and valid.

For cases sustaining the constitutionality of party wall and line fence statutes and regulations in various States of the Union, see *Moore* v. *Levert*, 24 Alabama, 310; *Mead* v. *Watson*, 57 California, 591; *Maudlin* v. *Hanscombe*, 12 Colorado, 204; *Wright* v. *Wright*, 21 Connecticut, 329; *Hall* v. *Andrews*, 75 Illinois, 252; *Tomlinson* v. *Bainaka*, 163 Indiana, 112; *Hewett* v. *Jewell*, 59 Iowa, 37; *Snyder* v. *Bell*, 32 Kansas, 230; *Grief* v. *Kahn*, 87 Kentucky, 17; *James* v. *Tibbetts*, 60 Maine, 557; *Kennedy* v. *Owen*, 131 Massachusetts, 587; *Carpenter* v. *Vail*, 36 Michigan, 226; *McClay* v. *Clark*, 42 Minnesota, 363; *Moore* v. *White*, 45 Missouri, 206; *Hoar* v. *Hennesy*, 29 Montana, 253; *Burr* v. *Hamer*, 12 Nebraska, 483; *Perkins* v. *Boody*, 62 N. H. 454; *Castner* v. *Riegel*, 54 N. J. L. 498; *Adams* v. *Van Alstyne*, 25 N. Y. 232; *Kingman* v. *Williams*, 50 Oh. St. 722; *Palmer* v. *Silverton*, 32 Pa. St. 65; *Howland* v. *Howland*, 14 R. I. 560; *Lightfoot* v. *Grove*, 5 Heisk. 473; *Cummings* v. *Brook*, 56 Vermont, 308; *Brooks* v. *Allen*, 1 Wisconsin, 114; *Hendricks* v. *Stark*, 37 N. Y. 106; *Swift* v. *Calnan*, 102 Iowa, 206; *Hunt* v. *Ambruster*, 17 N. J. Eq. 208; *Heron* v. *Houston*, 217 Pa. St. 1; *Larche* v. *Jackson*, 9 Martin, 724; *Carrigan* v. *De Neufbourg*, 3 La. Ann. 440. See also *Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 9; *Wurtz* v. *Hoagland*, 114 U. S. 606; *C., B. & Q. Ry.* v. *Drainage Commissioners*, 200 U. S. 561.

The wall in question complies with the requirements of the regulation as to party walls.

Even if the wall in question does present minor and remediable departures from the requirements of the regulations, the decree should not be modified. Sections 226, 233, Code, D. C.; *Corcoran* v. *Nailor*, 6 Mackey, 580.

Mr. H. Prescott Gatley, with whom *Mr. Samuel Maddox* and *Mr. Barry Mohun* were on the brief, for appellees:

The back of the bay-window built by appellant, partly on appellees' land, which forms no part of the main wall

of appellant's house and which can never be of any possible benefit or advantage to appellees, is in no sense a party wall. *Sharp* v. *Cheatham*, 5 W. Va. 673; *Corcoran* v. *Nailor*, 6 Mackey, 580.

There is no provision of law to authorize the building of party walls outside of the limits of Washington City as a right appurtenant to the ownership of land. *Fowler* v. *Saks*, 18 App. D. C. 570.

In some of the States provision for party walls is made by statute and such statutes are held not to be obnoxious to the contention that they deprive the owner of the servient land of his property without due process of law. *Swift* v. *Calnan*, 102 Iowa, 206; *Evans* v. *Jayne*, 23 Pa. St. 34; *Brooks* v. *Curtis*, 50 N. Y. 639.

But the decisions are not uniform and the right has been vigorously assailed on constitutional grounds.

The police power of the legislature does not justify it in authorizing one man to appropriate and use the property of another without his consent and without adequate compensation. *Wilkins* v. *Jewett*, 139 Massachusetts, 29. See also *Traute* v. *White*, 46 N. J. Eq. 437.

In the absence of legislative authority municipalities are without power to require or authorize the erection of party walls. *Schmidt* v. *Lewis*, 63 N. J. Eq. 566. See also *Pennsylvania* v. *Wheeling &c. Bridge Co.*, 13 How. 518. *Swift* v. *Calnan*, 102 Iowa, 211; *Hunt* v. *Ambruster*, 17 N. J. Eq. 211; *Carrigan* v. *De Neufbourg*, 3 La. Ann. 441; *Heron* v. *Houston*, 217 Pa. St. 1; *Rodearmel* v. *Hutchinson*, 2 Pearson, 324, distinguished.

Mr. Justice Hughes delivered the opinion of the court.

The appellant is the owner of a lot of land on the north side of Wyoming Avenue, between Twentieth and Twenty-first Streets, northwest, in the District of Columbia. The appellees own the adjoining lot on the west. The appel-

lant constructed on his lot a brick dwelling, the front of which was placed forty feet from the avenue. He located the main west wall of the dwelling about three feet inside of the line of his lot. This wall was about forty feet long and three stories high. About five feet back of the front end of this wall the appellant projected a semi-hexagonal bay-window, the west wall of which—about eight feet long and extending through the height of the first story—was placed upon the line of the lot so that approximately one-half the thickness of the wall was put upon the appellees' land. The appellant called this west wall of the bay-window a party wall and claimed the right to construct it in part upon his neighbor's land by virtue of the building regulations of the District of Columbia. The appellees protested against this use of their property and brought this suit in the Supreme Court of the District of Columbia to enjoin the maintenance of the wall on their land. The court entered a decree in their favor requiring its removal. The decree was affirmed by the Court of Appeals and this appeal is brought. 34 App. D. C. 480.

The act of June 14, 1878, c. 194, 20 Stat. 131, authorized the Commissioners of the District of Columbia to make "such building regulations for the said District as they may deem advisable" and provided that these should have the same force within the District as if enacted by Congress. Among the regulations promulgated by the Commissioners was the one approved by President Washington on October 17, 1791, relating to the location of party walls, which was recognized as in force and was "published for the information of builders." (Building Regulations, § 62, set forth in the margin.[1]) The land in question

[1] SEC. 62. The fourth section of the Building Regulations, No. 1, approved by President Washington, October 17, 1791, quoted below, is recognized as in force, and is published for the information of builders. The Inspector of Buildings has no official duty as to the enforcement of this regulation, as the matter is one of private rights between parties:

lies outside the original limits of the city of Washington, but the appellant contends that, by the above-mentioned act of Congress and the action of the Commissioners, this regulation was made applicable throughout the District. The appellees in their bill alleged that the wall built across their line was not a party wall, that the regulation permitting the use of adjoining land for party walls did not extend beyond the bounds of the Federal City as originally laid out, and that if it was intended to apply in the District beyond these limits it was "unconstitutional and void because its effect is to deprive your complainants of their property without due process of law and just compensation."

1. This court has jurisdiction. District Code, § 233, Act of March 3, 1901, c. 854, 31 Stat. 1189, 1227; *Steinmetz* v. *Allen*, 192 U. S. 543, 556; *McLean* v. *Denver & Rio Grande R. R. Co.*, 203 U. S. 38, 47, 48. As the appellees challenged the validity of the regulation if it applied to their property as was insisted by the appellant, the case was one in which there was drawn in question the validity of an authority exercised under the United States. The question was a substantial one, and was directly presented, its determination being required unless the appellees succeeded upon one of the other issues. To justify a review of the decision under the act governing this appeal

"That the person or persons appointed by the Commissioners to superintend buildings may enter upon the land of any person to set out the foundation and regulate the walls to be built between party and party, as to the breadth and thickness thereof, which foundation shall be laid equally upon the lands of the persons between whom such party walls are to be built, and shall be of the breadth and thickness determined by such person proper, and the first builder shall be reimbursed one moiety of the charge of such party wall or so much thereof as the next builder shall have occasion to make use of before such next builder shall anyways use or break into the wall, the charge of value thereof to be set by the person or persons so appointed by the Commissioners."

it is sufficient if the validity of the authority is drawn in question irrespective of the conclusion reached by the court below. *Baltimore & Potomac R. R. Co.* v. *Hopkins*, 130 U. S. 210, 222. The appeal brings the entire case here. See *Horner* v. *United States*, No. 2, 143 U. S. 570, 577; *Penn Mutual Life Ins. Co.* v. *Austin*, 168 U. S. 685, 695. In this view, it is unnecessary to pass upon the conflicting contentions with respect to the amount involved.

2. Upon the merits, we need not go beyond the point on which the Court of Appeals rested its decision. The court held that the wall placed on the appellees' land was not a party wall. In the building regulations a party wall is defined as "a wall built upon the dividing line between adjoining premises for their common use." The fundamental idea is that of mutual benefit. It is manifest that not every sort of construction projecting over the boundary, although it may form part of the exterior wall of a building, can be called a party wall. Instead of being for the common use, it may be merely an injurious protuberance. And whether or not a particular structure comes within the District rules is a question the decision of which by the Court of Appeals should be accepted unless there is plain error. Here we have the wall of a bay-window eight feet long projecting from the main wall of the house. Save for this short projection the main wall is set back three feet within the building line. The ends of the bay-window wall are splayed as is usual in such cases and, while it appeared that they could be chiseled out in order to make right angles, the testimony was that if the adjoining owners desired to build in connection with the wall it would cost as much as to erect a new wall of the same dimensions. Taking the entire construction into consideration, it would seem to be merely the case of an encroachment on the adjoining property rather than that of a wall built on the dividing line for mutual advantage. After reviewing the facts the Court of Appeals

summed up the matter by saying (pp. 482, 483): "It could serve no such purpose to appellees as is contemplated by the regulations of the District authorizing the construction of party walls. . . . Appellees can derive no such benefit from it as the servient owner is entitled to receive as compensation for the taking and occupation of his land. It constitutes a nuisance rather than a benefit."

We find no reason for disturbing the decree.

Affirmed.

SVOR *v.* MORRIS.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 756. Submitted January 6, 1913.—Decided February 24, 1913.

One who settled on land not at the time open to entry but which became open does not have to go through the idle ceremony of vacating and settling upon it anew.

Where the first selection of lieu lands is rejected as irregular, the land is open during the interval before a new and regular selection is filed, and the homestead right of one who had previously settled thereon in good faith attaches and is superior to that under the new selection.

As between conflicting claims to public lands, the one whose initiation is first in time, if adequately followed up, is to be deemed first in right.

Under the act of May 14, 1880, 21 Stat. 141 and § 2265, Rev. Stat., the rights of a settler who fails to assert his claim within three months of settlement are not inexorably extinguished but only awarded to the next settler in order of time who does assert his claim and complies with the law, and advantage of this statute cannot be taken by a railroad company selecting land which is withdrawn from selection by having already been settled on. *Hastings & Dakota Ry. Co.* v. *Arnold*, 26 L. D. 538, approved.

Title acquired by a railway company or its assignee of lieu lands, im-

properly selected because not open by reason of settlement thereon, is held in trust for the settler by such assignee or his grantee who took with notice.

118 Minnesota, 344, reversed.

THE facts, which involve questions of priority of right between a homestead settler and a railway company selecting lieu lands under a grant, are stated in the opinion.

Mr. C. A. Fosnes for plaintiff in error.

Mr. Owen Morris for defendant in error.

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

This case presents a controversy over one of the quarters of an odd-numbered section within the indemnity limits of the railroad land grant of July 4, 1866, to the State of Minnesota, which the State transferred to the Hastings and Dakota Railway Company. 14 Stat. 87, c. 168. The trial court gave judgment for the plaintiff, which was affirmed by the Supreme Court of the State, 118 Minnesota, 344, and the defendant prosecutes this writ of error.

The facts material to the controversy are these: In 1883, after the completion of the road, the railway company filed in the local land office an indemnity selection of the tract in controversy, but neglected to comply with an existing regulation requiring that the selection be accompanied by a designation of the loss in the place limits in lieu of which the selection was made. Report Com'r G. L. O. 1879, p. 128, rule V. The selection was rejected by the local officers, but remained pending on successive appeals to the Commissioner of the General Land Office and the Secretary of the Interior until October 23, 1891, when it was finally rejected by the latter

because of that irregularity. Six days later Russell Sage, trustee, to whom the rights of the railway company under the land grant had then been assigned, filed another indemnity selection of the same tract, accompanied by a proper designation of the loss in lieu of which the selection was made, and in that connection claimed and alleged that the tract was then vacant and unappropriated. March 29, 1897, this selection was approved by the Secretary of the Interior, and the tract was certified under the grant, the certification being treated as the equivalent of a patent. 14 Stat. 97, c. 183. The plaintiff subsequently acquired the right and title of Sage, trustee, to the tract, but did so with full notice and knowledge of the occupancy and claim of the defendant.

In 1885 the defendant applied at the local land office to make a homestead entry of the tract and the application was denied, the circumstances being such that it could not be allowed. In 1888, while the selection of 1883 was pending, he settled upon the tract with the purpose of acquiring the title by compliance with the homestead law, and continuously thereafter resided upon the tract, occupied, improved and cultivated it, all the time asserting a claim under that law. The improvements which he made exceeded $2,000 in value and the area which he reduced to cultivation exceeded 100 acres. Being continuous, his occupancy and claim covered the interim between the final rejection of the first indemnity selection and the filing of the second one, but he did not again apply at the local office to make a homestead entry until 1904, which was after the tract had passed beyond the jurisdiction of the Land Department by the certification under the land grant. At the time of his settlement, and continuously thereafter, he possessed all the qualifications requisite to acquire the title as a homestead claimant.

The plaintiff's title receives no support from the indemnity selection of 1883, for, as has been seen, it did not

conform to the existing regulations in an essential particular and was finally rejected, October 23, 1891, for that reason. And to avoid an extended statement and discussion respecting an indemnity withdrawal made in 1868 and still another claim to the tract, both of which were terminated on or shortly before October 23, 1891 (see H. R. Ex. Doc. 246, 50th Cong., 1st Sess.; 26 Stat. 496, c. 1040, § 4; *St. Paul & Sioux City R. R. Co.*, 12 L. D. 541; *Creswell Mining Co.* v. *Johnson*, 13 L. D. 440), it will be assumed, without so deciding, that the defendant's claim receives no support from what he did anterior to that date.

Following the final rejection of the first selection there was an interval of six days in which the land was not only free from any claim under the land grant but open to settlement under the homestead law. So, apart from the defendant's earlier efforts, there can be no doubt that by his residence and occupancy during that interval he initiated and acquired a homestead right. He was not disqualified by reason of what he had done before, and, of course, it was not necessary that he should go through the idle ceremony of vacating the land and then settling upon it anew. This is the view uniformly applied in the Land Department. *Central Pacific Railroad Co.* v. *Doll*, 8 L. D. 355; *La Bar* v. *Northern Pacific Railroad Co.*, 17 L. D. 406; *Vandeburg* v. *Hastings & Dakota Railway Co.*, 26 L. D. 390. See also *Moss* v. *Dowman*, 176 U. S. 413. The second selection came after this homestead right had attached and therefore was subordinate to it. In its facts the case is like *Sjoli* v. *Dreschel*, 199 U. S. 564, and *Osborn* v. *Froyseth*, 216 U. S. 571, and unlike *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, and *Northern Pacific Railway Co.* v. *Wass*, 219 U. S. 426, and yet is within the principle recognized and enforced in each, viz., that as between conflicting claims to public lands the one whose initiation is first in time, if adequately followed up, is to be deemed first in right. The *Sjoli* and *Osborn* cases involved con-

flicts between claims initiated by homestead settlement and claims resting upon railroad indemnity selections subsequently filed, and because the former were first in time they were held to be superior in right. The *Weyerhaeuser* and *Wass* cases presented conflicts between railroad indemnity selections and claims initiated, one by an application to purchase under the Timber and Stone Act and the other by a homestead settlement, while the selections were pending, and it was held that the selections gave the better right because they were first in time.

That in point of residence, improvements and cultivation the defendant fully complied with the homestead law is not questioned, but it is contended that he lost his claim by not asserting it in due time at the local land office. It is true that the act of May 14, 1880, 21 Stat. 141, c. 89, § 3, in connection with Rev. Stat., § 2265, fixed three months from the date of settlement as the time within which the claim should be asserted at the local land office, and that the defendant did not conform to this requirement; but that is not a matter of which advantage can be taken by one who stands in the shoes of the railway company, as does the plaintiff. The statute does not contemplate that such a default shall inexorably extinguish the settler's claim, but only that the land shall be "awarded to the next *settler* in the order of time" who does so assert his claim and otherwise complies with the law. As was said by this court in *Johnson* v. *Towsley*, 13 Wall. 72, 90: "We think that Congress intended to provide for the protection of the first settler by giving him three months to make his declaration, and for all other settlers by saying if this is not done within three months any one else who has settled on it within that time, or at any time before the first settler makes his declaration, shall have the better right." The question has been repeatedly considered by the Secretary of the Interior in connection with railroad indemnity selections of lands covered by existing homestead settle-

ments which had not been asserted at the local office within the time prescribed, and his ruling has been that "A failure to file an application to enter lands within three months after settlement forfeits the claim to the next settler in order of time, but such default is not one that can be taken advantage of by a railway company." *Missouri, Kansas & Texas Railway Co.* v. *Troxel*, 17 L. D. 122, 124; *Hastings & Dakota Railway Co.* v. *Arnold*, 26 L. D. 538, 540. We regard that ruling as resting upon a proper conception of the statute.

Had the real facts been disclosed to the Land Department, viz., that the defendant was residing upon and occupying the land in virtue of a lawful homestead settlement antedating the second indemnity selection, it would have been the duty of the Secretary of the Interior to disapprove the selection, and no doubt he would have done so. But the real facts were not disclosed. On the contrary, it was claimed and alleged by the agent who acted for Sage, trustee, in making the selection, that the land was then vacant and unappropriated, and on that representation the Secretary's approval was given. Thus, the title was wrongfully obtained by one who was not entitled to it, and another who had earned the right to receive it was prevented from obtaining it when subsequently he came to assert his right before the Land Department. Whatever may have been the cause of the defendant's delay in so asserting his right, there is no suggestion that he either knew of or acquiesced in the representation that the land was vacant and unappropriated, or that he was in any wise apprised of the filing, pendency or approval of the second selection until after the land had passed out of the jurisdiction of the Land Department by the certification under the land grant. In short, the proceeding was essentially *ex parte*, and he was neither heard nor given an opportunity to be heard.

In these circumstances we think it is a necessary con-

clusion that the title acquired by Sage, trustee, was held by him in trust for the defendant, and that it is now held upon a like trust by the plaintiff, who took with full notice and knowledge of the defendant's occupancy and claim. *Rector* v. *Gibbon*, 111 U. S. 276, 291; *Widdicombe* v. *Childers*, 124 U. S. 400, 405; *Duluth & Iron Range Railroad Co.* v. *Roy*, 173 U. S. 587.

As the state courts proceeded upon the theory that the second selection gave the better right notwithstanding the defendant's claim was first in time, the judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

ROSS *v.* STEWART.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 140. Submitted January 23, 1913.—Decided February 24, 1913.

Congress has power to invest a townsite commission with power to determine contests between rival claimants to lots in a townsite in Indian lands acquired and thrown open to settlement.

The acts providing for designation, surveying and platting townsites in the Cherokee lands and disposing thereof plainly show the intent of Congress to commit the appraisal and disposal of the lots to the commission created by the acts, subject to supervision by the Secretary of the Interior.

The provisions of the acts do not contemplate the determination of conflicting possessory claims without inquiry into the merits.

All reasonable presumptions must be indulged in support of the action of administrative officers to whom the law entrusts proceedings determining priority of claims; and in the absence of material error of law, or of misrepresentation or fraud practiced on or by them, their action should stand approved by the court.

The presumption is that a contest has been commenced in time, otherwise it would not have been entertained.

Where the party to a contest and his attorney have been notified that no answer had been filed on his behalf, and they take no steps to correct this omission, and the case is decided adversely to him, the failure to file the answer furnishes no ground for avoiding the decision.

One failing to answer raises no issue entitling him to a hearing, and he cannot afterwards be heard to complain that he was denied a hearing.

A hearing and decision on a contest where the contestant files no answer after notice is not an *ex parte* proceeding, but an adversary proceeding.

Misrepresentation and fraud that will entitle a contestant to open a decision in a land contest must be such as prevented him from presenting his side of the controversy or the officer deciding it from considering it. It is not enough to charge falsity in pleadings or perjury of witnesses. *Estes* v. *Timmins*, 199 U. S. 391.

25 Oklahoma, 611, affirmed.

THE facts, which involve the title to land in a townsite of the Cherokee country and the power of the Townsite Commission to settle contests, are stated in the opinion.

Mr. W. H. Kornegay for plaintiff in error.

Mr. Joseph C. Stone, Mr. Charles G. Watts and *Mr. Jess W. Watts* for defendant in error.

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

A lot in the townsite of Sallisaw, in the Cherokee Nation, is here in dispute. The conflicting claims are both founded upon the legislation of Congress providing for the designation, survey and platting of townsites in the Cherokee lands, and the appraisal and disposal of the lots. Acts, June 28, 1898, 30 Stat. 495, 500, c. 517, § 15; May 31, 1900, 31 Stat. 221, 237–238, c. 598; July 1, 1902, 32 Stat. 716, 722, c. 1375, §§ 38–58, 65. After the townsite was

designated, surveyed and platted the parties here severally sought to purchase lot 7 in block 39, each asserting a preference right by reason, as was alleged, of having a possessory claim and owning the improvements. Ross' application was first in the order of presentation, and the Townsite Commission, which was then charged with the work of appraisal and disposal, scheduled the lot to him. Stewart's application was refused, subject to her right to contest Ross' claim before the commission, the date of the refusal not being shown in this record. She instituted such a contest, due notice being given to Ross, and the lot was ultimately awarded to her by the Indian Inspector for the Indian Territory, who in the meantime [1] had been charged with the duty of completing the work of the Townsite Commission under the direction and subject to the approval of the Secretary of the Interior. Following this award a patent, bearing the Secretary's approval, was issued to Stewart by the principal chief of the Cherokee Nation conformably to §§ 58 and 59 of the act of 1902. Ross subsequently commenced this suit in a state court in Oklahoma (the newly admitted State including the town of Sallisaw) to have Stewart declared a trustee for him and to enforce a conveyance. To an amended petition, setting forth the facts just stated and containing other allegations presently to be mentioned, the defendant interposed a demurrer, which the court sustained. A judgment for the defendant was entered and was affirmed by the Supreme Court of the State, 25 Oklahoma, 611, whereupon the plaintiff sued out this writ of error.

We are asked to say, as was the state court, that the Townsite Commission was without jurisdiction to entertain or pass upon the contest resulting from the conflicting applications to purchase, and that such a controversy

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[1] See H. R. Doc. No. 5, 59th Cong., 1st Sess., p. 721; Sen. Doc. No. 396, part 4, 59th Cong., 2nd Sess., p. 337.

could be determined only in the courts. But, like the state court, we are unable so to say. No time need be spent in upholding the power of Congress to invest the Townsite Commission with such authority, for our prior decisions leave no doubt upon that subject. It is merely a question of what Congress intended by the legislation adopted. In this connection it is well to remember that no individual, even if an occupant and owning the improvements, had more than a possessory claim to the land to which the legislation was to be applied, and that all possessory claims were held subject to the superior ownership in fee, which was in the Cherokee tribe. Recognizing that this was so, and regarding the possessory claimants as entitled to favorable consideration, Congress made provision for according to them a preference right to purchase the lots covered by their improvements, and for selling such lots at public auction if the preference right was not exercised within a limited period, the sale in either event to be for the benefit of the tribe as owner of the fee. In the act of 1900 the duties and authority of the Townsite Commission were stated as follows: "As soon as the plat of any townsite is approved, the proper commission shall . . . proceed to make the appraisement of the lots and improvements, if any, thereon, and after the approval thereof by the Secretary of the Interior, shall, under the supervision of such Secretary, proceed to the disposition and sale of the lots in conformity with any then existing act of Congress or agreement with the tribe approved by Congress, . . ." This provision and the other townsite portions of the acts of 1898 and 1900 became by express reference a part of the act of 1902, with qualifications not here material, and that act also declared: "All things necessary to carry into effect the provisions of this Act, not otherwise herein specifically provided for, shall be done under the authority and direction of the Secretary of the Interior." Shortly

following this legislation the Secretary promulgated regulations for the guidance of the commission in the discharge of its duties, and gave express directions therein for the hearing and determination by the commission of contests between claimants asserting conflicting rights to purchase the same lot. These regulations remained in force until after the act of March 3, 1905, 33 Stat. 1048, 1059, c. 1479, when, upon the abolition of the commission, they were altered and superseded to the extent that the Indian Inspector for the Indian Territory was charged with the duty of completing the work of the commission under the direction and subject to the approval of the Secretary of the Interior. It is not suggested that the authority to hear and determine contests was diminished or enlarged by this change, and therefore it will suffice to speak only of the authority of the commission.

The acts of 1898, 1900 and 1902 show very plainly that it was the purpose of Congress to commit to the commission the appraisal and disposal of all lots, whether occupied or vacant, improved or unimproved, save as its work was to be done under the supervision of the Secretary of the Interior. More than this, there was an express command that the commission should proceed "in conformity with any then existing act of Congress or agreement with the tribe approved by Congress." This meant that the commission should respect and give effect to the congressional legislation regulatory of the disposal and sale of the lots. The provisions according preference rights to possessory claimants and directing sales at auction if those rights were not exercised within the prescribed period were a part of that legislation, and conformity to them necessarily involved an ascertainment of what lots were held under possessory claims and of who in each instance was the rightful claimant. True, there was no direct provision for such an ascertainment, but by necessary implication the duty of making it was cast upon the

commission to whom the command for conformity was addressed. Plainly, it was not contemplated that every claim of a preference right should be granted without inquiry into its merits, or that as between conflicting claims seasonably presented one should be granted and the other rejected without ascertaining which was the rightful one. The suggestion that such controversies were cognizable only in the courts finds no support in any statutory provision, is opposed to the plain implication of this legislation, and ignores the settled practice of Congress to commit such questions to the determination of administrative officers. As has been seen, the Secretary of the Interior, when issuing regulations for the guidance of the commission, took the view that it was to hear and determine such contests, subject to his supervisory authority, and in our opinion that was the correct view.

We come then to the further contention that, even conceding the jurisdiction of the administrative officers to entertain and pass upon the contest, the petition discloses a case which entitles the plaintiff to call in question their decision and to insist that the defendant, who obtained a patent under that decision, be declared a trustee for him and required to transfer the title to him. The test to which the petition must be subjected is this: All reasonable presumptions must be indulged in support of the action of the officers to whom the law entrusted the proceedings resulting in the patent, and unless it clearly appears that they committed some material error of law, or that misrepresentation and fraud were practiced upon them, or that they themselves were chargeable with fraudulent practices, and that as a result the patent was issued to the defendant when it should have been issued to the plaintiff, their action must stand. *Shepley* v. *Cowan*, 91 U. S. 330, 340; *Marquez* v. *Frisbie*, 101 U. S. 473; *Quinby* v. *Conlan*, 104 U. S. 420, 426; *Baldwin* v. *Starks*, 107 U. S. 463; *Lee* v. *Johnson*, 116 U. S. 48; *Sanford* v. *Sanford*, 139 U. S. 642.

The petition cannot be commended as a model. It is wanting in certainty and sets forth a good many conclusions which have no support in the facts alleged. It is copied at length in the opinion of the state court, and it will suffice here to state the substance of such parts as have a bearing upon the arguments advanced to sustain the contention last stated.

It now is said that the contest was entertained in violation of the established regulations in that it was not instituted within the time prescribed. This objection was not made in the petition, and for aught that there appears it may have no basis in fact. The regulations limited the time to ten days after notice of the refusal of the conflicting application to purchase. The petition, although showing when the defendant's application was presented and when the contest was begun, does not show when her application was refused or when she was notified. In this situation the presumption is that the contest was begun in time, else it would not have been entertained.

The contest was begun by filing with the commission a written complaint setting forth the grounds of contest, and the plaintiff was duly served with a copy and notified that he should file, within ten days, such answer as he desired to make. He was in jail at that time and employed an attorney to represent him. The attorney engaged to do whatever was necessary to protect the plaintiff's rights, and afterwards assured him that an answer had been filed and the hearing would come later. A year and a half thereafter the attorney made inquiry of the Indian Inspector who then was completing the work of the commission, which in the meantime had been abolished, concerning the contest and was informed that the lot was "in litigation" and he would be advised as soon as action was taken, and later in the same month the inspector informed him that the plaintiff had forfeited his right by not filing an answer and a formal decision to that effect would be rendered after

the first of the succeeding month. Information about the absence of an answer was also given to the plaintiff about that time. But it does not appear that he or his attorney took any action then or thereafter either to show that an answer had been filed or to correct the omission if none had been filed, although it does appear that more than seven months elapsed before the patent was issued. Whether in fact an answer was filed is left uncertain, for it is alleged that the plaintiff believes one was filed, that the contest record does not show such a filing, that no answer is in the files, and "that plaintiff's attorney either failed to file an answer in the contest proceeding or that said answer, having been filed, was disregarded." In this situation it is urged (a) that the inspector, by stating that the lot was in litigation, caused the plaintiff's attorney to believe that an answer was on file and thereby misled him; (b) that if no answer was filed it was an unfortunate omission for which the plaintiff was not responsible, and if one was filed it was wrongfully disregarded; and (c) that the contest was decided against the plaintiff without a hearing or an opportunity to be heard.

The statement attributed to the inspector, that the lot was in litigation, doubtless meant, and only meant, that the contest was pending and undecided. That was its natural import, and it was equally true whether the plaintiff had answered or was in default. Therefore, the claim that his attorney was misled is not even colorable. If the question whether an answer was filed be an open one, the allegations of the petition bearing thereon are so uncertain that effect must be given to the decision that none was filed. Not only is there a strong presumption that the decision was right, but the admission that no answer is in the files and that the contest record does not show the filing of one goes far to sustain the decision independently of the presumption. Thus, the absence of an answer must be regarded as accounted for only on the theory that the

attorney omitted to file one. Of that it is to be observed, first, that the omission was by the plaintiff's chosen representative; second, that there is no suggestion that it was in any wise attributable to the defendant or the administrative officers before whom the contest was pending, and, third, that it was called to the attention of the plaintiff while it was still within the power of the administrative officers to relieve him from the default, if the circumstances justified such action, and to proceed to a hearing and disposition of the contest as if the omission had not occurred, and yet no effort was made by him to secure action of that kind. In these circumstances the failure of the attorney to file an answer furnishes no ground for avoiding the decision. It is idle to say that the plaintiff did not have a hearing or an opportunity to be heard. He was notified of the contest, was served with a copy of the complaint, and was cited to answer, all in conformity with the regulations, and he could not have failed to understand that to make default would be in the nature of a confession of his adversary's claim and an abandonment of his own. Failing, as he did, to answer or interpose any objection to the contest, he raised no issue entitling him to a hearing. His trouble is, not that he was not accorded a hearing or an opportunity to be heard, but that he did not avail himself of the opportunities afforded.

In the petition the plaintiff now does what he failed to do in the contest, that is, takes issue with the allegations of the complaint therein by denying that they were true; and he insists that in this way the petition shows that misrepresentation and fraud were practiced upon the administrative officers whereby the patent was issued to the defendant when it should have been issued to him. The insistence cannot be sustained. The contest was not *ex parte*, as were the proceedings involved in *United States* v. *Minor*, 114 U. S. 233, 240–243; *Sanford* v. *Sanford*, 139 U. S. 642, 644, 650, and *Svor* v. *Morris*, *ante*, p. 524, but

was an adversary proceeding to which the plaintiff was a party, of which he had due notice, and in which he had full opportunity to meet and controvert the very allegations he now says were untrue. The question whether they were true or otherwise is one the decision of which was committed by law to the administrative officers as a special tribunal, and they, as is conceded, decided that the allegations were true, their action being in the nature of a judicial determination. The applicable rule in such a case is, that the misrepresentation and fraud which will entitle the unsuccessful claimant to relief against the decision and resulting patent must be such as have prevented him from fully presenting his side of the controversy, or the officers from fully considering it; and it is not enough that there may have been false allegations in the pleadings or that some witness may have sworn falsely. *Vance* v. *Burbank*, 101 U. S. 514, 519; *Lee* v. *Johnson*, 116 U. S. 48; *Estes* v. *Timmons*, 199 U. S. 391, 396; *Greenameyer* v. *Coate*, 212 U. S. 434, 444; *Durango Land & Coal Co.* v. *Evans*, 80 Fed. Rep. 425, 430.

The petition contains some allegations descriptive of the complaint in the contest and of the matters set forth in it, and it is urged that in this way it appears that, upon her own showing, the defendant did not have such a possessory claim as entitled her to a preference right of purchase, and therefore that the officers committed an error of law in sustaining the contest. Of this it seems enough to say that the petition neither sets forth a copy of the complaint nor purports to give the whole of its substance, and that upon contrasting what the petition does say of the complaint with the applicable sections of the act of 1902 it does not appear that the contest was ill founded. For aught that is disclosed, the complaint and the proof in support of it may have fully established the defendant's right to purchase.

Other contentions advanced in the brief of the plaintiff

have been considered and found so far untenable that their discussion here would serve no useful purpose.

Judgment affirmed.

MATHESON *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE FOURTH DIVISION OF THE TERRITORY OF ALASKA.

No. 148. Submitted January 24, 1913.—Decided February 24, 1913.

Where the jurisdiction is coextensive with the district, multiplication of places at which courts may be held or mere creation of divisions does not nullify it. *Barrett* v. *United States*, 169 U. S. 231.

Jurors summoned by the District Judge in Alaska before the act of March 3, 1909, creating a Fourth Division, became effective, to attend the first term of the court in that division when the act did become effective, *held* properly summoned, as the act did not create a new tribunal or revoke the power of the District Judges to summon jurors to attend at any session of the court.

It is the duty of the judge to determine whether non-experts are qualified to express an opinion as to sanity of the accused, and in this case there does not appear to have been any abuse of discretion.

An instruction that while the burden of proof is on defendant to establish the fact of insanity, the jury cannot convict if they had reasonable doubt as to his sanity, held proper and sufficient. *Davis* v. *United States*, 160 U. S. 469.

The court properly instructed the jury as to the definition of insanity and as to what relieves defendant from criminal responsibility by giving the charge approved in *Davis* v. *United States*, 165 U. S. 373.

THE facts, which involve the construction of certain provisions of the Alaska Code of 1900 and the validity of a trial and conviction for murder in Alaska, are stated in the opinion.

Mr. James Wickersham and *Mr. John F. Dillon* for plaintiff in error.

Mr. Assistant Attorney General Adkins and *Mr. Karl W. Kirchwey* for the United States.

MR. JUSTICE LAMAR delivered the opinion of the court.

Congress, by the act of June 6, 1900 (31 Stat. 321, 322, c. 786), established a District Court for Alaska with general civil and criminal jurisdiction. There were three judges, who though given jurisdiction over the entire District were required to reside in that one of the three Divisions to which they were respectively assigned by the President. On December 29, 1908, the Grand Jury of the Third Division indicted Matheson for murder. On the next day he was arraigned and entered a plea of not guilty. Before his case was called for trial, Congress passed the act of March 3, 1909 (35 Stat. 838, 839, c. 269), providing for a Fourth Division to be held at Fairbanks by the judge of the former Third Division. This act was not to become effective until July 1, 1909, but in preparation for the first term convened thereunder the District Judge, assigned to the Fourth Division, passed an order, under which jurors were drawn and summoned in June to attend at the session of court to be held in July at Fairbanks.

On July 13, during this term, the defendant applied for and obtained an order to have his witnesses subpœnaed at the expense of the Government. His case was called for trial in September. He announced ready, and without making any question as to the qualification of the jurors or the method and regularity of their selection, objected to the entire panel on the ground that the Judge of the Third Division was without jurisdiction to issue the call at a time when the Fourth Division had not come into existence. The objection was overruled. Several of those on the jury, which tried his case, were taken from this panel. After a verdict of guilty and sentence to imprisonment for life the case was brought here by writ of

error in which complaint is made of the action of the Judge in allowing a jury to be selected from a panel drawn in June, before the act creating the Fourth Division became effective.

The Alaskan Code (June 6, 1900, 31 Stat. 321, 322, §§ 4 and 5, c. 786), created one District Court with three judges having general civil and criminal jurisdiction over the entire District, and authority to hold regular terms at Juneau, St. Michæl's and Eagle City and Special terms at such times and places in the District as they or any of them might deem expedient. The act of March 3, 1909 (35 Stat. 838, 839, c. 269), in providing for a Fourth Division did not contemplate an interruption of the functions of the Judge throughout the entire District, nor did it destroy the unity of the District Court. But while preserving unimpaired the power of the court and judges, it fixed a new place, at which the same District Court must be held. It did not create a new tribunal, with new officers, to be organized in a new political division, but it continued the jurisdiction and power of the Judge to be exercised anywhere in Alaska. It did not revoke his authority to summon jurors to attend at any session of the District Court, whether permitted to be held at Fairbanks under the act of 1900, or required there to be held after July 1, under the act of 1909. The principle involved is, in some of its aspects, like that considered in *Rosencrans* v. *United States*, 165 U. S. 257, where it was said that "jurisdiction is co-extensive with District and no mere multiplication of places at which courts are to be held or mere creation of division nullifies it." *Barrett* v. *United States*, 169 U. S. 231, 299; *Bird* v. *United States*, 187 U. S. 118. There was no error in overruling the objection made by the defendant to the panel.

There are 37 assignments of error, none of which presents a ground requiring a reversal. One relates to the giving of a charge requested by the defendant; others to

rulings as to which no exception was taken at the time or as to matters not set out in the assignments and requiring a search through the record to determine the subject of the complaint; others to the exclusion of testimony as to facts subsequently proved.

Those which relate to the refusal of the court to permit non-experts to express the opinion that the defendant was insane, until after they had given facts on which it was based, are without merit. It was the duty of the judge to determine whether such witnesses had qualified themselves to give opinion evidence, and there was no abuse of the court's discretion in passing on these matters (*Turner* v. *American Security & Trust Co.*, 213 U. S. 257, 260), but his rulings were favorable to the defendant.

It would serve no useful purpose to discuss the ruling as to the burden of proof and the definitions of insanity, since they present no new propositions. In both these matters the court followed cases in which those subjects have been fully treated. He instructed the jury that while the burden of proof was upon the defendant to establish the fact that he was insane at the time of the killing, yet they could not convict if they had a reasonable doubt as to his sanity. *Davis* v. *United States*, 160 U. S. 469. His definition of insanity and as to what would relieve the defendant of criminal responsibility was in accord with the principle declared in *Davis* v. *United States*, 165 U. S. 373, 378—in fact, the court gave the exact charge there held to be correct. The case was one peculiarly for the jury, and finding no error in matter of law, the judgment must be

Affirmed.

GRAND TRUNK WESTERN RAILWAY COMPANY *v.* CITY OF SOUTH BEND.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 81. Argued December 10, 11, 1912.—Decided February 24, 1913.

What the contract alleged to be impaired by subsequent legislation is, is a question which this court is bound to determine for itself independent of decisions of the state court. *Northern Pacific Ry.* v. *Duluth*, 208 U. S. 590.

An ordinance conferring a street franchise, passed by a municipality under legislative authority, creates a valid contract binding and enforceable according to its terms. *Louisville* v. *Cumberland Telephone Co.*, 225 U. S. 430.

While a validly granted franchise to use streets of a municipality may be regulated as to its use by subsequent ordinances, or repealed if its operation becomes injurious to public health or morals, the franchise, if not injurious to public health or morals, cannot be repealed and destroyed.

The police power of the State cannot be bartered away; but it cannot be used to abrogate a valid and innocuous franchise.

Tracks laid in a street under legislative authority become legalized, and when used in the customary manner cannot be treated as unlawful either in maintenance or operation.

Inconvenience natural to the proper use of a properly granted franchise cannot be made the basis of exercising the police power to destroy the franchise.

The power to regulate implies the existence and not the destruction of the thing to be controlled.

A franchise to maintain and operate a double track railway is an entirety, and if valid the municipality cannot abrogate it as to one of the tracks, either as to all or as to a part of the distance for which it was granted. *Baltimore* v. *Trust Company*, 166 U. S. 673, distinguished.

The contract clause prevents a State from impairing the obligation of a contract, whether it acts through the legislature or a municipality exercising delegated legislative power.

The ordinance of South Bend, Indiana, of 1868, permitting a railway company to lay a double track through one of its streets, and which had been availed of as to part of the distance, was a valid exercise of

delegated legislative power, and no power to alter or repeal having been reserved, a subsequent ordinance repealing the franchise as to the double track was not a valid exercise of the police power to regulate the franchise, but an impairment of the contract and unconstitutional under the contract clause of the Constitution.

174 Indiana, 203, reversed.

In 1866 a charter was granted by the State of Indiana to plaintiff's predecessor in title whereby it was authorized to build a railroad from the Michigan line west through South Bend to the Illinois line in the direction of Chicago. The City of South Bend was a stockholder in this company and, in 1868, passed an ordinance granting the company the right to construct its railroad through the streets of the city, no more than one track to be laid, except that the privilege was granted to lay a double track along Division street from the Bridge over St. Joseph's River to Taylor street. The road was constructed and a single track was built in 1871.

Thereafter, in 1881, the company acquired by condemnation and purchase, from the abutting owners on Division street, the right to use a strip 18 feet in width on which to lay a double track and soon afterward constructed the same on Division street for about half the permitted distance. This double track was constantly used, and in 1901 the business of the company had so increased that it was necessary to double-track the entire line, and the company had so built 157 miles from Port Huron westward and was preparing to construct the balance of the double track on Division street, when the city, on October 14, 1901, repealed so much of the ordinance of 1868 as gave the right to a second track in Division street. Later when the work of construction was begun the mayor ordered the employés to desist and threatened to arrest any who should undertake to construct such double track.

The company thereupon filed a bill, asking that the city be enjoined from interfering with the building of the

balance of the double track. It alleged that the city was a stockholder in the original company and in one of the successors, and knew of the acquisition of the 18-foot strip in Division street; that at all times it had recognized the validity of the contract as an entirety and from time to time required the railroad to incur expenses called for thereunder, and was estopped from denying the validity of the double track privilege.

The bill alleges that when the ordinance of 1868 was passed it was understood the double track could be laid whenever the business of the company made it necessary; that in consequence of the increase of business it is now essential to the successful operation of plaintiff's freight and passenger business that it should maintain a second track in Division street as by said ordinance authorized; and that to facilitate and accommodate the present volume of such traffic, said double line "is particularly necessary because of the fact that plaintiff's freight and passenger stations in South Bend are located adjacent to Division Street, between St. Joseph's River bridge and General Taylor street, and at said station the trains, both passenger and freight, passing over plaintiff's road, have to stop for train orders. The obstructing of the general public in the use of said street by passing trains will be much less when two tracks are used than it now is, when all trains, both ways, have to pass over a single track; that said street is 82½ feet wide and that there is ample room thereon for general travel and for said double track."

The plaintiff claims that the "original Ordinance of 1866 constituted a contract in its entirety, . . . is irrepealable by said city either in whole or in part, and that said Ordinance of repeal is void as violative of said contract and plaintiff's right thereunder as being in conflict with Section 10 of Article I of the Constitution of the United States."

The city demurred. Later it withdrew the demurrer

and filed an answer. Subsequently it withdrew the answer and filed a general demurrer, which was sustained by the Circuit Court. On appeal the Supreme Court of Indiana held that there was no charge that the city proposed to remove the double track already laid, and that the pleadings, properly construed, only involved the right to construct the balance of the double track; that even if the Ordinance of 1866 was a contract it did not prevent the city from exercising the police power, and affirmed the judgment. (174 Indiana, 203.)

Mr. George W. Kretzinger, Jr., and *Mr. A. B. Browne*, with whom *Mr. George W. Kretzinger* was on the brief, for plaintiff in error.

Mr. Harry R. Wair, with whom *Mr. Iden S. Romig* and *Mr. Louis T. Michener* were on the brief, for defendants in error:

The City of South Bend had the power to repeal and set aside the grant of the right to lay down the additional track on Division street between Michigan and Taylor streets. Ordinance 62 is not an irrepealable contract.

Facts in pleadings must be positively averred and not set out by way of recital, inference or conclusion, and no facts will be presumed to exist in favor of a pleading which have not been averred or alleged. *Wabash R. R. Co.* v. *Beedle*, 173 Indiana, 437; *Wabash R. R. Co.* v. *Hasset*, 170 Indiana, 370; *Chicago & Erie R. R. Co.* v. *Lain*, 170 Indiana, 84, 90.

Whether the grant is a license or a contract, it is subject to the police power of the municipality.

The mere fact that plaintiff in error enjoys contract rights in the street is not controlling. Those who enter into such contract relations with the city as render their property reasonably subject to control do so with the knowledge that the police power is an inalienable and con-

tinuing authority in the city. *Indiana Ry. Co.* v. *Calvert*, 168 Indiana, 321; *Baltimore* v. *Guaranty Co.*, 166 U. S. 673; *Vandalia R. R. Co.* v. *State*, 166 Indiana, 219.

When a state court has construed a statute this court will accept that construction, and the power of determining the meaning of a statute carries with it the power to describe its extent and limitation as well as a method by which they shall be determined. *Smiley* v. *Kansas*, 196 U. S. 447–455; *Martin* v. *West*, 222 U. S. 196; *Chicago* v. *Sturges*, 224 U. S. 321; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 73; *Chamber of Commerce* v. *Boston*, 217 U. S. 194; *Gatewood* v. *North Carolina*, 203 U. S. 541.

The repealing ordinance was a proper exercise of the police power; the power of legislating for the protection of the public in the streets of the city is held by the city council in trust, and cannot be the subject of an irrevocable contract; a city council cannot limit its legislative discretion in the future by contract or grant so as to deprive itself of its police power; the power of regulation and control of streets is a continuing power to be exercised at all times for public benefit. *Vandalia R. R. Co.* v. *South Bend*, 166 Indiana, 219; *Indiana Ry. Co.* v. *Calvert*, 168 Indiana, 321; *Laurel Hill Cemetery* v. *San Francisco*, 216 U. S. 358, 365; *Peru* v. *Gleason*, 91 Indiana, 567; *Lake Roland Elevated Ry. Co.* v. *Baltimore*, 26 Atl. Rep. 510; *Baltimore* v. *Baltimore Trust Co.*, 166 U. S. 673; *Wabash Ry. Co.* v. *Defiance*, 167 U. S. 88; *C., B. & Q. Ry. Co.* v. *Nebraska*, 170 U. S. 57; *N. Y. & N. E. Ry. Co.* v. *Bristol*, 151 U. S. 556; *Board of Education* v. *Phillips*, 73 Pac. Rep. 97; *Snouffer* v. *Cedar Rapids Ry.*, 92 N. W. Rep. 79; *Clarendon* v. *Rutland Ry. Co.*, 52 Atl. Rep. 1057; *Thorpe* v. *Railway*, 27 Vermont, 141; *Binninger* v. *New York*, 69 N. E. Rep. 390; *Presbyterian Church* v. *New York*, 5 Cow. 542.

The police power is but another name for the power of government and legislation and cannot be judged by theoretical standards but must be tested by the concrete

conditions which induced it, and this court will not oppose to legislation under the police power its notions of its necessity for such legislation in determining whether the legislation is arbitrary and unreasonable and not designed to accomplish a legitimate public purpose. *Mutual Loan Co.* v. *Martell*, 222 U. S. 232–234; *Laurel Hill Cemetery Co.* v. *San Francisco*, 216 U. S. 358, 365.

Whether such an ordinance is a license or a contract, the real question is: is it repealable? Where privileges are given to a private corporation and subsequent regulation attempted is purely a matter of private concern, the facts come within the *Dartmouth College* doctrine, but this doctrine does not apply to the public contracts or charter legislation of municipalities, which are more in the nature of licenses and not irrepealable contracts. Ordinance No. 62 is not in the class of contracts which a municipality makes as a property holder, but was an exercise by the city of its delegated legislative powers. *Vandalia R. R. Co.* v. *South Bend*, 166 Indiana, 219; *Indiana Ry. Co.* v. *Calvert*, 168 Indiana, 321; *Indianapolis &c. R. R. Co.* v. *State*, 37 Indiana, 489; *Meyer* v. *Boonville*, 162 Indiana, 165; *Wabash Ry. Co.* v. *Defiance*, 167 U. S. 88; *Binninger* v. *City of New York*, 69 N. E. Rep. 390; *Lake Roland Elevated* v. *Baltimore*, 26 Atl. Rep. 510; *Snouffer* v. *Cedar Rapids Ry.*, 92 N. W. Rep. 79, at 83; *Logansport Ry. Co.* v. *Logansport*, 114 Fed. Rep. 688; *Citizens' Ry. Co.* v. *City Co.*, 64 Fed. Rep. 647; *Citizens' Co.* v. *City Co.*, 56 Fed. Rep. 746.

Neither the condition of the title of the plaintiff in error nor its relations with abutting property owners is important. If the repealing ordinance of 1901 is a valid exercise of the police power, it matters not whether plaintiff in error is deprived of the benefit of an easement, a privilege, a contract, or a license. Black's Const. Law, pp. 290, 293, 298; *Clarendon* v. *Rutland Ry. Co.*, 52 Atl. Rep. 1057.

The railroad company's complaint shows on its face that the privilege of laying a double track on Division street between Michigan and General Taylor Streets was never exercised. The repealing ordinance of 1901, if void, is void only on the ground that it is not a proper exercise of the police power.

The repealing ordinance of 1901 is not based upon non-user. Power is sometimes reserved to alter, amend or repeal grants, but the police power also necessarily extends to grants which do not contain any express reservation. *Gale* v. *Kalamazoo*, 23 Michigan, 343.

The repealing ordinance of 1901 concerns not only the use of the street for convenience of public travel, but also the protection of human life. Subjects of much less importance have properly been held to be within the scope of the police power. *International Text Book Co.* v. *Weissinger*, 160 Indiana, 349; *Fry* v. *State*, 63 Indiana, 552; *Adams Exp. Co.* v. *State*, 161 Indiana, 328; *Given* v. *State*, 160 Indiana, 552; *Stone* v. *Mississippi*, 101 U. S. 814; *State* v. *Woodward*, 89 Indiana, 110; *Barbier* v. *Connolly*, 113 U. S. 27; *Gaslight Co.* v. *Columbus*, 33 N. E. Rep. 292; *Slaughter House Cases*, 16 Wall. 36.

An estoppel may be raised against a private corporation even when it has not the power to act, but no estoppel can be raised against a public corporation. *St. Paul* v. *Minnesota Transfer Co.*, 80 Minnesota, 108; 83 N. W. Rep. 32; *Rissing* v. *Fort Wayne*, 137 Indiana, 427.

Neither the question of estoppel nor the question of laches, when raised in the state court, present or involve a Federal question. *Speed* v. *McCarthy*, 181 U. S. 269, 275; *Moran* v. *Horsky*, 178 U. S. 205.

This court will take judicial notice that every additional track placed longitudinally along the streets and crossing intersecting streets increases the danger of the public and inconvenience to travel. 1 Elliott on Evidence, §§39, 42 and 62.

The court will also take judicial notice of the population

of the City of South Bend as shown by the United States census since its incorporation as follows:

Population in 1850..... 1,652.
Population in 1910.....53,684.

MR. JUSTICE LAMAR, after making the foregoing statement, delivered the opinion of the court.

In 1868 the City Council of South Bend, by ordinance, granted plaintiff's predecessor in title the right to lay a double track over a part of Division street. The Company built a single track in 1871 and a double track for part of the way in 1881, but, on attempting in 1902 to extend it, for the balance of the authorized distance, was prevented from doing so because the city had repealed so much of the ordinance of 1868 as related to double tracks. In the record here it appears that, in the litigation which followed, the action of the city was sustained on the ground that the repeal was presumptively a reasonable exercise of the police power and not a legislative impairment of the contract ordinance.

The assignment of error on this ruling presents a question which this court is bound to decide for itself, independent of decisions of the State court, *Northern Pacific Ry.* v. *Duluth*, 208 U. S. 583, 590. In doing so it is necessary first to determine whether the city had legislative authority to pass the ordinance, for, if there was no such power, the grant was void and the repeal was not so much the impairment of the obligation of a contract as the withdrawal of an assent to occupy the streets.

We are, however, relieved of the necessity of making any extended inquiry on this primary question, because the Indiana statute provided that the railroad might be built through any city that would give its consent. In a suit by an abutting owner, the Supreme Court of the State, construing this very ordinance of 1868, held that

the city had power to pass it, "the laying out and operating of the railway being a new and improved method of using the streets germane to its principal object." *Dwenger* v. *Chicago & Grand Trunk Ry. Co.*, 98 Indiana, 153. In other cases that court held that the statute authorized cities to grant franchises to lay tracks in the streets; that such an ordinance created that which is in the nature of a contract "which the municipality itself cannot materially impair." *Williams* v. *Citizens' Ry.*, 130 Indiana, 71, 73; *Town of New Castle* v. *Lake Erie & W. R. Co.*, 155 Indiana, 18, 24. These rulings accord with the decisions in other jurisdictions and by this court in *Louisville* v. *Cumberland Telephone Company*, 225 U. S. 430, holding that an ordinance conferring a street franchise, passed by a municipality under legislative authority, created a valid contract binding and enforceable according to its terms.

2. If, then, the City of South Bend was authorized to pass this ordinance which granted an easement, the contract cannot be impaired unless, as claimed by the defendant, the railroad took subject to a right to amend or repeal in the exercise of the police power. And many cases are cited in support of the proposition that the grant of authority to use the streets of a city does not prevent the subsequent passage of ordinances needed for the preservation of the public safety and convenience. Some of the cases turned on the question as to the city's want of legislative power to make the grant in the first instance. Others held that charter grants did not prevent the State from subsequently repealing franchises which in their operation were injurious to the morals or health of the public, as in the *Lottery*, *Liquor* and *Fertilizer* cases. *Stone* v. *Mississippi*, 101 U. S. 814; *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659. Others related to the change of paving, grade and location of viaducts. All of them recognize the municipality's control of the use of the streets by travellers

on foot or in vehicles, as well as the use by companies which have a franchise to lay tracks over which to haul cars.

Undoubtedly the railroad here took no vested interest in the maintenance of the laws or regulations of force when the ordinance was passed in 1868, but the rights acquired were subject to the power of the municipality to pass reasonable regulations necessary to secure the public safety. *Northern Pac. R. R.* v. *Duluth*, 208 U. S. 583. And while the franchise to lay and use a double track was a contract which could not be impaired, yet, as the police power remained efficient and operative, the municipality had ample authority to make regulations necessitating changes of a nature which could not have been compelled if the grant had been from it as a private proprietor. The city could, therefore, legislate as to crossings, grades, character of rails, rate of speed, giving of signals and the details of operating track and train, regulating the use of the franchise, and preserving the concurrent rights of the public and the company. And, as in the viaduct cases, it might require these tracks to be lowered or elevated (*Chicago, B. & Q. R. R.* v. *Nebraska*, 170 U. S. 57), or,—the franchise, and not the particular location, being the essence of the contract, the city, under the power to regulate, might compel the company to remove the tracks from the center to the side, or from the side to the center of the street. *New Orleans Gas Light Co.* v. *Drainage Commission*, 197 U. S. 453; *Macon &c. R. R.* v. *Mayor*, 112 Georgia, 782; *Atlantic & B. Ry.* v. *Cordele*, 128 Georgia, 293, 296; *Snouffer* v. *Cedar Rapids & M. C. Ry. Co.*, 118 Iowa, 287 (5).

These, however, are examples of the persistence of the power to regulate and do not sustain the validity of the repealing ordinance of 1901, since it is not regulative of the use but destructive of the franchise. In every case like this involving an inquiry as to whether a law is valid, as an exertion of the police power, or void, as impairing

the obligation of a contract, the determination must depend on the nature of the contract and the right of government to make it. The difference between the two classes of cases is that which results from the want of authority to barter away the police power, whose continued existence is essential to the well-being of society, and the undoubted right of government to contract as to some matters and the want of power, when such contract is made, to destroy or impair its obligation. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650.

The State, with its plenary control over the streets, had this governmental power to make the grant. There was nothing contrary to public policy in any of its terms, and being valid and innocuous, the police power could not be invoked to abrogate it as a whole or to impair it in part. *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 17. Tracks laid in a street, under legislative authority, become legalized, and, when used in the customary manner, cannot be treated as unlawful either in maintenance or operation. As said by this court, "a railway over the . . . streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded." *Baltimore & Potomac R. R. Co.* v. *Fifth Baptist Church*, 108 U. S. 317, 331. The inconvenience consequent upon the running of a railroad through a city, under state authority, is not a nuisance in law, but is insuperably connected with the exercise of the franchise granted by the State. If the police power could lay hold of such inconveniences, and make them the basis of the right to repeal such an ordinance, the contract could be abrogated because of the very growth in population and business the railroad was intended to secure.

The power to regulate implies the existence and not the destruction of the thing to be controlled. And while the city retained the power to regulate the streets and the use of the franchise, it could neither destroy the public use nor impair the private contract, which, as it contemplated permanent and not temporary structures, granted a permanent and not a revocable franchise. Both the street and the railroad were arteries of commerce. Both were highways of public utility, and both were laid out subject to the authority of the State, though the power to regulate the use of the streets has been delegated to the municipality. So that while the company was itself authorized to select the route between the terminal points named in the charter, it could not use streets without the consent of the city through which the line ran. In determining whether they would grant or refuse that consent the municipal authorities were obliged to balance the present and prospective inconveniences of having trains operated through its streets against the advantage of having the railroad accessible to its citizens. It could have refused its consent, except on terms; it could have forced the road to the outskirts of the town, or could have permitted the company to lay tracks in the more thickly settled parts of the city. When such consent was once given the condition precedent had been performed and the street franchise was thereafter held, not from the city, but from the State which, however, did not confer upon the municipality any authority to withdraw that consent, nor was there any attempt by the council to reserve such power in the ordinance itself.

It is said, however, that even if the city could not prevent the use of the rails already laid, it could repeal so much of the ordinance as related to that part of the street on which the double track had not been actually built. But this was not a grant of several distinct and separate franchises, where the acceptance and use of one did not

necessarily execute the contract as to others not connected with the main object of the ordinance and not at the time directly within the contemplation of the parties. *Pearsall* v. *Great Northern R. R.*, 161 U. S. 646, 673. This franchise was single and specific, and when accepted and acted upon became binding,—not foot by foot, as the rails were laid—but as an entirety. Here the company not only accepted the ordinance and constructed the road, but, relying on the franchise, acquired from the abutters by purchase or condemnation an 18-foot strip with a view of laying thereon a double track as the increase in business made that necessary. Subsequently it built the double track for a part of the distance and has not abandoned or forfeited the right to use the balance of the easement when needed for the discharge of its public duties as a carrier.

The ordinance passed in pursuance of the Indiana statute was an entirety. When accepted it became binding in its entirety. If the city has the right to repeal the specific provisions of the contract, it has the like right to repeal the more general grant to lay a single track. If South Bend can do so, every other municipality having granted like rights, under similar ordinances, and affecting every line of railway in the country, can repeal the franchise to use double or single track. On the ground of congestion of traffic, the State's grant and command to operate a continuous road could be nullified by municipal action, to the destruction of great highways of commerce, similar in their nature to the street itself. Such consequences, though improbable, are rendered impossible by the provision of the Constitution of the United States prohibiting the impairment of the obligation of a contract by legislation of a State, whether acting through a General Assembly or a municipality exercising delegated legislative power. *Mercantile Trust Company* v. *Columbus*, 203 U. S. 311, 320; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *City Ry. Co.* v. *Citizens' R. R.*, 166 U. S. 557.

See also *Hestonville &c. R. R.* v. *Philadelphia*, 89 Pa. St. 210 (3); *Suburban R. T. Co.* v. *Mayor*, 128 N. Y. 510, 520; *Asbury Park Ry.* v. *Neptune Township*, 73 N. J. Eq. 323, 329–332; *Brunswick & Western R. R. Co.* v. *Mayor*, 91 Georgia, 573; *Workman* v. *R. R.*, 129 California, 536; *Africa* v. *Knoxville*, 70 Fed. Rep. 729; *Burlington* v. *Burlington S. R. R.*, 49 Iowa, 144; *Town of Arcata* v. *Arcata & M. R. R. Co.*, 92 California, 639; *Detroit* v. *Detroit & H. P. R. R. Co.*, 43 Michigan, 140, 147; *City of Seattle* v. *Columbia & P. S. R. R.*, 6 Washington, 379; *City of Noblesville* v. *Lake Erie & W. R. R.*, 130 Indiana, 1. "Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside." *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, 103.

The defendant relies on *Baltimore* v. *Baltimore Trust & G. Co.*, 166 U. S. 673, where, however, the facts were materially different. For there the company had a sweeping grant to lay double tracks through many miles of the streets. The city repealed the ordinance so far as it related to a short distance in a crowded part of Lexington street, which, as appears in the original record, varied from 48 to 50 feet in width, the sidewalks being about eleven feet in width and the roadway proper being about 29 feet from curb to curb. With double tracks, there was only 7½ feet from the curb to the nearest rail, and, allowing for the overhang of the car, this space was not wide enough to permit vans and large wagons to pass. At some points buggies and narrow vehicles could only pass by running the wheels on the edge of the sidewalk. These facts are wholly different from the situation disclosed by this record, where the sweeping grant conferred the right to lay a single track, but the specific grant "immediately within the contemplation of the parties" (*Pearsall* v. *Great Northern Ry.*, 161 U. S. 646, 673) was a definite franchise

to construct this particular double track between designated points, on Division street, which is 82½ feet wide, or 32 feet wider than Lexington street. It is admitted that a double track has been actually used on it for more than 20 years.

The statute and the ordinance, in the Baltimore Case, were also materially different from those here involved. The court declined to decide whether the council had the power to make an irrepealable contract, it being sufficient to hold that the direction to lay but one track for a short distance on Lexington street did not substantially change the terms of the contract, granting such very broad and general right to lay many miles of double track throughout the city. But regardless of the construction there was no impairment, because of the important fact that the legislature of Maryland had ratified the street ordinance on condition that it might at any time be amended or repealed by the city council.

That decision, based on such different facts and on such different statute and ordinance, is not applicable here where the city of South Bend sought to repeal a part of a street franchise granted in pursuance of a state statute which, while it authorized the city to consent, reserved to it no such power to repeal. As said in *Indianapolis* v. *Indianapolis Gas Co.*, 66 Indiana, 396, 402, such a contract ordinance "does not in the least restrict the legislative powers of the city except, as the sanctity of the contract is shielded by the Constitution of the United States, it cannot in the exercise of its legislative power impair its validity; for it would be a solecism to hold that a municipal corporation can impair the validity of a contract, when the State which created the corporation, by its most solemn acts, has no such power."

The facts stated in the complaint, and admitted by the demurrer, raise no presumption that the repeal was the reasonable exercise of the police power, but on the con-

trary show that the contract of 1868 was materially impaired by the ordinance of 1901 in violation of the provisions of Art. I, § 10, of the Constitution.

The judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE DAY concurs in the result on the ground that the facts stated in the complaint and admitted by the demurrer raise no presumption that the repeal was the reasonable exercise of the police power and that nothing else is necessary to be decided. MR. JUSTICE HUGHES and Mr. JUSTICE PITNEY dissent.

SOUTHERN PACIFIC COMPANY *v.* CITY OF PORTLAND.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

No. 122. Argued January 6, 1913.—Decided February 24, 1913.

Where, as in this case, a municipal ordinance, granting a franchise to use streets as authorized by the state law, expressly reserves to the city the power to make or alter regulations and to prohibit the use of a specified motive power, the grantee cannot accept it and afterwards claim that, as the state law only authorized the designation of streets, the municipality cannot exert the power reserved to prohibit the specified motive power without impairing the contract.

Although a municipality cannot defeat a grant made under authority of the State, it may under the police power reasonably regulate the method in which it shall be used; such regulations do not defeat the grant, if it is still practicable to operate under the new regulations. *Railroad Co.* v. *Richmond*, 96 U. S. 521.

The grantee of a franchise to use the streets coupled with conditions cannot avail of the benefits and deny the validity of the conditions, or claim that the exercise of the expressly reserved power is a violation of the contract clause of the Constitution.

Where under its reserved powers the municipality attempts to regulate a franchise to use the streets both as to nature of motive power and cars operated, the provisions are separable and do not stand or fall together. *Laclede Gas Co.* v. *Murphy*, 170 U. S. 99.

A franchise given by a municipality under state authority to a railroad to lay and operate tracks in a street includes the right to haul both passenger and freight cars, and a reserved power to regulate cannot be availed of to prohibit the hauling of freight cars and defeat the franchise given by the State and to that extent impair the contract under which the railroad was constructed.

While the power to regulate a franchise does not authorize a prohibition that destroys it, the municipality may legislate in the light of facts and conditions.

Whether subsequent regulations impair the obligation of a contract should only be determined on a complete record; and where, as in this case, all the conditions were not considered by the court of original jurisdiction the bill will be dismissed without prejudice.

The ordinance of Portland prohibiting the using of locomotives and hauling of freight cars on one of its streets occupied by a railroad under a franchise, *held* not to be an impairment of the contract as to the locomotives, but not decided on this record, whether it is an impairment as to the hauling of freight cars.

177 Fed. Rep. 958, affirmed.

APPEAL from a decree refusing to enjoin the City of Portland from enforcing an ordinance prohibiting the Southern Pacific Company from running steam locomotives or freight cars along Fourth Street.

It appeared that the Oregon Central R. R. was chartered to build a road from Portland to the California line. The company thereupon purchased a block of land in the city on which to locate its terminals and applied to the Council to designate the street on which the track should be laid. The general statute of the State then of force provided (Bellinger & Cotton's Code of Oregon, §§ 5077, 5078) that whenever a private corporation was authorized to appropriate any part of any public street within the limits of any town, such corporation should locate their road upon such particular street as the local authorities might designate. But if such local authorities refused to

make such designation within a reasonable time when requested, such corporation might make such appropriation without reference thereto.

The bill alleges that on January 6, 1869, "under and by virtue of the laws of the State and its charter then in effect," the City of Portland duly passed Ordinance 599, which provided that—

"SEC. 1. The Oregon Central Railroad Company, of Portland, Oregon, is hereby authorized and permitted to lay a railway track and run cars over the same along the center of Fourth Street, from the south boundary line of the City of Portland, to the north side of G Street, and as much further north as said Fourth Street may extend or be extended, upon the terms and conditions as hereinafter provided."

* * * * * * * *

"SECTION 3. The Common Council reserve the right to make or to alter regulations at any time as they deem proper for the conduct of the said road within the limits of the city, and the speed of railway cars and locomotives within said limits, and may restrict or prohibit the running of locomotives at such time and in such manner as they may deem necessary."

* * * * * * * *

"SECTION 5. It is hereby expressly provided that any refusal or neglect of the said Oregon Central Railroad Company to comply with the provisions and requirements of this ordinance, or any other ordinance passed in pursuance hereof, shall be deemed a forfeiture of the rights and privileges herein granted; and it shall be lawful for the Common Council to declare by ordinance, the forfeiture of the same, and to cause the said rails to be removed from said street."

The ordinance was accepted and the road was built from the terminals along Fourth to Sheridan Street, thence south over its private property and the right of way

granted by Congress (May 5, 1870, 16 Stat. 94, c. 69) to McMinnville. From its completion in 1871 to the present time freight and passenger cars drawn by steam locomotives have been constantly operated along Fourth Street. In 1903 the charter of the city of Portland was amended so as to authorize the granting of street franchises, and it is alleged that the city desired the railroad to take an electric franchise, paying therefor an annual sum. It is further charged that on May 1, 1907, over the protest of the Railroad Company, the Council passed Ordinance 16491, to go into effect eighteen months after date, by which it was made unlawful for the Oregon Central, its assigns, their lessees, or any other person to run or operate steam locomotives or freight cars along Fourth Street . . . between Glisan and the southerly limits of the city, excepting freight cars for the repair or maintenance of the railway lawfully and rightfully on said street. Violations were to be punished by fine or imprisonment and deemed a forfeiture of all rights claimed by the Oregon Central with respect to the operation of the railway on the street. On November 16, 1908, after the expiration of the eighteen months, a proceeding was instituted in the Municipal Court against the company and one of its agents, charging that he and it "did wilfully and unlawfully run and operate steam railway locomotives along Fourth Street" contrary to the provisions of Ordinance 16491.

The Southern Pacific, a Kentucky corporation, thereupon filed a bill in the United States Circuit Court, alleging that the Oregon Central's property had been transferred to the Oregon & California R. R. and that in 1887 the property and this street right had been leased to the Southern Pacific, which had since continuously operated freight and passenger cars with steam power over Fourth Street.

It averred that the railroad owned no other terminal

property than that purchased in 1869 and reached by the tracks on Fourth Street; that it was impossible to obtain any other terminal within the city accessible to the railroad from the intersection of Fourth and Sheridan Streets to the south boundary; that cars from Corvallis on its line running south could not be brought into the city and its business as a common carrier conducted if the ordinance was enforced, except by constructing, at an estimated cost of $911,000, about 10 miles of road from Beaverton to Willsburg, thence across a bridge owned by the Oregon R. R. & N. Co., and thence by the southern terminus of said railroad constructed by the Oregon Central. The bill charged that the ordinance imposed excessive penalties and illegal forfeitures; that it was arbitrary, unreasonable and oppressive; deprived the company of property without due process of law; interfered with interstate commerce, and impaired the obligation of the contract under which the track had been laid in Fourth Street.

The city answered denying that the Southern Pacific owned the property and franchises of the Oregon Central, on the ground that the latter company had no charter-right to sell and also offered evidence to show that when in 1869 the tracks were first laid on Fourth Street, there were very few buildings thereon, while it was now one of the principal thoroughfares upon which many stores, hotels and public structures have been erected; it proved that the locomotives and cars were much heavier than those in use when Ordinance 599 was passed and the grade being steep, the puffing, blowing, exhaust, noise and jar caused by steam locomotives was more disturbing and injurious than where the line is more nearly level. It also proved that the Southern Pacific was then building a Cut-off or Belt Line, by which freight could be carried around the city instead of being hauled over Fourth Street.

The court held that under the police power, as well as

that reserved in Ordinance 599, the city could prohibit the use of steam and the hauling of freight cars, the ordinance not being arbitrary in view of the results of hauling locomotives and cars along Fourth Street, which he found was "quite steep, and the noise, vibration, smoke, cinders and soot from the moving steam locomotive and train seriously interfere with the transaction of public and private business, and are a constant source of danger and inconvenience to the public." He made no finding as to whether the company had other convenient and accessible means of reaching the terminal, for handling through and local freight. But having held that the city had power to pass Ordinance 16491, he dismissed the bill, and the carrier appealed.

Mr. James E. Fenton, with whom *Mr. Wm. D. Fenton*, *Mr. Ben C. Dey*, *Mr. Kenneth L. Fenton* and *Mr. Maxwell Evarts* were on the brief, for appellant:

The franchise or right granted the Oregon Central Railroad Company to appropriate and use the portion of Fourth Street designated in Ordinance No. 599, for the purpose of constructing and operating its railroad thereon, is a grant direct from the State and not from the city. Dillon on Municipal Corporations, 5th ed., §§ 1228, 1230, 1242, 1265–9.

This franchise was granted by the State of Oregon under the terms and provisions of §§ 24 and 25 of the act of the Legislative Assembly of the State of Oregon, passed October 14, 1862, which are now §§ 6841 and 6842 (Lord's Oregon Laws).

The grant by the State of this franchise or right to appropriate and use the part of Fourth street so designated by Ordinance No. 599 when it was accepted and acted upon by the railroad company and valuable improvements made and money expended on the faith thereof, became a contract between the State and the company which cannot

be impaired either by law of the State or by an ordinance of the city. *Mayor of Knoxville* v. *Africa*, 77 Fed. Rep. 501; Dillon on Municipal Corporations, 5th ed., § 1242.

The franchise granted by the State of Oregon to the Oregon Central Railroad Company was one in perpetuity. *Louisville Trust Co.* v. *Cincinnati*, 76 Fed. Rep. 296; *Louisville* v. *Cumberland Tel. Co.*, 224 U. S. 649, 662; *Blair* v. *Chicago*, 201 U. S. 400; *Detroit Citizens' Street Ry.* v. *Detroit Ry.*, 171 U. S. 48; *St. Clair Turnpike County* v. *Illinois*, 96 U. S. 63; *Vilas* v. *Manila*, 220 U. S. 345; 3 Dillon Mun. Corp., §§ 1265–1269.

This franchise being a vested property right can be assigned, mortgaged or leased as other property. *Oregon Ry. & Navig. Co.* v. *Oregonian Ry. Co., Ltd.*, 130 U. S. 1.

Ordinance No. 16491 is not within any power reserved to the city by Ordinance No. 599; nor is it a reasonable or necessary exercise of any police power of the State or city regulating the use of the railroad on Fourth street with a view to the public welfare. *Railroad Co.* v. *Richmond*, 67 Virginia, 83; *S. C.*, 96 U. S. 521.

Ordinance No. 16491 is unreasonable and oppressive and as such operates to defeat the purposes of the grant from the State, and it is void in that—

It impairs the obligation of the contract under which the street was appropriated by the company and under which it located and operated its road thereon.

It deprives the company of its property—said franchise—without due process of law and denies it the equal protection of the laws.

Its enforcement will interfere with, restrain, and prevent the movement by the company of interstate commerce.

Even if it be conceded that the city could, under the police power, prohibit the use of steam locomotives on Fourth street, it could not, as it attempted to do under Ordinance No. 16491, deprive the company of its right,

under reasonable regulations, to move its freight trains at some time during the twenty-four hours. Such a prohibition is a taking of the property of complainant, under the guise of the exercise of the police power; it is not regulation, it is confiscation. *Wisconsin Tel. Co.* v. *Sheboygan*, 111 Wisconsin, 23, 36; *Wisconsin Tel. Co.* v. *Oshkosh*, 62 Wisconsin, 32, 40; *Am. Un. Tel. Co.* v. *Harrison*, 31 N. J. Eq. 627; *Summit* v. *N. Y. & N. J. Tel. Co.*, 57 N. J. Eq. 123, 127; *New Hope Tel. Co.* v. *Concordia*, 106 Pac. Rep. 35; *Missouri Tel. Co.* v. *Mitchell*, 22 So. Dak. 191; *Michigan Tel. Co.* v. *Benton Harbor*, 121 Michigan, 512; *Telephone Co.* v. *St. Joseph*, 121 Michigan, 502, 506; *Jonesville* v. *Southern Michigan Tel. Co.*, 155 Michigan, 86; *Carthage* v. *Cent. N. Y. Tel. Co.*, 185 N. Y. 448; *Northwestern Tel. Exchange* v. *Minneapolis*, 81 Minnesota, 140; 3 Dillon on Mun. Corp., 5th ed., §§ 1230, 1269; *Street Ry. Co.* v. *Asheville*, 109 No. Car. 688; *Traction Co.* v. *Shreveport*, 122 Louisiana, 1.

If Ordinance No. 16491 be invalid in respect to the prohibition against the movement of freight traffic, then the entire ordinance is void. It is a fundamental rule that if part of an ordinance is void, another essential and connected part of the same is also void. *State* v. *Hoboken*, 38 N. J. L. 110; *United States* v. *Ju Toy*, 198 U. S. 253, 262; *Illinois Cent. R. Co.* v. *McKendree*, 203 U. S. 514, 529.

Mr. Frank S. Grant, with whom *Mr. Lyman E. Latourette* was on the brief, for appellee:

The original ordinance, reserves to the city the right to make such rules and regulations, even to the extent of prohibiting the use of steam locomotives or freight cars on Fourth Street. *Railroad Co.* v. *Richmond*, 96 U. S. 521; *Buffalo &c. Ry. Co.* v. *Buffalo*, 5 Hill (N. Y.), 209; McQuillan on Ordinances, 2d ed., § 763; Nellis on St. Railways, § 46; *Pacific Railroad Co.* v. *Leavenworth*, Fed.

Cas. No. 10649; *Pac. &c. Ry.* v. *Hood*, 94 Fed. Rep. 618; *Railroad* v. *Bingham*, 87 Tennessee, 522; *Louisville T. Co.* v. *City*, 76 Fed. Rep. 296; *S. C.*, 78 Fed. Rep. 307; 3 Dillon on Municipal Corporations, 5th ed., § 1229, p. 1952; *Clinton* v. *Worcester*, 199 Massachusetts, 279; *Rutherford* v. *Hudson R. T. Co.*, 73 N. J. L. 227; *McQuaid* v. *Portland Ry. Co.*, 18 Oregon, 248; Art. II, § 4, Const. Oregon.

The original ordinance was necessarily made and accepted subject to the city's right to the exercise of its police power. The power to make such regulations concerning the operation of the plaintiff's road as public safety and welfare might, from time to time, require cannot be contracted away. *Northern Pacific Railway* v. *Duluth*, 208 U. S. 583; Joyce on Franchises, § 138; *Ex parte Koehler*, 23 Fed. Rep. 529; *P. Ry. L. & P. Co.* v. *Railroad Commission*, 105 Pac. Rep. 713; Constitution Oregon, Art. II, § 2; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 663; *North Chicago &c.* v. *Lakeview*, 105 Illinois, 207; *Buffalo &c. Ry. Co.* v. *City of Buffalo*, 5 Hill (N. Y.), 209; *Brown* v. *City*, 47 Pa. St. 329; 2 Elliott on Roads, 3d ed., § 839; *Municipal Paving Co.* v. *Donovan*, 142 S. W. Rep. 644; *Macomb* v. *Jones*, 158 Ill. App. 271; *Hennington* v. *Georgia*, 163 U. S. 299; *Baltimore* v. *Baltimore T. Co.*, 166 U. S. 673; *Portland Ry. L. & P. Co.* v. *Portland*, Fed. Rep. (decided Nov. 1912, not reported); *Beer* v. *Massachusetts*, 97 U. S. 25; *Mugler* v. *Kansas*, 123 U. S. 623; *N. Y. & N. E. R. R.* v. *Bristol*, 151 U. S. 567; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 60; *Budd* v. *New York*, 143 U. S. 517; *C., B. & Q. R. R.* v. *Chicago*, 166 U. S. 226; *Detroit Railroad Co.* v. *Osborne*, 189 U. S. 383; *New Orleans Gas Light Co.* v. *Drainage Commissioners*, 197 U. S. 453; *C., B. & Q. R. R. Co.* v. *Illinois*, 200 U. S. 561; *Union Bridge Co.* v. *United States*, 204 U. S. 364; Cooley on Const. Lim., 7th ed., p. 400; 9 Enc. of U. S. Sup. Ct. Reports, 494; *Stone v. Mississippi*, 101 U. S. 814,

817; *Butchers' Union* v. *Crescent City Co.*, 111 U. S. 748; *Slaughter House Cases*, 16 Wall. 36, 62; *Boyd* v. *Alabama*, 94 U. S. 645; *Douglas* v. *Kentucky*, 168 U. S. 488; *Railway Co.* v. *People*, 201 U. S. 506; *Portland* v. *Cook*, 48 Oregon, 550, 555; *Portland* v. *Meyer*, 32 Oregon, 368, 371; *State* v. *Muller*, 48 Oregon, 252, 255; affirmed *Muller* v. *Oregon*, 208 U. S. 412; *St. Louis & S. F. Ry. Co.* v. *Mathews*, 165 U. S. 1; *Providence Bank* v. *Billings*, 4 Pet. 514; *Railroad Comm. Cases*, 116 U. S. 307, 325; *Vicksburg S. & P. R. Co.* v. *Dennis*, 116 U. S. 665; *Water Co.* v. *Freeport*, 180 U. S. 587, 611; *Stanislaus Co.* v. *San Joaquin Canal Co.*, 192 U. S. 201; *Metropolitan Street Ry. Co.* v. *New York*, 199 U. S. 1; *Water, Light & Gas Co.* v. *Hutchinson*, 207 U. S. 385; *Home Tel. & Tel. Co.* v. *Los Angeles*, 211 U. S. 273.

The ordinance prohibiting the use of steam locomotives on Fourth Street does not deny the plaintiff in error the equal protection of the laws, although it alone is named in the ordinance, where no other person or corporation has the right to run engines in that street, as is the case at bar. *Richmond F. & P. R. Co.* v. *Richmond*, 96 U. S. 521.

The appropriate regulation of the use of property is not "taking it," within the meaning of the constitutional prohibition against the deprivation of property without due process of law. *Richmond F. & P. R. Co.* v. *Richmond*, 96 U. S. 521; *Pittsburg, C. & St. L. R. Co.* v. *Hood*, 36 C. C. A. 428; 94 Fed. Rep. 624.

The ordinance complained of, prohibiting the use of steam locomotives on Fourth Street, does not impair any vested rights of the plaintiff in error under its charter. *Richmond F. & P. R. Co.* v. *Richmond*, 96 U. S. 521.

The charter of the City of Portland in force when the ordinance was passed contains a provision giving the council power to exercise all the police powers to the same extent as the State could exercise said power within said limits. Under this power the council has authority to

regulate the running of railroad cars within the city limits and to prohibit their propulsion by steam. *Richmond F. & P. R. Co.* v. *Richmond*, 96 U. S. 521; *Buffalo & N. F. R. Co.* v. *Buffalo*, 5 Hill (N. Y.), 209; Dillon on Mun. Corp. (5th ed.), § 65.

Municipal corporations are *prima facie* the sole judges respecting the necessity and reasonableness of their ordinances. McQuillin on Mun. Ord., 2d.ed., § 731, p. 1586; *Greensboro* v. *Ehrenreich*, 80 Alabama, 579; *Van Hook* v. *Selma*, 70 Alabama, 361; *Ex parte Delaney*, 43 California, 478; *Louisville* v. *Roupe*, 6 B. Mon. (Ky.) 591; *Spriggs* v. *Garrett Park*, 89 Maryland, 406; *Commonwealth* v. *Patch*, 97 Massachusetts, 221; *Lamar* v. *Weidman*, 57 Mo. App. 507; *Hannibal* v. *M. & K. Tel. Co.*, 31 Mo. App. 23; *Budd* v. *Camden*, 69 N. J. L. 193; *Union Oil Co.* v. *Portland*, 198 Fed. Rep. 441; *Dobbins* v. *Los Angeles*, 195 U. S. 223.

The legal presumption is in their favor, unless the contrary appears on their face or is established by proper evidence. McQuillan on Mun. Ord., 2d ed., § 731, p. 1587; *Union Oil Co.* v. *Portland*, 198 Fed. Rep. 441.

When a privilege or a franchise is granted containing the reserved power to alter, amend or repeal, whenever the public interest may require, no question as to the impairment of the obligation of the contract can arise when additional burdens are imposed. *Northern Pacific* v. *Duluth*, 208 U. S. 583; *Sioux City Street Ry. Co.* v. *Sioux City*, 138 U. S. 98; 1 Nellis on Street Railways, § 46.

A municipal corporation has no power to grant a franchise in perpetuity without express statutory authority from the legislature. *Joseph* v. *Water Co.*, 57 Oregon, 586; *Artesian Water Co.* v. *Boise City*, 123 Fed. Rep. 232; 186 Fed. Rep. 705; *Logansport Railway Co.* v. *City*, 114 Fed. Rep. 688; *Citizens' St. Ry.* v. *Detroit*, 171 U. S. 48; Nellis on Street Railways, § 46; 2 Elliott on Roads, § 1048; *Lake Rowland* v. *Baltimore*, 77 Maryland, 352; *Belleville* v.

Citizens' R. R. Co., 152 Illinois, 171; *McQuaid* v. *Portland Ry. Co.*, 18 Oregon, 237; *Water Co.* v. *Cedar Rapids*, 118 Iowa, 234; 28 Cyc. 655, 875; Cooley's Const. Lim., 6th ed., 251; *Brenham* v. *Water Co.*, 67 Texas, 542; *Illinois Trust Co.* v. *Arkansas City Water Co.*, 76 Fed. Rep. 196; *Birmingham St. Ry. Co.* v. *Birmingham*, 79 Alabama, 472; *Water Works Co.* v. *Huron* (S. D.), 12 Am. R. R. & Corp. Rep. 398; *Water Company* v. *Westminster*, 98 Maryland, 551.

A contract beyond the power of the city is void *ab initio*. *State* v. *Minnesota Ry. Co.*, 80 Minnesota, 108; *Flynn* v. *Little Falls Elec. Co.*, 74 Minnesota, 180.

The city was vested with the right and power at the time ordinance 599 was passed to designate the street upon which the railroad could locate its road, and this right carried with it the power to impose reasonable conditions to such grant or permission which, when accepted by the grantee, became binding on it. *Pittsburg &c. Ry. Co.* v. *Hood*, 94 Fed. Rep. 618; *Southern Bell Tel. Co.* v. *Mobile*, 162 Fed. Rep. 523; *Mercantile Trust Co.* v. *Collins Park & B. R. Co.*, 101 Fed. Rep. 347; *Pacific Ry. Co.* v. *Leavenworth*, Fed. Cas. No. 10649; *Michigan Tel. Co.* v. *City*, 93 Fed. Rep. 11; *Pittsburg, C. & St. L. Ry. Co.* v. *Hood*, 94 Fed. Rep. 618.

Prohibition of steam power, under Ordinance No. 16491, does not prevent employment of electricity as a motive power. Booth on St. Railways, § 68, 2d ed.

The ordinance does not in any manner constitute an interference with interstate commerce. *Smith* v. *Alabama*, 121 U. S. 465.

Municipal corporations are *prima facie* the sole judges respecting the necessity and reasonableness of their ordinances, subject to the supervision of the courts. 2 McQuillan on Ordinances, 2d. ed, §§ 731, 732; *Union Oil Co.* v. *Portland*, 198 Fed. Rep. 441; *Holden* v. *Hardy*, 169 U. S. 366; *Dobbins* v. *Los Angeles*, 195 U. S. 223.

Any doubt or ambiguity in the ordinances must be resolved against appellant. 19 Cyc. 1459; *O. R. & N. Co.* v. *Ore. Ry. Co.*, 130 U. S. 1, 26; *Mayor* v. *Farmers' L. & T. Co.*, 143 Fed. Rep. 67, 71; *City* v. *Helena W. Wks.*, 122 Fed. Rep. 1, 14; *Oregon* v. *Pac. Gen. Elec. Co.*, 52 Oregon, 343; *Joseph* v. *Water Co.*, 57 Oregon, 586; *Water Co.* v. *Freeport*, 180 U. S. 587; *Burns* v. *Multnomah Ry. Co.*, 15 Fed. Rep. 177.

A right granted in the nature of a franchise, to be exercised for a public purpose, cannot be assigned or leased without legislative authority. *Oregon* v. *P. G. E. Co.*, 52 Oregon, 521; *Oregon Ry. Co.* v. *Oregonian Ry. Co.*, 130 U. S. 1.

MR. JUSTICE LAMAR delivered the opinion of the court.

The bill alleged that by virtue of the laws of the State and its charter the City of Portland passed Ordinance 599 permitting cars to be run along Fourth Street. That ordinance reserved the right "to make and alter regulations" and to "prohibit the running of locomotives." And as the court held that this reserve power authorized the city to prohibit the use of steam, the appellant,—though originally contending that Ordinance 599 was valid and constituted a contract which could not be impaired—now insists that under the law of force in 1869 the city could only "designate" the street on which tracks could be located and could not, by reservation, give itself power to prohibit the use of steam or the hauling of freight cars, nor could it provide for municipal forfeiture of a state franchise.

1. Under the Oregon Code (§§ 5077, 5078) the power to designate the street on which railroad tracks could be located was equivalent to the power to consent to the use of that street. The city was not limited to merely naming the thoroughfare or giving or refusing its consent. But—

provided they did not defeat the state franchise—could fix terms and reserve powers beyond those otherwise possessed by it as a municipality. The specific conditions and general powers reserved in § 3 of Ordinance 599 were not inconsistent with the grant from the State, and when, with such reservation, it was accepted by the company, it became contractual as well as legislative. The railroad could not rely on it for the purpose of laying the tracks and then deny the validity of such conditions. The Ordinance was proposed and accepted as an entire contract and, as such, was binding on the railroad as well as on the city. The power therein reserved "to make regulations" coupled with the right "to prohibit the running of locomotives at such time and in such manner as the city might deem necessary," authorized the city to prohibit the use of steam locomotives. This did not defeat the grant, inasmuch as it was permissible and practicable to use electricity, gasoline or other motive power free from noise and vibration—increased here above the ordinary when steam was used on a grade said to be one of the steepest, if not the steepest, in the State. The case is like *Richmond, F. & P. R. Co.* v. *Richmond*, 96 U. S. 521, where, under a somewhat similar ordinance, it was held that the city might provide that no car or engine could be drawn or propelled by steam along certain parts of the highway.

2. The appellant insists, however, that even if the city can regulate the motive power, it cannot prohibit the hauling of freight cars, and that the invalidity of this provision and that forfeiting the franchise renders the whole Ordinance 16491 void. In reply it is contended that even if there were no other route than Fourth Street by which to reach the terminals, it might be necessary for the railroad to establish a freight depot in another part of the city and make transfers by other vehicles, rather than to continue to haul freight cars through Fourth Street;

but that, in any event, the "entire ordinance would not be void if that portion relating to freight trains were found to be invalid."

The provisions relating to motive power, prohibiting the hauling of freight cars and declaring a forfeiture for a violation of the ordinance are so far separable that they do not necessarily stand or fall together and, therefore, the regulation against the use of steam can be enforced without regard to the validity of the prohibition against hauling freight cars. *Laclede Gas Light Co.* v. *Murphy*, 170 U. S. 78, 99.

3. Even if the city could have contracted for the right to revoke the State's franchise, the council did not attempt to reserve a power to repeal but only that it might make and alter regulations, and Ordinance 16491, whether treated as an exercise of the general police or special reserve power, recognized that the carrier might use electricity to haul passenger cars. There is nothing in that ordinance or in this record which indicates that there is any difference in result in the operation of the two classes of cars, or that the company has less right to haul one than the other. The lessee, and its assignors, as common carriers were charged with the duty of operating both, and Ordinance 599 in permitting a railway track to be laid in Fourth Street expressly authorized cars to be run thereon. Manifestly that gave the right to the company to transport freight as well as passengers. But if the city can prohibit the company from operating one set of cars it can prevent the use of the other, and under the power to regulate it could thus defeat the franchise granted by the State of Oregon and impair the contract under which the tracks were located and on the faith of which the terminals were constructed.

But while the power to regulate does not authorize the city to prohibit the use of the tracks in hauling freight cars, it may legislate in the light of facts and conditions

which would make restrictions reasonable and valid regulations. The extent of the power of the city and the rights of the company, however, ought not to be finally adjudicated on this record. For while the ordinance was attacked as a whole and there was some testimony that it would be possible to reach the terminals over other railways and by means of a Belt Line then being constructed for handling through freight, but not finished, yet the evidence was directed to the injurious consequences resulting from the use of steam and not from hauling cars. The bill was filed primarily to enjoin the city from prosecuting the company for running a steam locomotive. In sustaining the ordinance as a whole the court called attention to the fact that the street was quite steep throughout the business district, and the noise, vibration, cinders and soot from the moving steam locomotive and train seriously interfered with the transaction of business and were a source of danger and inconvenience to the public. But nothing appears to show that the noise or danger would be different in character or result from that caused by the running of other electric cars or that there was any reason why freight cars should be prohibited when passenger cars were permitted to be run. The city has the undoubted right to make regulations as to cars used in the transportation of local freight to and from the terminal. If, as claimed, the Belt Line, when completed, will afford convenient and accessible means of handling through cars without the necessity of going through Fourth Street, that fact may be given the weight to which it is entitled when regulations are made. But those issues were not clearly raised nor specifically ruled on by the lower court, and the city has neither attempted to prosecute for hauling freight cars nor attempted to enforce a forfeiture. These questions ought not to be determined here until such issues have been more definitely considered by the court of original jurisdiction. Without

prejudice to the right of either when such questions arise, the refusal to enjoin the prosecution for running a steam locomotive and the order entering a decree dismissing the bill must be

Affirmed.

MR. JUSTICE HUGHES and MR. JUSTICE PITNEY concur in the result.

VAN IDERSTINE, TRUSTEE IN BANKRUPTCY OF FELLERMAN, *v.* NATIONAL DISCOUNT COMPANY.

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

No. 136. Argued January 22, 23, 1913.—Decided February 24, 1913.

A general verdict in an equity case to declare a payment to be a fraudulent preference in favor of the trustee, which was only advisory, and which was practically demanded by the instructions of the court, cannot be treated as a finding of intent by the bankrupt to defraud, of which intent defendant had notice.

There is a difference between intent to defraud and intent to prefer—the former is *malum per se* and the latter *malum prohibitum* and only to the extent forbidden.

A *bona fide* transfer of securities to secure a loan made to one who immediately thereafter becomes a bankrupt is not an illegal preference where the person making the loan has no knowledge that the borrower intends to defraud any of his creditors, even though he may know that the whole or part of the money loaned is to be used to pay some of his debts.

Where error is assigned in the Circuit Court of Appeals, not only on refusal of the trial court to set aside the verdict against, but also for failure to enter a verdict in favor of, defendant, the Circuit Court of Appeals, if it finds facts justifying such action, may reverse and order the complaint dismissed.

174 Fed. Rep. 518, affirmed.

THE facts, which involve the determination of whether a payment by a bankrupt constituted an illegal preference, are stated in the opinion.

Mr. Abram I. Elkus, with whom *Mr. Garrard Glenn* was on the brief, for appellant:

At the time of the transfers the bankrupts were insolvent, and knew it.

The bankrupts' dealings with the appellee were part of a scheme by the bankrupts to convert their slow assets into cash, with part of the amount received to preferred favored creditors, and to appropriate the balance to their own use, to the exclusion of their remaining creditors.

Evidence concerning contemporaneous transactions is clearly admissible to show fraudulent intent of a bankrupt. *Benedick* v. *Gill*, 2 McCrary, C. C. Rep. 486; *Fraser* v. *Levy*, 6 H. & N. 15; *Delaware* v. *Ensign*, 21 Barb. 85.

The destruction of a bankrupt's books and records is likewise a strong badge of fraud. *Benedick* v. *Gill*, *supra*.

The appellee was not a transferee in good faith. To avoid a sale actual agreement or conspiracy to defraud creditors does not have to be shown. It is sufficient if facts and circumstances are such as fairly to induce the belief of fraudulent purpose; or, having good reason to suspect such fraudulent purpose, no inquiry is made. *Singer* v. *Jacobs*, 11 Fed. Rep. 559; *In re Pease*, 129 Fed. Rep. 446; *Clements* v. *Moore*, 6 Wall. 299; *Dokken* v. *Page*, 147 Fed. Rep. 438; *Kempner* v. *Churchill*, 8 Wall. 362; *Hyde* v. *Sontag*, 1 Sawy. 249; Fed. Cas. No. 6974; *Wright* v. *Sampter*, 152 Fed. Rep. 196; *Walbrun* v. *Babbitt*, 16 Wall. 577, 582; *Bartles* v. *Gibson*, 17 Fed. Rep. 293, 297; *Metcalf* v. *Moses*, 161 N. Y. 587.

A conveyance may be fraudulent as against creditors even though it is made for an actual consideration or loan. Statute 13 Elizabeth, c. 5; Williams on Bankruptcy, 8th London ed., p. 19; 2 Rich. II, c. 3; 50 Edw. III, c. 6; 3

Henry VII, c. 4; *Cadogan* v. *Kennett*, 2 Cowp. 432; *Graham* v. *Furber*, 14 C. B. 410; *Coder* v. *Arts*, 213 U. S. 223.

In determining whether the conveyance is fraudulent the chief factor is the intended disposition of the consideration. *Coder* v. *Arts*, *supra*.

As part of the money the bankrupts received from the appellee they applied to their own uses to the exclusion of their creditors, the decree of the Circuit Court of Appeals is clearly erroneous to that extent.

Though the bankrupts used $3,000 of the funds received from the appellee to prefer a favored creditor, the transaction is none the less fraudulent. *Coder* v. *Arts*, *supra*; *Sergeant* v. *Blake*, 160 Fed. Rep. 57, 61; *Ex parte Stubbins*, 17 Ch. Div. 58. *In re Maher*, 144 Fed. Rep. 503; *In re Bloch*, 142 Fed. Rep. 674; *Githens* v. *Schiffler*, 112 Fed. Rep. 505, distinguished. See also *New's Trustee* v. *Hunting*, 1 Q. B. 607; 2 Q. B. 19; *In re Lake*, 1 K. B. 710; *In re Blackpool Motor Car Co., Ltd.*, 1 Ch. 77; *Ex parte Taylor*, 18 Q. B. D. 295; *Ex parte Luck*, 49 L. T. 810; *McNaboe* v. *Columbian Co.*, 153 Fed. Rep. 967; *Clarke* v. *Rogers*, 183 Fed. Rep. 518; Hunt on Fraudulent Conveyances, 2d London ed., 1897, p. 165; *Roberts* v. *Johnson*, 151 Fed. Rep. 567; *In re Pease*, 129 Fed. Rep. 446; *In re Berrman*, 112 Fed. Rep. 663; *Ex parte Mendell*, 1 Low. 506; *Crafts* v. *Belden*, 99 Massachusetts, 535; *In re McLam*, 97 Fed. Rep. 922; *Natl. Bank of Newport* v. *Natl. Herkimer Co. Bank*, 225 U. S. 178.

The Circuit Court of Appeals erred in refusing to grant a new trial, instead of dismissing the bill.

The appellate court had the power to grant a new trial. *Edwin* v. *Thomas*, 2 Vern. 75; *Stace* v. *Mabot*, 2 Vesey Sr. 553; *Lord Faulconberg* v. *Pierce*, Amb. 210; *Cleeve* v. *Gascoigne*, Amb. 323; *East India Co.* v. *Bazett*, 1 Jac. 91; *Watt* v. *Starke*, 101 U. S. 247.

A new trial should have been granted. *Allen* v. *Blunt*, 3 Story, 742; *Clyde* v. *Richmond & Danville R. R.*, 72 Fed.

Rep. 121; *Cohen* v. *United States*, 157 Fed. Rep. 651, 655; 207 U. S. 596; *McLaughlin* v. *Potomac Bank*, 7 How. 220; *Eltho* v. *Lear*, 7 Pet. 130; *Gas Co.* v. *Peoria*, 200 U. S. 48, 54; *Barber* v. *Coit*, 118 Fed. Rep. 272; *Ill. Cent. R. R.* v. *Illinois*, 146 U. S. 387; *Stand. Comp. Scale Co.* v. *Computing Scale Co.*, 145 Fed. Rep. 627; *Chi. R. R.* v. *Tompkins*, 176 U. S. 167.

Mr. Chester H. Fuller, with whom *Mr. William J. Wallace* was on the brief, for appellee:

The court can in an equity case, at its discretion, submit the facts to the consideration of the jury; but when this is done the verdict is merely advisory, and it is the duty of the court to give an independent judgment upon its own consideration of the testimony. *Oilwell Supply Co.* v. *Hall*, 128 Fed. Rep. 875; *Johnson* v. *Harmon*, 94 U. S. 371; *Watt* v. *Stark*, 101 U. S. 247; *Basey* v. *Gallagher*, 20 Wall. 670.

There was no cause of action proved and the direction by the Circuit Court of Appeals to dismiss the bill of complaint was correct.

Neither under the Bankruptcy Act nor the laws of the State of New York, in any view that might be taken of the evidence, was any cause of action established against this defendant.

Payment by a failing debtor of a legitimate debt, even though he thereby intends to create a preference, is not a fraud under the Bankruptcy Act and does not come within the provisions of § 67*e* or § 70*e* of the Bankruptcy Act. Section 67*e* applies only to transfers which are fraudulent at common law and does not apply to preferential transfers. *In re Bloch*, 142 Fed. Rep. 674, 676, 677; *Githens* v. *Schiffler*, 112 Fed. Rep. 505; *Coder* v. *Arts*, 152 Fed. Rep. 943; *In re Maher*, 144 Fed. Rep. 503, 509; *Tompkins* v. *Hunter*, 149 N. Y. 117; *Delaney* v. *Valentine*, 154 N. Y. 692, 700; *Shotwell* v. *Dixon*, 163 N. Y. 43; *Dodge*

v. *McKechnie*, 156 N. Y. 514, 520; *Ex parte Stubbins, Re Wilkinson*, 17 Ch. Div. 58, 68.

There was no evidence of want of good faith on the part of defendant or to justify a finding that the defendant knew or had reason to believe at the time it made loans to the bankrupt that he was insolvent.

It makes no difference whether or not a man has present obligations which he cannot meet, so long as the actual value of his property is in excess of his liabilities. *In re Hines*, 144 Fed. Rep. 142; *In re Andrews, Hardy* v. *Gray*, 144 Fed. Rep. 922.

In reply to the statements in appellant's brief, complainant's evidence showed that all of this money was used to pay creditors.

As to what appellant calls the additional badges of fraud, they did not exist in fact and the nature and methods of defendant's business afford not the slightest evidence of any bad faith.

Whether or not the use of the borrowed money to pay preferred debts was a fraudulent act so as to render the assignment of the accounts subject to attack under § 67*e* of the Bankruptcy Act, the view taken by the Circuit Court of Appeals was correct and the authorities cited by the appellant do not support his claim that there was any error in that position. *In re Beerman*, 112 Fed. Rep. 663; *Roberts* v. *Johnson*, 151 Fed. Rep. 567; *In re Pease*, 129 Fed. Rep. 448, distinguished.

MR. JUSTICE LAMAR delivered the opinion of the court.

Van Iderstine, Trustee of Fellerman & Son, brought suit in the United States District Court for the Southern District of New York to set aside a transfer of accounts made to the National Discount Company as security for a loan, alleging that it was a fraudulent conveyance, and that the lending company was charged with notice of Feller-

man's intent to defraud. It is unnecessary to state the facts further than to say that Fellerman and his firm were insolvent, though rated at $50,000 to $75,000 in the Commercial Reports. Having been recommended by another merchant, he applied to the Discount Company to learn the terms on which he could borrow with book accounts as security. He was informed as to the method of doing business and the terms on which it would lend money, which, besides interest, included its customary charge of 5% of the face of the accounts for services in connection with correspondence, collections and the like. He returned in a few days with a number of accounts and applied for a loan of $3,000, stating that he was pressed for funds and needed the money for the purpose of paying a note which matured that day. The accounts were transferred, the money was advanced and Fellerman used it to take up a note, in bank, which had been endorsed by his son-in-law. Two or three days afterwards another loan of $1,000 on similar security was made, and the parties are at issue as to whether the money was used for paying a debt or went into the general funds of the firm and was checked out for other purposes. The day following the last loan a petition in bankruptcy was filed, and after adjudication a Trustee was elected. He then brought this suit to have the transfer set aside and to compel the Discount Company to account for the collections made by it.

The District Judge called in a jury to pass upon the disputed fact. After the introduction of the evidence, which was very conflicting, the court charged the law relating to fraudulent conveyances and the necessity of showing that there had been an intent on the part of Fellerman to defraud, and that the Discount Company had knowledge of such purpose. He, however, refused to charge that it was not fraudulent for the company to advance money to be used by Fellerman in paying legitimate debts,

and instead instructed them that a preference was as much within the terms of the act as though Fellerman had concealed the money from his creditors. The jury made no special finding, but rendered a general verdict in favor of the Trustee. It was approved by the District Judge, who refused to grant a new trial and entered a judgment against the company.

The Circuit Court of Appeals (174 Fed. Rep. 518) made a statement of fact in which it found that it was doubtful if Fellerman intended to defraud; but if he did the Discount Company did not know thereof and was not charged with knowledge by any of the circumstances surrounding the transaction, or by the fact that Fellerman borrowed on hard terms upon the security of book accounts. It therefore reversed the judgment of the District Court and directed that the complaint be dismissed. The Trustee then brought the case here by appeal.

The general verdict of the jury cannot be treated as a finding that there was an intent to defraud of which the Discount Company had knowledge. For whatever view they may have taken on that issue, the verdict in favor of the Trustees was practically demanded by the instructions given. For the District Court charged in effect that the transfer was to be treated as a fraudulent conveyance if the Discount Company made the loan with the knowledge that the money was to be used in paying an existing debt. The finding can therefore be treated as the jury's observance of the instructions, since it was admitted that Fellerman in applying for the loan stated that he needed the money for the purpose of paying a debt due that day in bank. In the absence of any other special finding in the case, and bearing in mind that the verdict of the jury was only advisory, the case being one in equity, we agree with the Circuit Court of Appeals, which held that the Discount Company had no knowledge of any intent on the part of Fellerman to defraud. If so its de-

cree directing the complaint to be dismissed must be affirmed, unless, as matter of law, the transfer is to be treated as a fraudulent conveyance in view of the fact that the company knew that the money was to be used in paying an existing debt.

Conveyances may be fraudulent because the debtor intends to put the property and its proceeds beyond the reach of his creditors; or because he intends to hinder and delay them as a class; or by perferring one who is favored above the others. There is no necessary connection between the intent to defraud and that to prefer, but inasmuch as one of the common incidents of a fraudulent conveyance is the purpose on the part of the grantor to apply the proceeds in such manner as to prefer his family or business connections, the existence of such intent to prefer is an important matter to be considered in determining whether there was also one to defraud. But two purposes are not of the same quality, either in conscience or in law, and one may exist without the other. The statute recognizes the difference between the intent to defraud and the intent to prefer, and also the difference between a fraudulent and a preferential conveyance. One is inherently and always vicious; the other innocent and valid, except when made in violation of the express provisions of a statute. One is *malum per se* and the other *malum prohibitum*,—and then only to the extent that it is forbidden. A fraudulent conveyance is void regardless of its date; a preference is valid unless made within the prohibited period. It is therefore not in itself unlawful to prefer nor fraudulent for one though insolvent to borrow in order to use the money in making a preference. So that even if the Discount Company knew that Fellerman borrowed the money in order to pay off an honest debt, the transfer would not have been subject to attack by the Trustee, except for the fact that a petition in bankruptcy was filed within four months thereafter. But the institution of

such proceedings did not relate back and convert a lawful transfer into a fraudulent conveyance.

Cases, under the present statute, like *In re Beerman*, 112 Fed. Rep. 663, relied on by the trustee, relate to transactions in which the mortgagee was practically the representative of the preferred creditor and where, consequently, the conveyence was as much subject to attack as though it had been made directly to him. But here the Discount Company was not a creditor of Fellerman & Son and had no relation with the persons to whom the money was paid. *National Bank of Newport* v. *National Bank of Herkimer*, 225 U. S. 178. The transfer, therefore, was not a preference to the Discount Company and could not be set aside without proof that it knew that Fellerman not only intended to pay some of his creditors but to defraud others. The difference between the two classes of cases is authoritatively recognized by *Coder* v. *Arts*, 213 U. S. 223, where it was said that "an attempt to prefer is not to be confounded with an intent to defraud, nor a preferential transfer with a fraudulent one."

The Circuit Court of Appeals applied this principle in the present case. Having found that the Discount Company had no knowledge of any intent to defraud, and the evidence supporting that finding, the conveyance cannot be set aside whether the money was used to pay an existing debt or, as claimed, a part was deposited with the general funds of the firm.

It is contended that even if the finding of the Circuit Court of Appeals was correct it should not have ordered the complaint to be dismissed, since the company itself only asked for a new trial. But error was assigned not only on the refusal to set aside the verdict but on the failure to enter a decree in favor of the Discount Company. The facts found by the Circuit Court of Appeals warranted a dismissal of the complaint, and the decree is

Affirmed.

ROSALY, WIDOW OF RABAINNE, *v.* GRAHAM Y FRAZER.

APPEAL FROM THE SUPREME COURT OF PORTO RICO.

No. 64. Submitted December 5, 1912.—Decided February 24, 1913.

The jurisdiction of this court on appeals from the Supreme Court of Porto Rico is confined to determining whether the facts found by that court support the judgment, and whether there was material and prejudicial error in the admission or rejection of evidence manifested by exceptions duly certified.

In the absence of findings on a special verdict there is nothing for this court to review except rulings on evidence, and in absence of error in those rulings the judgment must be affirmed.

When the judgment record itself discloses that the opinion of one of the judges deciding the case was made part of the judgment, this court may accept the statement of fact therein contained in lieu of more formal findings.

A finding by the appellate court that the fundamental fact of plaintiff's interest in the property sued for has not been proven is equivalent to a negative finding upon a fact essential to maintain the suit and supports a judgment of dismissal by the trial court.

16 Porto Rico 156, affirmed.

THE facts, which involve the jurisdiction of this court of appeals from the Supreme Court of Porto Rico and whether the facts found support the judgment in a suit to determine title to real estate in Porto Rico, are stated in the opinion.

Mr. Jacinto Texidor for appellant.

Mr. Manuel Rodriguez Serra and *Mr. Charles Hartzell* for appellee.

MR. JUSTICE PITNEY delivered the opinion of the court.

This action was brought in the District Court for the Judicial District of Ponce by the appellant against the respondent, for the purpose of establishing her ownership of an undivided interest in certain real property in Ponce

of which the defendant was in possession, and for setting aside the registration of possession and of ownership of the same property in the name of the defendant, alleged to have been fraudulently procured by him and to stand as a bar preventing the registration of the plaintiff's alleged undivided interest.

The action was fully tried before the District Court without a jury upon the issues raised by the plaintiff's amended complaint and the defendant's answer thereto, and the following decision was rendered:

"PONCE, P. R., *April 26th*, 1909.

"The question involved in this suit is to determine the rights of Doña Marcelina Rosaly in a property which she, as a member of a mercantile partnership, gave in lease to the defendant in the year 1880. The other members of said partnership were relatives of the plaintiff herein. It seems that in the year 1886 and following years, the defendant bought the respective interests of the several partners, and it seems, also, that he did not buy the interest belonging to Doña Marcelina, for the reason that she had lost her rights to an interest in the property belonging to said mercantile partnership. More properly speaking, the defendant acquired all the interests belonging to all such persons as he believed to have an interest in the property referred to. Twenty-three years have elapsed since the year 1886. The plaintiff lacks absolutely any means to show what was her interest in the properties of the partnership, and whether or not she had any interest whatever in the year 1886. There is absolute lack of evidence on the part of the plaintiff. This court does not look at old claims with favor, specially when the plaintiff's delay in bringing the action is not explained. Counsel for both parties have entered into a lengthy argument upon the construction of the Mortgage Law and other points. But the court does not make any decision with regard to

such questions at the present time. The most important matter is the absolute want of evidence on which to base a judgment in favor of the plaintiff. Therefore the action is dismissed with costs against the plaintiff.

"MARTIN E. GILL,
"*District Judge.*"

Judgment having been rendered accordingly, the plaintiff appealed to the Supreme Court of Porto Rico. Thereafter her attorneys filed in the District Court what purports to be a full history of the proceedings at the trial. It is entitled "Statement of Facts and Bill of Exceptions," and is certified by Hon. Charles E. Foote (who succeeded Judge Gill as judge of the District Court), to contain a "true and accurate statement of all the evidence introduced, exceptions taken and proceedings had during the trial of this cause in the District Court of Ponce."

The Supreme Court of Porto Rico affirmed the judgment, Mr. Justice del Toro delivering the opinion (16 Porto Rico, 156), in which, after stating the issues raised by the pleadings, he reviews the evidence and states the conclusions of the court thereon as follows:

"The first question to be considered and decided is the following: Did the plaintiff prove her title? She alleged, as shown by the transcript made above, that she was, and has always been, the owner, in full ownership, of an undivided interest, equivalent to the sum of $6,253.67, in the total value of $27,443.67, which value was given to the estate left at the death of Don Mateo and Don Luis Rabainne in the partition proceedings of the said estate. The defendant denied said allegation. And the evidence shows the following:

"It is true that from the testamentary proceedings of Don Mateo and Don Luis Rabainne, executed before a Notary Public and recorded in a Notarial protocol on the 28th of January, 1870, it appears that the said Messrs.

Rabainne died, respectively, on the 23rd of April, 1868, and on the 8th of April, 1869; that the former left as heirs his widow, Doña Bernardina Franco, and his children Luis, represented by his daughter Luisa Rabainne y Rosaly; Ramona, represented by her children Jacobo, Ofelia and Herminia Lopez y Rabainne; Josefa; and Hortensia; and the latter, his said daughter Luisa, and his widow, the plaintiff Marcelina Rosaly; that the properties left at their deaths were constituted by whatever interest might belong to them in the partnership M. Rabainne é Hijos; that such partnership was liquidated by a deed executed on the 19th of January, 1870, by the heirs and representatives of both persons deceased; that among the properties belonging to said partnership there were the lot and building involved in this suit, which were valued at $9,108.00, and steam-engines, etc., valued at $18,335.67, both items aggregating $27,443.67, of which $18,000 belonged to the estate of Don Mateo, and $9,443.67 to that of Don Luis; and that the inheritance left by Don Luis was adjudicated as follows: to his widow Doña Marcelina Rosaly, the plaintiff, $6,253.67, in partial payment of the properties brought by her into her marriage, which amounted to $19,030.39, and of one half of the conjugal property belonging to her; and to his daughter Luisa $3,190.00.

"But the evidence shows that, although the above is true, the plaintiff contributed all the capital adjudicated to her, to the partnership which under the firm M. Rabainne é Hijos was constituted by her together with Doña Bernardina Franco, widow of Rabainne, and Don Jobo Lopez, by a public deed executed on the 8th of February, 1870. Such partnership which was to be engaged in the same line of business followed by the extinguished partnership of M. Rabainne é Hijos, constituted by Don Mateo and Don Luis, was extended by public deeds executed on the 22nd of April, 1873, and the 7th of July, 1875, and no

evidence has been introduced tending to show that the same has been duly and finally liquidated, there being several circumstances showing that said partnership continued, although, perhaps in an irregular manner, for several years longer.

"The plaintiff claims as owner of a certain co-ownership, and the evidence shows that she contributed said co-ownership to a mercantile partnership, to the fate of which said co-ownership was subject from that time. And the evidence shows further that a balance of said partnership having been made on the 30th of November, 1875, it appeared that the contribution of the plaintiff was reduced to $2,478.52, such as is shown by the deed containing the partition proceedings of the properties left at the death of Doña Bernardina Franco, widow of Rabainne, executed before a Notary Public, on the 6th of May, 1876, by the plaintiff herself and other persons, and that there are circumstances showing that years afterwards the plaintiff was debtor of the partnership, as shown apparently by the books of the latter.

"Such being the case, it follows that the first fact, which is the fundamental fact of the complaint filed in this case, has not been proven, and, consequently, that the judgment rendered by the District Court, is just and proper."

The numerous exceptions to the rulings of the trial court upon matters of evidence were then reviewed, with the result of determining that there was no legal error therein.

The resulting judgment was expressed as follows:

"San Juan, Porto Rico, March 11th, 1910.

"This Court has carefully examined the transcript of record filed in this case and considered the briefs and arguments of counsel for both sides, and for the reasons given in the Opinion filed herewith, the Court decides to dismiss the appeal and to affirm the judgment appealed

from, rendered by the District Court of Ponce on the 26th of April, 1909."

An appeal having been taken to this court, the following order was made:

"SAN JUAN, PORTO RICO, *19th of May*, 1910.

"As the Statement of Facts and Bill of Exceptions which was approved by the Hon. Charles E. Foote, District Judge for the Judicial District of Ponce, on the 15th of July, 1909, and which forms a part of the record on the appeal taken in the above entitled case, was the Statement of Facts and Bill of Exceptions considered and acted upon by this Court in the discussion and decision of said appeal, it is hereby ordered that the same be used as Statement of Facts and Bill of Exceptions, in this case, in the appeal taken by the plaintiff herein to the Supreme Court of the United States from the Judgment rendered by the Supreme Court of Porto Rico.

JOSÉ C. HERNANDEZ,

"*Chief Justice of the Supreme Court of Porto Rico.*"

The cause has been argued here very much at large, and as if it were the duty of this court to review the evidence and reach its own conclusions of fact therefrom. This is a misapprehension of the proper function of this court in the premises. At the time the appeal was taken and the record made up § 35 of the act of April 12, 1900, chap. 191, known as the Foraker Act, was in force (31 Stat. 77, 85, since superseded by § 244 of the Judicial Code of March 3, 1911, 36 Stat. 1087, 1157, c. 231); by which it was enacted "That writs of error and appeals from the final decisions of the Supreme Court of Porto Rico and the District Court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same

regulations and in the same cases as from the supreme courts of the Territories of the United States," etc. Writs of error and appeals from the Supreme Courts of the Territories were regulated by act of April 7, 1874, chap. 80, § 2; 18 Stat. 27, 28; by which it was provided— "That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court together with the transcript of the proceedings and judgment or decree."

Our jurisdiction, therefore, is confined to determining whether the facts found by the Supreme Court of Porto Rico support its judgment, and whether there was material and prejudicial error in the admission or rejection of evidence, manifested by exceptions duly certified. *Gonzales* v. *Buist*, 224 U. S. 126, 130; *Nielsen* v. *Steinfeld*, 224 U. S. 534, 538; *Eagle Mining Co.* v. *Hamilton*, 218 U. S. 513, 515; *Stringfellow* v. *Cain*, 99 U. S. 610, 613; *Neslin* v. *Wells, Fargo & Co.*, 104 U. S. 428, 429; *Haws* v. *Victoria Copper Mining Co.*, 160 U. S. 303, 313; *Harrison* v. *Perea*, 168 U. S. 311, 323; *Young* v. *Amy*, 171 U. S. 179, 183.

An examination of the "Statement of Facts and Bill of Exceptions" shows that it contains nothing that could by any stretch of construction be deemed a finding of facts in the nature of a special verdict. In the absence of such findings there is nothing for us to review except the rulings upon evidence, and, in the absence of error in those rulings the judgment must be affirmed. *Thompson* v. *Ferry*, 180 U. S. 484; *Gonzales* v. *Buist, supra; Eagle Mining Co.* v. *Hamilton, supra.*

But since the judgment record itself discloses that the opinion delivered by Mr. Justice del Toro was made a part of the judgment, we may, for present purposes,

accept the statement of facts contained in that opinion in lieu of more formal findings.

The essential facts as recited in the opinion may be summarized as follows. That prior to the year 1868, Don Mateo Rabainne and his son Don Luis Rabainne, as partners in the name of M. Rabainne é Hijos, were the owners of the property in question; that Don Mateo died April 23, 1868, and Don Luis died April 8, 1869; that the partnership was liquidated by deed executed January 29, 1870, by the heirs and representatives of the deceased partners; that in the liquidation a certain part of the interest of Don Luis was found to belong to his widow, the present plaintiff and appellant; that she, together with the widow of Don Mateo and with Don Jobo Lopez, son-in-law of the latter, entered into a new partnership to continue the former business under the firm name of M. Rabainne é Hijos, to which partnership the plaintiff contributed all her interest in the property in question; that the plaintiff's interest in the firm was subsequently reduced by withdrawals of capital, and finally extinguished, so that she became a debtor of the partnership. Therefore the Supreme Court held that the fundamental fact of the plaintiff's interest in the property at the time of her action against the defendant had not been proven. This is equivalent to a negative finding upon a fact essential to the maintenance of her suit, and it of course supports the judgment affirming the judgment of the District Court that dismissed the action.

There remains only the question whether prejudicial error was committed by the trial court respecting the admission or exclusion of evidence. There are numerous exceptions, with assignments of error based thereon. They have been examined, without finding substantial error in the rulings complained of. They do not merit detailed discussion here.

Judgment affirmed.

WILLIAM A. ENSIGN *v.* COMMONWEALTH OF PENNSYLVANIA.

CHARLES A. ENSIGN *v.* SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

Nos. 123, 124. Argued January 20, 1913.—Decided February 24, 1913.

The Fifth Amendment is not obligatory upon the States or their judicial establishments, and regulates the procedure of Federal courts only. *Twining* v. *New Jersey*, 211 U. S. 78.

A violation of defendant's rights under a provision in the state constitution which is identical to one in the Federal Constitution which is only obligatory on the Federal courts, does not infringe a Federal right.

The word "testimony" more properly refers to oral evidence than to documentary, and it is reasonable that a distinction should be made between the two.

The prohibition in § 9 of the Bankruptcy Act of 1898 against offering testimony given by the bankrupt in accordance with the provisions of that section as evidence in any criminal proceeding applies only to the testimony and not to the schedules referred to therein.

Rev. Stat., § 860, prohibiting the use of a pleading of a party or discovery of evidence by judicial proceeding against him in a criminal proceeding, while in force, was limited by its own terms to proceedings in the Federal courts and does not apply to one in the state court.

Evidence showing the results of an expert examination of the bankrupt's books is not "testimony" within the meaning of § 9 of the Bankruptcy Act of 1898.

Quære, and not necessary to determine in this case, whether the prohibition in § 9 of the Bankruptcy Act against using testimony of the bankrupt is not limited to criminal proceedings in the Federal courts and does not apply to such proceedings in the state courts.

228 Pa. St. 400, affirmed.

THE facts, which involve the question whether schedules filed by the bankrupt are, under the Fifth Amendment to

the Federal Constitution and the provisions of the Bankruptcy Act, admissible in a criminal trial of the bankrupt in the state court, are stated in the opinion.

Mr. John B. Brooke, with whom *Mr. Charles H. English* was on the brief, for plaintiff in error:

The statement made by the accountant, from the books of the bank, which had been turned over to the trustee in bankruptcy, was improperly admitted.

If a bankrupt obeys the Bankruptcy Law, he will file schedules and turn over his books and papers to the trustee and obey all other lawful orders of the referee. If he does not do these things as directed by the United States statute and general orders made by the United States Supreme Court for the government of bankrupts, he can be declared in contempt of court and imprisoned, and when the United States law compels an individual to file schedules and turn over his books and papers, the use of these schedules and these books against him in a criminal trial is a violation of his rights under the Constitution of the United States and the constitution of the State of Pennsylvania. Amendment V of the United States Constitution; *Matter of Fellerman*, 17 Am. Bankr. Reps. 785; *Jacobs* v. *United States Circuit Court of Appeals, First Circuit*, 161 Fed. Rep. 694; *United States* v. *Marsh Chambers*, 13 Am. Bankr. Reps. 708; *Boyd* v. *United States*, 116 U. S. 616, 752; *Johnson* v. *United States*, 163 Fed. Rep. 30; *Cohen* v. *United States*, 170 Fed. Rep. 715; *Burrell* v. *State of Montana*, 194 U. S. 572.

Mr. W. Pitt Gifford, with whom *Mr. J. Orin Wait* and *Mr. U. P. Rossiter* were on the brief, for defendant in error:

Generally speaking, and in the absence of statutory regulation on the subject, testimony and written statements, voluntarily given or made by a party or witness in

a judicial proceeding, are, as admissions and confessions, competent against him on the trial of any issue in a criminal case to which they are pertinent; and statements made by a party in a judicial inquiry are considered voluntary, if he might have objected to answering on the ground that it would incriminate him, and failed to do so. Wharton's Crim. Evidence, § 664; 1 Roscoe, Crim. Evidence, 8th ed., pp. 82, 245; 1 Greenleaf on Evidence § 225; *Williams* v. *Commonwealth*, 29 Pa. St. 102; *Hendrickson* v. *People*, 10 N. Y. 13; *Commonwealth* v. *Reynolds*, 122 Massachusetts, 454; *Vermont* v. *Duncan*, 4 L. R. A. (N. S.) 1144 n.; *People* v. *Wieger*, 100 California, 352; *People* v. *Arnold*, 40 Michigan, 710; *Abbott* v. *People*, 75 N. Y. 602; *Commonwealth* v. *Doughty*, 139 Pa. St. 383; *Commonwealth* v. *House*, 6 Pa. Super. 92; *Burrell* v. *Montana*, 194 U. S. 572.

A written statement of the defendant, when prepared deliberately and seriously, is not only admissible in evidence against him, but is of weight proportioned to its pertinency. Wharton's Crim. Evidence, § 643, 8th ed.; 1 Greenleaf, § 215, Lewis's ed.

That bankrupts situated as these plaintiffs in error were, might have refused to answer, on the ground of self-incrimination, has been expressly ruled. *Counselman* v. *Hitchcock*, 142 U. S. 547; *Re Nachman*, 8 Am. Bankr. Reps. 180; *In re Feldstein*, 4 Am. Bankr. Reps. 32; *In re Welsh*, 4 Am. Bankr. Reps. 693; *In re Henschell*, 7 Am. Bankr. Reps. 207; *In re Shera*, 7 Am. Bankr. Reps. 552; *In re Smith*, 7 Am. Bankr. Reps. 213; *In re Kanter*, 117 Fed. Rep. 356; *United States* v. *Goldstein*, 132 Fed. Rep. 789.

No distinction is to be found, in principle, between refusing to answer questions or give testimony as required by § 7*a* of the Bankruptcy Act, on the ground of self-incrimination, and refusing to file schedules or turn over books of accounts as required by the same section of the Bankruptcy Act on the ground of incrimination.

While upon an application to compel a bankrupt to produce his books and deliver them to his trustee, the plea of constitutional privilege must prevail, yet he should be required to bring the books and papers which he alleges contained incriminating evidence before either the court or the referee in bankruptcy, and if it appears that his plea is well founded, the court can make such order as will fully protect him from discovery of such evidence, and if possible enable the trustee to obtain such information as is necessary and indispensable in the settlement of the estate. *In re Hess*, 134 Fed. Rep. 109; *In re Hark*, 136 Fed. Rep. 986; *In re Harris*, 164 Fed. Rep. 292.

Having offered no such objection, clearly, therefore, their acts in filing their schedules and delivering the books of account were voluntary; they could not thereafter set up the protection of the Constitution, either Federal or state, which they had so unequivocally waived. *Tucker* v. *United States*, 151 U. S. 164.

If freely given once, the evidence may of course be used thereafter, for the privilege is purely personal and may be waived. See also *Tracy & Co.*, 23 Am. Bankr. Reps. 438. *Matter of Fellerman*, 17 Am. Bankr. Reps. 785, which involved no question of constitutional privilege, distinguished. See also *Glassner, Snyder & Co.*, 8 Am. Bankr. Reps. 184; *George P. Rosser*, 2 Am. Bankr. Reps. 746; *In re Kanter*, 117 Fed. Rep. 356.

The time to claim the privilege is when the testimony is offered or book or document is about to be inspected, and if not then claimed, it is waived. Remington on Bankruptcy, § 1561; *Tracy & Co.*, 23 Am. Bankr. Reps. 438; *Burrell* v. *Montana*, 194 U. S. 572; *Kerrch Bros.* v. *United States*, 171 Fed. Rep. 366; *United States* v. *Halstead*, 27 Am. Bankr. Reps. 302; *Matter of Tracy & Co.*, 23 Am. Bankr. Rep. 438; *Strait* v. *State*, 84 Minnesota, 384; *In re Harris*, 221 U. S. 274; *Adams* v. *New York*, 192 U. S. 585; *Re Nachman*, 8 Am. Bankr. Reps. 180.

Johnson v. *United States*, 20 Am. Bankr. Reps. 724; *United States* v. *Chambers*, 13 Am. Bankr. Reps. 708; *United States* v. *Cohen*, 170 Fed. Rep. 715; *Burrell* v. *Montana*, 194 U. S. 572; *Jacobs* v. *United States*, 161 Fed. Rep. 694; *Boyd* v. *United States*, 116 U. S. 616, distinguished.

With reference to the construction of § 7 of the Bankruptcy Act of 1898, cl. 8 provides for the filing of schedules; cl. 9 for the bankrupt's examination at the first creditor's meeting, or as the court may order. The proviso, but no testimony given by him shall be offered in evidence against him in any criminal proceeding, is a part of cl. 9, and clearly refers only to the bankrupt's examination. The schedules and books of account are not to be considered "testimony," under § 7*a*, cl. 9. "Testimony" is confined to oral evidence or the statements made by a witness under oath. Bouvier's Law Dict.; 28 Am. & Eng. Encycl. of Law.

No definition of the word "testimony" is broad enough to include pleadings or other papers filed in the case previous to the trial or hearing. *Johnson* v. *United States*, 20 Am. Bankr. Reps. 724.

Had Congress intended to include in said provision all information furnished by the bankrupt, it could easily have so stated, by providing that no testimony or information given by him shall be offered against him in evidence in any criminal proceeding.

MR. JUSTICE PITNEY delivered the opinion of the court.

There are two writs of error, but a single record. The plaintiffs in error were jointly indicted in the Court of Quarter Sessions of Erie County, Pennsylvania, under an act of May 9, 1889 (P. L. 1889, Act 172, p. 145), "Relating to the receiving of deposits by insolvent bankers, etc., defining the offense, and providing a punishment there-

for." It appears that they were engaged together in business as private bankers in the Borough of North East, Pennsylvania, for a long time prior to February 12, 1908; that on that day they received from the prosecuting witness a deposit of one thousand dollars; that on the fifteenth of February they closed their banking house, and on the seventeenth made an assignment for the benefit of their creditors; that they were shortly thereafter thrown into involuntary bankruptcy, and schedules were filed by them in the bankruptcy proceeding. The receipt of the deposit of February twelfth was made the basis of the indictment.

Upon the trial the Commonwealth offered in evidence, and the court admitted, against the objection of the defendants, the schedules filed by them in the bankruptcy proceeding, and the testimony of an expert accountant based upon an examination of their banking books, which they had turned over to the trustee. The trial court, and, on successive appeals, the Superior Court and the Supreme Court of Pennsylvania (40 Pa. Superior Ct. 157, 163; 228 Pa. St. 400), overruled the contentions of the plaintiffs in error that their rights under the Constitution and laws of the United States were infringed by the admission of the evidence referred to, and so they bring the case here.

Article V of Amendments to the Federal Constitution is invoked, which provides (*inter alia*)—"No person . . . shall be compelled in any criminal case to be a witness against himself." But, as has been often reiterated, this Amendment is not obligatory upon the governments of the several States or their judicial establishments, and regulates the procedure of the Federal courts only. *Barron* v. *Baltimore*, 7 Pet. 243; *Spies* v. *Illinois*, 123 U. S. 131, 166; *Brown* v. *New Jersey*, 175 U. S. 172; *Barrington* v. *Missouri*, 205 U. S. 483; *Twining* v. *New Jersey*, 211 U. S. 78, 93.

We are referred to a similar prohibition in Art. I, § 9, of

the constitution of Pennsylvania; but, even if the trial of the plaintiffs in error proceeded in disregard of this provision, no Federal right was thereby infringed.

The only debatable question is that which is based upon the provisions of § 7 of the Federal Bankruptcy Act of July 1, 1898 (chap. 541, § 7; 30 Stat. 544, 548), which reads as follows:

"Duties of Bankrupts:—a. The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; (2) comply with all lawful orders of the court; (3) examine the correctness of all proofs of claims filed against his estate; (4) execute and deliver such papers as shall be ordered by the court; (5) execute to his trustee transfers of all his property in foreign countries; (6) immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this Act, coming to his knowledge; (7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee; (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors

and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding: *Provided, however*, that he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence."

The reliance of the plaintiffs in error, of course, is upon that part of clause 9 of the section which declares—"but no testimony given by him shall be offered in evidence against him in any criminal proceeding." It is insisted that, in accordance with the spirit of the Fifth Amendment, this should be construed as applying to the schedule required to be prepared, sworn to and filed by the bankrupt under the provisions of the 8th clause. But as a matter of mere interpretation, we deem it clear that it is only the testimony given upon the examination of the bankrupt under clause 9 that is prohibited from being offered in evidence against him in a criminal proceeding. The schedule referred to in the 8th clause, and the oath of the bankrupt verifying it, are to be "filed in court," and, therefore, are of course to be in writing. The word "testimony" more properly refers to oral evidence. It was reasonable for Congress to make a distinction between the schedule, which may presumably be prepared at leisure and scrutinized by the bankrupt with care before he verifies it, and the testimony that he is to give when he submits to an examination at a meeting of creditors or at other times pursuant to the order of the court; a proceed-

ing more or less unfriendly and inquisitorial, as well as summary, and in which it may be presumed that even an honest bankrupt might, through confusion or want of caution, be betrayed into making admissions that he would not deliberately make. Full effect can be given to the clause "but no testimony given by him shall be offered in evidence against him in any criminal proceeding" by confining it to the testimony given under clause 9, to which the words in question are immediately subjoined. And we think that proper interpretation requires their effect to be thus limited.

We are referred to *Johnson* v. *United States*, 163 Fed. Rep. 30, and *Cohen* v. *United States*, 170 Fed. Rep. 715. But these were both prosecutions in the Federal courts on indictments for fraudulently concealing property belonging to the bankrupt's estate; and the decision in each case was rested upon Rev. Stat., § 860 (U. S. Comp. Stat., 1901, p. 661), which declares that "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture; *provided*, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid." This section (since repealed by act of May 7, 1910, c. 216; 36 Stat. 352), was in force at the time of the trial of plaintiffs in error; but by its own terms it is limited to criminal proceedings "in any court of the United States," and constitutes no limitation upon the procedure of the state courts.

For the reasons given, it seems to us clear that the plaintiffs in error were not entitled to have the bankruptcy schedules excluded from evidence, because those schedules

were not within the description of "testimony" in the clause quoted from § 7 of the Bankruptcy Act.

And for like reasons, the evidence showing the results of an expert examination of the books of the bankers was also admissible.

This conclusion renders it unnecessary for us to consider whether the prohibition with which we have dealt, that "no testimony given by him shall be offered in evidence against him in any criminal proceeding" is not limited to criminal proceedings in the Federal courts; and upon this question we express no opinion.

Judgments affirmed.

SOUTHERN PACIFIC COMPANY *v.* SCHUYLER.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 143. Argued January 23, 1913.—Decided February 24, 1913.

Whether the anti-pass provision of the Hepburn Act prohibits a carrier from giving free interstate transportation to employés of the Railway Mail Service when not on duty but traveling for their own benefit, is a Federal question.

One holding a government commission that entitles him to free interstate railway transportation while on duty and who while not on duty enters a train, relying on such commission and with the consent of the officials in charge of the train, and remains thereon with their consent, is not a trespasser even if in so doing he violates the anti-pass provision of the Hepburn law.

Whether the relation of carrier and passenger arises in the case of one traveling gratuitously in violation of the anti-pass provision of the Hepburn Act, in the absence of any Federal statute regulating the matter, is a question not of Federal, but of state, law.

Where the decision of the state court adverse to plaintiff in error proceeds upon two independent grounds, one of which does not involve a Federal question and is sufficient to support it, the writ of error will be dismissed or the judgment affirmed according to circumstances.

On writ of error to a state court, while this court does not ordinarily review findings of fact, if a Federal right has beeu denied as the result of a finding of fact which is without support in the evidence,

this court may examine the evidence to the extent necessary to give plaintiff in error the benefit of the Federal right asserted.

In this case the finding of the state court that a railway mail clerk while traveling on his own business was a gratuitous passenger was well founded on the evidence.

There is no presumption that a railway company gives free interstate transportation, and that is a fact that must be established by evidence.

The anti-pass provision of the Hepburn Act does not make an outlaw of one traveling interstate on a pass and so deprive him of the benefit of the local law that makes the carrier responsible for exercising due care.

Penalties are not to be enlarged by construction; and so *held* that one violating the Hepburn Act by accepting gratuitous passage is not deprived of protection due to other passengers under the local law as well as subject to the penalty specified in the act.

In Utah the rights of safe carriage on a common carrier are not derived from the contract of carriage but are based on the law of the State requiring the carrier to use due care for the safety of passengers.

37 Utah, 581, affirmed.

THE facts, which involve the liability of an interstate railway carrier for personal injuries sustained through its negligence by a railway mail service clerk traveling without payment of fare, and the construction of the anti-pass provisions of the Hepburn Act, are stated in the opinion.

Mr. Maxwell Evarts, with whom *Mr. P. L. Williams* and *Mr. E. M. Bagley* were on the brief, for plaintiff in error:

Railway mail service employés are prohibited by the anti-pass clause of the Interstate Commerce Act from using their official commissions to obtain free interstate rides when off duty or when not in the discharge of their public duties. *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467. Interstate Commerce Law, § 1, par. 4, 34 Stat., p. 584.

The Interstate Commerce Commission has ruled that employés in the mail service are not entitled to free transportation when not on duty. Sen. Doc. No. 226, p. 26,

1st sess., 60th Cong. Congress has impliedly sanctioned this interpretation of the act. See 35 Stat. 60; *United States* v. *Wells-Fargo Express Co.*, 161 Fed. Rep. 607; 36 Stat. 546; *N. H. R. R.* v. *Int. Com. Comm.*, 200 U. S. 361, 401; *United States* v. *Hermanos*, 209 U. S. 337.

It was the purpose of the Anti-Pass Act that all citizens should under the same circumstance be treated alike. *C. I. & L. R. Ry. Co.* v. *United States*, 219 U. S. 486; *N. H. R. R.* v. *Int. Com. Comm.*, 200 U. S. 361, 392. To have granted Schuyler, or for him to have used, free interstate transportation would constitute just such discrimination as the statute was designed to abolish.

Schuyler's commission was in fact really nothing more than the certificate or credentials issued by the Government certifying to his appointment and authority. See *Ill. Cent. Ry. Co.* v. *Dunnigan*, 95 Mississippi, 749, to effect that railroads are not compelled to grant free transportation to any of the excepted classes named in the act. Even if it had previously been accepted or regarded as entitling the holder to free rides when off duty, the commission became null and void for that purpose when the Hepburn Act went into effect, at least so far as free interstate traveling when off duty was concerned. *Little Rock Ry. Co.* v. *Dowell*, 142 S. W. Rep. 165; *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467.

It was beyond the power of the state court to read into the Hepburn Act an exception in favor of "gratuitous" passengers, thereby evading the effect of the law and attempting to enlarge the class to whom Congress had limited the right of free interstate transportation. *Am. Exp. Co.* v. *United States*, 212 U. S. 522.

The Hepburn Act is the paramount and sole existing law on the subject of free interstate transportation, whether it is called gratuitous or free. *Armour Packing Co.* v. *United States*, 209 U. S. 56, 82; *Fulgham* v. *Midland Valley R. Co.*, 167 Fed. Rep. 660, 662; *E. P. & N. E. Ry.*

Co. v. *Gutierrez*, 215 U. S. 87; *Cound* v. *A., T. & S. F. Ry. Co.*, 173 Fed. Rep. 527, 531; *United States* v. *Colorado & N. W. R. Co.*, 157 Fed. Rep. 321, 330.

There is no presumption that the railroad company violated the statute and granted Schuyler a free interstate ride; and there is no evidence in the record to support any such conclusion. *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261; *United States* v. *Williams*, 159 Fed. Rep. 310; *Union Pacific Railway Co.* v. *Nichols*, 8 Kansas, 505.

Schuyler induced his carriage on this interstate trip by fraud and misrepresentation. He was an unauthorized intruder on the train, engaged in the commission of a misdemeanor as defined in the Hepburn Act, and had no rights enforceable at law. *Fitzmaurice* v. *N. Y., N. H. & H. R. Co.*, 192 Massachusetts, 159.

One traveling on a free pass or a mileage ticket which had been issued to another by name and not transferable is barred by his fraudulent conduct from recovering for a personal injury, unless it was due to negligence so gross as to show a willful injury. *Tol., Wab. & West. Ry. Co.* v. *Beggs*, 85 Illinois, 80; *Way* v. *C., R. I. & P. R. Co.*, 64 Iowa, 48; *Condran* v. *Chi., Mil. & St. P. Ry. Co.*, 67 Fed. Rep. 522; *Tol., Wab. & West. R. Co.* v. *Brooks*, 81 Illinois, 245; *C., B. & Q. Ry. Co.* v. *Mehlsack*, 131 Illinois, 61; *Godfrey* v. *Ohio & Miss. Ry.*, 116 Indiana, 30; *McVeety* v. *St. P. & Minn. Ry.*, 45 Minnesota, 268; *McNeill* v. *Durham & Charlotte R. R.*, 31 Am. & Eng. Railroad Cas. (N. S.) 285; *Railroad Co.* v. *Michie*, 83 Illinois, 431; *Robertson* v. *Railway Co.*, 22 Barb. 91; *Prince* v. *Railroad Co.*, 64 Texas, 146; *Railway Co.* v. *Campbell*, 76 Texas, 175; *Way* v. *Railway Co.*, 74 Iowa, 463.

To the same effect see: *Harmon* v. *Jensen*, 176 Fed. Rep. 519; *Sessions* v. *So. Pac. Co.*, 159 California, 599; *Norfolk &c. Ry.* v. *Bondurant*, 107 Virginia, 515; *Duncan* v. *Maine Cent. R. Co.*, 113 Fed. Rep. 508; *Brown* v. *M., K.*

& T. Ry. Co., 64 Missouri, 536; *Moore* v. *Ohio River R. R. Co.*, 41 W. Va. 160.

Good faith on Schuyler's part does not affect this case. *Clement* v. *Dwight*, 121 N. Y. Supp. 788, 791; *Rudy* v. *Railway Company*, 8 Utah, 165.

Schuyler's right was in no way affected by any belief he may have entertained as to his right to ride on his ticket. *Crosby* v. *Buchanan*, 23 Wall. 420, 458; *Gardner* v. *N. H. & N. Co.*, 51 Connecticut, 143.

Inasmuch as Schuyler was denied by the Federal statute the right to a free ride on an interstate trip—of which law and denial he is presumed to have had knowledge—the conductor could not by mere acquiescence confer such a right on him. *Clark* v. *C. & N. W. R. Co.*, 165 Fed. Rep. 408; *Purple* v. *U. P. R. Co.*, 114 Fed. Rep. 123; *Condran* v. *Ry. Co.*, 67 Fed. Rep. 522; *Grahn* v. *International &c. R. Co.*, 100 Texas, 27; *McVeety* v. *St. Paul &c. R. Co.*, 45 Minnesota, 268.

Schuyler was not an accepted gratuitous passenger. No contract to permit him to ride free was ever made between him and the carrier. *Ewell* v. *Daggs*, 108 U. S. 143; *Holman* v. *Johnson*, Cowp. 341; *Bank of United States* v. *Owens*, 2 Pet. 527; *Pullman's Car Co.* v. *Transp. Co.*, 171 U. S. 138, 151; *Duncan* v. *Maine Cent. R. Co.*, 113 Fed. Rep. 508.

The verdict of the jury and the judgment of the state Supreme Court are not supported by evidence and are contrary to law. *Carter* v. *Texas*, 177 U. S. 442; *Waterbury* v. *R. R. Co.*, 17 Fed. Rep. 671.

Mr. Edward M. Cleary, *Mr. Bert Schlesinger*, *Mr. Alfred W. Agee* and *Mr. James B. McCracken*, for defendants in error, submitted.

Mr. Justice Pitney delivered the opinion of the court.

This is a review, under Rev. Stat., § 709, of a judgment

recovered against the plaintiff in error for damages on account of the death of one Charles Albert Schuyler, occasioned by the derailment of a mail train at Gertney, Utah, January 14, 1907, while the deceased was riding thereon. It appears that he was an assistant chief clerk in the United States Railway Mail Service, and held a commission or certificate signed by the Postmaster General in the following form:

"POSTOFFICE DEPARTMENT, Washington, D. C.
"To Whom Concerned:

"The bearer hereof, Charles Albert Schuyler, has been appointed an assistant chief clerk railway mail service with headquarters Ogden, Utah, and will be obeyed and respected accordingly. Railroad companies are requested to extend to the holder of this commission the facilities of free transportation on the lines named on opposite page. If fare is charged receipt should be given. Valid only when issued through the office of the second assistant postmaster general and countersigned by James E. White.

'G. B. CORTELYOU.

"Countersigned:

"JAMES E. WHITE,
"*General Superintendent.*"

On opposite page:

"Good between all stations Utah, Idaho, Nevada, California, Montana, and Colorado."

The deceased had been called to go from Ogden, Utah, to Oakland, California, on account of the illness of his child. The child having died, he set out to return from Oakland to Ogden, and took the mail train in question with the knowledge of the train agent and conductor in charge, using as evidence of his right to transportation the com-

mission above quoted. It was on this interstate journey that the train was derailed and the deceased came to his death as already mentioned.

The defense (so far as here pertinent) was that the deceased was not traveling upon any official business that entitled him to free transportation under his commission, and that in riding free he was violating the act of Congress of June 29, 1906, commonly called the Hepburn Act (34 Stat. 584, 585, c. 3591, § 1), which forbids common carriers subject to the provisions of the act, after January 1, 1907, to "directly or indirectly issue or give any interstate free ticket, free pass, or free transportation for passengers, except . . . to Railway Mail Service employés, post-office inspectors, customs inspectors and immigration inspectors; . . . and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty." It was therefore contended that the deceased was a trespasser, and that the defendant was under no legal duty to care for his safety.

In the trial court there was a verdict for the plaintiffs, and from the judgment thereon the present plaintiff in error appealed to the Utah Supreme Court, which at first reversed, and afterwards, on a rehearing set aside the reversal and affirmed the judgment below, subsequently denying the company's application for a new trial. 37 Utah, 581, 595, 612.

The court held that there was no evidence to support a finding that the deceased was traveling on appellant's train in the discharge, or in pursuance, of duties pertaining to the Railway Mail Service; and that upon the evidence adduced the only permissible inference was that he left Ogden and went to Oakland solely on account of the death of his child, and that he was on the return journey of that mission when the train was derailed.

But the court also found that the existence of the rela-

tion of carrier and passenger between the deceased and the railroad company, and a breach of the duty of care for the passenger's safety, resulting in his death, were so conclusively made to appear as to entitle respondents to a directed verdict on those issues, so that certain errors committed by the trial court in the instructions to the jury became of no consequence. The court said: "That the car was derailed through the negligence of appellant as alleged in the complaint, and that the deceased was killed by reason of such derailment is, upon the record, not open to controversy. No substantial conflict is presented by the evidence on that subject."

Upon the question of the relation of carrier and passenger the court reasoned as follows: "When he left Ogden he entered a mail car in appellant's train. The evidence of his right to enter the mail car and be carried by appellant was the commission issued to him, which, on its face, entitled him to transportation between all stations in Utah, Nevada, and California. The commission, on its face, granted 'the facilities of free transportation on the lines named,' regardless of the question whether he was or was not in the discharge of public duties. It was issued to him before the Hepburn Act took effect. The derailment and the deceased's death occurred 14 days after the act took effect. It was admitted by the parties on the trial that the deceased used the commission on the trip as 'the evidence of his right to ride—the evidence of his right of transportation,'—and that no question would be raised with respect to the exhibition of the commission to the conductor in charge of the train. The deceased, at Oakland, in the presence of the conductor and train agent, and with their knowledge, entered a mail car in a train about to leave for Ogden, and impliedly with their consent, at least without their objection. In view of the stipulation, and upon the whole record, we think the only permissible inferences are, that the deceased, both in going

to and in returning from Oakland, rode in the mail car with the knowledge and consent of appellant's conductors in charge of the train; that the appellant, its conductors and agents in charge of the train, and the deceased, in good faith, assumed and believed that the commission entitled him to so ride and to be transported in the mail car, regardless of the fact whether he was or was not on duty, and that the commission was so treated and so recognized by them, and as 'the evidence of his right of transportation.' There is nothing in the record to support the allegations in the answer that the deceased entered the mail car without appellant's knowledge or consent, or against its will, or with the intent, or for the purpose, of deceiving or defrauding the appellant or the Government, or that he otherwise entered the car clandestinely or fraudulently, or in bad faith, or with any wrongful design or purpose. The evidence, quite conclusively, shows the contrary. The deceased was, therefore, not a trespasser."

In dealing with the questions of law arising from this state of facts, the court held, first, that the Hepburn Act does not forbid a carrier from giving free interstate transportation to Railway Mail Service employés when not on duty and when traveling for their own benefit or pleasure, and, secondly, "Though the construction which we have given the Hepburn Act should not be correct, and though it was unlawful for the appellant to give, and the deceased to receive, free transportation on his commission, when he was not on duty, yet we are also of the opinion that, under all the circumstances of the case, the appellant, having undertaken and assumed to carry and transport the deceased as a passenger by reason of the commission, cannot escape liability for the consequences of its negligence on that ground." And again: "We are of the opinion that when a common carrier accepts a person as a passenger, he is not permitted to deny that he

owes to him the duty of diligence, prudence, and skill, which, as carrying on a public employment, he owes to all his passengers; and that he cannot escape liability for a negligent performance of that duty resulting in injury by urging that the pass or commission was issued, or the gratuitous passage permitted, by him, in violation of law." As authority for this proposition the court cited *Carroll* v. *Staten Island R. R. Co.*, 58 N. Y. 126; *Del., Lack. & Western R. R. Co.* v. *Trautwein*, 52 N. J. Law, 169; 7 L. R. A. 435; 5 Am. & Eng. Encyc. Law (2d ed.), 508, and other authorities.

It is plain that the decision adverse to the plaintiff in error was upon two independent grounds, the second ground being avowedly based upon the hypothesis that the court might be wrong in its decision upon the first.

Whether the Hepburn Act prohibits a carrier from giving free interstate transportation to the employés of the Railway Mail Service when they are not on duty but are traveling for their own benefit or pleasure, is of course a Federal question.

But whether—assuming that question to be answered in the affirmative—the relation of carrier and passenger arises in the case of gratuitous passage under circumstances such as are presented in this case, is (in the absence of an act of Congress regulating the matter) a question not of Federal but of state law.

It is settled by numerous decisions of this court that where the decision in the state court adverse to the plaintiff in error proceeds upon two independent grounds, one of which, not involving a Federal question, is sufficient to sustain the judgment, the writ of error will be dismissed or the judgment affirmed, according to circumstances. *Murdock* v. *City of Memphis*, 20 Wall. 590, 635, 636; *De Saussure* v. *Gaillard*, 127 U. S. 216, 234; *Hale* v. *Akers*, 132 U. S. 554, 565; *Hopkins* v. *McLure*, 133 U. S. 380; *Johnson* v. *Risk*, 137 U. S. 300; *Beaupre* v. *Noyes*,

138 U. S. 397; *Hammond* v. *Johnston*, 142 U. S. 73, 78; *Giles* v. *Teasley*, 193 U. S. 146, 160; *Allen* v. *Arguimbau*, 198 U. S. 149, 154; *Leathe* v. *Thomas*, 207 U. S. 93, 98. In *Murdock* v. *City of Memphis* and *Beaupre* v. *Noyes* this court affirmed the judgments of the state court. In the other cases cited the writs of error were dismissed without considering the Federal questions.

Except for two contentions of the plaintiff in error now to be mentioned, a dismissal of the writ of error would necessarily follow in the present case, since the second ground of decision adopted in the state court is manifestly independent of the first and is fully sufficient to support the judgment; and except for what follows it involves no question of Federal right.

It is insisted (*a*) that there is no presumption that the railroad company violated the prohibition of the Hepburn Act by granting to Schuyler a free interstate ride, and that there is no evidence in the record to support such conclusion; and while it is conceded that ordinarily, upon writ of error to a state court, this court does not review the findings of fact, yet it is insisted that in this case a Federal right has been denied as the result of a finding of fact which is without support in the evidence; that the evidence is before us in the record by which that insistence may be tested; and that the status of Schuyler as an interstate passenger is a mixed question of law and fact so that it is incumbent upon us to analyze the evidence to the extent necessary to give to plaintiff in error the benefit of its asserted Federal right. The insistence as to the power and duty of this court in such a case is well founded. *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 573, 591; *Cedar Rapids Gas Co.* v. *Cedar Rapids*, 223 U. S. 655, 668; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261. We also agree there is no presumption that the railroad company gave free transportation, and that this was a fact to be established by evidence. Ac-

cepting the duty to review this question of fact, we have examined the evidence in the record and find that it fairly supports the conclusion of the state court that the deceased was accepted by plaintiff in error as a gratuitous passenger.

But, finally, it is argued (*b*) that it was beyond the power of the state court to "read into the Hepburn Act an exception in favor of gratuitous passengers"; thereby (as is said) enlarging the class to whom Congress limited the right of free interstate transportation. This is ingenious, but, as we think, unsound. As applied to the concrete case, it is equivalent to saying that the operation of the Hepburn Act is such as to deprive one who, in good faith and without fraud, and with the consent of the carrier, but in actual though unintentional violation of the prohibition of the act, accepts a free passage in interstate transportation, of the benefit of a rule of local law that renders the carrier in such circumstances responsible for exercising care for the passenger's safety because the carrier has voluntarily undertaken the burden of such care. But the act itself declares what penalty shall be imposed for a violation of its prohibition: "Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass or free transportation, shall be subject to a like penalty." This penalty is not to be enlarged by construction. Neither the letter nor the spirit of the act makes an outlaw of him who violates its prohibition by either giving or accepting gratuitous interstate carriage. The deceased no more forfeited his life, limb or safety, and no more forfeited his right to the protection accorded by the local law to a passenger in his situation, than the carrier

forfeited its right of property in the mail car upon which the deceased rode. His right to safe carriage was not derived, according to the law of Utah, from the contract made between him and the carrier, and therefore was not deduced from the supposed violation of the Hepburn Act. It arose from the fact that he was a human being, of whose safety the plaintiff in error had undertaken the charge. With its consent he had placed his life in its keeping, and the local law thereupon imposed a duty upon the carrier, irrespective of the contract of carriage. The Hepburn Act does not deprive one who accepts gratuitous carriage, under such circumstances, of the benefit and protection of the law of the State in this regard.

It results that the judgment under review must be affirmed, irrespective of the question whether the Hepburn Act forbids the giving of free interstate transportation to the employés of the Railway Mail Service when not on duty.

Judgment affirmed.

STARR *v.* LONG JIM.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 151. Argued January 28, 1913.—Decided February 24, 1913.

An agreement as to division and allotment of lands between the Secretary of the Interior and chiefs representing Indians which is informal in terms and is afterwards ratified by Congress should be construed so as to confer upon the Indians the full measure of benefit intended.

The best interests of the Indians do not always require that they should be allotted lands in fee rather than by having them held in trust by the Government for them.

The agreement with Chief Moses and others of July 7, 1883, as to distribution of lands in the Columbia and Colville reservations and the act of July 4, 1884, 23 Stat. 79, validating it, and the subsequent acts relating thereto, were properly construed by the Secretary of the Interior to the effect that the Government held the land in trust for the Indian allottees for a period of ten years and without power of alienation meanwhile except by consent of the Secretary.

The general rule, that a conveyance with warranty estops the grantor when he afterwards becomes the owner to deny the grantee's title, does not apply to a conveyance made by one *non sui juris* or that is contrary to public policy or statutory construction.

An allottee Indian, who conveys by warranty deed before patent and during the period of suspension of alienation without the consent of the Secretary, acts contrary to the policy of the law and is not estopped to deny the validity of the deed after patent, and the grantee acquires no rights.

59 Washington, 190, affirmed.

THE facts, which involve the title of Indians to lands within the Columbia Indian Reservation and the construction of an agreement allotting lands between Chief Moses and others, are stated in the opinion.

Mr. R. W. Starr pro se and *Mr. Frank Reeves* for plaintiff in error.

Mr. A. G. Avery, with whom *Mr. F. T. Post* was on the brief, for defendants in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

The plaintiff in error brought this action against the defendants in error in the Superior Court of the State of Washington in and for the County of Chelan to establish and quiet his title to certain lands in that county. The answer showed that the plaintiff claimed his title under a deed made by the defendants, and attacked the validity of this instrument on the ground of fraud in its procurement, and on the further ground that at the time of its execution

the title to the lands therein described was in the United States, and the defendants were without power to convey them. The trial court made findings of fact negativing the charges of fraud, and concluded as matter of law that the conveyance made by the defendants to plaintiff was valid, and that the plaintiff was entitled to recover. From the resulting judgment the defendants appealed to the Supreme Court of the State, which reversed the judgment and remanded the cause, with directions to enter a judgment in favor of the defendants upon terms that they should repay the consideration paid by the plaintiff to them, with certain additional charges. 52 Washington, 138. After the cause was remanded, a further hearing was had and a second and final judgment entered in accordance with the mandate. From this judgment the plaintiff appealed, and the Supreme Court of the State affirmed the judgment, 59 Washington, 190, and the case comes here by writ of error.

The facts are as follows:—The defendants are husband and wife and full blooded Indians, and the lands in question are a part of what was the Columbia Indian Reservation. On July 7, 1883, in the City of Washington, the Secretary of the Interior and the Commissioner of Indian Affairs on the part of the United States, and Chief Moses and other Indians of the Columbia and Colville reservations in the then Territory of Washington, entered into a certain agreement, subject to the approval of Congress, the material parts of which are as follows:

"In the conference with Chiefs Moses and Sar-sarp-kin, of the Columbia reservation, and Tonasket and Lot, of the Colville reservation, had this day, the following was substantially what was asked for by the Indians:

"Tonasket asked for a saw and grist mill, a boarding school to be established at Bonaparte creek to accommodate one hundred (100) pupils, and physician to reside with them, and $100 (one hundred) to himself each year.

"Sar-sarp-kin asked to be allowed to remain on the Columbia reservation with his people, where they now live, and to be protected in their rights as settlers, and, in addition to the ground they now have under cultivation within the limit of the fifteen-mile strip cut off from the northern portion of the Columbia reservation, to be allowed to select enough more unoccupied land in severalty to make a total to Sar-sarp-kin of four square miles, being 2,560 acres of land, and each head of a family or male adult one square mile, or to remove onto the Colville reservation, if they so desire; and in case they so remove, and relinquish all their claims to the Columbia reservation, he is to receive one hundred (100) head of cows for himself and people, and such farming implements as may be necessary.

"All of which the Secretary agrees they should have, and that he will ask Congress to make an appropriation to enable him to perform.

"The Secretary also agrees to ask Congress to make an appropriation to enable him to purchase for Chief Moses a sufficient number of cows to furnish each one of his band with two cows; also to give Moses one thousand dollars ($1,000) for the purpose of erecting a dwelling house for himself; also to construct a saw mill and grist mill as soon as the same shall be required for use; also that each head of a family or each male adult person shall be furnished with one wagon, one double set of harness, one grain cradle, one plow, one harrow, one scythe, one hoe, and such other agricultural implements as may be necessary.

"And, on condition that Chief Moses and his people keep this agreement faithfully, he is to be paid in cash, in addition to all of the above, one thousand dollars ($1,000.00) per annum during his life.

"All this on condition that Chief Moses shall remove to the Colville reservation and relinquish all claims upon the government for any land situate elsewhere.

"Further, that the government will secure to Chief Moses and his people, as well as to all other Indians who may go onto the Colville reservation and engage in farming, equal rights and protection alike with all other Indians now on the Colville reservation, and will afford him any assistance necessary to enable him to carry out the terms of this agreement on the part of himself and his people; that until he and his people are located permanently on the Colville reservation his status shall remain as now, and the police—over his people shall be vested in the military, and all money or articles to be furnished him and his people shall be sent to some point in the locality of his people, there to be distributed as provided. All other Indians now living on the Columbia reservation shall be entitled to 640 acres, or one square mile, of land to each head of family or male adult, in the possession and ownership of which they shall be guaranteed and protected; or, should they move onto the Colville reservation within two years, they will be provided with such farming implements as may be required, provided they surrender all rights to the Columbia reservation.

"All the foregoing is upon the condition that Congress will make an appropriation of funds necessary to accomplish the foregoing and confirm this agreement, and also, with the understanding that Chief Moses, or any of the Indians heretofore mentioned, shall not be required to remove to the Colville reservation until Congress does make such appropriation," etc.

This agreement was ratified and confirmed by act of Congress of July 4, 1884, c. 180, 23 Stat. 76, 79, which reads as follows:

"For the purpose of carrying into effect the agreement entered into at the city of Washington on the seventh day of July, eighteen hundred and eighty-three, between the Secretary of the Interior and the Commissioner of Indian Affairs and Chief Moses and other Indians of the Columbia

and Colville reservations, in Washington Territory, which agreement is hereby accepted, ratified, and confirmed, including all expenses incident thereto, eighty-five thousand dollars, or so much thereof as may be required therefor, to be immediately available: *Provided*, that Sarsopkin and the Indians now residing on said Columbia reservation shall elect within one year from the passage of this act whether they will remain upon said reservation on the terms therein stipulated or remove to the Colville reservation: *And provided further*, That in case said Indians so elect to remain on said Columbia reservation the Secretary of the Interior shall cause the quantity of land therein stipulated to be allowed them to be selected in as compact form as possible, the same when so selected to be held for the exclusive use and occupation of said Indians, and the remainder of said reservation to be thereupon restored to the public domain, and shall be disposed of to actual settlers under the homestead laws only, except such portion thereof as may properly be subject to sale under the laws relating to the entry of timber lands and of mineral lands, the entry of which shall be governed by the laws now in force concerning the entry of such lands."

In the above agreement of July 7, 1883 (commonly called the Moses Agreement), the following clause is especially pertinent to the present controversy, *viz.*: "All other Indians now living on the Columbia Reservation shall be entitled to 640 acres, or one square mile, of land to each head of family or male adult, in the possession and ownership of which they shall be guaranteed and protected."

In the confirmatory act the following proviso is to be noted: "That in case said Indians so elect to remain on said Columbia Reservation the Secretary of the Interior shall cause the quantity of land therein stipulated to be allowed them to be selected in as compact form as possible, the same when so selected to be held for the exclusive use

and occupation of said Indians, and the remainder of said reservation to be thereupon restored to the public domain, and shall be disposed of to actual settlers," etc.

By an executive order made by President Cleveland under date May 1, 1886 (Executive Orders, Indian Reserves, 1890, p. 75), the land in question was restored to the public domain, subject to the limitations as to disposition imposed by the act of July 4, 1884; it being, however, at the same time ordered that certain tracts of land surveyed for and allotted to Sar-sarp-kin and other Indians in accordance with the provisions of that act, and particularly described in the order, should be and the same were thereby set apart for the exclusive use and occupation of said Indians by name. Long Jim was not included.

But by a decision of the General Land Office rendered July 9, 1892, affirmed by the Secretary of the Interior January 6, 1893 (*Long Jim* v. *Robinson*, 16 L. D. 15), it was held that Long Jim, although not a party to the Moses Agreement, was entitled to its benefits by the terms of the act of July 4, 1884, and, because he and other members of a band of which he was the Chief were in actual occupancy of the land in question, having lived upon it for many years, cultivated a part of it, raised stock thereon, etc., it was also held, following *Mission Indians* v. *Walsh*, 13 L. D. 269, that the Executive Order of May 1, 1886, did not confer upon white men claiming under the preëmption and homestead laws any right to settle on, file upon, or enter lands that were in the occupation of the Indians. It was also held that Long Jim was not deprived of his rights under the act of July 4, 1884, by reason of not having elected within one year from its passage whether he would remain upon the Columbia Reservation on the terms therein stipulated or remove to the Colville Reservation; that limitation in the Act being construed to apply only to Sar-sarp-kin and the Indians who were

directly represented by him in the making of the Moses Agreement. The conclusion of the matter was that Long Jim and certain other Indian applicants were held entitled to have allotments made to them in severalty, in quantities and manner provided in the agreement of July 7, 1883, and the right of certain white claimants to the same land was held to be subordinate and subject to the prior and superior right of the Indians.

In accordance with this decision and in pursuance of the Moses Agreement and the act of Congress ratifying it, the Secretary of the Interior, in the year 1894, set apart for the exclusive use and occupation of Long Jim a certain allotment on the Columbia Reservation, included in which are the lands involved in the present action.

On March 29, 1900, Long Jim and his wife, by warranty deed, in consideration of the sum of two thousand dollars, assumed to convey the lands in question to the plaintiff. Up to this time no patent had been issued by the Government.

In April, 1904, the Secretary of the Interior held (*In re Long Jim*, 32 L. D. 568) that the act of July 4, 1894, had made no provision for issuing a patent; that if the Moses Agreement contemplated that patents should be issued, the act of ratification limited it in this respect; and that since there was no general authority of law for issuing patents to Indian allottees, none could be issued to cover Long Jim's allotment. Thereafter Congress, by act of March 3, 1905, c. 1479; 33 Stat. 1048, 1064, 1065; authorized the issuance of such a patent, in the following terms:

"That the Secretary of the Interior be, and hereby is, authorized and directed to issue a patent in fee to Long Jim for the lands heretofore allotted to him by the Secretary of the Interior on April eleventh, eighteen hundred and ninety-four, as modified and changed by Department order of April twentieth, eighteen hundred and

ninety-four, under and by virtue of the agreement concluded July seventh, eighteen hundred and eighty-three, by and between the Secretary of the Interior and the Commissioner of Indian Affairs and Chief Moses and other Indians of the Columbia and Colville reservations, commonly known as the 'Moses agreement,' accepted, ratified, and confirmed by the Act of Congress approved July fourth, eighteen hundred and eighty-four (Twenty-third Statutes, pages seventy-nine and eighty), and under the decision of the General Land Office of July ninth, eighteen hundred and ninety-two, affirmed by the Department of the Interior January sixth, eighteen hundred and ninety-three, to wit: the northeast quarter, northeast quarter of the southeast quarter and lot one of section eleven, the northwest quarter and southwest quarter of the southwest quarter of section twelve, lot one of section fourteen, and lots one and two of section thirteen, township twenty-seven north, range twenty-two east, Willamette meridian, Washington, free of all restrictions as to sale, incumbrance, or taxation."

And on August 2, 1905, pursuant to this authority, a patent was issued to Long Jim for the lands that had been allotted to him, including those that were included in his deed to the plaintiff.

By act of March 8, 1906, c. 629; 34 Stat. 55; a general provision was made for the issuance of patents for the lands allotted to Indians under the Moses Agreement and the act ratifying it, the patents to "be of legal effect and declare that the United States does and will hold the lands thus allotted for the period of ten years from the date of the approval of this Act in trust for the sole use and benefit of the Indian to whom such allotment was made, or in case of his decease, either prior or subsequent to the issuance of such patent, of his heirs, according to the laws of the State of Washington, and that at the expiration of said period the United States will convey the

same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever." The same act provided that an allottee holding such a trust patent might sell the lands covered thereby, except eighty acres, under rules and regulations prescribed by the Secretary of the Interior; and provided that any conveyance or contract of sale made within the trust period except as provided by the act, should be absolutely null and void.

The plaintiff in error contends (1) that the land allotted to Long Jim in the year 1894 passed to him in fee under the terms of the Moses Agreement and the act of ratification, and therefore passed to the plaintiff under the deed of 1900; and, failing this, (2) that the deed, having contained covenants of warranty, operated by way of estoppel to pass to the plaintiff the title afterwards acquired by Long Jim by virtue of the patent of August 2, 1905.

In *United States* v. *Moore*, 154 Fed. Rep. 712, it was held by the United States Circuit Court for the Eastern District of Washington that lands allotted to Indians in severalty under the Moses Agreement and the act of confirmation, and the Executive Order of May 1, 1886, became vested in the allottees in fee simple. The Circuit Court of Appeals reversed this decision. 161 Fed. Rep. 513. The Supreme Court of Washington, in the present case (52 Washington, 138), followed the reasoning and opinion of the Court of Appeals. We concur in the result reached, and have little to add.

As to the principles to be kept in view in construing an agreement with the Indians, we adhere to what was said in *Jones* v. *Meehan*, 175 U. S. 1, 10, 11,—

"In construing any treaty between the United States and an Indian tribe, it must always . . . be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of

a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

The Moses Agreement is quite informal, and it has been and should be construed in such manner as to confer upon the Indians the full measure of benefit that it was intended to secure to them. But it hardly follows that they would be more benefited by having the lands in fee than by having them held in trust for them by the Government. That part of the agreement now in question provided that each head of family or male adult on the Columbia Reservation should be entitled to one square mile of land—"in the possession and ownership of which they shall be guaranteed and protected." This is at least as consistent with a beneficial ownership, leaving the title in the Government, as with the vesting of a fee simple title in the Indian.

But whatever may have been the intent of the framers of the agreement, § 2079, Rev. Stat., prohibited the making of any contract with the Indians by treaty; and the Moses Agreement was expressly made "upon the condition that Congress will make an appropriation of funds necessary to accomplish the foregoing, and confirm this agreement." The act of confirmation (23 Stat., c. 180) was subject to the proviso that the Secretary of the Interior should cause the quantity of land stipulated to be selected in as compact

form as possible, "the same, when so selected, to be held for the exclusive use and occupation of said Indians, and the remainder of said reservation to be thereupon restored to the public domain, and shall be disposed of to actual settlers under the homestead laws," etc. Irrespective of the general recognition of the guardianship of the Government over the Indians, the clear antithesis in this proviso between the disposition of other lands to settlers and the retention of the lands in question for the use and occupation of the Indians, admits of but one construction.

The Executive Order of August 1, 1886, is consistent with this. So are the decisions of the General Land Office and the Secretary of the Interior, already referred to, (16 L. D. 15; 32 L. D. 568).

And the act of March 3, 1905 (33 Stat. 1048, 1064, c. 1479), above quoted, expressly authorizing and directing the Secretary of the Interior to issue a patent to Long Jim for the lands that had been allotted to him, is a recognition by Congress that without the act he had no right to the land in fee. Further corroboration is to be found in the act of March 8, 1906 (35 Stat. 55, c. 629), above quoted, which requires patents to be issued, with a restriction against alienation, to the other beneficiaries of the Moses Agreement.

The contention of the appellant that Long Jim had a title in fee at the time of the making of the warranty deed in the year 1900 must therefore receive a negative response.

As to the effect of the warranty upon the after-acquired title, while the general rule is that a conveyance with warranty estops the grantor, when he afterwards becomes the owner of the land assumed to be granted, to deny the grantee's title (Bigelow Estop., 2d ed., p. 324, etc.), it is well settled that the doctrine does not apply to the case of a conveyance made by one *non sui juris*, or that is contrary to public policy or statutory prohibition. *Bank of*

America v. *Banks*, 101 U. S. 240, 247; *Doe* v. *Ford*, 3 Ad. & El. 649; *Den ex dem. Wooden* v. *Shotwell*, 24 N. J. L. 789; *Connor* v. *McMurray*, 2 Allen (Mass.), 202, 204; *Doyle* v. *Coburn*, 6 Allen, 71, 72; *Merriam* v. *Boston &c. Railroad Co.*, 117 Massachusetts, 241, 244; *Brick* v. *Campbell*, 122 N. Y. 337, 346; *Kennedy* v. *McCartney*, 4 Porter (Ala.), 141, 158.

Since it is entirely plain, in the case before us, that the title to the lands in question was retained by the United States for reasons of public policy, and in order to protect the Indians against their own improvidence, it follows as matter of course that a conveyance made by one of them, before the title was vested in him pursuant to the act of 1905, was in the very teeth of the policy of the law, and could not operate as a conveyance, either by its primary force or by way of estoppel.

Judgment affirmed.

ZAVELO *v.* REEVES.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 299. Argued January 7, 1913.—Decided February 24, 1913.

In the absence of any proof to that effect in the record, a promise by the bankrupt made between the petition and the discharge to pay the balance of his provable debt to one of his creditors who advanced money to enable him to effect a composition without obtaining any undue preference over the other creditors, will not be regarded as an act of extortion or attempted extortion in violation of § 29b 5 of the Bankruptcy Act, prohibiting acting or forbearing to act in bankruptcy proceedings.

A discharge, while releasing the bankrupt from legal liability to pay a provable debt, leaves him under a moral obligation that is sufficient to support a new promise to pay it.

The theory of bankruptcy is that the discharge does not destroy the debt but does destroy the remedy.

As a general rule, the discharge when granted relates back to the inception of the proceeding, and the bankrupt becomes a free man as to new transactions as of the date of the transfer of his property to the trustee.

This court by promulgating General Orders and Forms in Bankruptcy construed § 63a 4 as confining the discharge to provable debts existing on the day of the petition and having it relate back thereto.

Under the Bankruptcy Act of 1898 an express promise to pay a provable debt is good although made after the petition and before the discharge.

Obligations created after the filing of the petition and before the discharge are not provable under § 63 and therefore are not included in the discharge.

As § 12 of the Bankruptcy Act requires that money for effecting the composition be deposited before the application to authorize it, it contemplates that the bankrupt may acquire such money by use of his credit.

171 Alabama, 401, affirmed.

THE facts, which involve the validity of an express promise by the bankrupt to pay a provable debt made after the petition and before the discharge, are stated in the opinion.

Mr. Oscar R. Hundley for plaintiff in error submitted.

Mr. Samuel A. Putman for defendants in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

Defendants in error sued plaintiff in error November 22, 1907, in the City Court of Birmingham, Alabama, declaring upon the common counts for moneys due December 10, 1906, and February 19, 1906, and by an amendment declared upon a promissory note for about $250 which was a part of a claim of the defendants in error that antedated the bankruptcy of the plaintiff in error. The defendant (now plaintiff in error) pleaded that on November 22, 1905, he filed in the District Court of the United States

for the Northern District of Alabama, his petition in bankruptcy; that said court had jurisdiction of said bankruptcy proceedings, and duly adjudicated him a bankrupt on that date; that subsequently he offered a composition to his creditors, and the offer was accepted and a composition made in said proceedings and duly confirmed by said District Court February 6, 1906, a certified copy of the decree of confirmation being attached to and made a part of the plea; that the plaintiffs were then creditors of the bankrupt, and as such accepted the offer of composition and were paid a dividend thereon; that the claim sued on herein is a part of and was included in said claim on which said dividend was paid, and the claim herein is barred by said proceedings and discharged by said composition. The plaintiffs replied, (a) that on January 1, 1906 (which date was after the adjudication and before the discharge), defendant promised that if plaintiffs would lend him $500 for use in paying the consideration of a composition with his creditors in said bankruptcy proceedings, he, defendant, when said composition was confirmed, would pay plaintiffs the balance of the demand sued on, after deducting therefrom plaintiffs' share of the consideration of such composition; and plaintiffs averred that they accepted defendant's said offer and promise, and did so lend him the said sum of $500 for the said purpose; and (b) for further replication, that after the filing of defendant's said petition in bankruptcy, and after he had been adjudged a bankrupt, defendant promised plaintiffs that he would pay what he owed them, being the same demand sued on herein, when his composition in bankruptcy was confirmed, and that plaintiffs accepted said promise. To these replications the defendant demurred. The City Court overruled the demurrers and proceeded to a trial of the issues of fact, which resulted in favor of the plaintiffs upon both the common counts and the note. The defendant appealed

to the Supreme Court of Alabama, which affirmed the judgment. 171 Alabama, 401. Whereupon he sued out the present writ of error.

The case is brought here under § 709, Rev. Stat., the contention being that a right or immunity set up and claimed by the plaintiff in error under the Federal Bankruptcy Act was denied by the state court. See *Linton* v. *Stanton*, 12 How. 423; *Mays* v. *Fritton*, 131 U. S., Appendix cxiv; *Hill* v. *Harding*, 107 U. S. 631; *Rector* v. *City Deposit Bank*, 200 U. S. 405.

It is not contended that the record imports a secret or fraudulent agreement between the bankrupt and the plaintiffs at the expense of other creditors. The state court construed the replications as not averring secrecy or fraud, saying (171 Alabama, 408)—"That an advantage accrued to plaintiffs as the result of the loan is true; but that it came as a result of fraud, collusion, or extortion, cannot be read from these replications. On the contrary, the advantage, so far as the pleadings show, was the result of the advancement made by way of the loan described. There is nothing in the replications on which to rest a conclusion that anything other than the loan induced the promise relied on for recovery here."

This construction of the pleadings is not disputed here. We therefore are not in this case concerned with the general equitable principle that composition agreements are invalid if based upon or procured by a secret arrangement with one or more favored creditors, in violation of the equality and reciprocity upon which such an agreement is avowedly based. Story Eq. Jurisp. (9th ed.), §§ 378, 379; *Clarke* v. *White*, 12 Pet. 178, 199; *Wood* v. *Barker*, L. R. 1 Eq. 139; *McKewan* v. *Sanderson*, L. R. 20 Eq. 65; *Bissell* v. *Jones*, L. R. 4 Q. B. 49; *Ex parte Nicholson*, L. R. 5 Ch. App. 332; *Crossley* v. *Moore*, 40 N. J. L. 27, 34; *Feldman* v. *Gamble*, 26 N. J. Eq. 494; *Dicks* v. *Andrews*, 132 Georgia, 601, 604.

Of the questions raised, only three deserve notice.

(1) It is contended that the transaction set up in the former of the two replications mentioned was in violation of the prohibition of § 29b 5 of the Bankruptcy Act (30 Stat., c. 541, pp. 544, 455), which declares that—"A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently . . . extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings." It is sufficient to say that we are unable to see in this record anything of extortion or attempted extortion.

(2) It is contended as to both replications that although a debt barred by discharge in bankruptcy may be revived by a new promise made after the discharge, this cannot be done by a new promise made in the interim between the adjudication and the discharge.

It is settled, however, that a discharge, while releasing the bankrupt from legal liability to pay a debt that was provable in the bankruptcy, leaves him under a moral obligation that is sufficient to support a new promise to pay the debt. And in reason, as well as by the greater weight of authority, the date of the new promise is immaterial. The theory is that the discharge destroys the remedy but not the indebtedness; that, generally speaking, it relates to the inception of the proceedings, and the transfer of the bankrupt's estate for the benefit of creditors takes effect as of the same time; that the bankrupt becomes a free man from the time to which the discharge relates, and is as competent to bind himself by a promise to pay an antecedent obligation, which otherwise would not be actionable because of the discharge, as he is to enter into any new engagement. And so, under other bankrupt acts, it has been commonly held that a promise to pay a provable debt, notwithstanding the discharge,

is as effectual when made after the filing of the petition and before the discharge as if made after the discharge. *Kirkpatrick* v. *Tattersall*, 13 M. & W. 766; *Otis* v. *Gazlin*, 31 Maine, 567; *Hornthal* v. *McRae*, 67 Nor. Car. 21; *Fraley* v. *Kelley*, 67 Nor. Car. 78; *Hill* v. *Trainer*, 49 Wisconsin, 537; *Knapp* v. *Hoyt*, 57 Iowa, 591; 42 Am. Rep. 59; *Lanagin* v. *Nowland*, 44 Arkansas, 84; *Wiggin* v. *Hodgdon*, 63 N. H. 39; *Griel* v. *Solomon*, 82 Alabama, 85; *Jersey City Ins. Co.* v. *Archer*, 122 N. Y. 376.

Our attention is not called to any decision in point arising under the present Bankruptcy Act; but we deem it clear that the same rule should be applied. If there is any distinction between this and former acts that would require a different rule, it must arise from the time to which the discharge is made to relate. As to this, § 17 of the act of 1898 declares that—"A discharge in bankruptcy shall release a bankrupt from all his provable debts," with certain exceptions not now pertinent. For the definition of "provable debts" we are referred to § 63, which is set forth in full in the margin.[1] Of the several

[1] SEC. 63. DEBTS WHICH MAY BE PROVED.—*a*. Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

b. Unliquidated claims against the bankrupt may, pursuant to ap-

classes of liabilities, those in clauses 1, 2 and 3 are in terms described as existing at or before the filing of the petition. Clause 5 relates to liabilities "founded upon provable debts reduced to judgment after the filing of the petition," etc.; plainly meaning that they arose before its filing. Clause 4 describes simply debts that are "founded upon an open account, or upon a contract express or implied," not in terms referring to the time of the inception of the indebtedness. But, reading the whole of § 63, and considering it in connection with the spirit and purpose of the act, we deem it plain that the debts founded upon open account or upon contract, express or implied, that are provable under § 63a 4 include only such as existed at the time of the filing of the petition in bankruptcy. This court in effect adopted that construction when, in promulgating the General Orders and Forms in Bankruptcy, 1898, under the authority conferred by § 30, a form of discharge was prescribed (Forms in Bankruptcy, No. 59), by which it is ordered that the bankrupt "be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the day of , A. D. , on which day the petition for adjudication was filed him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy." And the forms prescribed for proof of debts all declare that the indebtedness existed "at and before the filing of the said petition." Forms 31 to 36, inclusive. The General Orders and Forms, etc., are to be found in 172 U. S., Appendix; 89 Fed. Rep., Preface; 32 C. C. A., Preface; 3 Foster's Fed. Pract. (4th ed.) 2526, 2559, 2572.

The view above expressed as to clause 4 of § 63a is the same that has been generally adopted in the Federal District Courts. *In re Burka*, 104 Fed. Rep. 326; *In re*

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plication to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

Swift, 112 Fed. Rep. 315, 321; *In re Adams*, 130 Fed. Rep. 381; *Colman Co.* v. *Withoft*, 195 Fed. 250, 252; and see *In re Roth & Appel*, 181 Fed. Rep. 667, 673.

And so, upon the whole matter, we conclude that under the present act an express promise to pay a provable debt is good although made after the filing of the petition and before discharge.

3. What has been said disposes at the same time of the contention that the promises set up in the two replications under consideration were discharged by the confirmation of the composition. As these obligations were entered into after the adjudication of bankruptcy, they were of course not provable under § 63; and only provable debts are discharged.

With respect to the money loaned to the bankrupt for use in paying the consideration of the composition, it is perhaps worth while to remark that § 12 of the act, in prescribing the time and mode of offering terms of composition, plainly contemplates that a composition in money may be offered, and expressly prescribes that an application for the confirmation of a composition may be made after, but not before, "the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge." And the same section provides that "upon the confirmation of a composition the consideration shall be distributed as the judge shall direct, and the case dismissed."

The act, of course, contemplates that the bankrupt may acquire the money required for the purposes of the composition by the use of his credit.

Judgment affirmed.

MARRONE *v.* WASHINGTON JOCKEY CLUB.

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

No. 59. Argued February 28, 1913.—Decided March 10, 1913.

The rule commonly accepted in this country from the English cases is that a ticket to a place of entertainment for a specified period does not create a right *in rem*.

A contract binds the person of the maker, but does not create an interest in the property it concerns unless it also operates as a conveyance; a ticket of admission cannot have such effect as it is not under seal and by common understanding it does not purport to have that effect.

Specific performance of rights claimed under a mere ticket of admission to property cannot be enforced by self-help; the holder refused admission must sue for the breach.

While there might be an irrevocable right of entry under a contract incidental to a right of property in land or in goods thereon, where the contract stands by itself it must be a conveyance or a mere revocable license.

35 App. D. C. 82, affirmed.

THE facts, which involve the rights of the purchaser of a ticket to a race track, and liability for his ejection therefrom, are stated in the opinion.

Mr. Lorenzo A. Bailey, with whom *Mr. George A. Prevost* was on the brief, for plaintiff in error:

A conspiracy, for the purposes of a civil action, is a combination of two or more persons by some concerted action to accomplish any purpose by unlawful means or an unlawful purpose by any means. *Karges Furniture Co.* v. *Amalgamated Woodworkers' Union*, 165 Indiana, 421.

It may be a verbal agreement or undertaking, or a scheme evidenced by the action of the parties. *Franklin Union* v. *People*, 220 Illinois, 355.

Any conspiracy the object of which is to wrongfully or maliciously injure another in business, trade, or reputation, is actionable. Although in criminal conspiracy the combination is the gist of the offense, in civil conspiracy damage is the gist and not the combination itself. Eddy on Combinations, §§ 253, 371, 373.

The evidence of conspiracy is generally, from the nature of the case, circumstantial. It is not necessary to prove that the defendants came together and actually agreed in terms. Greenl. Ev. (Redf. Ed.), § 93; 8 Cyc. 685.

The record here shows the defendants acted in concert in ruling off the plaintiff and also in asserting, as grounds for ruling him off, that the horse was stimulated, thereby implying that he was responsible for it, which assertion was wholly false and the defendants had no reason even to suspect it to be true.

In an action for conspiracy to wrongfully expel plaintiff from the society, whether the members acted fairly and in good faith in finding that a letter written by plaintiff was in violation of the constitution and laws of the order, was for the jury. *St. Louis & S. W. Ry. Co.* v. *Thompson*, 113 S. W. Rep. 144.

The third and fourth assignments of error are based on the fifth exception to the action of the court in taking the case from the jury and present several questions of law.

As to the rights acquired by the plaintiff by the purchase of his ticket, see *Taylor* v. *Waters*, 7 Taunt. 374, decided in 1817; *Wood* v. *Leadbitter*, 13 M. & W. 838; *McCrea* v. *Marsh*, 12 Gray, 211; *Burton* v. *Scherpf*, 1 Allen, 133; *Drew* v. *Peer*, 93 Pa. St. 234.

The New York courts emphatically repudiate the doctrine of *Wood* v. *Leadbitter*. *McGoverney* v. *Staples*, 7 Alb. L. J. 219, holds that an action for assault and battery lies for forcible expulsion of a season ticket holder from the fair grounds of an agricultural society. And see also

MacGowan v. *Duff*, 12 N. Y. 680; *Cremore* v. *Huber*, 18 App. Div. 231; *Smith* v. *Leo*, 92 Hun, 242; *Collister* v. *Hayman*, 183 N. Y. 250; Wandell's Law of the Theater, 221; Brackett's Theatrical Law, 166; *People* v. *King*, 110 N. Y. 418, 428; *Pearce* v. *Spalding*, 12 Mo. App. 141; *Greenberg* v. *Western Turf Assn.*, 140 California, 357.

The establishment of the doctrine referred to demonstrates the fallacy of the theory of revocability for which Brackett and Wandell contend. *People* v. *King*, 110 N. Y. 418; *Baylies* v. *Curry*, 128 Illinois, 287; *Joseph* v. *Birdwell*, 28 La. Ann. 382; and see Article in 12 Cent. L. J. 390.

A license, founded upon a valuable consideration, to enter the land of another, is not revocable at the will of the licensor. *Ditch Co.* v. *Ditch Co.*, 10 Colo. App. 276; *Burrow* v. *Terre Haute R. Co.*, 107 Indiana, 432; 28 A. & E. Enc. 124.

The condition printed on the ticket, that the decision of an officer of the association shall be conclusive is inapplicable in this case, in which the decision was *ex parte* and in flagrant disregard of the plaintiff's right to have an inquiry as requested by him.

The conditions upon which the defendants could refuse to admit plaintiff are specified on the back of the ticket. The good faith of the stewards in their decision is directly impeached and put in issue in this suit and, upon all the evidence, was a question of fact for the jury. *St. Louis & S. W. Ry. Co.* v. *Thompson*, 113 S. W. Rep. 144.

Mr. Charles L. Frailey with whom *Mr. A. S. Worthington*, was on the brief, for defendants in error.

Mr. Justice Holmes delivered the opinion of the court.

This is an action of trespass for forcibly preventing the plaintiff from entering the Bennings Race Track in this District after he had bought a ticket of admission, and for

doing the same thing, or turning him out, on the following day just after he had dropped his ticket into the box. There was also a count charging that the defendants conspired to destroy the plaintiff's reputation and that they excluded him on the charge of having 'doped' or drugged a horse entered by him for a race a few days before, in pursuance of such conspiracy. But as no evidence of a conspiracy was introduced and as no more force was used than was necessary to prevent the plaintiff from entering upon the race track, the argument hardly went beyond an attempt to overthrow the rule commonly accepted in this country from the English cases, and adopted below, that such tickets do not create a right *in rem*. 35 App. D. C. 82. *Wood* v. *Leadbitter*, 13 M. & W. 838. *McCrea* v. *Marsh*, 12 Gray, 211. *Johnson* v. *Wilkinson*, 139 Massachusetts, 3. *Horney* v. *Nixon*, 213 Pa. St. 20. *Meisner* v. *Detroit, Belle Isle & Windsor Ferry Co.*, 154 Michigan, 545. *W. W. V. Co.* v. *Black*, 75 S. E. Rep. 82, 85. *Shubert* v. *Nixon Amusement Co.*, 83 Atl. Rep. 369. *Taylor* v. *Cohn*, 47 Oregon, 538, 540. *People* v. *Flynn*, 114 App. Div. 578, 189 N. Y. 180.

We see no reason for declining to follow the commonly accepted rule. The fact that the purchase of the ticket made a contract is not enough. A contract binds the person of the maker but does not create an interest in the property that it may concern, unless it also operates as a conveyance. The ticket was not a conveyance of an interest in the race track, not only because it was not under seal but because by common understanding it did not purport to have that effect. There would be obvious inconveniences if it were construed otherwise. But if it did not create such an interest, that is to say, a right *in rem* valid against the landowner and third persons, the holder had no right to enforce specific performance by self-help. His only right was to sue upon the contract for the breach. It is true that if the contract were incidental to a

right of property either in the land or in goods upon the land, there might be an irrevocable right of entry, but when the contract stands by itself it must be either a conveyance or a license subject to be revoked.

Judgment affirmed.

BAXTER *v.* BUCHHOLZ-HILL TRANSPORTATION COMPANY.

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

No. 882. Submitted February 24, 1913.—Decided March 10, 1913.

The decree in a case is the dominant act and cannot be given a greater effect than it purports to have and than would be warranted by the opinion that the court finally reached.

The fact that a court in dismissing a libel without prejudice to a new suit expressed a decision on the merits, which it afterwards, on motion, excluded, does not make the decree as finally entered a decision on the merits.

While a matter is still in its breast, the court may change its opinion and do so by changing the decree.

Writ of error to review, 206 N. Y. 173, dismissed.

THE facts are stated in the opinion.

Mr. Arthur English, for defendant in error, in support of motion to dismiss or affirm.

Mr. Charles C. Burlingham, *Mr. Norman B. Beecher* and *Mr. Ray Rood Allen* for plaintiff in error, in opposition thereto.

Memorandum opinion by direction of the court. By MR. JUSTICE HOLMES.

This is an action brought by the Buchholz-Hill Transportation Company, defendant in error, against Baxter for failing to use due diligence in locating and marking a sunken coal barge with a buoy, as he had agreed to, by reason of which failure a tug ran into the wreck and was sunk. It is alleged that the owners of the tug libelled the barge in the admiralty, that the Buchholz-Hill Company answered and filed a petition to bring in Baxter under the 59th Admiralty Rule, that the District Court entered a decree against the barge but gave costs to Baxter without prejudice to a new action against him; and that the Circuit Court of Appeals affirmed the decree. The defendant set up the decree dismissing the libel as against him, alleging that the decision was upon the merits and that the decree, in so far as it purported to be without prejudice, was not warranted by law. The Appellate Division and the Court of Appeals both held the plea bad. 142 App. Div. 25. 206 N. Y. 173.

The defendant relies upon the fact that the Circuit Court of Appeals in its opinion expressed a decision upon the merits. *The Macy*, 96 C. C. A. 146. 170 Fed. Rep. 930. But upon motion it so far changed its view as to exclude such a decision and to leave it open to the company to bring a new action. The matter was still in the breast of the court; it was free to change its opinion if it saw fit, and it was free to do so by changing the decree without delivering a new opinion to explain what the decree made manifest. If it thought, rightly or wrongly, that the collateral question of the present defendant's liability could not be tried in that case, it properly embodied its decision in the decree. The decree is the dominant act and cannot be given a greater effect than it purports to have and than would be warranted by the opinion that the court finally reached.

Writ of error dismissed.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* CARL.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 16. Argued October 22, 1912.—Decided March 10, 1913.

Under the Carmack Amendment an interstate carrier comes under liability not only for its own default but also for loss and damage upon the line of any connecting carrier. *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186.

Under the Carmack Amendment a stipulation for limitation of liability, if unauthorized as to the initial carrier, is ineffective also as to a connecting carrier, and if valid as to the initial carrier, is valid as to a connecting carrier.

The Carmack Amendment does not forbid a limitation of liability in case of loss or damage to a valuation agreed upon for the purpose of determining which of two alternative lawful rates shall apply to a particular shipment.

The Carmack Amendment manifested the purpose of Congress to bring contracts for interstate shipments under one uniform rule or law and therefore withdraw them from the influence of state regulation. *Adams Express Co.* v. *Croninger*, 226 U. S. 491.

An agreement to release a carrier for part of a loss of an interstate shipment due to negligence is no more valid than one for complete exemption, neither is such a contract any more valid because it rests on consideration than if it were without consideration; but a declared value by the shipper for the purpose of determining the applicable rate based upon valuation is not an exemption from either statutory or common-law liability.

Under the Act to Regulate Commerce a carrier who has filed rate sheets which show two rates based upon valuation is legally bound to charge the applicable rate.

A shipper who declares either voluntarily or on request the value of the article shipped so as to obtain the lower of several rates based on valuation is estopped upon plain principles of justice from recovering any greater amount.

A shipper, who has declared a value to get the lower of two rates, cannot be allowed to introduce evidence *aliunde* so as to recover a larger amount as the true value; it would encourage undervaluations and result in illegal preferences and discriminations.

Where the duly filed tariff sheets show different rates based on valuation, the shipper must take notice of the applicable rate and actual want of knowledge is no excuse; his knowledge is conclusively presumed.

A carrier cannot contract with a particular shipper for an unusual service unless he make and publish a rate for such service equally for all. *Chicago & Alton Ry.* v. *Kirby*, 225 U. S. 155.

An administrative rule of the Interstate Commerce Commission is that valuation and rate are dependent each upon the other.

In this case the valuation agreement of the contract was expressed in usual form, was conclusive on the shipper, and does not offend the Carmack Amendment.

91 Arkansas, 97; 121 S. W. Rep. 932, reversed.

ACTION by the holder of a bill of lading issued by the Chicago, Rock Island and Pacific Railway for two boxes and one barrel containing "household goods" received at Lawton, in what was then the Indian Territory, a station on the line of the railway company, for transportation to Gentry, Arkansas, a station on the line of railway of plaintiff in error. One of the boxes was never delivered, and the shipper sued to recover its value.

The defense was that the plaintiff had, in order to obtain the lower of two freight rates, shipped the boxes under an agreement that the goods, in case of a loss, should be valued at five dollars per hundred-weight, and that it, as a succeeding carrier in the route, was entitled to the benefit of that limitation of value. The total weight of the two boxes and barrel was four hundred pounds, and the weight of the box lost was not over two hundred pounds. The limitation of liability was in the form of a release signed by the shipper and was delivered to the primary carrier on receipt of the bill of lading.

The relevant parts of the bill of lading were in these words.

"LAWTON, 10–8–1907.

"Received from J. M. Carl, in apparent good order, by the Chicago, Rock Island & Pacific Railway Company

the following described packages marked and numbered as per margin, subject to the conditions and regulations of the published tariff of said Company, to be transported over the line of this railroad to —— and delivered, after payment of Freight, in like good order to the next carrier (if the same are to be forwarded beyond the line of this Company's road), to be carried to the place of destination; it being especially agreed that the responsibility of this Company shall cease at this company's depot at which the same are to be delivered to such carrier; but this Company guarantees that the rates of Freight for the transportation of said packages from the place of shipment to —— shall not exceed — per — and charges advanced by this Company, subject to the following conditions:

* * * * * * * *

"It is further especially agreed that for all loss or damage occurring in the transit of said packages the legal remedy shall be against the particular carrier or forwarder only in whose custody may be actually at the happening thereof, it being understood that the Chicago, Rock Island & Pacific Railway Company assumes no other responsibility for their safe carriage or safety than may be incurred on its own road.

* * * * * * * *

Consignee:	Destination:
J. M. Carl.	Gentry, Ark.

Description of Articles.

No.	Weights. Subject to Correction.	Stamp.
2 Bx. H. H. Goods.	400	Paid to Apply $3.85
1 Brl. H. H. Goods.	127016	
O. R. Val. 5.00 cwt.		

R. F. PRETTYMAN, *Agent.*"

The legend "O. R. Val. 5.00 cwt." on the bill of lading is an abbreviation for "Owner's released valuation five dollars per hundredweight," and was intended to connect with the contract of release, which was in these words:

"LAWTON STATION, 10, 8, 1907.

"In consideration of the price (special Rates on Carloads and first class rates on less quantities) at which the Chicago, Rock Island & Pacific Railway Company hereby agrees to transport a quantity of household goods, furniture or emigrants' movables (including live stock, if any in the car), from Lawton, O. T. Station to Gentry, Ark. Station, the same being consigned to J. M. Carl. I,—— ——, the consignor, hereby release the said company, and all other railroad and transportation companies, over whose lines the above property may pass to destination, from all liability from any loss or damage said property may sustain in excess of $5.00 per 100 lbs., and I hereby guarantee all charges for freight on connection lines to destination.

"J. M. CARL, *Consignor.*

"N. B.—When household goods, etc., are shipped at rate based on valuation of $5.00 per hundred pounds, agents will require the owner or consignor to sign this agreement, and when signed same must be kept on file at forwarding station. Agent must then note on Way-Bill 'Released to valuation of $5.00 per hundred pounds.'"

The suit was started before a state Justice of the Peace and the pleadings were informal. There was a judgment for $75, which was the uncontradicted full value of the goods lost. The case was taken to the Circuit Court for Benton County, where there was a verdict and a judgment for the same amount. This judgment was, upon a writ of error, affirmed in the Supreme Court of the State, the case being reported in 91 Arkansas, 97; 121 S. W. Rep. 932.

The uncontradicted evidence was that two boxes and a barrel containing household goods were delivered to the initial carrier, and that the plaintiff in error received same, but delivered only one of the boxes and the barrel, and that the value of the box lost was $75; that there were two rates in effect upon household goods shipped from Lawton to Gentry, one based upon a released valuation of five dollars per hundredweight, and a higher rate upon such articles not so released, and that the latter rate was seventy-eight cents per hundred pounds higher than the released valuation rate, and that these two rates "were evidenced by tariffs duly filed with the Interstate Commerce Commission and published according to law."

The defendant in error testified, over objection, that though he could read and write and had signed the release set out above and had received the bill of lading, he had neither read them nor asked any questions about them, and had not been given any information as to the contents of either document, and had no knowledge of the existence of the two rates. He was also allowed to testify that if he had known of the difference between the two rates, and the effect of accepting the lower, he would have paid the higher rate. There was no evidence tending to show any misrepresentation made by the company, or of any deceit, or fraud, or concealment, unless it be inferred from the fact that the company made no explanation of the rates or the contents of either the bill of lading or the release. The shipper merely said that the bill of lading was handed to him with the release, which he was asked to sign. Exceptions were taken to the rulings upon evidence and to certain parts of the charge and for the refusal of the court to grant certain requests.

Mr. Samuel W. Moore, with whom *Mr. James B. McDonough* was on the brief, for plaintiff in error:

The Hepburn Act does not prevent a common carrier

from making a valid contract limiting its liability in case of loss to an agreed valuation, when such contract rests upon a legal consideration.

When Congress enacted this legislation, it had before it the rule universally established in both state and Federal jurisdiction, that a carrier may, by contract, limit its liability to an agreed valuation in the event of the loss of articles, particularly where such agreement, as in this case, is based upon a valuable consideration. For Federal cases, see *Hart* v. *Pa. R. R. Co.*, 112 U. S. 331; *Liverpool Steam Co.* v. *Insurance Co.*, 129 U. S. 397; *Primrose* v. *West. Un. Tel. Co.*, 154 U. S. 1; *Chicago Ry. Co.* v. *Solan*, 169 U. S. 133; *Cau* v. *Ry. Co.*, 194 U. S. 427; *Jennings* v. *Smith*, 106 Fed. Rep. 139; *Mo., K. & T. Ry. Co.* v. *Patrick*, 144 Fed. Rep. 632.

For the leading cases in the state courts, see *Ballon* v. *Earle*, 17 R. I. 441; *Louisville & N. R. Co.* v. *Sherrod*, 84 Alabama, 178; *Starnes* v. *L. & N. R. Co.*, 91 Tennessee, 516; *Ullman* v. *C. & N. W. Ry. Co.*, 112 Wisconsin, 150; *Richmond & D. R. Co.* v. *Payne*, 86 Virginia, 481; *Normile* v. *Oregon R. & Nav. Co.*, 41 Oregon, 177; *Zouch* v. *Chesapeake & O. Ry. Co.*, 36 W. Va. 524; *Pierce* v. *Southern Pac. Co.*, 120 California, 156; *Alair* v. *Northern Pac. R. Co.*, 53 Minnesota, 160; *Douglas* v. *Minnesota T. R. Co.*, 62 Minnesota, 292; *Duntley* v. *Boston & M. Co.*, 66 N. Mex. 263.

Stipulations substantially the same as in the case at bar, releasing the value of property in case of loss to $5.00 per hundred pounds, were upheld in *Carleton* v. *N. Y. C. & H. R. R. R. Co.*, 117 N. Y. Supp. 1021; *M., K. & T. Ry. Co.* v. *McLaughlin*, 116 Pac. Rep. 811; *M., K. & T. Ry. Co.* v. *Patrick*, 144 Fed. Rep. 634; *Huguelet* v. *Warfield*, 65 S. E. Rep. 985; *Lansing* v. *N. Y. C. & H. R. R. R. Co.*, 102 N. Y. Supp. 1092; *Hazel* v. *C., M. & St. P. R. R. Co.*, 82 Iowa, 477. See also *Grenwald* v. *Barrett*, 199 N. Y. 170; *Belger* v. *Dinsmore*, 51 N. Y. 166; *Magnin* v. *Dinsmore*, 70

N. Y. 410; *Zimmer* v. *N. Y. C. & H. R. R. R. Co.*, 137 N. Y. 460; *Travis* v. *Wells-Fargo & Co.*, 74 Atl. Rep. 444; *Bernard* v. *Adams Express Co.*, 91 N. E. Rep. 325; *Fielder & Turley* v. *Adams Express Co.*, 71 S. E. Rep. 99; *Blackwell* v. *Southern Pacific Co.*, 184 Fed. Rep. 489; *Geo. N. Pierce Co.* v. *Wells-Fargo & Co.*, 189 Fed. Rep. 561. The cases of *St. L. &c. Ry. Co.* v. *Grayson*, 115 S. W. Rep. 933; *Schmelzer* v. *St. L. & S. F. Ry. Co.*, 158 Fed. Rep. 649; *Southern Pac.* v. *Crenshaw Bros.*, 5 Ga. App. 675, cited and relied upon by the Supreme Court of Arkansas as supporting its ruling in this case, do not consider or pass upon the question here involved.

The Supreme Court of Arkansas, prior to the case at bar, held that the Hepburn Act did not prohibit the making of a contract requiring notice of loss or damage as a condition precedent to a recovery. *St. L., I. M. & S. R. Co.* v. *Furlow*, 89 Arkansas, 404; *St. L. & S. F. Ry. Co.* v. *Keller*, 90 Arkansas, 308.

The plaintiff, having signed the contract of release, is conclusively presumed to have assented to both the contract and bill of lading, and will not be heard to say that he did not read them or know what they meant. *St. L., I. M. & S. Ry. Co.* v. *Weakly*, 50 Arkansas, 397; *Hutchinson* v. *C., St. P., M. & O. R. R. Co.*, 37 Minnesota, 524; *Coles* v. *L. E. & St. L. R. R. Co.*, 41 Ill. App. 607; *Johnstone* v. *R. & D. R. R. Co.*, 39 So. Car. 55; *Western Ry. Co.* v. *Harwell*, 91 Alabama, 340; *Wabash &c. R. R. Co.* v. *Black*, 11 Ill. App. 465; *Hart* v. *Pa. R. R. Co.*, 112 U. S. 331; *John Hood Co.* v. *Am. Express Co.*, 191 Massachusetts, 27; *Black* v. *Wabash &c. R. R. Co.*, 111 Illinois, 351; *Stewart* v. *Cleveland &c. Ry. Co.*, 21 Ind. App. 218; *Atchison &c. Ry. Co.* v. *Dill*, 48 Kansas, 210; *Grace* v. *Adams*, 100 Massachusetts, 505; *Davis* v. *Cent. V. Ry. Co.*, 66 Vermont, 290; *Taylor* v. *Wier*, 162 Fed. Rep. 585; *Milligan* v. *Ill. Cent. Ry. Co.*, 36 Iowa, 181; *Cau* v. *T. & P. Ry. Co.*, 194 U. S. 426.

To permit the judgment in this case to stand is to set aside and annul the lawfully published interstate tariffs of the defendant, and to create the very discrimination which it is the purpose and intent of the Interstate Commerce Act to prevent. *T. & P. Ry. Co.* v. *Mugg*, 202 U. S. 242; *Armour Pkg. Co.* v. *United States*, 209 U. S. 56; *T. & P. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426.

The bill of lading and contract of release inure to the benefit of the connecting carrier and may be availed of by it.

These two documents not only established the agreed valuation, but by the express terms of the contract of release it inured to the benefit of connecting carriers, within the rule that a contract may be availed of by one who is not a party to it, if it was made for his benefit as one of its expressed objects. *Young* v. *The Key City*, 14 Wall. 653; *Central Tr. Co.* v. *C. J. & M. Ry. Co.*, 58 Fed. Rep. 500; *Thompkins* v. *R. R.*, 102 Georgia, p. 445; *Collins* v. *K. C. M. & E. Co.*, 110 Pac. Rep. 734 (Okla.); *Spear Min. Co.* v. *Shinn & Co.*, 124 S. W. Rep. 1045 (Ark.); *Chambers* v. *Phila. P. Co.*, 75 Atl. Rep. 159 (N. J.); *Eau Claire L. Co.* v. *Banks*, 136 Mo. App. 44; *Luedecke* v. *Des Moines C. Co.*, 118 N. W. Rep. 456; *Bethlehem Iron Co.* v. *Hoadley*, 152 Fed. Rep. 735; *Fish* v. *Bank*, 150 Fed. Rep. 524; *Whitehill* v. *W. U. Tel. Co.*, 136 Fed. Rep. 499.

No appearance for defendant in error.

Mr. Justice Lurton, after making the foregoing statement, delivered the opinion of the court.

The Supreme Court of the State declined to consider or pass upon any of the questions made in that court for reversal except the single question as to whether the plaintiff in error, as the final carrier in the route, was entitled to the benefit of the stipulation in the release signed by the shipper, releasing the Chicago, Rock Island and Pacific Railway, the primary carrier, "and all other Railroad and

Transportation Companies over whose lines the above property may pass to destination, from any loss or damage the property may sustain in excess of five dollars per hundredweight.".

The court, after saying that the plaintiff in error "relies for a reversal on the clause in the contract with the initial carrier limiting the liability as to value in case of loss . . . as a stipulation for its benefit as well as for the benefit of the initial carrier, and bases this contention on our decisions to that effect," in answer to this contention, said:

"But in making their contention they have not taken into consideration the effect of the Hepburn Amendment to the Interstate Commerce Act, which became effective on June 29th, 1906, a date prior to the time the contract in question was made."

The provisions of the twentieth section of that act were then set out, and the court proceeded by saying:

"The undisputed evidence shows that the initial carrier received the property for transportation from a point in one State to a point in another State, and the presumption in the absence of evidence to the contrary was, as will be seen from our decisions hereinafter referred to, that the goods were lost through the negligence of appellant, the last carrier.

"The section of the Hepburn Act above quoted makes the carrier liable 'for any loss, damage, or injury to such property caused by it, . . . and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed.'

"The express terms of the act makes the carrier liable for any loss caused by it, and provides that no contract shall exempt it from the liability imposed. It is manifest that the act renders invalid all stipulations designed to limit liability for losses caused by the carrier. Public

policy forbids that a public carrier should by contract exempt itself from the consequences of its own negligence. For the same reason a statute may prohibit it from making stipulations in a contract which provide for such partial exemption.

"If the initial carrier is prohibited from making a contract limiting its own liability, it is obvious that it could not make a contract limiting the liability of its connecting carriers; for the section of the Hepburn Act under discussion provides that the carrier issuing the bill of lading may recover from the connecting carrier, on whose line the loss occurs the amount of the loss it may be required to pay the owner."

As the shipment was interstate, the contract was controlled by the twentieth section of the act of Congress of June 29, 1906. The initial carrier under that provision of the Interstate Commerce Act, as an interstate carrier, holding itself out to receive shipments from a point upon its own line in one State to a point in another State upon the line of a succeeding and connecting carrier, came under liability not only for its own default but also for loss or damage upon the line of a connecting carrier in the route: *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186. Any stipulation in its own receipt was ineffective in so far as it was not authorized by the section of the act referred to, whether intended for its own benefit or that of the succeeding carrier. It is also true that any limitation of liability contained in its contract which would be valid in its own behalf would likewise inure to the benefit of its connecting carrier. The liability of any carrier in the route over which the articles were routed, for loss or damage, is that imposed by the act as measured by the original contract of shipment so far as it is valid under the act. This provision of the Interstate Commerce Act has been so fully considered and decided that we need not go further into the matter: *Adams Express Company* v. *Croninger*,

226 U. S. 491; *Chicago &c. Ry.* v. *Latta*, 226 U. S. 519; *Chicago &c. Ry.* v. *Miller*, 226 U. S. 513. That provision, under the opinions above cited, does not forbid a limitation of liability in case of loss or damage to a valuation agreed upon for the purpose of determining which of two alternative lawful rates shall apply to a particular shipment.

But it is said that upon the face of the contract of limitation here involved, it is an exemption from liability for negligence forbidden by the Carmack Amendment, and that the judgment should therefore be affirmed.

That amendment undoubtedly manifested the purpose of Congress to bring contracts for interstate shipments under one uniform rule or law, and therefore, withdraw them from the influence of state regulation. *Adams Express Co.* v. *Croninger*, above cited. Every such initial carrier is required "to issue a receipt or bill of lading therefor," when it receives property for transportation from one State to another. Such initial carrier is made liable to the holder of such receipt for any loss or damage "caused by it," or by any connecting carrier in the route to whom it shall make delivery. It is then declared that no contract, receipt, rule or regulation shall "exempt" such a common carrier "from the liability hereby imposed."

In speaking of the "liability" imposed by the provision referred to, we said, in the *Croninger Case* (p. 511), that "the statutory liability, aside from responsibility for the default of a connecting carrier in the route, is not beyond the liability imposed by the common law as that body of law applicable to carriers has been interpreted by this court as well as many courts of many States." Referring to the exemption forbidden by the same clause, we said, that that was "a statutory declaration that a contract of exemption from liability for negligence is against public policy and void." Citing *Bernard* v. *Adams Express Co.*, 205 Massachusetts, 254, 259, and *Greenwald* v. *Barrett*, 199 N. Y. 170, 175, and other cases.

Is the contract here involved one for exemption from liability for negligence and therefore forbidden? An agreement to release such a carrier for part of a loss due to negligence is no more valid than one whereby there is complete exemption. Neither is such a contract any more valid because it rests upon a consideration than if it was without consideration. A declared value by the shipper for the purpose of determining the applicable rate, when the rates are based upon valuation, is not an exemption from any part of its statutory or common-law liability. The right of the carrier to base rates upon value has been always regarded as just and reasonable. The principle that the compensation should bear a reasonable relation to the risk and responsibility assumed is the settled rule of the common law. Thus in *Gibbon* v. *Paynton*, 4 Burrows, 2298, it was said by Lord Mansfield (p. 2300): "His warranty and insurance is in respect of the reward he is to receive: and the reward ought to be proportionable to the risque." In the leading case of *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331, the right of the carrier to adjust the rate to the valuation which the shipper places upon the thing to be transported is the very basis upon which a limitation of liability in case of loss or damage is rested. This is an administrative principle in rate-making recognized as reasonable by the Interstate Commerce Commission, and is the basis upon which many tariffs filed with the Commission are made. *Matter of Released Rates*, 13 I. C. C. Rep. 550.

It follows, therefore, that when the carrier has filed rate-sheets which show two rates based upon valuation upon a particular class of traffic, that it is legally bound to apply that rate which corresponds to the valuation. If the shipper desires the lower rate, he should disclose the valuation, for in the absence of knowledge the carrier has a right to assume that the higher of the rates based upon value applies. In no other way can it protect itself in its

right to be compensated in proportion to its insurance risk. But when a shipper delivers a package for shipment and declares a value, either upon request or voluntarily, and the carrier makes a rate accordingly, the shipper is estopped upon plain principles of justice from recovering, in case of loss or damage, any greater amount. The same principle applies if the value be declared in the form of a contract. If such a valuation be made in good faith for the purpose of obtaining the lower rate applicable to a shipment of the declared value, there is no exemption from carrier liability due to negligence forbidden by the statute when the shipper is limited to a recovery of the value so declared. The ground upon which such a declared or agreed value is upheld is that of estoppel. Thus in *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331, 340, 341, it is stated:

"As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them. If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed."

In summing up the view of the court in the same case it was said (p. 343):

"The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition

that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

The valuation declared or agreed upon as evidenced by the contract of shipment upon which the published tariff rate is applied, must be conclusive in an action to recover for loss or damage a greater sum. In saying this we lay on one side, as not here involved, every question which might arise when it is shown that the carrier intentionally connived with the shipper to give him an illegal rate, thereby causing a discrimination or preference forbidden by the positive terms of the act of Congress and made punishable as a crime. To permit such a declared valuation to be overthrown by evidence *aliunde* the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward undervaluations and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies. The valuation the shipper declares determines the legal rate where there are two rates based upon valuation. He must take notice of the rate applicable, and actual want of knowledge is no excuse. The rate, when made out and filed, is notice, and its effect is not lost, although it is not actually posted in the station: *Texas & Pacific Railway* v. *Mugg*, 202 U. S. 242; *Chicago & A. Railway* v. *Kirby*, 225 U. S. 155.

It would open a wide door to fraud and destroy the uniform operation of the published tariff rate sheets. When there are two published rates, based upon difference in value, the legal rate automatically attaches itself to

the declared or agreed value. Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. The shipper's knowledge of the lawful rate is conclusively presumed, and the carrier may not be required to surrender the goods carried upon the payment of the rate paid, if that was less than the lawful rate, until the full legal rate has been paid. *Texas & Pacific Railway* v. *Mugg, supra.* Nor is the carrier liable for damages resulting from a mistake in quoting a rate less than the full published rate. *Illinois Central Railroad* v. *Henderson Elevator Company*, 226 U. S. 441. Nor can a carrier legally contract with a particular shipper for an unusual service unless he make and publish a rate for such service equally open to all. *Chicago & Alton Railway* v. *Kirby, supra.*

That the valuation and the rate are dependent each upon the other is an administrative rule applied in reparation proceedings by the Interstate Commerce Commission. *Southern Oil Company* v. *Southern Railway Co.*, 19 I. C. C. Rep. 79; *Miller & Lux* v. *Southern Pacific Company*, 20 I. C. C. Rep. 129.

In *Hart* v. *Penn. R. R. Co.*, 112 U. S. 331, parole evidence that the horses shipped were of a far greater value than the valuation agreed upon was rejected as incompetent. "The presumption is conclusive," said the court, "that if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation."

The difference between two rates upon the same commodity based upon valuation is presumably no more than sufficient to protect the carrier against the greater amount of risk he assumes by reason of the difference in value. When the higher rate is no more than to reasonably insure

the carrier against the larger responsibility a real choice of rate is offered and the shipper has no reasonable excuse for undervaluation. If the margin between the rates is unreasonably beyond protection against the larger risk the shipper may be induced to misrepresent the value to escape the unreasonably high rate upon the real value. This would result in permitting the shipper to obtain a rate to which he is not entitled, and in the carrier escaping from a portion of its statutory liability. Both the adjustment of rates upon the class of articles based upon difference in valuation, as well as the acceptance of stipulations in the carrier's bill of lading which affect the liability declared by the Carmack Amendment, are administrative duties of the Commission. To the extent that such limitations of liability are not forbidden by law, they become, when filed, a part of the rate.

In the instant case, we must assume that the difference between the rates upon household goods of less value than five dollars per hundredweight and the rate upon the same class of goods of a higher value has been fixed upon this principle. We must for the purpose of this case accept the high and low rate as reasonable. If the present rates upon such goods, as shown in the tariffs filed, are inadequate to protect the shipper, a remedy can be had by an order of the Interstate Commerce Commission readjusting the rates to meet the requirements of justice, alike to shipper and carrier.

Coming now to the application of the principles we have indicated, we are at once confronted with the suggestion that the contract in this case is not one of valuation. Upon the side of the shipper the pregnant words are that he thereby "releases the said company from all liability for any loss or damage said property may sustain in excess of $5 per 100 lbs." At the foot and below the signature of the consignor is a notation addressed to the company's agent, stating in substance, that when house-

hold goods are shipped at the rate based on a valuation of $5 per 100 lbs. the agent will require the owner or consignor to "sign this agreement," and then note on the bill of lading, —"Released to valuation of $5 per hundred." This was done, showing that the agent understood that the household goods were shipped upon a valuation of five dollars per hundred pounds. The tariff sheets filed with the Commission showed two rates on household goods, one "when released to five dollars per hundred and a higher rate when not so released." The rate endorsed on the bill of lading and paid by the shipper was the lower rate so prescribed by the rate sheets. The lawful rate when valued at more than five dollars per hundred was twenty per cent. higher than the rate under which the consignor's household goods were shipped. In the light of the published tariffs and of the rate applied to this shipment, the two papers, read together, plainly mean that the household goods included in the two boxes and one barrel were valued for the purpose of coming under the lower rate at five dollars per hundred.

The phrase "hereby releases," etc., is said to indicate not a valuation but a release from liability for a part of the value. The words are somewhat misleading. Yet contracts for the limitation of loss to an agreed valuation are largely in this form. The Commission, which has the rate sheets of hundreds of railroads including stipulations as to value, treats the topic under the title "*Released Rates.*" 13 I. C. C. Rep. 550. The phrase has, we may take notice, come to be a term applied to contracts of shipment containing in one form or another an agreement to adjust a loss or damage upon the basis of an agreed or declared value. It is difficult not to see, when we read the bill of lading and the release, with its note, in the light of the filed rate sheets and the rate paid upon this shipment corresponding to the lower of two rates upon household goods, that the consignor and the carrier mutually under-

stood that these boxes and this barrel contained household goods of the average value per hundredweight of five dollars. The defendant in error must be presumed to have known that he was obtaining a rate based upon a valuation of five dollars per hundredweight, as provided by the published tariff. This valuation was conclusive, and no evidence tending to show an undervaluation was admissible.

It has been suggested that a rate of five dollars per hundred pounds upon household goods indiscriminately is arbitrary, and has no reasonable relation to the actual value. This objection goes to the classification made in the filed tariff sheets. They place two rates upon household goods valued over and under five dollars per hundred pounds. This basis has not been regarded by the Commission as either arbitrary or unreasonable. In the opinion styled "*In the matter of Released Rates*," cited above, the Commission, among other things, said (p. 564):

"The practice of basing rates upon the condition that the carrier shall not be responsible for losses due to causes beyond its control has received legal sanction. Similarly we find no impropriety in a graduation of rates in accordance with the actual values of specific commodities. Household goods, for example, differ widely in value, and it is fair to all that the man who ships goods of low value should receive the benefit of a lower rate than the man who ships more expensive goods. Rate-making upon this principle is in every respect legitimate."

Our conclusion is that the shipping contract does not upon its face offend against the statute, and the judgment must, for the errors indicated, be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE HUGHES and MR. JUSTICE PITNEY dissent.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY *v.* HARRIMAN.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 121. Argued January 20, 1913.—Decided March 10, 1913.

Adams Express Co. v. *Croninger*, 226 U. S. 491, and *Kansas City Southern Ry.* v. *Carl*, *ante*, p. 639, followed to effect that the shipper who values his goods for the purpose of obtaining the lower of two duly published rates, based on valuation, is estopped from recovering a greater amount than his own valuation; and that the Carmack Amendment to the Hepburn Act of 1906 expresses the policy of Congress on this subject and supersedes all state legislation thereon.

It is not unreasonable, and in fact is the method approved by the Interstate Commerce Commission, in graduating freight according to value, to divide the particular subject of transportation into two classes—those above and those below a fixed amount; and the establishment of two cattle rates, one based on a maximum fixed value and the other on the actual value, is not a violation of the Carmack Amendment of the Hepburn Act.

The Carmack Amendment has withdrawn the determination of validity of all stipulations in interstate shipping contracts from state law and legislation. Under that amendment the validity of a provision that suit must be brought within a specified period is a Federal question to be settled by the general common law.

The liability imposed by the Carmack Amendment is that of the common law and it may be limited or qualified by a special contract with the shipper limiting it in a just and reasonable manner except exemption from loss or responsibility due to negligence; and so *held* as to a stipulation that suit be brought within ninety days from the happening of the loss.

Limitation of the time within which to bring actions is a usual and reasonable provision and there is nothing in the policy of the Carmack Amendment that is violated thereby.

THE facts, which involve the validity under the Carmack Amendment of a contract for interstate shipment of

live stock and a provision therein fixing the valuation of the shipment in case of loss in consideration of a lower rate, are stated in the opinion.

Mr. Alex. S. Coke, Mr. Joseph M. Bryson and *Mr. Cecil H. Smith* for plaintiff in error submitted:

Under the act to regulate commerce a carrier may fix its rates with reference to its liability, or the time within which suit shall be brought, in case of loss or damage, increasing the rates where the liability is that fixed by common law or the time for filing it is long and reducing them where the liability is limited or the time within which to sue is short.

Where tariffs duly issued, filed and published contain two rates for the shipment of cattle, one based upon the carrier's common-law liability with the statutory period for filing suit and the other based upon a limited liability with a time less than that prescribed by the statute for suing, such provisions are binding upon the carrier and the shipper and must be observed by them both in the collection and payment of charges and in the adjustment of loss and damage claims. *Kansas City So. Ry. Co.* v. *Albers Comm. Co.*, 223 U. S. 573; *N. Y., N. H. & H. R. R.* v. *Int. Com. Comm.*, 200 U. S. 361, 391; *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Tex. & Pac. Ry. Co.* v. *Mugg*, 202 U. S. 242; *Louisville & Nash. R. R. Co.* v. *Motley*, 219 U. S. 467; *Chi. & Atl. R. R. Co.* v. *Kirby*, 225 U. S. 155; *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426.

The courts, whether state or Federal, have no power to declare unreasonable the rates, rules or regulations specified by a carrier in its tariffs unless the matter shall first have been presented to the Interstate Commerce Commission. *Texas & P. Ry. Co.* v. *Abilene Cotton Oil Co., supra; Robinson* v. *Balto. & O. R. R. Co.*, 222 U. S. 506; *B. & O. R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 480;

Int. Com. Comm. v. *Ill. Cent. Ry. Co.*, 215 U. S. 452; *Int. Com. Comm.* v. *C., R. I. & P. Ry. Co.*, 218 U. S. 88.

Where a carrier specifies two rates on cattle in its tariffs, one based upon its common-law liability and the other upon a limited liability fixed by the terms and conditions of its current live stock contract, such live stock contract, when properly executed, is valid, and the carrier's liability must be determined by its provisions.

There is nothing in the Carmack Amendment forbidding the basing of rates upon limited liability or prohibiting contracts limiting liability in consideration of reduced rates.

Prior to the statute of 11 Geo. IV, and 1 Wm. IV, c. 68, it was held that a carrier who had given notice that he would not be responsible for goods of greater value than five pounds, and in some cases ten pounds, unless the value was declared at the time of shipping, and the rate paid accordingly, would not be liable at all, even for the five pounds or the ten pounds, to a shipper who shipped a package of greater value, as an ordinary package, without disclosing its real value. *Gibbon* v. *Poynton*, 4 Burr. 2298; *Clay* v. *Willan*, 1 H. Bl. 298; *Izett* v. *Mountain*, 4 East, 371; *Batson* v. *Donovan*, 4 B. & Ald. 21.

Under the statute 11 Geo. IV, and 1 Wm. IV, c. 68, which required the shipper to give notice of the value if the value exceeded ten pounds, it was held that the carrier is not liable, even if the loss happens by the gross negligence of his servants, where a parcel of greater value than ten pounds is delivered without declaring its value and paying the rate according to value. *Hinton* v. *Dibbin*, 2 Ad. & E. N. S. 646.

Long prior to the passage of the Carmack Amendment it was held that a contract fairly made, agreeing on the valuation of the property carried with the freight rate based on an assumption by the carrier of liability only to the extent of the agreed valuation, even where the loss

resulted from the negligence of the carrier, would be upheld. *Hart* v. *Pennsylvania R. R. Co.*, 112 U. S. 331. This rule has also been followed in *Kidd* v. *Greenwich Insurance Co.*, 35 Fed. Rep. 351; *Calderon* v. *Atlas Steamship Co.*, 64 Fed. Rep. 874; *S. C.*, 69 Fed. Rep. 574; *The Kensington*, 88 Fed. Rep. 331; *Jennings* v. *Smith*, 106 Fed. Rep. 139; *Saunders* v. *Southern Railway*, 128 Fed. Rep. 15; *Macfarlane* v. *Adams Express Co.*, 137 Fed. Rep. 982; *Missouri &c. Ry. of Texas* v. *Patrick*, 144 Fed. Rep. 632; *Taylor* v. *Weir*, 162 Fed. Rep. 585; *Blackwell* v. *Southern Pac. Co.*, 184 Fed. Rep. 489; *Pierce Co.* v. *Wells-Fargo Co.*, 189 Fed. Rep. 561; and approved in *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 442; *Calderon* v. *Atlas S. S. Co.*, 170 U. S. 272; *The Kensington*, 183 U. S. 263, and *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477.

For the cases in the state courts of last resort adopting the rule in the *Hart Case*, see *Alair* v. *Railroad Company*, 53 Minnesota, 160; *Douglas Co.* v. *Railway Co.*, 62 Minnesota, 288; *O'Malley* v. *Railway Co.*, 86 Minnesota, 380; *Loeser* v. *Chicago, M. & St. P. Ry. Co.*, 94 Wisconsin, 571; *Ullman* v. *Chicago &c. Ry. Co.*, 112 Wisconsin, 150; *Baltimore & Ohio Ry. Co.* v. *Hubbard*, 72 Oh. St. 302.

The main purpose of the Carmack Amendment was to give the holder of the bill of lading a right of action against the initial carrier for loss caused by connecting carriers, but it also creates a cause of action against the initial line which is in the nature of a right created by Federal law to take the place of rights prior thereto existing under the common law or under state enactments. *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186; *So. Pac. Ry. Co.* v. *Crenshaw*, 63 S. E. Rep. 865.

The amendment has been frequently construed by state courts and by inferior Federal courts as not prohibiting agreements of the kind in question. *Greenwald* v. *Weir*, 199 N. Y. 170; *Bernard* v. *Adams Express Co.*, 205 Massachusetts, 254; *Travis* v. *Wells-Fargo*, 79 N. J. L. 83; *P. C.*

C. & St. L. Ry. Co. v. *Mitchell* (Ind.), 91 N. E. Rep. 735; *Larsen* v. *Oregon S. L. R. Co.* (Utah), 110 Pac. Rep. 983; *Frye* v. *Southern P. Ry. Co.*, 247 Illinois, 564; *Fielder* v. *Express Co.* (W. Va.), 71 S. E. Rep. 99.

For cases under the Harter Act, 27 Stat. 445, see *Calderon* v. *Atlas S. S. Co.*, 64 Fed. Rep. 874; aff'd 69 Fed. Rep. 574; *id.* 170 U. S. 272.

Many States having statutory provisions restricting the right of common carriers to limit their liability by contract, nevertheless apply the rule of the *Hart Case. D'Arcy* v. *Adams Express Co.*, 162 Michigan, 363; *Alair* v. *Railroad Co.*, 53 Minnesota, 160; *Douglas Co.* v. *Railway Co.*, 62 Minnesota, 288; *Oppenheimer* v. *U. S. Express Co.*, 69 Illinois, 62: *Johnstone* v. *Richmond & D. R. Co.*, 39 So. Car. 55.

No law or public policy of a State can serve to set aside or change the rates, rules and regulations of a carrier affecting interstate commerce specified in its duly issued, filed and published tariffs. *Mondou* v. *N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1.

Congress has rightfully assumed jurisdiction of the subject-matter, and therefore state laws covering the same must yield. *Southern Ry. Co.* v. *Reid & Beam*, 222 U. S. 444; *Nor. Pac. Ry. Co.* v. *Washington*, 222 U. S. 370; *G., C. & S. F. Ry. Co.* v. *Hefley*, 158 U. S. 98.

Congress has so taken possession of the field of interstate commerce as to render inoperative state laws governing liability where the liability is a matter of contract based upon tariff provisions, in consideration of which the shipper was given a reduced rate.

The finding of the state court that in this case there was in fact no reduction in the rate at which the cattle were to be carried and no consideration for the limitation, in the face of uncontradicted testimony showing that plaintiff in error did have two rates for the shipment of cattle and that defendants in error obtained the benefit of the

lower rate, which they could obtain only by executing the contract limiting plaintiff in error's liability, is not binding upon this court, but it will look to the whole testimony to determine for itself what the fact is. *K. C. So. Ry. Co.* v. *C. H. Albers Comm. Co.*, 223 U. S. 573.

To so construe the Carmack Amendment as to leave state regulations in force concurrently with the regulations of Congress would permit discrimination and leave uncertainty in a field where Congress clearly intended there should be no discrimination and no uncertainty. *C., M. &c. Ry. Co.* v. *Solan*, 169 U. S. 133, and *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477, distinguished.

Defendants in error, in declaring the value of their cattle at less than their true value for the purpose of securing a lower rate than they would have been charged had the true value been declared, were guilty of an unlawful act, under the Act to Regulate Commerce and the Elkins Act, and they cannot maintain a suit based upon such transaction. *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Ellison* v. *Adams Express Co.*, 245 Illinois, 410.

A transaction in violation of a penal statute cannot be the basis of judicial action, unless the statute manifests an intention not to limit its scope to the exaction of the penalty. *Miller* v. *Ammon*, 145 U. S. 421; *Brown* v. *Tarkington*, 3 Wall. 377; *Hanauer* v. *Doane*, 12 Wall. 342; *The Florida*, 101 U. S. 37; *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396; *McMullin* v. *Hoffman*, 174 U. S. 639; *Harriman* v. *Northern Securities Co.*, 197 U. S. 244.

Mr. William M. Williams, with whom *Mr. J. A. L. Wolfe* was on the brief, for defendants in error:

A carrier may fix its rates for interstate shipments with reference to the service to be performed, and may adopt rules and regulations concerning the same; but a shipper will not be bound by a contract, which is invalid and prohibited by law, simply because the rate collected is con-

ditioned upon the signing of such void agreement. *Drey & Kahn Glass Co.* v. *Missouri Pacific Ry. Co.* (Mo. App.), 136 S. W. Rep. 757; *O'Connor* v. *Great Northern Ry. Co.* (Minn.), 136 N. W. Rep. 743; *Hooker* v. *Boston R. Co.* (Mass.), 95 N. E. Rep. 945; *Adams Ex. Co.* v. *Mellinchamp* (Ga.), 75 S. E. Rep. 600; *Cramer* v. *Chicago, R. I. & P. Ry. Co.* (Iowa), 133 N. W. Rep. 387.

The Interstate Commerce Act was intended primarily to regulate rates. The chief purpose of the act was to secure uniformity of treatment to all, to suppress unjust discriminations and undue preferences and to prevent special and secret agreements in respect of rates for transportation. *Kansas City S. R. Co.* v. *Albers Com. Co.*, 223 U. S. 573.

The record does not show that the live stock contract was ever filed with the Interstate Commerce Commission, or that any tariff sheet so filed contained the rules and regulations relied on in this case.

Defendants in error did not misrepresent the value of their cattle for the purpose of obtaining a lower freight rate than they would have secured if the true value had been known.

Upon the general and local applicatory law, the special contract, attempting to limit the carrier's liability for its own negligence, and fixing an arbitrary and unreasonable value upon the cattle, was void. There is nothing in the Interstate Commerce Act to prevent a state court from enforcing its own rules upon this subject, and a judgment based upon the state law as contained in its statutes or decisions raises no Federal question. *Pennsylvania Ry. Co.* v. *Hughes*, 191 U. S. 477; *Chicago, M. & St. P. R. R. Co.* v. *Solan*, 169 U. S. 133; *Savage* v. *Jones*, 225 U. S. 551.

For cases in the state courts as to the effect of the Interstate Commerce Act and the decision in the *Hughes Case, supra*, see *Adams Express Co.* v. *Mellinchamp*, 75

S. E. Rep. 596; *Southern Express Co.* v. *Hanaw*, 134 Georgia, 445; *O'Connor* v. *Great Northern R. Co.*, 136 N. W. Rep. 743; *Hooker* v. *Boston & M. R. Co.*, 95 N. E. Rep. 945; *Louisville & N. R. Co.* v. *Smith*, 134 S. W. Rep. 866; *Cramer* v. *Chicago, R. I. & P. R. Co.*, 133 N. W. Rep. 387. See also *Latta* v. *Chicago, St. P. & M. R. Co.*, 172 Fed. Rep. 850.

Mr. Justice Lurton delivered the opinion of the court.

This was an action in a state court of Texas by a shipper of cattle, under a special live-stock transportation contract for a shipment from a point in Missouri to a point in Oklahoma, to recover the value of cattle killed by a negligent derailment occurring in the former State. The shipment consisted of four bulls and thirteen cows, claimed to have been very valuable "show cattle." They were all killed, and plaintiffs recovered their full value, $10,640, and this judgment was affirmed by the court below.

As the transaction was an interstate shipment the case comes here upon questions which involve the validity of certain provisions in the contract of shipment when tested by the twentieth section of the Act to Regulate Commerce, as amended by the act of June 29, 1906 (34 Stat. 584, c. 3591).

Aside from the question of negligence, which we assume to be closed by the verdict and judgment in the state court, the defenses pressed here are, first, that the limitation of value in case of loss or damage to thirty dollars for each bull and twenty dollars for each cow, was a valid declaration of the valuation upon which the rate was based; and, second, that the action was not brought within ninety days after damage sustained, both being stipulations found in the shipping contract.

Those provisions in the contract which directly relate to the questions stated are as follows:

The title at the head of the contract is,—

"RULES AND REGULATIONS FOR THE TRANSPORTATION OF LIVE STOCK.

NOTICE.

This Company has two rates on live stock."

Then follows a paragraph in these words:

"Ordinary Live Stock transported under this special contract is accepted and hauled at rate named below at owner's risk, as per conditions herein set forth, with the distinct understanding that said rate is a special rate, which is hereby agreed to, accepted and understood to be at less than published tariff rate applying thereon when transported at carrier's risk.

"All Kinds of Live Stock, Carrier's Risk, will be taken under the provisions and at rates provided for by existing tariffs and classification."

Then follows the contract described as "Special Live Stock Contract No. 4. Executed at Pilot Grove Station, 1–30–1907."

Passing over a number of provisions concerning the agreement upon the part of the carrier, and a number of things which the shipper assumes to do, we come to § 8, which is in these words:

"8. The carrier does not ship live stock or Emigrant Outfit under this contract or at the rate hereon given upon which its liability in case of any loss or injury, shall exceed the following prices per head:

Each horse, (gelding, mare, stallion mule or jack)	$100.00
Each pony or range horse	30.00
Each Ox, Steer or bull	30.00
Each cow	20.00
Each calf or hog	7.00
Each sheep or goat	2.00

"Emigrant Outfit (not live stock) consisting of Emigrant Movables, Household Goods, Second-hand Farm

Machinery, etc., when loaded with live stock, as per classification at valuation not to exceed $5.00 per 100 pounds in case of loss or damage, and said shipper represents and agrees that his said live stock or emigrant outfit do not exceed in value those prices, and in case of any loss or damage thereto, by carrier's negligent transportation, or handling of said cars as aforesaid, it is mutually agreed, in consideration of the rate named, and which is less than the rate applying on shipments at carrier's risk, the shipper shall be entitled to recover only actual damages, but in no instance more than the stipulated valuation shown above."

The provision of the published tariff sheet referred to in the contract is set out in the margin, preceded by the offer of counsel to file it in evidence.[1] By a clause in the ninth

[1] Mr. Head: We offer the following portions of I. C. C. tariff No. A-1636, M. K. & T. Local Distance Tariff No. 2548 applying on classes and commodities:

MISSOURI, KANSAS & TEXAS RAILWAY CO.
THE 'KATY' ROUTE.
Local Distance Tariff No. 2548.
(Cancels No. 737.)

Applying on classes and commodities between stations on the Missouri, Kansas & Texas Ry. as follows:

Between Stations in	And Stations in
Indian Territory	Oklahoma Territory
Missouri or Kansas	Indian Territory
Missouri or Kansas	Oklahoma Territory

And locally between Stations in the Indian or Oklahoma Territories.

Rates in Cents Per 100 lbs.

CATTLE (See Rule 3)

Distance	Commodities	Carloads.
380 miles and over 370		26½

Rule 3.

LIVE STOCK—Continued.

Limitation of Liability.—Rates provided on Live Stock will apply only on shipments made at Owner's Risk, with limitation of liability on the part of the railroad company as common carrier under the terms and conditions of the current Live Stock contract provided by this

section of the contract under which the cattle were shipped it is stipulated that "no suit shall be brought against any carrier, and only against the carrier on whose line the injuries occur, after the lapse of 90 days from the happening thereof, any statute or limitation to the contrary notwithstanding."

In respect of the two stipulations just referred to, the trial judge charged the jury as follows:

"The contract of shipment in this case contains among other things, a stipulation that suit for any damages growing out of this shipment must be commenced within ninety days. You are instructed that such stipulation is void and not binding upon the plaintiffs herein.

"Said contract also contains a stipulation to the effect that if the cattle in the shipment are lost or killed, that their owners can only recover a certain fixed amount, which amount is named in said contract. You are instructed that such stipulation is void and not binding upon plaintiffs in this case, and if you should find for plaintiffs, you will fix the amount of their damages under instructions hereinafter given you."

This charge was approved upon appeal and the judgment affirmed. The ground upon which the charge in respect to the limitation of recovery in case of loss was based was first, that every such contract, where the loss was due to negligence, was null and void under the law and public policy of the State; and, second, that it was a contract of exemption forbidden by the Hepburn Act of June 29, 1906, being the Carmack Amendment of the

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company, the contract to be first duly executed in manner and form provided therein.

120 per cent. of the rates named in this tariff will be charged on shipments made without limitations of carrier's liability at common law and under this status, shippers will have the choice of executing and accepting contracts for shipments of Live Stock with or without limitation of liability, the rates to be made as provided for herein.

twentieth section of the general act to regulate commerce of February 4, 1887. (24 Stat. 379, c. 104.)

That the shipper had the choice of two rates, one twenty per cent. higher than the other, upon this shipment, is shown by the provisions of the shipping contract and the tariff sheets referred to therein. That the difference between the two rates was not unreasonable, the one when the cattle were not valued and the other when their value was declared, is to be assumed from the acceptance of the rates as filed with the Commission. That the "portion" of the rate sheets in evidence does not include the "Current Live Stock Contract" referred to in the part filed, is of no vital significance. The objection was not made below. The case was proceeded with in the state court upon the hypothesis that the "Current Live Stock Contract," referred to in the "portion" of the rate sheets actually in evidence, was the live stock contract executed by the parties, and had been duly filed as part of the rate sheets. It is too late to make an objection here which, if made below, might have been remedied by filing all instead of a "portion" of the filed tariff. *Texas & P. Railway* v. *Abilene Oil Co.*, 204 U. S. 426. In any event the rate sheets do provide for a choice between two rates, one with and one without a declared valuation. In one case the carrier is liable for whatever loss or damage the shipper sustains and in the other its liability is limited to the valuation upon which the rate was based. The ground upon which the shipper is limited to the valuation declared is that of estoppel, and presupposes the valuation to be one made for the purpose of applying the lower of two rates based upon the value of the cattle. This whole matter has been so fully considered in *Adams Express Company* v. *Croninger*, 226 U. S. 491, and *Kansas City Southern Railway* v. *Carl*, just decided, that we only need to refer to the opinions in those cases without further elaboration.

That the trial court and the Court of Civil Appeals

erred in holding this stipulation null and void because forbidden by either the law or policy of the State of Texas, or by the twentieth section of the act of June 29, 1906, is no longer an open question since the decisions of this court in the cases just referred to.

Nor is there anything upon the face of this contract, when read in connection with the rate sheets referred to therein, (of which the defendants in error were compelled to take notice not only because referred to in the contract signed by them, but because they had been lawfully filed and published), which offends against the provisions of the twentieth section of the act of June 29, 1906.

Neither is the valuation of cattle at thirty and twenty dollars per head subject to impeachment as upon its face arbitrary and unreasonable. The valuation in this case was made by the consignor himself. The contract upon this point reads, "And said shipper represents and agrees that his said live stock . . . do not exceed in value those prices," referring to the schedule set out immediately above that declaration. That the cattle were not other than average or ordinary cattle of no peculiar value as "show cattle," or otherwise, is indicated by the character of the printed form of contract signed by the consignor. After reciting that the company had two rates on live stock, it proceeds,—"Ordinary live stock transported under this special contract," etc.

The contract here involved is substantially identical with the contract and schedule upheld in *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331, where the transportation was "on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: 'If horses or mules, not exceeding two hundred dollars each. If cattle or cows, not exceeding seventy-five dollars each.'"

In the case at bar it has been said that the shipper was not asked to state the value, but only signed the contract

handed to him and made no declaration. But the same point was made in the *Hart Case*, when the court said (p. 337):

"A distinction is sought to be drawn between a case where a shipper, on requirement, states the value of the property, and a rate of freight is fixed accordingly, and the present case. It is said, that, while in the former case the shipper may be confined to the value he so fixed, in the event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract is not a valuation previously named by the shipper. But we see no sound reason for this distinction. The valuation named was the 'agreed valuation,' the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further."

It is said that the contract in the case at bar includes a valuation of all bulls and all cows at the same sum, and that this is arbitrary and not the result of any real effort to value the particular bulls and cows to be transported. But the same objection applied to the contract in the *Hart Case*, where horses were valued at the same maximum value and other cattle at the same fixed sum. But here, as there, it is plain that all animals, horses and other cattle, have not a fixed value, and so, the contract fixes "a graduated value according to the nature of the animal."

It is not unreasonable for the purpose of graduating freight according to value to divide the particular subject of transportation into two classes, those above and those below a fixed maximum amount. No other method is practicable, and this is a method administratively approved by the Commerce Commission.

That the value of the cattle shipped under this valuation did greatly exceed the valuation therein represented, may

be true. It only serves to show that the shipper obtained a lower rate than he was lawfully entitled to have by a misrepresentation. It is neither just nor equitable that he shall benefit by the lower rate, and then recover for a value which he said did not exist, in order to obtain that rate. Having obtained a rate based upon the declared value, he is concluded, and there is no room for parol evidence to show otherwise. *Hart* v. *Pennsylvania Railroad* and *Kansas City &c. Railroad* v. *Carl, supra.*

When the carrier graduates its rates by value and has filed its tariffs showing two rates applicable to a particular commodity or class of articles, based upon a difference in valuation, the shipper must take notice, for the valuation automatically determines which of the rates is the lawful rate. If he knowingly declares an undervaluation for the purpose of obtaining the lower of two published rates, he thereby obtains an advantage and causes a discrimination forbidden and made unlawful by the first section of the Elkins Act of February 19, 1903 (32 Stat. 847, c. 708). *Texas & P. Railway* v. *Mugg*, 202 U. S. 242; *Chicago & A. Railway* v. *Kirby*, 225 U. S. 155. The particular cattle were loaded by the shipper and were never seen by the company's agent. Neither was it claimed that he was informed of the value or quality of the cattle to be shipped. We see no ground upon which this contract can be held upon its face to have offended against the statute.

The court below held that the stipulation in the shipping contract that no suit shall be brought after the lapse of ninety days from the happening of any loss or damage, "any statute or limitation to the contrary notwithstanding," was void.

It is conceded that there are statutes in Missouri, the State of the making of the contract, and the State in which the loss and damage occurred, and in Texas, the State of the forum, which declare contracts invalid which require the bringing of an action for a carrier's liability

in less than the statutory period, and that this action, though started after the lapse of the time fixed by the contract was brought within the statutory period of both States.

The liability sought to be enforced is the "liability" of an interstate carrier for loss or damage under an interstate contract of shipment declared by the Carmack Amendment of the Hepburn Act of June 29, 1906. The validity of any stipulation in such a contract which involves the construction of the statute, and the validity of a limitation upon the liability thereby imposed is a Federal question to be determined under the general common law, and, as such, is withdrawn from the field of state law or legislation. *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Michigan Central Railroad* v. *Vreeland*, *ante*, p. 59. The liability imposed by the statute is the liability imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence. *Adams Express Company* v. *Croninger*, and *Michigan Central Railroad* v. *Vreeland*, cited above; *York Co.* v. *Central Railroad Co.*, 3 Wall. 107; *Railroad Company* v. *Lockwood*, 17 Wall. 357; *Express Company* v. *Caldwell*, 21 Wall. 264, 267; *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331.

The policy of statutes of limitation is to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents or failure of memory. But there is nothing in the policy or object of such statutes which forbids the parties to an agreement to provide a shorter period, provided the time is not unreasonably short. That is a question of law for the determination of the court. Such stipulations have been sustained in insurance policies. *Riddlesbarger* v. *Hartford*

Insurance Co., 7 Wall. 386. A stipulation that an express company should not be held liable unless claim was made within ninety days after a loss was held good in *Express Company* v. *Caldwell*, 21 Wall. 264. Such limitations in bills of lading are very customary and have been upheld in a multitude of cases. We cite a few: *Central Vermont Railroad* v. *Soper* (1st C. C. A.), 59 Fed. Rep. 879; *Ginn* v. *Ogdensburg Transit Co.* (7th C. C. A.), 85 Fed. Rep. 985; *Cox* v. *Central Vermont Railroad*, 170 Massachusetts, 129; *North British &c. Insurance Co.* v. *Central Vermont Railroad*, 9 App. Div. (N. Y.) 4, aff'd 158 N. Y. 726. Before the Texas and Missouri statutes forbidding such special contracts, short limitations in bills of lading were held to be valid and enforceable. *McCarty* v. *Gulf &c. Ry.*, 79 Texas, 33; *Thompson* v. *Chicago &c. Ry.*, 22 Mo. App. 321. See cases to same effect cited in 6 Cyc., p. 508. The provision requiring suit to be brought within ninety days is not unreasonable.

For the errors indicated, the judgment must be reversed for such further proceedings as may be consistent with this opinion.

Mr. Justice Hughes concurs in the result. Mr. Justice Pitney dissents.

OPINIONS PER CURIAM, ETC., FROM JANUARY 14, 1913, TO MARCH 10, 1913.

No. 178. GEORGE MENGEL, PLAINTIFF IN ERROR, *v.* BLANCHE MENGEL AND LOUIS ECKHART, SHERIFF. In error to the Supreme Court of the State of Iowa. January 27, 1913. *Per Curiam.* Dismissed for the want of jurisdiction. (*Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 112, 118; *McCorquodale* v. *Texas*, 211 U. S. 432; *Farrell* v. *O'Brien*, 199 U. S. 100–101; *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102.) *Mr. Benjamin I. Salinger* for the plaintiff in error. *Mr. I. S. Pepper* for the defendants in error.

No. 134. THE GULF, COLORADO & SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* J. H. THORN. In error to the County Court of Sabine County, State of Texas. January 27, 1913. *Per Curiam.* Judgment reversed with costs, and cause remanded for further proceedings, upon the authority of *Gulf, Colorado & Santa Fe Ry. Co.* v. *Dennis*, 224 U. S. 503. *Mr. J. W. Terry, Mr. Gardiner Lathrop, Mr. A. H. Culwell, Mr. A. B. Browne, Mr. Alexander Britton* and *Mr. Evans Browne* for the plaintiff in error. No appearance for the defendant in error.

No. —. Original. *Ex parte:* IN THE MATTER OF NATHAN EISEMANN, PETITIONER. Submitted January 27, 1913. Decided February 3, 1913. Motion for leave to file a petition for a writ of mandamus denied. *Mr. Eugene P. Carver* for the petitioner.

No. —. Original. *Ex parte:* In the Matter of Dan Chain, Petitioner. Submitted January 28, 1913. Decided February 3, 1913. Motion for leave to file petition for writ of *habeas corpus* denied. *Mr. A. M. Belcher* and *Mr. H. W. Houston* for the petitioner.

No. —. Original. In the Matter of the Petition of William Armstrong to Strike the Name of Fletcher Dobyns from the Roll of Attorneys. Submitted February 24, 1913. Decided March 3, 1913. Motion for leave to file petition denied. *Mr. William Armstrong* in support of the petition.

No. —. Original. *Ex parte:* In the Matter of Gordon R. McGee, Petitioner. Submitted March 3, 1913. Decided March 10, 1913. *Per Curiam.* The motion for leave to file petition for writ of *habeas corpus* is denied. (*Ex parte Webb*, 225 U. S. 663, 674, and authorities there cited.) *Mr. Frans E. Lindquist* for the petitioner.

Decisions on Petitions for Writs of Certiorari, from January 14, 1913, to March 10, 1913.

No. 917. Louisiana & Texas Lumber Company, Petitioner, *v.* C. S. Swift. January 20, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. L. C. Boyle* and *Mr. Joseph S. Brooks* for the petitioner. *Mr. Cone Johnson* for the respondent.

No. 926. J. B. CLEMENTS ET AL., PETITIONERS, *v.* GEORGE P. NORTHROP ET AL., EXECUTORS. January 27, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Alexander Akerman* for the petitioners. *Mr. Arthur H. Codington* for the respondents.

No. 927. M. P. HALL ET AL., PETITIONERS, *v.* W. A. HUFF ET AL. January 27, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Alexander Akerman* for the petitioners. *Mr. Dupont Guerry* and *Mr. Thos. S. Felder* for the respondents.

No. 905. FIREBALL GAS TANK & ILLUMINATING COMPANY ET AL., PETITIONERS, *v.* COMMERCIAL ACETYLENE COMPANY ET AL. February 3, 1913. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Hugh K. Wagner* for the petitioners. No appearance for respondents.

No. 935. A. D. HOWE MACHINE COMPANY, PETITIONER, *v.* COFFIELD MOTOR WASHER COMPANY. February 3, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Conrad H. Syme* for the petitioner. *Mr. R. J. McCarty* for the respondent.

No. 902. JOSEPH F. GUFFEY ET AL., PETITIONERS, *v.* JAMES A. SMITH ET AL.; and

No. 903. JOSEPH F. GUFFEY ET AL., PETITIONERS, *v.* SUSANNAH SMITH ET AL. February 24, 1913. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Joseph W. Bailey*, *Mr. J. H. Beal*, *Mr. Levy Mayer* and *Mr. J. W. Moses* for the petitioners. *Mr. Jay A. Hindman*, *Mr. John W. Kern* and *Mr. Abram Simmons* for the respondent.

No. 947. MALLEABLE IRON RANGE COMPANY, PETITIONER, *v.* ARTHUR K. BECKWITH. February 24, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Thos. A. Banning* and *Mr. Arthur L. Morsell* for the petitioner. *Mr. Fred L. Chappell* for the respondent.

No. 957. FRED D. MAY ET AL., PETITIONERS, *v.* THE UNITED STATES. February 24, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. P. H. Cullen*, *Mr. Thos. T. Fauntleroy* and *Mr. Shepard Barclay* for the petitioners. *The Attorney General* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 942. MISSOURI, KANSAS & TEXAS RAILWAY COMPANY ET AL., PETITIONERS, *v.* THE UNITED STATES. March 3, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Cecil H. Smith* for the petitioners. *The Attorney General* for the respondent.

No. 956. MARY A. VELATI, PETITIONER, *v.* WILLIAM J. DANTE, TRUSTEE. March 3, 1913. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Wilton J. Lambert* for the petitioner. *Mr. Edwin C. Brandenburg, Mr. Clarence A. Brandenburg* and *Mr. F. Walter Brandenburg* for the respondent.

No. 961. JOSEPHINE P. MCGOWAN, EXECUTRIX, ETC., ET AL., PETITIONERS, *v.* EMILY E. PARISH, EXECUTRIX, ETC. March 3, 1913. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Nathaniel Wilson* and *Mr. J. J. Darlington* for the petitioners. *Mr. Holmes Conrad* and *Mr. Leigh Robinson* for the respondent.

No. 968. J. A. FOLGER, PETITIONER, *v.* KATE C. PUTNAM, ADMINISTRATRIX, ETC. March 3, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Walter D. Mansfield* for the petitioner. *Mr. Edward M. Cleary* for the respondent.

No. 977. ISAAC B. WALKER, PETITIONER, *v.* THE UNITED STATES. March 3, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Hannis Taylor, Mr. Francis M. Etheridge* and *Mr. Joseph M. McCormick* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 962. THERESA L. LANG ET AL., PETITIONERS, *v.* THE CHOCTAW, OLKAHOMA & GULF RAILROAD COMPANY ET AL. March 10, 1913. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Wm. M. Randolph* and *Mr. Wassell Randolph* for the petitioners. *Mr. Thos. S. Buzbee* for the respondents.

No. 988. MISSISSIPPI VALLEY FUEL COMPANY ET AL., PETITIONERS, *v.* WATSON COAL COMPANY. March 10, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Thos. William White* for the petitioners. *Mr. John A. Blevins, Mr. Wm. M. Acton* and *Mr. J. W. Jamison* for the respondent.

No. 983. THE UNITED STATES, PETITIONER, *v.* F. W. WHITRIDGE, RECEIVER, ETC.; and

No. 984. THE UNITED STATES, PETITIONER, *v.* A. H. JOLINE ET AL., RECEIVERS, ETC. March 10, 1913. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *The Attorney General, The Solicitor General* and *Mr. Wm. C. Herron* for the petitioner. *Mr. Joseph H. Choate, Jr., Mr. Matthew C. Fleming* and *Mr. A. H. Masten* for the respondents.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM JANUARY 14, 1913, TO MARCH 10, 1913.

No. 278. ROBERT H. MONTGOMERY, TRUSTEE IN BANKRUPTCY OF MAURICE G. SAMUELS, APPELLANT, *v.* CHARLES A. READ, TRUSTEE, ETC. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. January 15, 1913. Dismissed with costs, on motion of *Mr. E. C. Brandenburg*, in behalf of counsel for the appellant. *Mr. Leon Lauterstein* and *Mr. Jackson H. Ralston* for appellant. No appearance for the appellee.

No. 130. AXEL GUSTAVESON ET AL., PLAINTIFFS IN ERROR, *v.* THE STATE OF IOWA. In error to the Supreme Court of the State of Iowa. January 16, 1913. Dismissed with costs, pursuant to the tenth rule. *Mr. Benjamin I. Salinger* for the plaintiffs in error. No appearance for the defendant in error.

No. 225. COMMERCIAL LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR, *v.* THE PEOPLE OF THE STATE OF ILLINOIS, UPON THE INFORMATION OF GEORGE J. AMBROSE. In error to the Supreme Court of the State of Illinois. January 20, 1913. Dismissed, without costs to either party, per stipulation of counsel. *Mr. George A. Chritton* for the plaintiff in error. *Mr. Thomas F. Sheridan* and *Mr. George B. Gillespie* for the defendant in error.

No. 137. COMPANIA DE LOS FERROCARRILES DE PUERTO RICO, PLAINTIFF IN ERROR, *v.* KARL ROHRER ET AL.

In error to the District Court of the United States for Porto Rico. January 21, 1913. Dismissed with costs, pursuant to the tenth rule. *Mr. Francis H. Dexter* for the plaintiff in error. *The Attorney General* for the defendants in error.

No. 773. R. A. Marks et al., Plaintiffs in Error, *v.* S. A. Davis et al. In error to the Supreme Court of the State of Kansas. January 23, 1913. Dismissed with costs, on motion of *Mr. M. E. Olmsted* for the plaintiffs in error. *Mr. Marlin E. Olmsted* and *Mr. D. R. Hite* for the plaintiffs in error. No appearance for the defendants in error.

No. 950. Congregacion de la Mision de San Vicente de Paul, Appellant, *v.* Francisco Reyes y Mijares and Banco Espanol Filipino. Appeal from the Supreme Court of the Philippine Islands. January 27, 1913. Docketed and dismissed with costs, on motion of *Mr. Evans Browne* for the appellees. *Mr. Evans Browne* for the appellees. No one opposing.

No. 461. Central Vermont Railway Company, Appellant, *v.* John W. Redmond, et al., Constituting the Public Service Commission of the State of Vermont. Appeal from the Circuit Court of the United States for the District of Vermont. January 29, 1913. Dismissed with costs, on motion of counsel for the appellant, and cause remanded to the District Court of the United States for the District of Vermont. *Mr. C. W. Witters* and *Mr. George B. Young* for the appellant. No appearance for the appellees.

No. 164. HENRY S. REDMOND ET AL., APPELLANTS, *v.* PAUL ALEXANDER, AS TRUSTEE IN BANKRUPTCY OF BORNN & COMPANY. Appeal from the United States Circuit Court of Appeals for the Second Circuit. February 24, 1913. Dismissed per stipulation. *Mr. Herbert A. Heyn, Mr. C. E. Thorn* and *Mr. Chas. K. Beekman* for the appellants. *Mr. Frederick C. McLaughlin* for the appellee.

No. 700. LOUIS CELLA, APPELLANT, *v.* WILLIAM HENKEL, UNITED STATES MARSHAL, ETC., ET AL.;

No. 701. ANGELO CELLA, APPELLANT, *v.* WILLIAM HENKEL, UNITED STATES MARSHAL, ETC., ET AL.; AND

No. 702. SAMUEL ADLER, APPELLANT, *v.* WILLIAM HENKEL, UNITED STATES MARSHAL, ETC., ET AL. Appeals from the District Court of the United States for the Southern District of New York. February 24, 1913. Dismissed with costs, on motion of counsel for the appellants. *Mr. A. S. Worthington, Mr. Chas. L. Frailey* and *Mr. Howard Taylor* for the appellants. *The Attorney General* for the appellees.

No. 770. DAN SHAW, PLAINTIFF IN ERROR, *v.* THE CITY OF ATLANTA. In error to the Court of Appeals of the State of Georgia. February 24, 1913. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Chas. T. Hopkins* for the plaintiff in error. No appearance for the defendant in error.

No. 840. THE UNITED STATES, APPELLANT, *v.* THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS ET AL.

Appeal from the District Court of the United States for the Eastern District of Missouri. February 26, 1913. Dismissed, on motion of *Mr. Solicitor General Bullitt* for the appellant. *The Attorney General* for the appellant. No appearance for the appellees.

No. 166. UMENO SHIGEMATSU, APPELLANT, *v.* H. HACKFELD & COMPANY, LIMITED. Appeal from the District Court of the United States for the Territory of Hawaii. February 27, 1913. Dismissed with costs, pursuant to the tenth rule. *Mr. John W. Cathcart* for the appellant. *Mr. Frank E. Thompson* and *Mr. Charles F. Clemons* for the appellee.

No. 173. JOSEPH ATWATER, PLAINTIFF IN ERROR, *v.* W. T. HASSETT, JUDGE, ET AL. In error to the Supreme Court of the State of Oklahoma. March 3, 1913. Dismissed with costs, pursuant to the tenth rule. *Mr. John Devereux* for the plaintiff in error. No appearance for the defendants in error.

No. 174. FREDERICK M. HUBBELL ET AL., AS TRUSTEES, ETC., PLAINTIFFS IN ERROR, *v.* LAFAYETTE HIGGINS. In error to the Supreme Court of the State of Iowa. March 3, 1913. Dismissed with costs, pursuant to the tenth rule. *Mr. Alonzo C. Parker* and *Mr. Will E. Johnston* for the plaintiffs in error. No appearance for the defendant in error.

No. 761. PHŒNIX KNITTING WORKS, APPELLANT, *v.* NATHAN J. RICH ET AL., AS N. J. RICH & COMPANY.

Appeal from the District Court of the United States for the Northern District of Ohio. March 5, 1913. Dismissed per stipulation. *Mr. Chas. F. Fawcett* for the appellant. *Mr. Albert Lynn Lawrence* for the appellees.

No. 224. RIWKE MAISEN, ALIAS RIWKE MAISCH, APPELLANT, *v.* LOUIS T. WEIS, UNITED STATES COMMISSIONER OF IMMIGRATION, ETC., ET AL. Appeal from the District Court of the United States for the District of Maryland. March 6, 1913. Dismissed with costs, on motion of counsel for the appellant. *Mr. Eugene O'Dunne* and *Mr. Thos. J. Mason* for the appellant. *The Attorney General* for the appellees.

No. 220. THE PULLMAN COMPANY, PLAINTIFF IN ERROR, *v.* ELLSWORTH C. IRVINE, RECEIVER, ET AL. In error to the Supreme Court of the State of Ohio. March 10, 1913. Dismissed per stipulation. *Mr. Wm. B. Sanders, Mr. Harold T. Clark, Mr. H. T. Wilcoxon, Mr. Andrew Squire* and *Mr. F. B. Daniels* for the plaintiff in error. *Mr. Fred C. Rector, Mr. Gilbert H. Stewart, Mr. Gilbert H. Stewart, Jr.*, and *Mr. T. E. Powell* for the defendants in error.

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2. *Under § 250 of Judicial Code; when authority of officer of United States drawn in question.*

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3. *Under § 250 of Judicial Code; meaning of "drawn in question."*

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2. *Applications; basis for; substitution of rights.*

An application must depend upon its particular basis; it cannot be kept open for the substitution of another right than that upon which it was made; and if a practice to do so existed in the Department it was wrong. (*Moss* v. *Dowman*, 176 U. S. 413.) *Ib.*

3. *Applications; rejection; substitution of claims; effect of action by Secretary in keeping case open.*

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The act of March 2, 1896, 29 Stat. 42, was one of a series of acts and applies only to public lands open to entry and not to lands within an Indian reservation. *Northern Pacific Ry. Co.* v. *United States*, 355.

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