
T
9891993388

UNITED STATES REPORTS

VOLUME 229

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1912

CHARLES HENRY BUTLER

REPORTER

THE BANKS LAW PUBLISHING CO.
NEW YORK
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] Resigned March 11, 1913. The office of Solicitor General was not filled until after the close of October Term, 1912.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES, MARCH 18, 1912.[1]

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

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

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

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

For the Third Circuit, Mahlon Pitney, Associate Justice.

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

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

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

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

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

For the Ninth Circuit, Joseph McKenna, Associate Justice.

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

TABLE OF CONTENTS.

TABLE OF CASES REPORTED.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

TABLE OF CASES

CITED IN OPINIONS

TABLE OF STATUTES

CITED IN OPINIONS

(A.) Statutes of the United States.

(B.) Statutes of the States and Territories.

(C.) Statutes of Foreign Nations.

(D.) Treaties.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1912.

BAUER & CIE *v.* O'DONNELL.

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

No. 951. Argued April 10, 1913.—Decided May 26, 1913.

The right to make, use and sell an invented article existed without, and before, the passage of the patent law; the act secured to the inventor the exclusive right to make, use and vend the thing patented.

While the patent law should be fairly and liberally construed to effect the purpose of Congress to encourage useful invention, the rights and privileges which it bestows should not be extended by judicial construction beyond what Congress intended.

In framing the patent act and defining the rights and privileges of patentees thereunder Congress did not use technical or occult phrases, but in simple terms gave the patentee the exclusive right to make, use and vend his invention for a definite term of years.

A patentee may not by notice limit the price at which future retail sales of the patented article may be made, such article being in the hands of a retailer by purchase from a jobber who has paid to the agent of the patentee the full price asked for the article sold. *Henry* v. *Dick Co.*, 224 U. S. 1, distinguished.

The patent law differs from the copyright law in that it not only confers the right to make and sell, but also the exclusive right to use the subject-matter of the patent.

The words "vend" and "vending" as used in § 4952, Rev. Stat., in regard to the copyright protection accorded authors and as used in § 4884, Rev. Stat., in regard to the protection accorded inventors for their patented articles, are substantially the same, and the protection intended to be secured to authors and inventors is substantially identical.

While *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, recognized that there are differences between the copyright statute and the patent statute, and disclaimed then deciding the effect of the word "vending" as used in the latter, this court now decides that the terms used in regard to the protection accorded by both statutes in regard to the exclusive right to sell are to all intents the same.

The right given by the patent law to the inventor to use his invention should be protected by all means properly within the scope of the statute, and the patentee may transfer a patented article with a qualified title as to its use. *Henry* v. *Dick Co.*, 224 U. S. 1.

Where the transfer of the patented article is full and complete, an attempt to reserve the right to fix the price at which it shall be resold by the vendee is futile under the statute. It is not a license for qualified use, but an attempt to unduly extend the right to vend. *Henry* v. *Dick Co.*, 224 U. S. 1, distinguished.

While the patent law creates to a certain extent a monopoly by the inventor in the patented article, a patentee who has parted with the article patented by passing title to a purchaser has placed the article beyond the limits of the monopoly secured by the act. *Adams* v. *Burke*, 17 Wall. 453.

THE facts, which involve the construction of § 4884, Rev. Stat., and the extent of the rights thereunder of patentees to control the price at which the patented article shall be sold by their vendees, are stated in the opinion.

Mr. Edwin J. Prindle for plaintiffs-appellants:

The inventor has the right to exclude every one from any making, using, or selling of the patented invention. Therefore, when he grants any right under the patent to anyone, he simply waives his right to exclude them from all making, using, or selling of the patented invention to that extent, and all ungranted right of exclusion remains in him.

A notice of price restriction on a package is notice to all the world that the right to sell the article below the price stated on the package is not granted and does not pass from the inventor.

Defendant's sale at a retail price below the amount named, of packages bought from jobbers and having the license restriction label on them, was an infringement.

Price restrictions have been sustained in this court and in the lower Federal courts. *Mitchell* v. *Hawley*, 16 Wall. 544; *Henry* v. *Dick*, 224 U. S. 1; *Bement* v. *National Harrow Co.*, 186 U. S. 70.

The right of a patentee to restrict the price at which his article shall be sold by a license-restriction-notice attached to the article, of the same import as the notice in the present case, has been sustained by many of the lower courts in the United States and by the courts of England. *Victor Talking Machine* v. *The Fair*, 123 Fed. Rep. 424; *New Jersey Patent Co.* v. *Schaefer*, 144 Fed. Rep. 437; *Rubber Tire Wheel Co.* v. *Milwaukee R. W. Co.*, 154 Fed. Rep. 358; *Goshen Rubber Works* v. *Single Tube A. & B. Tire Co.*, 166 Fed. Rep. 431; *Edison* v. *Ira M. Smith Co.*, 188 Fed. Rep. 925; *Waltham Watch Co.* v. *Keene*, 191 Fed. Rep. 855; *Automatic Pencil Sharpener Co.* v. *Goldsmith Bros.*, 190 Fed. Rep. 205; *Indiana Mfg. Co.* v. *Nichols*, 190 Fed. Rep. 579; *Incandescent Gas Co.* v. *Cantelo*, 12 Rep. Pat. Cas. 262; *Same* v. *Brogden*, 16 Rep. Pat. Cas. 183; *Badische Analin &c.* v. *Isler* (1906), 1 Chancery, 611; *McGruther* v. *Pitcher* (1904), 2 Chancery, 306; *National Phonograph Co.* v. *Mench*, 27 T. L. R. 239; *The B. V. D. Co.* v. *Wolf* (unreported); *The Fair* v. *Dover Mfg. Co.*, 166 Fed. Rep. 117; *Edison Phonograph Co.* v. *Kaufmann*, 105 Fed. Rep. 960; *Edison Phonograph Co.* v. *Pike*, 116 Fed. Rep. 863; *National Phonograph Co.* v. *Schlegel*, 128 Fed. Rep. 733; *Ingersoll* v. *Shellenberg*, 147 Fed. Rep. 522; *Winchester Arms Co.* v. *Buengar*, 199 Fed. Rep. 786; *American Graphophone Co.* v. *Pickard*, 201 Fed.

Rep. 546; *Lovell-McConnell Co.* v. *International Automobile League*, 202 Fed. Rep. 219.

Many of the foregoing cases are identical, in principle, with the facts in the present case.

The patentee's control over selling was recognized by this court in *Henry* v. *Dick*, 224 U. S. 1.

The right of the patentee to restrict the price at which his article shall be sold comes within the principle decided in *Henry* v. *Dick*, and the defendant in this case is a contributory infringer precisely as Henry was in that case.

The patentee's monopoly of selling is coördinate with that of using his patented article and subject to the same degree of control. *Adams* v. *Burke*, 17 Wall. 453; *Bement* v. *National Harrow Co.*, *supra*; *Standard Sanitary Co.* v. *United States*, 226 U. S. 20.

Plaintiffs did not receive the full consideration for the patented article when they received the purchase money from the defendant or the jobber, and they have a continuing interest in the article.

Patentee's control over the price of his article is reasonable, proper and consistent with sound public policy.

Defendant's purchase from jobber instead of from plaintiffs does not relieve him from infringement, as he had notice through the price restriction on the label. *Victor Talking Machine Co.* v. *The Fair*, 123 Fed. Rep. 427; *New Jersey Patent Co.* v. *Schaefer*, 144 Fed. Rep. 437; *S. C.*, 159 Fed. Rep. 171; *Edison* v. *Smith*, 188 Fed. Rep. 925; *Automatic Pencil Co.* v. *Goldsmith*, 190 Fed. Rep. 205.

The *Waltham Watch Case*, 191 Fed. Rep. 855, has no bearing on the case at bar, and the language quoted had no reference to the distinction in the present case. So also as to the *Folding Bed Case*, 147 U. S. 659.

There is no attempt in this case at monopoly or to restrict trade. The patentee only seeks to control the price

of an article in an industry which he himself has created, and in which the public has had no previous rights or experience of free competition in the article. The public is just as free to purchase unpatented articles as it ever was, and the monopoly which the law gives the patentee is only the inducement which it held out to the patentee to make the invention and the just and proper price paid for his contribution of it forever to public knowledge at the expiration of the monopoly.

The defense based on the copyright statute and *Bobbs-Merrill* v. *Straus*, 210 U. S. 339, does not apply. Judge Ray in his decision in the *Waltham Watch Case* argues at length that as the Supreme Court in the *Bobbs-Merrill Case* held that an author has no right to fix the price at which his book should be resold, it follows that an inventor is also without that right.

This court in that case expressly refused to express an opinion as to whether, under the state of facts in the present case, its decision would be the same as it was in that case.

These three separate rights of making, using and selling granted the inventor by the patent statute have always been treated as coördinate rights and never been treated as of different rank.

The right to sell is always treated as coördinate with the right to make and use in the patent cases, while as decided in the *Bobbs-Merrill Case*, the right to sell under the copyright statute is merely incidental to the right of duplication.

There are vital differences between the right to vend of the inventor and the right to vend of the author. And because of the differences in the nature of a patented article and an author's book, there are vital differences in what is involved in "vending" under the two statutes.

The power of an inventor to subdivide the right to vend,

granted by his patent, has been repeatedly upheld. On the other hand, the author can only assign his right as a whole. He could not subdivide the territory in any such way. See *Bobbs-Merrill Case*, 147 Fed. Rep. 23; *Crown Co.* v. *Standard Brewery*, 174 Fed. Rep. 258.

Rights under the patent statute are much broader than those under the copyright statute. The patent statute gives a complete monopoly of the invention. The copyright statute only gives the right of duplicating and the right of vending. "Making" under the patent statute covers every form of the invention which performs the same function in substantially the same way, without regard to appearance.

The patent statute gives the inventor absolute control over the use of the invention and the inventor can forbid its use in any but a particular locality. No author, however, could restrict the reading of his book only to the person who purchases it, or to its being read only in a certain town.

The monopoly granted to the inventor is very much more extensive than that granted to the author, and the scope of "vending" under the patent statute cannot be measured by the scope of "vending" under the copyright statute. *The Fair* v. *Dover Mfg. Co.*, 166 Fed. Rep. 117; *Automatic Pencil Co.* v. *Goldsmith*, 190 Fed. Rep. 205; *Indiana Mfg. Co.* v. *Nichols*, 190 Fed. Rep. 579; *Edison* v. *Smith*, 188 Fed. Rep. 925; *Waltham Watch Co.* v. *Keene*, 191 Fed. Rep. 855.

The cases cited by defendant, to-wit: *Bloomer* v. *McQuewan*, 14 How. 539; *Adams* v. *Burke*, 17 Wall. 453; *Chaffee* v. *Boston Belting Co.*, 22 How. 217; *Morgan Envelope Co.* v. *Albany Paper Co.*, 152 U. S. 425; *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659; *Bement* v. *National Harrow Co.*, 186 U. S. 70, do not sustain his proposition to the effect that a sale of a patented article under a license restriction borne by that article, and known to the pur-

chaser, frees the article from the restrictions. *Patterson* v. *Kentucky*, 97 U. S. 501.

Defendant's right in the physical materials of the packages of Sanatogen which be bought is unquestioned. He has, however, no right to use those materials in violation of the reserved portion of monopoly, namely, to sell the package at a retail price lower than one dollar. *Henry* v. *Dick*, 224 U. S. 1.

Plaintiffs' patent grants them the right to exclude all others from any making, using or selling of the patented invention. In *Henry* v. *Dick*, the right was sustained of a patentee to enjoin others from violation of conditions as to use attached to a sale.

The patentee's control over selling is coördinate and co-extensive with that over using his invention.

Plaintiffs did not receive the full consideration for the patented article when they received the purchase money, and they have a continuing interest in the article.

The patentee's control over the price of his patented article is reasonable, proper and consistent with sound public policy.

This court has recognized the patentee's control over the resale price of his patented article, and such control comes within the principle decided in *Henry* v. *Dick*.

Mr. Daniel W. Baker, with whom *Mr. Frank J. Hogan* was on the brief, for O'Donnell, defendant-appellee.

Mr. Frederick P. Fish and *Mr. Thomas W. Pelham*, by leave of court and on behalf of the Gillette Safety Razor Company, filed a brief in support of plaintiffs' contention.

Mr. Horace Pettit, by leave of court and on behalf of the Victor Talking Machine Company, also filed a brief in support of plaintiffs' contention.

MR. JUSTICE DAY delivered the opinion of the court.

This case is on a certificate from the Court of Appeals of the District of Columbia. The facts stated in the certificate are:

"Bauer & Cie, of Berlin, Germany, copartners, being the assignees of letters patent of the United States, dated April 5, 1898, No. 601,995, covering a certain water soluble albumenoid known as 'Sanatogen' and the process of manufacturing the same, about July, 1907, entered into an agreement with F. W. Hehmeyer, doing business in the City of New York under the trade name of The Bauer Chemical Company, whereby Hehmeyer became and has since been the sole agent and licensee for the sale of said product in the United States, the agreement contemplating that Hehmeyer should have power to fix the price of sale to wholesalers or distributors and to retailers, and to the public. The agreement further contemplated that said product should be furnished Hehmeyer at manufacturing cost, the net profits obtained by him to be shared equally by the parties to the agreement. Since April, 1910, this product has been uniformly sold and supplied to the trade and to the public by the appellants and their licensees in sealed packages bearing the name 'Sanatogen,' the words 'Patented in U. S. A., No. 601,995,' and the following:

"'Notice to the Retailer.

"'This size package of Sanatogen is licensed by us for sale and use at a price not less than one dollar ($1.00). Any sale in violation of this condition, or use when so sold, will constitute an infringement of our patent No. 601,995, under which Sanatogen is manufactured, and all persons so selling or using packages or contents will be liable to injunction and damages.

"'A purchase is an acceptance of this condition. All

rights revert to the undersigned in the event of violation.

THE BAUER CHEMICAL CO.'

"The appellee is the proprietor of a retail drug-store at 904 F Street, N. W., in this city. He purchased of the Bauer Chemical Company for his retail trade original packages of said Sanatogen bearing the aforesaid notice. These packages he sold at retail at less than one dollar and, persisting in such sales, appellants in March, 1911, severed relations with him. Thereupon appellee, without the license or consent of the appellants, purchased from jobbers within the District of Columbia, said jobbers having purchased from appellants, original packages of said product bearing the aforesaid notice, sold said packages at retail at less than the price fixed in said notice, and avers that he will continue such sales."

The question propounded is: "Did the acts of the appellee, in retailing at less than the price fixed in said notice, original packages of 'Sanatogen' purchased of jobbers as aforesaid, constitute infringement of appellants' patent?"

The protection given to inventors and authors in the United States originated in the Constitution, § 8 of Art. I of which authorizes the Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." This protection, so far as inventors are concerned, has been conferred by an act of Congress passed April 10, 1790, and subsequent acts and amendments. The act of 1790, 1 Stat. 109, c. 7, granted "the sole and exclusive right and liberty of making, constructing, using and vending to others to be used, the said invention or discovery." In 1793 (Feb. 21, 1793, 1 Stat. 318, c. 11) the word "full" was substituted for the word "sole," and in 1836 (July 4, 1836, 5 Stat. 117, § 5,

c. 357) the word "constructing" was omitted. This legislation culminated in § 4884 of the Revised Statutes, the part with which we are dealing being practically identical with the act of July 8, 1870, 16 Stat. 198, § 22, c. 230. It provides that every patent shall contain "a grant to the patentee, his heirs and assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery."

The right to make, use and sell an invented article is not derived from the patent law. This right existed before and without the passage of the law and was always the right of an inventor. The act secured to the inventor the *exclusive* right to make, use and vend the thing patented, and consequently to prevent others from exercising like privileges without the consent of the patentee. *Bloomer* v. *McQuewan*, 14 How. 539, 549; *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U. S. 405, 425. It was passed for the purpose of encouraging useful invention and promoting new and useful improvements by the protection and stimulation thereby given to inventive genius, and was intended to secure to the public, after the lapse of the exclusive privileges granted, the benefit of such inventions and improvements. With these beneficent purposes in view the act of Congress should be fairly or even liberally construed; yet, while this principle is generally recognized, care should be taken not to extend by judicial construction the rights and privileges which it was the purpose of Congress to bestow.

In framing the act and defining the extent of the rights and privileges secured to a patentee Congress did not use technical or occult phrases, but in simple terms gave an inventor the exclusive right to make, use and vend his invention for a definite term of years. The right to make can scarcely be made plainer by definition, and embraces the construction of the thing invented. The right to use is a comprehensive term and embraces within its meaning

the right to put into service any given invention. And Congress did not stop with the express grant of the rights to make and to use. Recognizing that many inventions would be valuable to the inventor because of sales of the patented machine or device to others, it granted also the exclusive right to vend the invention covered by the letters patent. To vend is also a term readily understood and of no doubtful import. Its use in the statute secured to the inventor the exclusive right to transfer the title for a consideration to others. In the exclusive rights to make, use and vend, fairly construed, with a view to making the purpose of Congress effectual, reside the extent of the patent monopoly under the statutes of the United States. *Bloomer* v. *McQuewan, supra,* 549. We need not now stop to consider the rights to sell and convey, and to license others to sell or use inventions, which rights have been the subject of consideration in the numerous reported cases to be found in the books. We are here concerned with the construction of the statute in the aspect and under the facts now presented.

The case presented pertains to goods purchased by jobbers within the District of Columbia and sold to the appellee at prices not stated, and resold by him at retail at less than the price of one dollar fixed in the notice. The question therefore now before this court for judicial determination is: May a patentee by notice limit the price at which future retail sales of the patented article may be made, such article being in the hands of a retailer by purchase from a jobber who has paid to the agent of the patentee the full price asked for the article sold?

The object of the notice is said to be to effectually maintain prices and to prevent ruinous competition by the cutting of prices in sales of the patented article. That such purpose could not be accomplished by agreements concerning articles not protected by the patent monopoly was settled by this court in the case of *Dr. Miles Medical*

Co. v. *Park & Sons Co.*, 220 U. S. 373, in which it was held that an attempt to thus fix the price of an article of general use would be against public policy and void. It was doubtless within the power of Congress to confer such right of restriction upon a patentee. Has it done so? The question has not been determined in any previous case in this court, so far as we are aware. It was dealt with under the copyright statute, however, in the case of *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339. In that case it was undertaken to limit the price of copyrighted books for sale at retail by a notice on each book fixing the price at one dollar and stating that no dealer was licensed to sell it for less and that a sale at a less price would be treated as an infringement of the copyright. It was there held that the statute, in securing to the holder of the copyright the sole right to vend copies of the book, conferred a privilege which, when the book was sold, was exercised by the holder, and that the right secured by the statute was thereby exhausted. The court also held that it was not the purpose of the law to grant the further right to qualify the title of future purchasers by means of the printed notice affixed to the book, and that to give such right would extend the statute beyond its fair meaning and secure privileges not intended to be covered by the act of Congress. In that case it was recognized that there are differences between the copyright statute and the patent statute, and the purpose to decide the question now before us was expressly disclaimed.

Section 4952, Revised Statutes, a part of the copyright act, secures to an author, inventor, designer or proprietor of books, maps, charts or dramatic or musical compositions the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending them. While that statute differs from the patent statute in terms and in the subject-matter intended to be protected, it is apparent that in the respect involved in the present

inquiry there is a strong similarity between and identity of purpose in the two statutes. In the case of patents the exclusive right to vend the invention or discovery is added to the like right to make and use the subject-matter of the grant, and in the case of copyrights the sole right of multiplying and reproducing books and other compositions is coupled with the similar right of "vending the same." So far as the use of the terms "vend" and "vending" is concerned, the protection intended to be secured is substantially identical. The sale of a patented article is not essentially different from the sale of a book. In each case to vend is to part with the thing for a consideration. It is insisted that the purpose to be subserved by notices such as are now under consideration—keeping up prices and preventing competition—is more essential to the protection of patented inventions than of copyrighted articles; and it is said that the copyrighted article may be and usually is sold for a lump consideration by the author or composer and that he has no interest in the subsequent sales of the work, while patented inventions require large outlays to create and maintain a market. To some extent this contention may be based upon fact, nevertheless it is well known that in many instances the compensation an author receives is the royalties upon sales of his book or a percentage of profits, which makes it desirable that he shall have the protection of devices intended to keep up the market and prevent the cutting of prices. But these considerations could have had little weight in framing the acts. In providing for grants of exclusive rights and privileges to inventors and authors we think Congress had no intention to use the term "vend" in one sense in the patent act and "vending" in another in the copyright law. Protection in the exclusive right to sell is aimed at in both instances, and the terms used in the statutes are to all intents the same.

It is apparent that the principal difference in the enact-

ments lies in the presence of the word "use" in the patent statute and its absence in the copyright law. An inventor has not only the exclusive right to make and vend his invention or discovery, but he has the like right to use it, and when a case comes fairly within the grant of the right to use, that use should be protected by all means properly within the scope of the statute. In *Bement* v. *National Harrow Co.*, 186 U. S. 70, the owner of a patent granted a license to the defendant to manufacture and sell harrows embodied in the invention covered by the patent. The license provided for the payment to the licensor by the licensee of a royalty of one dollar for each harrow or frame sold and stipulated that the licensee was not to sell to any person for a less price than that named, and that the license was subject to change from time to time. The case was one arising upon license agreements, originating in a state court, and did not involve the construction of the patent act in the circumstances now disclosed.

Chief reliance, however, of the plaintiff in this case is upon the recent decision of this court in *Henry* v. *Dick Co.*, 224 U. S. 1. An examination of the opinion in that case shows that the restriction was sustained because of the right to use the machine granted in the patent statute, distinguishing in that respect the patent from the copyright act. In that case a patented mimeograph had been sold which bore an inscription in the form of a notice that the machine was sold with the license restriction that it might only be used with stencil, ink and other supplies made by the A. B. Dick Company, the owners of the patent. The alleged infringer sold to the purchaser of the mimeograph a can of ink suitable for use with the machine with full knowledge of the restriction and with the expectation that the ink sold would be used in connection with the machine. It is expressly stated in the opinion that the machine was sold at cost or less and that the patentee depended upon the profit realized from the sale

of the non-patented articles to be used with the machine for the profit which he expected to realize from his invention (224 U. S. 26). After commenting upon the copyright statutes and the resemblance between the author's right to vend copies of his work and the patentee's right to vend the patented thing, it was said (p. 46):

"To the inventor, by § 4884, Revised Statutes, there is granted 'the exclusive right to make, *use* and vend the invention or discovery.' This grant, as defined in *Bloomer* v. *McQuewan*, 14 How. 539, 549, 'consists altogether in the right to exclude every one from making, *using* or vending the thing patented.' Thus, there are several substantive rights, and each is the subject of subdivision, so that one person may be permitted to make, but neither to sell nor use the patented thing. To another may be conveyed the right to sell, but within a limited area, or for a particular use, while to another the patentee may grant only the right to make and use, or to use only for specific purposes. *Adams* v. *Burke*, 17 Wall. 453; *Mitchell* v. *Hawley*, 16 Wall. 544; *Rubber Co.* v. *Goodyear*, 9 Wall. 788, 799." (Italics in the original opinion.)

That case was distinguished from *Bobbs-Merrill* v. *Straus*, *supra*, construing the copyright act, because of the difference in the terms of the copyright and patent statutes, the patent act conferring not only the right to make and sell, but the exclusive right to *use* the subject-matter of the patent. It was under the right to use that the license notice in question was sustained, and it is obvious that the notice in that case dealt with the use of the machine and limited it to use only with the paper, ink and supplies of the manufacture of the patentee. While the title was transferred, it was a qualified title, giving a right to use the machine only with certain specified supplies. It was said in the *Dick Case* (p. 47) that "there is no collision whatever between the decision in the *Bobbs-Merrill Case* and the present opinion. Each rests upon a

construction of the applicable statute, and the special facts of the cases."

It is contended in argument that the notice in this case deals with the use of the invention, because the notice states that the package is licensed "for sale and use at a price not less than one dollar," that a purchase is an acceptance of the conditions, and that all rights revert to the patentee in event of violation of the restriction. But in view of the facts certified in this case, as to what took place concerning the article in question, it is a perversion of terms to call the transaction in any sense a license to use the invention. The jobber from whom the appellee purchased had previously bought, at a price which must be deemed to have been satisfactory, the packages of Sanatogen afterwards sold to the appellee. The patentee had no interest in the proceeds of the subsequent sales, no right to any royalty thereon or to participation in the profits thereof. The packages were sold with as full and complete title as any article could have when sold in the open market, excepting only the attempt to limit the sale or use when sold for not less than one dollar. In other words, the title transferred was full and complete with an attempt to reserve the right to fix the price at which subsequent sales could be made. There is no showing of a qualified sale for less than value for limited use with other articles only, as was shown in the *Dick Case*. There was no transfer of a limited right to use this invention, and to call the sale a license to use is a mere play upon words.

The real question is whether in the exclusive right secured by statute to "vend" a patented article there is included the right, by notice, to dictate the price at which subsequent sales of the article may be made. The patentee relies solely upon the notice quoted to control future prices in the resale by a purchaser of an article said to be of great utility and highly desirable for general use.

The appellee and the jobbers from whom he purchased were neither the agents nor the licensees of the patentee. They had the title to, and the right to sell, the article purchased without accounting for the proceeds to the patentee and without making any further payment than had already been made in the purchase from the agent of the patentee. Upon such facts as are now presented we think the right to *vend* secured in the patent statute is not distinguishable from the right of *vending* given in the copyright act. In both instances it was the intention of Congress to secure an exclusive right to sell, and there is no grant of a privilege to keep up prices and prevent competition by notices restricting the price at which the article may be resold. The right to vend conferred by the patent law has been exercised, and the added restriction is beyond the protection and purpose of the act. This being so, the case is brought within that line of cases in which this court from the beginning has held that a patentee who has parted with a patented machine by passing title to a purchaser has placed the article beyond the limits of the monopoly secured by the patent act.

In *Adams* v. *Burke*, 17 Wall. 453, Mr. Justice Miller, delivering the opinion of the court, pertinently said (p. 455):

"The vast pecuniary results involved in such cases, as well as the public interest, admonish us to proceed with care, and to decide in each case no more than what is directly in issue. . . .

"The true ground on which these decisions rest is that the sale by a person who has the full right to make, sell, and use such a machine carries with it the right to the use of that machine to the full extent to which it can be used in point of time.

"The right to manufacture, the right to sell, and the right to use are each substantive rights, and may be granted or conferred separately by the patentee.

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

Bloomer v. *McQuewan, supra; Goodyear* v. *Beverly Rubber Co.*, 1 Cliff. 348, 354, 10 Fed. Cases, 638; *Chaffee* v. *Boston Belting Co.*, 22 How. 217, 223; *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659.

Holding these views, the question propounded by the Court of Appeals will be answered in the negative, and

It is so ordered.

Dissenting: MR. JUSTICE MCKENNA, MR. JUSTICE HOLMES, MR. JUSTICE LURTON and MR. JUSTICE VAN DEVANTER.

GORMAN *v.* LITTLEFIELD, TRUSTEE IN BANKRUPTCY OF A. O. BROWN & CO.

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

No. 243. Argued April 21, 22, 1913.—Decided May 26, 1913.

Where the trustee of a bankrupt broker finds in the estate certificates for shares of a particular stock legally subject to the demand of the customer for whom shares of that stock were bought by the bankrupt, the customer is entitled to the same although the certificates may not be the identical ones purchased for him. *Richardson* v. *Shaw*, 209 U. S. 365.

Where there are in the bankrupt's possession certificates for enough shares of a particular stock to satisfy the legal demand of a customer for whom shares of that stock were purchased, and no other customer can legally demand any shares of that stock, those certificates will be presumed to be the certificates kept by the bankrupt in accordance with his duty so to do to satisfy the demand of such customer.

It is the right and duty of the bankrupt, if he uses securities belonging to a customer, to use his own funds to replace such securities with others of the same kind, and in so doing he does not deplete the estate against his other creditors.

No creditor of the bankrupt can demand that the estate of the bankrupt be augmented by the wrongful conversion of property of another, or the application to the general estate of property which never rightfully belonged to the bankrupt.

There is no presumption that certificates of stock in the possession of the bankrupt were embezzled or stolen, but there is a presumption that such certificates were bought and paid for out of his own funds to replace those which he had used belonging to a customer.

175 Fed. Rep. 769, reversed.

THE facts, which involve the right of a customer of a bankrupt brokerage firm to shares of stock purchased for him by the bankrupt and fully paid for by the claimant prior to the petition, notwithstanding the certificates in

possession of the bankrupt are not the identical ones purchased, are stated in the opinion.

Mr. James L. Coleman, with whom *Mr. Robert Dunlap* was on the brief, for appellant-petitioner.

Mr. Daniel P. Hays, with whom *Mr. Ralph Wolf* was on the brief, for appellee-respondent:

The burden was on appellant to prove that his stocks, or the proceeds thereof, came into the possession of the receiver or trustee. *First National Bank* v. *Littlefield*, 226 U. S. 110; *Peters* v. *Bain*, 133 U. S. 670.

Appellant cannot establish title to the specific shares of copper stock found after bankruptcy unless he identifies such certificates as having been purchased for him. This he has not done. Cases *supra*, and *Empire State Surety Co.* v. *Carroll County*, 194 Fed. Rep. 593; *Commissioners* v. *Strawn*, 157 Fed. Rep. 49; *City Bank* v. *Blackmore*, 75 Fed. Rep. 771; *In re Hicks*, 170 N. Y. 195; *Lowe* v. *Jones*, 192 Massachusetts, 94; *In re Berry*, 149 Fed. Rep. 176; *Thomas* v. *Taggart*, 209 U. S. 385; *In re McIntyre*, 181 Fed. Rep. 960.

See also various proceedings in *Re A. O. Brown & Co.*, 185 Fed. Rep. 766; 193 Fed. Rep. 24; *Id.* 30, and *In re Ennis*, 187 Fed. Rep. 728.

The concurrent finding of both the District Court and the Circuit Court of Appeals that appellant failed to prove that his stock, or the proceeds thereof, came into the possession of the receiver or trustee will not be disturbed in the absence of manifest error. *First Natl. Bank* v. *Littlefield*, 226 U. S. 110; *Brainerd* v. *Buck*, 184 U. S. 99; *Stuart* v. *Hayden*, 169 U. S. 1.

These findings of fact, unless reversed by this court, effectually dispose of appellant's claim.

The mere fact that there came into the possession of the receiver 350 shares of this particular stock, does

not, without further proof, entitle the appellant thereto. *In re McIntyre*, 181 Fed. Rep. 960; *In re Berry*, 149 Fed. Rep. 176; aff'd *sub nomine Thomas* v. *Taggart*, 209 U. S. 385, and other cases *supra; Empire Surety Co.* v. *Carroll County*, 194 Fed. Rep. 593.

If the decree of the court below is reversed, a new method will be added to the Bankruptcy Act for the distribution of the estate of an insolvent brokerage firm. There will be nothing left to distribute to general creditors. All of each stock coming into the possession of the receiver would be reclaimed by and distributed among the creditors of the firm owning or carrying such stock. No shares would be left in the trustee's hands for distribution among general creditors.

The authorities relied upon by appellant are not in point. *Richardson* v. *Shaw*, 209 U. S. 365, can be distinguished. See *Thomas* v. *Taggart*, 209 U. S. 385.

Mr. Justice Day delivered the opinion of the court.

This case presents a controversy over 250 shares of Green Cananea Copper Company stock, which came into the possession of the trustee in bankruptcy of Albert O. Brown and others, copartners, trading under the name of A. O. Brown & Company. Appellant, James E. Gorman, claimed to be the owner of the shares of stock and instituted proceedings in the District Court to recover them. The matter was referred to a special master, who found the facts and recommended the transfer of the stock to the claimant. The District Court upon hearing ruled otherwise, and, upon appeal to the Circuit Court of Appeals, the ruling of the District Court was sustained.

The claimant for a year or more before the failure of A. O. Brown & Company was a customer dealing with one of the Chicago offices of that firm, buying stocks on margin and also paying for them in full. On or about April 14,

1908, Gorman directed the Chicago office to buy 250 shares of Green Cananea Copper stock for him. The stock was bought on the understanding that it was to be paid for in full, and at the time that the order was executed the claimant had an ample credit balance with the firm applicable on its books to the payment in full of the shares purchased. The certificates of stock were left by the claimant in the possession of the broker subject to the claimant's future order. The books of the bankrupt firm show that on April 14, 1908, they bought for the account of Gorman, 100 shares of Green Cananea Copper stock and received certificate A-335. This certificate was delivered to J. T.————————on May 6, 1908, on account of a sale from H. Wright & Company, of Cleveland, Ohio. On April 14, 1908, the bankrupt firm bought for the claimant 50 shares of Green Cananea Copper stock and received certificate Y-11083. This certificate was on May 14, 1908, delivered to DeCoppet & Doremus, on account of balance of trade on that date. On April 14, 1908, the bankrupt firm bought for the claimant 50 shares of the same stock and received certificate B-6589. This certificate was delivered to DeCoppet & Doremus on April 16, 1908, on account of the sale of L. E. Gorton, of Detroit, Michigan. On April 14, 1908, the bankrupt firm bought for the claimant 50 shares of the same stock and received certificate B-6537. This certificate was delivered to Carpenter & Baggott on May 14, 1908, on account of a sale to Parson, Snyder & Company, of Cleveland, Ohio. The receiver in bankruptcy, now the trustee, came into the possession of, and still has in his possession, certificates indorsed in blank for an aggregate of 350 shares of Green Cananea Copper stock. As to this stock no claim has been filed with the receiver or trustee, although the master says the time for filing claims has expired. The certificates of stock in question, with those purchased for other clients, which were paid for in full or were purchased on margin, were

placed without discrimination in the same tin box. It was customary to take certificates to make delivery from that box, indiscriminately, unless the certificate had been transferred to the name of the customer. At no time before the failure did the claimant receive his shares of the Green Cananea Copper stock, nor did he order its sale.

Upon these facts the question is, Are these shares of stock a part of the general estate for the benefit of creditors or should they be turned over to the claimants?

In *Richardson* v. *Shaw*, 209 U. S. 365, the nature of this property was the subject of discussion and decision in this court. In that case a broker, who had been adjudicated a bankrupt, shortly before the bankruptcy and after his insolvency turned over upon demand to a customer shares of stock similar to those which had been held for the customer and for an equal number of shares. It was contended that under the circumstances this delivery of certificates amounted to a preference under the Bankruptcy Act. This court therefore had to consider the legal relation of customer and broker, in buying and holding shares of stock, and it was held that the certificates of stock were not the property itself, but merely the evidence of it, and that a certificate for the same number of shares represented precisely the same kind and value of property as another certificate for a like number of shares in the same corporation; that the return of a different certificate or the substitution of one certificate for another made no material change in the property right of the customer; that such shares were unlike distinct articles of personal property, differing in kind or value, as a horse, wagon or harness, and that stock has no earmark which distinguishes one share from another, but is like grain of a uniform quality in an elevator, one bushel being of the same kind and value as another. It was therefore concluded that the turning over of the certificates for the shares of stock belonging to the customer and

held by the broker for him did not amount to a preferential transfer of the bankrupt's property.

In the subsequent case of *Sexton* v. *Kessler*, 225 U. S. 90, this court, speaking of the relation of customer and broker, said (p. 97):

"When a broker agrees to carry stock for a customer he may buy stocks to fill several orders in a lump; he may increase his single purchase by stock of the same kind that he wants for himself; he may pledge the whole block thus purchased for what sum he likes, or deliver it all in satisfaction of later orders, and he may satisfy the earlier customer with any stock that he has on hand or that he buys when the time for delivery comes. Yet as he is bound to keep stock enough to satisfy his contracts, as the New York firm in this case was bound to substitute other security if it withdrew any, the customer is held to have such an interest that a delivery to him by an insolvent broker is not a preference. *Richardson* v. *Shaw*, 209 U. S. 365. *Markham* v. *Jaudon*, 41 N. Y. 235. So a depositor in a grain elevator may have a property in grain in a certain elevator although the keeper is at liberty to mix his own or other grain with the deposit and empty and refill the receptacle twenty times before making good his receipt to the depositor concerned."

It is therefore unnecessary for a customer, where shares of stock of the same kind are in the hands of a broker, being held to satisfy his claims, to be able to put his finger upon the identical certificates of stock purchased for him. It is enough that the broker has shares of the same kind which are legally subject to the demand of the customer. And in this respect the trustee in bankruptcy is in the same position as the broker. *Richardson* v. *Shaw*, *supra*.

It is said, however, that the shares in this particular case are not so identified as to come within the rule. But it does appear that at the time of bankruptcy certificates

were found in the bankrupt's possession in an amount greater than those which should have been on hand for this customer, and the significant fact is shown that no other customer claimed any right in those shares of stock. It was, as we have seen, the duty of the broker, if he sold the shares specifically purchased for the appellant, to buy others of like kind and to keep on hand subject to the order of the customer certificates sufficient for the legitimate demands upon him. If he did this, the identification of particular certificates is unimportant. Furthermore, it was the right and duty of the broker, if he sold the certificates, to use his own funds to keep the amount good, and this he could do without depleting his estate to the detriment of other creditors who had no property rights in the certificates held for particular customers. No creditor could justly demand that the estate be augmented by a wrongful conversion of the property of another in this manner or the application to the general estate of property which never rightfully belonged to the bankrupt.

The ground upon which the Circuit Court of Appeals decided the case seems to have been that the certificates were not sufficiently identified, but, as we have said, they were on hand to an amount claimed by the appellant and more, and were not claimed by any other customer. We think there should be no presumption that the stock was stolen or embezzled with intent to deprive the rightful owner of it, and when the unclaimed shares are found in the possession of the bankrupt it is only fair to accept the general presumption in favor of fair dealing and to decide, in the absence of countervailing proof, that the broker out of his funds has supplied the deficiency for the benefit of his customer, which he had a perfect right to do.

Judgment reversed.

BARRETT *v.* STATE OF INDIANA.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 245. Submitted April 18, 1913.—Decided May 26, 1913.

Coal mining is a dangerous business and subject to police regulation by the State.

The legislature of the State is itself the judge of means necessary to secure the safety of those engaged in a dangerous business, and only such regulations as are palpably arbitrary can be set aside as violating the due process provision of the Fourteenth Amendment.

The equal protection provision of the Fourteenth Amendment requires laws of like application to all similarly situated, but the legislature is allowed wide discretion in the selection of classes.

A classification, in a police statute regulating operations in coal mines including bituminous coal mines and excluding block coal mines, is not so unreasonable or arbitrary as to justify the courts in overruling the legislature.

It is the province of the legislature to make the laws and of the court to enforce them.

Courts will not interfere with a police statute on the ground that the classification is so arbitrary as to deny equal protection of the laws unless it appears that there is no fair reason for the law that would with equal force not require its extension to others whom it leaves untouched. *Missouri, Kansas & Texas Ry.* v. *May*, 194 U. S. 267.

The statute of Indiana requiring entries in coal mines to be of a specified width was a reasonable exercise of the police power of the State in regulating a dangerous business and is not unconstitutional under the Fourteenth Amendment either as depriving the owners of bituminous coal mines of their property without due process of law or as denying them equal protection of the law because it expressly excepts block coal mines.

93 N. E. Rep. 543, affirmed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of the statute of Indiana prescribing the width of entries in bituminous coal mines, are stated in the opinion.

Mr. John C. Chaney and *Mr. Charles E. Barrett* for plaintiff in error:

The act of March 9, 1907, is in conflict with § 1 of the Fourteenth Amendment. It denies the equal protection of the law to the person or persons engaged in the mining of coal in certain districts of the State. It grants special privileges to another class of citizens engaged in mining coal in what is known as the block coal district, and denies these privileges to all other persons. *Chicago, M. & St. P. Ry. Co.* v. *Westby*, 178 Fed. Rep. 619; *Bells Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Gulf &c. R. R. Co.* v. *Ellis*, 165 U. S. 150, 159; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 359; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Santa Clara Co.* v. *Southern Pacific*, 118 U. S. 394; *Pembina Co.* v. *Pennsylvania*, 125 U. S. 181; *Charlater R. R. Co.* v. *Gibbs*, 142 U. S. 386; *Covington* v. *Sandford*, 164 U. S. 578; *Smythe* v. *Ames*, 169 U. S. 466; Tiedeman, Pol. Powers (1886), § 3; *Toledo Co.* v. *Jacksonville &c.*, 67 Illinois, 37; *Lake View* v. *Rose Hill Cemetery*, 70 Illinois, 192; *Southern Ry. Co.* v. *Greene*, 216 U. S. 400.

Appellant in the operation of his coal mine fell within the exception or proviso clause of the act. The act of 1907 is class legislation, and appellant is, by its terms, denied the equal protection of the law. *Greene* v. *State*, 119 N. W. Rep. 6.

Mr. Thomas M. Honan, Attorney General of the State of Indiana, *Mr. Edwin Corr*, *Mr. Thomas H. Branaman* and *Mr. James E. McCullough* for defendant in error.

Mr. Justice Day delivered the opinion of the court.

The plaintiff in error was convicted in a Circuit Court of Indiana of the violation of a statute of that State requiring entries in certain coal mines to be of not less than a pre-

scribed width. The case was twice before the Supreme Court of Indiana. *State* v. *Barrett*, 172 Indiana, 169; *Barrett* v. *State*, 93 N. E. Rep. 543. From the judgment in the latter case, affirming the conviction, a writ of error was prosecuted. The assignments of error raise the question of the validity of the statute under the Fourteenth Amendment to the Constitution of the United States.

The statute provides (Burns' Annotated Indiana Statutes, 1908):

"8582. Width of entries.—1. That it shall be unlawful for any owner, lessee, agent or operator of any coal mine within the State of Indiana, to make, dig, construct, or cause to be made, dug or constructed any entry or trackway after the taking effect of this act, in any coal mine in the State of Indiana where drivers are required to drive with mine car or cars unless there shall be a space provided on one or both sides continuously of any track or tracks measured from the rail, in any such entry of at least two (2) feet in width, free from any props, loose slate, debris or other obstruction so that the driver may get away from the car or cars and track in event of collision, wreck or other accident. It shall be unlawful for any employé, person or persons to knowingly, purposely or maliciously place any obstruction within said space as herein provided: Provided, That the geological veins of coal numbers three and four commonly known as the lower and upper veins in the block coal fields of Indiana shall be exempt from the provisions of this act."

The next section provides that any one violating the act shall be guilty of a misdemeanor and prescribes the penalty.

That the legislatures of the States may in the exercise of the police power regulate a lawful business is too well settled to require more than a reference to some of the cases in this court in which that right has been sustained as against objections under the Fourteenth Amendment.

Gundling v. *Chicago*, 177 U. S. 183; *Jacobson* v. *Massachusetts*, 197 U. S. 11; *McLean* v. *Arkansas*, 211 U. S. 539; *Williams* v. *Arkansas*, 217 U. S. 79; *Watson* v. *Maryland*, 218 U. S. 173; *Schmidinger* v. *City of Chicago*, 226 U. S. 578. That the mining of coal is a dangerous business and therefore subject to regulation is also well settled. It is an occupation carried on at varying depths beneath the surface of the earth, amidst surroundings entailing danger to life and limb, and has been, as it may be, the subject of regulation in the coal mining States by statutes which seek to secure the safety of those thus employed. The legislature is itself the judge of the means necessary and proper to that end, and only such regulations as are palpably arbitrary can be set aside because of the requirements of due process of law under the Federal Constitution. When such regulations have a reasonable relation to the subject-matter and are not arbitrary and oppressive, it is not for the courts to say that they are beyond the exercise of the legitimate power of legislation. *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61.

We are unable to say that the requirement that entries shall have a certain width beyond the tracks, as prescribed by this statute, would not promote the safety of the employés engaged in that work. The legislature found, for reasons sufficient to itself, that such additional width, kept clear of obstructions, would promote the safety of the exployés, and we are not prepared to say that in enacting such legislation it violated the Federal Constitution.

It is argued that the act in question is also violative of the equal protection clause of the Fourteenth Amendment, in that it applies to bituminous coal mines but not to block coal mines. The equal protection of the laws requires laws of like application to all similarly situated, but in selecting some classes and leaving out others the legislature, while it keeps within this principle, is, and may be,

allowed wide discretion. It is the province of the legislature to make the laws and of the courts to enforce them. This court has had such frequent occasion to consider this matter that extended discussion is not necessary now. The legislature is permitted to make a reasonable classification and before a court can interfere with the exercise of its judgment it must be able to say "that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched." This was one test laid down in *Missouri, Kansas & Texas Ry. Co.* v. *May*, 194 U. S. 267, and has been quoted and followed with approval in *Williams* v. *Arkansas*, *supra;* and *Watson* v. *Maryland*, *supra.* In noticing this contention the Supreme Court of Indiana, when the case was first before it, 172 Indiana, 169, reviewed the situation in that State, as evidenced by official reports concerning the coal mining industry, and noted the great difference in the production and number of mines between what are called the block veins of coal and the bituminous veins of coal existing in the State, and also the different depths at which coal is mined in the strata of block and bituminous coal, and concluded its discussion of this subject, as follows:

"It is not unlikely that there is in fact a difference in the degree of danger in mining the two kinds of coal. We at least cannot say the contrary. If so, it must be presumed that the legislature informed itself upon that subject. It may be that mining coal at a distance of 165 feet from the surface is more hazardous than mining it at 90 feet. These matters, with the relative output, relative number of mines and persons employed, may have entered into the consideration as requiring the act in one case, and not in the other, and while the relative number of employés, mines and the output might not be a proper classification if applied to persons in the same class of work, or under the same conditions, we cannot say that

they are not different at different depths and in different kinds of coal, and must presume that they are; at least we cannot say that, as applied to all persons alike employed in mining bituminous coal, the act is invalid because not applicable to block mining, and we cannot say that the act is unreasonable, or determine as to its propriety or impropriety, and to doubt its constitutionality is to resolve in favor of its constitutionality."

This is a reasonable disposition of the matter, and we concur in the conclusion reached by the Supreme Court of Indiana in this respect. We are unable to say that the application of the law to bituminous coal mines and the omission of block coal mines was such arbitrary discrimination as to render the act unconstitutional.

We find no error in the judgment of the Supreme Court in affirming the conviction, and it is

Affirmed.

BIG VEIN COAL COMPANY OF WEST VIRGINIA *v.* READ.

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

No. 501. Argued April 11, 1913.—Decided May 26, 1913.

A Circuit Court of the United States has no jurisdiction to issue an order of attachment in a case where no personal service can be had upon the defendant and where there has been no personal appearance in the action.

Neither under § 915, Rev. Stat., nor under any provision of the act of March 3, 1887, as amended August 13, 1888, can the auxiliary remedy by attachment be had in a Circuit Court of the United States where that court cannot obtain jurisdiction over the defendant personally.

An attachment is still but an incident to a suit and unless jurisdiction can be obtained over the defendant, his estate cannot be attached in a Federal court.

This court will not construe an amendment to the judiciary statute as making such a radical change as granting a new remedy unless provision is clearly made for making the remedy effective; and so *held*, that as Congress did not in the act of March 3, 1887, as amended August 13, 1888, make any provision for service by publication, the act will not be construed as giving jurisdiction to Federal courts to grant attachments in cases where the defendant cannot be served.

In the Federal courts an appearance may be made for the sole purpose of raising jurisdictional questions without thereby submitting to the jurisdiction of the court over the action; and where, as in this case, no issue involving the merits was made, a special appearance to object to the jurisdiction does not give the court jurisdiction to issue an attachment.

THE facts, which involve the jurisdiction of a Circuit Court of the United States to issue an order of attachment in a case where no personal service could be had upon the defendant and wherein there was no personal appearance to the action, are stated in the opinion.

Mr. Frank Gosnell and *Mr. Wm. L. Rawls*, with whom *Mr. Geo. Weems Williams* was on the brief, for defendant in error, in support of motion to dismiss.

Mr. Osborne I. Yellott for plaintiff in error in opposition thereto.

MR. JUSTICE DAY delivered the opinion of the court.

This case involves the jurisdiction of a Circuit Court of the United States to issue an order of attachment in a case where no personal service could be had upon the defendant and wherein there was no personal appearance to the action.

The case was begun in the Circuit Court of the United

States for the Northern District of West Virginia to recover in debt upon certain promissory notes. A summons was issued against the defendant, Benjamin H. Read, trading as Lynah & Read, and return was made by the marshal that the writ had not been served, as defendant was not found in his district. Thereafter an affidavit was filed for an attachment, setting forth that the defendant was one of the receivers of the Circuit Court of the United States for the Northern District of West Virginia of the property of The Oakland Coal & Coke Company and that there had been allowed to him for his services as such receiver the sum of two thousand dollars. An order of attachment was issued, and the return of the marshal stated that he had been unable to locate any property in his district upon which to serve the attachment and accordingly returned the writ, "no property found." Afterwards an order was made which, after reciting the beginning of the suit and that the defendant was a nonresident of West Virginia; that the special master had found the sum of two thousand dollars due him as such receiver, and that an order of attachment had been issued and placed in the hands of the marshal for the purpose of attaching the estate of the defendant, provided that a copy of the order be served upon the defendant, that he appear before the court and that a copy of the order served upon the defendant and one Slingluff, special receivers in a suit entitled *The Baltimore Trust & Guaranty Company* v. *The Oakland Coal & Coke Company*, should be notice to them of the proceedings and that the claim of the defendant was sought to be attached therein.

A copy of the order was served upon the defendant in Baltimore, Maryland, who thereafter appeared by his counsel for the purpose only of objecting to the jurisdiction of the court and moved the court to dismiss the suit and quash the attachment upon the following grounds:

"First. The record shows that this defendant is not a

citizen of or resident in, nor found within the Northern District of West Virginia.

"Second. The record shows that the defendant has no property whatever within the said State or District.

"Third. That this court has no jurisdiction *in rem* or *in personam* in said action.

"Fourth. That at the time of the suing out of the writs of summons and of attachment herein on the 26th day of June, 1911, this defendant was not a citizen or resident or found within West Virginia, and he had no property in said State or District, and at no time since has this defendant been such citizen or resident, or had any property within the said District, although the return day of the said writs has long since passed and the defendant makes the said writs and the returns thereon by the Marshal for the Northern District of West Virginia a part of this motion.

"Fifth. The fund or compensation ordered by this Honorable Court to be paid to the defendant for services as Receiver was not, at the time of the issuance of said writs or at any time since then, liable to be attached upon the alleged indebtedness of the plaintiff or for the payment thereof, in this Honorable Court.

"Sixth. This Honorable Court has no jurisdiction either of property or person giving jurisdiction for the maintenance of the said action."

Thereafter the case coming on to be heard, counsel appearing for the defendant for the purpose of objecting to the jurisdiction and for the purpose of the motions filed only and further moving the court to vacate and set aside the orders issued and to quash the service of summons in the action and to dismiss the case, certain facts were found, without prejudice to any motion of the defendant and without enlarging the appearance of the defendant, as follows:

"Messrs. Read and Slingluff were appointed Receivers in the cause of the *Baltimore Trust & Guarantee Company*

v. *The Oakland Coal & Coke Company of West Virginia*, a cause pending in the United States Circuit Court for the Northern District of West Virginia, by an order in said cause passed on the twelfth day of June, 1907, and the receivership estate being ready for distribution on June 20, 1910, this Court passed a decree referring the cause to Special Master C. D. Merrick, with directions among other things to make a report 'including costs and allowances and fees to the end that a full and complete decree might be made for the distribution and settlement of the estate.'

"On May 15th, 1911, the Special Master filed such report. Among other allowances were the following:

"'That Benjamin H. Read, for his services as Receiver, is entitled to and should be allowed the sum of Two Thousand Dollars.'

"That no objection had been taken or exceptions made to the above allowance at the time the attachment was laid in this cause.

"That in July, 1911, this court passed an order ratifying the report of the Master as to the above and similar allowances, but directed that the allowance of $2,000 commissions to B. H. Read be retained by the Receivers pending the determination of the questions arising out of such attachment."

Afterwards the court delivered an opinion in which the judge directed that the former order, amounting to an attachment, should be set aside and held that, inasmuch as personal service upon the defendant in the action might yet be obtained by alias summons, he would not then dismiss the action. Later the plaintiff refused to direct the issuance of alias summons, and upon motion judgment was entered dismissing the action, and a certificate was made by the court.

The certificate states that the judgment complained of in plaintiff's writ of error, which was set out, is based solely upon the ground that the court had no jurisdiction as a

Federal court to grant relief to the plaintiff by subjecting to the claim of the plaintiff the assets and credits of the defendant, to be attached in the case, without personal service of summons upon him or his voluntary appearance in the cause, and that the motion filed in the case did not constitute a voluntary appearance, and that the court, as a Federal court, had no jurisdiction to grant a personal judgment against the defendant or to make a final judgment or order subjecting to the claim of the plaintiff the assets and credits of the defendant so sought to be attached.

The attachment was sought to be levied and was claimed to be authorized under the act of June 1, 1872, 17 Stat. 196, c. 255, now § 915 of the Revised Statutes. It is as follows:

"In common law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the State in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachments and other process: Provided, That similar preliminary affidavits or proofs, and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy."

Assuming that the attachment could be issued under the laws of West Virginia, under this statute was there authority in the courts of the United States to issue the attachment, it appearing that no service had been or could be made upon the defendant and that he had not appeared in the action?

Section 915 was before this court in *Ex parte Railway Company,* 103 U. S. 794, and it was held that as, under § 739 of the Revised Statutes, Act of March 3, 1875, 18

Stat. 470, c. 137, then in force, no civil action, not local in its nature, could be brought against any one by original process in any United States Circuit Court other than that for the State of which he was an inhabitant or in which he was found at the time of serving the writ, an attachment could not be issued, the defendant being a nonresident and not having been served with process. It was further held that an attachment was but an incident to a suit and unless the suit could be maintained the attachment must fall. In other words, in cases where the defendant could not be sued and jurisdiction acquired over him personally, the auxiliary remedy by attachment could not be had, as attachment was not a means of acquiring jurisdiction. The same view was taken in *Nazro* v. *Cragin,* 3 Dillon, 474, by Mr. Justice Miller, on the circuit. *Ex parte Railway Company, supra,* was but an affirmance, as to the right of attachment where no personal service could be had, of the former case of *Toland* v. *Sprague,* 12 Peters, 300, wherein it was held that a person was not amenable to attachment against his property except where process could be served upon his person.

It is contended, however, that since the act of March 3, 1887, 24 Stat. 552, c. 373, as amended August 13, 1888, 25 Stat. 433, c. 866, the right of attachment should be held to exist in cases like the present. The statute of 1888 provides:

"And no civil suit shall be brought before either of said courts against any person, by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plantiff or the defendant."

The argument is that the right to issue an attachment under the act of 1872 should obtain, since the law now permits suit in the district of the residence either of the

plaintiff or defendant, omitting the provision of the act of 1875 that the defendant could be sued only in the district in which he was an inhabitant or could be found at the time of commencing the proceeding. But we are of the opinion that this amendment to the statute was not intended to do away with the settled rule that, in order to issue an attachment, the defendant must be subject to personal service or voluntarily appear in the action. If Congress had intended any such radical change, it would have been easy to have made provision for that purpose, and doubtless a method of service by publication in such cases would have been provided. We think the rule has not been changed; that an attachment is still but an incident to a suit, and that, unless jurisdiction can be obtained over the defendant, his estate cannot be attached in a Federal court. See *Laborde* v. *Ubarri*, 214 U. S. 173; *United States* v. *Brooke*, 184 Fed. Rep. 341.

Another contention is that the defendant in appearing for the purpose of the motion submitting to the court the question of the right to attach his compensation as receiver in the court, had voluntarily submitted to the jurisdiction of the court, but we are of the opinion that this contention is untenable. It is the settled practice in the Federal courts that an appearance may be made for the sole purpose of raising jurisdictional questions, without thereby submitting to the jurisdiction of the court over the action. *Goldey* v. *Morning News*, 156 U. S. 518; *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 453.

It is true that where the defendant appears by motion and objects to the jurisdiction and also submits a question going to the merits of the action, it being one of which the court had jurisdiction, there is a general appearance in the case which gives jurisdiction, as in *St. Louis & S. F. R. Co.* v. *McBride*, 141 U. S. 127, where a demurrer was interposed raising two grounds of jurisdiction and the third going to the merits of the cause of action, and it was held

that there had been a submission to the jurisdiction of the court. See also *Western Loan Co.* v. *Butte & Boston Min. Co.*, 210 U. S. 368.

In this case, however, the submission was not of any question involving the merits of the suit, but of one with reference to the jurisdiction of the court to issue the attachment, adding the further ground that the property in question was not subject to attachment or garnishment. No issue was made involving the merits of the action. This special appearance was sufficient to raise the question of jurisdiction only. *Davis* v. *C., C., C. & St. L. Ry.*, 217 U. S. 157.

In our opinion the Circuit Court did not err in holding that it had no jurisdiction to issue the attachment in this case.

Judgment affirmed.

DETROIT UNITED RAILWAY *v.* CITY OF DETROIT.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 1047. Submitted May 5, 1913.—Decided May 26, 1913.

Franchises granting rights of the public must be in plain language, certain and definite in terms and containing no ambiguities. They are to be strictly construed against the grantee. *Cleveland Electric Ry. Co.* v. *Cleveland*, 204 U. S. 116.

An ordinance requiring a street railway company to comply with certain conditions on all of its lines until the expiration of the franchises of longest duration, *held* not to constitute a contract, extending all the franchises to the date of such expiration, within the protection of the contract clause of the Federal Constitution.

Where a street railroad company is operating in the streets of a city for a definite period and has enjoyed the full term granted, the

municipality may, upon failure of renewal of the grant, require the company within a reasonable time to remove its tracks and other property from the streets, without impairing any contractual obligation protected by the Federal Constitution or depriving the company of its property without due process of law.

156 Michigan, 106, affirmed.

THE facts, which involve the validity of a decree of the state court holding that certain franchises of the railway company had expired and that it should pay the city temporary rental for the use of certain streets or vacate those streets, are stated in the opinion.

Mr. Richard I. Lawson and *Mr. Alfred Lucking* for appellee, in support of motion to dismiss, affirm or advance.

Mr. John C. Donnelly, Mr. William L. Carpenter and *Mr. Fred A. Baker* for plaintiff in error, in opposition thereto.

MR. JUSTICE DAY delivered the opinion of the court.

This is a suit in equity, originating in the Circuit Court for the County of Wayne, of the State of Michigan, brought by the City of Detroit against the Detroit United Railway, to determine that certain franchises of the railway have expired and to require it to pay a temporary rental or to vacate the streets operated under the franchises. The decree of the Circuit Court in favor of the city was affirmed by the Supreme Court of Michigan. The case comes here on writ of error, and is now before us on motion of the city to dismiss, affirm or advance.

The Detroit United Railway owns and operates all the street railways in Detroit. Its principal east and west line is called the Fort Street Line, in connection with which three franchises have been granted to the Railway and

its predecessors. One of the franchises was granted by the Township of Springwells, part of which has since been annexed to the City of Detroit by legislative act, and the other two were granted by the city. By their terms the franchises expired June 17, June 30, and July 24, 1910, respectively.

The Township of Springwells had also granted certain other franchises (the part of the railway system covered by such franchises not being involved in this suit, however) to the Railway in 1889 and 1891 to expire in 1921, naming a certain rate of fare and providing that the tracks constructed under such grants should be deemed, for the purpose of collecting fares, an extension of the tracks theretofore laid in the Township and City. Upon the inclusion of that part of the Township of Springwells within the city which contained the lines of railway covered by the franchises of 1889 and 1891, the city, which had theretofore made certain contracts with the Railway for the reduction of fare upon the lines then within the city limits at certain hours under a system of tickets called workingmen's tickets, by an ordinance passed May 2, 1906, entitled "An ordinance in relation to rates of fare on Fort Street lines of the Detroit United Railway," amended the Township franchises so that the agreement between the Railway and the City with reference to workingmen's tickets should apply to the lines embraced in the grants of 1889 and 1891 for the term of such grants, but provided that the other provisions of the Township grants should remain unchanged.

Shortly before the expiration of the three franchises involved in this suit the City passed three resolutions under date of June 14, June 21, and July 19, 1910, the third being like but superseding the other two. The resolution of July 19, 1910, after reciting the fact that two of the ordinances had expired and the other soon would expire; that, because of the pendency of a certain suit and

injunctions issued therein, an ordinance prescribing the terms and conditions under which the Railway might continue to operate its lines after the expiration of its franchises could not be enforced; that under the constitution of Michigan it was impossible for the City to grant a term franchise without the affirmance of the electors of the City, and that the Railway was denied the right to operate its lines without a franchise, provided that the Railway might temporarily operate under the same terms and conditions as theretofore existed upon the payment of $200 a day to the City, and that, except upon such terms, consent to operate its railway was denied and refused to the Railway. The Railway by written communication denied that the franchises had expired, insisted that the demands of the City were illegal and declined to pay the sum named in the resolution.

The Railway, among other defenses, asserted that the ordinance of 1906 had the effect of extending its franchises to 1921, that, the original franchises being silent on the question of the rights of the parties upon the termination of the grants, an implied contract was created that the railway and other property of the Railway should continue in place and in use for the public convenience on reasonable terms and in conformity to the rights of the City, public and Railway, and that the resolutions impaired the obligations of the contracts of the Railway, in violation of § 10, Article I, of the Constitution and deprived it of its property without due process of law, in contravention of the Fourteenth Amendment.

The Circuit Court held, among other things, that the franchises had expired and ordered the Railway to accept the terms of the resolution and comply with its provisions or to vacate the streets. The Supreme Court of Michigan affirmed the decision of the Circuit Court that the franchises had expired and that all rights of the Railway to occupy the streets and to maintain and operate its railway

had terminated, and held that the Common Council of the City might require the Railway to cease the operation of its cars and might also require the Railway to remove its tracks from the streets, and provided the minimum time in which the Railway should be compelled to comply with the demands of the Common Council.

Certain Federal questions are made which require consideration, upon this application to dismiss or affirm, the first of which is that the attempt to terminate the rights of the Railway and require the removal of its tracks and property from the streets of the City impairs the obligation of a valid and subsisting contract for the continued use of the streets until 1921. This contention is based upon the ordinance of May 2, 1906, which, by its title, purports to be one in relation to rates of fare on the Fort Street lines of the Railway and which provides, after reciting the purpose of the ordinance, as we have mentioned above, and the intention that the grants from the Township of Springwells may be modified in accordance with the ordinance, the terms and conditions of the township grants not to be otherwise affected by the agreement:

"That the Detroit United Railway shall for the full term of said township grants, issue and sell tickets at the rate of eight tickets for twenty-five cents, each of said tickets to be good for a continuous ride between any two points on what are known as the routes of the Fort Wayne & Elmwood Railway lines, so called, whether constructed under grants from the Township of Springwells or from the City of Detroit, between the hours of 5 a. m. to 6.30 a. m.; and the hours of 4:45 and 5:45 p. m., but the terms of said township grants in all other respects shall not be modified or changed, nor shall this ordinance and the acceptance thereof be construed to abridge, enlarge or extend any rights acquired by said railway company, or its assignors or predecessors in title under said several grants from the Township of Springwells."

The argument is that, as this ordinance obligates the Railway for the full term of the township grants, which do not expire until December 14, 1921, to sell tickets and transport passengers over its railway, including the portion covered by the now expired grants, the last named grants of the Railway were thereby extended to expire at the same time with the township grants, because only by such construction can the obligation of the Railway to furnish transportation for the full term of the township grants be complied with; that this was a contractual obligation proposed by the City and accepted by the Railway, and necessarily extended the grants of the Railway.

The principles upon which grants of this character are to be construed have been frequently declared in decisions of this court. They were stated by the late Mr. Justice Peckham, speaking for the court, in *Cleveland Electric Railway Co.* v. *Cleveland*, 204 U. S. 116, 129:

"The rules of construction which have been adopted by courts in cases of public grants of this nature by the authorities of cities are of long standing. It has been held that such grants should be in plain language, that they should be certain and definite in their nature, and should contain no ambiguity in their terms. The legislative mind must be distinctly impressed with the unequivocal form of expression contained in the grant, 'in order that the privileges may be intelligently granted or purposely withheld. It is matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislatures with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed.' *Blair* v. *Chicago*, 201 U. S. 400, 471."

Applying these principles, it is impossible to hold that the effect of this ordinance was to extend franchises which by their terms had definite and fixed duration. Such

effect is nowhere suggested in the preamble of the ordinance, and does not necessarily inhere in the thing sought to be accomplished. Legislation concerning prior grants was not brought to the attention of the council, so that privileges enlarging them could be intelligently acted upon and clearly given or explicitly withheld. A fair construction of the ordinance requires such service at the rates fixed only while the Railway had a lawful right to use the streets by grant from the City. Certainly it was not contemplated that the City could require such service after the grant which it had itself given to the Railway had expired by its own limitation. Any other construction of this ordinance is forced and unnatural, and the construction contended for would have the effect to deprive the City of the right to control the use of its streets and grant to the Railway without any consideration or compensation rights which this record shows are of great value.

Nor do we find more force in the claim of an implied contract to permit the Railway to remain in the streets under such reasonable arrangements for public service as the situation might require. The right to grant the use of the streets was in the City. It had exercised it, had fixed by agreement with the Railway the definite period at which such rights should end. At their expiration the rights thus definitely granted terminated by force of the terms of the instrument of grant. The Railway took the several grants with knowledge of their duration and has accepted and acted upon them with that fact clearly and distinctly evidenced by written contract. The rights of the parties were thus fixed and cannot be enlarged by implication. *Louisville Trust Co.* v. *Cincinnati*, 76 Fed. Rep. 296; *Cedar Rapids Water Co.* v. *Cedar Rapids*, 118 Iowa, 234; *Scott County Road Company* v. *Hines*, 215 U. S. 336; *Turnpike Company* v. *Illinois*, 96 U. S. 63.

We are of the opinion that where a street railroad is

authorized to operate in the streets of a city for a definite and fixed time, and has enjoyed the full term granted, it may, upon failure to renew the grant, be required, within a reasonable time, to remove its tracks and other property from the streets. In this case the Supreme Court of Michigan held that, if the city by the resolution of its Common Council should require the removal of the Railway's property from the streets, the removal should be effected by the Railway within ninety days after notice of the resolution, unless it be given a longer time or the time given be extended by like resolution. In thus providing for the removal of the property of the Railway from the streets of the city we are unable to see that any contractual obligation was impaired or that the property of the Railway was taken without due process of law, and these are the contentions as to Federal questions argued in this connection.

A number of other assignments of error are made, some of which do not appear to have been taken in the Supreme Court of Michigan and are consequently not reviewable here, and in none of them do we find any contention of the substantial impairment of rights secured by the Federal Constitution to the plaintiff in error.

We think the Federal rights relied upon are of such nature as to require no further argument for their determination, and the motion of the defendant in error to affirm will be granted.

Affirmed.

BARRY v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 170. Argued March 6, 1913.—Decided May 26, 1913.

Where a contractor is unable to make deliveries under a contract with the Government for continuous deliveries of a specified article and agrees with the properly authorized official to meet the emergency by delivering goods of a different class to be paid for according to actual value, the delivery is not one under the contract but is an emergency purchase, nor is an acceptance by the Government an acceptance under the contract; if the goods so delivered are not of the value of the goods contracted for the Government may offset the difference against future deliveries under the contract.

The failure, by reason of a strike, of contractors to deliver coal as required by a contract for continuous delivery for the Philippine Division, creates a condition contemplated by the act of April 23, 1904, providing for open market emergency purchases, and a purchase of coal other than that contracted for so made from the contractor is an emergency purchase and not an outside purchase to meet contractor's default and accepted as fulfilment.

Where a contractor is indebted to the Government under one contract the Government may offset without separate action an amount owing by that contractor under another contract.

45 Ct. Cl. 532, affirmed.

THIS is a petition by appellants, partners under the style of Henry W. Peabody & Company, for a balance alleged to be due on account of coal furnished the Quartermaster's Department, Philippine Division of the Army. So much of the contract, which was in writing and duly signed and approved, as required by § 3744 of Revised Statutes, as is essential to a judgment, may be shortly stated: The contractors agreed to sell and deliver at Manila or certain other designated points, 70,000 tons of coal known as "Wallsend" coal, of good quality "for steaming purposes" at $5.15 per ton, deliveries not to exceed 800 tons per month. The contractors were required

to file an official report of tests showing the quality of coal intended to be delivered and a sufficient sample for test. The sixth provision of the contract was in these words:

"That the said parties of the second part shall file with the officer in charge of water transportation an official report of tests, showing the quality of the coal intended to be delivered and a sufficient sample for test, and if at any time the coal offered under this contract shall fall below the report so filed or the quality of the sample submitted, then such coal will be rejected."

By article 4 of the contract it was agreed, "that all deliveries on this contract shall be subject to careful inspection, under instructions of the Chief Quartermaster, Philippine Division, United States Army," etc. Payment for coal delivered under the contract was to be made on discharge of each cargo.

By article 12 it was agreed:

"That in case of failure of the said parties of the second part to comply with the stipulations of this contract according to the true intent and meaning thereof then the party of the first part shall have the power to purchase in open market at the lowest price obtainable, or by special contract, such quantity of coal of equal grade as may be required, not to exceed the amount herein stated, the difference in cost to be charged to and paid by the said parties of the second part, or their sureties."

The II, III and IV findings of fact are in these words:

II.

"Deliveries were begun under this contract in August, 1904, and averaged about one delivery a month, and were made at the times and places and to the amounts requested by the officers of the Quartermaster's Department, who did not require or wish the full amount specified in the contract to be delivered and who also did not give and were not required to give the amount of notice specified

in paragraph 2 of the contract for deliveries at ports outside of Manila Bay.

"In the month of January, 1905, a strike took place at the Newcastle collieries in Australia, the source of supply of the coal known as Wallsend, specified in the contract, whereby the claimants became temporarily unable to supply that kind of coal. Being informed of this fact by cablegram dated January 21, 1905, and received at Manila on the same day, the agent of the claimants conveyed immediate notice thereof to Col. John L. Clem, Assistant Quartermaster General, United States Army, chief quartermaster of the Division of the Philippines at Manila, informing him at the same time that, as also stated in the same cablegram, an equal quantity of good Australian coal, known as mountain coal, could be supplied. It was stated in the conversation with Colonel Clem that this mountain coal was not fully equal to Wallsend, but that it was believed to be a good coal. Colonel Clem agreed to accept said mountain coal. It was then and there stated between said agent of the claimants and said Colonel Clem that the price to be paid for the 6,000 tons of mountain coal then required by the Government should be $5.15 a ton, the same price as specified in the contract for Wallsend coal, and agreed that the same should be considered as a purchase outside of the contract to meet existing conditions. The agent of the claimants thereupon cabled to their office at Sydney, New South Wales, Australia, ordering the 6,000 tons of mountain coal, and the same was delivered by the claimants, accepted by the Government, and paid for on a voucher of the disbursing quartermaster at Manila at the rate of $5.15 a ton.

III.

"On the 3d of February, 1905, after the shipment, but before the delivery of said mountain coal, the claimants

addressed a letter to Colonel Clem asking to be furnished with an order for said coal as a purchase in accordance with the agreement and conversation referred to in the preceding finding. Colonel Clem thereupon informed the claimants, through the officer in charge of water transportation, that a sample of the mountain coal would be shipped to the Quartermaster-General for test, and in case of its falling below the Wallsend coal, that difference would be charged against the claimants under the contract. The claimants, by letter of February 18, 1905, protested against this qualification, insisting that the agreement orally made with Colonel Clem was to accept mountain coal at the same price as that specified in the contract for Wallsend coal without reserve as to quality. The mountain coal was inferior to Wallsend coal, but its market value at Manila at that time, owing in part to said strike, was $5.15 a ton, the price orally agreed upon and paid to the claimants.

IV.

A sample taken from the cargo of mountain coal above mentioned was sent to the Quartermaster-General at Washington, and on being subjected to test was found to be of less value than the Wallsend coal, as provided by the contract, the pro rata reduction in price of the cargo being found to be $3,193.32, or of the value of $4.63 a ton instead of $5.15.

"Thereafter claimant entered into a second contract with the chief quartermaster of the Division of the Philippines to deliver 60,000 tons of West Wallsend coal for the fiscal year beginning July 1, 1905. In the month of April, 1906, the quartermaster deducted from the price of a cargo of coal delivered under said contract the sum of $3,193.32 due the United States, the difference in value between the Wallsend coal as provided by the contract and the mountain coal delivered by the claimant."

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

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

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

From the facts it is plain that the contractors could not and did not deliver a cargo of "Wallsend" coal in January, 1905, as their contract obligated them to do. This temporary inability was due to a strike at the colliery. This did not excuse them, since the contract did not so provide. The cargo of mountain coal which was bought to meet the immediate demand, though the same price was paid for it, had a fuel value of $3,193.32 less than that of the same quantity of Wallsend coal, as determined by tests and comparisons with the sample of Wallsend coal, and the question is whether this loss shall be borne by the Government or by the contractor.

Appellants say that if any cargo did not conform to the standard, the only right of the Government was to reject it. But it was not pretended that this cargo was Wallsend coal, or equal to that coal in quality, nor was it accepted as a delivery under the contract. That the Chief Quartermaster agreed to accept it and pay for it the price fixed for Wallsend coal under the contract, and did so accept and pay for it, constitutes the ground upon which the claim of appellants must rest.

The situation was one brought about by the inability of the contractors to carry out their contract. The coal was needed for present necessities. The deficiency in Wallsend coal had to be made up. There was thus presented one of the emergency conditions contemplated by

the law then in force, the act of April 23, 1904, 33 Stat. 268, 269 and the 548th and 549th paragraphs of the Army Regulations of 1904, providing for "open market emergency purchases." Under this condition and under this authority, the Chief Quartermaster agreed to accept a cargo of confessedly inferior coal, and pay the market price for that quality of coal in Manila at the time. That this cargo was not to be accepted as a fulfillment of the contract, and as a waiver of any difference in value between that and Wallsend coal, is demonstrated by the finding that it was agreed "that the same should be considered as a purchase outside of the contract to meet existing conditions." It could not be regarded as an "outside purchase" to meet conditions brought about by the contractors' fault and at the same time be regarded as accepted in fulfillment of the contract.

The finding that the Chief Quartermaster, after the coal had been shipped, but before it arrived or was delivered, gave notice that he would send a sample of the coal to the Quartermaster-General to be tested, and that if it fell below the Wallsend coal, the difference would be charged against the contractors, operated to put them upon guard. They might have refused delivery. They did not, although they protested and asserted views in opposition to that of the officer. The payment made was for that cargo as an "outside purchase," and not a payment under the contract for Wallsend coal. Neither is the agreement to take that cargo, and the payment made for it to be regarded as a waiver of any difference that might exist between the quality and fuel value of the coal so purchased and the coal which should have been supplied. That it does not constitute a waiver, results from the agreement that it should be considered "an outside purchase," and the express notice before delivery that the contractors would be charged with that difference. When that difference was ascertained, it was charged up and

retained from money due under a later contract. The liability might have been asserted by the Government in an action; but it might, as it did, charge it up as a set-off against its own liability. It would be folly to require the Government to pay under the one contract what it must eventually recover for a breach of the other.

Judgment affirmed.

UNITED STATES *v.* CHANDLER-DUNBAR WATER POWER COMPANY.

CHANDLER-DUNBAR WATER POWER COMPANY *v.* UNITED STATES.

ST. MARYS POWER COMPANY *v.* UNITED STATES.

BROWN, RECEIVER OF THE MICHIGAN LAKE SUPERIOR POWER COMPANY, *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

Nos. 783, 784, 785, 786. Argued April 28, 1913.—Decided May 26, 1913.

The technical title to the beds of navigable rivers of the United States is either in the States in which the rivers are situated, or in the riparian owners, depending upon the local law.

Upon the admission of Michigan as a State into the Union the bed of the St. Marys River passed to the State; under the law of Michigan a conveyance of land bordering upon a navigable river carries the title to the middle thread.

The title of the riparian owner to the bed of a navigable stream is a qualified one, and subordinate to the public right of navigation and

subject to the absolute power of Congress over the improvement of navigable rivers.

Under the Constitution, Congress can adopt any means for the improvement of navigation that are not prohibited by that instrument itself.

Commerce includes navigation and it is for Congress to determine when and to what extent its powers shall be brought into activity. *Gilman* v. *Philadelphia*, 3 Wall. 713.

The judgment of Congress as to whether a construction in or over a navigable river is or is not an obstruction to navigation is an exercise of legislative power and wholly within its control and beyond judicial review; and so *held* as to the determination of Congress that the whole flow of St. Marys River be directed exclusively to the improvement thereof by the erection of new locks therein.

The flow of the stream of a navigable river is in no sense private property, and there is no room for judicial review, at the instance of a private owner of the banks of the stream, of a determination of Congress that such flow is needed for the improvement of navigation.

One placing obstructions in a navigable stream under a revocable permit of the Secretary of War does not acquire any right to maintain the same longer than the Government continues the license; and an act of Congress revoking the permit does not amount to a taking of private property so far as exclusion from what was covered by the permit is concerned.

Private ownership of running water in a great navigable stream is inconceivable.

Every structure in the water of a navigable river is subordinate to the right of navigation and must be removed, even if the owners sustain a loss thereby, if Congress, in assertion of its power over navigation so determines.

The act of Congress of March 3, 1909, declaring that a public necessity existed for absolute control of all the water of St. Marys River excludes forever all structures necessary for commercial use of the water power, regardless of whether there may be any surplus in the flow beyond that required for purposes of navigation.

Even if the act declaring that the entire flow of a navigable stream is necessary for navigation provides for the sale of surplus power, the act is still a taking for the purposes of navigation and not for a commercial use.

If the primary object is a legitimate taking there is no objection to the usual disposition of what may be a possible surplus of power. *Kaukauna Co.* v. *Green Bay Canal*, 142 U. S. 254.

An objection to selling excess water power resulting from construction of works for the improvement of navigation cannot be made by one who has no property right in the water which has been taken.

An owner of upland bordering on a navigable river which is taken under condemnation by the Government for the purpose of improving navigation is entitled to compensation for the fair value of the property, but not to any additional values based upon private interest in the potential water power of the river.

The Fifth Amendment is satisfied by payment to the owner of what he actually loses; it does not demand what the taker has gained. *Chamber of Commerce* v. *Boston*, 217 U. S. 189.

One whose property is taken by the Government for improvement of the navigation of the river on which it borders is not entitled to the probably advanced value by reason of the contemplated improvement. The value is to be fixed as of the date of the proceedings.

One whose land is taken by the Government for a particular purpose is entitled to have the fact that the land is peculiarly available for such purpose considered in the appraisal. *Boom Co.* v. *Patterson*, 98 U. S. 403.

Where a survey of a town site has not been carried out the title of the streets does not pass out of the United States and the value of the street cannot be added to that of the abutting property in condemnation proceedings at the instance of the United States.

The owner of a separate parcel is not entitled to additional value resulting as part of a comprehensive scheme of improvement, requiring the taking of his and other property. *Chamber of Commerce* v. *Boston*, 217 U. S. 189.

"Strategic value" cannot be allowed in condemnation proceedings; the value of the property to the Government for a particular use is not the criterion. The owner is compensated when he is allowed full market value.

Where the state of the title and pending litigation affecting it is set up in the pleadings, the fact that the Government seeks condemnation of the property does not amount to conceding that the title is in the party claiming it and against whom the proceeding is directed. In this case all rights were reserved.

THESE writs of error are for the purpose of reviewing a judgment in a condemnation proceeding instituted by the United States under the eleventh section of an act of

Congress of March 3, 1909, 35 Stat., pp. 815, 820, c. 264. The section referred to is set out in the margin.[1]

The notice of condemnation required by the statute was duly given by the Secretary of War and this pro-

[1] SEC. 11. That the ownership in fee simple absolute by the United States of all lands and property of every kind and description north of the present Saint Marys Falls Ship Canal throughout its entire length and lying between said ship canal and the international boundary line at Sault Sainte Marie, in the State of Michigan, is necessary for the purposes of navigation of said waters and the waters connected therewith.

The Secretary of War is hereby directed to take proceedings immediately for the acquisition by condemnation or otherwise of all of said lands and property of every kind and description, in fee simple absolute. He shall proceed in such taking by filing in the office of the register of deeds of Chippewa County, in the State of Michigan, a writing, stating the purpose for which the same is taken under the provisions of this section, and giving a full description of all the lands and property of every kind and description thus to be taken. After the filing of said writing, and ten days after publication thereof in one or more newspapers in the city of Sault Sainte Marie, in the State of Michigan, the United States shall be entitled to, and shall take, immediate possession of the property described, and may at once proceed with such public works thereon as have been authorized by Congress for the uses of navigation.

The Circuit Court of the United States for the western district of Michigan is hereby given exclusive jurisdiction to hear condemnation proceedings and to determine what compensation shall be awarded for property taken under authority of this section. After the taking of any property by the Government of the United States, as herein provided for, the United States, by its proper officials, shall begin condemnation proceedings in the aforesaid court, and the practice shall be in accordance with the practice in the courts of the State of Michigan for the condemnation of lands by the State for public buildings of such State so far as the same may be followed without conflicting with the provisions hereof. Possession may be taken by the United States prior to a determination by a court of any necessity of taking, and prior to any determination of the amount of compensation.

Any money payable by the Government under the provisions of this section shall be payable out of any money heretofore authorized or appropriated for the purpose of improving Saint Marys River at the falls, Michigan.

ceeding was instituted against all the corporations and persons supposed to have any interest in the property sought to be condemned. A jury was waived and the

All that part of "An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," approved March second, nineteen hundred and seven, beginning with the words "and all lands and waters north of the present Saint Marys Falls ship canal throughout its length," and ending with the words "to comply with the provisions of the river and harbor Act of nineteen hundred and two, but such lands, if so acquired, shall be obtained without expense to the United States," is hereby repealed.

Every permit, license, or authority of every kind, nature, and description heretofore issued or granted by the United States, or any official thereof, to the Chandler-Dunbar Water Power Company, the Edison Sault Light and Power Company, the Edison Sault Electric Company, or the Saint Marys Power Company, shall cease and determine and become null and void on January first, nineteen hundred and eleven, and the Secretary of War is hereby authorized and instructed to revoke, cancel, and annul every such permit, license or authority, to take effect on January first, nineteen hundred and eleven.

The Secretary of War may, in his discretion, permit the Chandler-Dunbar Water Power Company and the Edison Sault Electric Company to maintain their present works and utilize the water power in said river at said rapids, in so far as the same does not interfere with navigation, or retard the construction of government works in said river, under such rules or regulations as have been or hereafter shall be imposed by the Secretary of War, until they shall be paid the compensation awarded by the court for their property condemned under the provisions of this section; but said permit shall not extend beyond January first, nineteen hundred and eleven.

The President of the United States is respectfully requested to open negotiations with the Government of Great Britain for the purpose of effectually providing, by suitable treaty with said Government, for maintaining ample water levels for the uses of navigation in the Great Lakes and the waters connected therewith, by the construction of such controlling and remedial works in the connecting rivers and channels of such lakes as may be agreed upon by the said governments under the provisions of said treaty.

The Secretary of War is further authorized and instructed to cause to be made a preliminary examination and survey to ascertain and

evidence submitted to the court, which, at the request of all the parties, made specific findings of fact and law.

By an agreement, the property of the International Bridge Company required by the Government was acquired by deed, and later in the progress of the case the property of the Edison-Sault Electric Company involved in the proceeding was acquired by stipulation. This eliminates from the cases every question except those arising in respect of the compensation to be awarded to the Chandler-Dunbar Water Power Company, the St. Marys Power Company and Clarence M. Brown, Receiver of the Michigan Lake Superior Power Company. The final judgment of the court was:

1. That the ownership in fee simple absolute by the United States of all lands and property of every kind and description north of the present St. Marys Falls Ship Canal, throughout its entire length and lying between the said ship canal and the international line at Sault St. Marie, in the State of Michigan, was necessary for the purposes of navigation of said waters and the waters connected therewith as declared by the act of March 3, 1909.

The compensation awarded was as follows:

a. To the Chandler-Dunbar Company, $652,332. Of this $550,000 was the estimated value of the water power.

b. To the St. Marys Falls Power Company, $21,000.

c. To the Edison-Sault Electric Company, $300,000, which has, however, been settled by stipulation.

d. To the Michigan Lake Superior Power Co., nothing.

From these awards the Government, the Chandler-Dunbar Company, the St. Marys Falls Power Company, and the Michigan Lake Superior Power Company, have sued out writs of error.

---

determine a proper plan and the probable expense for constructing in the rapids of the Saint Marys River a filling basin or forebay, from which the ship locks shall be filled: Provided, That such survey shall in no way delay or interfere with the plans for construction already under way.

The errors assigned by the United States challenge the allowance of any compensation whatever on account of any water power right claimed by any of the owners of the condemned upland, and also the principles adopted by the District Court for the valuation of the upland taken. The several corporations, who have sued out writs of error, complain of the inadequacy of the award on account of water power claimed to have been taken, and also of the valuation placed upon the several parcels of upland condemned.

The errors assigned by the United States deny that any water power in which the defendants below had any private property right has been taken, and also deny the claim that riparian owners must be compensated for exclusion from the use of the water power inherent in the falls and rapids of the St. Marys River, whether the flow of the river be larger than the needs of navigation or not. The award of $550,000 on account of the claim of the Chandler-Dunbar Company to the undeveloped water power of the river at the St. Marys rapids in excess of the supposed requirements of navigation constitutes the prime question in the case, and its importance is increased by the contention of that company that the assessment of damages on that account is grossly inadequate and should have been $3,450,000.

Each of the several plaintiffs in error also challenge the awards made on account of the several parcels of upland taken,—the Government insisting that the awards are excessive, and the owners, that they are inadequate.

Mr. Assistant Attorney General Fowler, with whom *Mr. Reeves T. Strickland* was on the brief, for the United States.[1]

Mr. William L. Carpenter for St. Marys Power Company, plaintiff in error in No. 785, submitted.[1]

[1] See note on next page.

Mr. Moses Hooper, with whom *Mr. John H. Goff* and *Mr. A. B. Eldredge* were on the brief, for Chandler-Dunbar Water Power Company, defendant in error in No. 783 and plaintiff in error in No. 784.[1]

Mr. Justice Lurton, after making the foregoing statement, delivered the opinion of the court.

From the foregoing it will be seen that the controlling questions are, first, whether the Chandler-Dunbar Company has any private property in the water power capacity of the rapids and falls of the St. Marys River which has been "taken," and for which compensation must be made under the Fifth Amendment to the Constitution; and, second, if so, what is the extent of its water power right and how shall the compensation be measured?

That compensation must be made for the upland taken is not disputable. The measure of compensation may in a degree turn upon the relation of that species of property to the alleged water power rights claimed by the Chandler-Dunbar Company. We, therefore, pass for the present the errors assigned which concern the awards made for such upland.

The technical title to the beds of the navigable rivers of the United States is either in the States in which the rivers are situated, or in the owners of the land bordering upon such rivers. Whether in one or the other is a question of local law. *Shively* v. *Bowlby*, 152 U. S. 1, 31; *Philadelphia Company* v. *Stimson*, 223 U. S. 605, 624, 632; *Scott* v. *Lattig*, 227 U. S. 229. Upon the admission of the State of Michigan into the Union the bed of the St. Marys River passed to the State, and under the law

[1] The briefs in this case were very elaborate and exhaustive, several hundred authorities bearing on the issues involved are collated and reviewed. This renders it impossible to make abstracts of them.

of that State the conveyance of a tract of land upon a navigable river carries the title to the middle thread. *Webber* v. *The Pere Marquette &c.*, 62 Michigan, 626; *Scranton* v. *Wheeler*, 179 U. S. 141, 163; *United States* v. *Chandler-Dunbar Water Power Co.*, 209 U. S. 447.

The technical title of the Chandler-Dunbar Company therefore, includes the bed of the river opposite its upland on the bank to the middle thread of the stream, being the boundary line at that point between the United States and the Dominion of Canada. Over this bed flows about two-thirds of the volume of water constituting the falls and rapids of the St. Marys River. By reason of that fact, and the ownership of the shore, the company's claim is, that it is the owner of the river and of the inherent power in the falls and rapids, subject only to the public right of navigation. While not denying that this right of navigation is the dominating right, yet the claim is that the United States in the exercise of the power to regulate commerce, may not exclude the rights of riparian owners to construct in the river and upon their own submerged lands such appliances as are necessary to control and use the current for commercial purposes, provided only that such structures do not impede or hinder navigation and that the flow of the stream is not so diminished as to leave less than every possible requirement of navigation, present and future. This claim of a proprietary right in the bed of the river and in the flow of the stream over that bed to the extent that such flow is in excess of the wants of navigation constitutes the ground upon which the company asserts that a necessary effect of the act of March 3, 1909, and of the judgment of condemnation in the court below, is a taking from it of a property right or interest of great value, for which, under the Fifth Amendment, compensation must be made.

This is the view which was entertained by Circuit Judge Denison in the court below, and is supported by most

careful findings of fact and law and an elaborate and able opinion. The question is, therefore, one which from every standpoint deserves careful consideration.

This title of the owner of fast land upon the shore of a navigable river to the bed of the river, is at best a qualified one. It is a title which inheres in the ownership of the shore and, unless reserved or excluded by implication, passed with it as a shadow follows a substance, although capable of distinct ownership. It is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers. That power of use and control comes from the power to regulate commerce between the States and with foreign nations. It includes navigation and subjects every navigable river to the control of Congress. All means having some positive relation to the end in view which are not forbidden by some other provision of the Constitution, are admissible. If, in the judgment of Congress, the use of the bottom of the river is proper for the purpose of placing therein structures in aid of navigation, it is not thereby taking private property for a public use, for the owner's title was in its very nature subject to that use in the interest of public navigation. If its judgment be that structures placed in the river and upon such submerged land, are an obstruction or hindrance to the proper use of the river for purposes of navigation, it may require their removal and forbid the use of the bed of the river by the owner in any way which in its judgment is injurious to the dominant right of navigation. So, also, it may permit the construction and maintenance of tunnels under or bridges over the river, and may require the removal of every such structure placed there with or without its license, the element of contract out of the way, which it shall require to be re-

moved or altered as an obstruction to navigation. In *Gilman* v. *Philadelphia*, 3 Wall. 713, 724, this court said:

"Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstructions to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England.

"It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided."

In *Gibson* v. *United States*, 166 U. S. 269, it is said (p. 271):

"All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal Government by the Constitution."

Thus in *Scranton* v. *Wheeler*, *supra*, the Government constructed a long dyke or pier upon such submerged lands in the river here involved, for the purpose of aiding its navigation. This cut the riparian owner off from direct access to deep water, and he claimed that his rights had

been invaded and his property taken without compensation. This court held that the Government had not "taken" any property which was not primarily subject to the very use to which it had been put, and, therefore, denied his claim. Touching the nature and character of a riparian owner in the submerged lands in front of his upland bounding upon a public navigable river such as the St. Marys, this court said (p. 163):

"The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bounding on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such waters. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation."

So unfettered is this control of Congress over the navigable streams of the country that its judgment as to whether a construction in or over such a river is or is not an obstacle and a hindrance to navigation, is conclusive. Such judgment and determination is the exercise of legislative power in respect of a subject wholly within its control.

In *Pennsylvania* v. *Wheeling Bridge Company*, 18 How. 421, 430, this court, upon the facts in evidence, held that a bridge over the Ohio River, constructed under an act of the State of Virginia, created an obstruction to navigation, and was a nuisance which should be removed. Before the decree was executed Congress declared the bridge a lawful structure and not an obstruction. This court there-

upon refused to issue a mandate for carrying into effect its own decree, saying:

"Although it still may be an obstruction in fact, it is not so in the contemplation of law. We have already said, and the principle is undoubted, that the act of the legislature of Virginia conferred full authority to erect and maintain the bridge, subject to the exercise of the power of Congress to regulate the navigation of the river. That body having in the exercise of this power, regulated the navigation consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, State and Federal, which, if not sufficient, certainly none can be found in our system of government."

In *Philadelphia* v. *Stimson, supra,* and in *Union Bridge Company* v. *United States,* 204 U. S. 364, many of the cases are cited and reviewed and we need add nothing more to the discussion.

The conclusion to be drawn is, that the question of whether the proper regulation of navigation of this river at the place in question required that no construction of any kind should be placed or continued in the river by riparian owners, and whether the whole flow of the stream should be conserved for the use and safety of navigation, are questions legislative in character; and when Congress determined, as it did by the act of March 3, 1909, that the whole river between the American bank and the international line, as well as all of the upland north of the present ship canal, throughout its entire length, was "necessary for the purposes of navigation of said waters and the waters connected therewith," that determination was conclusive.

So much of the zone covered by this declaration as consisted of fast land upon the banks of the river, or in islands which were private property, is, of course, to be paid for.

But the flow of the stream was in no sense private property, and there is no room for a judicial review of the judgment of Congress that the flow of the river is not in excess of any possible need of navigation, or for a determination that if in excess, the riparian owners had any private property right in such excess which must be paid for if they have been excluded from the use of the same.

That Congress did not act arbitrarily in determining that "for the purposes of navigation of said waters and the waters connected therewith," the whole flow of the stream should be devoted exclusively to that end, is most evident when we consider the character of this stream and its relation to the whole problem of lake navigation. The river St. Marys is the only outlet for the waters of Lake Superior. The stretch of water called the falls and rapids of the river is about 3,000 feet long and from bank to bank has a width of about 4,000 feet. About two-thirds of the volume of the stream flows over the submerged lands of the Chandler-Dunbar Company, the rest over like lands on the Canadian side of the boundary. The fall in the rapids is about 18 feet. This turbulent water, substantially unnavigable without the artificial aid of canals around the stream, constitutes both a tremendous obstacle to navigation and an equally great source of water power, if devoted to commercial purposes. That the wider needs of navigation might not be hindered by the presence in the river of the construction works necessary to use it for the development of water power for commercial uses under private ownership was the judgment and determination of Congress. There was also present in the mind of Congress the necessity of controlling the outflow from Lake Superior, which averages some 64,000 cubic feet per second. That outflow has great influence both upon the water level of Lake Superior and also upon the level of the great system of lakes below, which receive that outflow. A difference of a foot in the level of Lake

Superior may influence adversely access to the harbors on that lake. The same fall in the water level of the lower lakes will perceptibly affect access to their ports. This was a matter of international consideration, for Canada, as well as the United States, was interested in the control and regulation of the lake water levels. And so we find in the act of 1909 a request that the President of the United States will open negotiations with the Government of Great Britain, "for the purpose of effectually providing, by suitable treaty, for maintaining ample water levels for the uses of navigation in the Great Lakes and the waters connected therewith, by the construction of such controlling and remedial works in the connecting rivers and channels of such lakes as may be agreed upon by the said governments under the provisions of said treaty."

The falls and rapids are at the exit of the river from the lake. Millions of public money have already been expended in the construction of canals and locks, by this government upon the American side, and by the Canadian Government upon its own side of the rapids, as a means by which water craft may pass around the falls and rapids in the river. The commerce using these facilities has increased by leaps and bounds. The first canal had hardly been finished before it became inadequate. A second upon the American side was constructed parallel with the first. The two together are insufficient, though the canal upon the Canadian side accommodates much of the commerce. The main purpose of the act of 1909 was to clear the way for generally widening and enlarging facilities for the ever growing commerce of the Great Lakes. The act, therefore, looks to the construction of one or more canals and locks, paralleling those in use, and directs a survey "to ascertain and determine the proper plan, . . . for constructing in the rapids . . . a filling basin or forebay from which the ship locks may be filled."

The upland belonging to the Chandler-Dunbar Company consists of a strip of land some 2,500 feet long and from 50 to 150 feet wide. It borders upon the river on one side, and on the Government canal strip on the other. Under permits from the Secretary of War, revocable at will, it placed in the rapids, in connection with its upland facilities, the necessary dams, dykes and forebays for the purpose of controlling the current and using its power for commercial purposes, and has been for some years engaged in using and selling water power. What it did was by the revocable permission of the Secretary of War, and every such permit or license was revoked by the act of 1909. (See act of September 19, 1890, 26 Stat., pp. 426, 454, c. 907, forbidding the construction of any dam, pier or breakwater in any navigable river without permission of the Secretary of War, or the creation of any obstruction not affirmatively authorized by law, "to the navigable capacity of such rivers." See also the later act of March 3, 1899, 30 Stat., pp. 1151, 1155, c. 425, and *United States* v. *Rio Grande Irrigation Company*, 174 U. S. 690, construing and applying the act of 1890). That it did not thereby acquire any right to maintain these constructions in the river longer than the Government should continue the license, needs no argument. They were placed in the river under a permit which the company knew was likely to be revoked at any time. There is nothing in the facts which savors of estoppel in law or equity. The suggestion by counsel that the act of 1909 contemplates that the owner should be compensated not only for its tangible property, movable or real, but for its loss and damage by the discontinuance of the company's license and its exclusion from the right to use the water power inherent in the falls and rapids, for commercial purposes, is without merit. The provisions of the act in respect of compensation apply only to compensation for such "property described" as shall be held private property taken for

public uses. Unless, therefore, the water power rights asserted by the Chandler-Dunbar Company are determined to be private property the court below was not authorized to award compensation for such rights.

It is a little difficult to understand the basis for the claim that in appropriating the upland bordering upon this stretch of water, the Government not only takes the land but also the great water power which potentially exists in the river. The broad claim that the water power of the stream is appurtenant to the bank owned by it, and not dependent upon ownership of the soil over which the river flows has been advanced. But whether this private right to the use of the flow of the water and flow of the stream be based upon the qualified title which the company had to the bed of the river over which it flows or the ownership of land bordering upon the river, is of no prime importance. In neither event can there be said to arise any ownership of the river. Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable.

Whatever substantial private property rights exist in the flow of the stream must come from some right which that company has to construct and maintain such works in the river, such as dams, walls, dykes, etc., essential to the utilization of the power of the stream for commercial purposes. We may put out of view altogether the class of cases which deal with the right of riparian owners upon a non-navigable stream to the use and enjoyment of the stream and its waters. The use of the fall of such a stream for the production of power may be a reasonable use consistent with the rights of those above and below. The necessary dam to use the power might completely obstruct the stream, but if the effect was not injurious to the property of those above or to the equal rights of those

below, none could complain, since no public interest would be affected. We may also lay out of consideration the cases cited which deal with the rights of riparian owners upon navigable or non-navigable streams as between each other. Nor need we consider cases cited which deal with the rights of riparian owners under state laws and private or public charters conferring rights. That riparian owners upon public navigable rivers have in addition to the rights common to the public certain rights to the use and enjoyment of the stream which are incident to such ownership of the bank, must be conceded. These additional rights are not dependent upon title to the soil over which the river flows, but are incident to ownership upon the bank. Among these rights of use and enjoyment is the right, as against other riparian owners, to have the stream come to them substantially in its natural state, both in quantity and quality. They have also the right of access to deep water, and when not forbidden by public law may construct for this purpose, wharves, docks, and piers in the shallow water of the shore. But every such structure in the water of a navigable river is subordinate to the right of navigation, and subject to the obligation to suffer the consequences of the improvement of navigation, and must be removed if Congress in the assertion of its power over navigation shall determine that their continuance is detrimental to the public interest in the navigation of the river. *Gibson* v. *United States*, 166 U. S. 269; *Transportation Co.* v. *Chicago*, 99 U. S. 635. It is for Congress to decide what is and what is not an obstruction to navigation; *Pennsylvania* v. *Wheeling Bridge Co.*, 18 How. 421; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605.

To utilize the rapids and fall of the river which flows by the upland of the Chandler-Dunbar Company, it has been and will be necessary to construct and maintain in the river the structures necessary to control and direct

the flow so that it may be used for commercial purposes. The thirty-fourth finding of fact includes this:

"For about twenty years the Chandler-Dunbar Company, or its predecessors or someone claiming under it, has been developing power at this part of the rapids. This was accomplished by a short transverse dam near the lower boundary of its land extending out a short distance into the stream and then extending up along the bed of the stream (substantially) parallel to the bank up to the head of the rapids. This dam or wall toward its upper end diverged out into the stream the better to divert water into the headrace and into the forebay formed by its lower part. Earlier structures of this character were replaced about 1901 by those more extensive ones which existed when this condemnation was made. While considerable in extent and cost, they are inconsiderable as compared with the structures now proposed to utilize the whole power, and they were, comparatively speaking, along the bank rather than across the stream."

The seventy-first finding of fact was in these words:

"All the development works ever constructed upon the Chandler-Dunbar submerged lands by anyone, have been constructed after obtaining from the Secretary of War a permit therefor, and each such permit has been expressly revocable by right of revocation reserved on its face, to be exercised with or without cause. Each such permit was revoked before the commencement of this proceeding."

Upon what principle can it be said that in requiring the removal of the development works which were in the river upon sufferance, Congress has taken private property for public use without compensation? In deciding that a necessity existed for absolute control of the river at the rapids, Congress has of course excluded, until it changes the law, every such construction as a hindrance to its plans and purposes for the betterment of naviga-

tion. The qualified title to the bed of the river affords no ground for any claim of a right to construct and maintain therein any structure which Congress has by the act of 1909 decided in effect to be an obstruction to navigation, and a hindrance to its plans for improvement. That title is absolutely subordinate to the right of navigation and no right of private property would have been invaded if such submerged lands were occupied by structures in aid of navigation or kept free from such obstructions in the interest of navigation. *Scranton* v. *Wheeler, supra; Hawkins Light House Case*, 39 Fed. Rep. 77, 83. We need not consider whether the entire flow of the river is necessary for the purposes of navigation, or whether there is a surplus which is to be paid for, if the Chandler-Dunbar Company is to be excluded from the commercial use of that surplus. The answer is found in the fact that Congress has determined that the stream from the upland taken to the international boundary is necessary for the purposes of navigation. That determination operates to exclude from the river forever the structures necessary for the commercial use of the water power. That it does not deprive the Chandler-Dunbar Company of private property rights follows from the considerations before stated.

It is said that the twelfth section of the act of 1909 authorizes the Secretary of War to lease upon terms agreed upon, any excess of water power which results from the conservation of the flow of the river, and the works which the Government may construct. This it is said is a taking of private property for commercial uses and not for the improvement of navigation. But aside from the exclusive public purpose declared by the eleventh section of the act, the twelfth section declares that the conservation of the flow of the river is "primarily for the benefit of navigation, and incidentally for the purpose of having the water power developed, either for the direct

use of the United States, or by lease . . . through the Secretary of War." If the primary purpose is legitimate, we can see no sound objection to leasing any excess of power over the needs of the Government. The practice is not unusual in respect to similar public works constructed by state governments. In *Kaukauna Co.* v. *Green Bay &c. Canal,* 142 U. S. 254, 273, respecting a Wisconsin act to which this objection was made, the court said:

"But, if, in the erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the State may not retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement. Indeed, it might become very necessary to retain the disposition of it in its own hands, in order to preserve at all times a sufficient supply for the purposes of navigation. If the riparian owners were allowed to tap the pond at different places, and draw off the water for their own use, serious consequences might arise, not only in connection with the public demand for the purposes of navigation, but between the riparian owners themselves as to the proper proportion each was entitled to draw—controversies which could only be avoided by the State reserving to itself the immediate supervision of the entire supply. As there is no need of the surplus running to waste, there was nothing objectionable in permitting the State to let out the use of it to private parties, and thus reimburse itself for the expenses of the improvement."

It is at best not clear how the Chandler-Dunbar Company can be heard to object to the selling of any excess of water power which may result from the construction of such controlling or remedial works as shall be found advisable for the improvement of navigation, inasmuch as

it had no property right in the river which has been "taken." It has, therefore, no interest whether the Government permit the excess of power to go to waste or made the means of producing some return upon the great expenditure.

The conclusion therefore is that the court below erred in awarding $550,000, or any other sum for the value of what is called "raw water," that is the present money value of the rapids and falls to the Chandler-Dunbar Company as riparian owners of the shore and appurtenant submerged land.

Coming now to the award for the upland taken:

The court below awarded to the Chandler-Dunbar Company on this account—

a. For the narrow strip of upland bordering on the river, having an area of something more than 8 acres, excluding the small parcels described in the pleadings and judgment as claims 95 and 96, $65,000, less 7% of that sum on account of Portage Street, which the court later found belonged to the United States and not to that company $60,450

b. For the small parcels covered by claims 95 and 96..... 25,000

c. For a half interest in lot on bridge property. 338

These awards include certain sums for special values: The value of the upland strip fixed at $60,450 was arrived at in this manner—

a. For its value, including railroad side tracks, buildings and cable terminal, including also its use, "wholly disconnected with power development or public improvement, that is to say, for all general purposes, like residences, or hotels, factory sites, disconnected with water power etc., $20,000."

b. "For use as factory site in connection with the development of 6,500 horse power, either as a single site or for several factories to use the surplus of 6,500 horse

power not now used in the city, an additional value of $20,000.

c. For use for canal and lock purposes, an additional value of $25,000.

The small parcels constituting claims 95 and 96 were valued at $25,000.

These two parcels seem to have been connected by a costly fill. They fronted upon deep water above the head of the rapids. They had therefore a special value for wharfs, docks, etc., and had been so used. The gross sum awarded included the following elements:

a. For general wharfage, dock and warehouse purposes, disconnected with development of power in the rapids, $10,000.

b. For its special value for canal and lock purposes an additional sum of $10,000.

c. In connection with the canal along the rapids, if used as a part of the development of 4,500 (6,500) horse power, an additional value of $5,000.

The United States excepted to the additional value allowed in consequence of the availability of these parcels in connection with the water power supposed to be the property of the Chandler-Dunbar Company, and supposed to have been taken by the Government in this case. It also excepted to so much of the awards as constituted an additional value by reason of availability for lock and canal purposes.

These exceptions so far as they complain of the additional value to be attached to these parcels for use as factory sites in connection with the development of horse power by the Chandler-Dunbar Company, must be sustained. These "additional" values were based upon the erroneous hypothesis that that company had a private property interest in the water power of the river, not possibly needed now or in the future for purposes of navigation, and that that excess or surplus water was capable,

by some extension of their works already in the river, of producing 6,500 horse power.

Having decided that the Chandler-Dunbar Company as riparian owners had no such vested property right in the water power inherent in the falls and rapids of the river, and no right to place in the river the works essential to any practical use of the flow of the river, the Government cannot be justly required to pay for an element of value which did not inhere in these parcels as upland. The Government had dominion over the water power of the rapids and falls and cannot be required to pay any hypothetical additional value to a riparian owner who had no right to appropriate the current to his own commercial use. These additional values represent, therefore, no actual loss and there would be no justice in paying for a loss suffered by no one in fact. "The requirement of the Fifth Amendment is satisfied when the owner is paid for what is taken from him. The question is what has the owner lost, and not what has the taker gained." *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 194, 195.

Neither can consideration be given to probable advancement in the value of such riparian property by reason of the works to be constructed in the river by the Government, or the use to which the flow of the stream might be directed by the Government. The value should be fixed as of the date of the proceedings and with reference to the loss the owner sustains, considering the property in its condition and situation at the time it is taken and not as enhanced by the purpose for which it was taken. *Kerr* v. *Park Commissioners*, 117 U. S. 379, 387; *Shoemaker* v. *United States*, 147 U. S. 282, 304, 305.

The exception taken to the inclusion as an element of value of the availability of these parcels of land for lock and canal purposes must be overruled. That this land had a prospective value for the purpose of constructing

a canal and lock parallel with those in use had passed beyond the region of the purely conjectural or speculative. That one or more additional parallel canals and locks would be needed to meet the increasing demands of lake traffic was an immediate probability. This land was the only land available for the purpose. It included all the land between the canals in use and the bank of the river. Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose. Lewis on Eminent Domain, § 707. *Boom Co.* v. *Patterson*, 98 U. S. 403, 408; *Shoemaker* v. *United States*, 147 U. S. 282; *Young* v. *Harrison*, 17 Georgia, 30; *Alloway* v. *Nashville*, 88 Tennessee, 510; *Sargent* v. *Merrimac*, 196 Massachusetts, 171. *Boom Company* v. *Patterson* was this: A boom company sought to condemn three small islands in the Mississippi river so situated with reference to each other and the river bank as to be peculiarly adapted to form a boom a mile in length. The question in the case was whether their adaptability for that purpose gave the property a special value which might be considered. This court held that the adaptability of the land for the purposes of a boom was an element which should be considered in estimating the value of the lands condemned. The court said, touching the rule for estimating damages in such cases:

"So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community,

or such as may be reasonably expected in the immediate future."

In *Shoemaker* v. *United States*, *supra*, lands were condemned for park purposes. In the court below the commissioners were instructed to estimate each piece of land at its market value and that, "the market value of the land includes its value for any use to which it may be put, and all the uses to which it is adapted, and not merely the condition in which it is at the present time, and the use to which it is now applied by the owner; . . . that if, by reason of its location, its surroundings, its natural advantages, its artificial improvement or its intrinsic character, it is peculiarly adapted to some particular use—e. g., to the use of a public park—all the circumstances which make up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating the compensation." The court approved this instruction.

The Chandler-Dunbar Company has also assigned as error the denial of any award on account of a portion of Portage Street to which it claimed title. The title to that parcel has never passed out of the United States. It was part of a street laid off by a survey made of the village of Sault Sainte Marie, a town which had grown up on public land of the United States. But that survey was never carried into a patent and the village never accepted this part of the street. Thus abandoned, it was occupied for a time by the Chandler-Dunbar Company, but not long enough to acquire title. The court did not err in holding that the company had acquired no title, and that title was already in the United States.

The award to the St. Marys Power Company, as owner of island No. 5 is excepted to. The value of that island was fixed at $21,000. That amount was reached, as shown by the 70th finding of fact, in this manner:

a. As a base value, for general purposes, as for a cottage or fishing station..... $1,000

b. As a strategic value, growing out of the extent to which it may control or block the most available development by up stream owners..... $15,000

c. As an additional value, by reason of its special suitability for lock or canal purposes"..... $5,000

This island No. 5, otherwise known as Oshawano Island, is on the American edge of the rapids and below the Chandler-Dunbar property, and opposite that part of the shore belonging to the United States. It has an area of about one-third of an acre. The court found that it had no appreciable water power which was in any sense appurtenant, and so no allowance was made on that account. Because none was made the St. Marys Power Company sued out a writ of error. The reasons which have induced us to deny such an allowance in respect of upland upon the bank of the river, require the assignment referred to to be held bad. The court below held, however, that the island had value in other ways, being those mentioned above. In respect to the allowance of $15,000 as its "strategic value," the court below in its opinion said:

"Owing to its location, this property has, and always has had, a strategic value with reference to any general scheme of water development in the river and because it must be included as a tail race site, if not otherwise, in any completely efficient plan of development by any owner, private or public. This value is denied, because it is, as Government counsel say, of the 'hold up' character. It should not be permitted to assume the latter character, nor should the fair strategic value be denied because there might be an attempt at exaggeration or abuse. I fix this so-called strategic value at $10,000

(afterwards raised to $15,000), and it should be awarded under the circumstances of this case to whomsoever the owner may be."

This allowance has no solid basis upon which it may stand. That the property may have to the public a greater value than its fair market value affords no just criterion for estimating what the owner should receive. It is not proper to attribute to it any part of the value which might result from a consideration of its value as a necessary part of a comprehensive system of river improvement which should include the river and the upland upon the shore adjacent. The ownership is not the same. The principle applied in *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, is applicable. In that case it appeared that one person owned the land condemned subject to servitudes to others. It was sought to have damages assessed upon a bill in which all of the interests joined for the purpose of having a lump sum awarded to be divided as the parties might or had agreed. If this could be done it was agreed that the estate, considered as the sole unencumbered estate of a single person, was worth many times more than if the damage should be assessed according to the condition of the title at the time. This court held that the requirement of compensation when land is taken for a public purpose "does not require a disregard of the mode of ownership. It does not require a parcel of land to be valued as an unencumbered whole."

The "Strategic Value" for which $15,000 has been allowed is altogether speculative. It is based not upon the actual market value for all reasonable uses and demands, but the possible worth of the property to the Government.

A "strategic value" might be realized by a price fixed by the necessities of one person buying from another, free to sell or refuse as the price suited. But in a condemna-

tion proceeding, the value of the property to the Government for its particular use is not a criterion. The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available uses and purposes. Lewis Eminent Domain, 3d ed., § 706; *Moulton* v. *Newburyport Water Co.*, 137 Massachusetts, 163, 167; *United States* v. *Seufert Bros. Co.*, 78 Fed. Rep. 520; *Alloway* v. *Nashville*, 88 Tennessee, 510, 514; *United States* v. *Honolulu Co.*, 122 Fed. Rep. 581.

The exception must be sustained.

One other assignment by the St. Marys Power Company needs to be specially noticed. The title to Oshawano Island is in ligitation between the United States and the St. Marys Power Company. For this reason the award to that company was ordered to remain in the registry of the court until that litigation was ended. The St. Marys Power Company contends that when the United States sought the condemnation of the property in this proceeding it thereby conceded the title to be in it. But the pleadings show that no such concession was made. The state of the title and of the pending litigation was set up and we think all rights were thereby reserved.

The assignments of error by the Michigan Lake Superior Power Company must be overruled. No property, real or hypothetical, has been taken from it.

Other assignments of error by one or another of the several plaintiffs in error need not be specially noticed. They are all overruled as either covered by the views we have expressed, or as having no merit.

The judgment of the court below must be reversed and the cases remanded with direction to enter a judgment in accordance with this opinion.

LEWIS BLUE POINT OYSTER CULTIVATION COMPANY *v.* BRIGGS.

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

No. 272. Argued April 30, May 1, 1913.—Decided May 26, 1913.

The determination by the state court of the effect of grants of title to the bed of navigable waters within the State must be followed by this court.

The deepening, in the interest of navigation, of a channel across a navigable bay, the bed of which is used for oyster cultivation under grants from the State, is not a taking of the property of the lessee of the oyster beds within the meaning of the Fifth Amendment.

The public right of navigation is the dominant right in navigable waters and this includes the right to use the bed of the water for every purpose which is an aid to navigation.

Whatever power the several States had before the Union was formed over navigable waters within their respective jurisdictions has been delegated to Congress, which now has all governmental power over the subject, restricted only by the limitations in the other clauses of the Constitution.

United States v. *Chandler-Dunbar Co.*, *ante*, p. 53, followed as to the nature of the title of an owner of the bed of navigable waters and the control of Congress thereover. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, distinguished as not resting on proprietary rights but on estoppel.

198 N. Y. 287, affirmed.

THE facts, which involve the rights of private owners to land under navigable waters within a State used for cultivation of oysters, and whether such parties are entitled to compensation from the Government of the United States for the destruction of the oyster beds therein by reason of improvement of the channel for navigation pursuant to act of Congress, are stated in the opinion.

Mr. Howard Taylor, for plaintiff in error:

Plaintiff in error is clearly entitled to the relief sought.

The power of Congress to regulate commerce, and incidentally navigation, goes hand in hand with the other powers of and limitations upon the Government set forth in the Constitution, and is obviously to be exercised in conformity to such limitations. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 336; *United States* v. *Lynah*, 188 U. S. 445, 471.

The right of compensation to the owner of private property when it has been taken for public use, is a fundamental inherent right which exists even independently of the National or state constitutions, and has merely been declared therein. *Sinnickson* v. *Johnson*, 17 N. J. L. (2 Harr.) 129, 145.

There has been laid down no exception to this right because the property taken was growing oysters. The growing of oysters is a legitimate industry. The oysters here in question were being grown upon the lands of the plaintiff, and, of course, upon the only kind of lands (submerged ones), where the product of that industry could grow. See *Brown* v. *United States*, 81 Fed. Rep. 55; *Richardson* v. *United States*, 100 Fed. Rep. 714, both decided by Judge Simonton, and holding that the owners of the oyster beds might permit the entry of the Government's officials and recover compensation in a direct proceeding. In the case at bar plaintiff simply seeks to enjoin this entry until the Government takes proceedings for the condemnation of his property. In this alternate procedure plaintiff in error is clearly within its rights. *Phila. Co.* v. *Stimson*, 223 U. S. 605, 620; Pomeroy's Eq. Jurisp., Vol. V, §§ 493, 499.

Plaintiff's constitutional right is plain; the call for its exercise in this instance is equally plain; and the correct remedy has been pursued.

The courts below have misconceived the decisions of the Federal courts, as those cited afford no basis for the adjudication. See opinion of Atty. Gen. Bonaparte,

Oct. 25, 1907, 26 Ops. 441, citing cases *supra* and *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; see also 27 Ops. Atty. Gens. 311.

Scranton v. *Wheeler*, 179 U. S. 141, was erroneously applied to this case. See dissenting opinion in 179 U. S. 169; *Yates* v. *Milwaukee*, 10 Wall. 497, 507. *Chic., B. & Q. Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 561; *West Chic. Street R. R. Co.* v. *Chicago*, 201 U. S. 506; *Union Bridge Co.* v. *United States*, 204 U. S. 364, are not in point. See *Avery* v. *Fox*, 1 Abb. U. S. 246, *S. C.*, Fed. Cas. No. 674; *Stockton* v. *Balt. & N. Y. R. R. Co.*, 32 Fed. Rep. 9; *Hawkins Point Light House Case*, 39 Fed. Rep. 77.

There is in the Great South Bay this great and perfectly legitimate industry of the development of oysters. The Bluepoint oyster is known from one end of this country to the other.

The digging of a channel which destroys "a large number of oysters on the lands aforesaid" and "cuts diagonally through the premises described in said leases" is fundamentally different from the action of the Government in erecting a lighthouse or putting down a pier into the sea or the river.

The Government, in such an instance as this, aids navigation in the sense that it makes a water way where nature did not make a water way; it makes a place for vessels of deep draft where nature made a place for skiffs. In so doing it undertakes a public use. But in so doing, it takes private property, which is just as much private property, and just as much private property taken, as any other kind of property in this country.

The people whose property is being taken in the course of that work should be paid for it.

Mr. Assistant Attorney General Denison, with whom *Mr. Louis G. Bissell* was on the brief, for the United States.

MR. JUSTICE LURTON delivered the opinion of the court.

This was an action to restrain the defendant in error from dredging upon certain lands under the waters of Great South Bay in the State of New York. The defense was that the lands upon which he was engaged in dredging were under the navigable waters of the bay, which was a navigable area of the sea, over which enrolled and registered vessels passed in interstate commerce; that Congress had provided for the dredging of a channel some 2,000 feet long and 200 feet wide across said Bay, and that defendant was engaged as a contractor with the United States in dredging the channel so authorized. The plaintiff in error, plaintiff below, averred that this channel would pass diagonally across submerged land in said bay which it held as lessee under the owner of the fee in the bed of the bay. The land so held under lease had been planted with oysters and had been long used for the cultivation of that variety of oyster known as the "Blue Point." The claim was that the dredging of such a channel would destroy the oysters of the plaintiff, not only along the line of excavation, but for some distance on either side, and greatly impair the value of his leasehold for oyster cultivation.

The New York Court of Appeals held that the title of every owner of lands beneath navigable waters was a qualified one, and subject to the right of Congress to deepen the channel in the interest of navigation, and such a "taking" was not a "taking" of private property for which compensation could be required. The judgment of the courts below discharging the injunction and dismissing the action was therefore affirmed.

The case comes here upon the claim that the dredging of such a channel, although in the interest of navigation, is a taking of private property without just compensation, forbidden by the Fifth Amendment to the Constitution of the United States.

The foundation of the title to a large portion of the soil lying under the water of Great South Bay is found in certain royal patents made when the State of New York was a colonial dependency of Great Britain. Through the patents referred to and certain mesne conveyances, the lessors of the oyster company have been adjudged to be seized of the legal title to a large part of the land which lies at the bottom of that bay. That determination of title under the local law is not complained of, and must, of course, be accepted and followed by this court. The single question, therefore, is, whether the deepening of the channel across the bay in the interest of navigation with the incidental consequence to the oyster plantation of the lessee company is a taking of private property which may be enjoined unless provision for compensation has been made.

The cultivation of oysters upon the beds of the shallow waters of bays and inlets of the sea and of the rivers affected by the tides, has become an industry of great importance. In many localities the business is regulated by the laws of the States in which such waters are situated, and the beds of such waters are parcelled out among those owning the bottom or holding licenses from the State, and marked off by stakes indicating the boundaries of each cultivator. The contention is that whether title to such an area at the bottom of navigable salt waters comes from the State, or, as in the case here, from royal patents antedating the State's right, such actual interest is thereby acquired that when such area so planted and cultivated is invaded for the purpose of deepening the water in aid of navigation, private property is taken. For this, counsel cite the cases of *Brown* v. *United States*, 81 Fed. Rep. 55, decided by Circuit Court Judge Simonton; and *Richardson* v. *United States*, 100 Fed. Rep. 714, also decided by the same eminent judge. They also cite and rely upon *Monongahela Navigation Co.* v. *United States*,

148 U. S. 312. In the *Brown Case,* Judge Simonton, while recognizing that the navigable waters of the United States were within the jurisdiction of the United States which has control over their improvement for navigation, was of opinion, that so long as the owner of the bed of such bodies of water did not use it "for the erection of structures impeding or obstructing navigation," his ownership of the bottom and his right to put it to such use as did not obstruct navigation, was a property right, which could not be destroyed or taken without compensation. From these considerations he held (p. 57) that "when the Government, for the purpose of adding to the navigability of a stream, changes its natural channel, and, in doing so, occupies and assumes exclusive possession of the land of a citizen, it takes private property." In that case the Government had, in the exercise of its power of improving navigation, erected a dyke on the oyster beds of the complainant in the shallow salt water of York River, for the purpose of directing the current of the river and maintaining the channel. The effect of this was to destroy the property of the owner or lessee of the bed of the river at that point for the purpose to which it was devoted. This the learned judge ruled was a "taking" which was not lawful without compensation.

That case and the later one cited fail to recognize the qualified nature of the title which a private owner may have in the lands lying under navigable waters. If the public right of navigation is the dominant right and if, as must be the case, the title of the owner of the bed of navigable waters holds subject absolutely to the public right of navigation, this dominant right must include the right to use the bed of the water for every purpose which is in aid of navigation. This right to control, improve and regulate the navigation of such waters is one of the greatest of the powers delegated to the United States by the power to regulate commerce. Whatever power the several

States had before the Union was formed, over the navigable waters within their several jurisdictions, has been delegated to the Congress, in which, therefore, is centered all of the governmental power over the subject, restricted only by such limitations as are found in other clauses of the Constitution.

By necessary implication from the dominant right of navigation, title to such submerged lands is acquired and held subject to the power of Congress to deepen the water over such lands or to use them for any structure which the interest of navigation, in its judgment, may require. The plaintiff in error has, therefore, no such private property right which, when taken, or incidentally destroyed by the dredging of a deep water channel across it, entitles him to demand compensation as a condition.

In the *Hawkins Point Light House Case*, 39 Fed. Rep. 77, it was held that the occupation of the lands under navigable waters for the purpose of erecting a light house thereon in aid of navigation was not a taking of private property requiring compensation, the owner's title being, by necessary implication, subject to the use which the United States had made of it. In *Scranton* v. *Wheeler*, 57 Fed. Rep. 803, 813, 814, it appeared that the United States had erected a long dyke or pier upon the submerged lands of a riparian owner on the St. Marys River, Michigan, cutting off his access to deep water. It was held that his title was subject to whatever use the Government found appropriate for improving navigation.

The case referred to had been removed from a state court to the Circuit Court of the United States. Upon a writ of error to this court, the case was held to have been improperly removed and was remanded, with direction to remand to the court from which it had been removed. It was there heard and upon review by the Supreme Court of Michigan, the plaintiff's action was dismissed upon the same ground upon which the Circuit

Court had dismissed it. The case then came to this court upon a writ of error to the Michigan court, and the judgment was affirmed. Concerning the nature of the title of a riparian owner to submerged lands over which his boundary extends, this court said:

"Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation." *Scranton* v. *Wheeler*, 179 U. S. 141, 163.

The whole subject of the nature and character of the interest of the owner of such a title and the scope of the control of the Congress over navigable rivers has been fully considered by this court in *United States* v. *Chandler-Dunbar Water Power Co.*, just decided, *ante*, p. 53, where the decision in *Scranton* v. *Wheeler* was fully affirmed.

The case of the *Monongahela Navigation Company* v. *United States*, 148 U. S. 312, 335, has been cited as a case in which the owners of a lock and canal and a franchise to take tolls were awarded compensation not only for the tangible property taken but for the value to the company of the State's franchise to take tolls. That case really rests upon estoppel. The lock and dam had been constructed "at the instance and implied invitation of Congress." After stating the action of Congress, the court said:

"This is something more than the mere recognition of an existing fact; it is an invitation to the company to do the work; and when in pursuance of that invitation, and under authority given by the State of Pennsylvania,

the company has constructed the lock and dam, it does not lie in the power of the State or the United States to say that such lock and dam are an obstruction and wrongfully there, or that the right to compensation for the use of this improvement by the public does not belong to its owner, the Navigation Company."

Compare *Union Bridge Co.* v. *United States*, 204 U. S. 364.

The conclusion we reach, is that the court below did not err in dismissing the action of the plaintiff in error, and the judgment is accordingly

Affirmed.

SHELTON *v.* KING.

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

No. 180. Argued March 11, 12, 1913.—Decided May 26, 1913.

Trustees having the power to exercise discretion will not be interfered with by a court of equity, at the instance of the beneficiaries, so long as they are acting *bona fide*.

In the absence of circumstances and conditions not provided for in the will, there being no question of perpetuities or restriction of alienation and creditors not being concerned, the court should not compel testamentary trustees to anticipate the time of payment of legacies which the testator expressly provided should be held in trust for the legatees until a specified time.

While one may not by his own act preserve to himself the enjoyment of his own property in such manner that it shall not be subject to claims of creditors or to his own power of alienation, a testator may bestow his own property in that manner upon one to whom he wishes to secure beneficial enjoyment without being subject to the claims of assignees or creditors. *Claflin* v. *Claflin*, 149 Massachusetts, 19, approved.

The courts of this country have rejected the English doctrine that

liability to creditors and freedom of alienation are necessary incidents to enjoying the rents and profits from the property by the object of bounty of a testator.

One of the highest duties resting upon a court is to carry out the intentions of a testator as expressed in valid provisions not repugnant to well settled principles of public policy.

In this case the court refuses to compel testamentary trustees to pay over legacies prior to the time specified in the will although the property bequeathed had vested in the legatees.

36 App. D. C. 1, affirmed.

THE facts, which involve the validity of a testamentary trust and the right of the beneficiaries to have the same terminated prior to the time fixed by the will, are stated in the opinion.

Mr. Henry F. Woodard, with whom *Mr. Arthur A. Birney* was on the brief, for appellants:

Appellants took a vested and fixed interest in their legacies, and the attempt to postpone the time for the enjoyment of the same is inconsistent with their ownership, contrary to public policy, and a restraint on the power of their free disposition or alienation, and is, therefore, void. As no other person claims any interest in the legacies appellants may rightfully waive the provision made for their benefit and have the fund paid to them at this time.

It is agreed that the legacies give appellants a vested interest in the moneys bequeathed, so that the only point in controversy is when the fund is to be paid over. *Johnson* v. *Washington L. & T. Co.*, 224 U. S. 224; *McArthur* v. *Scott*, 113 U. S. 340, 380.

Appellants took a vested and indefeasible interest in their legacies and by no known process of human laws could they be defeated in the enjoyment of the same. *Rector* v. *Dalby*, 98 Mo. App. 189.

The will makes no provision with reference to the income or accumulations. It is merely a dry, naked trust.

The fund is not given to the trustees to be by them held, but the gifts are to the children. The only function of the trustee is to lock the fund up and keep the legatees from any participation therein until the youngest reaches the age of 25.

The law is that a trust such as it was attempted to establish in this case is void, or if not void, voidable. For the English rule see *Saunders* v. *Vautier*, 4 Beav. Rep. 115; *Wharton* v. *Masterman*, App. Cas., 1895, H. of L., p. 186; *Josslyn* v. *Josslyn*, 9 Sim. 64; Marsden on Perpetuities, p. 206, citing *Hilton* v. *Hilton*, L. R. 14 Eq. 648; Gray on Perpetuities, § 120.

See, also: *Re Jacob's Will*, 29 Beav. 402; *Rocke* v. *Rocke*, 9 Beav. 66; *Jackson* v. *Marjoribanks*, 12 Sim. 93; *Craxton* v. *May*, L. R. 9 Ch. Div. 338; *Magrath* v. *Morehead*, L. R. 12 Eq. 491.

For the American rule, see 22 Am. & Eng. Ency. 735, 2d ed.; 30 Cyc. 1497; *Rector* v. *Dalby*, 98 Mo. App. 189. *Sears* v. *Choate*, 146 Massachusetts, 395, is parallel to the case at bar and sustains appellants' contention.

See also *Bennett* v. *Chapin*, 77 Michigan, 526, 537, citing *Mandlebaum* v. *McDowell*, 29 Michigan, 87; *Hall* v. *Tufts*, 18 Pick. 459; *Bank* v. *Davis*, 21 Pick. 42; *Brandon* v. *Robinson*, 18 Ves. 429; *Doebler's Appeal*, 64 Pa. St. 9; *Craig* v. *Wells*, 11 N. Y. 315; *Huber* v. *Donoghue*, 49 N. J. Eq. 125; *Sanford* v. *Lackland*, 2 Dillon, 6; *Brandon* v. *Robinson*, 18 Ves. 429; *Kimball* v. *Crocker*, 53 Maine, 263. *The Claflin Case*, 149 Massachusetts, 19, decided in 1889, does not disapprove of the *Sears Case*, 146 Massachusetts, 395; and see *Wharton* v. *Masterman*, App. Cas. 1895, *supra*.

The rule as contended for by the appellees and the authorities cited do not sustain their position.

Mrs. Ellen S. Mussey and *Mr. J. J. Darlington* for appellees.

MR. JUSTICE LURTON delivered the opinion of the court.

This is a bill to terminate a trust under the will of Anna Smith Mallett. The material clauses are in these words:

"3. I give, bequeath and devise to Jean Louisa, Anna Gertrude, and Robert Philo Shelton, being the children of my cousin John Consider Shelton, deceased, all of Bridgeport, Connecticut: the sum of Seventy-five Thousand dollars, being Twenty-five Thousand to each.

"10. I give, bequeath and devise all the rest, residue and remainder of my estate, real and personal wheresoever and whatsoever, of which I may die possessed to the aforesaid Jean Louisa, Anna Gertrude, and R. Philo Shelton.

Codicil.

* * * * * * * *

"In addition to Frank B. King, whom I have appointed executor of this, my last will and testament, I wish to appoint Wm. H. Saunders, of the firm of Wm. H. Saunders & Co., 1407 F Street, Northwest, and George W. White, Paying Teller of the National Metropolitan Bank, co-trustees with the said F. B. King,—to hold in trust the legacies devised to Jean Louisa, Anna Gertrude and Robert Philo Shelton,—said trusteeship to terminate when these legatees shall receive their portions of my estate.

"And it is my further will that these legacies to the said Jean Louisa, Anna Gertrude, and Robert Philo Shelton, shall be paid in full when the said Robert Philo Shelton shall reach the age of twenty-five years."

The complainants are the three legatees, Jean L. Shelton, now more than twenty-one years of age, and Anna Gertrude and Robert Philo Shelton, not yet twenty-one, who sue by their guardian. As the youngest of the lega-

tees was not born until 1896, the bill is premature by many years, if the trust created by the codicil is to be regarded.

That the respective legacies are vested and absolute is undeniable. No other person has any interest in them, and if the trustees should disregard the time of payment and pay over to each legatee his or her legacy when they are competent to give a valid discharge, there would be no one who could call them to account. But the trustees, having regard for the express wish of the testatrix, have refused to terminate the trust, and the object of this proceeding is to compel them to pay over the shares of the legatees as they reach the age of twenty-one years.

The objects of the bounty of the testatrix were distant kinspeople. Besides their postponed legacies they were given the residuum of the estate. What that was does not appear. It is not claimed that they are in want, nor that anything has happened since the will which was not anticipated by the testatrix, and no special reasons are claimed for terminating the trust because of new conditions which she did not take into account. In *Sears* v. *Choate*, 146 Massachusetts, 395, a situation arose after the will, which the court thought had not been contemplated by the testator, and for which no provision had been made. The court therefore saw in that a reason for terminating a like trust. In the case at bar no ground, aside from the alleged illegality of the trust, is suggested for defeating the wishes of Miss Mallett other than that it will be convenient and will save the cost of continuing the trust.

The trust is not dry, but is active, and must continue, if not invalid, until the time of payment arrives. Upon what principle, then, is a court of equity to control the trustee by compelling a premature payment? It is a settled principle that trustees having the power to exercise discretion will not be interfered with so long as they are acting *bona fide*. To do so would be to substitute

the discretion of the court for that of the trustee. Upon the same and even stronger grounds a court of equity will not undertake to control them in violation of the wishes of the testator. To do that would be to substitute the will of the chancellor for that of the testator. Lewin on Trusts, 2nd Am. Ed. 448; *Nichols* v. *Eaton*, 91 U. S. 716, 724.

There being in this case no ground for saying that there have arisen circumstances and conditions for which the testatrix made no provision, we may not control the trustee, if the postponement directed by the will does not offend against some principle of positive law or settled rule of public policy.

There is no pretense of perpetuity. Creditors are in no way concerned. If the testatrix saw fit to have this fund accumulate in the hands of trustees and thereby postpone the enjoyment of her gift, why shall her will be disregarded? The restriction she imposed may protect her bounty against ill-advised investments and waste or extravagance. She did not undertake to guard against alienation, except in so far as the alienors will take subject to the same postponement of payment. *Stier* v. *Nashville Trust Co.*, 158 Fed. Rep. 601. Nor did she undertake to protect against creditors as in *Nichols* v. *Eaton*, 91 U. S. 716. The single restriction she imposed upon her gift was that the legacies should not be paid until the time named, and in the meantime should be held in trust.

The appellants contend that whether the trust be active or dry, it is one for the benefit of the legatees, and, as no other person has any interest in the legacies, may be waived by them. For this they cite *Saunders* v. *Vautier*, 4 Beavan's Reports, 115, and *Wharton* v. *Masterman*, Appeal Cases, 1895, pp. 186, 193. In *Saunders* v. *Vautier* it was laid down, without argument, that "where a legacy is directed to accumulate for a certain period, or where

the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge." The point thus decided in *Saunders* v. *Vautier* was followed in *Wharton* v. *Masterman*, where Lord Herschell said very significantly, "The point seems, in the first instance, to have been rather assumed than decided. It was apparently regarded as a necessary consequence of the conclusion that a gift had vested, that the enjoyment of it must be immediate on the beneficiary becoming *sui juris*, and could not be postponed until a later date unless the testator had made some other destination of the income during the intervening period.

"It is needless to inquire whether the courts might have given effect to the intention of the testator in such cases to postpone the enjoyment of his bounty to a time fixed by himself subsequent to the attainment by the objects of his bounty of their majority. The doctrine has been so long settled and so often recognized that it would not be proper now to question it."

The doctrine thus stated is the plain outgrowth of certain earlier English decisions in the interest of creditors, which hold, in substance, that the necessary incidents of beneficial ownership in property are liability to creditors and the power of alienation. Having concluded that a testator could not so bestow that which was his own to an object of his bounty as not to be subject to the claims of creditors of the latter, it was a logical conclusion that a testator could not postpone the payment of a vested and absolute legacy beyond the time when the legatee should be able to give a valid discharge. But the acceptance of the principle upon which *Saunders* v. *Vautier* and *Wharton* v. *Masterman* rest involves the acceptance of the limitation which the earlier English cases place upon the powers of a testator in so disposing of his prop-

erty that it may be enjoyed by the recipient without liability to creditors. The foundation of the English doctrine in both classes of cases is an assumption that there is some settled principle of public policy which subjects all property in which one has a beneficial ownership to the claims of creditors and forbids restraint upon alienation. That this theory of public policy is not of universal application, at least in this country, is manifest from the numerous exemption statutes existing which protect to a limited extent the acquisitions of a debtor from the claims of his creditors and restrain his power of alienation in the interest of his family. Neither do we for a moment question the rule that one may not by his own act preserve to himself the enjoyment of property in such manner that it shall not be subject to the claims of creditors or placed beyond his own power of alienation.

But a very different question is presented when we come to the powers of a testator to so bestow that which is absolutely his own as to secure its beneficial enjoyment by an object of his bounty without being subject to the claims of assignees or creditors. This court, and the courts of a number of the States of the Union, have not accepted the limitation which the English courts have placed upon the right of testamentary disposition, and have sustained trusts having as an object the application of a testator's bequest to the support and maintenance of the recipient of his bounty. They have, therefore, rejected the assumption that liability to creditors and freedom of alienation are necessary incidents to the right to enjoy the rents and profits of real estate, or the income from other property.

In the leading case of *Nichols* v. *Eaton*, 91 U. S. 716, 725, Mr. Justice Miller, speaking the unanimous voice of this court, said of the English doctrine to which we have referred, and upon which *Saunders* v. *Vautier* must in principle rest:

"We do not see, as implied in the remark of Lord Eldon, that the power of alienation is a *necessary* incident to a life estate in real property, or that the rents and profits of real property and the interest and dividends of personal property may not be enjoyed by an individual without liability for his debts being attached as a necessary incident to such enjoyment. This doctrine is one which the English Chancery Court has ingrafted upon the common law for the benefit of creditors, and is comparatively of modern origin. We concede that there are limitations which public policy or general statutes impose upon all dispositions of property, such as those designed to prevent perpetuities and accumulation of real estate in corporations and ecclesiastical bodies. We also admit that there is a just and sound policy peculiarly appropriate to the jurisdiction of courts of equity to protect creditors against frauds upon their rights, whether they be actual or constructive frauds. But the doctrine, that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court."

Touching the theory that public policy forbids restraints upon the disposition of a testator's bounty, the court said (p. 727):

"Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who *gives*, who gives without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another,

and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection, should not be permitted to do so, is not readily perceived."

In *Hyde* v. *Woods*, 94 U. S. 523, 526, this court said of *Nichols* v. *Eaton*, *supra:*

"In that case, the mother of the bankrupt, Eaton, had bequeathed to him by will the income of a fund, with a condition in the trust that on his bankruptcy or insolvency the legacy should cease and go to his wife or children, if he had any, and if not, it should lapse into the general fund of the testator's estate, and be subject to other dispositions. The assignee of the bankrupt sued to recover the interest bequeathed to the bankrupt, on the ground that this condition was void as against public policy.

"But this court, on a full examination of the authorities, both in England and this country, held that the objection was not well taken; that the owner of property might make such a condition in the transfer of that which was his own, and in doing so violated no creditor's rights and no principle of public policy."

If such a trust as that upheld in *Nichols* v. *Eaton*, was not in violation of principles of public policy, it must follow that one which neither restrains creditors nor alienation is not. If that case is to stand the decree of the court below was right.

The principle upon which *Nichols* v. *Eaton* stands is in line with the views of a number of other courts. Many of them are cited in that opinion, and to those we add: *Broadway National Bank* v. *Adams*, 133 Massachusetts, 170; *Mason* v. *Rhode Island Hospital Trust Co.*, 78 Connecticut, 81; *Jourolmon* v. *Massengill*, 86 Tennessee, 81; *Henson* v. *Wright*, 88 Tennessee, 501; *Brooks* v. *Raynolds*, 59 Fed. Rep. 923; *Smith* v. *Towers*, 69 Maryland, 77;

Keyser v. *Mitchell*, 67 Pa. St. 473; *Seymour* v. *McAvoy*, 121 California, 438; *Steib* v. *Whitehead*, 111 Illinois, 247; *Wallace* v. *Campbell & Maxey*, 53 Texas, 229; *Garland* v. *Garland*, 87 Virginia, 758; *Lampert* v. *Haydel*, 96 Missouri, 439.

Claflin v. *Claflin*, 149 Massachusetts, 19, was a case, on its facts, like the case at bar. The testator gave the residue of his estate to trustees in trust to sell and dispose of as follows: Ten thousand dollars to a son when of age; a like sum when he reached twenty-five years, and the balance when he should reach the age of thirty years. When the son reached the age of twenty-one the trustee paid him ten thousand dollars, and thereupon he filed a bill in equity to obtain the whole of the fund. The Massachusetts court held the trust valid and dismissed the bill. Referring to *Broadway Bank* v. *Adams*, *supra*, where a trust for support and maintenance had been upheld against creditors, the court said:

"The decision in *Broadway National Bank* v. *Adams*, 133 Massachusetts, 170, rests upon the doctrine that a testator has a right to dispose of his own property with such restrictions and limitations, not repugnant to law, as he sees fit, and that his intentions ought to be carried out unless they contravene some positive rule of law, or are against public policy. The rule contended for by the plaintiff in that case was founded upon the same considerations as that contended for by the plaintiff in this; and the grounds on which this court declined to follow the English rule in that case are applicable to this; and for the reasons there given we are unable to see that the directions of the testator to the trustees to pay the money to the plaintiff when he reached the age of twenty-five and thirty years, and not before, are against public policy, or are so far inconsistent with the rights of property given to the plaintiff that they should not be carried into effect. It cannot be said that these restrictions upon the

plaintiff's possession and control of the property are altogether useless, for there is not the same danger that he will spend the property while it is in the hands of the trustees, as there would be if it were in his own."

Stier v. *Nashville Trust Co.*, decided by the Sixth Circuit Court of Appeals, 158 Fed. Rep. 601, is also directly in point.

The case of *Sears* v. *Choate*, 146 Massachusetts, 395, has been cited as in conflict with *Claflin* v. *Claflin*. It is not. In the former case it appeared that there had occurred circumstances which the testator had not contemplated, on account of which the court saw no reason for not terminating the trust. The case was distinguished in *Claflin* v. *Claflin*.

In the case at bar nothing has happened since the will which was not anticipated by the testatrix. The case falls, therefore, precisely within the later case of *Claflin* v. *Claflin*. There is no reason for declaring the trust invalid. There is no higher duty which rests upon a court than to carry out the intentions of a testator when the provision is not repugnant to settled principles of public policy and is otherwise valid.

Decree affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* DOWELL.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 208. Submitted April 14, 1913.—Decided May 26, 1913.

Quære, whether liability to a third person against the master may result from the servant's neglect of some duty owing to the employer alone.

Positive acts of negligence on the part of an engineer while engaged in his employer's business toward a fellow-servant, are acts of misfeasance for which he is primarily liable notwithstanding his contract with his employer and the liability of the latter under the state statute.

If plaintiff allege that the concurrent negligence of both defendants caused his injury, he may join them in one action; and if he do so the fact that he might have sued them separately furnishes no ground for removal.

Whether or not defendants are jointly liable depends on plaintiff's averments in the statement of his cause of action, and it is a question for the state court to decide.

If the state court so decides, a plaintiff may join joint tort-feasors even though the liability of one is statutory and the liability of the other rests on the common law.

While issues of fact arising on the controverted allegations in a petition for removal are only triable in the Federal court, the state court may deny the petition if it is insufficient on its face.

Mere averment that a resident defendant, in this case an employé of small means, is fraudulently joined with a non-resident defendant of undoubted responsibility for the purpose of preventing removal by the latter, is not sufficient to raise an issue of fraud in the absence of other averments of actual fraud. The motive of plaintiff in such a case is immaterial; if the right of joinder exists he can exercise it.

83 Kansas, 562, affirmed.

THE facts, which involve the construction of the Removal Act and what constitutes a separable controversy as to a non-resident defendant sued jointly with a resident defendant, are stated in the opinion.

Mr. F. C. Dillard and *Mr. Paul E. Walker* for plaintiffs in error:

The petition for the removal of the suit to the United States court should have been allowed, as the controversy was separable.

The State of Kansas prohibited the joinder of the several causes of action. 3 Am. and Eng. Anno. Cases, pp. 283, 285; *Atchison, T. & S. F. Ry. Co.* v. *Sumner County*, 51 Kansas, 617; *Benson* v. *Battey*, 70 Kansas, 288; *Enos* v. *Kentucky Distilleries*, 189 Fed. Rep. 342; *Griffith* v. *Griffith*, 71 Kansas, 547; *Harrod* v. *Farrar*, 68 Kansas, 153; *Haskell Bank* v. *Santa Fe Bank*, 51 Kansas, 39; *Hentig* v. *Benevolent Assn.*, 45 Kansas, 462; *Hudson* v. *Atchison County*, 12 Kansas, 141; *Hurd* v. *Simpson*, 47 Kansas, 372; *Illinois Central* v. *Sheegog*, 215 U. S. 308; *Jeffers* v. *Forbes*, 28 Kansas, 174; *Lindh* v. *Crowley*, 26 Kansas, 47; *Marshall* v. *Saline River Land Co.*, 75 Kansas, 445; *Mentzger* v. *Burlingame*, 71 Kansas, 581; *M'Allister* v. *Ches. & O. Ry. Co.*, 198 Fed. Rep. 660; *New* v. *Smith*, 68 Kansas, 807; *Nicholas* v. *Ches. & O. Ry. Co.*, 195 Fed. Rep. 913; *Palmer* v. *Waddell*, 22 Kansas, 352; *Ritzer* v. *Davis County*, 48 Kansas, 389; *State* v. *Addison*, 76 Kansas, 699; *State* v. *Reno County*, 38 Kansas, 317; *State* v. *Shufford*, 77 Kansas, 263; *Stewart* v. *Rosengren*, 66 Nebraska, 445; *Swenson* v. *Moline Plow Co.*, 14 Kansas, 387; *Veariel* v. *United Engineering Co.*, 197 Fed. Rep. 877.

The removing defendant was liable, if at all, under the terms of the Kansas statute; the resident defendant, 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; 8 Am. & Eng. Anno. Cas., p. 233; *Ayers* v. *Commissioners*, 37 Kansas, 240; *Balt. & 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; *Chicago, R. I. & P. Ry. Co.* v. *Stepp*, 151 Fed. Rep. 908; *Henry* v. *Ill. Cen. R. Co.*, 132 Fed. Rep. 715; *Hoye* v. *Raymond*, 25 Kansas, 665; *Jackson* v. *Chicago, R. I. & P. Ry. Co.*, 178 Fed. Rep. 432; *Larned* v. *Boyd*, 76 Kansas,

37; *Lockard* v. *St. Louis & S. F. R. Co.*, 167 Fed. Rep. 675. *Martin* v. *Atchison, T. & S. F. R. Co.*, 166 U. S. 399; *McAllister* v. *Fair*, 72 Kansas, 533; *Nor. Pac. Ry. Co.* v. *Charless*, 162 U. S. 359; *North. Pac. Ry. Co.* v. *Hambly*, 154 U. S. 349; *Nor. Pac. Ry. Co.* v. *Peterson*, 162 U. S. 346; *Nor. Pac. Ry. Co.* v. *Poirier*, 167 U. S. 48; *Nor. Pac. Ry. Co.* v. *Dixon*, 194 U. S. 338; *New Eng. Ry. Co.* v. *Conroy*, 175 U. S. 323; *Prince* v. *Ill. Cent. Ry. Co.*, 98 Fed. Rep. 1; *Swartz* v. *Siegel*, 117 Fed. Rep. 13; *St. Paul, M. & M. Ry. Co.* v. *Sage*, 71 Fed. Rep. 40; *State* v. *Mosman*, 231 Missouri, 474; *Tex. & Pac. Ry. Co.* v. *Bourman*, 212 U. S. 536; *Un. Pac. Ry. Co.* v. *Wyler*, 158 U. S. 285; *Veariel* v. *United Engineering Co.*, 197 Fed. Rep. 877; *Webber* v. *St. Paul Ry. Co.*, 97 Fed. Rep. 140.

The decisions of this court do not establish principles in conflict with the contentions of the plaintiff in error. *Alabama G. Southern Ry. Co.* v. *Thompson*, 200 U. S. 206; *Chesapeake & O. Ry. Co.* v. *Dixon*, 179 U. S. 131; *Chicago, B. & Q. R. Co.* v. *Willard*, 220 U. S. 413; *Chicago, R. I. & P. Ry. Co.* v. *Martin*, 178 U. S. 245; *Cincinnati, N. O. & T. P. Ry. Co.* v. *Bohon*, 200 U. S. 221; *Dowell* v. *Chicago, R. I. & P. Ry. Co.*, 83 Kansas, 562; *East Tenn., V. & G. R. Co.* v. *Grayson*, 119 U. S. 240; *Ill. Cent. R. Co.* v. *Sheegog*, 215 U. S. 308; *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; *Torrence* v. *Shedd*, 124 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. *Arapahoe Co.* v. *Ry. Co.*, 4 Dill. 277; *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; *Dudley* v. *Ill. Cent. R. Co.*, 96 S. W. Rep. 835; *Ill. Cent. R. Co.* v. *Sheegog*, 215 U. S. 308; *Ill. Cent. R. Co.* v. *Coley*, 89 S. W. Rep. 234; *Kansas City R. 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; *Underwood* v. *Ill. Cent. R. Co.*, 103 S. W. Rep. 322; *Wecker* v. *Nat. Enameling Co.*, 204 U. S. 176.

Apart from the allegations of negligence with which the resident defendant was charged, the petition contained other and distinct controversies 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 Ry. Co.*, 95 Fed. Rep. 368; *Beuttel* v. *Chicago & 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. *N. Y., L. E. & N. R. Co.*, 24 Fed. Rep. 516; *Connell* v. *Smiley*, 156 U. S. 335; *Elkins* v. *Howell*, 140 Fed. Rep. 157; *Erb* v. *Popritz*, 59 Kansas, 264; *Ferguson* 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; *Hoye* v. *Raymond*, 25 Kansas, 665; *Leavenworth, W. & S. Ry. Co.* v. *Wilkins*, 45 Kansas, 674; *M'Allister* v. *Ches. & O. R. Co.*, 198 Fed. Rep. 660; *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; *Southern Ry. Co.* v. *Robbins*, 43 Kansas, 145; *Telegraph*

Co. v. *Vandervort*, 67 Kansas, 269; *Wheeling Creek Gas Co.* v. *Elder*, 170 Fed. Rep. 215; *Willard* v. *Spartanburg R. Co.*, 124 Fed. Rep. 796.

Among the other numerous decisions of this court construing the separable controversy provisions of the Federal Removal Act, see the cases cited *supra* and also *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; *Cincinnati, N. O. & T. P. Ry. Co.* v. *Robertson*, 115 Kentucky, 858; *Davis' Admr.* v. *Chesapeake & O. Ry. Co.*, 116 Kentucky, 144; *Little* v. *Giles*, 118 U. S. 596; *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 S. Car. 332; *Slaughter* v. *Nashville, C. & St. L. Ry. Co.*, 91 S. W. Rep. 744; *Southern Ry. Co.* v. *Grizzle*, 124 Georgia, 735; *Southern Ry. Co.* v. *Miller*, 57 S. E. Rep. 1090; *Winston's Admr.* v. *Ill. Cent. R. Co.*, 111 Kentucky, 954.

Mr. J. D. Houston, *Mr. E. C. Hyde*, *Mr. David Smyth*, *Mr. C. H. Brooks* and *Mr. F. S. Macy* for defendant in error:

A cause of action is alleged against defendant engineer where it is charged that he injured plaintiff by carelessly running his engine over him while handling same in the course of his duties as defendant's engineer, as this is a charge of misfeasance and not of mere nonfeasance. *Alabama R. R.* v. *Thompson*, 200 U. S. 206; *Charman* v. *Lake Erie Ry.*, 105 Fed. Rep. 449; *C., R. I. & P. Ry.* v. *Dowell*, 83 Kansas, 562; Cooley on Torts, 2d ed. (1888), p. 164; 31 Cyc. 1559; 38 *Id.* 726; *Davenport* v. *So. Ry.*, 135 Fed. Rep. 960–962; 1 Am. & Eng. Ency. Law, 1132; Gen'l Statutes Kansas, 1909 ed., §§ 5603, 5628, 5681; Meachem on Agency,

572; Notes to Cases, 25 L. R. A. (N. S.) 356; *Riser* v. *So. Ry.*, 116 Fed. Rep. 215; *Southern Ry.* v. *Miller*, 217 U. S. 209; 5 Words and Phrases, p. 4537, "Misfeasance."

Under the decisions of the Supreme Court of Kansas and the Kansas statutes the railway company and the defendant engineer were jointly and severally liable for the injury thus inflicted, and were properly joined as defendants in this case. *Arnold* v. *Hoffman*, 86 Kansas, 12; 31 Cyc. 1559; *Durand* v. *Railway Co.*, 65 Kansas, 380; Gen'l Stat. Kansas, 1909, §§ 5681, 5628, 5603; *Kansas City* v. *File*, 60 Kansas, 157; *Luengene* v. *Consumers*, 86 Kansas, 866, 876; *Southern Ry.* v. *Miller*, 217 U. S. 209; *W. & W. Ry.* v. *Beebe*, 39 Kansas, 465.

Even though the plaintiff misconceived his cause of action and had no right to prosecute the defendants jointly yet it does not even then become a separable controversy or removable if he attempted to join them in good faith. *Alabama Ry.* v. *Thompson*, 200 U. S. 206; *C., B. & Q. Ry.* v. *Willard*, 220 U. S. 413; *Dougherty* v. *Yazoo Ry.*, 122 Fed. Rep. 205; *Enos* v. *Ky. Distilling Co.*, 189 Fed. Rep. 342; *Jacobson* v. *C., R. I. & P. Ry.*, 176 Fed. Rep. 1004, Syl. 5; *Keller* v. *Ry.*, 135 Fed. Rep. 202; *McGarvey* v. *Butte Miner*, 199 Fed. Rep. 671.

Defendant employé was at least liable under the common law, and the railway company both at common law and under the statute; but the case is not thereby made removable nor the controversy separable. *Amer. Bridge Co.* v. *Hunt*, 130 Fed. Rep. 302; *Arnold* v. *Hoffman*, 86 Kansas, 12; *Brown* v. *Cox Bros.*, 75 Fed. Rep. 689, Syl. 2; *C., B. & Q. Ry.* v. *Willard*, 220 U. S. 413; *Charman* v. *Ry.*, 105 Fed. Rep. 449, 454; *Dougherty* v. *Yazoo Ry.*, 122 Fed. Rep. 205; *Hough* v. *So. Ry.*, 57 S. E. Rep. 469; *Hodges* v. *Railroad Co.*, 120 Fed. Rep. 712; *Jacobson* v. *Illinois Ry.*, 176 Fed. Rep. 1004; *Luengene* v. *Consumers*, 86 Kansas, 866, 876; *Painter* v. *Chicago Ry.*, 177 Fed. Rep. 517; *Southern Ry.* v. *Miller*, 217 U. S. 209.

The petition for removal herein was wholly insufficient as to the charge of fraudulent joinder as held by the Kansas Supreme Court and also in like cases in Federal courts. It is a statement of conclusions and not of specific facts constituting the fraud. *C., B. & Q. Ry.* v. *Willard,* 220 U. S. 426; *Dowell* v. *Ry.,* 83 Kansas, 562, 568; *Ill. Cent. Ry.* v. *Sheegog,* 215 U. S. 308; *Jacobson* v. *C., R. I. & P. Ry.,* 176 Fed. Rep. 1004; *K. P. & W. Ry. Co.* v. *Quinn,* 45 Kansas, 477; *Ladd* v. *Misto,* 63 Kansas, 23; *Offner* v. *C., R. I. & P. Ry. Co.,* 148 Fed. Rep. 201; *Schwyhart* v. *Barrett,* 145 Mo. App. 348; *Stearns* v. *Page,* 7 How. 819–829; *Southern Ry.* v. *Citizen,* 74 N. E. Rep. 898; *Tobacco Co.* v. *Tobacco Co.,* 57 S. E. Rep. 5; *Ward* v. *Pullman,* 114 S. W. Rep. 754; *Warax* v. *Ry.,* 72 Fed. Rep. 637; *Wood* v. *Carpenter,* 101 U. S. 135; *York Gold Co.* v. *Keys,* 96 Kansas, 199.

The charge that the defendant engineer was financially irresponsible and was joined as defendant merely to prevent removal of the case to the Federal court, even if true, is no evidence of fraudulent joinder, if plaintiff in good faith thought he had a right to join him as defendant. *C., B. & Q. Ry.* v. *Willard,* 220 U. S. 413; *Deere Wells* v. *Ry.,* 85 Fed. Rep. 876; *Dowell* v. *C., R. I. & P. Ry. Co.,* 83 Kansas, 563, 570; *Hough* v. *So. Ry.,* 57 S. E. Rep. 469; *Schwyhart* v. *Barrett,* 130 S. W. Rep. 388; 145 Mo. App. 332; *Shane* v. *Butte,* 150 Fed. Rep. 801; *Welsh* v. *C. N. O. Ry.,* 177 Fed. Rep. 760.

Whether there is a controversy warranting a removal to the Circuit Court must be determined by the state of the pleadings and the record of the case at the time of filing the application for removal. *Cleveland* v. *Cleveland, C., C. & St. L. R. Co.,* 147 Fed. Rep. 171; *Laden* v. *Meck,* 65 C. C. A. 361; *Louisville & N. Co.* v. *Wangelin,* 132 U. S. 599; *Merchants' Storage Co.* v. *Insurance Co.,* 151 U. S. 368; *Thomas* v. *G. Nor. R. Co.,* 147 Fed. Rep. 83; *Wilson* v. *Oswego,* 151 U. S. 67.

Federal courts will not take cognizance where the record does not affirmatively show jurisdiction to be in those courts, and the presumption at every stage of the case is, that it is without their jurisdiction, unless the contrary appears from the record. *Bors* v. *Preston*, 111 U. S. 253; *Carson* v. *Hyatt*, 118 U. S. 279; *Crehore* v. *O. M. R. R.*, 131 U. S. 240; *Mansfield R. R. Co.* v. *Swan*, 111 U. S. 383; *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U. S. 239; *N. O. & T. Ry.* v. *Hohon*, 200 U. S. 221–225.

Mr. Justice Lurton delivered the opinion of the court.

This writ of error is sued out to review a judgment in a personal injury case because a petition to remove the case to the Circuit Court of the United States is said to have been erroneously denied.

The plaintiff, Albert M. Dowell, was a laborer in the employ of the railroad company, his work being to remove cinders and other debris from the tracks and yards of the company in the town of Liberal, Kansas. He was a resident and citizen of that State. The railroad company was a corporation of the States of Illinois and Iowa, but not of Kansas. The plaintiff while engaged in his proper work was run down by an engine, upon which one Ed. Johnson was the engineer in control, sustaining serious and permanent injuries.

To recover damages for his hurt, Dowell sued the railroad company and Johnson as jointly and severally liable. Johnson was alleged to be, and was in fact, a citizen of the State of Kansas. The railroad company in due time filed its petition and bond, to remove the action of the plaintiff against it to the Circuit Court of the United States, as presenting a separable controversy between the plaintiff and the corporation, which could be tried out and determined without the presence of its co-defendant, Johnson.

It also averred that Johnson was a man of no means, who had been joined as a defendant "for the sole and fraudulent purpose of defeating and preventing" the removal of the case by the non-resident railroad company to the Circuit Court of the United States. The application was denied and the suit was tried before a jury upon the issues made, which found for the plaintiff, against both of the defendants in the sum of $15,000, for which sum a judgment was entered. This judgment was later affirmed by the Supreme Court of the State. *Dowell* v. *Railroad Company*, 83 Kansas, 562. The only error assigned in this court is that the Kansas court erred in denying the application for removal.

Shortly stated the plaintiff's grounds for recovery, as averred in his petition, were these:

a. That the engine which ran over him was old, worn and defective. "That it leaked steam into its cylinder and would not stand when left alone, but would move without the intervention of human or outside agency. That the appliances and machinery of said engine for starting and stopping same were so defective that the same would start and stop without reference to said machinery, and would not respond to the operation of said machinery." That it was without sufficient or safe driving wheel brakes, all of which was averred to be well known to the defendants and not known to the plaintiff.

b. That the defendant Johnson in charge and control of the said engine at the time of its collision with plaintiff, "was incompetent, unskilled and unfit to discharge the duties as an engineer at the time he was employed, . . . as said railway company well knew, and that he has been unskilled, unfit and incompetent as the railway company well knew, but all of which this plaintiff was at all times ignorant."

c. "That the injury to plaintiff was the direct and proximate result of the unfitness and incompetency of

the defendant, Ed. Johnson, and of the negligence and carelessness of said Ed. Johnson in carelessly, recklessly and needlessly running said engine upon and against the said plaintiff, and of the careless failure of said Ed. Johnson in neglecting to use proper precaution to observe and avoid running upon and injuring the said plaintiff at the time and place in question, and in the carelessness of the defendant Railway Company in employing the said Ed. Johnson as engineer and in retaining him and allowing him to act as engineer at the time and place in question, and in the carelessness of the defendant Railway Company in knowingly retaining and using said defective engine at said time and place, and in carelessly failing to take proper precaution to prevent injury to said plaintiff at said time and place while engaged in the discharge of his duty as employé of said defendant Railway Company; and each and every act of omission and commission of the defendants and of each of them as above, were the joint, proximate and concurrent cause of said injury, and each of said acts of the said defendants materially, concurrently and jointly contributed to the injuries of said plaintiff, and plaintiff says that he was without fault or negligence in the premises."

The claim of a right to have the cause removed to the Circuit Court of the United States was that the requisite diversity of citizenship existed as between the plaintiff and the petitioning railroad company, and that there existed as between them a separable controversy.

But if the plaintiff alleges that the concurrent negligence of the railroad company and its employé, Johnson, was the cause of his injury, he has a right to join them in one action. If he elects to do so, it supplies no ground for removal because he might have sued them separately. *Louisville & N. R. R. Co.* v. *Wangelin*, 132 U. S. 599, 601; *Powers* v. *C. & O. Railroad*, 169 U. S. 92; *Alabama & G. S. Railway* v. *Thompson*, 200 U. S. 206.

The petition of the plaintiff below was in substance that the defective character of the engine, the unfitness and incompetency of Johnson, the engineer controlling it, and his negligence and carelessness in needlessly running the engine over him without the exercise of proper care and caution, "concurrently and jointly contributed to the injuries of said plaintiff," who was at the time in the exercise of due care.

But it is said that some of the matters charged against Johnson consisted in acts of non-feasance, and that an employer is not liable to a third person for conduct of that character.

Whether liability to a third person against a master may result from the servant's neglect of some duty owing to the employer alone, may be debatable. But we need not consider that question, since the plaintiff's declaration averred positive acts of negligence on the part of Johnson toward the plaintiff, namely, that while engaged in the company's service in the movement of the engine, he did not exercise that degree of care and skill which he was bound to exercise toward another servant engaged upon the tracks in the company's work. This was an act of misfeasance, for which he would be primarily liable, notwithstanding his contract relation to the employer and the liability of the latter for his negligent act under the Kansas statute abolishing the common law rule in respect of fellow-servants.

The state court held that the allegations of the petition stated a case of concurring negligence of master and servant for which they might be jointly sued. That court, also, aside from any positive acts of negligence, such as the retention of an incompetent servant in the control and management of an unmanageable engine, must be regarded as necessarily holding that under the law and practice of the State, it was admissible to jointly sue the company with the servant for whose negligent act it was

liable. *Southern Railway* v. *Miller*, 217 U. S. 209; *Alabama &c. Ry.* v. *Thompson, supra.*

Whether there was a joint liability or not was a question to be determined upon the averments of the plaintiff's statement of his cause of action, and is a question for the state court to decide. *Railroad* v. *Thompson, supra; Illinois Central Railroad* v. *Sheegog*, 215 U. S. 308.

That the liability of the railroad company was statutory in so far as the common law fellow-servant rule had been abolished by statute, and the liability of Johnson dependent upon common law, was held by the Kansas Court not to preclude a joinder. "It is enough," said the court below, "if the concurrent acts of negligence of each contributed to the injury inflicted upon the plaintiff." *Southern Railway* v. *Miller, supra.*

But the petition for removal averred that the sole reason in joining Johnson was for the fraudulent purpose of defeating the right of the railroad company to remove the action. It is further insisted that this averment presented a question of fact which could be tried only in the Circuit Court of the United States.

Allegations of fact, if controverted, arising upon such a petition, are triable, only in the court to which it is sought to be removed. *Illinois Central Railroad* v. *Sheegog, supra.* But if the petition was insufficient upon its face, the state court might for that reason deny it. It is well settled that the mere averment that a particular defendant had been joined for the fraudulent purpose of defeating the right of removal which would otherwise exist, is not in law sufficient. If the plaintiff had a right to elect whether he would join two joint tort-feasors, or sue them separately, his motive in joining them is not fraudulent, unless the mere epithet "fraudulent" is backed up by some other charge or statement of fact. *Illinois Central Railroad Co.* v. *Sheegog, supra.*

Neither did the allegation that the defendant Johnson

was a man of small means and the responsibility of the railroad company unquestioned, serve to show any actual fraudulent purpose in joining him as a defendant. If the plaintiff had a cause of action which was joint and had elected to sue both tort-feasors in one action, his motive in doing so is of no importance. *Chicago, R. I. & P. Ry.* v. *Schwyhart*, 227 U. S. 184; *Deere, Wells & Co.* v. *Chicago, M. & St. P. Ry.*, 85 Fed. Rep. 876; *Welch* v. *Cincinnati &c. Ry.*, 177 Fed. Rep. 760.

There was no error in denying the petition to remove.

Judgment affirmed.

NORFOLK & WESTERN RAILWAY COMPANY *v.* EARNEST.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

No. 153. Argued January 29, 30, 1913.—Decided May 26, 1913.

The truth of evidence tending to show a custom as to where switchmen walk in a railroad yard is for the jury to determine; and if true it is the duty of an engineer, in the exercise of ordinary care to watch for a switchman whom he knows is in the usual locality and in front of his engine.

It is not error to refuse an instruction as to assumption of risk which is couched in such sweeping terms that it could not enlighten the jury as to the particular phase of the case to which it is deemed applicable.

Fairness to the court requires one objecting to a particular part of the charge as misleading to call special attention to the words in order that the court may either modify or explain them.

An instruction that contributory negligence of the employé goes by way of diminution of damages, held not error because the statute says that in such a case the jury must diminish the damages, it appearing that the words objected to followed an instruction that the

damages in such a case shall be diminished by the jury, and the words objected to were meant to give effect to, and not to qualify, the previous instruction.

The purpose of the provision in regard to contributory negligence in the Employers' Liability Act is to abrogate the common-law rule of complete exoneration of the carrier from liability in case of any negligence whatever on the part of the employé and to substitute therefor a new rule confining the exoneration to a proportional part of the damages corresponding to the amount of negligence attributable to the employé.

Where an instruction embodies several propositions of law, to some of which no objection can properly be taken, a general exception does not entitle the exceptor to take advantage of a mistake or error in some single or minor proposition of law.

THE facts, which involve the liability of a railroad for personal injuries sustained by one of its employés while both were engaged in interstate commerce, and the construction of the provisions of the Employers' Liability Act of 1908 in regard to contributory negligence, are stated in the opinion.

Mr. Roy B. Smith and *Mr. John H. Holt*, with whom *Mr. Theodore W. Reath* was on the brief, for plaintiff in error.

Mr. Bynum E. Hilton, and *Mr. Thomas Lee Moore*, with whom *Mr. Harold J. Pack* and *Mr. Samuel B. Pack* were on the brief, for defendant in error.

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

This was an action against a railroad company to recover for personal injuries sustained by an employé while both were engaged in interstate commerce. The plaintiff secured a verdict and judgment in the Circuit Court, and the defendant sued out this direct writ of error, claiming

that the Employers' Liability Act of April 22, 1908, 35 Stat. 65, c. 149, upon which the right of action was based, was repugnant to the Constitution of the United States. After the writ of error was allowed, our decision in *Second Employers' Liability Cases*, 223 U. S. 1, settled the constitutional questions in favor of the validity of the statute, but it is still necessary that we pass upon other questions presented in the case. *Michigan Central Railroad Company* v. *Vreeland*, 227 U. S. 59, 63.

The injury to the plaintiff occurred in the night time, in the month of February, in the railroad yards of the defendant at North Fork, West Virginia, while he was piloting a locomotive through several switches to a main track, where the locomotive was to be attached to an interstate train to assist in moving it over an upgrade in the direction of the next station. He carried a torch and was proceeding in advance of the locomotive to see whether the switches were in proper position, and, if not, to change them. Upon reaching the first switch, known as No. 3, he found it in proper position, signaled the engineer accordingly, and advanced along the track, between the rails, to a point near the next switch, known as No. 2, where the engine overtook him and inflicted serious injuries upon him, resulting in the loss of his right leg. He had not yet signaled to the engineer whether that switch was in proper position, and one of the questions controverted at the trial was, whether the engineer was negligent in attempting to pass over that switch without waiting for a signal. The evidence for the plaintiff was to the effect that it was the established custom in that yard for the engineer to await a signal from the pilot before proceeding over a switch and that the pilot was entitled to rely upon the engineer's conforming to that custom; while the evidence for the defendant was to the effect that by the settled custom the engineer, although required to await a signal before passing over the first

switch, was not required to await a signal before passing over the others, and that it was incumbent upon the pilot to govern himself accordingly. The evidence was likewise contradictory as to whether it was usual for pilots, in advancing before the engine, to walk between the rails, and also as to whether the conditions outside the track made it necessary to do so in the night time. But although the evidence was conflicting in these particulars, it established without any contradiction that it was the duty of the pilot to go ahead and see that the switches were lined up properly and, if not, to put them in position for the engine to pass, and that it was the duty of the engineer to keep control of his engine and to follow at a rate of not more than three or four miles an hour. Both the plaintiff and the engineer had been in this service for a long time and were familiar with the manner in which it was conducted and with all the conditions surrounding it. The plaintiff admitted that as he advanced from the first to the second switch, a distance of 130 feet, he made no attempt to see where the engine was, and the engineer substantially admitted that in covering that distance he made no attempt to see where the plaintiff was. Each justified his action or nonaction in this regard by what he described as the usage in that service.

In its charge to the jury the court, after saying that the mere occurrence of the injury was no evidence of negligence on the part of the defendant or its engineer and that the burden was on the plaintiff to establish such negligence by affirmative evidence, gave the following instructions at the defendant's request:

"The court further instructs the jury that if they shall believe from the evidence that the custom and practice in the North Fork yard was for the engineer to follow the fireman with his engine as he lined up the switches, and not to wait for a signal to proceed after the first switch, then it was not the duty of the engineer to wait for such

signal, and he had the right to proceed without any being given, and the fact that engineer Drawbond did approach switch No. 2, where the plaintiff was injured without any further signal from him is no evidence of negligence against defendant company.

"The court instructs the jury that if they shall believe from the evidence that it was the custom and practice in the North Fork yard for the fireman to line up the switches and for the engineer to follow him at a rate of three or four miles per hour without signals, or upon signal to proceed given at switch No. 3 [the first one], and if they shall further believe from the evidence that plaintiff was familiar with this custom and practice in said yard, and that at and before the accident which resulted in plaintiff's injury, engineer Drawbond was proceeding in accordance with this custom, then they are told that said engineer Drawbond had the right to act on the assumption and belief that the plaintiff in lining up the switches would take reasonable precaution for his own safety against the approaching engine."

The defendant complains that the court refused to say to the jury in that connection that the engineer was not required to keep any lookout for the plaintiff. We think the refusal was right. As before indicated, there was evidence tending to show that it was usual for the pilot to walk between the rails in advance of the locomotive, that the conditions outside the track made it necessary to do so in the night time, and that all this was known to the engineer. Whether this evidence was true was for the jury to determine, and if it was true it certainly could not be said as matter of law that the engineer was in the exercise of ordinary care, which was the controlling standard for him, if he made no effort to see whether the plaintiff was on the track and took no precautions for his protection. Upon that question the court rightly gave the following instruction:

"If the jury believes from the evidence that it was necessary or usual within the knowledge of John Drawbond [the engineer] for the plaintiff to walk on, along or over the tracks of the defendant company in front of the said engine while it was moving, in order to properly perform his duties of piloting said engine out of said yard, it was then the duty of the defendant company, through its engineer in charge of said engine, to use reasonable care and caution in the management of said engine and to keep such a lookout for the plaintiff as an ordinarily prudent and careful man would have done under the circumstances, to avoid running said engine, upon or over the plaintiff; and if the said engineer did not exercise such reasonable care and caution and that his failure so to do was the proximate cause of the accident, then they must find for the plaintiff."

Complaint is also made of the refusal to give an instruction requested by the defendant upon the subject of assumption of risk. But the instruction was couched in such general and sweeping terms that it was not calculated to give the jury an accurate understanding of the law upon that subject or to direct their attention to the particular phase of the case to which it was deemed applicable. Consequently, the refusal to give it was not error.

The declaration alleged that the plaintiff's damages amounted to $20,000, and prayed judgment for that sum. One paragraph of the charge to the jury dealt at some length with the question of the measure of damages and contained the statement that, if the verdict was for the plaintiff, he should be awarded "such an amount of damages, not exceeding $20,000 as" would compensate him for the injury. An exception was taken to this paragraph, without indicating wherein it was deemed objectionable, and complaint is now made that it erroneously conveyed to the jury an intimation that a finding that the plain-

tiff's damages amounted to $20,000 was justified by the evidence. Looking at the entire paragraph we think it could not have been understood by the jury as conveying such an intimation, and that the words now criticised could only have been understood as marking a limit beyond which the jury could not go. Besides, if the defendant entertained any fear that the jury would be misled in that regard, it should, in fairness to the court and the plaintiff, have called special attention to those words in order that they might be so modified or explained as to leave no doubt of their purpose and meaning. *McDermott* v. *Severe*, 202 U. S. 600, 610.

The third section of the Employers' Liability Act declares, subject to a proviso not material here, that "the fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé;" and in its charge the court dealt with the subject of contributory negligence as follows:

"Contributory negligence is the negligent act of a plaintiff, which concurring and coöperating with the negligent act of a defendant is the proximate cause of the injury. If you should find that the plaintiff was guilty of contributory negligence, the act of Congress under which this suit was brought provides that such contributory negligence is not to defeat a recovery altogether, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé. So, if you reach that point in your deliberations where you find it necessary to consider the defence of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, but it goes by way of diminution of damages in proportion to his negligence as compared with the negligence of the defendant. If the defendant relies upon the defence of contributory

negligence, the burden is upon it to establish that defence by a preponderance of the evidence."

An exception to this instruction was reserved, without suggesting any other objection to it than that the Employers' Liability Act was deemed unconstitutional. It is now criticised (a) because, instead of saying that, if the plaintiff was guilty of contributory negligence, the jury "must diminish the damages," it merely said that such negligence "goes by way of diminution of damages," and (b) because it prescribed a wrong rule for the diminution in that it directed or permitted it to be made upon a comparison of the plaintiff's negligence with that of the defendant. Both criticisms were advanced in the Circuit Court in support of a motion for a new trial which was overruled, the court stating that neither criticism had been suggested before.

We think there is no merit whatever in the first criticism. In one sentence the instruction plainly stated that the statute requires, where the plaintiff has been guilty of contributory negligence, that "the damages *shall* be diminished by the jury," and the statement in the next sentence that such negligence "goes by way of diminution of damages" was evidently intended as a mere repetition of the statutory requirement in somewhat different words. Its purpose was to give effect to what went before, not to qualify it, and it is not reasonable to believe that the jury could have thought otherwise.

The other criticism deserves more discussion. The thought which the instruction expressed and made plain was that, if the plaintiff had contributed to his injury by his own negligence, the diminution in the damages should be in proportion to the amount of his negligence. This was twice said, each time in terms readily understood. But for the use in the second instance of the additional words "as compared with the negligence of the defendant" there would be no room for criticism.

Those words were not happily chosen, for to have reflected what the statute contemplates they should have read, "as compared with the combined negligence of himself and the defendant." We say this because the statutory direction that the diminution shall be "in proportion to the amount of negligence attributable to such employé" means, and can only mean, that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common law rule completely exonerating the carrier from liability in such a case and to substitute a new rule confining the exoneration to a proportional part of the damages corresponding to the amount of negligence attributable to the employé. *Second Employers' Liability Cases*, 223 U. S. 1, 50.

Not improbably the mistake in the instruction was purely verbal and would have been promptly corrected had attention been specially called to it, and possibly it was not prejudicial to the defendant. But, be that as it may, the record discloses that full opportunity for presenting objections was afforded and that the one now pointed out was not made. We must therefore apply the rule that where an instruction embodies several propositions of law, to some of which no objection properly could be taken, a general exception to the entire instruction will not entitle the exceptor to take advantage of a mistake or error in some single or minor proposition therein. *Baltimore & Potomac Railroad Co.* v. *Mackey*, 157 U. S. 72, 86; *McDermott* v. *Severe*, *supra*.

Judgment affirmed.

CITY AND COUNTY OF DENVER *v.* NEW YORK TRUST COMPANY.

CITY AND COUNTY OF DENVER *v.* DENVER UNION WATER COMPANY ET AL.

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

Nos. 642, 643. Argued October 28, 29, 1912.—Decided May 26, 1913.

The exceptional power of this court to review, upon certiorari, decisions of the Circuit Court of Appeals on an appeal from an interlocutory order is intended to be, and is, sparingly exercised; that power does exist, however, in a case where no appeal lies from the final decision of that court.

While the jurisdiction of the Circuit Court in a case where diverse citizenship exists may also rest upon the fact that the case is one arising under the Constitution of the United States, in which case there is an appeal from the judgment of the Circuit Court of Appeals, that is not the case where the alleged infractions of the Constitution are without color of merit, or are anticipatory of defendant's defense.

A suit to enforce a contract between a municipality and a water company for the purchase, as is claimed, by the former of the water plant of the latter and to enjoin the city from constructing another plant, is not without more a case arising under the Constitution of the United States. In such a case the decision of the Circuit Court of Appeals is final and the writ of certiorari may be exercised.

On a review of an order of the Circuit Court of Appeals granting an injunction in an equity case, this court is not confined to considering the act of granting the injunction, but if it determines that there is any insuperable objection to maintaining the bill it may direct a final decree dismissing it.

The various ordinances of the City of Denver, Colorado, granting and relating to the franchise to the Denver Union Water Company considered and construed; and *held* that they did not require the city at the expiration of twenty years to exercise either the option to renew or the option to purchase reserved in the franchise ordinance, nor did they preclude the city from erecting its own plant.

Where a municipal ordinance grants a franchise to such extent as the city may lawfully grant it, the term is not in doubt, if the city charter expressly limits the term of all such grants.

A limitation in the charter on grants by the municipality is as much part of an ordinance subsequently passed as though written into it.

An ordinance providing for appraisal of a water plant and for submitting to the electors whether the contract shall be extended or the plant purchased at the appraised value, does not amount to an election to purchase the plant.

Where the franchise of a water company has expired and the city has lawfully refused to purchase the plant at the appraised value, a charter amendment permitting the municipal authorities to offer the company less than such value and in case of non-acceptance to erect a municipal plant, does not violate the due process clause of the Fourteenth Amendment by subjecting the company to the alternative of accepting less than value for the plant or having it ruined by construction and operation of the municipal plant.

The equal protection provision of the Fourteenth Amendment does not prevent a city from adopting a scheme of municipal ownership as to a single public utility, and a charter provision which prohibits franchises for that purpose does not violate the equal protection provision of the Fourteenth Amendment.

A provision in regard to the acquisition of a municipal water plant *held* in this case not to be a revision *in extenso* of the city charter but only an amendment thereto; and also *held* that none of the objections to the adoption of the amendment to the charter of the City of Denver providing for erection of a municipal water plant are tenable.

187 Fed. Rep. 890, reversed.

THE facts, which involve various elements of a controversy between the City of Denver, Colorado, the Denver Union Water Company and the New York Trust Company, trustee of bonds of the said company, and the construction and validity of the contracts and ordinances and statutes relating to the water supply of Denver, are stated in the opinion.

Mr. William H. Bryant and *Mr. Charles W. Waterman*, with whom *Mr. William P. Malburn* and

Mr. William A. Jackson were on the brief, for petitioners.[1]

Mr. Henry McAllister, Jr., with whom *Mr. Joel F. Vaile, Mr. William N. Vaile* and *Mr. J. Markham Marshall* were on the brief, for the New York Trust Company, respondent in No. 642.[1]

Mr. Gerald Hughes and *Mr. Clayton C. Dorsey* for the Denver Union Water Company, respondent in No. 643.[1]

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

This suit presents a threefold controversy, to which the New York Trust Company (a New York corporation), the City and County of Denver (a municipal corportation in Colorado), and the Denver Union Water Company (a Colorado corporation) are the principal parties. They are respectively the successors of similar corporations whose acts, together with their own, created the situation out of which the controversy arose, but it will be convenient to treat them as if they were the original participants in all those acts. Although formerly controlled by a charter enacted by the legislature of the State, the city, in pursuance of an amendment of the state constitution, came in 1904 to be governed by a charter framed and adopted by the people of the city and over which they possessed an exclusive power of alteration and amendment. Laws 1889, p. 124; Laws 1893, p. 131; Const., Art. 20, Rev. Stat. 1908, p. 55.

By the charter from the state legislature (Laws 1889) the city was given power (§ 9) "to construct or purchase

[1] The briefs in this case were very elaborate and exhaustive, several hundred authorities bearing on the issues involved are collated and reviewed. This renders it impossible to make abstracts of them.

water works for the use of the city" and generally to do whatever was "needful . . . in order to supply the city with water for fire, irrigating, domestic and other purposes," subject to the qualification (§ 12) that "*all franchises or privileges*" granted by the city should "*be limited to twenty years from the granting of the same.*" April 10, 1890, while that charter was in force, the city, by an ordinance designated as No. 44 and duly accepted by the water company, granted to the latter, its successors and assigns, the right and privilege of laying down, continuing and maintaining pipes and other apparatus for the conveyance and distribution of water along and through designated streets, alleys and public places of the city, "*to such extent as the city may lawfully grant the same*" and subject to termination as therein provided. The ordinance contained various provisions regulatory of the right and privilege so granted, the duty of the water company to supply water for private use and for fire and other public purposes, the rates to be charged private users, and the hydrant rentals to be paid by the city. There were also the following sections:

"SEC. 11. At the expiration of *the period of twenty years* from and after the date of the passage and approval of the ordinance, *in case the city shall then elect so to do*, the said works *may be purchased* by the said city, and in case the parties can not agree, after such election, upon the price to be paid by the city for the water works of the said company, its successors and assigns, then their fair cash value shall be determined by arbitration, by five disinterested persons, none of whom shall be residents of Denver, two of them to be chosen by the city, two by the company, and the fifth by the four first chosen, and in case of failure on the part of the company to name arbitrators for the period of thirty days after the city shall have named arbitrators and notified the company so to do, the city may apply to any court having equity

jurisdiction in the county in which the city of Denver shall then be situated for the appointment of two persons of the qualifications aforesaid as such arbitrators, and the court may thereupon appoint two persons, who shall act with the same force and effect as if appointed by the company, and the decision of a majority of said board shall be final and binding upon both parties, and upon the payment, or tender of payment, by said city the said company shall convey to said city all of its property, real or personal, easements, rights and privileges, and thereafter all franchises, rights and privileges which have been at any time theretofore granted said company, its successors or assigns, and which it may then possess, shall cease and be at an end.

"SEC. 12. At the expiration of the said *period of twenty years* the said city *may, at its election, renew the contracts hereby made*, by ordinance to that effect, for a like period of twenty years, but at a price for hydrant rental 10 per cent. less than mentioned in section 10 hereof, for the period remaining after the ten years after May 1st, 1891, and for successive periods of twenty years at the price last aforesaid, as often and as long as the city *may choose*. This section is conditioned, however, upon the full performance by the city of the provisions of section 2 hereof.

"SEC. 19. This ordinance, when the same shall be in writing accepted by The Denver Water Company, becomes a contract between the city of Denver and the said The Denver Water Company, its successors and assigns, and the same shall as to every provision herein contained as fully bind and inure to the benefit of the successors and assigns of the said The Denver Water Company as to the said company. And it is expressly understood that by the acceptance of this ordinance the said The Denver Water Company loses no rights in regard to the occupation of the streets, alleys and public places, or as to the rights of any other person or persons thereto which it now

possesses, but the same are hereby recognized and confirmed and are to be deemed independent of and not merged in any grant in this ordinance elsewhere contained.

"SEC. 20. All mains, pipes, valves and other apparatus now owned by said The Denver Water Company, and composing its plant, and all such mains, pipes, valves, hydrants and other apparatus as said The Denver Water Company, its successors or assigns, shall hereafter lay down or set in or upon any of the streets, alleys or other public places within said city shall be and remain the sole and absolute property of said The Denver Water Company, its successors and assigns, and the said The Denver Water Company, its successors or assigns, shall forever be considered and entitled to be in possession thereof, except in case of purchase by said city under the terms of this ordinance, or some agreement between said city and said company, its successors or assigns, when all rights of whatsoever nature of said company, its successors or assigns, in and to the subject-matter hereof shall vest in said city.

"SEC. 21. While the consideration for the respective agreements of the city and the company are upon each side the several agreements of the other, all of the several grants, contracts and agreements in this ordinance contained are to be deemed independent agreements with the same force and effect as if each section of this ordinance was contained in a separate ordinance by itself."

By a written contract made in 1870 the city had granted to the water company a sole and exclusive right to lay pipes within the city for use in the distribution and sale of water, but that contract had been expressly annulled by another made in 1874, whereby the city granted to the company a right of like character expressly limited to a period of seventeen years from May 1 of that year. What was said in §§ 19 and 20 of the ordinance of 1890 about rights and a water plant already possessed by the water

company had reference to the rights then held and the plant then operated under the 17-year contract, which was within a year of expiration, and to some other rights mentioned in the record and equally without material bearing here.

By an amendment of the state constitution in 1902—it being the amendment under which the home-rule charter was framed and adopted two years later—the city was empowered to construct, purchase, maintain and operate water works for the use of itself and its inhabitants, and to issue bonds, after an approving vote of the taxpaying electors, in any amount necessary to carry out that power; and this amendment declared that "No franchise relating to any street, alley, or public place of the said city and county shall be granted except upon the vote of the qualified taxpaying electors." Article XX, §§ 1 and 4.

October 2, 1907, about two and one-half years before the expiration of the 20-year period specified in the ordinance of 1890, the city adopted and the water company accepted an ordinance designated as No. 163, providing, first, for an immediate appraisement, by appraisers selected conformably to § 11 of the ordinance of 1890, of the fair cash value of all the property of the water company and its auxiliary companies then used in supplying the city and its inhabitants with water; second, for the immediate fixing by the appraisers of a schedule of reasonable rates for water for private and public purposes for a further period of 20 years; third, that the decision of any three of the appraisers should be binding as to the questions submitted to them for determination; fourth, for the submission to the electors of the city, at a single special election, of the questions (a) whether the city should purchase the property at the value fixed by such appraisement, and (b) whether a new contract or franchise should be granted to the water company for a further period of 20 years on the basis of the rates fixed by the

appraisers; fifth, for carrying into effect either of said propositions if approved by the electors; and, sixth, that if the electors should "*refuse to accept either proposition*" no prejudice should result to the rights of either party under the ordinance of 1890, but such rights should remain as if the ordinance of 1907 had not been adopted or accepted. That ordinance recited that the water company would agree with the city to put in new temporary rates to be charged private consumers of water after November 1, 1907, for the remainder of the term specified in the then existing contract or ordinance of 1890, "in the event that the city . . . shall *not* at said election . . . *determine to purchase said plant or to extend or renew said contract* for a further period of twenty years."

March 20, 1909, the appraisers, acting under the ordinance of 1907, appraised the property at $14,400,000, but they failed to fix the schedule of rates which was to be a part of the proposition to renew the existing contract or franchise of 1890 for a further period of 20 years, and this failure operated, without fault on the part of the city or the water company, to prevent any further action under the ordinance of 1907, which called for the submission of both propositions at a single special election.

May 17, 1910, over a month after the expiration of the 20-year period specified in the ordinance of 1890, the people of the city amended its charter by adding a new section, known as § 264a. Briefly described, this amendment created a public utilities commission, named its first members and transferred to it the authority theretofore given to the board of public works as to all public utilities; particularly invested it with large powers in respect of the construction, acquisition, maintenance and operation of a water plant; declared that the city should never exercise any option to purchase such a plant, or to renew any contract with reference thereto, otherwise than through an approving vote of the qualified electors;

authorized the issuance of bonds in the sum of $8,000,000, if sanctioned by a vote of the taxpaying electors, to provide a municipal water plant; provided for the use, subject to the approving vote of such electors, of $7,000,000 of these bonds in the purchase of the plant of the water company, if it should, on or before July 1, 1910, elect to accept that sum, and for the use of the remaining $1,000,000 of bonds in improving, repairing and adding to the plant; and directed that, if the water company did not so elect, a special election should be held on the first Tuesday in September, 1910, to enable the taxpaying electors to vote upon the question of issuing the $8,000,000 of bonds for the purpose of constructing and putting into operation a municipal plant.

The water company did not elect to accept the $7,000,000 for its plant, and the city officers took the necessary preliminary steps to hold the special election called for by the charter amendment.

There was at no time an election by the city to purchase the water company's plant pursuant to the option reserved in § 11 of the ordinance of 1890, unless the ordinance of 1907, the charter amendment of 1910, or the failure to renew the contract or franchise pursuant to the option reserved in § 12 operated as such an election; and there was no election by the city to renew the contract or franchise pursuant to the latter option, unless the failure to exercise the other one was such an election.

The positions of the city and the water company in that regard came to be as follows: The city was insisting that the contract or franchise granted by the ordinance of 1890 was limited to 20 years in duration by the legislative charter in force when the ordinance was adopted; that the options reserved in §§ 11 and 12 of that ordinance were not alternative in the sense that one or the other must be exercised, but were independent in the sense that there was no obligation to exercise either; that neither

was exercised, and therefore that, the 20-year limitation having expired, the contract or franchise was at an end. The water company, on the other hand, although not conceding the 20-year limitation, was insisting that the options were alternative in that the city was bound to exercise one or the other, that it had elected not to purchase the company's plant, and that in so doing it necessarily had elected and become obligated to renew the contract or franchise for another period of 20 years.

In this situation the trust company, being the trustee in a subsisting mortgage given in 1894 by the water company upon all of its property, including franchises, contracts, rentals and the right to receive the purchase price in the event of a purchase by the city, brought this suit against the city, certain of the city officers, the water company, and the South Platte Canal and Reservoir Company, a subsidiary of the latter holding the title to an important part of its property, to obtain a decree which should, among other things, declare that the city had elected and become obligated to purchase the property, direct a specific performance of that obligation and of the correlative obligation of the water company to sell, compel the payment of the purchase price to the trust company under the mortgage, and restrain and enjoin the city and its officers from meanwhile constructing a new municipal water plant, as also from taking any steps towards issuing bonds for that purpose. A cross-bill against the other defendants and the trust company was interposed by the water company, wherein it prayed, among other things, that its right to a renewed contract or franchise for another term of 20 years be established and that the city and its officers be directed to take such steps as might be necessary to effect the renewal. Upon applications submitted upon the bill, cross-bill and divers proofs the Circuit Court granted interlocutory orders, upon both bills, temporarily enjoining the city and its

officers from taking any steps towards the construction of a municipal water plant or issuing bonds for that purpose, and, in the instance of the cross-bill, from interfering with the water company in the exercise and enjoyment of the rights asserted by it under the contract or franchise of 1890. Appeals were taken to the Circuit Court of Appeals, where the interlocutory orders were affirmed, 187 Fed. Rep. 890, and the case is now here upon certiorari.

The exceptional power to review, upon certiorari, a decision of a Circuit Court of Appeals rendered on an appeal from an interlocutory order is intended to be and is sparingly exercised. But there can be no doubt that the power exists where no appeal would lie from a final decree of that court, as is the case where the suit is one in which the jurisdiction of the court of first instance depended entirely upon diverse citizenship. Judicial Code, §§ 128, 240; *American Construction Co.* v. *Jacksonville Co.*, 148 U. S. 372, 385; *Forsyth* v. *Hammond*, 166 U. S. 506. We think this is such a suit. The bill states that the trust company is a citizen of New York, that all the defendants are citizens of Colorado, and that "this is a controversy wholly between citizens of different States." True, it also alleges that the suit is one arising under the Constitution of the United States and attempts to support this general allegation by others referring to supposed and conjectured infractions of the contract and due process of law clauses of that instrument; but, when the true nature of the trust company's cause of action is considered, it is apparent that these allegations must be disregarded—some because they are without color of merit, and others because they are not a necessary part of the statement of that cause of action, but are in anticipation of defenses which it is thought the defendants may possibly interpose. See *Colorado Central Mining Co.* v. *Turck*, 150 U. S. 138, 143; *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, 459; *New Orleans* v. *Benjamin*, 153 U. S. 411, 424; *Boston*

&c. Mining Co. v. *Montana Ore Co.*, 188 U. S. 632, 638, 639; *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, 191; *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561, 576; *Devine* v. *Los Angeles*, 202 U. S. 313, 333; *Shulthis* v. *McDougal*, 225 U. S. 561, 569.

The gravamen of the trust company's cause of action is that the ordinance of 1890 restricted the city to a choice between two options, one to purchase the water plant and the other to renew the contract or franchise; that by the ordinance of 1907, and again by the charter amendment of 1910, the city made a binding election to purchase, which it now disregards and refuses to carry into effect; that the city is authorized by law to acquire a water plant by purchase or to construct one of its own, but not to do both; that, having elected and become obligated to purchase the existing plant, it is without authority to construct a new one; that the water company erroneously maintains that it is entitled to a renewal of the existing contract or franchise, and wrongfully refuses to insist upon a purchase by the city; and that in this situation the trust company is entitled, in virtue of its mortgage, to enforce the city's election and obligation to purchase and meanwhile to have the city enjoined from placing an obstacle in the way of the purchase by constructing a new plant. It is not asserted that the contract or franchise of 1890 was exclusive or contained any stipulation restraining the city from constructing and operating a plant of its own, or that the trust company is a property holder or taxpayer of the city; and so, the company can have no legal concern with what is done by the city in the premises, if only it performs its alleged obligation to purchase. It hardly needs statement that a suit to enforce such a cause of action is not one arising under the Constitution of the United States. "As has been stated, the rule is a reasonable and just one that the complainant in the first instance shall be confined to a statement of his cause of

action, leaving to the defendant to set up in his answer what his defense is, and, if anything more than a denial of plaintiff's cause of action, imposing upon the defendant the burden of proving such defense." *Joy* v. *St. Louis*, 201 U. S. 332, 341.

But if we go beyond the trust company's statement of its cause of action and consider the attitude which it attributes to the city the result is still the same, for the bill expressly shows that the city puts its refusal to purchase upon the ground that it was not restricted by the ordinance of 1890 to a choice between the two options but left free to exercise either or neither; that it did not, by the ordinance of 1907, the charter amendment of 1910, or otherwise, exercise the option to purchase; and therefore that it has incurred no obligation in that regard. In other words, the bill discloses that the city's position is, that the trust company's claim is refuted by the very ordinances and charter amendment which are relied upon to sustain it. Of course, if this were the city's defense the controversy would be solved by merely ascertaining the proper construction of the ordinances and charter amendment, and there would be no occasion to consider the Constitution of the United States at all.

That the cross-bill may be broader than the original and seek relief on a Federal ground does not affect the question of the Circuit Court's jurisdiction, for a cross-bill is a mere auxiliary or dependency of the original and is entertained and disposed of in the exercise of the jurisdiction invoked by the latter. *Ayres* v. *Carver*, 17 How. 591, 595; *Ex parte Railroad*, 95 U. S. 221, 225; *Rouse* v. *Letcher*, 156 U. S. 47, 50; *Shulthis* v. *McDougal*, 225 U. S. 561, 568.

It follows that the jurisdiction of the Circuit Court depended entirely upon diverse citizenship, and therefore that the suit is one in which no appeal would lie from a final decree of the Circuit Court of Appeals.

We come, then, to the objections made to the orders granting the temporary injunctions, and as these objections are addressed, not merely to the injunctions, but to the merits of both the bill and the cross-bill, it is well to observe at the outset that our power of review, like that of the Circuit Court of Appeals, is not confined to the act of granting the injunctions, but extends as well to determining whether there is any insuperable objection, in point of jurisdiction or merits, to the maintenance of either bill, and, if so, to directing a final decree dismissing it. *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, 525; *Mast, Foos & Co.* v. *Stover Manufacturing Co.*, 177 U. S. 485, 494; *Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 287; *United States Fidelity & Guaranty Co.* v. *Bray*, 225 U. S. 205, 214.

Whether the trust company is merely an assignee seeking to recover the contents of a chose in action, and whether its interest in the litigation is so far identical and in accord with that of the water company as to require that they be aligned on the same side, are questions upon which the record is not entirely clear, and it therefore will be assumed, as is expressly or impliedly affirmed by both companies, that these questions should be resolved favorably to the jurisdiction of the Circuit Court. See act August 13, 1888, 25 Stat. 433, c. 866, § 1; *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, 181; *Shoecraft* v. *Bloxam*, 124 U. S. 730, 735.

What is the proper construction of the ordinance of 1890? Was the contract or franchise granted by it limited to 20 years? Did the city obligate itself thereby to purchase the plant or to renew the contract or franchise at the end of that period, or did it merely reserve the privilege of doing one or the other or neither, as to it should seem best at the time? These are the questions which must first be considered. It is not asserted that the ordinance granted an exclusive franchise or restrained the city from con-

structing a plant of its own, nor would such an assertion, if made, have any support in the terms of the ordinance. But it is said that no time was fixed for the duration of the franchise. This may be taken as true so far as the actual terms of the ordinance are concerned, although it ought not to be overlooked that it contained some recognition of a limitation elsewhere imposed, for the granting clause was qualified by the words "to such extent as the city may lawfully grant the same," and §§ 11 and 12, before set forth, proceeded as if the period would be 20 years. But the term of the franchise was not left undefined or in doubt, for the charter of the city explicitly declared that "all franchises and privileges" granted by it should "be limited to twenty years from the granting of the same," and the context made it perfectly plain that this limitation was intended to apply to rights to occupy and use the streets, alleys and public places of the city such as were granted in this instance. The limitation became a part of the ordinance quite as much as if written into it. No doubt it was intended that the franchise should endure for the full period of 20 years. The qualifying words in the granting clause and the reference to that period in §§ 11 and 12 leave no doubt of this, but it was not intended, because it could not be, that it should endure longer. True, some of the provisions in §§ 19 and 20, if taken by themselves, might possibly make for a different conclusion, but they must be read with other parts of the ordinance, and all must be read with and subordinated to the charter limitation.

The principal controversy is over the purpose and effect of §§ 11 and 12 of that ordinance. As before shown, § 11 states that at the expiration of the period of 20 years the plant "may be purchased" by the city, if it "shall then elect so to do," and § 12 says that at the expiration of that period, the city "may, at its election, renew the contract hereby made," with a reduction of 10 per cent. in the

rental for hydrants. The word "contract" is used here, as elsewhere in the ordinance, as inclusive of the franchise to occupy and use the streets. Each section reserves or gives to the city a pure option. Under one it may purchase the plant, if it so elects, and under the other it may, at its election, renew the contract; but neither imposes any duty or obligation upon it, unless it exercises the privilege therein given. Such is the natural import of the terms employed, and they are plain and unequivocal. But it is said that the presence of the two options imposes on the city the duty of accepting one. Indeed, it is said in support of the bill that a failure to renew is an election to purchase, and in support of the cross-bill that a failure to purchase is an election to renew. We are clearly of opinion that these claims are ill-founded. In the absence of some stipulations to that end the city would be under no obligation to purchase or to renew, nor would it be entitled to do either. There is no stipulation purporting to impose such an obligation. All that is done is to reserve or give to the city the right to purchase or to renew, if it so elects. In other words, it is given a privilege to do either, but with no obligation to exercise it. Its situation is not unlike that of one who has sold real property, with a reserved privilege of repurchasing it or of taking a lease upon it after the expiration of a term of years. Although entitled to avail himself of either phase of the privilege, he is free to reject both.

As suggesting that the purpose of §§ 11 and 12 is different from what we hold it to be, we are referred to an ordinance of December 15, 1894, leasing to the water company a water plant formerly owned by the town of South Denver and acquired by the city through the annexation of that town. At most this ordinance has only an indirect bearing here, and the inferences drawn from it by counsel, even if justified, are quite inadequate to overcome the plain and unequivocal terms of those sections.

Whether, consistently with the powers conferred and the limitations imposed by the city charter then in force, the city could have bound itself, when the ordinance of 1890 was adopted, to purchase the plant or to renew the franchise at the expiration of the 20-year period is a question extensively discussed by counsel; but as we are fully persuaded that there was no attempt or purpose to create such an obligation by that ordinance, the point may be passed without further notice.

The trust company relies upon the ordinance of 1907 as showing an election by the city to purchase, or at least to purchase if the franchise was not renewed. That ordinance, we have seen, provided for an appraisement of the water company's property in advance of the expiration of the existing franchise, for the fixing of a reasonable schedule of rates to be charged during a further period of 20 years, and for submitting to the electors of the city, at a single special election, the questions (a) whether the city should purchase at the appraisement, and (b) whether a new franchise should be granted to the water company for a further period of 20 years on the basis of the rates so fixed. The appraisers chosen for the purpose made an appraisement but failed to fix the schedule of rates, and so, without any fault of the city or the water company, nothing further was done under that ordinance. It did not purport to make an election to purchase or to renew, either conditionally or otherwise. On the contrary, it affirmatively contemplated that the election, if any, was to be by the electors of the city, and that they might reject both propositions. Besides, Article 20, § 4, of the state constitution then in force provided that no franchise relating to the streets of the city should be granted except upon a vote of the electors, and Article 9 of the city charter then in force made a like vote a prerequisite to the acquisition by the city of any public utility. So, had the council attempted by the ordinance of 1907 to make an

election to purchase or to renew, the attempt would have gone for nothing. No doubt, the difficulty arising from the failure to fix a schedule of rates could have been adjusted between the city and the water company and the two propositions (the second in a modified form) submitted to the electors at an election called through a new ordinance. But this was not done, possibly because, as the record discloses, both parties were dissatisfied with the appraisement, the city claiming that it proceeded upon erroneous principles and was grossly excessive and the water company that it was inadequate and insufficient. But, however this may have been, it is plain that the ordinance of 1907 was not an election to purchase, either conditionally or at all.

The trust company also relies upon the charter amendment of May 17, 1910, § 264a, as showing an election to purchase under the option reserved in the ordinance of 1890. The amendment did not contemplate a purchase in accordance with that option, but independently of it and upon altogether different terms. Instead, therefore, of being an exercise of the option, it was a rejection of it. *Minneapolis & St. Louis Railway Co.* v. *Columbus Rolling Mill*, 119 U. S. 149, 151.

The Circuit Court of Appeals, having stated the conflicting claims of the trust company and the water company, the one that the city had elected to purchase, and the other that it had elected to renew, said: "The facts are stated upon which these claims are based, and it does not appear to us that the city has done either." With that conclusion we fully agree. In so far, then, as the bill and cross-bill are founded upon the contractual relations claimed to have arisen out of the ordinance of 1890, they must fail, and as the bill has no other basis it manifestly cannot be maintained.

As an additional ground for enjoining the issuing of bonds and the construction of a municipal water plant

under the charter amendment, § 264a, the cross-bill, after stating that the water company is a large property holder and taxpayer of the city and must share in the burdens which will be placed upon all its property holders and taxpayers by issuing the bonds and constructing the municipal plant, challenges the validity of the amendment, and therefore the authority of the city to carry it into effect. It remains to consider the objections upon which this challenge is rested.

Two objections named in the cross-bill are, that Article 20 of the state constitution (adopted as an amendment in 1902), upon which the charter amendment is based, (a) is repugnant to Article IV, § 4 of the Constitution of the United States guaranteeing to the State a republican form of government, in that it takes from the state legislature and vests directly in the people of the city legislative power over all subjects of purely municipal concern, and (b) is repugnant to § 2 of Article 2, § 1 of Article 5, and § 2 of Article 19 of the state constitution. These objections are not now insisted upon, the first doubtless because it is deemed sufficiently covered and disposed of, as undoubtedly it is, by our recent decision in *Pacific States Telephone & Telegraph Co.* v. *Oregon*, 223 U. S. 118, and the second because it appears to be foreclosed by decisions of the Supreme Court of the State, in *People* v. *Sours*, 31 Colorado, 369, and other cases. Both may therefore be passed without further notice.

The next objection invokes the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, and is, that the charter amendment subjects the water company to the alternative of accepting an inadequate price for its plant or of having its value ruinously impaired by the construction and operation of a municipal plant, and that this amounts to an unlawful deprivation of property. The objection is faulty in that it fails to recognize the real situation to which the

charter amendment applies. The water company, although the undoubted owner of the physical property constituting its plant, is without a franchise to maintain and operate it through the streets of the city, the prior franchise having expired; and the city not only is under no legal obligation to renew the franchise or to purchase the plant, but is free to construct and operate a plant of its own. How then, can it be said that the proposal, expressed in the amendment, to purchase the company's plant at $7,000,000 and to devote $1,000,000 more to its betterment, or else to construct a new one at a cost of $8,000,000, involves an unlawful deprivation of property or any right? See *Madera Water Works* v. *Madera*, 228 U. S. 454; *Detroit United Railway* v. *Detroit*, *ante*, p. 39. Whether $7,000,000 is an adequate price for the company's plant, and whether its value will be ruinously impaired by the construction of a municipal plant, are beside the question. Being under no obligation to purchase, the city is free to name its own terms, and the water company is likewise free to accept or reject them. The latter is under no compulsion other than such as inheres in the nature of its property or arises from a proper regard for its own interests. That the city, mindful of its interests, offered $7,000,000 for the water company's plant, when it could have proceeded to the construction of a new plant of its own, without making any offer to the company, affords no ground for complaint by the latter. *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561, 577.

Another objection invokes the equal protection clause of the Fourteenth Amendment and is, that the charter amendment singles out and deals with the subject of a water supply and with the plant of the water company, leaving all other public utilities to be dealt with under general charter provisions, and also cuts off all opportunity to obtain future franchises to occupy and use the streets

for the purpose of supplying water to the city and its inhabitants, while leaving full opportunity to obtain such franchises for other purposes, such as supplying light, heat, power, transportation, or telephone service. There is no merit in this objection. The equal protection clause is directed only against arbitrary discrimination, that is, such as is without any reasonable basis. *Lindsley* v. *Natural Carbonic Acid Gas Co.*, 220 U. S. 61, 78. It does not prevent a city from applying the scheme of municipal ownership and maintenance to one public utility without applying it to all; nor does it prevent a city, owning and maintaining a municipal water plant, from refusing to grant franchises which will bring privately owned plants into competition with its own. There is nothing unequal in this in the sense of that clause. And if it was essential that there be a reasonable basis for dealing specially and directly, as was done, with the question of purchasing the company's plant, the situation before recited shows that such a basis was not wanting.

Article 20 of the state constitution, under which the present home-rule charter was adopted, while investing the people of the city (§ 4) with "exclusive power in the making, altering, revising, or amending their charter," makes a distinction (§ 5) between the modes of amending it and of revising it *in extenso* or making a new one, the difference being that an amendment may be initiated by petition and directly voted upon and adopted by the electors, while a revised or new charter requires the intervention of a charter convention. Relying upon this, it is objected that § 264a, now under consideration, is not an amendment but partakes of the nature of a revised or new charter, and is invalid because, as is the fact, it was not framed and approved by a charter convention before being submitted to the electors. The point cannot be sustained. The section is in form and in substance a mere amendment. It does not alter the form of the city government or make

extensive changes in the existing charter, but is confined to matters pertaining to public utilities, more especially the acquisition, maintenance and operation of a municipal water plant. In the briefs some reference is made to *Speer* v. *People*, 52 Colorado, 325, where the Supreme Court of the State recently had before it a proposed amendment radically and extensively changing the form of the city government. The opinions rendered in the case disclose some differences of opinion upon the question whether what was proposed could be regarded as a mere amendment, but the question was not decided and nothing was said in the opinions that tends to sustain the objection now made to § 264a.

Another objection urged against that section is, that it is in conflict with Article 20, § 4, of the state constitution in that, while that article provides that the question of granting a desired franchise shall be submitted to the electors upon the deposit with the city treasurer of the expense of the submission, § 264a prevents the granting of any franchise for the purpose of furnishing a supply of water. Assuming that § 264a does do this, it is done as part of the plan of establishing and maintaining a municipal water plant expressly authorized by Article 20, § 1. Besides, the provision in Article 20, § 4, which is relied upon, is a subordinate part of a limitation or restriction to the effect that no franchise to occupy or use the streets of the city shall be granted except upon an approving vote of the electors, and is evidently intended to be merely regulatory of the payment of the expense of taking the vote, and not to make such payment the only test of the right to have the vote taken.

Finally, it is objected that the submission and adoption of § 264a were in contravention of the existing charter, (a) because the section deals with several independent and unrelated subjects, (b) because it designates the first members of the public utilities commission, instead of

leaving them to be elected in accordance with the general provision in § 178 of the charter, and (c) because it prescribes a different mode of acquiring a municipal water plant than that provided in Article 9 of the charter. In disposing of a preceding objection, we have held that § 264a was merely an amendment of the charter, and that the mode of its submission and adoption was in accord with the applicable restrictions of the state constitution. No additional restrictions were prescribed by the charter, its only provision upon the subject being (§ 20), "Any measure, charter amendment, or proposal for a charter convention, may be submitted to a vote of the qualified electors in the manner provided by the constitution." In passing upon the preceding objection, therefore, we have passed upon the first branch of the one just stated; but it may be added that we think all the provisions of the amendment have such a relation to the principal subject, namely, the public utilities of the city, as to permit their inclusion in a single amendment. Of the other two branches of this objection it is enough to say that the amendment supersedes *pro tanto* the original provisions of the charter with which it is not in accord. The purpose in adopting it was to introduce something new, to make a change in existing provisions, and being adopted conformably to the constitutional and charter requirements, the new or changed provisions became at once a part of the charter, thereby supplanting or modifying the original provisions to the extent of any conflict.

Having now considered all the claims advanced in support of the cross-bill and finding, as we do, that it has no support in any of them, it follows that, like the original bill, it cannot be maintained. The interlocutory decrees of the Circuit Court of Appeals and the Circuit Court are accordingly reversed, and the case is remanded with a direction to dismiss both bills on the merits.

Reversed.

PEDERSEN *v.* DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY.

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

No. 698. Argued January 14, 1913.—Decided May 26, 1913.

Under the Employers' Liability Act a right of recovery exists only where the injury is suffered while the carrier is engaged in interstate commerce and while the employé is employed in such commerce; but it is not essential that the co-employé causing the injury be also employed in such commerce.

One engaged in the work of maintaining tracks, bridges, engines or cars in proper condition after they have become and during their use as instrumentalities of interstate commerce, is engaged in interstate commerce, and this even if those instrumentalities are used in both interstate and intrastate commerce.

One carrying materials to be used in repairing an instrumentality of interstate commerce is engaged in such commerce; and so *held*, that a railroad employé carrying bolts to be used in repairing an interstate railroad and who was injured by an interstate train is entitled to sue under the Employers' Liability Act of 1908.

A Federal court is without authority to reverse a judgment in favor of one party and direct a judgment in favor of the other *non obstante veredicto*. *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364.

197 Fed. Rep. 537, reversed.

THE facts, which involve the construction of the Employers' Liability Act of 1908 and the determination of what constitutes being engaged in interstate commerce, are stated in the opinion.

Mr. Benjamin Patterson, with whom *Mr. George Bell* was on the brief, for plaintiff in error.

Mr. James F. Campbell, with whom *Mr. William S. Jenney* was on the brief, for defendant in error:

An attempt is made in this case to stretch to the utmost limit the scope of the Federal Employers' Liability Act as to what employés of a railroad company are entitled to its benefits.

The injured employé had nothing at all to do with transportation, but was merely a helper in and about the building of new bridges or the repair of old ones; he had nothing to do with the operation of trains, the repair or maintenance of track or cars or anything in connection with intercourse between the States.

If this employé comes within the terms of the act then practically every other employé of a railroad does, no matter how remote their services may be in connection with interstate commerce.

One of the chief objections to the act of 1906, which was declared unconstitutional in the *Employers' Liability Cases*, 207 U. S. 463, 498, was that it included employés who were not actually employed in interstate commerce.

There was nothing real or substantial in plaintiff in error's employment in connection with interstate commerce that would include him within the terms of the act. He had nothing whatever to do with operation of trains; nor with anything in connection with intercourse or traffic; nor with tracks, roadbed or the other instrumentalities of commerce. He was a laborer in and about the construction of a new bridge or carrying supplies that were to be used in the repair or remodeling of an old one. The mere fact that he was using the railroad track as a path to go to or from his work certainly would not make him engaged in commerce, or the fact that his carrying bolts or rivets which were to be used in the construction of a railroad bridge, give him any real or substantial connection with interstate commerce, traffic or intercourse.

Commerce is a term of the largest import, *Welton* v. *Missouri*, 91 U. S. 275; *P. & R. R. Co.* v. *Pennsylvania*, 15 Wall.

232; *New York* v. *Miln*, 11 Pet. 102; *Kidd* v. *Pearson*, 128 U. S. 1, 20; Judson on Interstate Commerce, §§ 6, 7; 7 Cyc. 413; but giving the words their proper construction means that the employé must be engaged in commerce; that is, traffic or intercourse between the States, and that an employé not engaged in transportation, traffic or intercourse between the States is not engaged in such commerce. Congress has power under the commerce clause to regulate the instrumentalities of commerce, but if Congress meant to take care of employés not engaged in traffic or commerce, but simply about the instrumentalities of commerce, it would so have said. *Hooper* v. *California*, 155 U. S. 648; *Williams* v. *Fears*, 179 U. S. 270.

The distinction, therefore, is between acts of commerce and subjects of commerce which include anything that may be transported and the instrumentalities thereof. The plaintiff was engaged about some construction work, that is, manufacturing something new, although it is true such creation or result was afterwards to be used as a means whereby interstate commerce was to be carried on. These acts are not such interstate commerce as is contemplated by the statute. *United States* v. *Knight*, 156 U. S. 1; *Int. Com. Comm.* v. *Detroit &c. R. Co.*, 167 U. S. 633; *Penn. R. R.* v. *Knight*, 192 U. S. 21.

If plaintiff in error was engaged in interstate commerce, then the man chopping down trees in the forest in order to make railroad ties is equally employed in interstate commerce, and even the miner working in mines to furnish the railroad with coal, which is to be used on its interstate engines, is so engaged. *Southern Ry. Co.* v. *United States*, 222 U. S. 20, does not apply.

For cases in the Federal courts deciding what employés come under the act, see *Taylor* v. *Southern Ry. Co.*, 178 Fed. Rep. 380; *Johnson* v. *Gt. Nor. Ry. Co.*, 178 Fed. Rep. 643; *Zikos* v. *Oregon Nav. Co.*, 179 Fed. Rep. 893; *Colasurdo* v. *Cent. R. R. of N. J.*, 180 Fed. Rep. 832, aff'd 192

Fed. Rep. 901; *Van Brimmer* v. *Tex. & Pac. Ry. Co.*, 190 Fed. Rep. 394; *Behrens* v. *Ill. Cent. R. R. Co.*, 192 Fed. Rep. 581; *Lamphere* v. *Oregon Nav. Co.*, 196 Fed. Rep. 336; *Bennett* v. *Lehigh Valley R. R. Co.*, 197 Fed. Rep. 578; *Heimbach* v. *Lehigh Valley R. R. Co.*, 197 Fed. Rep. 579; *Feaster* v. *Phila. & Read. Ry. Co.*, 197 Fed. Rep. 580; *Nor. Pac. Ry. Co.* v. *Maerkl*, 198 Fed. Rep. 1.

In every one of these cases where a recovery was allowed under the act, the railroad employé had some direct connection with interstate commerce, either as part of a crew upon a train engaged in interstate commerce, or about the tracks and switches which were in active use in conducting interstate commerce, but in the case at bar the employé was engaged merely in duties tending towards the manufacturing of something which was afterwards to be used in interstate commerce and therefore his connection is entirely too remote to be covered by the act.

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

This was an action under the Employers' Liability Act [1] of April 22, 1908, 35 Stat. 65, c. 149, to recover for personal injuries sustained by the plaintiff through the negligence of a co-employé while both were in the defendant's service. At the trial the Circuit Court refused to direct a verdict in the defendant's favor, and the jury returned a verdict for the plaintiff, assessing his damages at $6,190. Subsequently the court, following a local statute (Penn. Laws, 1905, p. 286, c. 198), entered judgment for the defendant notwithstanding the verdict, on the ground that the latter was not sustained by the evidence. 184 Fed. Rep. 737. The judgment was affirmed

[1] The act and the amendment of April 5, 1910, are printed in full in 223 U. S., p. 6.

by the Circuit Court of Appeals, 197 Fed. Rep. 537, and the plaintiff sued out this writ of error.

The evidence, in that view of it which must be taken here, was to the following effect: The defendant was operating a railroad for the transportation of passengers and freight in interstate and intrastate commerce, and the plaintiff was an iron worker employed by the defendant in the alteration and repair of some of its bridges and tracks at or near Hoboken, New Jersey. On the afternoon of his injury the plaintiff and another employé, acting under the direction of their foreman, were carrying from a tool car to a bridge, known as the Duffield bridge, some bolts or rivets which were to be used by them that night or very early the next morning in "repairing that bridge," the repair to consist in taking out an existing girder and inserting a new one. The bridge could be reached only by passing over an intervening temporary bridge at James Avenue. These bridges were being regularly used in both interstate and intrastate commerce. While the plaintiff was carrying a sack of bolts or rivets over the James Avenue bridge, on his way to the Duffield bridge, he was run down and injured by an intrastate passenger train, of the approach of which its engineer negligently failed to give any warning.

The Circuit Court ruled that an injury resulting from the negligence of a co-employé engaged in intrastate commerce was not within the terms of the Federal act, and the Circuit Court of Appeals, although disapproving that ruling, held that under the evidence it could not be said that the plaintiff was employed in interstate commerce and therefore he was not entitled to recover under the act.

Considering the terms of the statute, there can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employé is employed by the carrier in such commerce; but it is not essential,

where the causal negligence is that of a co-employé, that he also be employed in such commerce, for, if the other conditions be present, the statute gives a right of recovery for injury or death resulting from the negligence "of *any* of the . . . employés of such carrier," and this includes an employé engaged in intrastate commerce. *Second Employers' Liability Cases*, 223 U. S. 1, 51.

That the defendant was engaged in interstate commerce is conceded, and so we are only concerned with the nature of the work in which the plaintiff was employed at the time of his injury. Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct "any defect or insufficiency . . . in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment" used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can

be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? See *McCall* v. *California*, 136 U. S. 104, 109, 111; *Second Employers' Liability Cases*, *supra*, 6, 59; *Zikos* v. *Oregon R. & Navigation Co.*, 179 Fed. Rep. 893, 897, 898; *Central R. Co. of N. J.* v. *Colasurdo*, 192 Fed. Rep. 901; *Darr* v. *Baltimore & O. R. Co.*, 197 Fed. Rep. 665; *Northern Pacific Ry. Co.* v. *Maerkl*, 198 Fed. Rep. 1. Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such.

True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce.

The point is made that the plaintiff was not at the time of his injury engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce. See *Lamphere* v. *Oregon*

R. & Navigation Co., 196 Fed. Rep. 336; *Horton* v. *Oregon, &c. Co.*, 130 Pac. Rep. 897; *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 21.

What has been said shows that there was evidence to sustain a finding that at the time of the plaintiff's injury the defendant was engaged, and he was employed by it, in interstate commerce, and, as in other respects the case was one for the jury, the court rightly denied the defendant's request that a verdict in its favor be directed. A motion for a new trial was interposed by the defendant, but no ruling was had upon it, doubtless because the court concluded that it could and should render judgment for the defendant on the evidence notwithstanding the verdict. In this the court was in error, first, because it was without authority so to do (*Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364), and, second, because the evidence did not warrant such a judgment. Unless the motion for a new trial was well taken, judgment should have been given for the plaintiff on the verdict, and, subject to that qualification, the plaintiff is now entitled to such a judgment.

The judgments of the Circuit Court and the Circuit Court of Appeals are reversed, and the case is remanded for further proceedings in accordance with this opinion.

Judgment reversed.

MR. JUSTICE LAMAR with whom concurred MR. JUSTICE HOLMES and MR. JUSTICE LURTON, dissenting:

I am unable to assent to the proposition that a man carrying bolts to be used by him in repairing a railroad bridge was employed in interstate commerce.

Transportation has been defined as commerce, and those engaged in transportation are employed in commerce. But in building the bridge originally the carrier was not "engaging in commerce between the States," and the plaintiff, in subsequently repairing it, was not

employed in such commerce. Such work was not a part of commerce, but an incident which preceded it.

The act provides that "every common carrier by railroad, while engaging in commerce between any of the States or Territories . . . shall be liable in damages to any person suffering injury while employed by such carrier in such commerce."

The defendant, though engaged in both interstate and intrastate commerce was also engaged in many other incidental activities which were not commerce in any sense.

The railroad had to be surveyed and built, bridges had to be constructed and renewed, cars had to be manufactured and repaired, warehouses had to be built and painted, wages had to be paid and books kept; but these transactions, though incident to it were not transportation, and, therefore, not within the purview of the statute limited to persons employed in commerce. Otherwise the law would embrace "all of the activities in any way connected with trade between the States and exclude state control over matters purely domestic in their nature." *Hooper* v. *California*, 155 U. S. 648, 655. Acts burdening interstate commerce can, of course, be prohibited by Congress. But when Congress itself limits the operation of the statute to persons injured while employed in interstate commerce the statute does not extend to its incidents and is confined to transportation. It does not include manufacturing, building, repairing, for they are not commerce, whether performed by a private person, a railroad, or its agents.

It is conceded that a line must be drawn between those employés of the carrier who are employed in commerce and those engaged in other departments of its business. It must be drawn so as to take in on one side those engaged in transportation, which is commerce, otherwise there is no logical reason why it should not include every

agent of the company; for there is no other test by which to determine when he must sue under the state statute and when under the act of Congress; for if a man on his way to repair a bridge is engaged in interstate commerce, then the man in the shop who made the bolts to be used in repairing the bridge is likewise so engaged. If they are, then the man who paid them their wages, and the bookkeeper who entered those payments in the accounts, are similarly engaged. For they are all employed by the carrier, and the work of each contributes to its success in hauling freight and passengers.

This view is supported by the two cognate statutes. The Hours of Service Law applies only to those "engaged in the movement of trains" and the Safety Appliance Law refers, not to machines in the shop, but to cars and locomotives, which are the immediate instruments of transportation. The Employers' Liability Act in like manner applies to those engaged in transportation and not to those employed in building, manufacturing or repairing.

The plaintiff was carrying bolts to be used in repairing a bridge. That was not interstate commerce, and in my opinion the court below properly held that his rights were to be determined by the laws of the State of New Jersey and not by the act of Congress.

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

ST. LOUIS, SAN FRANCISCO & TEXAS RAILWAY COMPANY *v.* SEALE.

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

No. 857. Argued May 5, 1913.—Decided May 26, 1913.

Where the Federal Employers' Liability Act is applicable, the state statute on the same subject is excluded by reason of the supremacy of the former.

Where the Federal Employers' Liability Act applies, no one but the injured employé or, in case of his death, his personal representative, can maintain the action.

Whether the Federal or state statute is applicable depends upon whether the injuries of the employé were sustained while the company was engaged and the employé was employed in interstate commerce.

An employé whose duty is to take the numbers of, and seal up and label, cars, some of which are engaged in interstate, and some in intrastate, traffic, is directly and not indirectly engaged in interstate commerce.

Interstate transportation is not ended by the arrival of the train at the terminal. The breaking up of the train and moving the cars to the appropriate tracks for making up new trains for further destination or for unloading is as much a part of interstate transportation as the movement across the state line.

Where plaintiff's petition states a case under the state statute, but on the evidence it appears that the case is controlled by the Federal statute, and the defendant has duly excepted, the state court is bound to take notice of the objection and dismiss if plaintiff is not entitled to recover under the Federal statute.

THE facts, which involve the construction of the Employers' Liability Act of 1908, and its effect on actions for personal injuries of employés brought in the state courts, are stated in the opinion.

Mr. Cecil H. Smith, with whom *Mr. W. F. Evans* was on the brief, for plaintiff in error.

Mr. Judson H. Wood, with whom *Mr. John P. Haven* was on the brief, for defendants in error.

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

This was an action against a railroad company, by the widow and parents of one of its employés, to recover damages for his death while in its service in its railroad yard at North Sherman, Texas, the death being caused, as was alleged, by the negligence of other employés. The action was begun in one of the courts of the State and resulted in a judgment for the plaintiffs, which was affirmed by the Court of Civil Appeals. 148 S. W. Rep. 1099. A petition for a writ of error was denied by the Supreme Court of the State, and the present writ of error to the Court of Civil Appeals was then allowed. See *Bacon* v. *Texas,* 163 U. S. 207, 215; *Norfolk & Suburban Turnpike Co.* v. *Virginia,* 225 U. S. 264, 269.

A motion to dismiss the writ is interposed, but the grounds of the motion are plainly untenable, and it is denied.

In the trial court and again in the Court of Civil Appeals the railroad company contended that the injuries which caused the death of the deceased were received while the company was engaged, and while he was employed by it, in interstate commerce; that its liability for his death was exclusively regulated and controlled by the Employers' Liability Act of April 22, 1908, 35 Stat. 65, c. 149; and that, if liable, it was liable only to his personal representative and not to the plaintiffs or any of them. This contention was denied by both courts, and the correctness of that ruling is the matter now to be considered.

The cause of action sought to be enforced was not recognized at common law. *Michigan Central Railroad Co.*

v. *Vreeland*, 227 U. S. 59, 67. It was essential, therefore, that it be based on some applicable statute. There was a Texas statute on the subject and also the Federal one. Both could not occupy the same field, and they were unlike. The Texas statute gave the right of action to the "surviving husband, wife, children and parents" and provided that it might be enforced by all of them or by one or more for the benefit of all, while the Federal statute vested the right of action in the deceased's "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." There were other points of dissimilarity, but they need not be noticed. If the Federal statute was applicable, the state statute was excluded by reason of the supremacy of the former under the National Constitution. *Second Employers' Liability Cases*, 223 U. S. 1, 53; *Michigan Central Railroad Co.* v. *Vreeland, supra.* And if the Federal statute was applicable, the right of recovery, if any, was in the personal representative of the deceased, and no one else could maintain the action. *Briggs* v. *Walker*, 171 U. S. 466, 471; *American Railroad Co.* v. *Birch*, 224 U. S. 547, 557; *Missouri, Kansas & Texas Railway Co.* v. *Wulf*, 226 U. S. 570, 576; *Troxell* v. *Delaware, Lackawanna & Western Railroad Co.*, 227 U. S. 434, 443. The real question, therefore, is, whether the Federal statute was applicable, and this turns upon whether the injuries which caused the death of the deceased were sustained while the company was engaged, and while he was employed by it, in interstate commerce. *Second Employers' Liability Cases, supra; Pedersen* v. *Delaware, Lackawanna & Western Railroad Co.* (decision announced with this, *ante*, p. 146).

The plaintiffs' petition was altogether silent upon that subject, and the defendant, by appropriate special exceptions, called attention to the two statutes, insisted

that whether one or the other applied depended upon facts not stated, and asked that the plaintiffs be required so to state the facts as to enable it to perceive which statute was relied upon. The exceptions were overruled, and when that matter came before the Court of Civil Appeals it said: "The action was brought under the state law, and the petition stated a good cause of action and was not subject to the exceptions presented." By its answer the defendant put in issue the allegations of the petition, and the evidence adduced upon the trial established without dispute the following facts:

The defendant was a Texas corporation owning and operating a railroad extending from the boundary between Oklahoma and Texas southward through North Sherman. This railroad connected at the Oklahoma boundary with another one extending northward through Madill, and the two were so operated that trains were run through from North Sherman to Madill and from Madill to North Sherman. The defendant was engaged in both intrastate and interstate commerce, much the larger part of the traffic handled in its North Sherman yard being interstate. The deceased was employed by the defendant as a yard clerk in that yard, and his principal duties were those of examining incoming and outgoing trains and making a record of the numbers and initials on the cars, of inspecting and making a record of the seals on the car doors, of checking the cars with the conductors' lists, and of putting cards or labels on the cars to guide switching crews in breaking up incoming, and making up outgoing, trains. His duties related to both intrastate and interstate traffic, and at the time of his injury and death he was on his way through the yard to one of the tracks therein to meet an incoming freight train from Madill, Oklahoma, composed of several cars, ten of which were loaded with freight. The purpose with which he was going to the train was that of taking the

numbers of the cars and otherwise performing his duties in respect of them. While so engaged he was struck and fatally injured by a switch engine, which, it is claimed, was being negligently operated by other employés in the yard.

At the conclusion of the evidence the defendant requested the court to direct a verdict in its favor on the ground that the undisputed evidence disclosed that the case was one in which the defendant's liability was controlled by the Federal statute, and that, if liable, it was liable only to the personal representative of the deceased, and not to the plaintiffs. The request was denied, and the jury returned a verdict for the plaintiffs, in which the damages were apportioned among them conformably to the state law.

In its original opinion the Court of Civil Appeals took the view (a) that by not interposing a plea in abatement the defendant waived any right it had to object that the plaintiffs were not personal representatives of the deceased, (b) that the plaintiffs were the real beneficiaries and it was immaterial that they were not the deceased's personal representatives, and (c) that the state statute authorized a recovery by the plaintiffs on the case stated in the petition, and as the Federal statute was not pleaded as a defense it could not be invoked to defeat a recovery, no matter what may have been its effect on the state statute. In its opinion on the motion for rehearing the court recognized the supremacy of the Federal statute, if applicable, and held that the evidence did not bring the case within that statute. While recognizing that the train which the deceased was proceeding to examine was an interstate train, having just come from Oklahoma, the court said: "The North Sherman yards were the terminal for that train, that is, that was the end of the run of that train. If any trains went south, they were made up in the yards, new trains, and sent south, or other

trains made up and sent north. The evidence does not show that any of the cars in the train coming in were destined for other points."

In our opinion the evidence does not admit of any other view than that the case made by it was within the Federal statute. The train from Oklahoma was not only an interstate train but was engaged in the movement of interstate freight, and the duty which the deceased was performing was connected with that movement, not indirectly or remotely, but directly and immediately. The interstate transportation was not ended merely because that yard was a terminal for that train, nor even if the cars were not going to points beyond. Whether they were going further or were to stop at that station, it still was necessary that the train be broken up and the cars taken to the appropriate tracks for making up outgoing trains or for unloading or delivering freight, and this was as much a part of the interstate transportation as was the movement across the state line. *McNeill* v. *Southern Railway Co.*, 202 U. S. 543, 559. See also *Johnson* v. *Southern Pacific Company*, 196 U. S. 1, 21.

It comes then to this: The plaintiffs' petition, as ruled by the state court, stated a case under the state statute. The defendant by its special exceptions called attention to the Federal statute and suggested that the state statute might not be the applicable one. But the plaintiffs, with the sanction of the court, stood by their petition. It was to the case therein stated that the defendant was called upon to make defense. A plea in abatement would have been unavailing, because the plaintiffs were the proper parties to prosecute that case. When the evidence was adduced it developed that the real case was not controlled by the state statute but by the Federal statute. In short, the case pleaded was not proved and the case proved was not pleaded. In that situation the defendant interposed the objection, grounded on the Federal statute,

that the plaintiffs were not entitled to recover on the case proved. We think the objection was interposed in due time and that the state courts erred in overruling it. Two of the plaintiffs, the father and mother, in whose favor there was a separate recovery, are not even beneficiaries under the Federal statute, there being a surviving widow; and she was not entitled to recover in her own name, but only through the deceased's personal representative, as is shown by the terms of the statute and the decisions before cited. See also Tiffany on Death by Wrongful Act, 2d ed., §§ 80, 109, 116.

The judgment is accordingly reversed and the case is remanded for further proceedings not inconsistent with this opinion, but without prejudice to such rights as a personal representative of the deceased may have.

Reversed.

MR. JUSTICE LAMAR dissents.

DEGGE *v.* HITCHCOCK, POSTMASTER GENERAL.

MAURY *v.* SAME.

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

Nos. 157, 158. Argued January 31, 1913.—Decided May 26, 1913.

This is apparently the first case in which a Federal court has been asked to issue a writ of certiorari to review a ruling by an executive officer of the United States Government.

Constant failure to apply for a particular remedy suggests that it is due to conceded want of power in the courts to grant it.

The scope of the writ of certiorari as it exists at common law has not been enlarged by any statute in the Federal jurisdiction, and cases

in which it has issued under statute from state courts to state officers are not controlling in the Federal courts.

While the original scope of the writ of certiorari has been enlarged so as to serve the office of a writ of error, it has always run from court to court or to such boards, tribunals and inferior jurisdictions whose findings and decisions had the quality of a final decision and from which there was no appeal or other method of review.

The decision of the Postmaster General that a fraud order shall issue is not the exercise of a judicial function, and if the decision is beyond his jurisdiction the party injured may obtain relief in equity; the order cannot be reviewed by certiorari.

So long as proceedings before an executive officer are *in fieri* the courts will not interfere with them. *Plested* v. *Abbey*, 228 U. S. 42.

The writ of certiorari is an extraordinary remedy, and in deciding that it will not issue in a particular case this court does not anticipate in what cases exceptional facts may call for its use.

35 App. D. C. 218, 228, affirmed.

In 1909 complaint was made to the postal authorities that W. W. Degge and the Wellington corporations, of which he was president, were using the mails in furtherance of a fraudulent scheme. Notice was given to Degge and the corporations and a hearing was had before the officer to whom, under the Postal Regulations, the disposition of this class of cases was committed. He found that the charges were true and to his finding he attached a copy of all the evidence which had been taken. The report was confirmed by the Postmaster General, who issued an order directing the postmaster at Boulder, Colorado, not to deliver mail addressed to Degge or to these corporations, but to return all such letters to the sender with the word "Fraudulent" plainly stamped on the envelope. Rev. Stat., §§ 3929, 4041.

Degge, the corporations, and some of the stockholders, thereafter filed petitions in the Supreme Court of the District of Columbia alleging that the officer before whom the hearing had been had was without power to make the report on which the Postmaster General had acted; that there was no testimony to show the existence of a fraud-

ulent scheme, and no evidence whatever to support the finding. It was alleged that the order was arbitrary, in excess of the power of the Postmaster General, and void. The petitioners prayed that the court would issue writs of certiorari directing the Postmaster General to certify the record to the court and that upon hearing and review thereof the court would set aside the order. A rule to show cause was granted. The Postmaster General demurred on the ground that the court was without jurisdiction to issue the writ, and subject thereto answered, attaching the record and the evidence on the hearing before the officer of the Post-Office Department having charge of the Fraud Orders investigations.

The case was heard by the Supreme Court of the District of Columbia on petition, demurrer and answer. After a hearing the court dismissed the case. The Court of Appeals of the District, without passing on the right to issue the writ, affirmed the judgment upon the ground that the evidence supported the order. The petitioners appealed and on the argument in this court, the Government renews the contention that the District Court was without jurisdiction to issue the writ of certiorari to the Postmaster General.

Mr. O. A. Erdman, with whom *Mr. Walter B. Guy* was on the brief, for plaintiffs in error:

The rights of petitioner Degge and the corporations are based upon the common right of citizens to receive mail unless that right has been forfeited by a use of the mails for purposes which are condemned by the acts of Congress as criminal, such as lotteries and similar schemes for perpetrating fraud. Petitioners' business consists in making investments in lands, irrigation ditches, reservoirs, mining property, stocks and securities, and they are not engaged in any business or practice prohibited by any law of the United States. The facts shown by the evidence

and reported to the Postmaster General are not only insufficient in law to sustain the supposed "findings," but do not constitute any scheme or device condemned by §§ 3929, 4041, Rev. Stat., or any other law authorizing the Postmaster General to issue a fraud order.

The petitioning stockholders based their case on the common right of citizens to have their mail forwarded and delivered, unless such mail contained matter vicious, corrupting, immoral or dangerous in violation of the laws of Congress.

Inasmuch as the Postmaster General has rested his defense in this proceeding entirely upon the findings and conclusions of his subordinate, and has relied upon such findings and conclusions as being conclusive and not subject to review by the courts, suppressing and omitting from this record the papers on which such findings and conclusions are based, it becomes necessary to bring up the omitted papers by means of the writ of certiorari, and this will show how many more "false and misleading" statements there are and who made them.

The answer of the Postmaster General declaring that whether he is right or wrong, or whether he has misconstrued the law or not, is not for the courts to say, and that the courts have no business to interfere, is in the face of the fact that the findings do not support any fraud order against any of the corporations, according to which Degge is the only offender.

Decisions of the Postmaster General in fraud order cases are by no means final and conclusive. *Bank* v. *Gilson,* 161 Fed. Rep. 290; *American School* v. *McAnulty,* 187 U. S. 94, 108–110; *Marbury* v. *Madison,* 1 Cranch, 137, 171.

The writ of certiorari at common law is considered as an extraordinary remedy resorted to for the purpose of supplying a defect of justice in cases obviously entitled to redress, and yet unprovided for by the ordinary forms

of proceedings. Harris on Cert., §§ 17–21; 4 Enc. P. & P. 9, and see *Duggan* v. *McGruder*, 12 Am. Dec. 536.

In the Federal courts it is in the nature of a writ of error to bring up after judgment the proceedings of an inferior court or tribunal whose procedure is not according to the course of the common law. *Harris* v. *Barber*, 129 U. S. 366–369; *Dist. of Col.* v. *Brooke*, 29 App. D. C. 563; *Dist. of Col.* v. *Burgdorf*, 6 App. D. C. 465.

The test of the question whether a proceeding is reviewable upon certiorari is not what are the usual functions exercised by the tribunal, but what is the character of the proceedings sought to be reviewed. Where an executive officer is charged with duties of a judicial nature the action can be so reviewed. *Duggan* v. *McGruder*, 12 Am. Dec. 527, 536; *Cunningham* v. *Squires*, 2 W. Va. 422, 424; *State* v. *Ansel*, 76 So. Car. 395, 412–414.

The proceeding before the Postmaster General in this case was quasi-judicial in character. It involved a hearing and the ascertainment of facts upon evidence. It resulted in a decision based upon alleged satisfactory evidence. *United States* v. *Burton*, 131 Fed. Rep. 552, 556.

Public officers whom the court has power by injunction to restrain are ministerial and not judicial; certiorari is an appropriate legal remedy and there is no necessity for resort to equity. *Western R. R. Co.* v. *Nolan*, 48 N. Y. 513, 518.

Where there is technically no record, the proceedings and orders in the nature of a record can, as a rule, alone be regarded. But the evidence upon a disputed jurisdictional fact is reviewable, as well as every issue of law upon the question of jurisdiction. Not only the record, but the evidence to support jurisdiction must, when necessary, be returned. *Whitney* v. *Board*, 14 California, 479, 500; *People* v. *Goodwin*, 1 Selden (N. Y.), 568, 572; *Stone* v. *Mayor*, 25 Wend. (N. Y.) 157, 170; see also *People* v. *Assessors*, 39 N. Y. 81, 88; *People* v. *Assessors*,

40 N. Y. 154, 158; *People* v. *Allen*, 52 N. Y. 538, 541; *People* v. *Board of Police*, 39 N. Y. 506, 518; *People* v. *Brooklyn*, 103 N. Y. 370.

All parties interested and aggrieved are entitled to the writ. It is not necessary that a petitioner for a certiorari should be a party of record, but only that he should be interested in the subject-matter upon which the record rests. *Dyer* v. *Lowell*, 30 Maine, 217, 220; *Hemmer* v. *Bonson* (Ia.), 117 N. W. Rep. 257, 259.

If the exercise of a sound judicial discretion requires that one thus injured ought to have the writ it is an abuse of authority to refuse it. *State* v. *Chittenden*, 127 Wisconsin, 468, 470, Syl. 4.

Where individual rights are affected in a case in which there are no formal parties and no appeal or other remedy for an excess of jurisdiction exists, a review by certiorari is allowed to those who are bound by the proceedings. *Elliott* v. *Superior Court*, 144 California, 501, 508; *Campau* v. *Button*, 33 Michigan, 525; *Wilson* v. *Bartholomew*, 45 Michigan, 41; *Cowing* v. *Ripley*, 76 Michigan, 650; *Pingree* v. *Commissioners*, 30 Maine, 351; *State* v. *Snedeker*, 30 N. J. L. 80; *People* v. *Ford*, 112 N. Y. S. 130; *Clary* v. *Hoagland*, 5 California, 476; *State* v. *Rose*, 4 N. Dak. 319, 329.

The writ should have been granted as of right. *Matthews* v. *Matthews*, 4 Ired. L. (N. C.) 155; *State* v. *Bill*, 13 Ired. L. (N. C.) 373; *Queen* v. *Justices*, L. R. 5 Q. B. 473; *Re Lord Listowel's Fishery*, 9 Ir. C. L. , 46 Q. B. .

Even lapse of time will not bar ordinarily in meritorious cases. *Barnard* v. *Fitch*, 48 Massachusetts, 605, 609; *Drainage Commissioners* v. *Volke*, 163 Illinois, 243, 248; *Sturr* v. *Elmer* (N. J.), 67 Atl. Rep. 1059; *State* v. *Hudson City*, 29 N. J. L. 115.

Mr. Assistant Attorney General Adkins, with whom *Mr. Louis G. Bissell* was on the brief, for defendant in error:

Certiorari does not lie to review administrative action by cabinet officers. *Bates & Guild Co.* v. *Payne*, 194 U. S. 106; *Decatur* v. *Paulding*, 14 Pet. 497, 515; *Gaines* v. *Thompson*, 7 Wall. 347; *Marbury* v. *Madison*, 1 Cranch, 137; *Marquez* v. *Frisbie*, 101 U. S. 473; *Riverside Oil* v. *Hitchcock*, 190 U. S. 316; *United States ex rel.* v. *Black*, 128 U. S. 40; *United States* v. *Young*, 94 U. S. 258.

At common law and in the District of Columbia a writ of certiorari runs to an inferior tribunal only to ascertain whether that tribunal had jurisdiction and has observed due process of law. *Basnet* v. *Jacksonville*, 18 Florida, 523; *Bradshaw* v. *Earnshaw*, 11 App. D. C. 495; *District of Columbia* v. *Burgdorf*, 6 App. D. C. 471; *Harris* v. *Barber*, 129 U. S. 366; *Hendley* v. *Clark*, 8 App. D. C. 165; *In re Schneider*, 148 U. S. 162; *People* v. *Lindblom*, 55 N. E. Rep. 358 (Ill.); *Phillips* v. *Welch*, 12 Nevada, 158; *Reaves* v. *Ainsworth*, 219 U. S. 297; *The King (Martin)* v. *Mahoney*, 1910, 2 Irish Law Reports, 695, 727 *et seq.*

In some jurisdictions the scope of the writ has been enlarged to include questions of law arising on the record. *Keenan* v. *Goodwin*, 17 R. I. 649; *People* v. *Board of Police*, 39 N. Y. 506.

It is practically universally agreed that the case is not reviewable on the merits, and that a writ of error is inappropriate to settle disputed questions of fact. *Water Co.* v. *Commissioners*, 112 Massachusetts, 206; *Harris* v. *Barber*, 129 U. S. 366; *Imperial Water Co.* v. *Supervisors*, 120 Pac. Rep. 780, 786; *Rawson* v. *McIlvaine*, 49 Michigan, 194; *State* v. *Common Council*, 53 Minnesota, 238; *State* v. *Hudson*, 32 N. J. L. 365.

If the court has power on certiorari to review questions of law, it will not interfere with decision of the Postmaster General. *Bates and Guild Co.* v. *Payne*, 194 U. S. 108; *Smith* v. *Hitchcock*, decided this term.

The action of the Postmaster General cannot be quashed

on writ of certiorari. He had jurisdiction to issue the fraud orders. *Public Clearing House* v. *Coyne*, 194 U. S. 497; *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; Rev. Stat., §§ 3929, 4041.

The fraud order issued by Postmaster General was correct in law, and his findings of fact were supported by ample evidence. *Harris* v. *Rosenberger*, 145 Fed. Rep. 449; *Public Clearing House* v. *Coyne*, 194 U. S. *supra*.

The evil sought to be remedied is the same in this case as in *Durland* v. *United States*, 161 U. S. 306, 313.

As to what constitutes scheme to defraud, see *Branaman* v. *Harris*, 189 Fed. Rep. 461; *Durland* v. *United States*, 161 U. S. 306; *Harris* v. *Rosenberger*, 145 Fed. Rep. 449; *Horn* v. *United States*, 182 Fed. Rep. 721.

The trial court properly refused the writ on the merits following the hearing on petition and answer. The writ does not issue as of right, but in the discretion of the court. *District of Columbia* v. *Brooke*, 29 App. D. C. 563; *Ex parte Hitz*, 111 U. S. 766; *Hyde* v. *Shine*, 199 U. S. 62; *People* v. *Board of Assessors*, 39 N. Y. 87.

The practice is followed in many jurisdictions. *Am. Const. Co.* v. *Jacksonville Ry.*, 148 U. S. 372, 388; *Water Co.* v. *County Commissioners*, 112 Massachusetts, 206; *Ex parte Dugan*, 2 Wall. 134; *Walbridge* v. *Walbridge*, 46 Vermont, 617.

Similar procedure is sanctioned by this court for other extraordinary writs. *Ex parte Webb*, 225 U. S. 663; *Ex parte Yarborough*, 110 U. S. 651, 652; *In re Baiz*, 135 U. S. 403; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court.

This case is the first instance, so far as we can find, in which a Federal court has been asked to issue a writ of certiorari to review a ruling by an executive officer of the

United States Government. That at once suggests that the failure to make such application has been due to the conceded want of power to issue the writ to such officers. For, since the adoption of the Constitution, there have been countless rulings by heads of departments that directly affected personal and property rights and where the writ of certiorari, if available, would have furnished an effective method by which to test the validity of *quasi*-judicial orders under attack. The modern decisions cited to sustain the power of the court to act in the present case are based on state procedure and statutes that authorize the writ to issue not only to inferior tribunals, boards, assessors and administrative officers, but even to the Chief Executive of a State in proceedings where a *quasi*-judicial order has been made. But none of these decisions are in point in a Federal jurisdiction where no statute has been passed to enlarge the scope of the writ at common law.

In ancient times it was used to compel the production of a record for use as evidence; more often to supplement a defective record in an appellate court, and later, to remove, before judgment—*Harris* v. *Barber*, 129 U. S. 366, 369—a record from a court without jurisdiction and with a view of preventing error rather than of correcting it. When later still its scope was enlarged so as to make it serve the office of a writ of error, certiorari was granted only in those instances in which the inferior tribunal had acted without jurisdiction, or in disregard of statutory provisions. But in those cases the writ ran to boards (*Reaves* v. *Ainsworth*, 219 U. S. 296), officers, tribunals and inferior judicatures, whose findings and decisions, even though erroneous, had the quality of a final judgment, and there being no right of appeal or other method of review, the extraordinary writ of certiorari was resorted to from necessity to afford a remedy where there would otherwise have been a denial of justice. But in all those cases it ran

from court to court,—including boards, officers or tribunals having a limited statutory jurisdiction, but whose judgments would be conclusive unless set aside.

The appellant insists that under these common law principles the writ should issue here because, having to act "upon evidence satisfactory to him" (Rev. Stat., § 3929), and notice and a hearing having been given, the Postmaster General acted in a judicial capacity in making the order, which was therefore subject to review on certiorari because he exceeded his jurisdiction and, without any proof of fraud in the use of the mails, deprived appellants of the valuable right to receive letters and money through the post-office.

It is true that the Postmaster General gave notice and a hearing to the persons specially to be affected by the order and that in making his ruling he may be said to have acted in a *quasi*-judicial capacity. But the statute was passed primarily for the benefit of the public at large and the order was for them and their protection. That fact gave an administrative quality to the hearing and to the order and was sufficient to prevent it from being subject to review by writ of certiorari. The Postmaster General could not exercise judicial functions, and in making the decision he was not an officer presiding over a tribunal where his ruling was final unless reversed. Not being a judgment, it was not subject to appeal, writ of error, or certiorari. Not being a judgment, in the sense of a final adjudication, the appellants were not concluded by his decision, for had there been an arbitrary exercise of statutory power or a ruling in excess of the jurisdiction conferred, they had the right to apply for and obtain appropriate relief in a court of equity. *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620.

The fact that there was this remedy is itself sufficient to take the case out of the principle on which, at common

law, right to the writ was founded. For there it issued to officers and tribunals only because there was no other method of preventing injustice. Besides, if the common law writ, with all of its incidents, could be construed to apply to administrative and *quasi*-judicial rulings it could, with a greater show of authority, issue to remove a record before decision and so prevent a ruling in any case where it was claimed there was no jurisdiction to act. This would overturn the principle that, as long as the proceedings are *in fieri* the courts will not interfere with the hearing and disposition of matters before the Departments. *Plested* v. *Abbey*, 228 U. S. 42, 51. To hold that the writ could issue either before or after an administrative ruling would make the dispatch of business in the Departments wait on the decisions of the courts and not only lead to consequences of the most manifest inconvenience, but would be an invasion of the Executive by the Judicial branch of the Government.

The writ of certiorari is one of the extraordinary remedies and being such it is impossible to anticipate what exceptional facts may arise to call for its use, but the present case is not of that character, but rather an instance of an attempt to use the writ for the purpose of reviewing an administrative order. *Public Clearing House* v. *Coyne*, 194 U. S. 497. This cannot be done.

Affirmed.

MACKAY *v.* UINTA DEVELOPMENT COMPANY.

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

No. 190. Argued March 14, 17, 1913.—Decided May 26, 1913.

Where the defects in service of process and in procedure in the state court are waivable, and after removal there is presented to the Circuit Court a controversy involving more than $2,000 and between citizens of different States, that court has jurisdiction and the method of getting the case before the court cannot operate to deprive it of jurisdiction.

Removal proceedings are in the nature of process to bring the parties before the Federal court.

The defendant may waive defects in removal proceedings if jurisdiction actually exists, and if he does so the court will not of its own motion inquire into the regularity of the proceedings.

THE facts, which involve the validity of the removal of this cause from the state to the Federal court and the jurisdiction of the latter thereover, are stated in the opinion.

Mr. Barnard J. Stewart, with whom *Mr. Charles B. Stewart, Mr. Samuel W. Stewart* and *Mr. Daniel Alexander* were on the brief, for plaintiff in error.

Mr. John W. Lacey for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

On December 8, 1908, the Uinta Development Company, a corporation of the State of Wyoming, brought an action in a Wyoming court against John C. Mackay, a resident and citizen of Utah, to recover $1,950 damages

for a trespass upon land of the Development Company, situated in Wyoming.

On January 8, 1909, Mackay duly filed his answer. On March 2 the plaintiff, by leave of court, filed an amended petition, which Mackay answered. On May 3 he filed an amended answer, which, in addition to denying many of the allegations of the amended petition, set up a counter-claim for $3,000 damages.

The claims of the parties were so related that either could have been interposed as a counter-claim to the other; or they could have been determined in different suits—subject to the provision that, under the Wyoming statute, a defendant who failed to set up his counter-claim and subsequently made it the subject of a separate action could not recover costs if he prevailed therein. No Federal question was presented in the plaintiff's suit or defendant's original answer, but Mackay's amended answer and counter-claim were grounded upon certain statutes of the United States. This counter-claim for $3,000 was filed after the expiration of the time in which he was required to plead to the original petition.

But, notwithstanding the delay, Mackay, the non-resident, without objection on the part of the Development Company, filed in the state court a petition to remove the case to the United States Circuit Court for the District of Wyoming. An order removing the case was granted on the theory that the parties were citizens of different States; that the construction of the Federal statutes was necessarily involved, and that the amount in dispute, as disclosed by the counter-claim, exceeded $2,000. The transcript was duly filed in the United States court. Both parties appeared. The plaintiff filed in the United States court a reply to Mackay's counter-claim, and the case, which was docketed as "*Uinta Development Company* v. *John C. Mackay*," was submitted to the court for determination without a jury.

Judgment was entered in favor of the Development Company and thereupon Mackay took the case to the Circuit Court of Appeals, assigning errors relating to rulings made in the course of the trial, but neither party raised any question as to its power to determine the cause. On these facts the Circuit Court of Appeals certified to this court various questions as to whether Mackay could remove the case to the United States court, among them the following:

4. "Assuming that the removal at the instance of Mackay was not in conformity with the removal statute, and assuming that as respects his claim against the Development Company all the jurisdictional elements were present which were essential to enable the Circuit Court to take cognizance thereof, if he had commenced an action thereon in that court, and assuming that in such an action the Development Company lawfully could have set up its claim as a counter-claim and thereby have enabled the court to take cognizance thereof, Did the parties by appearing in the Circuit Court and there litigating both claims to a final conclusion in a single cause, without any objection to the jurisdiction of the court or to the manner in which its jurisdiction was invoked, enable that court to take cognizance of the controversy and to proceed to a final judgment therein with like effect as if they had invoked the jurisdiction of that court in the first instance through an action commenced therein by Mackay upon his claim and through the interposition by the Development Company of its claim as a counter-claim in that action?"

This question must be answered in the affirmative and that fact makes it unnecessary to consider the status of the parties in the state court and who was technical plaintiff and who technical defendant, or whether Mackay, a non-resident defendant, sued in a state court for $1,950, could, by filing a counter-claim for $3,000, acquire the

right to remove the case to the United States court. The case was removed in fact, and, while the parties could not give jurisdiction by consent, there was the requisite amount and the diversity of citizenship necessary to give the United States Circuit Court jurisdiction of the cause. The case, therefore, resolves itself into an inquiry as to whether, if irregularly removed, it could be lawfully tried and determined.

Removal proceedings are in the nature of process to bring the parties before the United States court. As in other forms of process, the litigant has the right to rely upon the statute and to insist that, in compliance with its terms, the case shall be taken from the state to the Federal court in the proper district, on motion of the proper person, at the proper time, and on giving the proper bond. But these provisions are for the benefit of the defendant and intended to secure his appearance. When that result is accomplished by his voluntary attendance, the court will not, of its own motion, inquire as to the regularity of the issue or service of the process,—or, indeed, whether there was any process at all, since it could be waived, in whole or in part, either expressly or by failing seasonably to object. *Powers* v. *C. & O. Ry.*, 169 U. S. 92, 98.

What took place in the state court may, therefore, be disregarded by the court because it was waived by the parties, and regardless of the manner in which the case was brought or how the attendance of the parties in the United States court was secured, there was presented to the Circuit Court a controversy between citizens of different States in which the amount claimed by one non-resident was more than $2,000, exclusive of interest and costs. As the court had jurisdiction of the subject-matter the parties could have been realigned by making Mackay plaintiff and the Development Company defendant, if that had been found proper. But if there was any irreg-

ularity in docketing the case or in the order of the pleadings such an irregularity was waivable and neither it nor the method of getting the parties before the court operated to deprive it of the power to determine the cause.

The Fourth question certified to us by the Circuit Court of Appeals is answered in the affirmative.

TEXAS & PACIFIC RAILWAY COMPANY *v.* PRATER.

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

No. 211. Submitted April 15, 1913.—Decided May 26, 1913.

There being evidence to sustain the verdict that plaintiff was not guilty of contributory negligence, the court below properly denied a motion to direct a verdict for the defendant, and this court affirms the judgment with ten per cent. damages.

183 Fed. Rep. 574, affirmed.

THE facts, which involve the validity of a verdict and judgment against a railroad company for personal injuries sustained by one of its employés, are stated in the opinion.

Mr. W. L. Hall for plaintiff in error.

Mr. C. C. Prater, pro se, and *Mr. A. W. Gregg* for defendant in error.

Memorandum opinion, by direction of the court, by MR. JUSTICE LAMAR.

The plaintiff, a locomotive engineer, sued for personal injuries resulting from a collision with a freight train

which had been left standing, without danger signals, on the track in the defendant's railroad yard at Thurber Junction, Texas. The company contended that he had been guilty of contributory negligence in failing to keep a lookout, in running at a high rate of speed, and disregarding rules requiring the engineer to keep the locomotive under control in anticipation that cars might be on the tracks within yard limits. The evidence for the plaintiff tended to show that he was in the exercise of proper diligence; that from his position on the right of the locomotive he could look straight down the track, but on account of the height of the boiler, could not see the freight train, which was standing on a curve, which there turned to the left; that it was about dark and the freight train having no danger signals, and being out of range of the headlight, was not seen by the fireman, on the left of the engine, until too late to avoid the collision, although the emergency brake was applied as soon as he saw the danger and gave warning to the engineer.

The defendant offered evidence tending to show that the speed exceeded that permitted in the yard limits and that the freight train could have been seen in time to stop if proper lookout had been kept. From the physical condition proved, and the whole evidence, the company moved the court to direct a verdict in its favor. The motion was overruled and the jury found for the plaintiff. There was no exception to the charge, but the case was taken to the Circuit Court of Appeals on the ground that, from the undisputed evidence, the plaintiff was shown to have been guilty of contributory negligence. That court held (183 Fed. Rep. 574) that though the evidence was conflicting that for the plaintiff was sufficient to sustain the verdict. In that view we fully concur; and, as there is no question of law involved, the judgment is affirmed with ten per cent. damages.

Affirmed.

FIRST NATIONAL BANK OF CLAREMORE *v.* KEYS.

FIRST NATIONAL BANK OF VINITA *v.* SAME.

CITIZENS' BANK OF PRYOR CREEK *v.* SAME.

HOGAN *v.* SAME.

ERROR TO THE SUPREME COURT OF OKLAHOMA.

Nos. 263, 264, 302, 303. Argued April 25, 28, 1913.—Decided May 26, 1913.

Registration laws are of statutory origin, and, in each case, the applicable statute determines what instruments are to be recorded and where and what the effect is of failure to record.

An act of Congress creating a new district in the Indian Territory and establishing a clerk's office therein, and which does not expressly so provide, does not require a chattel mortgagee to re-record his instrument in the new clerk's office.

Where the duty of transferring records of instruments from one clerk's office to another newly established is placed upon the clerk, rights of persons under such instruments are not lost on account of the failure of the clerk to comply with the statute.

Even if the decision of a state court having jurisdiction of a case transferred from a Federal court were subject to review here on a non-Federal question, this court would not, in the absence of manifest error, interfere with the discretion of the trial judge in permitting or refusing an amendment.

27 Oklahoma, 704, affirmed.

On July 20, 1906, the First National Bank of Claremore brought suit against Wat Mayes in the United States District Court in the Indian Territory, Northern District, sitting at Vinita. An attachment issued and was levied on cattle belonging to Mayes and located on his ranch near Pryor Creek. It appeared that he had given mortgages

on the herd to Vinita National Bank (1899), C. M. Keys & Co. (1901), First National Bank of Vinita (1903), Citizens' Bank (July 24, 1905), J. C. Hogan (July 27, 1905), Mary D. Mayes (Aug. 2, 1905).

These mortgagees intervened in the attachment suit and asked that the case be transferred to the Equity Docket and that the cattle be sold and the proceeds applied to the payment of their debts.

It appeared that the Bank of Claremore and the First National Bank of Vinita also had mortgages on real estate, and it was contended that having a lien on two funds they should be required to seek payment out of this land before receiving anything under their mortgages against the cattle. A receiver was appointed, who took charge of the property, real and personal. He sold the herd for $11,234.47. The case was then referred to a master, where all the mortgages were proved, although an attack was made on that given by Mayes to Keyes & Co. It appeared that being indebted to that firm $34,800.04, he, on October 28, 1901, gave them a note therefor due one month after date. To secure that note and any renewals thereof he, on October 29, 1901, executed a mortgage on 2,835 head of mixed cattle and their increase. The cattle were described as being located on the "mortgagor's range, 3 miles south of Pryor Creek, I. T.," then in the Northern Judicial District of the Indian Territory. The acknowledgment recited that "Mayes executed the same for the purposes and consideration therein named," omitting "and set forth" which it was claimed was required by the provisions of § 656, Mansfield's Digest of force in the Indian Territory. This mortgage, thus acknowledged, was filed for record Oct. 31, 1901, with the Clerk of the United States court, *ex officio* recorder for the Northern District of Indian Territory, at Muskogee, and was recorded Nov. 22, 1901.

At the hearing Mayes contended that he had shipped

enough cattle to pay off the mortgage debt. It appeared, however, that in January and March, 1905, he gave two notes aggregating $15,288.69. The master found that they were renewal notes representing the balance due on the original debt of $34,800.04, and were secured by the mortgage of Oct. 29, 1901. He held, however, that this mortgage, while oldest in date and while good against Mayes, was inferior to the attachment and the other mortgages because of the failure of Keys and Co. to re-record it at Vinita and transfer it to the index at Pryor Creek in pursuance of acts of May 27, 1902, 32 Stat. 276, c. 888, and February 19, 1903, 32 Stat. 842, c. 707, successively creating recording offices at those two places. He, therefore, recommended that the money should be paid in the following order: First National Bank of Vinita, $3,778.19 (mortgage of Jan. 16, 1903); First National Bank of Claremore, $4,869.10 (attachment issued July 20, 1905); Citizens' Bank of Pryor Creek, $1,824.68 (mortgage of July 24, 1905); J. C. Hogan, $6,187.00 (mortgage of July 27, 1905); Mary D. Mayes, $1,440 (mortgage of Aug. 2, 1905); Vinita National Bank (one of the cases by subsequent stipulation); Keys & Co., $15,808.69 (mortgage of Oct. 28, 1901).

Under this ruling nothing would have been paid on the mortgage to Keys & Co., which had been transferred to the Stock Yards Bank. They, therefore, filed exceptions, which were overruled. The court, however, confirmed the report and made the additional finding that "the mortgage of C. M. Keys & Co. is an absolute fraud by reason of their failure to renew or to advise people in any way, shape or form of the various payments that had been made and the transfers that had been made." The court directed that the real estate should be sold and the proceeds applied in the order of priority heretofore set out. Before this was done, Keys & Co. took the case to the United States Court of Appeals in the Indian Territory,

and while the cause was there pending, Oklahoma was made a State, and, under the Enabling Act (June 16, 1906, 34 Stat. 267, c. 3335; 34 Stat. 1286, c. 2911), the cause was transferred to the Supreme Court of Oklahoma, which (22 Oklahoma, 174), held that the acts of Congress did not require mortgages recorded at Muskogee to be re-recorded at Vinita, nor was the holder required to have them transferred to the index at Pryor Creek. It thereupon directed that the money should be paid to (1) the Vinita National Bank; (2) to Keys & Co., "the other creditors taking their places after them in the order decreed by the court below. Let the judgment of the court below be modified to conform to this opinion."

A motion for a rehearing was granted, and the then defendants in error urged many grounds why the judgment should be affirmed. The court rendered an elaborate supplemental opinion in which it held that the Keys mortgage was properly acknowledged; that it had not been rendered void by failure to take possession of the cattle; that there was no exception to the finding by the master, that the debt of $15,808.69 was due and secured by the mortgage; that no issue of fraud had been raised by the pleadings, "and the charge of fraud upon the merits seems to be without foundation." The court refused to make a final order of distribution, but adhered to the judgment of reversal previously made. The mandate was returned to the District Court of Craig County, Oklahoma.

Thereupon the Bank of Claremore, Citizens' Bank, First National Bank of Vinita, J. C. Hogan, and Mrs. Mayes called the court's attention to the fact that the Supreme Court had held that the issue of fraud had not been presented by the pleadings, and they asked leave to file amended answers to the intervention of Keys & Co., in which they denied the existence of any debt from Mayes to Keys & Co., averring that the mortgage was defectively

acknowledged, was fraudulent in law and in fact, or if originally good had lost its validity against creditors of Mayes because he had been permitted to retain possession of the herd.

The motions to amend were disallowed and (the Vinita National Bank, by consent, having been paid) the court entered a decree in conformity with the opinion of the Supreme Court, under which the proceeds of the cattle were to be applied to the payment of the mortgage of Keys & Co., transferred to the Stock Yards Bank. No distribution was made of the proceeds of the real estate. The Claremore Bank and the other plaintiffs in error again took the case to the Supreme Court of Oklahoma, which held that the District Court had merely followed its ruling and dismissed the writ of error. The case was then brought here on the ground that the construction of Federal statutes and the validity of a Federal judgment were involved.

Mr. W. H. Kornegay, with whom *Mr. J. Howard Langley* was on the brief, for plaintiffs in error.

Mr. Robert F. Blair for defendants in error.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court.

The Bank of Claremore levied an attachment upon cattle of Mayes, who had given several mortgages on the herd. The property did not sell for enough to pay all of the liens, and the various creditors united in an attack on the mortgage to Keys & Co., which, being the oldest in date would, unless defeated take all of the fund. This mortgage, however, was sustained by the Supreme Court of Oklahoma, and three of the contesting creditors brought their cases here. They were all argued together and were

submitted on the briefs and record in No. 263, in which there are 44 assignments of error. They need not, however, be separately considered, since the controlling question is whether the mortgage from Mayes to Keys & Co., duly recorded at Muskogee, on Oct. 31, 1901, lost its lien because it was not re-recorded in 1902 at Vinita, and was not transferred in 1903 to the indexes at Pryor Creek, under the acts of 1902 (32 Stat. 276) and 1903 (32 Stat. 843), successively creating new districts with recording offices at those two places.

Registration laws are of statutory origin, and the statute must in each case be examined to determine what instruments are to be recorded, where they are to be recorded, and the effect of a failure to record. Provision as to these matters was made by Congress when it declared that the registration laws of Arkansas should be of force in the Indian Territory, and that the clerk of the court should be *ex officio* recorder, with his office at Muskogee. In compliance with that law the mortgage from Mayes to Keys was duly recorded at Muskogee. Some months later Congress passed the act of May 27, 1902, 32 Stat. 276, c. 888, dividing the District, providing that the "clerk's office at Vinita shall be the Recorder's Office for the Northern District," in which Mayes' ranch was left. But as that statute did not require that recorded instruments should be re-recorded at Vinita, Keys & Co. were under no obligation to do what the law did not demand, but could rely on the fact that their mortgage had been duly registered at Muskogee in accordance with the law of force when it was given and when the cattle were in that district.

Nor is the case different under the act of February 19, 1903, 32 Stat. 842, c. 707. It created 25 recording offices, named Pryor Creek as the place for the office in the Fifth District, in which Mayes' ranch was located, made the clerk *ex officio* recorder, provided that he should receive

the usual fees for registering deeds and mortgages, but that all sums collected in excess of $1,800 should be paid over to a school fund. It then declared that "such instruments heretofore recorded with the clerk of any United States Court in Indian Territory shall not be required to be again recorded under this provision, but shall be transferred to the indexes without further cost, and such records heretofore made shall be of full force and effect, the same as if made under this statute."

This provision of the act, following as it does the clause on the subject of fees, was evidently addressed to the clerk, who was thereby required, without cost, to transfer to the indexes in his office all papers previously recorded at Muskogee or Vinita relating to property in his district. There was no provision in the statute that the lien of a duly recorded mortgage should be lost against subsequent purchasers if not transferred to the index, and that silence cannot be construed into an affirmative declaration that such penalty should follow non-action by the mortgagee. Congress could have made it the duty of grantees to have their recorded documents again registered in the new district on pain of holding their rights subject to those which might be acquired by *bona fide* purchasers. But it made no such provision and we need not, therefore, inquire as to whether, had it done so, it would not have been necessary to give a reasonable time in which to have deeds and mortgages reindexed. The duty to transfer to the index was imposed on the clerk. No time was fixed within which it should be done. No penalty for its non-performance was imposed on the holder of any instrument previously and duly recorded. Purchasers were charged with notice of territorial limits and that Mayes' ranch had been in the old Northern District at a time the registration office was located at Muskogee, and that there they must look to see whether during that period sales had been made or mortgages given on property then

located within the District. This is in accord with the practice in the many instances in which counties have been subdivided. In none of which do we find that holders of mortgages on property falling in the new county lost their rights because of a failure to have them refiled, reindexed, or re-recorded at the new county seat.

This conclusion disposes of the case, because the other assignments of error relate to findings by the master to which the plaintiffs in error took no exception, but on which they were heard in the Supreme Court of Oklahoma, upon their application for a rehearing. In the rulings of that court, so far as they are subject to review on this writ, we find no error. As to those made when the mandate was returned to the District Court, it is sufficient to say that they are all foreclosed by the refusal to permit plaintiffs in error to amend. For even if the decision of a state court having jurisdiction of a case transferred from a Federal court were subject to review here on a non-Federal question, we would not interfere with the discretion of the trial judge in permitting or refusing an amendment except in case of manifest error. Cf. *Spencer* v. *Lapsley*, 20 How. 264. The judgment of the Supreme Court of Oklahoma is

Affirmed.

SWIGART *v.* BAKER.

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

No. 944. Argued April 9, 10, 1913.—Decided May 26, 1913.

A statutory provision for charging cost of construction of an improvement against property benefited may include the cost of maintenance as well as of actual construction; and in determining the scope of the provision the court may arrive at the legislative intent by examining the history of the statute.

The history of the Reclamation Act of 1902 shows that it was the intent of Congress that the cost of each irrigation project should be assessed against the property benefited and that the assessments as fast as collected should be paid back into the fund for use in subsequent projects without diminution. This intent cannot be carried out without charging the expense of maintenance during the Government-held period as well as the cost of construction.

Subsequent legislative construction of a prior act may properly be examined as an aid to its interpretation: and so *held* that statutes passed since the Reclamation Act of 1902 indicate that Congress has construed the provisions of that act as authorizing the Secretary of the Interior to assess cost of maintenance as well as of construction of irrigation projects upon the land benefited.

Where the executive officer charged with its enforcement annually reports to Congress the same construction of a statute, it is significant if Congress never has taken any adverse action in regard to such construction.

Quære whether Congress may not by legislation construe a prior statute so that as to all matters subsequently arising the action is legislative in character.

The repeated and practical construction of the Reclamation Act of 1902 by both Congress and the Secretary of the Interior, in charging cost of maintenance as well as construction, accords with the provisions of the act taken in its entirety and is followed by this court.

199 Fed. Rep. 865, reversed.

THE facts, which involve the construction of the Reclamation Act of 1902 and whether the purchaser was

required thereunder to pay the annual charges for maintaining the irrigation project by which his lands are irrigated, are stated in the opinion.

Mr. Assistant Attorney General Knaebel, with whom *Mr. S. W. Williams* and *Mr. W. W. Dyar* were on the brief, for appellant.

Mr. W. T. Dovell for appellee:

The unambiguous language of the act requires the charges for operation and maintenance to be paid out of the "Reclamation Fund" until such time as the major portion of the lands under a project shall have been paid for, when the management shall pass to the water users, and then to be maintained at their expense. The contention of the Government that the act is to be so construed as to permit the Secretary of the Interior to keep the "Reclamation Fund" intact without diminution on account of maintenance charges, and arbitrarily levy and collect by coercive measures of his own invention the charges of operation and maintenance, prior to the time when the major portion of the lands have been paid for as provided for in § 6 of the act, cannot be maintained.

In § 4 of the act, in directing how charges should be apportioned to the acreage under the ditch for the purpose of fixing the price at which water is to be sold, it is expressly provided that the charges shall be fixed so as to return to the fund the cost of construction. Nowhere is there a provision made for the return to the fund of any of the cost except the cost of construction. Had Congress intended that the fund should never be diminished by maintenance charges, here would have been an apt place to express such an intention.

Sections 5 and 6 also support appellee's contention. It is contemplated that during all this time the management and operation of the works shall remain, as they still are

in our case, with the officers of the Reclamation Department; but when the time shall be reached that the major portions of the lands under the ditch shall have been paid for, the management and operation shall be taken over by the water users themselves under some form of organization and under rules to be approved by the Secretary of the Interior, and then the works shall be maintained at the water users' expense.

This is the act as the law-making body saw fit to write it. As it is clear in its meaning there is no function for this tribunal to perform except to interpret it as written and enforce the clearly expressed design of Congress. If there be no ambiguity in the act, there is no room for construction. *Hamilton* v. *Rathbone*, 175 U. S. 421; *United States* v. *Goldenberg*, 168 U. S. 102; *Lake County* v. *Rollins*, 130 U. S. 670.

The contemporaneous and practical construction which the Interior Department has for some time placed upon this act, and which appellant contends should be now followed by the judicial department, is incorrect. The Interior Department has disobeyed the express mandate of the law, and appellants now insist that the statute has been in effect modified by this disobedience. Malfeasance, however, cannot ripen into an amendment of the law. Cooley Const. Lim., 7th ed., p. 105; *Houghton* v. *Payne*, 194 U. S. 99; *United States* v. *Graham*, 110 U. S. 219; *United States* v. *Alger*, 152 U. S. 384; *Webster* v. *Luther*, 163 U. S. 331; *St. Paul &c. Ry. Co.* v. *Phelps*, 137 U. S. 528; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1; *Fairbank* v. *United States*, 181 U. S. 310; *United States* v. *United Verde Copper Co.*, 196 U. S. 207.

As to interpretation by subsequent legislation, if any words used in statutes passed subsequently thereto indicate that Congress interpreted the "Reclamation Act" as providing for the payment of maintenance and operation charges otherwise than out of the "Reclamation

Fund" prior to the time this period was reached, an all sufficient answer is if the subsequent Congress put such an interpretation upon the act it was and is a wrong interpretation, as the words of the act itself indisputably demonstrate. See in this respect *Hamilton* v. *Rathbone*, 175 U. S. 419; *Koshkong* v. *Burton*, 104 U. S. 678; Sutherland on Stat. Constr.; and see 2 Lewis' Stat. Cons., 2d ed., § 447.

Appellants may not resort to the doctrine of construction by statutes *in pari materia*. This rule, like the other, has no application except where an actual ambiguity exists in the statute, and does not obtain where the intention of the law-making body has been clearly expressed. *Barnes* v. *Railroad*, 17 Wall. 307, *Lamp Chimney Co.* v. *Brass & Copper Co.*, 91 U. S. 662.

The well defined principle announced by all the courts and text writers is that prior or subsequent legislation may be resorted to to solve but never to create an ambiguity.

When a law making body designs to repeal or amend previous legislation, it has a well recognized method of doing so, so that the purpose cannot easily be mistaken, but no attempt to amend this act in that way has ever been made by Congress.

While the Attorney General in 27 Op. Atty. Gen'l, 374, approved the practice of the Interior Department in assessing charges for maintenance and operation against the water users, under our form of government even one so high in official life as the Attorney General has not the power to change existing law. Courts do not yield their functions out of deference to the opinion of officers of other departments. *Deming* v. *M'Claughry*, 113 Fed. Rep. 639; aff'd 186 U. S. 49.

There is no presumption that Congress would require water users to pay the cost of maintenance. It was the policy of the American Government to recognize the

reclamation of arid lands as a public measure. *United States* v. *Burley*, 179 Fed. Rep. 1.

The Government maintains lighthouses upon the coast, yet the suggestion has never been made that the support thereof should be paid for wholly by those who navigate the sea.

The reports of committee and debates in Congress make the purpose clear that the users shall not pay any charges until after the work is turned over to them, and that the cost of operation and maintenance of reservoirs and irrigation works shall be paid from the irrigation fund. See Cong. Rec., Vol. 35, pt. 3, p. 2276.

Reports of committees may be used as an aid to construction, where there is any ambiguity. *Johnson* v. *Southern Pacific Ry. Co.*, 196 U. S. 20. See also Cong. Rec., Vol. 35, pt. 7, pp. 6683, 6753.

Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived. *United States* v. *Fisher*, 2 Cr. 386.

While courts have said that resort is not to be had to the debates in legislative bodies to determine the construction of an act, courts do repeatedly resort to that very source for enlightenment. *Wadsworth* v. *Boysen*, 148 Fed. Rep. 771; *Binns* v. *United States*, 194 U. S. 486; *Roberts* v. *Pac. Co.*, 186 Fed. Rep. 938; *Jennison* v. *Kirk*, 98 U. S. 453; *United States* v. *Wilson*, 58 Fed. Rep. 768; *Ex parte Farley*, 40 Fed. Rep. 66; *Simonds* v. *St. Louis &c.*, 192 Fed. Rep. 353.

MR. JUSTICE LAMAR delivered the opinion of the court.

The Sunnyside Unit of the Yakima Irrigation Project was so far completed in 1909 that the Secretary of the Interior gave notice that water would be furnished for irrigation purposes and that "the charges would be in

two parts: 1. Building of the irrigation system, $52 per acre . . . 2. For operation and maintenance, 95 cents per acre per annum." The appellee, Baker, applied for a water right and paid the assessed charges until 1911, when he refused to pay the 95 cents per acre for maintenance and operation, on the ground that the Secretary had no authority to make such an assessment. The Reclamation officers thereupon threatened to cut off the supply of water and Baker at once filed, in the United States Circuit Court for the Eastern District of Washington, a Bill against them, alleging that the charge for maintenance was illegal, that his crops would be destroyed if water was not furnished and praying that the Reclamation officers should be perpetually enjoined from cutting off the supply of water because of his failure to pay the illegal assessment.

The defendants in their answer set up that the charge of 95 cents per acre, per annum, for maintenance and operation had been lawfully made by the Secretary of the Interior under the power conferred upon him by statute. The case was heard on Bill and Answer and the Bill dismissed. 196 Fed. Rep. 569. Baker took the case to the Circuit Court of Appeals, where, one judge dissenting, the decree was reversed (199 Fed. Rep. 865) on the ground that the Secretary of the Interior could not assess irrigable land with the cost of maintenance and operation.

Since its adoption in 1902 (32 Stat. 388, c. 1093) the act has always been differently construed by the Secretary of the Interior who, in granting water-rights, has uniformly assessed the landowners with the cost of maintenance. The contrary construction by the Circuit Court of Appeals raises a question of great importance to the owners of the land now irrigated. It is of equal importance to the Government and to that part of the public interested in the reclamation of those portions of the arid region which can be irrigated as soon as funds are available. For, by so much as the fund is depleted in the payment of

operating charges at one place, by so much is the reclamation of arid lands elsewhere postponed.

The statute provides that the cost of construction of the Project shall be charged against the land within the irrigable limits. The phrase is not expressly defined and being general in its terms is not necessarily limited to building, but may include the preservation and maintenance of what has been built. For example, a statute authorizing the levy of a tax to construct a sewer was held to empower the city to levy taxes for its maintenance. Power to construct a dock imposed the duty of operating it. Permission to "construct internal improvements" warranted the purchase of a plant already built, and authority to construct a road conferred power to maintain it. *In re Fowler*, 57 N. Y. 60; *Seymour* v. *Tacoma*, 6 Washington, 138; *Attorney General* v. *Boston*, 142 Massachusetts, 200; *Pelham* v. *Woolsey*, 16 Fed. Rep. 418; *Atchison &c. Ry.* v. *McConnell*, 25 Kansas, 370; *Bell* v. *Maish*, 137 Indiana, 226; *Weston* v. *Hancock County*, 98 Mississippi, 800, 54 So. Rep. 307. So, in the present case the statute provides that the Secretary may assess "the cost of construction of the project" without defining the term, and it may assist in arriving at the legislative intent to refer briefly to the facts leading up to the passage of the Reclamation Act.

The official reports show that, in 1902, there were in sixteen States and Territories 535,486,731 acres of public land still held by the Government and subject to entry. A large part of this land was arid, and it was estimated that 35,000,000 acres could be profitably reclaimed by the construction of irrigation works. The cost, however, was so stupendous as to make it impossible for the development to be undertaken by private enterprise, or, if so, only at the added expense of interest and profit private persons would naturally charge. With a view, therefore, of making these arid lands available for agricultural purposes by an expenditure of public money, it was pro-

posed that the proceeds arising from the sale of all public lands in these sixteen States and Territories should constitute a Trust Fund to be set aside for use in the construction of irrigation works—the cost of each Project to be assessed against the land irrigated, and as fast as the money was paid by the owners back into the Trust, it was again to be used for the construction of other works. Thus the fund, without diminution except for small and negligible sums not properly chargeable to any particular Project would be continually invested and reinvested in the reclamation of arid land. See H. R. Report, No. 1468, 57th Congress, 1st session.

The general outline of this plan was approved by Congress, which, on June 17, 1902, passed "An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands." [1] 32 Stat. 388, c. 1093.

---

[1] The proceeds of the public land less certain deductions, were, sec. 1, "reserved, set aside, and appropriated as a special fund in the Treasury to be known as the 'Reclamation Fund,' to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories, and for the payment of all other expenditures provided for in this Act."

Sec. 5. The entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract, as provided in section four. . . . The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this Act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. . . .

The statute provided that the money arising from the sales of the public lands in these States and Territories was to be known as the Reclamation Fund and was to be used for the purpose of reclaiming arid lands. Provision was made for preliminary surveys, and when the Secretary determined that a Project was practicable, he was authorized to make contracts for its construction, if there were funds available. The land capable of being irrigated was to be open only to homestead entry and (sec. 4) the Secretary was then to give notice "of the charges which should be made per acre and the number of installments, not exceeding ten, in which the charges should be paid; these charges to be determined with a view of returning to the Reclamation Fund the estimated cost of the construction of the project . . . and all moneys received from the above sources shall be paid into the Reclamation Fund. . . . The Secretary of the Interior is hereby authorized and directed to use the reclamation funds for the operation and maintenance of all reservoirs and irrigation works constructed under the

---

Sec. 6. The Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this Act: Provided, That when the payments required by this Act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: Provided, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

Sec. 10. The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect."

provisions of this act; provided that when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby to be maintained at their expense; . . . provided that the title to and management and operation of the reservoirs and works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress."

In pursuance of this act, various Works, including that of the Sunnyside Unit of the Yakima Project, were constructed and notice was given of the charges that would be made. At first they were stated in a lump sum, cost of building, maintenance and operation making up the total. After 1906, the charges were separately stated substantially thus: "1. For building, $—— per acre; 2. For maintenance and operation, $—— per acre per annum." [1]

1. The contention that this last item could not be assessed against the irrigated land is based upon the fact

---

[1] Examples of the form of Notice showing such division of charges, are to be found in "Report of Reclamation Service, 1908–1909," pp. 124, 130, 136, 163, 200. The Notice for the Sunnyside Project recites that water "will be furnished from the Sunnyside Project under the provisions of the Reclamation Act . . . and the charges which shall be made per acre of irrigable land which can be irrigated by the waters from said irrigation project are in two parts, as follows:

1. The building of the irrigation system, $52 per acre of irrigable land, payable in not more than 10 annual instalments. . . .

2. For operation and maintenance, which will as soon as the data are available, be fixed in proportion to the amount of water used, with the minimum charge per acre of irrigable land whether water is used or not. The operation and maintenance charge for the irrigation season of 1909, and until further notice, will be 95 cents per acre of irrigable land, for which water is ready in the irrigation season of 1909, whether water is used thereon or not.

that § 4 authorizes the Secretary to make the estimated charges "with a view of repaying the cost of construction of the Project." But an analysis of the act shows that the charges were not limited to the building of the dam or the digging of the canals, but included the purchase of land needed for reservoirs and everything chargeable to "the cost of construction of the project," which Project was later to be turned over as a going concern to the landowners. The cost to the United States represented not only the expense of building but of maintenance up to the time it was surrendered to the water users. And as the Government collected no interest, the result would be that if the cost of maintenance was not returned there would be a constant and heavy diminution of the Reclamation Fund. That fund was the proceeds of public land and was not intended to be diminished for the benefit of any one project, but, without increase by interest and undiminished by local expenses, was again to be used for constructing other works. The cost of surveying those projects which were not developed and the administrative expenses not chargeable to any particular Project might not be repaid, but these sums were so small as to be negligible as against the fundamental idea of the Bill, that the proceeds of public land as a Trust Fund should be kept intact and again invested and reinvested for constructing new irrigation works. But if it should be taxed with cost of maintenance, it follows as a mere matter of mathematics that the Reclamation Fund would be greatly depleted if not entirely consumed and the proceeds of the public domain be thus diverted to the payment of local expenses.

2. If there could be any doubt as to the meaning of the statute, it disappears in the light of congressional construction which may properly be examined as an aid in its interpretation. *Burridge* v. *Detroit*, 117 Michigan, 557. The Secretary of the Interior annually made re-

ports to Congress in which these charges of maintenance and operation were shown. No adverse action was taken as to these assessments by the Secretary. On the contrary, Congress in several instances showed that it construed the act in the same way. This distinctly appears in statutes providing a method by which irrigable lands in Indian reservations might be opened to entry and brought within the limits of an irrigation project. In these cases it was provided that the person taking up such land should pay the amount due to the Indians "*in addition to the charges for construction and maintenance of the irrigation system made payable into the reclamation fund by the provisions of the Reclamation Act.*" (Act March 6, 1906, 34 Stat. 53, c. 518, § 2.) A similar recital is found in the statute relating to the acquisition of irrigable land in the Blackfeet Reservation, where it was provided that if any such lands were "deemed practicable for an irrigation Project under the provisions of the Reclamation Act, said lands shall be disposed of under the provisions of said act and settlers shall pay, *in addition to the cost of construction and maintenance provided therein*, the appraised value of the Indian land." (March 1, 1907, 34 Stat. 1037, c. 2285.) See also 35 Stat. 85, c. 153; *Id.*, 558, 562, c. 237; 36 Stat. 835, c. 407.

3. It is argued that though these expressions show that Congress, in 1906 and 1907, thought that the cost of maintenance was chargeable under the Reclamation Act of 1902, yet no effect should be given to such legislative interpretation since Congress is not authorized to exercise the judicial function and has no power to construe existing statutes. But these acts of 1906 and 1907 were passed before the appellee, Baker, applied for his water-rights in 1909, and there are cases (*State* v. *Orphans' Home*, 37 Oh. St. 275; *Dequindre* v. *Williams*, 31 Indiana, 444), which would support a holding that this language, as to future transactions, was legislative in charac-

ter and incorporated these provisions into the original act. We refer to them, however, as we do to the notices given and charges made by the Secretary of the Interior, as showing the repeated and practical construction which has been given the statute from the beginning, and in the light of which many water-rights have been granted and many hundreds of thousands of dollars for maintenance paid to the Government as a part of "the cost of construction of the project." This practical interpretation by Congress and the Secretary of the Interior accords with the provisions of the act taken in its entirety.

The decree of the Circuit Court of Appeals is reversed, that of the District Court is affirmed and the case remanded to the District Court.

Reversed.

DILL *v.* EBEY, RECEIVER OF THE CITIZENS' BANK AND TRUST COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 191. Argued March 17, 1913.—Decided May 26, 1913.

Section 723, Rev. Stat., declaring that suits in equity shall not be sustained where a plain, adequate and complete remedy may be had at law, by its own terms applies only to courts of the United States; and does not apply to a territorial court, the procedure of which has been prescribed according to the law of an adjoining State, and to c. 18, Rev. Stat., which does not include § 723.

Even if a demurrer in an action in the United States Court of Indian Territory, on the ground that the action should be at law instead of in equity, does amount to an assertion of right under § 723, Rev. Stat., that section is so plainly inapplicable to the practice in such court that no substantial Federal question is raised that would war-

rant this court in reviewing, under § 709, Rev. Stat., the judgment of the state court to which the case was transferred on Statehood.

Demurrer in the territorial court, on the ground that the action should be at law and not in equity, is not such a demand for a jury trial as to amount to specially setting up a right under the trial by jury provision of the Federal Constitution.

In order to entitle plaintiff in error to have this court review a judgment of the state court in an action transferred to that court from the territorial court after Statehood, the Federal question should be specially set up in the state court at the proper time; he cannot rely on a premature assertion of the right in the territorial court.

Writ of error to review, 27 Oklahoma, 584, dismissed.

THE facts, which involve the jurisdiction of this court to review judgments of the state court under § 709, Rev. Stat., and Judicial Code, § 237, and whether a Federal question exists and was properly and specially set up in the state court, are stated in the opinion.

Mr. Frank B. Burford, with whom *Mr. John H. Burford* was on the brief, for plaintiff in error.

Mr. Frederic D. McKenney, with whom *Mr. Clinton A. Galbraith* was on the brief, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This writ of error brings before us a judgment of the Supreme Court of the State of Oklahoma, affirming a judgment rendered by the District Court of Okfuskee County, holding the plaintiff in error liable for the amount of an unpaid subscription made by him to the capital stock of a bank of which the defendant in error is the Receiver.

The case is brought here under § 709, Rev. Stat., Judicial Code, § 237, and the jurisdictional question is raised.

The action was commenced in the United States court

for the Western District of the Indian Territory on September 17, 1906, by Ebey, as receiver of the Citizens Bank and Trust Company, against Dill, the plaintiff in error, and four others, by the filing of a complaint in equity setting forth that the defendants had organized the Bank and caused it to be incorporated for the purpose of transacting a general banking and trust business at Stonewall, in the Indian Territory; that the articles of incorporation and certificate required by law were properly filed, setting forth the objects and purposes of the corporation, and reciting that the capital stock was $25,000, divided into shares of $25 each, and that $10,000 thereof had been actually paid in by the subscribers, who were the defendants, and that they had severally taken certain shares of stock, of which 80 shares, of the par value of $2,000 were issued to Dill; that he had not paid any part of this par value, or anything of value, for the stock subscribed for by and issued to him; that defendants organized the Bank without any purpose or intent to pay for its capital stock, except $2,000 paid in by one of the other defendants, and that this latter sum was paid in with the distinct understanding that it should be returned, and it was returned, after the corporation became a going concern; that the Bank was and is insolvent, and on the petition of one of its creditors the plaintiff was appointed by the United States court for the Southern District of the Indian Territory, Receiver to take charge of all its property and effects and administer them for the benefit of its creditors; that the liabilities as shown by its books were $15,179.02; that a great deal of its paper was worthless, and a very small sum could be realized from the same and the rest of its assets; that after six months' effort the plaintiff had only been able to collect on notes $60.50, and to realize on other property the sum of $100; that all of the capital stock represented as paid, namely, $10,000, and the assets in the hands of the plaintiff as

Receiver, would not be sufficient to pay the creditors; that on a partial presentation of these facts to the judge, an order was made directing the plaintiff as Receiver to institute proper proceedings against the defendants as subscribers to the capital stock, to recover the respective amounts remaining unpaid on said subscription, or for the stock issued to them, for the benefit of all the creditors of the bank, and that this suit was commenced in compliance with that order. "That the plaintiff has no adequate remedy at law, and unless this court takes jurisdiction of this suit in equity he will be driven to a multiplicity of actions in trying to enforce the liability of said defendants at law, and the funds of said estate will be greatly depleted in paying the additional costs and expenses necessary in filing and prosecuting such actions."

November 4, 1907, Dill filed a demurrer to the complaint, upon the following grounds: (a) That it did not state sufficient facts to authorize a court of equity to assume jurisdiction; (b) That it showed upon its face that plaintiff had a plain, adequate, and complete remedy at law; and (c) That defendant was entitled to a trial by jury under the laws and Constitution of the United States, of which he would be deprived should the cause be tried in equity. The demurrer was overruled, and he took an exception.

Thereafter, and on November 16, 1907, by proclamation of the President (35 Stat. 2160), the State of Oklahoma, including the former Territory of Oklahoma and Indian Territory, was admitted into the Union by virtue of the Enabling Act of June 16, 1906, 34 Stat. 267, c. 3335. By § 20 of this act (34 Stat. 277), as amended by act of March 4, 1907, 34 Stat. 1286, c. 2911, it was provided that all causes pending in the District Courts of Oklahoma Territory and in the United States courts in the Indian Territory at the time said Territories should become a State, not transferred to the United States Circuit or

District Courts under previous sections, should be "proceeded with, held and determined by the courts of said State, the successors of said district courts of the Territory of Oklahoma, and the United States Courts in the Indian Territory; with the right to prosecute appeals or writs of error to the supreme or appellate court of said State, and also with the same right to prosecute appeals or writs of error from the final determination in such cases made by the supreme or appellate court of such State to the Supreme Court of the United States, as is provided by law for appeals and writs of error from the supreme or final appellate court of a State to the Supreme Court of the United States."

Upon Statehood, the present action was transferred to the District Court of Okmulgee County, and the defendant Dill, now plaintiff in error, obtained its transfer from that court to the District Court of Okfuskee County. There he answered upon the merits, admitting the organization and incorporation of the Bank, and that he subscribed for eighty shares of its capital stock, but alleging that he paid the consideration therefor to the Bank at the time, and denying any indebtedness to the plaintiff on the stock.

If any of the other defendants pleaded to the action, the transcript presented here does not show it. The cause, however, came on for trial before the court without a jury, the plaintiff, the defendant Dill, and another defendant named Malott, appearing respectively in person and by attorney. The issue as between the plaintiff and Malott was declared to be, whether the latter had in fact subscribed for eighty shares of the stock of the Bank, for the par value of which the plaintiff sought to hold him liable. The trial court found in favor of the defendant Malott, and against the defendant Dill, and rendered a decree against the latter for $2,000, together with interest and costs.

Dill moved for a new trial on several grounds, the only one here significant being—"Error of the court in trying the said cause without submitting the same to a jury, when the parties thereto had not waived a jury trial."

This motion having been denied, he appealed to the Supreme Court of Oklahoma, renewing there the insistence that the cause of action alleged in the complaint was cognizable at law and not in equity, and that under the Constitution and laws of the United States he was entitled to a trial by jury. The court overruled this contention and on rehearing adhered to the same view, so that the judgment of the District Court was affirmed (27 Oklahoma, 584), and the case comes here.

It is insisted that whatever rights or immunities, under the laws of the United States, had been asserted by defendant in the course of the litigation prior to Statehood, were preserved to him after Statehood by the clause above quoted from § 20 of the Enabling Act, together with § 1 of the schedule to the state constitution (Okla. Comp. Laws, 1909, p. 137), the language of which is: "No existing rights, actions, suits, proceedings, contracts, or claims shall be affected by the change in the forms of government, but all shall continue as if no change in the forms of government had taken place."

Without passing upon the soundness of this proposition, we may, for present purposes, assume it to be sound. *Blanchard* v. *Ezell*, 106 Pac. Rep. 960; *Garnsey* v. *State*, 112 Pac. Rep. 24; *Pacific Mutual Life Ins. Co.* v. *Adams*, 112 Pac. Rep. 1026; *Choctaw Electric Co.* v. *Clark*, 114 Pac. Rep. 730; *St. Louis & S. F. R. Co.* v. *Cundieff*, 171 Fed. Rep. 319, 322.

Next, the insistence is that by his demurrer, filed before Statehood, and specifying, as one of the grounds, that the plaintiff had "a plain, adequate, and complete remedy at law," the defendant clearly asserted a right or immunity under § 723, Rev. Stat., which declares that—"Suits in

equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." This section, however, by its own terms applies only to "courts of the United States;" and when afterwards a United States Court was established in the Indian Territory by the act of March 1, 1889, c. 333, 25 Stat. 783, it was by the sixth section enacted—"That the provisions of chapter eighteen, title thirteen, of the Revised Statutes of the United States shall govern such court, so far as applicable; *Provided*, That the practice, pleadings, and forms of proceeding in civil causes shall conform, as near as may be, to the practice, pleadings, and forms of proceeding existing at the time in like causes in the courts of record of the State of Arkansas, any rule of court to the contrary notwithstanding." Chap. 18 of Title 13, Rev. Stat., includes some sections prescribing the forms of procedure, but not § 723. However, the proviso making the practice, pleadings, and forms of procedure conformable to those existing in the State of Arkansas must of course be given effect. Moreover, in the act of May 2, 1890, enlarging the jurisdiction of the court (c. 182, 26 Stat. 81, 95), it was in § 31 enacted that certain provisions of the Arkansas statutes, as contained in Mansfield's Digest of 1884, should be extended over and put in force in the Indian Territory, among them being chapter 119, relating to pleadings and practice. That chapter (Mans. Dig., §§ 4914, etc.) abolishes forms of action; provides that there shall be but one form of civil action; enacts that the proceedings therein may be of two kinds, at law or in equity: (§ 4925), that "An error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings by an amendment in the pleadings and a transfer of the action to the proper docket;" and (§ 4926), that such error may be corrected on motion. Section 5028 provides that the

defendant may demur to the complaint for want of jurisdiction of the court over the person or the subject-matter, the plaintiff's want of legal capacity, the pendency of another action, a defect of parties, plaintiff or defendant, or "*Fifth*, That the complaint does not state facts sufficient to constitute a cause of action." Evidently, under this mode of pleading, the objection that the action is in equity, whereas it ought to be in law, is not a ground of demurrer. The liberality of the system is illustrated in *Zufall* v. *United States*, 1 Ind. Terr. 638, 643; *Sparks* v. *Childers*, 2 Ind. Terr. 187, 198; *Hampton* v. *Mayes*, 3 Ind. Terr. 65, 72; *Rogers* v. *Nidiffer*, 5 Ind. Terr. 55, 58. In *Indian Land & Trust Co.* v. *Shoenfelt*, 135 Fed. Rep. 484, the Circuit Court of Appeals for the Eighth Circuit, in an action commenced by bill in equity in the United States Court in the Indian Territory, seems to have held that § 723, Rev. Stat., was applicable. But see a later decision by the same court in *St. Louis & S. F. R. Co.* v. *Cundieff*, 171 Fed. Rep. 319, 321.

Upon this question, we hold that if the demurrer may be deemed an assertion by the defendant of a right, under § 723, Rev. Stat., to have the case determined in equity, yet that section was so plainly inapplicable to the practice in the territorial court that no substantial Federal question is raised, such as would warrant a review here under § 709, Rev. Stat.

It is, however, next insisted that the demurrer amounted also to a demand for a trial by jury, and an assertion of a right thereto under the Federal Constitution (extended to the Territory by c. 182, § 31, 26 Stat. 96); and that this right was denied by the subsequent decision of the state court sustaining the judgment notwithstanding the demurrer.

We deem this untenable, for two reasons, viz., (a) because the demurrer was not a proper demand for trial by jury; and (b) the right to such a trial, if it existed, and

was properly demanded prior to Statehood, was subsequently waived.

(a) We have already pointed out that under the Code as contained in Mansfield's Digest the grounds of demurrer are limited, and the contention that defendant will be deprived of a jury trial is not one of them. Indeed, since a demurrer has the necessary effect of admitting the facts alleged in the complaint, a demand for a trial by jury is quite incongruous; for a jury has no function to perform where the facts are admitted. It is evident that, under the local practice, the court of the Territory was warranted in overruling this ground of demurrer, and that no question of Federal right is raised by its action in doing so.

(b) As already pointed out, the defendant afterwards answered in the state court, denying the facts set up in the complaint. But he did not in his answer, nor at any other time so far as the record discloses, demand a jury trial until after the court had found against him on the facts and rendered judgment accordingly. He did then move for a new trial upon the ground, among others, that there was error in trying the cause without submitting it to the jury, "when the parties thereto had not waived a jury trial."

While it is conceded that under Mansfield's Digest, § 5105, and also under § 5785 of the State Code (Comp. Laws Okla. 1909, p. 1256), a jury might be waived, it is insisted that since the case was tried after Statehood, and pursuant to the procedure prescribed by the state law, § 5808 (Okla. Comp. Laws 1909, p. 1258) applied, which prescribes the manner in which trial by jury may be waived, viz., "By the consent of the party appearing, when the other party fails to appear at the trial by himself or attorney. By written consent, in person or by attorney, filed with the clerk. By oral consent, in open court, entered on the journal."

The record shows no written consent, nor any entry upon the journal of oral consent. It does show that the action was in form an action in equity, normally triable without jury, and it further shows a trial of the issues before the court without a jury, in which trial the now plaintiff in error participated in person and by attorney, without taking any exception to the mode of trial.

The state courts did not pass upon the question whether under the local practice this amounted to a waiver of a demand for jury trial; both courts having entertained the view that the cause was properly brought in equity, in which case there was no right to trial by jury.

We deem it clear that in order to entitle himself to a review here under § 709, Rev. Stat., on the ground of a deprivation of the right to trial by jury, plaintiff in error should have "specially set up" his alleged right in proper time in the state court, and should not have relied upon a premature assertion of that right, contained in a demurrer where it had no proper place, and not reiterated at any time when there was an issue of fact to be tried.

Writ of error dismissed.

MORSE *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 274. Argued May 2, 1913.—Decided May 26, 1913.

A naval officer who had been retired under § 23 of the act of 1861 for disability not originating in the line of duty and afterwards transferred to the three-quarter pay list under § 1558, Rev. Stat., by authority of a special act of Congress, *held*, not entitled to advanced pay to which officers retired on account of wounds or disabil-

ity incident to the service are entitled under the act of June 29, 1906.

There being nothing in the record to show that any injustice was done by the Retiring Board in retiring an officer of the navy for disability not originating in the line of duty, a special act of Congress subsequently passed for his relief and placing him on a list by which he receives increased pay, will not be construed as one relieving him from wrong and injustice and giving him the benefits of officers retired for disabilities incident to the service.

46 Ct. Cl. 361, affirmed.

THE facts, which involve the construction of the acts of Congress relating to pay of retired naval officers, are stated in the opinion.

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

Mr. Frederick De C. Faust, Acting Assistant Attorney General, for the United States.

MR. JUSTICE PITNEY delivered the opinion of the court.

The question in this case is whether the appellant, an officer on the retired list of the Navy, is entitled to the difference between the retired pay of a lieutenant and that of a lieutenant commander, from the date of the passage of the act of June 29, 1906, 34 Stat. 553, 554, c. 3590. At the time of his retirement he held the rank of lieutenant. The act referred to provides that any officer not above the grade of captain, whose name is borne on the official register of the Navy, and having certain other qualifications that the appellant concededly possesses, "and who has heretofore been, or may hereafter be, retired on account of wounds or disability incident to the service . . . may, in the discretion of the President, by and with the

advice and consent of the Senate, be placed on the retired list of the Navy with the rank and retired pay of one grade above that actually held by him at the time of retirement."

Appellant had served in the Navy during the Civil War, and thereafter until July 22, 1874, when he was retired on furlough pay upon approval by the President of the finding of a Retiring Board that he was incapacitated for performing the duties of his office, and that the incapacity did not originate in the line of duty. The Retiring Board acted under § 23 of the act of August 3, 1861, 12 Stat. 287, 291, c. 42, now §§ 1448 to 1457 of the Revised Statutes. Afterwards, and on July 17, 1878, under the provisions of § 1594, Rev. Stat., he was transferred by the President, with the consent of the Senate, from the furlough to the retired-pay list, and thereafter received 50 per centum of the highest sea pay of his grade as lieutenant.

On June 26, 1902, he was transferred from the half-pay list to the three-quarters pay list, under the authority of a special act of Congress, approved June 10, 1902, 32 Stat. 1444, c. 1075, which reads as follows: "Be it enacted, etc., that the Secretary of the Navy be, and he is hereby, authorized and empowered to transfer Lieutenant Jerome E. Morse, of the retired list of the United States Navy, from the half-pay list of the seventy-five per centum pay list of retired officers, under section fifteen hundred and eighty-eight of the Revised Statutes of the United States; and the said transfer shall take effect as of the passage of this Act."

The section of the Revised Statutes therein referred to is as follows: "Sec. 1588. The pay of all officers of the Navy who have been retired after forty-five years' service after reaching the age of sixteen years, or who have been or may be retired after forty years' service, upon their own application to the President, or on attaining the age

of sixty-two years, or on account of incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein, shall, when not on active duty, be equal to seventy-five per centum of the sea-pay provided by this chapter for the grade or rank which they held, respectively, at the time of their retirement. The pay of all other officers on the retired list shall, when not on active duty, be equal to one-half the sea-pay provided by this chapter for the grade or rank held by them, respectively, at the time of their retirement."

In January, 1907, appellant was nominated by the President for advancement to the grade of lieutenant commander on the retired list, in accordance with the provisions of the act of June 29, 1906, first above mentioned; the nomination was confirmed by the Senate, and the appellant was shortly afterwards advised in the usual mode by the Secretary of the Navy that he had been advanced from June 29, 1906, the date of the passage of the act.

The question is, whether the appellant (having all other qualifications for advancement under the act referred to) is to be considered as having been retired for disability incident to the service; and this depends upon the question whether the special act of June 10, 1902, operated to change his status from that of an officer retired for incapacity not incident to the service, to that of an officer retired for incapacity incident to the service.

The Court of Claims resolved this question against the claimant (46 Ct. Claims, 361). This we think is correct. The case is in effect governed by *Potts* v. *United States*, 125 U. S. 173, and *United States* v. *Burchard*, 125 U. S. 176.

The argument to the contrary is based upon the act of June 10, 1902. Its title is—"An act for the relief of Lieu-

tenant Jerome E. Morse." This is invoked as an aid in interpreting the meaning of the enactment. The query propounded is, "What was the relief that Congress intended to grant the claimant unless it was relief from the consequences of the wrong and injustice that had been done him by the Retiring Board in 1874?" But this query begs the whole question. There is nothing in the record to show that any wrong or injustice was done by the action of the Retiring Board. The answer to the query is, we think, written in unmistakable terms in the act itself, and in § 1588, Rev. Stat., to which it refers. The intended relief consisted in an increase of pay, measured by the difference between half-pay and three-quarters pay, for the rank that he held at the time of his retirement; that is to say, for the rank of lieutenant.

The case differs widely from *McLean* v. *United States*, 226 U. S. 374, and is not controlled by it.

Judgment affirmed.

CITIZENS NATIONAL BANK OF ROSWELL, NEW MEXICO, *v.* DAVISSON.

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

No. 551. Argued December 4, 1912.—Decided May 26, 1913.

Under the act of April 7, 1874, c. 80, § 2, the review by this court of judgments of the Supreme Court of a Territory is confined to determining whether the facts found by the court below sustain the judgment.

The facts found are certified to this court by the territorial Supreme Court either by adopting the findings of the trial court or by making separate findings of its own.

One holding in escrow an agreement and money to be paid to one of two parties according to the terms of the agreement, acts at his peril in dealing with either party without the consent of the other; and if the party to whom he pays the amount deposited is not entitled thereto he is liable to the other party.

An endorsement on the outside of the envelope containing the escrow, made by an officer of the bank acting as escrow-holder, does not protect the bank if it is not in accordance with the escrow agreement itself.

One cannot plead ignorance of a fact of which he has notice as an excuse for violating rights of parties whom he is bound to protect.

The fact that no officer of the bank has read an escrow agreement does not relieve the bank of responsibility for its action based on a separate memorandum made by one of its officers and which does not express the terms of the agreement.

An extension verbally agreed to for completing the record title to the property where the contract to convey expressly provides for such an extension without specifying its length in case defects are developed, is not a parol variation or modification of a written contract.

In this case a bank acting as escrow-holder with notice of the contract, having by paying over to one party failed in its duty to act impartially, it is liable to the other party who was entitled to the money under the contract.

16 N. Mex. 689, affirmed.

THE facts are stated in the opinion.

Mr. William C. Reid, with whom *Mr. James M. Hervey* was on the brief, for appellants:

The holder of papers deposited with a bank in escrow can redeliver the paper deposited by one of the parties, to him, after the other party to the escrow agreement is in default in the performance of everything he was bound to perform,—without the consent of such other party in default, or order of court. 16 Cyc. 576, 584; 11 Am. & Eng. Enc. of Law, 352; *Humphrey* v. *Richmond R. R. Co.*, 13 S. E. Rep. 985; *Burlington R. R. Co.* v. *Palmer*, 42 Iowa, 222; *Bodwell* v. *Webster*, 13 Pick. 411; *Hayton* v. *Meeks* (Ark.), 14 S. W. Rep. 864; *Equity Gaslight Co.* v.

McKeige (N. Y.), 34 N. E. Rep. 898; *Riggs* v. *Trees* (Ind.), 5 L. R. A. 696; *Hoyt* v. *McLagan*, 87 Iowa, 146.

The court below erred in holding that the appellant bank's liability in this action is not limited by the escrow agreement and also erred in holding that the liability of the bank is to be determined by the contract of Owens and Berryman, to which contract the bank was not a party, and the terms of which were not brought to its knowledge.

The court below erred in holding that the contract between Berryman and Owens did not become unenforceable under the statute of frauds.

The bank was a stranger to any alleged parol contract, but if, as assumed by the court, it is bound by it, it could only be so bound as a privy of Berryman and the statute of frauds is available by parties to the contract, their representatives and privies. 29 Am. and Eng. Enc. of Law, 807.

The contract in question being for the sale of land, is within the statute of frauds, and the agreement that the estate should have further time in which to secure an order of the court, was a subsequent and non-permissible variation of the contract in writing by parol. *Emerson* v. *Slater*, 22 How. 42; *Swain* v. *Seeman*, 9 Wall. 254, 274.

The effect of changing the time for performance of a written contract that was in escrow with the bank would be to make the entire contract a parol contract. *Kirchner* v. *Laughlin*, 5 N. Mex. 394; *Hasbrouck* v. *Tappen*, 15 Johnson, 200; *Hersley* v. *Savanstrom*, 41 N. W. Rep. 1027; *Athe* v. *Bartholomew*, 33 N. W. Rep. 110; *Abel* v. *Munson*, 18 Michigan, 305; *Cook* v. *Bell*, 18 Michigan, 389; 29 Am. and Eng. Enc. of Law, 824.

Oral promises to convey land gain no validity at law by reason of the taking possession of land by the proposed purchaser. 20 Cyc. 289.

Unless the contract expressly provides that a deed shall be made by a third person, it must be made by the vendor

himself, even though the words of the contract are that the vendor shall execute the deed or cause it to be executed. 29 Am. & Eng. Enc. of Law, 701; Warvelle on Vendors, § 419.

Mr. W. A. Dunn, with whom *Mr. G. A. Richardson* and *Mr. Ed. S. Gibbany* were on the brief, for appellees.

Mr. Justice Pitney delivered the opinion of the court.

This action was brought in the first instance in the District Court of Chaves County, in the then Territory of New Mexico, by Davisson, as plaintiff, against the Citizens National Bank of Roswell and Mrs. Owens, as defendants. He set up a claim to be paid $5,000 as commissions on a sale of real and personal property made by him as broker in her behalf to one C. C. Berryman, claiming a right to recover against the Bank on the ground that Mrs. Owens had given to him a written order directed to the Bank for payment of the $5,000 out of money of hers that was in the hands of the Bank. Mrs. Owens answered for herself and others as Executors of Solon B. Owens, deceased, denying liability to Davisson, on the ground that the sale in question had not been consummated; and, by a cross-complaint against the Bank, she set up that a contract of sale was made by her in behalf of the Executors of Solon B. Owens, deceased, with Berryman, and, upon its execution, the sum of $9,173.32 was by agreement of the parties deposited in the Bank together with a copy of the agreement; that after examination of the title by Berryman he required the Executors to procure an order of court authorizing them to sell and convey the land, whereupon it was agreed that the time for the conveyance of the title should be extended until such date as the Executors should be able to obtain the order so required, and that in the meantime Berryman should enter into

possession of the land, and he did go into possession thereof; that afterwards Berryman abandoned the possession of the land and removed to his former home in Arkansas, and because of his not being within the jurisdiction of the Territory the Executors could not obtain service of process upon him nor sue him for specific performance of the contract of sale; that under the provisions of the contract the Executors had elected to declare said $9,173.32 forfeited by the failure and refusal of Berryman to carry out the contract; wherefore judgment was prayed against the Bank as trustee for the Executors with respect to the money in question. The Bank answered both the complaint and the cross-complaint, not denying the making of the contract between Mrs. Owens and Berryman, but denying that it was a party thereto or had any knowledge thereof or concern therewith, and asserting that the $9,173.32 was deposited with the Bank by Berryman in escrow, and subject only to the terms of a written memorandum or agreement signed by the Bank's cashier; and that because these terms had not been complied with by Mrs. Owens the responsibility of the Bank to her had been terminated, and therefore the Bank had paid the whole of the sum of $9,173.32 to Berryman, in compliance with his demand.

Upon the issues thus joined, the parties proceeded to trial before the judge of the District Court, without a jury, who rendered judgment in favor of the Bank, dismissing both the complaint and the cross-complaint.

Davisson and Mrs. Owens appealed to the Supreme Court of the Territory, which court reversed the judgment and remanded the record to the District Court with instructions to reinstate the action and proceed in accordance with the views expressed in the opinion. 15 N. Mex. 680. The grounds of decision, briefly, were that by the escrow agreement the Bank became agent for both parties, that the memorandum did not authorize it to pay over

the money to either party, and that in taking sides and making payment to Berryman it acted at its peril, and should be held responsible to Davisson and Mrs. Owens if upon a retrial they should sustain their right to the money as against Berryman.

The case was accordingly brought on again to trial before the District Court, without a jury, with the result that judgment was rendered against the Bank, in favor of Davisson for $5,000 and interest (the amount of his commissions), and in favor of Mrs. Owens and the other Executors of the Estate of Solon B. Owens, deceased, for the residue of the $9,173.32. Upon appeal by the Bank to the Supreme Court of the Territory this judgment was affirmed, 16 N. Mex. 689, and the Bank appealed to this court.

Under the act of April 7, 1874, c. 80, § 2, 18 Stat. 27, 28, our review is confined to determining the question whether the facts found by the court below sustain the judgment. And these facts are to be certified to us by the territorial Supreme Court, either by adopting the findings of the trial court, or by making separate findings of its own. *Stringfellow* v. *Cain*, 99 U. S. 610, 613, 614; *O'Reilly* v. *Campbell*, 116 U. S. 418, 421; *Haws* v. *Victoria Copper Mining Co.*, 160 U. S. 303, 312; *Gildersleeve* v. *New Mexico Mining Co.*, 161 U. S. 573, 577; *Apache County* v. *Barth*, 177 U. S. 538, 542, 547; *Crowe* v. *Trickey*, 204 U. S. 228, 235; *Eagle Mining Co.* v. *Hamilton*, 218 U. S. 513; *Zeckendorf* v. *Steinfeld*, 225 U. S. 445, 448; *Rosaly* v. *Graham*, 227 U. S. 584, 590.

The Supreme Court of the Territory, in affirming the judgment of the District Court resulting from the second trial, adopted the findings of that court, and supplemented them with certain findings of its own. From these findings, and from the admissions of the pleadings, the essential facts of the case may be summarized as follows:

On August 21, 1908, Mrs. Owens, residing at Roswell,

Chaves County, New Mexico, acting for herself and in behalf of others who were her co-executors of the estate of her deceased husband, Solon B. Owens, made an agreement in writing with C. C. Berryman of Arkadelphia, Arkansas, for the sale to him of certain lands, belonging to the Estate, situate in Chaves County, containing 360 acres, with the live stock and other personal property thereon. Davisson negotiated the sale as broker, and was entitled to a commission of $5,000 for his services if the sale should be finally consummated. The price agreed to be paid by the purchaser was $80,000, payable $10,000 in cash upon the making of the agreement (receipt whereof was acknowledged), $12,000 by assuming payment of a note for that amount held by an insurance company in Ohio and not yet due, and the balance to be secured by five notes of $11,600 each, falling due September 10, 1909, and in the four successive years thereafter. The property was to be clear of all encumbrance excepting the $12,000 mortgage. By the terms of the agreement the party of the first part, within ten days from its date (that is, on or before August 31), was to furnish the party of the second part, at Roswell, a complete abstract of title showing a good merchantable title in the party of the first part; the purchaser was to have until September 10th to examine the abstract, and if it showed a good title the transaction was to be closed at Roswell on or before September 10th, by the delivery of a warranty deed to the purchaser, he paying the consideration according to the terms of the agreement. There were the following additional clauses, which should be quoted in full:

"6th. If, upon examination of the said abstract of title, it is found that the title is not a good merchantable title, then any objections made to said title, shall be pointed out by the party of the second part, and then the party of the first part shall have ten days in which to cure said objections. Should it prove, upon examina-

tion of said abstract, that the said title is not good, and same cannot be made good within such reasonable time, then it shall be the duty of the party of the first part to perfect said title at their expense, promptly in accordance with the requirements of the party of the second part, within the time stated, and if the party of the first part fails, neglects, or refuses to perfect said title in accordance with the requirements of the party of the second part, then the party of the second part shall have the right to perfect said title at the expense of the party of the first part who shall repay at Roswell, New Mexico, such sum of money as is expended by the party of the second part in perfecting said title, and if upon examination of said title it shall be shown that the title to the said property is not good and cannot be made good, then in such event this sale shall be annulled and the said $10,000.00 paid as purchase money hereinbefore provided for shall be returned by the party of the first part to the party of the second part.

"7th. Now, if the party of the first part complies with this contract and furnishes the abstract as provided for and the title is shown to be good or can be made good, and tenders to the party of the second part at Roswell, New Mexico, a warranty deed as provided for, and the party of the second part shall fail, neglect or refuse to comply with this contract, shall fail to accept deed and execute the said notes as provided for, then in such event, the party of the second part shall forfeit the said $10,000.00 paid, at the option of the party of the first part, or at his option *and* the party of the first part shall have a cause of action against the party of the second part, enforceable in the courts of Chaves County, New Mexico, for a specific performance of contract.

"8th. Should the party of the second part, upon examination of said abstract, find the title to the said property good and within the time stated, stand willing and

able to consummate this deal, to pay the balance of purchase money and execute the notes as above provided for and the party of the first part shall fail, neglect or refuse to execute said warranty deed in accordance with this contract, then in such event, the party of the second part shall have a cause of action against the party of the first part, enforceable in the courts of Chaves County, New Mexico, for a specific performance of contract.

"9th. Possession of said property shall be given on or before the 10th day of September, 1908."

Upon the making of this written contract, it was folded and placed in an envelope, together with a check made by Berryman and payable to Mrs. Owens for the sum of $9,173.32, and the envelope and its contents were taken by Mrs. Owens, Davisson and Berryman to the Citizens National Bank of Roswell, to be held by the Bank "in escrow" until September 10th, pending the furnishing an abstract of title, a favorable report thereon, and final settlement. With the consent and approval of all the parties a memorandum was indorsed upon the envelope in the following terms: "Check enclosed to be held in escrow until September 10, when final settlement is to be made. Deed and abstract to be placed in escrow with this. Abstract to be forwarded to Citizens Bank & Trust Company, Arkadelphia, Arkansas, for examination. No money to be paid over until abstract is approved by purchaser's attorneys. (Signed) J. J. JAFFA, Cashier."

Up to September 10th the Owens Estate had not made good title to Berryman, and on or about that date it was orally agreed between them that the Estate should have thirty or forty days time in which to secure an order of court, and in consideration of this, Berryman, who was stopping on expense at the hotel in Roswell, was put in possession of the property on September 10th, and he remained in possession thereof, exercising acts of ownership thereon until September 22d, on which date (the

time agreed upon for securing an order of sale through the courts, not having yet expired) Berryman, without just cause, repudiated and abandoned the contract and departed from the Territory. Meanwhile, and in consideration of the verbal arrangement of September 10th, the Estate took immediate steps at considerable expense to secure the required order of court, and did in fact secure it on October 5th. But at some time after September 10th (the precise date does not appear) Berryman demanded of the Bank the return of his check. The Bank had been notified by Davisson of the verbal agreement of September 10th extending the time in which to perfect the title to the land, but had no other knowledge of this, and the granting of this extension was denied by Berryman. The Bank complied with his demand and returned to him the check of $9,173.32, or its equivalent. It appears that no officer of the Bank ever read the contract of sale or knew of its terms; and the Bank so far as appears, had no knowledge of what had taken place between Mrs. Owens and Berryman after the contract and check were left with it except for Davisson's notification respecting the verbal arrangement made on September 10th. After the Bank had turned over to Berryman the check or its equivalent, Mrs. Owens and Davisson demanded from the Bank their respective shares of the money, and the demands not being complied with, the present action resulted. Berryman, being absent from the Territory, was not joined as a party.

The fundamental proposition that underlies the whole argument for the appellants is that the Bank had no concern with anything beyond the terms of the escrow as manifested in the written memorandum endorsed upon the envelope. But this memorandum is evidently not a complete expression of the agreement between the parties, and indeed is unintelligible except by reference to the contract of sale. It does not mention the names of the

parties or either of them; does not specify what "settlement" is to be made, nor where; does not state by whom "deed and abstract" are to be placed in escrow, nor when, nor for what purpose. Above all, and more important for the present purpose, it does not either state or intimate what is to be done with the check or money if settlement is not made on September 10th, or if abstract is not "approved by purchaser's attorney."

It is clear that the instrument of August 21st came into existence as a binding contract between the parties thereto at, if not before, the time it was lodged with the Bank. We say this, notwithstanding the ambiguity of the findings in this regard; for the Supreme Court, after having stated that the parties "entered into" the contract, afterwards stated that "the contract itself was never delivered to either of the parties, other than being placed in escrow." Since the making of the contract was clearly averred in both the complaint and the cross-complaint, and was not denied by the Bank in its answer, it followed, under the local practice (Comp. Laws, N. M. 1897, § 2685, sub-sec. 67), that for the purposes of this action the averment must be taken as true. And, on general principles, the findings are to be interpreted in the light of the issue. *Reynolds* v. *Stockton*, 140 U. S. 254, 268, and cases cited.

Therefore the deposit of the agreement and check with the Bank was not technically an "escrow," in the sense that the agreement was not to take effect until performance of the condition. In the light of all the facts of the transaction, as shown by the findings, it is clear that the parties treated the agreement as in force between them. And the terms of the memorandum endorsed on the envelope are consistent with this.

The contract of August 21, 1908, being in force as a contract between the parties, it is plain that the memorandum endorsed upon the envelope was not intended to modify its provisions.

Upon the whole case, we are clear that the effect of the deposit of the contract and check with the Bank was to constitute it a custodian or stakeholder for the benefit of both parties, holding the money without right or interest in it, bound above all things not to take sides between the parties, and answerable ultimately to the one or the other, according to their respective rights as between themselves.

The endorsement upon the envelope was a mere memorandum, not containing any clear expression respecting the agreement of the parties, and evidently unintelligible unless read in connection with the contract of sale. Quite as manifestly the deposit had no reason for existence except in aid of that contract and as a protection to both contracting parties.

The fact that no officer of the Bank read this contract or knew of its terms is of no avail to the Bank. By the very circumstances of the deposit it was put upon notice that it was assuming a duty that could not be fully understood or fairly performed without a knowledge of the contents of the contract; it had possession of that instrument, with full opportunity to examine it; except for its own negligence it would have known the terms thereof. To permit it now to set up its own ignorance as an excuse or justification of its conduct in violating the rights of one of the parties to the contract would be to permit it to take advantage of its own wrong.

Berryman's check to the order of Mrs. Owens for $9,173.32, having been deposited as a substitute for the cash payment of $10,000, called for by the agreement of August 21, was of course subject to be forfeited under the terms of the agreement as above recited, in the event that Berryman failed to comply with his contract.

The facts found show that while the vendors were doing what he had required them to do, and, so far as appears, all that they were called upon to do, to make a

good title under the contract, he repudiated and abandoned it, without just cause, gave up possession of the property and departed from the Territory. On familiar principles, this absolved the Owens' Estate from any further performance of conditions precedent on their part. *Roehm* v. *Horst*, 178 U. S. 1, 8, 16, and cases cited; *O'Neill* v. *Supreme Council*, 70 N. J. Law, 410; *Holt* v. *United Security Life Ins. Co.*, 74 N. J. Law, 795, 801; 76 N. J. Law, 585, 590.

It is contended that the verbal arrangement made between the Owens' executors and Berryman on or about September 10th, for an allowance of time within which to procure the court order, was an attempt to vary the written contract, and that this could not be done without writing, because of the statute of frauds. *Emerson* v. *Slater*, 22 How. 28, 42; *Swain* v. *Seamens*, 9 Wall. 254, 272.

Without stopping to inquire as to the bearing of the statute, a sufficient answer to this point is that the verbal arrangement of September 10th was not variant from, and therefore did not have the effect of modifying, the written agreement of August 21st. That agreement did not call for the passing of title on or before September 10th, unless the abstract showed a good title; if it did not, and objections were pointed out by the purchaser, the vendors were to have at least ten days in which to cure his objections, and if the title could not be made good "within such reasonable time" (evidently referring to the ten days) "then it shall be the duty of the party of the first part to perfect said title at their expense, promptly in accordance with the requirements of the party of the second part, within the time stated, and if the party of the first part fails, etc., to perfect said title in accordance with the requirements of the party of the second part, then the party of the second part shall have the right to perfect said title at the expense of the party of the first part, who shall repay," etc.

The contract did not fix any specified time, upon the expiration of which Berryman was entitled to treat it as being at an end. It foresaw possible delays respecting the perfection of the title, and contemplated a verbal agreement allowing to the vendors a reasonable time for this purpose. The verbal arrangement, allowing to the Executors "thirty or forty days time in which to procure an order of court," was in effect a "stating of time" by Berryman, within which his "requirements" should be complied with, as provided by the sixth paragraph of the written agreement.

That instrument stated what should be deemed sufficient ground for an annulment of the sale, and a return to Berryman of the $10,000, paid on account of the purchase money, and did not set any time limit, the language being: "And if upon examination of said title it shall be shown that the title to the said property is not good and cannot be made good, then in such event this sale shall be annulled and the said $10,000 paid as purchase money hereinbefore provided for shall be returned by the party of the first part to the party of the second part." Berryman, having himself repudiated the contract before any default was made by the vendors, thereby dispensed with a tender or further performance on their part, and forfeited to them the money deposited.

The Bank, with fair notice of this, and in violation of its duty of acting impartially between the parties, paid the money over to Berryman, and thereby became liable to respond to the Executors, in whose behalf the contract was made by Mrs. Owens, and who were represented by her in this action.

It follows that the facts fairly sustain the judgment of the court below. Upon this appeal no controversy is raised as between Davisson and the Executors.

Judgment affirmed.

UNITED STATES *v.* WRIGHT.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA.

No. 918. Argued April 11, 1913.—Decided May 26, 1913.

In determining the effect of statutes regarding the introduction of liquor into Indian country, within the territorial limits of Oklahoma, every consideration arising out of the guardianship of the Federal Government over the Indians and control of their land indicate that as to them the liquor prohibition should be maintained after Statehood so far as consistent with the control of the State over its internal police.

The liquor prohibition, so far as it concerns Indians, has always been deemed one of the peculiar responsibilities of the Federal Government.

The provisions of § 2139, Rev. Stat., as amended by the acts of July 23, 1892, and January 30, 1897, so far as they related to the introduction of liquor into the Indian Territory from points outside of that Territory, but within what is now Oklahoma, have not been repealed, either expressly or by implication, by the Oklahoma Enabling Act.

THE facts, which involve the construction of the various acts relating to the introduction of intoxicating liquor into Indian country in Oklahoma, are stated in the opinion.

Mr. Assistant Attorney General Denison for the United States.

Mr. James C. Denton for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

The defendant in error was indicted in the United States District Court for the Eastern District of Oklahoma, the charge being that—"on the nineteenth day of March, in the year 1912, in the County of Muskogee, in the said

District, and within the jurisdiction of said court, the said county and district then and there being a portion of the Indian country of the said United States, (he) did at the time and place aforesaid, unlawfully, wilfully, knowingly, and feloniously introduce into said Indian country one quart of malt, vinous, spirituous, distilled, ardent, and intoxicating liquor, to-wit, whiskey. Contrary to the form of the statute in such case made and provided," etc.

The District Court sustained his demurrer, and the case is brought here under the Criminal Appeals Act.

The statutes involved are: § 2139, Rev. Stat., as amended by the act of July 23, 1892, c. 234, 27 Stat. 260, and by the act of January 30, 1897, c. 109, 29 Stat. 506; also § 8 of the act of March 1, 1895, c. 145, 28 Stat. 693; and the Oklahoma Enabling Act of June 16, 1906, c. 3335, 34 Stat. 267. Extracts from these are set forth in footnotes to the opinion in *Ex parte Webb*, 225 U. S. 663, 671, 677. Muskogee County is a part of what was the Indian Territory.

The District Court in effect construed the indictment as charging, not an interstate transaction, but an introduction of liquor from a point within the State of Oklahoma, but outside of what is now Indian country, into such Indian country. The decision of this court in the *Webb Case*, which had to do with § 8 of the act of March 1, 1895, and the effect of the Enabling Act upon it; and also the decision of the Circuit Court of Appeals for the Eighth Circuit in *United States Express Co.* v. *Friedman*, 191 Fed. Rep. 673, and *Mosier* v. *United States*, 198 Fed. Rep. 54,—both of which turned upon the effect of the Enabling Act upon the act of January 30, 1897;—were reviewed by the District Court, and the conclusion reached, principally because of the line of reasoning expressed in the opinion in *Ex parte Webb*, was "That the provisions of § 2139, Rev. Stat., as amended by the act of 1892 and the act of 1897, so far as they related, if at all, to the introduction

of liquor into the Indian Territory from points outside of that Territory, but within what is now Oklahoma, must be considered as having been repealed by the Enabling Act."

And again: "This confines offenses of this character, of which the Federal court has jurisdiction, to those in which the liquor is introduced from a point without the State. It is a violation of the state law, as established by the constitutional provision above referred to, to introduce liquor into what was formerly Indian Territory from some other portion of Oklahoma, but such violation is an offense exclusively within the jurisdiction of the state court. In order to give the Federal court jurisdiction, it is necessary that the introduction of the liquor should have been from a point without the State. This is an essential element of the offense, so far as the Federal court is concerned, and should therefore be charged in the indictment. It follows that the demurrer must be sustained."

The Criminal Appeals Act, March 2, 1907, c. 2564, 34 Stat. 1246, provides for a writ of error, to be taken by the United States from the District Court direct to this court, from a decision or judgment sustaining a demurrer to an indictment, "Where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded." The present case is clearly within this act, as previously interpreted and applied. *United States* v. *Sutton*, 215 U. S. 291, 294; *United States* v. *Keitel*, 211 U. S. 370, 385; *United States* v. *Biggs*, 211 U. S. 507, 518; *United States* v. *Stevenson*, 215 U. S. 190, 195; *United States* v. *Miller*, 223 U. S. 599, 602; *United States* v. *Patten*, 226 U. S. 525, 535; *United States* v. *George*, 228 U. S. 14, 17; *United States* v. *Anderson*, 228 U. S. 52; *United States* v. *Pacific & Arctic Co.*, 228 U. S. 87, 100.

Upon the merits, the principal question is whether the acts of 1892 and of 1897 were repealed, as to intra-state

transactions, by the effect of the Enabling Act and the admission of the State, with the constitutional prohibition of the liquor traffic that was prescribed by that act. It is not contended that there was any express repeal. The insistence that there was a necessary repeal by implication, is supported by arguments that may be outlined as follows:

(a) That since the act of 1895 was a special act, applicable by name to the Indian Territory, it had the necessary effect of superseding as to that Territory the existing general statute (§ 2139, Rev. Stat., as amended in 1892) against the introduction and sale of intoxicating liquors in the Indian country.

(b) That § 8 of the act of 1895 was in turn superseded or repealed *in toto* by the act of 1897 and the Enabling Act.

(c) Or else, that the act of 1897, because amendatory only of the general statute against the introduction and sale of intoxicating liquors in the Indian country, had no effect upon the act of 1895, and did not apply to the Indian Territory because that Territory was covered by the act of 1895.

(d) And that whether the acts of 1892 and 1897, or either of them, was in force in Indian Territory prior to the admission of Oklahoma as a State, they were necessarily superseded as to intra-state transactions by the force and effect of that act, upon the same grounds on which this court said in the *Webb Case* that the act of 1895 was superseded.

Section 2139, Rev. Stat., providing for the punishment of persons introducing liquor into the Indian country, traces its origin to § 20 of the Indian Intercourse Act of June 30, 1834, c. 161, 4 Stat. 729, 732, as amended by act of March 15, 1864, c. 33, 13 Stat. 29. The amendment of 1892 (set forth in 225 U. S. 671), extended the prohibition to include ale, beer, and intoxicating liquors of any kind, as well as ardent spirits and wine, and added a clause

fixing the venue for complaints, arrests, and trials, including a special provision that complaints for offenses committed in the Indian Territory should be made before the United States Court Commissioner, or Commissioner of the Circuit Court of the United States, residing nearest the place where the offense was committed. The penalty under this act, as under § 2139, Rev. Stat., is imprisonment for not more than two years and fine of not more than three hundred dollars for each offense.

Next in chronological order was the act of March 1, 1895, c. 145, 28 Stat. 693, the title of which is—"An act to provide for the appointment of additional judges of the United States Court in the Indian Territory, and for other purposes." Section 8 (set forth in 225 U. S. 672) provides (*inter alia*) that any person carrying into the Territory any vinous, malt or fermented liquors or other intoxicating drinks, shall upon conviction be punished by fine not exceeding five hundred dollars and by imprisonment for not less than one month nor more than five years. Other sections have to do with the creation of judicial districts in the Territory, the establishment of courts, the appointment of judges, attorneys, marshals, clerks, &c. Section 4 adopts the criminal law provisions of Mansfield's Digest of General Laws of Arkansas, with certain reservations. And § 13 declares—"That none of the provisions of any other acts, or of any of the laws of the United States, or of the State of Arkansas, heretofore put in force in said Indian Territory, except so far as they come in conflict with the provisions of this act, are intended to be repealed, or in any manner affected by this act, but all such acts and laws are to remain in full force and effect in said Territory."

The act of January 30, 1897, c. 109, 29 Stat. 506, while having an independent title,—"An act to prohibit the sale of intoxicating drinks to Indians, providing penalties therefor, and for other purposes,"—was manifestly intended primarily as an amendment of the act of 1892.

This appears from a comparison of the clauses defining the acts prohibited, from the circumstance that the act of 1897 contains no provisions of its own prescribing the venue for complaints, arrests, and trials, and especially from the provision of its second section, "That so much of the act of the twenty-third day of July 1892, as is inconsistent with the provisions of this act is hereby repealed." The prohibition is made to apply to sales of intoxicants "to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian, a ward of the Government, under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship," and the familiar prohibition of the introduction of intoxicants "into the Indian country" is repeated, with the addition of the following new clause: "which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States." And the act provides that any person violating its provisions "shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense, and not less than two hundred dollars for each offense thereafter."

The act of 1895, although evidently *in pari materia*, is not mentioned in the act of 1897. This circumstance, coupled with the fact that the latter act contains an express repealing clause, is, we think, negatively significant upon the question of implied repeal. In our opinion the act of 1897 was not intended to take the place of § 8 of the act of 1895 after the manner of a revision, and there is no such complete repugnance as to render it clear that that section was intended to be repealed *in toto*.

It is contended that, while the act of 1892 covered the

subject of the introduction and sale of intoxicating liquors in Indian country, and was applicable to the Indian Territory because it was Indian country, the passage by Congress of the act of 1895, a special act applicable to the Territory by name, and covering, by its eighth section, the general subject of the introduction and sale of intoxicating liquors therein, necessarily superseded the former act, so far as the Territory was concerned.

To show the purpose that Congress had in mind in passing this act of 1895, the argument is that prior to the general allotment act of February 8, 1887, 24 Stat. 388, c. 119, all Indian lands were held in common by the Indian tribes; that soon thereafter it came to be questioned whether § 2139, Rev. Stat., as amended by the 1892 act, would apply to an Indian allottee and his allotment under the 1887 act, for the reason that upon allotment thereunder the individual Indian became a citizen of the United States, and his allotment ceased to be Indian country under the accepted definition (*Bates* v. *Clark*, 95 U. S. 204; *Ex parte Crow Dog*, 109 U. S. 556); because of the Indian title having been extinguished; that beginning with the act of March 3, 1893, 27 Stat. 645, 646, c. 209, Congress began to contemplate the allotment in severalty of all lands within the Indian Territory and to look forward to the ultimate creation of a new State out of that Territory; that it was supposed that the effect of allotment would be the same as under the 1887 act, in that the lands allotted would cease to be Indian country; and that hence Congress passed § 8 of the 1895 act, in order that the people residing in Indian Territory might not be left without protection against the introduction and sale of intoxicants when the 1892 act should become inoperative because of the extinguishment of the Indian titles. This argument is ingenious, and has much force; but it takes too little account, we think, of § 13 of the act of 1895, above quoted.

Assuming all that is claimed as to the general object that Congress had in view during these years when the Indian Territory was in a transition state, it seems to us safer to rely upon the words of the several acts of 1892, 1895, and 1897 in order to determine the true intent and meaning of the law-maker. If Congress, in enacting the eighth section of the act of 1895, had intended to totally supersede the act of 1892 as to the Indian Territory, that purpose would naturally have been expressed in plain terms. And so would the act of 1897 presumably have expressed the purpose to supersede and repeal that section, if such purpose had existed. The very fact that Congress contemplated that the situation in Indian Territory was but temporary; that either because of Statehood, or because of the allotment of the Indian lands in severalty, the necessity for retaining these prohibitory laws upon the statute-book would not long continue; tends to negative a desire on the part of Congress to presently repeal either of them; and therefore rebuts the presumption of an implied repeal of one act by the other.

It seems to us, upon the whole, that during this transition period preceding the admission of Oklahoma as a State, the several acts referred to were intended to and did stand together, excepting so far (if at all) as they were necessarily repugnant one to the other; that is to say, the act of 1892, as amended in 1897, on the one hand, making "Indian country" (a term defined in *Bates* v. *Clark*, 95 U. S. 204; *Clairmont* v. *United States*, 225 U. S. 551, 558, and cases cited) the test of the prohibition respecting the introduction of intoxicants; and the act of 1895, on the other hand, employing the territorial test, irrespective of whether it was or continued to be Indian country.

We thus come to consider the effect of the Enabling Act of June 16, 1906, c. 3335, 34 Stat. 267, and the admission of Oklahoma as a State thereunder, which occurred November 16, 1907.

The pertinent clauses of the act may be found in 225 U. S. 677; the clause respecting liquor prohibition being especially important. We should also note the proviso in the first section, that nothing in the state constitution should "be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreements, law, or otherwise, which it would have been competent to make if this Act had never been passed." And also this clause from the 21st section: "All laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout said State, except as modified or changed by this act or by the constitution of the State, and the laws of the United States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States."

It is suggested, rather than argued, that the reservation of "the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights, by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed," evidences a purpose *not* to preserve *prior* laws or regulations respecting the Indians. But this is sufficiently answered by what was said in *Ex parte Webb*, 225 U. S. 663, 682, where the view of the court was expressed as follows: "It is contended that this does not preserve the existing laws and regulations respecting the Indians, but rather excludes the inference of their continued force and existence by indicating a purpose on the part of Congress to thereafter enact regulations for the protection of the Indians in Oklahoma if necessity requires. This, we think, is an

inadmissible construction. We deem it unreasonable to suppose that Congress, possessing the constitutional power and recognizing the moral duty to make laws and regulations respecting the Indians, and having already established laws and regulations of this character applicable in the Territory, including some that were established by treaties and agreements, should resolve to wipe them out, and thereby impose upon future Congresses the labor and difficulty of establishing other proper laws and regulations in their stead. In our opinion, the purpose expressed in the proviso to reserve to the Government of the United States the authority to make laws and regulations in the future respecting the Indians is, under the circumstances, evidence tending to negative a purpose to repeal by implication the existing laws and regulations on the subject."

When it is recalled that the new State was made up by combining two Territories theretofore separately existing under different systems of laws, one of them being largely inhabited by Indian tribes, with whom numerous treaties had previously been made, differing from each other in many respects, but each recognizing to some extent the propriety of restricting the liquor traffic, the importance of these clauses in the Enabling Act,—read, as they of course must be read, in connection with the restriction of the manufacture and sale of liquors within those parts of the State known as the Indian Territory and the Osage Indian Reservation for a period of twenty-one years, imposed upon the new State by § 3 of the Act,—is very evident.

In the *Webb Case*, as appears from the opinion, p. 676, the Government conceded that the act of 1895 had been repealed by the Enabling Act and the admission of the State thereunder, saving so far as it prohibited the carrying of intoxicating liquors, etc., from another State into the Territory. The statement to the like effect in the

opinion, p. 681, was made in view of this concession; but we see no reason for recalling it. The language used was: "No doubt the Enabling Act, followed by the adoption of the constitution therein prescribed and the admission of the new State, had the effect of remitting to the state government the enforcement of the prohibition respecting the manufacture, sale, barter, etc., of intoxicating liquors within the State, and respecting commerce in such liquors conducted wholly within the State; and, to the extent that the scheme of prohibition established by the Enabling Act covered the same field that had been covered by the act of 1895, the latter act must be considered as impliedly repealed." But this had reference only to the act of 1895, and not to the act of 1897, it having previously been stated in the opinion (p. 676) that since § 2139, Rev. Stat., and the act of 1897 contained provisions respecting the sale of intoxicating liquors to Indians, and in this and perhaps in other important respects covered ground not covered by the act of 1895, we must not be understood as deciding that those prohibitions were no longer in force within what was the Indian Territory.

But, because the act of 1895 was impliedly repealed with respect to intra-state manufacture and traffic, it does not necessarily follow that the act of 1892, as amended in 1897, was likewise repealed in respect of that traffic, by the Enabling Act and the admission of the State. The one was a territorial prohibition applicable to the Indian Territory because made so by Congress, irrespective of other considerations; while the other act, applicable to Indian country throughout the States and Territories generally, happened to be applicable to the Indian Territory because that was Indian country. But as already pointed out, in passing the Enabling Act, Congress knew that if, and when, and so far as, portions of the Indian Territory ceased to be Indian country, the acts of 1892 and 1897 would cease to apply, irrespective

of Statehood; and on the other hand, must be deemed to have intended that the establishment of Statehood should repeal the act of 1895 with respect to matters wholly intrastate, because that act (whatever reasons may have moved Congress to enact it) was, by its terms, applicable to the Territory as a Territory and as a whole, irrespective of whether it was Indian country; and this kind of internal prohibition of the liquor traffic would naturally cease with Statehood, because inconsistent with local self-government and with equality between the States.

The terms of the act of January 30, 1897, show that it was especially designed to provide for the changes consequent upon the adoption of the policy of alloting the Indian lands in severalty. *Hallowell* v. *United States*, 221 U. S. 317. This policy was in progress in the Indian Territory at the time of the passage of the Oklahoma Enabling Act. The history has been so recently rehearsed that it need not be here repeated. *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 300, 302; *Heckman* v. *United States*, 224 U. S. 413, 435; *Mullen* v. *United States*, 224 U. S. 448; *Goat* v. *United States*, 224 U. S. 458; *Deming Investment Co.* v. *United States*, 224 U. S. 471. Every consideration arising out of the Governmental guardianship over the Indians, and control over their lands, indicated that as to them the liquor prohibition should be maintained after Statehood, so far as it was consistent with the control of the State over its internal police. The act of 1892, as amended in 1897, concededly remains in force in other States where there is Indian country or Governmental trusteeship over Indian lands or guardianship over the Indians. *United States* v. *Sutton*, 215 U. S. 291, 295. Such legislation is of undoubted constitutionality. *United States* v. *Kagama*, 118 U. S. 375, 383; *Ex parte Webb*, *supra*. The prohibition against introducing liquor into the Indian country has been consistently adhered

to for many years, with beneficial results so far as the welfare of the Indians is concerned.

All of these considerations were presumably in the mind of Congress when it passed the Enabling Act, and they are inconsistent with any tacit purpose to repeal the acts of 1892 and 1897. The liquor prohibition, so far as it concerns the Indians, has always been deemed one of the peculiar responsibilities of the Government at Washington, and it may easily be believed that Congress felt reluctant to delegate the subject-matter wholly to the state government that was about to be established in the Indian Territory; especially as the same subject-matter in other States remained, as it still remains, under Federal control.

In *United States Express Company* v. *Friedman*, 191 Fed. Rep. 673, the Circuit Court of Appeals for the Eighth Circuit held that the Enabling Act did not repeal the act of 1897, at least with respect to the introduction of liquor into the Indian country from points outside the State. In *Mosier* v. *United States*, 198 Fed. Rep. 54, the same court held the act of 1897 to be in force within the State so far as relates to the sale of liquors to Indians.

Upon the whole, while the matter is not free from difficulty, it seems to us the better argument is against the implied repeal. It follows that the District Court erred in holding the acts in question, viz: § 2139, Rev. Stat., as amended by the acts of 1892 and 1897, to be no longer in force, and erred in sustaining the demurrer to the indictment. The judgment should be reversed and the cause remanded for further proceedings in accordance with the views above expressed.

Judgment reversed.

UNITED STATES *v.* SHELLEY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 943. Argued April 11, 1913.—Decided May 26, 1913.

The mere mixing of smoking opium with the residue of opium that has been smoked, and heating the same, is not a manufacture of opium for smoking purposes within the meaning of § 36 of McKinley Tariff Law of October 1, 1890.

Criminal statutes ought not to be extended by construction.

A statute which is primarily designed as a taxing act to raise revenue on, and not one to suppress the manufacture of, a specified article, will not be construed so as to subject the same substance more than once to the tax or to require surveillance over places where the secondary treatment is conducted as well as over the factory of primary manufacture.

The prohibition against manufacturing smoking opium under § 36 of the Tariff Act of 1890 is not more extensive than the clause taxing the article; and if the article produced is not taxable thereunder there is no violation thereof in its production.

THE facts, which involve the construction of provisions of § 36 of the McKinley Tariff Law in regard to the manufacture of opium, are stated in the opinion.

Mr. Assistant Attorney General Harr for the United States.

Mr. Robert M. Moore for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

We have here under review a judgment of the District Court sustaining a demurrer to two counts of an indictment for a violation of § 36 of the act of Congress approved October 1, 1890, c. 1244, 26 Stat. 567, 620.

This act is the so-called McKinley Tariff Law, and provided for the tariff duties to be paid upon articles imported from foreign countries, and also for the collec-

tion of certain internal revenue taxes. The tariff provisions are of course long since superseded. Section 36 reads as follows: "That an internal-revenue tax of ten dollars per pound shall be levied and collected upon all opium manufactured in the United States for smoking purposes; and no person shall engage in such manufacture who is not a citizen of the United States and who has not given the bond required by the Commissioner of Internal Revenue."

The counts in question are the second and third counts of the indictment. The former of these avers (omitting formal matters) that, without having given bond, etc., the defendant "did engage in the manufacture of opium for smoking purposes, in and by employing and using the process by means of which yen shee, which is the product or ashes which remains after prepared, or smoking, opium has been used and smoked by the smoker, is dissolved in water after having been permitted to remain in solution in water in any receptacle or vessel for a period of time; furthermore, by means of which the said aqueous solution of yen shee is strained and purified so as to remove from the said solution all matter which is foreign to such opium as may be contained in the said yen shee, such matter consisting of the product produced as the result of the partial combustion of prepared, or smoking, opium in the course of its use by the smoker for smoking purposes, and by means of which the said aqueous solution of yen shee thus strained and purified is heated and cooked in any receptacle or vessel for a period of time and until a product is produced as the result, among other things, of the evaporation of a part of the aqueous content of the said solution in the course of such heating and cooking, which said product thus remaining is smoking, or prepared, opium of an inferior grade, and which said product resembles in appearance and consistency thick molasses, and is opium for smoking

purposes, against the peace of the United States and their dignity, and contrary to the form of the statute," etc.

The third count charges that the defendant, without having given bond, etc., "did engage in the manufacture of opium for smoking purposes, in and by employing and using a process by means of which a high-grade smoking opium is dissolved in water in any receptacle or container; and yen shee, which is the product of the partial combustion of smoking, or prepared, opium remaining when the smoker has used such smoking, or prepared, opium for smoking purposes, is in like manner dissolved in water, in any receptacle or container, and the said aqueous solution of yen shee is strained and purified so that all substances contained therein which are foreign to the opium content in the said solution, and to the water therein contained, are removed, and which said substances so removed consist of the product produced as the result of the partial combustion of prepared, or smoking, opium in the course of its use by the smoker for smoking purposes; and the said process is, further, that the said aqueous solution of yen shee thus strained and purified is mixed with the aforesaid solution of high-grade smoking, or prepared, opium, and the two solutions thus mixed and combined are heated and cooked in any receptacle or vessel over a slow fire until a product is produced by such heating and cooking and by the evaporation of a part of the aqueous content of the said combined solution, which has the consistency and appearance of thick molasses, and which said product is known as smoking, or prepared, opium, and which said product is opium prepared for smoking purposes; against," etc.

This indictment seems to have been framed with the object of indirectly reviewing *Shelley* v. *United States*, 198 Fed. Rep. 88, where the Circuit Court of Appeals for the Second Circuit reversed a conviction that had been had in the District Court under a previous indictment, upon

grounds succinctly expressed in the opinion, as follows (p. 89): "It appears that, when smoking opium has been produced, it may be smoked more than once. That is to say, the residuum left after a first smoking may be simply heated and smoked again. If to this residuum (known as yen shee) some additional smoking opium is added, each time it is reheated, the process of resmoking may be continued longer. We are of the opinion that the mere mixing of smoking opium with the residue of opium that has been smoked, and heating the same is not a 'manufacture of opium for smoking purposes' within the meaning of the statute. The manufacture which the statute contemplates is complete when from the crude opium there has been produced the smoking opium, with which alone, as defendant contended, he operated, in its unsmoked and smoked condition. . . . We think there was error in the refusal to charge that, if the jury found that defendant only mixed smoking opium with the residue which remains after smoking, his act was not a manufacture of opium for smoking purposes within the meaning of the statute."

It appears that the primary manufacture of opium for smoking purposes is done by treating crude opium in such manner as to convert it into a different form, thus rendering it fit for smoking. It is conceded that this manufacture is subject to the tax prescribed by § 36 of the act of 1890. And see *Marks* v. *United States*, 196 Fed. Rep. 476. The counts now under consideration describe two processes by which the residuum of opium remaining after smoking (yen shee), may be reconverted into a form fit for smoking, in the one case by dissolving it in water, straining and purifying the solution so as to remove foreign matter, and then heating and cooking the refined solution, and thereby producing an inferior grade of smoking opium; the other process differs in that an admixture of smoking opium of a high grade is employed together with the yen shee.

In the argument counsel discussed the proper definition of the term "manufacturing," citing *Kidd* v. *Pearson*, 128 U. S. 1, 20; and *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 14; to which may be added *Anheuser-Busch Assoc.* v. *United States*, 207 U. S. 556, 559, which had to do with the drawback provision of the McKinley law (26 Stat. 567, 617, c. 1244, § 25).

But, aside from the general principle that criminal statutes ought not to be extended by construction, we have here the additional consideration that this statute was primarily designed as a taxing act. Section 36 must be read in connection with the accompanying administrative provisions, which render it clear that the tax was designed to yield substantial revenue, and not merely or primarily to prohibit the manufacture of smoking opium. It may easily be believed that if (irrespective of constitutional limitations upon its power) Congress were undertaking to stamp out the practice of opium smoking, it might prohibit such processes of reclaiming as were charged against the defendant in the second and third counts of this indictment. But it is not so easy to believe, in the absence of clear language requiring such a construction, that in prescribing a revenue tax upon the manufacture of opium for smoking purposes, it intended to subject the same substance more than once to the tax, or to require surveillance over opium-smoking resorts—in which, it would seem, such treatment of the residuum might most readily be conducted—the same as over a factory or other establishment where the primary conversion of crude opium into smoking opium is conducted.

Of course the prohibition is not more extensive than the taxing clause; and so we are satisfied that the offences charged in the second and third counts of this indictment are not within the denunciation of § 36 of the act.

Judgment affirmed.

UNITED STATES *v.* BALTIMORE & OHIO RAILROAD COMPANY.

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

No. 118. Argued October 19, 20, 1911.—Decided June 10, 1913.

A judgment dismissing, on the merits, an equity action brought by the Secretary of War against a railroad company to declare a bridge over a navigable stream to be an unreasonable obstruction and to require its removal under the act of March 3, 1899, on the ground that the provisions of the act did not apply, *held*, in a criminal trial on an indictment charging the same party with violating the penal provisions of the said act, to be *res judicata* and decisive of the question.

Quære, how far if at all a statutory grant to erect a bridge over navigable waters of the United States on specified terms in an act of Congress without reservation of the right to alter or amend, operates to limit Congress to directly legislate as to removal or alteration of such bridge.

Quære what the effect is on subsequent action by Congress of a decree of a court in an action determining that a bridge was properly erected over a navigable stream pursuant to grant in an earlier act of Congress.

THE facts, which involve the construction of provisions of the act of March 3, 1899, in regard to the authority of the Secretary of War to require alteration of bridges over navigable waters of the United States, are stated in the opinion.

Mr. Assistant Attorney General Harr for the United States.

Mr. B. M. Ambler, with whom *Mr. W. W. Van Winkle* and *Mr. M. G. Ambler* were on the brief, for defendant in error.

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

This writ of error seeks the reversal of a judgment discharging the defendant in error here from further prosecution under an indictment which alleged a violation of the act of March 3, 1899, 30 Stat. 1151, c. 425, in refusing to alter, as directed by the Secretary of War, a bridge across the Ohio River, connecting Parkersburg, West Virginia, and Belpre, Ohio. The case was tried to a jury, and at the close of the evidence, by direction of the court, a verdict of not guilty was returned, whereupon the judgment was entered which is under review.

The facts established by the evidence, so far as material to be stated, may thus be summarized.

The bridge in question was completed in the year 1871, in full compliance with an act of Congress approved July 14, 1862, 12 Stat. c. 167, p. 569, which prescribed the height, width of span and other requirements for bridges erected above the Kentucky line (mouth of Big Sandy River) and in § 5 it was provided: that "any bridge or bridges erected under the provisions of this act shall be lawful structures, and shall be recognized and known as post-routes . . . and that officers and crews of all vessels, boats, or rafts navigating the said Ohio River are required to regulate the use of said vessels and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation, construction or use of any of the bridges erected or legalized under the provisions of this act." The act contained no express reservation of right to alter or amend it in any respect.

On October 29, 1904, the United States Attorney for the Northern District of West Virginia, by direction of the Attorney General, filed in the Circuit Court of the United States for the Northern District of West Virginia a bill of complaint on behalf of the United States against the

Parkersburg Branch Railroad Company, a West Virginia corporation, John W. Davis, its receiver, and the Baltimore & Ohio Railroad Company. The bill in effect charged that the bridge in question was owned, operated and controlled by the defendants, that the bridge had been constructed under the act of 1862, and averments were made as to the provisions of various statutes subsequently passed by Congress concerning the construction of bridges across the Ohio River, viz., § 7 of the act of December 17, 1872, 17 Stat. 398, c. 4, and §§ 2 and 4 of the act of February 14, 1883, 22 Stat. 414, c. 44, and the provisions of other statutes conferring additional powers upon the Secretary of War in regard to the control and regulation of the navigable waters of the United States, viz., §§ 4 and 7 of the act of September 19, 1890, 26 Stat. 426, c. 907, and § 9 of the act of March 3, 1899, 30 Stat. 1151, c. 425. In substance it was charged that the spans of the bridge in question—the present main span being 349 feet in width and the adjacent span of the same width—were wholly inadequate to accommodate the present commerce of the Ohio River at the point where built and constituted a serious and dangerous obstruction to the navigation of the Ohio River at such point, and it was averred that the Secretary of War under the supervisory power conferred upon him by the statutes referred to "in recent years has required that all bridges over the Ohio River shall have channel spans ranging from six hundred to eight hundred feet in length." It was further averred that the railroad company, under the pretense of renewing the old bridge was erecting a new structure on the site of the old, despite the fact that the Government "through its proper officers" had refused to grant authority so to do, except "on condition of removing the pier between spans 38 and 39 of the said bridge and uniting spans 38 and 39 in one span, thus making the channel span to the said bridge approximately 698 feet. It was also alleged "that the construction of

this proposed new bridge, without the consent or approval of the United States, to which is entrusted by the Constitution the protection of this great waterway of commerce among the several States, will be in violation of law, and to the great and irreparable injury of the United States and the commercial interests entrusted to its care." The prayer of the bill was as follows:

"Your orator avers that there is no adequate remedy at law in the premises, and therefore prays that a temporary restraining order enjoining the defendants, their agents, servants, employés, workmen, contractors, and others whomsoever, from constructing or proceeding to construct the contemplated bridge or any bridge across the Ohio River from Parkersburg to Belpre, with a channel span of not less than 698 feet, and without the consent of Congress and the approval of the Secretary of War and the Chief of Engineers, until the final hearing of this cause, when your orator prays that such temporary injunction may be made perpetual; and that the existing bridge operated by the said railroad company between Parkersburg, West Virginia, and Belpre, Ohio, be declared and decreed to be an unreasonable obstruction to the navigation of the Ohio River, and that the said railroad company be required within a reasonable time to remove the same, or replace same with such a bridge as shall conform to existing law. And your orator prays for such other relief as may be proper in the premises."

The defendants, in their answer, recited the history of the bridge and alleged it to be a lawful structure, and averred that under the authority vested by the act of 1862, they possessed the right to maintain the bridge not only during the life of the first superstructure thereof, but by the renewal of the superstructure from time to time as might be required for the maintenance of the bridge as a post route, etc. It was expressly averred that the defendants were proceeding merely to renew the superstructure

of the bridge by providing a steel superstructure of much greater weight and strength, than that now in use, and that it was not contemplated or intended to make any change whatever in the piers of the bridge, any lowering of the height of the channel spans, or any other change which in any respect or in any degree will, or can possibly affect the navigation of the Ohio River at the point where the bridge stands.

The motion for a permanent injunction as prayed in the bill was heard upon bill, answer and affidavits, and was decided on February 4, 1905, in an opinion by District Judge Jackson. The injunction was refused. (134 Fed. Rep. 969.) It was held that the construction of the bridge under the authority conferred by the act of 1862 created a vested right to the use of the bridge of which the defendants could not be deprived without just compensation. It was also held that the defendants were not building or attempting to build a new bridge, but were simply replacing the old superstructure and that "the right to repair the bridge, to alter it or to improve it, for the safety of the public, is incident to the power to build it." The court thus concluded the opinion (p. 972):

"It must appear from what we have said that an injunction furnishes no remedy for the grievances complained of in the bill. This is the third application that has been made for an injunction, before the judges of this court, against the Baltimore & Ohio Railroad Company, involving the act of 1862. Judge Goff heard the case of the United States against the Baltimore & Ohio Railroad Company, which was an application for an injunction to prevent reconstruction of the Benwood Bridge. He dismissed the bill on March 27, 1900. Judge Goff and I heard the case of the Baltimore & Ohio Railroad Company against Leidecker, one of the United States engineers, in which the same question was involved, in which, upon a review of the case decided by Judge Goff, as well as the

case then under consideration, we reached the conclusion that the United States could not interfere with the reconstruction of the superstructure of the bridge which was built under the act of 1862. And now we have this application, which I have under consideration, involving the same question. It would seem to me that the action of the court heretofore had in previous cases should be adhered to in this case. In all the cases the judges of this court, either sitting alone or together, have reached the conclusion that the act of 1872 and those acts subsequent thereto do not in anywise affect the rights of the Baltimore & Ohio Railroad Company in relation to any and all of the bridges built under the act of 1862.

"For the reasons assigned, the court is of the opinion to refuse the injunction in this case, and suggests that the only remedy is to apply to Congress for an act to remove the bridge, if it is such an obstruction to navigation as to justify their action, upon such terms and conditions that the Baltimore & Ohio Railroad Company should receive compensation for the destruction of the bridge."

A decree denying the motion for a permanent injunction was entered on February 27, 1905, and an appeal therefrom was prosecuted to the Circuit Court of Appeals. The assignment of errors filed in that court, omitting title of cause and signature of attorneys, is as follows:

"And now on the 14th day of March, 1905, comes the said plaintiff, the United States of America, by Reese Blizzard, United States attorney for the Northern District of West Virginia, duly authorized to appear in this behalf by the Attorney General of the United States, and says:

"That the decree entered in said cause is erroneous and against the just rights of the said plaintiff for the following reasons:

"First. Because the court erred in overruling and denying the motion of the plaintiff to grant the permanent in-

junction prayed for by the plaintiff's bill, and heard on the 30th day of November, 1904.

"Second. Because the evidence showed that the said bridge was a serious and unreasonable obstruction to the navigation of the Ohio River, a navigable river of the United States.

"Third. Because the court erred in entering the order entered by it of record in the said cause on the 27th day of February, 1905.

"Wherefore the said plaintiff prays that the said decree be reversed and that the said court may be directed to enter a decree in accordance with the prayer of the bill."

The appeal was decided on February 6, 1906, and, substantially upon the grounds upon which the Circuit Court rested its conclusions, it was held that error was not committed in refusing to grant the injunction. 143 Fed. Rep. 224.

Nine months after the decision of the Circuit Court of Appeals, just referred to, the Secretary of War—assuming to act under the authority of § 18 of the River and Harbor Act of March 3, 1899—gave to the railroad company, the defendant, the notice the failure to obey which was made the basis of the indictment. The notice stated that the bridge in question was an unreasonable obstruction to the free navigation of the Ohio River, on account of insufficient length of channel spans, and ordered "the removal of pier No. 38, and the conversion of spans Nos. 38 and 39 into one channel span," by December 1, 1908.

The case was heard upon an agreed statement of facts practically embodying the essential facts presented in the equity cause and the other facts to which we have referred above; and the record in the equity cause was admitted in evidence over the objection of immateriality and an exception by the Government. It was also agreed that the necessary cost and expense of altering the bridge in the manner specified in the notice of the Secretary of War

"would exceed five hundred thousand dollars, and would entail great loss and inconvenience to the defendant in the conduct of its business." At the close of the evidence, the court, as we have stated, instructed the jury to return a verdict of not guilty which was done. The instruction rested upon the hypothesis "that the legal and vested right to maintain this bridge in its present condition has been judicially determined by courts of competent jurisdiction" in the equity cause to which we have referred. To the action of the court, the United States duly excepted. Thereupon judgment was entered discharging the railroad company from further prosecution upon the indictment, etc., and this direct writ of error was sued out as authorized by the act of 1899.

In substance, it is assigned that the court erred in admitting in evidence the record in the equity case and in instructing the jury to acquit the defendant. As the Circuit Court based its action in directing the verdict of not guilty upon the doctrine of *res judicata*, it is apparent that the effect of the proceedings in the equity cause is the matter to be determined.

The section of the River and Harbor Act of March 3, 1899, 30 Stat. 1121, 1153, c. 425, from which the authority to issue the notice in question was derived, reads as follows:

"SEC. 18. That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed or which may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons

or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him wilfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every month such persons, corporation or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed: *Provided,* That in any case arising under the provisions of this section an appeal or writ of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court either by the United States or by the defendants."

Two Attorneys General have delivered opinions that this act was not applicable to the bridge here in question. 22 Opin. Atty. Gen. 346; 25 *Ib.* 194.

Unlike the statutes thereafter enacted nowhere in the act of 1862, by which the authority to build the bridge was conferred and under which it was built, was there an

express reservation of a right to alter or amend the act in any respect. So, also, it is not questioned that the bridge was constructed in exact conformity to the requirements of the statute and that it has been so maintained ever since. No statute has been passed expressly condemning the structure as an obstruction to navigation, or ordering its removal or alteration. Indeed when the equity cause was commenced the act of March 3, 1899, was operative and under its provisions prior to the commencement of that suit the Secretary of War had been seeking to compel the railroad company to alter the bridge precisely in the mode directed in the notice upon which the indictment at bar is based. It is not contended that the institution of the equity cause was directed by Congress and it manifestly was brought directly or indirectly through the procurement of the Secretary of War in order to carry into effect his conception of his duty to compel the radical alterations deemed essential to be made in the width of the channel spans. An issue plainly presented in the equity cause was whether the bridge in question was subject to the act of 1899, and was within the jurisdiction of the Secretary of War under that act and whether the Government had the right to enforce the decision of the Secretary, that pier 38 should be removed and one span made from pier 37 to pier 39; and among other things the defendant denied that the act of 1899 had application or that the Secretary possessed jurisdiction in the premises. The final adjudication of the Circuit Court of Appeals necessarily decided this issue adversely to the Government, and conclusively determined as between the parties that the Secretary had no power over the bridge and that the structure in its present condition was not subject to the act of 1899. We are of opinion, therefore, that as against action by the Secretary of War, the decree in the equity cause was properly held to be *res judicata* as to the facts averred in the indictment and as decisive of the question,

that in the absence of changed conditions the bridge in question was not subject to the act of 1899. How far, if at all, the grant of the right to build the bridge under the terms specified in the act of 1862, with no reservation of the right to alter or amend, will operate to limit the power of Congress to directly legislate on the subject of the removal or alteration of the bridge is a question we are not here concerned with and therefore express no opinion upon it. And of course, we also express no opinion as to how far the decree in the equity cause would be applicable in case of such direct action by Congress.

Judgment affirmed.

MR. JUSTICE PITNEY, not being a member of the court when this case was argued, took no part in its consideration.

ROBERTSON *v.* HOWARD.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 320. Submitted May 7, 1913.—Decided June 10, 1913.

This court follows the ruling of the state court on the question whether contracts between the purchaser and the State convey such an equitable title that the certificates of purchase are real estate.

The bankruptcy court is not confined in the administration of the property of the bankrupt to state or district boundaries; nor is it necessary to institute independent or ancillary proceedings in the different States in which the bankrupt's property is situated, or to conform to the provisions of the act of 1893 prescribing the method of selling real estate under orders and decrees of courts of the United States.

General Order XVIII in Bankruptcy does not contemplate that the act of 1893 be followed in sales of real estate.

The effect of adjudication in bankruptcy is to transfer title of all of the property of the bankrupt wheresoever situated and vest the same in the trustee, who has the right to administer the same under the authority of the court.

After sale of real estate by the trustee and confirmation by the referee, lack of appraisal and error of description in published notice are mere irregularities cured by the order of confirmation and validated under § 70b of the Bankruptcy Act, and the conveyance cannot be attacked collaterally.

83 Kansas, 453, reversed.

THE facts, which involve the right of a trustee in bankruptcy to convey real estate in a jurisdiction other than that in which he was appointed, are stated in the opinion.

Mr. Charles Blood Smith and *Mr. Samuel Barnum* for plaintiffs in error.

Mr. T. F. Garver and *Mr. R. D. Garver* for defendants in error.

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

John H. Hagener was adjudicated a bankrupt by the District Court of the United States for the Southern District of Illinois, and a trustee for his estate was qualified. At the time of the adjudication the bankrupt was the owner, by assignment, executed to him on October 28, 1901, of two certificates, each reciting the purchase from the State of Kansas of a particular quarter-section of school lands situated in Rawlins County, Kansas, of the making of a partial payment therefor, and the right to receive from the State a deed of the land upon the payment of the balance due. The certificates were placed on the bankruptcy schedule as real estate. Upon the petition of the trustee the referee ordered the sale at public auction, after ten days' notice by publication in a newspaper of general circulation, published in Cass County, Illinois.

and by distribution of hand bills, of the interest of the bankrupt in certain described real estate, including the certificates in question. The published notice, however, mistakenly stated the lands to be situated in Range 1 instead of in Range 34. The certificates realized only the sum of one dollar each. The sale, on the report of the trustee, was confirmed by the referee. The record does not affirmatively show that any appraisement was made either of the certificates or of the interest of the bankrupt in the land which they embraced.

By virtue of the sale and its confirmation, the trustee executed an assignment to Henry Fraumann, the purchaser at the sale, of each certificate and of "all the right, title and interest" of the bankrupt "of and to the land therein described." Fraumann transferred the certificates and his interest in the land, as well as all his right to rents and profits which had accrued, to Fred. Robertson, one of the plaintiffs in error, and Robertson executed a like assignment of an undivided half of each certificate, with an undivided half of the interest in the real estate and in the rents which had accrued, to W. J. Ratcliff, the other plaintiff in error.

It appears that in September, 1901, just prior to the time when Hagener, the bankrupt, had acquired the certificates, the taxes on the land not having been paid, a sale for delinquent taxes took place, at which the County of Rawlins became the purchaser. The county, on September 28, 1903, issued a certificate to each of the defendants in error reciting the tax sale, the purchase by the county, the payment by the defendants in error of the delinquent taxes and costs, and assigned the interest of the county in the property to the purchasers. Subsequently, evidently treating the certificates which had been previously issued for the land by the State, and which were surrendered in the bankruptcy, under the circumstances we have recited, as being the land itself and there-

fore as passing to the purchaser at the sale for delinquent taxes, assignments were drawn by the county officials making recitals of the facts and virtually substituting the two Howards to the ownership of the right, title and interest acquired under the original certificates, with the right on their part to acquire patents for the land from the State on paying the balance due to the State on the terms fixed in the original certificates issued by the State. Thereafter the two Howards, as the owners each of a quarter-section, under these proceedings, went into possession of the land.

Subsequently, as the result of mandamus proceedings, Robertson and Ratcliff, as the owners of the lands by virtue of the original certificates issued by the State, surrendered by the bankrupt, and acquired by the sale in bankruptcy, paid the full amount of principal and interest due to the State upon the certificates, as also a sum sufficient to reimburse each of the Howards for the moneys disbursed by them in acquiring from the County of Rawlins supposed rights under the tax sale to which we have referred, it not being disputed that the tax sales were void. In the year 1899 patents of the State for the land were duly issued to Robertson and Ratcliff.

Prior to the issue of the state patents, as above mentioned, and while the bankruptcy proceedings were undetermined, the bankrupt and his wife executed to Robertson and Ratcliff a quitclaim deed of all their right, title and interest to the land.

Soon after the execution by Hagener and wife of this quitclaim deed Robertson and Ratcliff commenced two actions in ejectment in the District Court of Rawlins County, Kansas, to recover possession of the two quarter-sections, and damages for detention. The defendant in one action was C. F. Howard and the defendant in the other action was Fred. Howard. The plaintiffs recovered

in the trial court. On appeal to the Supreme Court of the State, the actions were consolidated and the court decided that the sale in the bankruptcy proceedings was void and that the purchaser did not acquire either the title to the certificates or the right to the possession of the quarter-sections in controversy. The judgment of the trial court was nevertheless affirmed upon the ground that the interest of the bankrupt in the land passed by the quitclaim deed executed by the bankrupt and his wife. 82 Kansas, 588. Upon a rehearing the judgment of affirmance was vacated and set aside and the judgment of the trial court was reversed with directions to render judgment for the Howards, the claimants under the tax sale. 83 Kansas, 453. This was based upon the ruling that not only was the sale in the bankruptcy proceedings of the certificates of purchase invalid, but that a right to possession was not derived from the quitclaim deed, since when it was executed and when the actions in ejectment were commenced, the bankruptcy proceedings were pending and the property and right of possession to the land was in the trustee in bankruptcy. In consequence it was held that the plaintiffs in ejectment were not entitled "to recover the possession of the property even against one who had simply the naked possession thereof." This writ of error was then prosecuted.

But one ground for reversal is relied on, viz., that the Supreme Court of Kansas erred in deciding that the sale of land in Kansas by a trustee in pursuance of an order of the court of bankruptcy for the Southern District of Illinois, made in original proceedings pending in that court, was void and did not convey to the purchaser any interest to such land.

The state court held that the contracts between the bankrupt and the State of Kansas evidenced by the certificates of purchase in question conveyed to the purchaser an equitable title to the land and was real estate.

We follow this construction of the local law; hence the only question with which we are concerned was thus stated by the court below: "Whether the sale of the certificates by the trustee in bankruptcy conveyed any interest in the land, or whether it was necessary in order to divest the certificate holder of his title in the land to appraise and advertise the land itself for sale and to sell it in the method provided by the laws of the United States." The court while conceding that the adjudication in bankruptcy "conveyed this land and all the property of Hagener to the trustee," yet decided that "the court had no jurisdiction over the land. Its jurisdiction was *in personam*." And apparently having in mind the provisions of the act of Congress approved March 3, 1893, c. 225, 27 Stat. 751, regulating sales of real estate by courts of the United States, it was declared that the attempted sale of the land by the trustee was not simply irregular and erroneous, but was void. The views of the court on the subject were thus stated:

"The United States District Court for the Southern District of Illinois has no jurisdiction in Kansas in bankruptcy, and a trustee appointed by it could only sell real estate in this State under orders procured from some court having jurisdiction therein. 1 U. S. Compiled Statutes, sec. 563, subd. 18. So far as conveying any interest in the lands in question, the sale of the certificates by the trustee is void."

It is to be observed that no question was raised concerning the validity under the state law of the certificates, and their efficacy to transfer the title, if the court of bankruptcy had power in the premises and the sale was otherwise valid under the laws of the United States. It is certain therefore that the refusal to recognize the assignments as having validity was based solely upon the opinion that the court of bankruptcy was without power to order the sale because the land covered by the certificate

was not located within its territorial jurisdiction, and that a sale could only have been made under orders of a court of the United States within whose territorial jurisdiction the land was situated, and in the mode pointed out by the act of 1893. This, however, but amounts to holding that a court of bankruptcy is confined in the administration of the property of a bankrupt to state or district boundaries, and that whenever the bankrupt has property within two or more States it is necessary to commence independent or ancillary proceedings in all such States in order to subject the property therein to administration and sale. But we think it is clear that this view is incompatible with the Bankruptcy Act of 1898. No analysis of the text of the act, we think, is necessary to demonstrate this result, since it is elementary and has been decided over and over again that the effect of the adjudication in bankruptcy is to transfer the title of the property of the bankrupt and vest the same in the trustee, who has the right, under the control and authority of the court, to administer the same.

No limitation on this general principle arises from the mere fact of the particular situation of the property, as the principle is general and embraces all the property of the bankrupt estate wherever situated. Indeed this view was accepted by the court below and made the basis of its ruling, since in considering whether the quitclaim deed was valid it held it to be void because the title to the property which it embraced remained in the trustee in bankruptcy; a view which necessarily demonstrates that the ruling as to the invalidity of the sale made in the bankruptcy proceedings rested upon the conception that although the property passed to the trustee and was subject to administration, nevertheless the court was without power to direct the sale of the property, because it was located in another State. But in discussing the jurisdiction vested in a court of bankruptcy, in *United*

States Fidelity & Guaranty Co. v. *Bray*, 225 U. S. 205, 217, it was said:

"We think it is a necessary conclusion from these and other provisions of the act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection and reconsideration of claims, the reduction of the estates to money and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them."

The court of bankruptcy in Illinois therefore acquired full jurisdiction over the land in question upon the filing of the petition in bankruptcy. Having such jurisdiction it possessed the power to order a sale of the certificates or of the interest in the land evidenced by them. The legal title to the certificates being in the trustee and he being within the jurisdiction of the court and subject to its orders, that tribunal could lawfully exert its powers over him, without regard to where the land was situated. Even if the enlarged powers of a court of bankruptcy over the estate under its control be put out of view and the subject be looked at as a mere question of equitable jurisdiction, it may not be doubted that a court of equity in one State in a proper case could compel a defendant before it to convey property situated in another State. *Fall* v. *Eastin*, 215 U. S. 1, 8 *et seq.*, and cases cited. There being thus ample power in the court, it follows of course that resort to ancillary proceedings was unnecessary. The decision in *Babbitt* v. *Dutcher*, 216 U. S. 102, to the effect that district courts other than the court in which original proceedings in bankruptcy are instituted possess power in proper cases to exert ancillary jurisdiction in aid

of the court in which the bankruptcy proceedings are pending, lends no support to the contention that the court which had full power could not exert its ample authority without invoking the ancillary power of another and different court.

We come, then, to consider whether the court of bankruptcy in Illinois, in the proceedings to sell the certificates and the interest in the land evidenced by them was required to conform to the provisions of the act of Congress of March 3, 1893, c. 225, 27 Stat. 751, heretofore referred to, reading as follows:

"SECTION 1. That all real estate or any interest in land sold under any order or decree of any United States court shall be sold at public sale at the court house of the county, parish, or city in which the property, or the greater part thereof, is located, or upon the premises, as the court rendering such order or decree of sale may direct.

"SEC. 2. That all personal property sold under any order or decree of any court of the United States shall be sold as provided in the first section of this act, unless in the opinion of the court rendering such order or decree, it would be best to sell it in some other manner.

"SEC. 3. That hereafter no sale of real estate under any order, judgment, or decree of any United States court shall be had without previous publication of notices of such proposed sale being ordered and had once a week for at least four weeks prior to such sale in at least one newspaper printed, regularly issued and having a general circulation in the county and State where the real estate proposed to be sold is situated, if such there be. If said property shall be situated in more than one county or State, such notice shall be published in such of the counties where said property is situated, as the court may direct. Said notice shall, among other things, describe the real estate to be sold. The court may, in its discretion, direct the publication of the notice of sale herein provided

for to be made in such other papers as may seem proper."

We think this question must be answered in the negative. It is not to be doubted that the subject of bankruptcy was special in its nature and that in enacting the Bankruptcy Act it was proposed, comprehensively to deal with the subjects coming within the scope of bankruptcy legislation, which included, of course, the authority of courts of bankruptcy to deal with the sale of the real and personal estate of a bankrupt. Section 70*b* of the Bankruptcy Act, provides that:

"All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value."

This provision makes it manifest that it was the purpose of Congress to give bankruptcy courts full and complete equitable power in matters of the administration and sale of the bankrupt estate, wholly irrespective of the mere situs of the property, the controlling factor being, not where the property is situated, but did it pass to the trustee and is it a part of the estate subject to administration under the direction of the court. In view of the fact that the Bankruptcy Act was enacted long after the passage of the statute of 1893, and of the complete right of administration which the Bankruptcy Act confers over the property, real and personal, of the bankrupt estate, we think it follows that the authority to realize, by way of sale, on the property of the bankrupt estate, cannot be held to be limited by the provisions of the act of 1893. Indeed, this conclusion is additionally demonstrated by the fact that as recognized by No. 18 of the General Orders in

Bankruptcy, in disposing by sale of the property of the bankrupt, a bankruptcy court, as to both real and personal property, may, if reason for so doing exists, direct a private sale to be made. We do not stop to refer to the many cases in the lower Federal courts which have applied and enforced the view which we here maintain, as we think it unnecessary to do so.

As regards the alleged lack of an appraisement and error in the description of the property covered by the certificate contained in the published notice, we think they must in this collateral proceeding be deemed as mere irregularities, and that the order of confirmation, made by the referee was sufficient to validate the sale under the discretionary power given to the referee by § 70*b* of the Bankruptcy Act. *Thompson* v. *Tolmie*, 2 Peters, 157.

The Supreme Court of Kansas erred in deciding that the plaintiffs in error acquired no right or interest to the land in controversy under the sale made by the court of bankruptcy for the Southern District of Illinois; and its judgment must therefore be reversed and the case be remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* McWHIRTER.

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

No. 541. Argued December 4, 1912.—Decided June 10, 1913.

Where the case was decided on the Federal question, the fact that it might have been decided from a non-Federal point of view does not afford a basis for holding that it was decided on the latter ground and that this court has no jurisdiction under § 709, Rev. Stat.

While the power of this court to review the judgment of a state court is controlled by § 709, Rev. Stat., § 237, Judicial Code, yet where in a controversy of a purely Federal character the claim is made and denied that there was no evidence tending to show liability under the Federal statute, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law.

It was not the intent of Congress in enacting the Hours of Service Act of 1907 to subject carriers to the extreme liability of insurers of the safety of their employés by rendering them liable for all accidents occurring during the period of over-time whether attributable to the fact of working over-time or not.

In order to render the carrier liable under the Hours of Service Act there must be proof tending to show connection between permitting the over-time work and the happening of the accident.

In this case the evidence does not reasonably tend to connect the working over-time with the accident which occurred about seven minutes after the expiration of the permitted period.

145 Kentucky, 427, reversed.

THE facts, which involve the construction of the Hours of Service Act of 1907, and the liability of a railroad company thereunder, are stated in the opinion.

Mr. R. P. Railey, with whom *Mr. M. L. Clardy* and *Mr. E. T. Bullock* were on the brief, for plaintiff in error.

Mr. William V. Eaton, with whom *Mr. Aubrey Everett Boyd* was on the brief, for defendant in error.

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

The record in this case is confusedly arranged, and numerous matters are pressed in argument which we deem to be irrelevant. Not following the various steps by which the petition as originally filed and the answer were both frequently amended, the case as finally put at issue was as follows: The defendant in error as administratrix of the estate of her husband Etwal McWhirter, sued the plaintiff in error, for the benefit of herself and her four infant children, to recover damages alleged to have been suffered by the death of McWhirter. It was alleged that the deceased was employed as a flagman by the defendant company and that he was doing that work on an interstate commerce freight train when he was run over and killed by the train on which he was serving. The death was alleged in general terms to have resulted from the wrongful and negligent acts of the conductor and engineer in charge of the train and by the negligent and wrongful acts of the train dispatcher and higher officers of the defendant company. It was moreover alleged that the deceased "had been permitted and required by the officers and agents of the defendant to be and remain on duty for a longer period than sixteen consecutive hours, next before the aforesaid accident, and in violation of Chapter 2939, section 2, 34 Stat., 1415, of the acts of Congress of the United States relating to interstate commerce, and being a part of an act entitled 'An Act to Promote The Safety Of Employés And Travelers Upon Railroads By Limiting The Hours Of Service Of Employés Thereon,' which became a law on the 4th day of March, 1907, and also an act entitled 'An Act Relating To The Liability Of Com-

mon Carriers By Railroad To Their Employés In Certain Cases,' which became a law on the 22nd day of April, 1908 (35 Stat. 65, c. 149); and that the aforesaid negligent and wrongful acts of the officers and agents of the said defendant, and the said violation of the laws of the United States relating to interstate commerce were the proximate and sole causes of the death of her said husband, and she relies on the laws of the United States made and provided in such cases."

The answer of the defendant company denied the charges of negligence of its officers and other employés, admitted the death of McWhirter at a date and hour which was specified while employed as alleged in the petition, and stated facts which it was charged established that the death was an unavoidable accident for which the company was not responsible. It, besides, averred there was no right to recover because of an alleged written contract of assumption of risk entered into by the deceased and the company at the time he entered its service several years before the happening of the accident.

The case was tried to a jury. During the course of the trial both sides made various objections to evidence and exceptions were taken to testimony offered. All the evidence upon which the case was tried is in the record. Leaving aside trivial matters having no tendency to affect the result, the entire case, as to negligence, was this: The defendant operates a line of railroad through the States of Missouri and Illinois, and Illmo is a station on the main line in Missouri, and Bush a station on a branch line in Illinois, the branch diverging from the main line at a station in Illinois called Gorham. On the afternoon of February 22, 1910, at 3:30, a train of empty coal or freight cars was started from Illmo, destined for Bush for the purpose of being loaded with coal and returning. The train reached Bush about 11:30 that night. It there either loaded some of the empties with coal or exchanged some

for loaded cars. Exactly how long a time the operations at Bush consumed is not precisely fixed, one witness saying an hour, and another an hour and a half, and the same divergence exists as to the hour of departure on the return journey, one witness saying 12:30 and the other one o'clock. Gorham, where the branch line connects with the main line is about twenty miles from Bush. When the train reached that point on the return trip is not shown. Certain it is, however, that judging by the average speed of the train somewhere about 6:15 the train passed a station called Howardtown, where there was a siding, and found itself at either 7:35 or 7:37 drawing into a station called Wolf Lake which is fifteen miles from Gorham and thirty-five miles from Bush. The proof as to what then took place is contained in the testimony of three witnesses. Guess, the engineer of the train, Roberson the telegraph operator who was stationed at Wolf Lake, and Loper the conductor of the train.

Omitting as a general rule questions and answers except where it may be thought important to reproduce them, we state in narrative form the entire testimony of the first two of these witnesses and make such reference to the third (Loper) as has any bearing upon the happening of the accident.

The engineer testified, as a witness for the plaintiff, as follows:

"I have been employed as an engineer three years by the St. Louis, Iron Mountain and Southern Railway Company, for a longer period than that was a fireman. At Illmo, Missouri, I was called out on the afternoon of February 22, 1910, at 3:30 o'clock as near as I can remember. The crew of the train was as follows: Loper, conductor, flagman Mansker, brakeman McWhirter and fireman Edmiston. The train was going to Bush in Illinois. Bush is on a branch line which runs from Gorham to Bush. I do not recollect what hour we arrived at

Gorham, but we changed from the main to the branch line. The train going up to Bush consisted of nine empties, a freight train. We stayed about an hour at Bush. We set out the train of empties, and turned the engine. It took about an hour to make the transfer at Bush. We came back to Gorham, going south towards Illmo. McWhirter was killed, returning, at Wolf Lake, on the morning of February 23, at 7:35 as near as I can remember. It was in that neighborhood. He was killed performing his duty, going out to set a switch.

Question. Just detail the manner as it occurred, as you know it?

Answer. As I came into Wolf Lake, when I whistled for town, brakeman McWhirter asked me if I were going to head in at Wolf Lake. I told him yes, that we had to get in on account of the sixteen-hour law. He got up, went out at the front window on the left side of the engine along the footboard, and the next thing I seen was the operator at Wolf Lake very much excited in giving a stop signal. I stepped off of engine, asked him what was the matter. He said, 'My goodness you have run over the brakeman.' I went looking for him, found him under the left tank wheel, cut in two.

Q. Did you know this brakeman was in front of the engine?

A. No, sir.

Q. Did you see him go out of the cab window?

A. I seen him go out of the cab window. That is all.

Q. What did you suppose he went out of the cab window for?

A. He is supposed to get out there to open the switch. I supposed that is what he went out there for.

Q. Was it his duty to throw the switch in front of the window or not?

A. No, sir, it wasn't his place to throw it in front of the window. He wasn't supposed to go out on that pilot.

Q. What I mean is was the switch that the brakeman was required to throw in front of the engine or behind of the engine?

A. It was in front of the engine. I have no record that would show the minute that the train arrived at Wolf Lake on the morning of the 23d. I testified before the Coroner's jury. As near as I can remember I stated at the Coroner's inquest that the train arrived at Wolf Lake at 7:35. That would make five minutes over the sixteen-hour law.

Q. You stated before the Coroner's inquest 'at 7:30 the sixteen-hour law was up. We were seven minutes over time.' Was that correct?

A. I suppose so. As near as I can remember it was five minutes. It was 7:35. If I said 7:37 that was correct. Then I knew it. It has been over a year ago now. Neither cylinder of my engine was bad, more than ordinarily. It wouldn't make any difference in this case. Neither was leaking steam. I was not working steam when he was killed. The engine was drifting. Understand, shut off, there would be no leak there. Neither cylinder had been leaking steam that morning. There had not been anything the matter with the engine on this return trip. Nothing at all.

Q. Who saw this man run over?

A. Mr. Roberson was the only man I can say. Mr. Fred Roberson. He was standing on the platform. The train was going out to Wolf Lake. Destination was Illmo.

The crew of my train did not go any further than Wolf Lake. There was another crew that came to relieve us there."

On cross-examination the witness testified:

"McWhirter knew of our purpose to head in at Wolf Lake, for I told him that we were going to head in on account of the sixteen-hour law. Wolf Lake was the first

switch or place which we could enter at the expiration of the sixteen-hour law. It was McWhirter's duty as brakeman to throw the switch.

Q. When was the first time that you knew of the unfortunate accident?

A. When Mr. Roberson told me what had happened.

Q. Whom do you mean by Mr. Roberson, who was he?

A. The telegraph operator at Wolf Lake."

On re-direct examination the witness said:

"It is about in the neighborhood of fifteen miles from Wolf Lake to Gorham, and about six miles from Wolf Lake to Howardtown. There is a switch at Howardtown. There was no defect in the pilot step and I know nothing about how this accident happened except from the fact that the telegraph operator told me that something was wrong."

F. A. Roberson, a witness for the plaintiff, testified as follows:

"I am employed as a telegraph operator by the St. Louis, Iron Mountain & Southern Railway Company, and have been so employed since July, 1904. I was stationed, as operator, at Wolf Lake on February 22, 1910. I was at the station on the morning of the 23rd of February when extra train No. 503 came into Wolf Lake from the north. I saw the train when it pulled in. It was about 7:37 as well as I recollect by the time it got to the depot.

Q. Just tell what you know about the accident that happened at Wolf Lake on that morning?

A. As I was sweeping out the office, I heard an engine coming. I looked out of the window and saw it was an extra south—saw it was a train coming south—didn't know it was an extra. I seen they were stopping and I wondered what they were stopping for and went ahead sweeping. When they came in close to the office I went out and was standing on the platform. I saw a man leave the cab window and come down the left running board

and came down to the pilot, and as it was nearing the switch he left the pilot and struck the ground running and the next I saw he fell face downward between the rails. I next saw him on his hands and knees. After that I turned my eyes to the engineer and did not see him any more, giving the engineer a stop signal. When he came to a stop I told the engineer something, but I do not remember what I told him, but that was the last I saw of the brakeman until he was taken from under the tender of the engine.

He was dead when he was taken out from under the engine. The weather was pretty cold—weather chilly, cold. As near as I can remember, the ground was frozen. I do not remember that there was any ice and sleet on the ground.

Q. Do you know how this man came to fall?

A. I do not.

There were cinders between the rails where he was, ashes between the rails, a little higher than the other ground about the place he was killed. I believe they were frozen. I do not recollect whether it had been raining on the night of the 22nd—not that I remember of it raining. I do not think any one else saw McWhirter at the time he was killed—not at the office. At that time there was no one else around there except the train crew on this freight train.

The remainder of the testimony of the witness is as follows:

"Q. When you saw McWhirter's perilous condition you say you turned your head. Why did you do that?

A. I don't remember saying I turned my head. I turned my eyes from the brakeman to the engineer.

Q. Did you know that he was in a condition to be hurt?

A. I didn't positively know so, but I thought he was in a dangerous condition down there.

Q. How far did the train run before the engineer stopped it after you notified him of this trouble?

A. I suppose about the length of an engine. Maybe not quite so far, maybe a little further. I don't remember.

Q. Do I understand you to say that Mr. McWhirter left the engine, passed down over the pilot and was out on the ground when you saw him?

A. He was on the ground when I saw him.

Q. How far was he from in front of that engine when he fell?

A. That is pretty hard for me to judge because he was in line of the engine and myself.

Q. How far was it from where he fell to the switch which he was called on to turn?

A. Perhaps three or four car lengths, maybe not so far.

Q. How far is a car length—how many feet?

A. That is pretty hard for me to say.

Q. How long is a car?

A. Well, they ordinary run thirty-six feet, some of them thirty, some of them forty.

Q. Now, when you saw him fall how far was he from this switch?

A. About three car lengths. About three car lengths."

Redirect examination by Mr. E. Boyd, counsel for plaintiff:

"Q. You say that at the time McWhirter fell he was in line with you and the engine. Explain what you mean by that?

A. In direct with me—between where I stood and where he got off putting me in direct line with him and where he got off. I can't tell whether he was ten, twenty or how far he was from the engine.

Q. You mean, if I understand you, that the train was coming towards you and he stepped off between you and the engine, is that correct?

A. That is correct.

Q. Do you know whether or not the cylinder heads of this engine were leaking?

A. I couldn't say whether it was the cylinder heads or not. I recollect there was some steam or other from the engine.

Q. Steam was escaping?

A. Steam was escaping from the engine, as well as I recollect."

Cross-examination by Judge E. T. Bullock, counsel for defendant:

"Q. Do you know what caused that?

A. I do not."

As to the testimony of conductor Loper, it suffices to say that he swore he was in the caboose and saw nothing of the accident, although he knew it occurred as the train was entering the station at Wolf Lake at 7:37 in the morning. When examined as a witness for the plaintiff he testified on cross-examination that at the time of the accident the train could not have been going more than two miles an hour because they stopped at an "engine's length," while when called to the stand as a witness for the railroad company he testified on cross-examination that at the time of the accident the train was going "about three or four miles an hour." Loper also testified that the night of the twenty-second of February, 1910, was a cold night, freezing, and the ground was frozen; that at the expiration of the sixteen hour limit the train was probably two miles from Wolf Lake, which was the first switch on the expiration of that limit.

At the close of all the evidence the defendant requested the court to instruct the jury to find in its favor. The court refused to do so, and an exception was noted. There were many other requests to charge asked by the respective parties, some of which were given and some of which were refused and exceptions taken.

There was a verdict and judgment for the plaintiff. The

Court of Appeals affirmed the judgment. 145 Kentucky, 427. Among other things, the court held that there was testimony tending to show negligence, and therefore the binding instruction to the contrary asked by the defendant was rightly refused, and that an instruction as to the operation and effect of the Hours of Service Act was also correct.

We must first dispose of a motion to dismiss which was made and postponed to the hearing on the merits. It rests upon the ground that the case as made by the pleadings presented two distinct causes of action—one at common law irrespective of the statutes of the United States and the other under those statutes, and that the former cause of action was sustained and affords a basis broad enough to support the judgment irrespective of what may have been decided concerning the statutes of the United States. The contention wants foundation in fact. As we have seen the pleadings in express terms exclusively based the right to relief upon the statutes of the United States and no non-Federal ground was either presented below or passed upon. It is true that although the case was exclusively rested upon Federal statutes, as it comes here from a state court, our power to review is controlled by Rev. Stat., § 709, and we may therefore not consider merely incidental questions not Federal in character, that is, which do not in their essence involve the existence of the right in the plaintiff to recover under the Federal statute to which his recourse by the pleadings was exclusively confined, or the converse, that is to say, the right of the defendant to be shielded from responsibility under that statute because when properly applied no liability on his part from the statute would result. *Seaboard Air Line Ry.* v. *Duvall*, 225 U. S. 477; *St. Louis, I. M. & S. R. Co.* v. *Taylor*, 210 U. S. 281. And of course as the cause of action alleged was exclusively placed on the Federal statute and the defense therefore alone involved, determining

whether there was liability under the statute, the mere statement of the case involved the Federal right and necessarily required, from a general point of view, its determination. *Swafford* v. *Templeton*, 185 U. S. 487. If as is inferable from the argument, reliance is placed on the ruling of the court below that there was evidence tending to show negligence on the part of the engineer for the purpose of establishing that even if a Federal question was passed upon the case was also decided on an independent non-Federal ground broad enough to sustain the judgment, the proposition is without merit. The mere ruling that there was evidence sufficient to authorize consideration of the case from the point of view of negligence alone, affords no basis for saying that the case was decided on such ground. Mere conjecture may not be indulged in for the purpose of concluding that because there was a potentiality of considering the case from a non-Federal point of view, therefore it was considered and decided in that aspect. But it was long since pointed out in *Neilson* v. *Lagow*, 12 How. 98, the court speaking through Mr. Justice Curtis, that to admit that the authority to review the action of a state court where it has decided a Federal question can be rendered unavailing by a suggestion "that the court below may have rested its judgment" on a non-Federal ground, would simply amount to depriving this court of all power to review Federal questions if only a party chose to make such a suggestion. But, aside from this, the argument, when rightly considered, reduces itself to this, that the power to review a Federal question which has been expressly decided by a state court does not obtain where such court has also decided another Federal question. This is true since the finding that there was some evidence to go to the jury on the subject of negligence independently considered was necessarily a ruling against the binding instruction asked at the close of the testimony upon the assumption that there was nothing adequate to

go to the jury to show liability under the Federal law. While it is true, as we have said, that coming from a state court the power to review is controlled by Rev. Stat., § 709, yet where in a controversy of a purely Federal character the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law. *Kansas City So. Ry.* v. *Albers Commission Co.*, 223 U. S. 573, 591; *Creswill* v. *Knights of Pythias*, 225 U. S. 246.

The plaintiff in error assigns twenty-two alleged errors. We deem it necessary only to refer to those which concern the following subjects: First, the refusal to give the binding instruction asked by the defendant; and, second, an instruction given over the objection and exception of the defendant concerning the act of Congress commonly known as the Hours of Service Act, and in connection therewith a special charge on the same subject, given by the court of its own motion, which was excepted to by both parties.

Let us first consider the interpretation and effect given to the Hours of Service Act as a result of the instructions of the trial court and the action of the court below in approving the same. The instructions given by the trial court were as follows:

"The Court further instructs the Jury that if you shall believe from the evidence that the said Etwal McWhirter had been permitted or required to be or remain on duty continuously for more than 16 consecutive hours next before the accident which caused his death, then the defendant was negligent and liable in damages for said injury and death of Etwal McWhirter, if you shall believe from the evidence that the permitting or requiring the said Etwal McWhirter to be or remain on duty continuously for more than 16 consecutive hours next before his death in any way contributed to the said accident and

death, you will find for the plaintiff such damages as you may believe from the evidence she has sustained by reason of his death, not exceeding the sum of $25,000.

"The Court instructs the jury that unless they believe from the evidence that Etwal McWhirter came to his death on account of the carelessness or negligence of the officers, agents and servants of the defendant, or that said McWhirter was permitted or required by the defendant to be on duty more than sixteen hours consecutively next before his death, and that his being permitted or required to be on duty more than sixteen hours next before his death contributed to his death, the law is for the defendant and the jury should so find."

The Court of Appeals, after reviewing the evidence as to the happening of the accident and stating that it was patent "that it occurred after more than sixteen consecutive hours of continuous service by the intestate on the train," said:

"In thus requiring of the intestate more than sixteen consecutive hours of service, albeit the excess of service over the sixteen hours was but five or seven minutes, appellant violated the statute, *supra;* and as the death of the intestate, from the act of its engineer complained of, occurred while he was engaged in the required continuous service and after the expiration of the sixteen consecutive hours allowed by the statute, there seems to be no escape from the conclusion that the act of appellant in thus extending his service beyond the statutory limit was negligence *per se,* to which the intestate's death must, as a matter of law, be attributed, and, if so, the right of appellee to maintain this action cannot be questioned."

Further declaring that if the right to recover depended alone upon the ability to show that the death of McWhirter was caused by the negligence of the engineer, there was evidence tending to prove such negligence, the court said:

"Recurring to the appellant's violation of the provisions

of the statute prohibiting it from requiring its employés to remain on duty longer than sixteen consecutive hours, we find that the language of the provision in question is mandatory and that the duty it imposes is a definite, absolute duty. Its non-performance may not, therefore, be excused by a showing on the part of the railroad company that it used ordinary care or reasonable diligence to perform it, but was unable to do so. The violation of such a statutory duty is, therefore, negligence *per se*."

And these positive conclusions were deemed to be further reinforced by a citation of decisions of this court enforcing the imperative duty of carriers to maintain in good order all appliances required by the Safety Appliance Act, the court saying:

"The requirements of the statute with respect to the safety appliances to be used on appellant's trains, are no more imperative or mandatory than is the statutory restriction here involved upon its right to suffer its employés to engage in its service more than sixteen consecutive hours. The violation of the statute in either case invites the penalty prescribed, and the offender will not be excused upon a showing of reasonable effort or diligence in attempting to comply with the statutory requirements."

Giving to the views thus expressed by the court, their natural significance, there would seem to be little doubt that it was intended to hold that the effect of the violation of the Hours of Service Act was to create an unconditional liability for all accidents happening during the period beyond the statutory time irrespective of proof showing a connection between the accident and the working over time. In other words, the ruling was that by operation of law the carrier is an insurer of the safety of all his employés while working beyond the statutory time. And it is true also to say that although the instructions given by the trial court may not have as explicitly stated the doctrine as did the Court of Appeals, nevertheless such

instructions rested upon the same interpretation of the statute for the following reasons: *a*, because beyond the proof of working over time there was no offer of proof connecting the accident with the working over time, and, *b*, because it is apparent that the Court of Appeals interpreted the charge upon which it was passing as having that significance and affirmed it for that reason.

In giving to the statute the construction above stated we think error was committed. The Hours of Service Act was approved March 4, 1907, and is entitled "An Act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon." Chapter 2939, 34 Stat. 1415. We are unable to discover in the text of the statute any support for the conclusion that it was the purpose of Congress in adopting it to subject carriers to the extreme liability of insurers which the view taken of the act by the court below imposes. We say this because although the act carefully provides punishment for a violation of its provisions, nowhere does it intimate that there was a purpose to subject the carrier who allowed its employés to work beyond the statutory time to liability for all accidents happening during such period without reference to whether the accident was attributable to the act of working over time. And we think that where no such liability is expressed in the statute it cannot be supplied by implication. It requires no reasoning to demonstrate that the general rule is that where negligence is charged, to justify a recovery it must be shown that the alleged negligence was the proximate cause of the damage. The character of evidence necessary to prove such causation we need not point out, as it must depend upon the circumstances of each case. Conceding that a case could be presented where the mere proof of permitting work beyond the statutory time and the facts and circumstances connected with an accident might be of such a character as to justify not only the conclusion

of negligence, but also the inference of proximate cause, such concession can be of no avail here, since the instruction of the trial court and the ruling affirming that instruction were based upon the theory that the mere act of negligence in permitting an employé to work beyond the statutory period created liability irrespective of the connection between the alleged negligence and the injury complained of.

It is to be observed, however, that even if for the sake of argument the broad expressions of the court below and those of the trial court be so limited as to justify the conception that it was only intended to decide that permitting the working beyond the statutory time was negligence *per se*, giving rise to liability only where the proof showed a causal connection between the injury complained of and such *per se* negligence, the concession would not avoid the Federal question or remove the error. We say this, because indulging in the assumption stated, would render it necessary to determine, as previously pointed out, the Federal question whether there was any evidence tending to show a connection between the asserted negligence and the occurrence of the accident; that is, whether the plaintiff had offered any proof tending to show the existence of the Federal right which was asserted or conversely speaking whether there was any proof tending to establish that the defendant was liable within the terms of the statute—considerations as the right on the one part of the plaintiff, or the immunity on the other part of the defendant, depended exclusively upon the statute, were, in the nature of things both necessarily Federal—since they were from the point of view of the statute correlative. Assuming then that as the result of the hypothesis we have indulged in, the case is reducible to the Federal question last stated, we are clearly of the opinion that as there was no proof tending to show a connection between the permitting of the working beyond the statutory time,

and the happening of the accident, reversible error was committed. Of course the inquiry whether there was any proof having such tendency is not to be solved by indulging in mere surmise or conjecture, or by resorting to imaginary possibilities, for to so do would but resolve the question back to the generic rule of liability as insurer which we have previously disposed of.

Our conclusion that there was no reasonable tendency in the evidence connecting the permitting of the working over time with the accident may be briefly thus summarized: First, because we think there is nothing in the proof concerning the action of the deceased from which an inference could be drawn, that his jumping from the pilot of the slowly moving engine was in any way caused by the fact that he had been working over time; second, because we think there was no proof tending to show negligence on the part of the engineer and therefore obviously no room to conclude that the fact that he had worked over time negligently contributed to the accident, for the following reasons: *a*, because of the uncontradicted testimony of the engineer and of the telegraph operator whose signal was immediately seen and caused the engineer to stop the train within a car length; *b*, because of the testimony of the operator as to the position of the brakeman when he leaped from the pilot to run towards the switch, of his statement as to the line of vision from where he stood and the brakeman and engineer, the short interval which elapsed, the place where the brakeman in rising after falling was struck by the locomotive as shown by the distance the engine traveled before it came to a stop and the place where the body was found. Indeed, irrespective of the testimony of the telegraph operator, we think, when the natural position of the engineer on the right side of the cab is considered, of the position in which it is unquestionably shown the deceased was, of the short distance which the train moved before it was stopped after

the signal from the operator, it is demonstrated with mathematical certainty that the deceased was not within the possible vision of the engineer as he leaped or stepped from the pilot for the purpose of running along the track to the switch.

The judgment of the Court of Appeals of Kentucky must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE PITNEY, dissenting.

It seems to me that the rulings of the state court, held to be erroneous, are not within the scope of our review under the act (Rev. Stat., § 709; Jud. Code, § 237) that alone confers jurisdiction upon this court to review the judgment of a state court.

The action was based upon the Hours of Service Act of March 4, 1907 (34 Stat. 1415, 1416, c. 2939, § 2), and upon the Employers' Liability Act of April 22, 1908 (35 Stat. 65, c. 149), and the verdict and judgment rest upon the theory that plaintiff's intestate, Etwal McWhirter, a flagman or brakeman upon one of defendant's interstate trains, had been kept continuously at work for more than sixteen consecutive hours, in violation of the former act, and that his death was directly due to the negligence of the locomotive engineer upon the same train, either alone or in conjunction with McWhirter's excessive fatigue due to his having been worked overtime. The negligence of the engineer was of course attributable to the defendant under the act of 1908, and under that act the negligence of the deceased, if shown, would not bar the action.

As I read the record the trial judge instructed the jury to the effect that the violation of the Hours of Service Act created no liability unless there was a causal relation

between the working overtime of the deceased and the catastrophe that resulted in his death. And so, I think, the Court of Appeals of Kentucky interpreted the instructions (145 Kentucky, 427, 441; Instructions 4 and 5).

However, let it be conceded, for present purposes, that the trial court erroneously instructed the jury that the effect of the violation of the Hours of Service Act was to create an unconditional liability for an accident happening after the expiration of the 16-hour limit, and to render the carrier an insurer of the safety of the employé while working beyond the statutory time. And let it be further conceded that the trial court held, and erred in holding, that there was enough in the evidence to warrant a finding that the locomotive engineer was negligent, so as to make the carrier liable under the Employers' Liability Act; or held, erroneously, that there was enough to show a causal relation between the working overtime of McWhirter and the disaster, so as to create a liability under the Hours of Service Act.

It still does not seem to me that the state courts, in overruling defendant's objections to the instructions referred to, or in denying the motion (and sustaining such denial) for direction of a verdict in defendant's favor, decided *against* any "title, right, privilege, or immunity specially set up or claimed" by the defendant under the Constitution or laws of the United States, within the meaning of § 709, Revised Statutes; Judicial Code, § 237. It was the plaintiff in the trial court (now defendant in error) who alone claimed under the laws of the United States. The attitude of the defendant was that of merely denying the validity of her claims. And the rulings of the state court (as is conceded, for argument's sake) erroneously imposed upon the defendant a greater responsibility than those laws warranted; in other words, gave too great force to the Federal statutes. The questions thus raised were undoubtedly Federal questions in

the general sense; that is to say, they arose under the laws of the United States. And I concede that the judgment cannot be sustained upon any independent non-Federal ground. But according to all previous decisions, so far as I am aware, the mere existence of a Federal question in the record is not sufficient to give to this court jurisdiction to review the judgment of a state court; it is necessary that the Federal question shall have been decided in a particular way.

There is a clear distinction between the existence of a Federal question such as would give original jurisdiction to a Federal court because "arising under the Constitution or laws of the United States," etc. (Judicial Code, § 24), or such as would give a right of appeal to this court from those courts (§§ 238, 241), and the *denial* by a state court of a Federal right or immunity, under such circumstances as to give jurisdiction to this court to review the state court's decision.

Section 237, Judicial Code, formerly § 709, Rev. Stat., authorizes a review by this court of the final judgment of the court of last resort of a State only "where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is *against* their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is *in favor of* their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is *against* the title, right, privilege, or immunity especially set up or claimed by either party, under such Constitution, treaty, statute, commission, or authority."

Unless the emphatic words—"*against* their validity"—

"*in favor of* their authority"—"*against* the title . . . or immunity *especially set up*," etc.—are to be eliminated from the section, it must be construed as giving, not a mutual or reciprocal right of review of Federal questions decided in the state courts, but an unilateral right of review, dependent upon the way in which the question was decided in the state court.

The distinction has been recognized by this court in cases without number. See *Whitten* v. *Tomlinson*, 160 U. S. 231, 238; *Penn Mutual Life Ins. Co.* v. *Austin*, 168 U. S. 685, 695; *Holder* v. *Aultman*, 169 U. S. 81, 88; *Field* v. *Barber Asphalt Co.*, 194 U. S. 618, 620.

The terms of § 237, Judicial Code, are not new. Except for using the word "*especially*" instead of "*specially*" the jurisdictional clause is identical with the corresponding clause in § 709, Rev. Stat., under which it has been uniformly held that this court has no general power to review or correct the decisions of the state courts, and is authorized only to protect against alleged violations in state court decisions of rights arising under the Federal authority; that it was not the purpose of Congress to authorize a review by this court whenever a Federal question is decided in a litigation in a state court, but was to prevent the state jurisdictions from impairing or frittering away the authority of the Federal Government by failing to give full force to the statutes, etc., established by that Government; and that therefore the writ of error will lie only when the decision is adverse to the Federal right asserted in the state court by the plaintiff in error; and that a decision in the state jurisdiction upon a Federal question, however erroneous the decision may be, is not to be corrected in this court if the decision be in favor of the right or immunity that is set up under the Federal authority. *Montgomery* v. *Hernandez* (1827), 12 Wheat. 129, 132; *Hale* v. *Gaines* (1859), 22 How. 144, 160; *Murdock* v. *City of Memphis* (1874), 20 Wall. 590, 626; *Mis-*

souri v. *Andriano*, 138 U. S. 496, 499; *Jersey City & Bergen R. Co.* v. *Morgan*, 160 U. S. 288, 292; *DeLamar's Nevada G. M. Co.* v. *Nesbitt*, 177 U. S. 523, 528.

In all these cases the word "immunity," as used in § 709, Rev. Stat., like the associated words "title, right, privilege," has been given its normal affirmative force; the clause meaning not that the plaintiff in error may have merely denied a Federal right asserted against him by his adversary, but that he must have claimed exemption from a liability or obligation asserted against him on grounds of state or of Federal law, by *specially setting up* an immunity because of some statute, or treaty, or constitutional provision of the United States.

The more recent decisions that are sometimes supposed to have given a different construction to § 709, do not, upon critical examination, bear out this view. *Nutt* v. *Knut*, 200 U. S. 12, 19, and cases cited; *Texas Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 434, etc.; *Kansas City Southern Ry.* v. *Albers Commission Co.*, 223 U. S. 573, 591; *Creswill* v. *Knights of Pythias*, 225 U. S. 246; *Seaboard Air Line Ry.* v. *Duvall*, 225 U. S. 477. An apparent exception is *St. Louis, Iron Mountain & S. Ry.* v. *Taylor*, 210 U. S. 281, 291, etc. But in that case the plaintiff in error did at least assert a special construction of the Federal act upon which its adversary's suit was based, and upon that special construction claimed an exemption from liability.

I am unable to find in § 709, or in previous decisions of this court, any authority for a review by this court of a decision by a state court sustaining a defendant's liability in an action founded upon a Federal law, although such decision be excepted to; or for reviewing a state court decision that, instead of impairing or limiting the effect of an act of Congress, is alleged to enlarge its scope and effect and the consequent responsibility of a defendant thereunder.

LEWIS PUBLISHING COMPANY *v.* MORGAN, POSTMASTER IN NEW YORK CITY.

JOURNAL OF COMMERCE AND COMMERCIAL BULLETIN *v.* BURLESON, POSTMASTER GENERAL OF THE UNITED STATES.[1]

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 819, 818. Argued December 2, 3, 1912.—Decided June 10, 1913.

From the beginning Congress, in exerting its power under the Constitution to establish post-offices, has acted upon the assumption that it is not bound by any hard and fast rule of uniformity, and has always assumed the right to classify in its broadest sense.

Congress always has given, and subject only to the express limitations of the Constitution, can give, special mail advantages to favor the circulation of newspapers, and has also fixed the general standard and imposed conditions upon which these privileges can be obtained.

The provisions in § 2 of the Post Office Appropriation Act of 1912 regarding publications and conditions under which they can be carried in the mail construed and *held*, that:

Those provisions are intended simply to supplement existing legislation relative to second class mail matter, and not as an exertion of legislative power to regulate the press, curtail its freedom or to deprive one not complying therewith of all right to use the mail service.

A provision in a departmental appropriation act gives rise to the inference that it concerns the general subject under control of that Department.

A provision in a post-office appropriation act referring to the entering of mail matter refers to second class mail as that is the only class to which the word "enter" can apply.

Requirements in the second paragraph of a statutory provision *held* to apply to articles enumerated in the preceding paragraph

[1] See *post*, p. 600, for proceedings on motion for restraining order in this case.

when the words used cannot otherwise be reasonably construed, and when it also appears that as passed by the first enacting chamber the two paragraphs subsequently divided were embodied in one paragraph.

A penalty of denial of the privileges of the mail for failure to comply with requirements applicable only to second class matter does not amount to entire exclusion from use of the mail.

Requirements in regard to publications entitled to be entered as second class mail and sanctioned by the penalty of exclusion from the privileges of such second class, are not to be construed as independent regulation of such publications, but only as condition precedent to retaining the privileges of second class mail after entry of the publication; and so *held* as to the provision that paid for matter in periodicals must be marked "advertisement" under penalty of exclusion from the privileges of the mail.

Legislative history of a statute can be examined to enable the court to construe it.

The requirements in § 2 of the Post Office Appropriation Act of 1912 that certain specified information be presented to the Postmaster General and that all paid for matter, editorial and otherwise, be marked "advertisement" under penalty of exclusion from the privileges of the mail, *held*, not to be an unconstitutional abridgment of the freedom of the press protected by the First Amendment or a denial of due process of law under the Fifth Amendment, or as a denial of the use of the mail, but only a requirement relating to second class mail matter sanctioned by exclusion from the privileges of the mail in that regard.

THE facts, which involve the constitutionality and construction of the provisions in the Post Office Appropriation Act of 1912 in regard to privileges of second class mail matter accorded to magazines and other publications, are stated in the opinion.

Mr. James M. Beck, for Lewis Publishing Company, appellant in No. 819:

To adopt the Government's narrow construction of this statute would be judicial legislation. Its provisions are plain and free from ambiguity. Failure to comply with its requirements subjects "every newspaper" to a denial

of "the privileges of the mails"—not the advantages of second class rates only, but the privilege of using the mail for any purpose.

The act has been thus interpreted by the Attorney General, the Postmaster General, the press and the public. Its position in the appropriation act confirms this interpretation, for it is not included in the subdivision relating to second class matter, but in that which deals with miscellaneous and general legislation. The views expressed by its proponents in Congress confirm the same interpretation.

The present attempt to restrict its meaning was an afterthought to save its constitutionality.

While it is true that this court will accept of two "reasonably susceptible" interpretations the one which is most free from constitutional objection, yet this court should not, in applying this salutary doctrine legislate by reconstructing a statute. *United States* v. *Reese*, 92 U. S. 214; *James* v. *Bowman*, 190 U. S. 127.

Either construction of the statute, however, makes it unconstitutional. The difference is one of degree but not of kind. Congress can neither enlarge the powers of the Federal Government over the newspaper press by the duress of exclusion from the mails nor by the inducement of preferential rates. In either event such a statute is an attempted "accomplishment of objects not entrusted to the Government" and therefore "not the law of the land." *McCulloch* v. *Maryland*, 4 Wheat. 423. Otherwise Congress could indirectly legislate as to many matters which, under the Tenth Amendment, were reserved to the States, by the simple device of compelling a citizen to do things, in themselves beyond Federal power, if he wishes to use the mails, and such a privilege being vital, the citizen would have no choice but obedience to an unconstitutional statute.

This case draws sharply the vital issue between an

arbitrary and unrestricted Government and a restricted and free Government. Either Congress has, as the Solicitor General contends, the power to prescribe absolutely the conditions on which the citizen shall use the mails or Congress has only the power to prescribe such conditions as to the use of the mails as have a legitimate and appropriate reference to the carriage of the mails.

No encouragement is found for the former view in the decisions of this court. While asserting the exclusive and plenary power of Congress over interstate commerce (see *Lottery Cases*, 188 U. S. 331), this court denied that even a plenary power could be "arbitrary." Similarly, while this court has recognized the plenary power of Congress to determine what shall and what shall not be carried in the mails, yet such general expressions cannot sanction an arbitrary use of such power or justify statutory conditions imposed upon the exercise of a vital right, which have no legitimate relation to the carriage of the mails. Otherwise there would follow an indefensible extension of Federal power, of which neither the generation that framed the Constitution nor any succeeding generation until the present would have dreamed of as a possibility.

This current doctrine of the right to pervert Federal powers to accomplish extra-constitutional ends can be justly characterized as "nullification by indirection."

It is not the doctrine of this court, as is shown by the earlier decisions in *Marbury* v. *Madison*, 1 Cranch, 138, and *McCulloch* v. *Maryland*, 4 Wheat. 423, and the later decisions in the *Lottery Cases*, 188 U. S. 331, the *Employers' Liability Cases*, 207 U. S. 463, and *Adair* v. *United States*, 208 U. S. 161.

The other line of cases, commencing with *Veazie* v. *Fenno*, 8 Wall. 533, and ending with *McCray* v. *United States*, 195 U. S. 27, are not inconsistent. They were cases of express powers and arose under the taxing clause of the Constitution. This power is *sui generis* and exhausts

definition and a statute which on its face is a taxing statute cannot, except under very extraordinary circumstances, be invalidated by attributing to Congress a purpose other than to raise revenue. Moreover, the power to tax as a means to regulate industry was recognized long before the Constitution and has been recognized ever since.

A different question arises where the exercise of an alleged implied power is under consideration. Such power is confronted with the Tenth Amendment and can only be sustained under the power "to make all laws necessary and proper for carrying into execution the powers" expressly granted to Congress. A statute, therefore, like the present one, which claims to be thus "necessary and proper" must find its justification not only in the letter of the Constitution but in the facts of human life. To apply the acid test of Chief Justice Marshall (*McCulloch* v. *Maryland*, 4 Wheat. 423), it must be "appropriate" and "plainly adapted" and "consistent with the letter and spirit of the Constitution." This court has nullified nineteen acts of Congress because they were not as matter of fact plainly adapted to carry out the alleged constitutional grant and this legislation is of that class.

The statute also abridges the freedom of the press. The First Amendment means in substance that no burden or restriction should be imposed upon the press, excepting only in matters of recognized morality and subject always to responsibility at common law for libelous statements. The history, which preceded the First Amendment, clearly shows that it was made to prevent a censorship of the press either by anticipation through a licensing system or retrospectively by obstruction or punishment.

The compulsory disclosure to the public of the circulation of a newspaper is calculated to impair its influence and violate the privacy of its business. By compelling a public disclosure of the editors and owners of newspapers, the right to disseminate ideas impersonally is destroyed.

At the time the Constitution was adopted, nothing was more familiar to its framers than impersonal journalism. To this day we do not accurately know who wrote the letters of "Junius," and when the Constitution was adopted the most valuable arguments in its support were submitted anonymously by Madison, Hamilton, Jay and many others.

To compel a newspaper to use its own capital, labor facilities and valuable space, to disclose the most intimate secrets of its business to the public, is also a taking of private property without due process of law and without just compensation.

To concede to Congress the power to utilize the mails to discipline the free press of the country would hereafter mean a stricter and more dangerous censorship, for in the matter of arbitrary power, "the appetite grows by what it feeds on."

Mr. Robert C. Morris, with whom *Mr. Guthrie B. Plante* was on the brief, for Journal of Commerce, appellant in No. 818.

The Solicitor General for the United States:

The statute means that in order to obtain the low, second class postage rates all newspapers must comply with two requirements, to-wit:

(A) File with the Post Office Department and publish in the paper the name of the editor; and

(B) Mark as an advertisement any article for the publication of which the newspaper receives compensation; and, in default of so complying, shall be denied the second class postal rates.

The intent of Congress as deduced from the legislative history of the statute shows that Congress in its final enactment of the bill had the same intent that the House had in originally passing it, namely, merely to exclude

from the second class mail privileges all publications that did not comply with the requirements laid down in the act. The changes in the bill all related to the terms of the requirements, and were not intended to affect the broad principle that Congress (pursuant to its power to decide what should be carried by its mails) was limiting the use of the second class mail privileges to those newspapers that would comply with certain regulations which Congress felt it wise to impose as conditions upon such use.

A reasonable construction of the language used shows that the act only applies to newspapers using, or desiring to use, the second class mail privileges.

The words "this paragraph" refer to the whole subject of newspaper regulation.

The purpose of the special penalty for violating the advertisement clause is to enable the post office to properly enforce the act.

The true construction that should be adopted is, *First*, That Congress did not attempt to regulate all newspapers, magazines, etc., but only those that used the second class mail privileges; *Second*, That Congress prescribed certain things which those publications must do in order to continue the use of the second class privileges; *Third*, That Congress denied the use of the second-class privileges only to such publications as, after ten days' notice, still refused to comply therewith; and, *Fourth*, That Congress prescribed a moderate fine for any publication which (while complying with the first paragraph and thereby securing the continued use of the mails) inserted paid-for articles without marking them "advertisement."

This construction should be adopted, as any other might invalidate the statute.

Under the power to establish post offices and post roads, Congress has the absolute right to determine what matter may be carried in and what matter may be excluded from the mails; and it may declare the conditions on which it

will carry articles and that a given class of matter (newspapers, etc.) shall not be carried at the second class rate unless such matter conforms to every requirement Congress may prescribe. *Ex parte Jackson*, 96 U. S. 727; *In re Rapier*, 143 U. S. 110, 133; *Public Clearing House* v. *Coyne*, 194 U. S. 497.

The present statute is a mere exercise of the right to determine what shall be admitted to the mails.

Appellants' argument that Congress had no power to enact the statute in question is based on an assumed erroneous construction of the act.

In the exercise of an admitted power Congress may indirectly accomplish results which it would have no power to accomplish directly. *Employers' Liability Cases*, 207 U. S. 463, 502; *McCray* v. *United States*, 195 U. S. 27.

The statute is not a law "abridging the freedom of the press." *Francis* v. *United States*, 188 U. S. 375; *France* v. *United States*, 164 U. S. 676; *In re Rapier*, 143 U. S. 110.

The freedom of the press only imports the right to print and circulate, but does not give any vested right to use any particular postal rate.

The statute does not deprive appellants of either liberty or property without due process of law, nor does it take private property for public use without just compensation.

A court of equity will not, by injunction, restrain the prosecution of criminal proceedings. *In re Sawyer*, 124 U. S. 200, 210–211; *Harkrader* v. *Wadley*, 172 U. S. 148, 170; *Fitts* v. *McGhee*, 172 U. S. 516, 531–533; *Hemsley* v. *Myers*, 45 Fed. Rep. 283; *Wagner* v. *Drake*, 31 Fed. Rep. 849; *Logan* v. *Postal Telegraph Co.*, 157 Fed. Rep. 570; 2 Story Eq. Jur., § 893; High on Injunctions, 4th ed., § 68; Joyce on Injunctions, §§ 58–60a.

If the "advertisement" paragraph should be held void, it is separable and should not affect the validity of the balance of the statute. *Bank of Hamilton* v. *Dudley*, 2 Pet. 492, 526; *Field* v. *Clark*, 143 U. S. 649, 695; *Income*

Tax Cases, 158 U. S. 601, 635; *Trade-Mark Cases*, 100 U. S. 82, 98; *Baldwin* v. *Franks*, 120 U. S. 678, 687; *Poindexter* v. *Greenhow*, 114 U. S. 270, 304; *Employers' Liability Cases*, 207 U. S. 463, 501; *Packet Co.* v. *Keokuk*, 95 U. S. 80, 89; *Presser* v. *Illinois*, 116 U. S. 252.

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

The Post Office Appropriation Act of August 24, 1912, 37 Stat. 539, 553, 554, c. 389, in § 2, contains the following:

"SEC. 2. . . . That it shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication to file with the Postmaster General and the postmaster at the office at which said publication is entered, not later than the first day of April and the first day of October of each year, on blanks furnished by the Post Office Department, a sworn statement setting forth the names and post-office addresses of the editor and managing editor, publisher, business managers, and owners, and, in addition, the stockholders, if the publication be owned by a corporation; and also the names of known bondholders, mortgagees, or other security holders; and also, in the case of daily newspapers, there shall be included in such statement the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months: *Provided*, That the provisions of this paragraph shall not apply to religious, fraternal, temperance, and scientific, or other similar publications: *Provided further*, That it shall not be necessary to include in such statement the names of persons owning less than one per centum of the total amount of stock, bonds, mortgages, or other securities. A copy of such sworn statement shall be published in the second issue of such newspaper, magazine, or other publication printed

next after the filing of such statement. Any such publication shall be denied the privileges of the mail if it shall fail to comply with the provisions of this paragraph within ten days after notice by registered letter of such failure.

"That all editorial or other reading matter published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked 'advertisement.' Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted or promised without so marking the same, shall upon conviction in any court having jurisdiction, be fined not less than fifty dollars ($50) nor more than five hundred dollars ($500)."

The two appellants, publishers of newspapers in the City of New York, complaining that this legislation abridged the freedom of the press protected by the First, and constituted a denial of the due process of law guaranteed by the Fifth, Amendment to the Constitution, filed their bills against designated officials of the United States to prevent the enforcement of the provision in question. The bills were dismissed for want of equity and this appeal was taken directly to this court, because of the rights asserted under the Constitution. Coming to define the controversy in order to appreciate and restrict the issues to the end that we may pass on none but the questions which are necessary to be decided, it is to be observed that there are some differences in the mode in which the cases are stated in the pleadings and in the argument. But after all, these divergencies give rise to no real distinction between the two cases and we hence treat them as one. At the outset, in order to state in the most direct way the grievances which the publishers deem they have suffered, we reproduce, retaining the italics, the statement made on that subject in the opening passages of the argument of the counsel for the Lewis Publishing Company:

"The newspaper law, whose constitutionality is in this suit called into question, is neither in form nor substance a law to regulate the carriage of the mails but *to regulate journalism.*

"In this respect it has the merit of sincerity. It does not pretend to be in aid of the Post Office Department. That Department did not seek its enactment but protested against it.

"The law in question makes no reference to the mails except that it uses exclusion therefrom *as a means of enforcing this censorship of the press.*

"Even this remote connection is wanting in the latter section of the law, which requires paid reading matter to be formally branded as an advertisement. Its enforcement is left to a criminal action for a penalty.

"The law has two plainly avowed objects.

"The first is to compel a disclosure to the Government, under oath, of the names and addresses of the editors, publishers, business managers and owners, stockholders, security creditors and the daily circulation of such newspapers for the preceding six months.

"*This will be hereafter referred to as the inquisitorial provision.*

"The second object is to compel a disclosure to the public through newspaper publication of these facts and also whether any editorial or reading matter in such publication has been inserted for a valuable consideration.

"*This will be hereafter referred to as the publicity provision.*

"The publicity provision cannot be referred to any proper function of the Post Office Department. Its function is to carry the mails and in such carriage it cannot matter whether *the public* are advised as to the ownership, editorial direction and circulation of a newspaper or not, or whether the matter which it publishes is published for a consideration."

And thus interpreting the assailed provision not as a

mere exertion of legislative power to additionally prescribe the conditions by which publishers might continue to enjoy the right to participate in the large pecuniary advantages and other privileges created in their favor through the classification of mail matter, but on the contrary treating the provision as a substantive exercise of a legislative authority not possessed and which unduly restricted the freedom of the press, thinly disguised as a regulation of the mails and enforcible by an absolute exclusion from the right to all mail service—the legal propositions advanced are as follows:

"1. The Constitution has not either under the Post Roads clause or elsewhere delegated to the Federal Government the power (1) to compel these disclosures and (2) to direct their publication or (3) to compel paid reading matter to be marked as an advertisement.

"2. The Constitution not only failed to give such power but it expressly forbade it, by the First Amendment, prohibiting any law 'abridging the freedom of the press.'

"3. The requirement that a certain class of newspapers shall disclose to the public by publication the most intimate details of their business, and use their own capital, labor facilities and valuable space for such disclosure, is a taking of 'liberty' and 'property' without due process of law and a like taking of valuable property rights for an assumed public use without just compensation."

On the other hand, putting aside what we deem to be minor subdivisions, broadly stated, all the contentions of the Government are reducible to the following: (a) That the assailed provision in no sense can be considered as an attempted exertion of power to regulate the freedom of the press or even as the exercise of the legislative authority to regulate the mails in the larger or general sense of that term since, when rightly construed, the provision only deals with what is known as second class mail matter, and imposes conditions necessary to be complied with to

enable publishers to participate in the great and exclusive privileges and advantages which arise from the right to use the second class mail. (b) That the precedent conditions thus imposed are relevant to the purpose which was intended to be accomplished by Congress in creating the second class mail privilege and are either directly or incidently embraced in the power to regulate the mails and in doing so to confer the second class privilege. (c) That even if these propositions be not well founded and the provision be given the significance attributed to it by the publishers, nevertheless it is valid as an exertion by Congress of its power to establish post offices and post roads, a power which conveys an absolute right of legislative selection as to what shall be carried in the mails and which therefore is not in any wise subject to judicial control even although in a given case it may be manifest that a particular exclusion is but arbitrary because resting on no discernible distinction nor coming within any discoverable principle of justice or public policy.

From this statement of the opposing contentions it is apparent that the first and fundamental cause of difference arises from the widely conflicting views entertained concerning the meaning of the assailed provision, and that hence it becomes primarily necessary to settle such differences, that is, to determine the true meaning of the provision. Moreover, as the controversy concerning the meaning of the provision involves its relation to the law concerning the carriage of newspapers in the mails in force at the time of the passage of the provision and an appreciation of its letter and spirit, it also becomes necessary to consider that law, its origin and development.

An abstract of the laws relating to the postal service from early Colonial times (1639), and under the Constitution down to, and including the year 1888, will be found in the report of the Postmaster General for the year 1888. A condensed yet comprehensive statement of the general

results of the legislation from the first statute on the subject, February 20, 1792, 1 Stat. 232, c. 7, to the act of May 12, 1910, 36 Stat. 366, c. 230, is contained in the report of the Commission on Second-class Mail Matter, communicated by the President to Congress on February 22, 1912, pp. 13–18.

A consideration of the abstract made by the Postmaster General above referred to and of the synopsis contained in the report of the Commission, leaves no doubt that from the beginning Congress, in exerting the power to establish post-offices and post-roads, has acted upon the assumption that it was not bound by any hard and fast rule of uniformity, that is to say, that in exerting its power on the subject of the mails it has always considered that the right to classify in the broadest sense was enjoyed, and, consequently, depending upon conceptions of public good to be accomplished irrespective of the mere cost of carriage, the rates of mail have varied and the privileges accorded have changed from time to time. All the power which has been exerted is derived from the grant to Congress, in Art. I, § 8 of the Constitution to establish post-offices and post-roads. And the wise combination of limitation with flexible and fecund adaptibility of the simple yet comprehensive provisions of the Constitution are so aptly illustrated by a statement in the argument of the Government as to the development of the postal system, that we insert it as follows:

"Under that six-word grant of power the great postal system of this country has been built up, involving an annual revenue and expenditure of over five hundred millions of dollars, the maintenance of 60,000 post offices, with hundreds of thousands of employés, the carriage of more than fifteen billions of pieces of mail matter per year, weighing over two billion of pounds, the incorporation of railroads, the establishment of the rural free delivery system, the money-order system, by which more than a half

a billion of dollars a year is transmitted from person to person, the postal savings bank, the parcels post, an aeroplane mail service, the suppression of lotteries, and a most efficient suppression of fraudulent and criminal schemes impossible to be reached in any other way."

Only particularly concerned as we are with the legislation relating to the carriage of newspapers in the mails we need not stop to generally demonstrate the accuracy of the statements we have made. An abstract from and reference to the statutes chronologically arranged, relating particularly to discriminations in favor of the carriage of newspapers in the mail, will be found in a statement made by W. A. Glasgow, Jr., Esq., before the Postal Commission of 1906–7, forming part of House Document, vol. 98, beginning at p. 541. And a consideration of the statutes referred to in this abstract will demonstrate the legislative inauguration of and persistent adhesion to what is aptly described in the report of the Commission on Second-class Mail Matter as "the historic policy of encouraging by low postal rates the dissemination of current intelligence." Indeed, we think also that it is not open to controversy that a review of these statutes will demonstrate that it was always conceived not only that Congress might so exert its power as to favor the circulation of newspapers, by giving special mail advantages, but that it also possessed the authority to fix a general standard to which publishers seeking to obtain the proffered privileges must conform in order to obtain them. Nothing affords a more apt illustration of the assumed existence of the power in Congress to discriminate on the subject than was shown as early as 1845 by the act of March 3 of that year, 5 Stat. 736, c. 43, § 9, by which, although there was secured to the Government a virtual monopoly in the transportation "of any letters, packets, or packages of letters," by forbidding the establishment of "any private express or expresses" for their conveyance on mail routes, it was declared that the

restrictions should not apply to the transportation of newspapers, pamphlets, magazines and periodicals.

But it is useless to pursue the subject in detail, since as the result of legislation, beginning with the act of March 3, 1863, c. 71, 12 Stat., pp. 701, 704 *et seq.*, and embracing statutes which are noted in the margin,[1] it had come to pass on August 24, 1912, when the provision here assailed was enacted, that mail matter, disregarding mere subordinate subdivisions, was divided into four general classes, the first class embracing letters and printed matter, the second class covering newspapers and periodicals, the third, books and pamphlets and the fourth merchandise. And it is obvious and is not disputed, that the classification thus adopted was based, not upon merely inherent distinctions or differences in the nature and character of the articles as mailable matter and the cost of their carriage, but rested upon broad principles of public policy; in other words, upon the conceptions of Congress as to how far it was wise for the general welfare to give advantages to one class not enjoyed by another. It is not necessary to stop to enumerate the exceptional privileges, and great advantages which were offered to publishers of newspapers by the classification thus adopted, since it is not questioned that as a result of giving them the benefits of the second class rates, pecuniary advantages of great consequence to them resulted which when conjoined with the exceptional administrative and other privileges, which were accorded under that classification undoubtedly operated a very great discrimination in

[1] Act of June 8, 1872, c. 335, §§ 99 *et seq.*, 17 Stat. 283, 296; June 23, 1874, c. 456, §§ 5 *et seq.*, 18 Stat. 232; July 12, 1876, c. 179, § 15, 19 Stat. 78, 82; March 3, 1879, c. 180, § 7 *et seq.*, 20 Stat. 355, 358; June 9, 1884, c. 73, 23 Stat. 40; March 3, 1885, c. 342, 23 Stat. 385, 387; July 16, 1894, c. 137, 28 Stat. 105; June 6, 1900, c. 801, 31 Stat. 660; May 12, 1910, c. 230, 36 Stat. 366. See, also, act of August 24, 1912, 389, 37 Stat., p. 551.

their favor. It was obviously this result of the legislation which caused the Postmaster General at page 6 of his report to Congress, for the year 1907, to say that "by acts of Congress passed in 1874, 1879, 1885 and 1894, a privileged class has been created." And without going into detail or intending by citing them to treat the figures as being other than illustrative, the subject is illumined by a statement made in the brief for the Government, that the rate for first class or letter mail is of such a character as to produce a profit of seventy millions a year to the Government, while for the second or newspaper class the rates are such as to entail upon the Government a loss of seventy millions of dollars each year, a result which it is moreover stated is brought about by the fact that letter mail under the classification is subjected to a rate eighty times higher than that given newspapers under the second class and that while not so large, a very great discrimination also exists against the other classes and in favor of the second class.

But the mere distinction between the classes is not the only measure of the exceptional privileges accorded to publishers, for within the second class under which they are placed, advantages are given them not possessed by others in that class. For instance, the postage on a newspaper coming under the second class rate when mailed by an individual is higher than is the rate of postage exacted for the mailing of the same newspaper by publishers or news agents. While it cannot be questioned that the conferring of the special privileges above stated, were at least in form a discrimination against the public generally, beyond doubt, however, in the legislative mind they were deemed not to be of that character because the purpose of their bestowal was to secure to the public the benefits to result from "the wide dissemination of intelligence as to current events." Certain, however, as is this view, it is equally also certain that for the purpose of securing the

public benefits which it was conceived would result from the giving of the privilege, it was deemed that the power and duty existed to fix a standard which should be complied with by those who wished to enjoy the privilege,—a result manifested by the following provisions of § 14 of the act of March 3, 1879, c. 180, 20 Stat. 355, 359:

"SEC. 14. That the conditions upon which a publication shall be admitted to the second class are as follows:

"First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

"Second. It must be issued from a known office of publication.

"Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguished printed books for preservation from periodical publications.

"Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers; *Provided, however*, That nothing herein contained shall be so construed as to admit to the second class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

And the long settled administrative practice in enforcing these conditions serves to show what was deemed to be their importance and the necessity for applying them to the end that the results intended to be accomplished by Congress might be realized. Prior to 1887 the enforcement of the conditions exacted as a prerequisite to the enjoyment of second class mail privileges depended upon the action of postmasters throughout the United States and although in the discharge of their duty they were governed by regulations and instructions promulgated by the Post Office Department, there was certainly laxity

and possible confusion. In 1887, to remedy this condition under the authority conferred upon him by Rev. Stat., § 396, the Postmaster General promulgated new rules and regulations. It suffices briefly to point out the means by which uniformity in administration was secured. Those desiring to obtain the second class privileges were compelled to make written application for entry of their publications at the local post office, to file copies of the publications, to make affidavit to the essential facts and to make written answers to questions propounded which were deemed to be essential to show the existence of the conditions precedent imposed by the statute. A copy of the questions required to be answered are in the margin.[1]

---

[1] From Postal Laws and Regulations—ed. 1902, p. 198.

V.—Applications for Entry of Publications as Second Class Matter.

Sec. 438. When a publication, not included in sections 429 and 430 (see secs. 427 and 428), is offered for mailing for the first time at the second-class rates of postage the postmaster shall require the proprietor or his duly authorized representative to make and present to him, with two copies of the publication, sworn answers in writing (on Form 3501) to the following interrogatories:

(1) How often is the publication issued?

(2) Where is the "known office of publication"? (If in a city give street and number.)

(3) Where is it printed?

(4) Who are the proprietors?

(5) Are they in any way interested pecuniarily in any business or trade represented by the publication, either in the reading matter or in the advertisements? If so, what is the interest?

(6) Who are the editors of the publication, and how is their compensation determined?

(7) Have the editors any pecuniary interest in any business or trade represented by the publication, either in the reading matter or in the advertisements? If so, what is the interest?

(8) Can any house in good standing advertise in your publication at the regular published rates?

(9) Are advertisements of competitors accepted at the usual rates?

(10) Have any of the business houses which advertise in your pub-

One controlling authority for passing upon all applications for entry was provided by vesting the Third Assistant Postmaster General with power to that end, that officer being authorized in case of approval of the application to empower the postmaster at the proper office to issue a certificate of entry. Upon the issue of the certificate it was made the duty of the publisher to print upon each copy of the publication, so entered, the following:

---

lication any interest (either by past connection or special contract) therein respecting advertisements or subscriptions? If so, what is the interest?

(11) What is the greatest number of copies furnished to any person or firm advertising in your publication?

(12) On what terms are these papers furnished?

(13) What number of copies do you print of each issue?

(14) What number of bona fide subscribers have you for the next issue of your paper, made up as follows:

a. Direct individual subscriptions to publisher without premium?

b. Direct individual subscriptions to publisher with premium?

c. Direct individual subscriptions in clubs or through clubbing arrangements?

d. Copies regularly sold over publishers' counter to purchasers of individual copies?

e. Copies regularly sold by newsboys?

f. Regular sales of consecutive issues by news agencies?

g. Bulk purchases of consecutive issues by news agencies for sale without the return privilege?

h. Copies to advertisers, one to each to prove advertisement?

i. Bona fide exchanges, one copy for another, with existing second-class publications?

(15) What is the subscription price of your publication per annum?

(16) How many pounds weight will cover the papers furnished to regular subscribers?

(17) What average number of specimen copies with each issue do you desire to send through the mails at the pound rate?

(18) How are the names of the persons to whom sample copies are to be sent obtained?

(19) What disposition is made of the excess, if any, of copies printed over those furnished to subscribers, news agents, including newsboys, and as sample copies.

"Entered—at the post office at—as second class matter under the act of—."

It is true to say that these regulations promulgated in 1887, modified in some respects not material here to be considered, were continuously in force from their adoption up to the time the statutory provision here in question was enacted, and had therefore been in operation for about twenty-five years.

In the light of this statement concerning the evolution of the law, as to mail-matter and its classification, as it existed at the time the provision here involved was enacted, we come to dispose of the controversy as to the meaning of that provision, the question which we are called upon to solve being this:

Was the provision intended simply to supplement the existing legislation relative to second class mail matter or was it enacted as an exertion of legislative power to regulate the press, to curtail its freedom, and under the assumption that there was a right to compel obedience to the command of legislation having that object in view, to deprive one who refused to obey of all right to use the mail service? When the question is thus defined its solution is free from difficulty, since by its terms the provision only regulates second class mail, and the exclusion from the mails for which it provides is not an exclusion from the mails generally, but only from the right to participate in and enjoy the privileges accorded by the second class classification.

The reasons which cause us to think this to be the case are these: (a) Because the provision is part of a post-office appropriation act and naturally therefore, gives rise to the inference that it concerns the general subject of the mails, there being an entire absence of anything justifying even a surmise, if such a point of view could be indulged in under any circumstances, that Congress was intentionally exerting power not delegated to it and consciously

violating an express prohibition of the Constitution and for that reason clothed its exertion of power in the disguise of postal legislation; (b) because the text makes clear the fact that the legislation was exclusively addressed to the regulation of second class mail and was shaped in contemplation of the long established law and regulations governing that class. This result becomes apparent when it is observed that the provision makes it the duty of the publisher to "enter" his publication, since by practice and regulation prevailing during a long period of time, it had come to pass that the word "enter" had exclusive relation to a duty to be performed in order to obtain the benefits of the second class classification. In the absence, therefore, of some express indication to the contrary, no other conclusion is possible, than that the word was used with reference to its received official and administrative significance. In fact, in view of the history which we have given of the development of the second class classification, and the reasons which led to the system of entry, unless the settled significance of the word be given to it, it would have no meaning whatever.

Further, we think that because as finally enacted the provision which was in one paragraph as it passed the House of Representatives, in the Senate was divided into two paragraphs, affords no ground for contending that the requirement as to advertisements contained in the second printed paragraph is not embraced within and controlled by the conclusion we have stated. We say this because the second printed paragraph by reference clearly manifests that its provision applied to "such" newspapers, periodicals, etc., that is, the newspapers or periodicals covered by the first paragraph and which by its terms are submitted to the duty of entry in order to enjoy the privileges conferred. Nor do we think there is in reason ground to support the proposition that because the provision sanctioned the duty to make entry by an exclusion from

the mails it hence is a general regulation and not simply one conferring the right of availing of the second class privileges. The proposition assumes that the command is that for failure to comply with the conditions imposed there shall be a denial of the use of the mails, while in fact the provision is, there shall be a denial of the "privileges" of the mail, a qualification which in view of the great advantages given by the second class mail classification and of the fact that in the reports made to Congress concerning that classification, attention was directed to the circumstance that a privileged class was thereby created, goes to show the conscious purpose to provide only for the exceptional privileges with which the provision was dealing.

Equally wanting in force is the further contention that because the regulation in the second paragraph to the effect that paid matter shall be marked as advertisement is sanctioned by a penalty, therefore, at least as to such provision, an independent regulation of the press was intended, divorced from the requirements as to entry contained in the first paragraph. We reach this conclusion because when the paragraph referred to is accurately considered it makes more cogent the view we have taken and additionally demonstrates that the legislative mind in enacting it, was sensitively alive to the fact that the provision alone concerned the privileges of second class mail, and the administrative rule which for so many years prevailed on the subject. In other words, that as, under existing administrative regulations, the exactions as to entry contemplated conditions existing at the time of the application for entry, and the condition as to advertisements concerned conduct of a publisher after entry, which could not therefore be a condition precedent to entry, a penalty for the latter was devised in order to harmonize with the requirements as to admission to the second class mail.

But even if we were to omit the word privilege which qualifies the exclusion from the mails as provided in the first paragraph so as to cause the provision to read "shall be denied the (privileges of the) mails," there would be nevertheless no room for doubt. As we have seen, coeval with the establishment of the system of entry, as the means of securing the privileges of the second class mail and presumably because of the overshadowing advantages and benefits which were conferred by that system upon those entitled to participate in them, the right to such admission came to be indifferently described as "the entry to the mails of newspapers," etc., the "publications admitted to the mails," etc., and the duty which was cast upon the Third Assistant Postmaster General, in passing upon such subjects as "The responsibility of finally admitting such matters to the mail," etc. See the report of the Third Assistant Postmaster General contained in the report of the Department for the year 1887, at page 699, where, after referring to the regulations concerning entry, the quoted expressions are employed. Moreover, when it is considered that the provision was dealing only with the second class privilege, it cannot in reason be assumed that conditions were imposed dealing with a subject with which the statute was not concerned, in order thereby to afford ground for asserting it to be unconstitutional, when the elementary rule is that every reasonable intendment to avoid such a result must be indulged in. *United States* v. *Delaware and Hudson Co.*, 213 U. S. 366, 407. Without stopping however to review the subjects in detail we content ourselves with saying that we think neither the reference to expressions in debate, upon the concession for the sake of argument that they are competent to be looked at, nor an opinion of the Attorney General upon which reliance is placed, are adequate to control or modify the conclusion we have reached as to the meaning of the provision.

But granting that room for doubt remains after the analysis of the text, which has preceded, we are of opinion that the legislative history of the adoption of the provision makes that conclusion indisputable for the following reasons: 1. Since the bill as introduced in the House of Representatives, contained but one paragraph and obviously related to the privileges of the second class mail alone; 2d, because although the bill as reported to the Senate by the committee to which it was there referred, was somewhat modified as to the conditions exacted, and was divided into two paragraphs, the report of the committee leaves no doubt that there was no purpose to disintegrate the provision as it passed the House of Representatives, by making two enactments or to do anything more than to exact additional conditions for the right to enjoy the second class mail privileges, the latter result being clearly shown by the following excerpt from the report of the committee. (Report No. 955, p. 24.)

"The extremely low postage rate accorded to second-class matter gives these publications a circulation and a corresponding influence unequaled in history. It is a common belief that many periodicals are secretly owned or controlled, and that in reading such papers the public is deceived through ignorance of the interests the publication represents. We believe that, since the general public bears a large portion of the expense of distribution of second-class matter, and since these publications wield a large influence because of their special concessions in the mails, it is not only equitable but highly desirable that the public should know the individuals who own or control them."

As therefore the assailed provision when rightly construed only affixes additional conditions for admission to a privileged class of mail, and it was merely designed to provide for the continuance on compliance with designated conditions of a system under which vast sums of public

money were expended, to the end that the power and influence of the press might be expanded, it results that there was no foundation for the meaning attributed to the provision in question by the complainants and on which the grievances upon which they relied rested.

We come then to determine whether the provision as thus construed is valid. That Congress in exerting its power concerning the mails has the comprehensive right to classify which it has exerted from the beginning and therefore may exercise its discretion for the purpose of furthering the public welfare as it understands it, we think it too clear for anything but statement; the exertion of the power of course, at all times and under all conditions being subject to the express or necessarily implied limitations of the Constitution. From this it results that it was and is in the power of Congress in "the interest of the dissemination of current intelligence" to so legislate as to the mails, by classification or otherwise, as to favor the widespread circulation of newspapers, periodicals, etc., even although the legislation on that subject, when considered intrinsically, apparently seriously discriminates against the public and in favor of newspapers, periodicals, etc., and their publishers. Although in the form in which the contentions here made by the publishers which we have at the outset reproduced, as literally stated, seem to challenge this proposition by suggesting that the power of Congress to classify is controlled and limited by conditions intrinsically inhering in the carriage of the mails, we assume that such apparent contention was merely the result of an unguarded form of statement, since we cannot bring our minds to the conclusion that it was intended on behalf of the publishers to generally assail as an infringement of the constitutional prohibition against the invasion of the freedom of the press the legislation which for a long series of years has favored the press by discriminating so as to secure to it great pecuniary and other concessions

and a wider circulation and consequently a greater sphere of influence. If, however, we are mistaken in this view, then, we think, it suffices to say that the contention is obviously without merit. This being true the attack on the provision in question as a violation of the Constitution because infringing the freedom of the press, and depriving of property without due process of law, rests only upon the illegality of the conditions which the provision exacts in return for the right to enjoy the privileges and advantages of the second class mail classification. The question therefore is only this, Are the conditions which were exacted incidental to the power exerted of conferring on the publishers of newspapers, periodicals, etc., the privileges of the second class classification or are they so beyond the scope of the exercise of that power as to cause the conditions to be repugnant to the Constitution? We say this is the question since necessarily if the power exists to legislate by discriminating in favor of publishers, the right to exercise that power, carries with it the authority to do those things which are incidental to the power itself or which are plainly necessary to make effective the principal authority when exerted. In other words, from this point of view, the illuminating rule announced in *McCulloch* v. *Maryland* and *Gibbons* v. *Ogden*, governs here as it does in every other case where an exertion of power under the Constitution comes under consideration. The ultimate and narrow question therefore is, Are the requirements of the provision in question incidental to the purpose intended to be secured by the second class classification?

Let us consider the matter from the historical and from the inherent standpoint. Under the statute, as we have seen, for a long series of years a publication primarily devoted to advertisements was not entitled to the benefit of the second class classification, and by a long administrative construction, embodied in the regulations, the disclosure of the names of the proprietors as well as of the

editors of a publication which has sought to be entered as second class matter was required. The new conditions imposed are first, that where there is matter the publication of which is paid for, the fact of such payment shall be disclosed by marking the matter as an advertisement, and second, the disclosure as to ownership, etc., previously exacted is enlarged by making it necessary in the case of a corporation to furnish the names of the stockholders and also requiring that the names of the principal creditors, etc., be given. As the right to consider the character of the publication as an advertising medium was previously deemed to be incidental to the exercise of the power to classify for the purpose of the second class mail, it is impossible in reason to perceive why the new condition as to marking matter which is paid for as an advertisement is not equally incidental to the right to classify. And the additional exactions as to disclosure of stockholders, principal creditors, etc., also are as clearly incidental to the power to classify as are the requirements as to disclosure of ownership, editors, etc., which for so many years formed the basis of the right of admission to the classification. We say this because of the intimate relation which exists between ownership and debt, since debt in its ultimate conception is a dismemberment of ownership and the power which it confers over an owner is by the common knowledge of mankind, often the equivalent of the control which would result from ownership itself. Considered intrinsically, no completer statement of the relation which the newly exacted conditions bear to the great public purpose which induced Congress to continue in favor of the publishers of newspapers at vast public expense the low postal rate as well as other privileges accorded by the second class mail classification can be made than was expressed in the report of the Senate committee, stating the intent of the legislation which we have already excerpted, that is, to secure to the public in

"the dissemination of knowledge of current events," by means of newspapers, the names not only of the apparent, but of what might prove to be the real and substantial owners of the publications, and to enable the public to know whether matter which was published was what it purported to be or was in substance a paid advertisement. We repeat that in considering this subject we are concerned not with any general regulation of what should be published in newspapers, not with any condition excluding from the right to resort to the mails, but we are concerned solely and exclusively with the right on behalf of the publishers to continue to enjoy great privileges and advantages at the public expense, a right given to them by Congress upon condition of compliance with regulations deemed by that body incidental and necessary to the complete fruition of the public policy lying at the foundation of the privileges accorded.

It may be deemed from what we have said in considering the asserted repugnancy of the conditions imposed by the provision under examination that we have assumed that if the attack made upon such conditions was well founded and they therefore would disappear, nevertheless the right to continue to enjoy the second class mail privileges would remain, but we have not considered that subject and intimate no opinion upon it.

Finally, because there has developed no necessity of passing on the question, we do not wish even by the remotest implication to be regarded as assenting to the broad contentions concerning the existence of arbitrary power through the classification of the mails, or by way of condition embodied in the proposition of the Government which we have previously stated.

Decrees affirmed.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY *v.* BROWN.

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

No. 230. Argued April 18, 1913.—Decided June 10, 1913.

Where the case is within the class which it was the purpose of the Judiciary Act of 1891 to submit to the final jurisdiction of the Circuit Court of Appeals, this court goes no further than to inquire whether plain error is made out. *Texas & Pacific Railway* v. *Howell*, 224 U. S. 577.

Under the Safety Appliance Acts the failure of a coupler to work at any time sustains a charge of negligence on the part of the carrier. *C., B. & Q. R. R. Co.* v. *United States*, 220 U. S. 559.

Where the trial court and the Circuit Court of Appeals have, after considering the evidence, confirmed the verdict, this court will hesitate to say that their concurring judgments are not such as could be reasonably formed or are without foundation as matter of law.

One obliged to form a judgment in an emergency on the spot is not to be held accountable in the same measure as one able to judge the situation in cold abstraction. *The Germanic*, 196 U. S. 589.

The movement of trains requires prompt action, and one engaged therein should not be held guilty of contributory negligence because he did not anticipate that he might be injured if he selected one of several ways of performing his duty even though he had knowledge of the existence of that which caused his injury.

185 Fed. Rep. 80, affirmed.

THE facts, which involve the construction of the Safety Appliance Acts and determination of what constitutes contributory negligence on the part of a switchman in a railway yard, are stated in opinion.

Mr. M. L. Bell, with whom *Mr. F. C. Dillard* was on the brief, for plaintiff in error.

Mr. James C. McShane, for defendant in error submitted.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Error to review a judgment of the Circuit Court of Appeals affirming a judgment of the Circuit Court for the Northern District of Illinois for $8,000, in an action brought by Brown, defendant in error, against the railway company for injuries received by him while working as a switchman in the railway company's yards at Chicago.

The action was brought in the state court and removed on the petition of the railway company to the Federal court.

The first count of the declaration is based upon a violation of the Safety Appliance Act, and it also contains allegations based upon the Employers' Liability Act. The company was engaged and Brown was employed in interstate commerce. The fourth count charges negligence in failing to fill up the space between a running rail and a guard rail, in which space Brown's foot caught, where it was run over and his leg cut off.

The case was tried to a jury, resulting in a verdict for $8,000 for Brown upon two counts (a) for a violation of the Safety Appliance Law, (b) common law negligence in not blocking the switches. Judgment was entered upon the verdict, which was subsequently affirmed by the Circuit Court of Appeals, 185 Fed. Rep. 80.

For the purpose of the contentions which are made here, the following facts must be accepted to be established, as summarized in the opinion of the Circuit Court of Appeals (p. 82):

"The defendant in error, a switchman in a large switch yard, was called upon, at night, to uncouple some cars.

Not being in touch, by signal, with the engineer, he conveyed his signals to another switchman in advance of him, who conveyed them to the engineer. The cars were in motion on a car track at the time. The uncoupling was to be done by means of shoving the cars in motion. Had the safety appliance been in order, this could have been accomplished by defendant in error while walking at the side of the train. But the safety appliance on the side of the car on which he was working at the time would not operate. He gave three or four jerks to it, which failed to open the coupler. He then reached in between the cars and attempted to lift the coupler pin with his fingers, which he was unable to do. He then attempted to reach the pin on the adjacent coupler, in order to lift that with his fingers. During all this time he was walking beside the cars, which were moving slowly. The pin lifting rod on the other car projected, not towards him, but away from him; and as he was reaching for the coupler pin on this adjacent coupler, his foot slipped, and a low brake beam striking his foot, shoved it into an unblocked guard rail, where it was run over and his leg cut off. Had he, under these circumstances, abandoned the uncoupling altogether until the car had come to a standstill, he would have been saved the accident."

These being the facts, the railway company asserts error in the trial court in not directing a verdict for the company, on the ground (1) that Brown, in leaning between the cars while they were in motion, was guilty of contributory negligence as a matter of law, and (2) in instructing the jury, in effect, that Brown was not chargeable with contributory negligence by the mere fact of going between the cars.

The contentions are resolvable into one and may be said to be covered by the charge to the jury which the railway company attacks. The court, after stating that the first count of the declaration is based on the failure

of the company to equip the car with such a coupling device as that it could be operated without the switchman going between the ends of the car, said:

"This first count charging the failure I have just referred to is based upon the Act of Congress imposing certain requirements upon common carriers engaged in interstate commerce, and this statute provides that a carrier so engaged shall not move or permit to be moved on its rails a car that is used in interstate commerce unless so equipped. This act also provides that if an employé engaged in the service of such a carrier sustains an injury by reason of the carrier's failure to obey that law, the employé shall not be held to have assumed the risk of danger or injury resulting from such failure on the part of the carrier. It is also the law, having in mind still this first count, that if the employé goes between the cars to effect an uncoupling, he is not chargeable with contributory negligence, that is, a failure to exercise ordinary care for his own safety, by the mere fact of going in between the cars to effect the uncoupling, but he is required before he can recover to exercise ordinary care for his own safety after he goes between the cars and while he is there endeavoring to effect an uncoupling, that is, the separation of the cars."

The counsel for the company at the outset expressed their realization that this case is one of those characterized in *Chicago Junction Railroad Company* v. *King*, 222 U. S. 222, as of the class which it was the purpose of the Judiciary Act of March 3, 1891, 26 Stat. 826, c. 517, to submit to the final jurisdiction of the Circuit Court of Appeals, and that this court under such circumstances will "go no farther than to inquire whether plain error is made out." *Texas & Pacific Ry. Co.* v. *Howell*, 224 U. S. 577. And the concession is made that in the *Taylor Case*, 210 U. S. 281, and in *C., B. & Q. R. R. Co.* v. *United States*, 220 U. S. 559, this court settled that the failure

of a coupler to work at any time, sustains a charge of negligence in this respect, no matter how slight the pull on the coupling lever. And, further, "The mere fact that the pin would not lift when plaintiff [Brown] endeavored to lift it makes a case of negligence under the first count." Contributory negligence is asserted because Brown knew, as it is contended, that he would have to pass over an unblocked guard rail; that, besides, he controlled the situation, it is contended, through signals to the engineer, and that he had two safe methods in which to make the cut of the cars but voluntarily and for his own purpose chose the most dangerous method.

But all these facts and how far they should have affected his conduct were submitted to the jury. The evidence detailed the situation to them and whether the judgment of Brown was prudently formed and exercised.

The trial court and the Circuit Court of Appeals, considering the evidence, confirmed the finding of the jury expressed by its verdict. It would be going far to say that these concurring judgments are not such as could be reasonably formed but such as must be pronounced to be without foundation as a matter of law.

The railway company starts its contentions with a concession of its own culpability in sending Brown to his duty to encounter defective appliances and then seeks to relieve itself from liability by a charge against him of a careless judgment in its execution. But some judgment was necessary, and whether he should have selected one of the ways which counsel point out admits of debate. It is one thing to judge of a situation in cold abstraction; another thing to form a judgment on the spot. *The Germanic*, 196 U. S. 589, 595, 596. The movement of trains requires prompt action, and we cannot hold that as a matter of law Brown, in leaning forward to remove a pin which would have yielded to his effort, was guilty of negligence because he did not anticipate that his foot

might slip and be caught in an open frog rail of which he had or could be charged with knowledge. The case is within the ruling in *Texas & Pac. Ry. Co.* v. *Harvey*, 228 U. S. 319.

Judgment affirmed.

CITIZENS' TELEPHONE COMPANY OF GRAND RAPIDS *v.* FULLER, AUDITOR-GENERAL OF THE STATE OF MICHIGAN.

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

No. 284. Argued May 2, 1913.—Decided June 10, 1913.

Power of exemption from taxation seems to imply the power of discrimination; and in taxation, as in other matters of legislation, classification is within the legislative power—and it may be even to a greater extent.

The numerous decisions of this court reviewed in this opinion illustrate the power of the legislature of the State over the subjects of taxation and the range of discrimination that may be exercised in classification.

The legislature, having the power of classification, has also the power to select the differences on which to base the classification.

The State is not bound to rigid equality by the equal protection provision of the Fourteenth Amendment: classification simply must not be exercised in clear and hostile discrimination between particular persons and classes.

There is a clear and reasonable distinction on which to base a classification for taxation between telegraph and telephone corporations conducting for profit large businesses and having offices and exchanges in cities and villages, and those conducting a very small business for mutual convenience of the incorporators; and so *held* that the Michigan statute taxing such smaller corporations does not deny the larger corporations the equal protection of the laws because it

exempts corporations having gross receipts of less than five hundred dollars.

Where there has been a constant legislative and executive construction of a provision of the constitution of the State in regard to the title of a statute clearly expressing the object thereof, this court will not, in view of the consequences of striking down legislation, declare a statute invalid on account of defective title where, as in this case, there has been substantial compliance with the requirements of the constitution of the State in that regard.

THE facts, which involve the constitutionality under the Fourteenth Amendment of a statute of Michigan taxing telephone companies and excepting therefrom certain classes thereof, are stated in the opinion.

Mr. Thomas P. Bradfield and *Mr. Jacob Kleinhans* for appellant submitted:

An exemption of companies whose gross receipts do not exceed $500 per annum invalidates the act.

Judicial construction cannot enlarge or restrict the obvious meaning of the act. *Atty. Gen'l.* v. *Assessors*, 143 Michigan, 73; *Bate Refrigerator Co.* v. *Sulzberger*, 157 U. S. 37; *Denn* v. *Reed*, 10 Pet. 527; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Leoni* v. *Taylor*, 20 Michigan, 148, 154; *People* v. *Plumstead*, 2 Michigan, 465; *Ry. Co.* v. *Phelps*, 137 U. S. 528; *Swartz* v. *Siegel*, 117 Fed. Rep. 18; *Whipple* v. *Saginaw Judge*, 26 Michigan, 342; *Wilt* v. *Cutler*, 38 Michigan, 189.

A law must operate equally and uniformly and the classification must be based upon some reasonable ground. *Am. Sugar Co.* v. *Louisiana*, 179 U. S. 89, 92; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Cotting* v. *Stockyards Co.*, 183 U. S. 79, 112; *Field* v. *Asphalt Co.*, 194 U. S. 618, 621; *Kentucky R. R. Tax Cases*, 115 U. S. 321, 337; *McLean* v. *Arkansas*, 211 U. S. 539; *Railway Co.* v. *Ellis*, 165 U. S. 150, 160; *St. Louis Cons. Coal Co.* v. *Illinois*, 185 U. S. 203; *S. W. Oil Co.* v. *Texas*, 217 U. S. 114; *State* v. *Haun*, 61 Kansas, 146.

While the legislature has the right to make exemptions, as held in *Supervisors* v. *Auditor Gen'l*, 65 Michigan, 408; *Loan Co.* v. *Detroit*, 136 Michigan, 451; *People* v. *Auditor Gen'l*, 7 Michigan, 84, the power is not absolute and without limitation. 1 Cooley Taxation (3d ed.), 382; *Cotting* v. *Stockyards Co.*, 183 U. S. 79; *Gulf &c. Ry.* v. *Ellis*, 165 U. S. 150; *Railroad Co.* v. *Pennsylvania*, 134 U. S. 237; *Yick Wo* v. *Hopkins*, 118 U. S. 369.

The exemption does not operate to segregate any definite class of telephone companies to the exclusion of all others.

The value of non-assessed properties is substantial.

The object of the act is not expressed in the title and is in conflict with the Michigan constitution. *Atty. Gen'l* v. *Bolger*, 128 Michigan, 355; *Bresler* v. *Delray Investment Co.*, 156 Michigan, 3; *Callaghan* v. *Chipman*, 59 Michigan, 614; Cooley's Const. Lim. 143; *Depot Co.* v. *Com'nr of Railroads*, 118 Michigan, 340; *Detroit* v. *Wayne Circuit Judge*, 112 Michigan, 319; *Fish* v. *Stockdale*, 111 Michigan, 646; *In re Hauck*, 70 Michigan, 396; *Pratt Food Co.* v. *Bird*, 148 Michigan, 634; *Wilcox* v. *Paddock*, 65 Michigan, 24.

Mr. Roger I. Wykes, with whom *Mr. Grant Fellows* was on the brief, for appellee.

Mr. Justice McKenna delivered the opinion of the court.

Appellant is a telephone company, located in the city of Grand Rapids, in the State of Michigan, where it has 10,000 telephones in use, and by its own and other lines is engaged in the telephone business all over the southern peninsula. It brought this suit to restrain the collection of a tax levied on its property under a certain act of the State of Michigan, on the ground (1) that the act violates

the Fourteenth Amendment of the Constitution of the United States and (2) violates the constitution of the State because the purpose of the act is not expressed in its title.

A demurrer was filed to the bill, which was overruled. An answer was then filed and, after hearing, a decree was entered dismissing the bill. This appeal was then taken directly to this court, the case presenting questions under the Constitution of the United States.

Prior to 1909 telephone companies were taxed under Act No. 179 of the Public Acts of Michigan for the year 1899 (June 23, 1899, Pub. Acts 1899, p. 270), at the rate of 3% on their gross receipts for the year in which the tax was laid. This act also embraced express and telegraph companies. The companies were required to make a report of their gross receipts for the year ending December 1st next preceding such report. The taxes paid were to be in lieu of all other taxes.

Act No. 282 of the Public Acts of 1905 (June 16, 1905, Pub. Acts 1905, p. 439) provided for the assessment of the property of railroads and certain other companies and for the levying of taxes thereon by a State Board of Assessors. The act did not include either telephone or telegraph companies.

In 1909 the legislature passed Act No. 49 (April 28, 1909, Pub. Acts 1909, p. 77), which amended the title and certain sections of the Act No. 282 and provided for the assessment by the State Board of Assessors of the property of telephone companies on an *ad valorem* basis instead of a tax on their gross earnings, as provided by the act of 1899. The act contained this proviso: "Provided, That the property of telegraph and telephone companies whose gross receipts within this State for the year ending June thirty do not exceed five hundred dollars shall be exempt from taxation."

The contention of appellant that the act offends the

equal protection clause of the Constitution is based on that proviso. It is urged that the proviso makes an unjust discrimination between companies doing the same business by the same means and imposes a tax on their property because the business of one is large and the other small. "The business is not taxed," it is contended, "under Act 49. It is the property used in the business, and it is all of like kind and used for like purposes, and each dollar's worth should be treated alike." And it is urged that "it must be remembered that the tax in question is a tax *on property* according to its value, and not a tax on doing the business." This being the insistence of appellant, that is, that the tax is on property simply, appellant makes the property, dollar for dollar, the only basis of comparison between the taxed companies and the exempt companies, and asserts illegal discrimination. In other words, treating the tax as one on property, and this being the purpose of the statute, "each dollar's worth should be treated alike;" and it is contended, if each dollar's worth is not treated alike, there is an arbitrary classification and hence an illegal classification, because it has no proper relation to the legislative purpose.

The District Court, however, took a broader view and considered the inducement of the legislation and its administrative possibilities as giving character to its classification. The court also considered the character of the taxed and non-taxed lines, their number and comparative value and the amount of taxes which would be assessed against them. The court said:

"For the year ending June 30, 1909, 659 corporations, individuals or associations made the required report. Of these, 224 showed receipts of more than $500 each, reported property said to have cost $35,000,000.00 and reported gross receipts of $7,600,000.00. The Board assessed this property at $21,000,000.00 and levied thereon a total tax of $433,000.00 (in place of the former specific

tax, which would have been $228,000.00). Four hundred and thirty-five of the reports showed receipts of less than $500.00 each. Property belonging to the persons and companies so reporting was not assessed. The cost of this non-assessed property, at the average reported cost per telephone of all reporting companies, would be about $145,000.00; complainants' proof tends to show such cost to be about $250,000.00; $200,000.00 may fairly be assumed as such cost; and upon the comparative basis used with the larger corporations, this exempted property would have been assessed at $120,000.00. If we add an ample allowance for non-reporting, non-taxable property, it still appears that the property which escaped taxation and which forms the basis of the complaint, is not more than one per cent. of the total."

The lines may be divided into two classes, (1) lines owned by appellant and conducted for profit, and (2) lines connected with those of the first class and called sub-licensed companies, rural and roadway. There are 17 to 20 of the sub-licensed companies which operate for a profit. Their lines are connected with the main lines and may extend over a whole county or more. It is testified that the sub-licensed companies run their own business, no control being in the main line. Their lines, it is further testified, were constructed by themselves, and the instruments either leased from the main company or owned by themselves. The contracts with the sub-companies are not all alike. The main line may or may not have investment in the sub-licensed lines.

The "rural" usually belongs to an association of farmers who live along the line. It comprises a switch-board leased by the main or profit-making company to a rural manager, the main company owning the telephones on the line and receiving the entire charge for toll messages, less the manager's commissions for collection. The roadways connected with a "rural" are constructed and owned

by the farmers in the same way as other roadways. The larger portion of "rurals" are contracts with individuals. The percentage of corporations in the roadway and sub-licensed lines is very small.

The "roadway" is a line owned and constructed by farmers connected with a receiving service from an existing exchange of a main line or profit-making company, or of a rural exchange manager.

The profit that is derived from the rural and roadway lines is in the reduced rate for the telephones. The manager gets the difference between what he pays the main company and what he gets from those to whom he rents.

The difference, therefore, between the tax-paying and non-tax-paying companies, or individuals is that the former, as said by the District Court, belong to commercial corporations or enterprises, organized and conducted for the purpose of earning and paying profits as or in the nature of dividends; the latter, the untaxed, are co-operative or farmers' mutual associations, usually unincorporated, conducted at estimated costs and organized primarily to get for the association cheap telephone service.

It is manifest, therefore, that there are marked differences between the taxed and non-taxed companies, and the differences might be pronounced arbitrary if the rule urged by appellant should be applied, that is, that in the taxation of property no circumstance should be considered but its value, or, to use appellant's words, "each dollar's worth should be treated alike." But such rigid equality has not been enforced. In Michigan the legislature has the power of prescribing the subjects of taxation and exemption, notwithstanding the constitution of the State requires the legislature to provide a uniform rule of taxation, except on property paying specific taxes. *The People* v. *The Auditor General*, 7 Michigan, 84; *Board of Supervisors* v. *Auditor General*, 65 Michigan, 408; *National Loan &c.*

Co. v. *City of Detroit,* 136 Michigan, 451. The power of exemption would seem to imply the power of discrimination, and in taxation, as in other matters of legislation, classification is within the competency of the legislature. We said in *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, 92, that from time out of mind it has been the policy of this Government to classify for the purpose of taxation, and a discrimination was supported between taxation of producers and manufacturers of products; and yet in *Billings* v. *Illinois,* 188 U. S. 97, 102, we compared the rule with that in *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, where a distinction between buyers of products and the producers of them was held an illegal discrimination.

It may, therefore, be said that in taxation there is a broader power of classification than in some other exercises of legislation. There is certainly as great a power, and the rule appellant urges cannot be adopted. It is inconsistent with the principle of classification and the cases which have explained the principle and the range of its legal exercise.

In *Bell's Gap Railroad Co.* v. *Pennsylvania,* 134 U. S. 232, 237, it was decided that under the power of classification there might be exemption of property dependent upon its species and the rates of excise might be varied upon different trades and products. And it was said that it was safe to say "that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation." It was pointed out that to give it that effect would destroy the constitutional provision and laws of some of the States which, while enjoining uniformity of taxation, permitted exceptions which were deemed material, and that "it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and

vice; and which every State, in one form or another, deems it expedient to adopt."

In *Pacific Express Company* v. *Seibert*, 142 U. S. 339, a distinction, for taxing purposes, between express companies which owned their own means of transportation and those who engaged for hire a railroad or steamship company to transport their merchandise, was supported. The range of classification for taxing purposes which was expressed in *Bell's Gap Railroad Company* v. *Pennsylvania* and *Home Insurance Co.* v. *New York*, 134 U. S. 594, 606, 607, was approved. These cases and others were cited in *Michigan Central Railroad Company* v. *Powers*, 201 U. S. 245, 293, for the same principle of classification and its application to taxation. It was said, "There is no general supervision on the part of the Nation over state taxation, and in respect to the latter the State has, speaking generally, the freedom of a sovereign both as to objects and immunities. And, further, quoting from the opinion of the lower court, it was said, "It is enough that there is no discrimination in favor of one against another of the same class, and the method for the assessment and collection of the tax is not inconsistent with natural justice."

In *Travelers' Insurance Co.* v. *Connecticut*, 185 U. S. 364, a law of the State was sustained which imposed a tax on the stock of non-residents in corporations and exempted the stock of residents.

In *King* v. *Mullins*, 171 U. S. 404, 435, a distinction was made in the taxing system of the State between tracts of 1000 acres or less and tracts of more than 1000 acres. It was sustained.

In *Consolidated Coal Co.* v. *Illinois*, 185 U. S. 203, a law providing for the inspection of mines was held not unconstitutional by reason of its limitation to mines where more than five men were employed at any one time. See also *McLean* v. *Arkansas*, 211 U. S. 539.

In *New York, N. H. & H. R. R. Co.* v. *New York*, 165

U. S. 628, a law requiring railroads to heat their passenger coaches but exempting roads of less than fifty miles in length was declared not unconstitutional and discriminatory. To like effect is *Dow* v. *Beidelman*, 125 U. S. 680, where a classification of railroads by their length in fixing the rate of passengers' fare was sustained.

In *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, a tax was graduated according to the amount and value of the property measured by miles, and was in lieu of taxes levied directly on the property. Held valid. In *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, legacies less than a certain amount were held legally exempt from taxation.

To these cases may be added others. They illustrate the power of the legislature of the State over the subjects of taxation and the range of discrimination which may be exercised in classifying those subjects when not obviously exercised in a spirit of prejudice and favoritism. *Cook* v. *Marshall County*, 196 U. S. 261, 274; *Missouri* v. *Dockery*, 191 U. S. 165. The cases decided subsequent to the decision in *Bell's Gap Railroad Co.* v. *Pennsylvania*, have applied its principle to many varying instances. Granting the power of classification, we must grant Government the right to select the differences upon which the classification shall be based, and they need not be great or conspicuous. *Keeney* v. *New York*, 222 U. S. 525, 536. The State is not bound by any rigid equality. This is the rule;—its limitation is that it must not be exercised in "clear and hostile discriminations between particular persons and classes." See 223 U. S. 59, 62, 63. Thus defined and thus limited, it is a vital principle, giving to the Government freedom to meet its exigencies, not binding its action by rigid formulas but apportioning its burdens and permitting it to make those "discriminations which the best interests of society require."

We think the statute under review is within the rule.

It is not arbitrary. It has a reasonable basis, resting on a real distinction. It is not a distinction based on mere size only, as contended by appellant, nor upon the mere amount of business done. There is a difference in the doing of the business and its results; a difference in the relation to the public. Indeed, the non-taxed companies, are subsidiary to the taxed companies, patrons, in a sense, of the taxed companies. The use of the untaxed property, as pointed out by the District Court, is "predominantly private, while the use of the taxed property is correspondingly public; the exempt property is used for the personal convenience of the owners, while the taxed property represents commercial investment for profit making purposes." To these differences the court added others: "(1) That the property exempted is only a trifling portion of the whole; (2) that the cost of assessing and collecting in this class would be disproportionate to the amount which would be realized; (3) that this property is in the incipient or development stage, while the taxed property is in the fully developed form." All were differences which could appeal to the legislature and determine a difference of treatment. To accomplish it they had to be united in a class, and, as happily said by Judge Denison in the Circuit Court, the companies were described "in terms of earnings instead of in terms of method and use." It seems, however, that by the selection of earnings as a basis of classification all of the differences we have enumerated are not exactly accommodated. Some small portion of the coöperative companies will be taxed and some small portion of the profit-making companies will be exempt. This result is not, we think, an impeachment of the basis of classification, as the cases we have cited illustrate. Besides, the appellant is not affected by the inexactitude.

The second question in the case is whether the purpose of act No. 49, of 1909, under which the appellant was

assessed, is sufficiently expressed in its title. Prior to the passage of that act certain specified classes of corporations, such as railroad, express companies, etc., were taxed under the provisions of act No. 282 of the acts of 1905, *supra.*

The title of act No. 49 and § 1 are as follows:

"An act to amend the title and certain sections of Act No. 173 of 1901 relating to the taxation of railroads and express companies.

"Section 1. The title and sections 1, 4, 5, 6, 8, 9, 10, 13, 14, 18 and 21 of Act No. 282 of the Public Acts of 1905, entitled 'An Act to provide for the assessment of the property of railroad companies, union station and depot companies, sleeping car companies, express companies, car loaning companies, stock car companies, refrigerator car companies, and fast freight line companies, and for the levy of taxes thereon by a State Board of Assessors, and for the collection of such taxes, and to repeal all acts or parts of acts contravening any of the provisions of this act,' are hereby amended to read as follows:

"'TITLE. An act to provide for the assessment of the property, by whomsoever owned, operated or conducted, of railroad companies, union station and depot companies, telegraph companies, telephone companies, sleeping car companies, express companies, car loaning companies, stock car companies, refrigerator car companies, and fast freight companies, and all other companies owning, leasing, running or operating any freight, stock, refrigerator, or any other cars, not being exclusively the property of any railroad company paying taxes upon its rolling stock under the provisions of this Act, over or upon the line or lines of any railroad or railroads in this State, and for the levy of taxes thereon by a State Board of Assessors, and for the collection of such taxes, and to repeal all acts or parts of acts contravening any of the provisions of this act.'"

The contention is that there is nothing in the title to indicate the intention of adding to the act of 1905 "new classes of business to those already taxed by the *ad valorem* method, so as to include telephone companies." It is hence further contended that the act is invalid, the constitution of the State providing that "no law shall embrace more than one object, which shall be expressed in its title."

There can be no doubt that the purpose of the act was to extend to telegraph and telephone companies the provisions of the act of 1905, which provided for the assessment of the property of certain companies and the levying of taxes thereon by the State Board of Assessors, and the method of collecting such taxes. Its title explicitly states that the purpose is to amend the title and the *act* relating to the taxation of railroad and express companies and the particular sections which consummate the purpose are referred to and declared in § 1 to be amended. The title, therefore, is a substantial compliance with the constitution of the State, and the brief of appellee shows thirty-eight examples of like kind in the laws of the State. This legislative and executive construction is entitled to weight, and, when considered in connection with the consequence of making those laws invalid as well as declaring the law under review invalid, would determine against the construction urged by appellant even if we had doubt of the sufficiency of the title to give notice of the purpose of the legislation. See *Attorney General* v. *Amos*, 60 Michigan, 372; *Grimm* v. *Secretary of State*, 137 Michigan, 134; *Common Council of Detroit* v. *Schmid*, 128 Michigan, 379; *People* v. *Howard*, 73 Michigan, 10; *City of Detroit* v. *Chapin*, 108 Michigan, 136.

Decree affirmed.

CITIZENS' TELEPHONE COMPANY OF JACKSON *v.* FULLER, AUDITOR GENERAL OF THE STATE OF MICHIGAN.

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

No. 285. Argued May 2, 1913.—Decided June 10, 1913.

Decided on authority of preceding case.

THE facts are stated in the opinion.

Mr. Thomas P. Bradfield and *Mr. Jacob Kleinhans* for appellant submitted.

Mr. Roger I. Wykes, with whom *Mr. Grant Fellows* was on the brief, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Appellant is a telephone company, located at the City of Jackson, State of Michigan, doing an extensive business. It brought this bill in equity to restrain the collection of a tax levied under the laws considered in the preceding case, *Citizens' Telephone Co.* v. *Fuller, ante*, p. 322. It is substantially like the bill in the latter case.

A demurrer was filed to the bill and, being overruled, an answer was filed. After hearing, a decree was entered dismissing the bill. This appeal was then taken.

The questions presented are the same as those presented in the preceding case and were submitted at the same time and on the same argument. On the authority of the opinion in that case the decree is

Affirmed.

RAILROAD COMMISSION OF LOUISIANA *v.* TEXAS AND PACIFIC RAILWAY COMPANY.

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

No. 335. Submitted May 8, 1913.—Decided June 10, 1913.

It is the essential character of the commerce, not the accident of local or through bills of lading, which determines Federal or state control thereover.

Commerce takes its character as interstate or foreign when it is actually started in the course of transportation to another State or to a foreign country.

In this case staves and logs intended by the shippers to be exported to foreign countries and shipped from points within the State to a seaport also therein from which they were to be exported were in interstate and foreign commerce notwithstanding they were shipped on local bills of lading for the initial journey and were subject to interstate and not intrastate charges, and within Federal and not state jurisdiction.

184 Fed. Rep. 989, affirmed.

THE facts, which involve determining whether a shipment intended for export to a foreign country, but shipped to the exporting seaport on local bills of lading, was interstate or intrastate commerce and whether it was subject to Federal or state jurisdiction, are stated in the opinion.

Mr. Ruffin G. Pleasant, Attorney General of the State of Louisiana, *Mr. Wylie M. Barrow*, Assistant Attorney General, and *Mr. E. Howard McCaleb* for appellants.

Mr. Charles Payne Fenner, *Mr. Walker B. Spencer*, *Mr. Philip S. Gidiere*, *Mr. Esmonds Phelps*, *Mr. Henry Bernstein*, *Mr. John Totts* and *Mr. F. G. Hudson* for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit in equity to declare void certain orders of the Railroad Commission of the State of Louisiana and to restrain the enforcement of penalties for the alleged violation thereof. The ground of the suit is that the orders and the penalties constitute a regulation of interstate commerce and therefore are in violation of the commerce clause of the Constitution of the United States.

An amended and supplemental bill was filed by leave of the court, making the appellant, Walter Guion, then Attorney General of the State, a party on the ground that he had asserted a right and intention to bring suits in the state courts to collect the fines and penalties imposed by the State Railroad Commission.

A demurrer was filed to the bill, stating as grounds thereof—(1) That neither the original nor the supplemental bill stated any cause for the relief prayed. (2) That the suit was one against the State, being one brought to restrain the State in her sovereign character and capacity from instituting suits to recover and enforce the collection of penalties imposed under and by virtue of the provisions of her constitution of a penal nature. (3) That the amount involved is not sufficient to give the court jurisdiction, not being over $2,000.

The demurrer was overruled. An answer was then filed. The case was referred to a master, who reported his conclusions of fact and of law and recommended that the bill be dismissed, basing his recommendation on *Gulf, Colorado & Santa Fe R. R. Co.* v. *Texas*, 204 U. S. 403.

The Circuit Court, however, drew a different conclusion from the facts, and entered a decree perpetually enjoining the fines imposed. The decree was affirmed by the Circuit Court of Appeals, expressing, without discussion, its concurrence with the court below that on

the facts found by the master the commerce involved in the case was interstate.

The facts as found by the master may be summarized as follows:

The appellee railroad companies are corporations engaged in interstate and intrastate commerce from points within and without the State of Louisiana to the City of New Orleans, and the freight transported by them is subsequently loaded on board ships and transported to foreign ports and countries. The Railroad Commission of Louisiana, on May 25, 1905, promulgated and put in effect an order which fixed the freight rates that the railroads should be entitled to charge on all intrastate traffic, and the rates were effective and in force at the date of the shipment in controversy. In the months of July, August and September, 1905, certain persons (their names are unimportant) delivered to the St. Louis, Iron Mountain & Southern Railway Company at certain stations on the line of its road, within the State, eighteen carloads of logs and staves. The logs and staves were transported by the railway from said stations and delivered to Alexandria and there delivered to the Texas & Pacific Railway Company, which transported them to New Orleans, where they were unloaded from the cars, put on board ship and exported to foreign countries.

When the shipments were made, the local tariff filed with and approved by the State Railroad Commission was ten cents per hundred pounds; the local tariff filed with and approved by the Interstate Commerce Commission on such shipments, at that time, was twelve cents per hundred pounds.

The consignees were notified of the arrival of the cars at New Orleans and the Texas & Pacific Railway Company was ordered by them to deliver the freight to certain steamships plying between New Orleans and European ports. The freight was delivered in accordance with the

orders and exported from Louisiana. A freight rate of twelve cents per hundred pounds was charged on the shipments and collected by the railway company.

In March, 1905, a shipper delivered to the Kansas City Southern Railway Company at Leesville, Louisiana, on its line of road, three carloads of tank staves, which were loaded in cars of the Texas & Pacific Railway Company to be transported to a named consignee at New Orleans. The rate established by the State Railroad Commission was ten cents per hundred pounds; the interstate rate filed with the Interstate Commerce Commission was fifteen cents per hundred pounds. The staves were hauled to Shreveport, Louisiana, and there delivered to the Texas & Pacific Railway Company, which hauled them to New Orleans. The customary notice of their arrival was given to the consignee and they were directed by him to be delivered to a particular steamship, to which they were delivered, being switched to the lines of two other carriers and transported to Hamburg. The Texas & Pacific Railway Company collected freight charges thereon from the consignee at fifteen cents per hundred pounds. The consignee at the date of the shipment of the freight resided at New Orleans and was engaged in the business of shipping broker in negotiating for cargo space, routes, and attending to shipments for consignors in the United States. The consignees of the eighteen carloads of logs and staves were engaged at New Orleans in the business of exporting staves to foreign countries; the staves they deal in are not treated, manufactured or changed from the original shape in which they are received at New Orleans for export, and 98% of the shipments by them at New Orleans are exported to foreign countries.

At the time of the shipment the rules of the State Railroad Commission allowed four days' free time for unloading cars at New Orleans, except where the consignment

was for export, then twenty days were allowed. No demurrage was tendered by the shipper or consignee or received by the carrier on account of delays in handling beyond the four days allowed by the rules. Every one of the shipments paid to the carrier three-fourths of a cent per hundred pounds for handling charges, this being the amount paid on all export shipments. The shipments were in the physical custody of the railroad company until arrival at New Orleans and thereafter in the physical custody of the steamships, which issued bills of lading therefor to the shippers of the cargo.

The bills of lading in each instance provided for the delivery of freight from the initial point to New Orleans, there to be delivered to the shipper or consignee's order. But, notwithstanding this, the staves and logs were intended by the shippers to be exported to foreign countries, and were treated by both the shippers and the carriers accordingly, the shippers always holding the cars on the railroad track until they could accumulate cargo to fill their export orders and arrange for transportation. The railroad company allowed the shippers the usual twenty days' time for delivery, as in the case of export shipments, without charging demurrage, which the company would have had the right to charge, after the expiration of four days, if the shipments had been considered and treated as purely intrastate.

The sole question in the case is whether the shipments were foreign or intrastate commerce, or, speaking more accurately, whether they were within Federal or state jurisdiction. The Circuit Court and the Circuit Court of Appeals both decided, as we have seen, that they were within Federal jurisdiction.

Appellants attack the conclusion and rely on, as the master relied on, the case of *Gulf, Colorado & Santa Fe R. R. Co.* v. *Texas, supra.* The argument is that the service rendered by the railroad companies was wholly

within the State and had "no contractual or necessary relation to foreign transportation." It was, it is argued, "manifestly preliminary thereto, independently contracted for, and not necessarily connected therewith." And the principle is urged that "locality, therefore, determines the jurisdiction [separation between Federal power and state power] unless it is shown that though the local movement is actually within, it is legally outside the State." To make the movement within legally outside of the State, appellants insist there must be bills of lading and other means of connection between the railroads and the ocean carriers. To make application of this principle, it is contended that "not a single fact appears or exists, physical or other which connects the railroads with the ocean carrier" and that the intention of the shippers or consignees is made absolutely controlling.

To the principle urged, so far as its applicability to the case at bar is concerned, we may oppose *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498; *Ohio Railroad Commission* v. *Worthington*, 225 U. S. 101; and *Texas & New Orleans R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111.

In those cases there was necessarily a local movement of freight, and it necessarily terminated at the seaboard. But it was decided that its character and continuity as a movement in foreign commerce did not terminate, nor was it affected by being transported on local bills of lading. The principle enunciated in the cases was that it is the essential character of the commerce, not the accident of local or through bills of lading, which determines Federal or state control over it. And it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another State or to a foreign country. The facts of the case at bar bring it within the ruling. The staves and logs were

intended by the shippers to be exported to foreign countries, and there was no interruption of their transportation to their destination except what was necessary for transshipment at New Orleans.

Decree affirmed.

WHEELER *v.* CITY AND COUNTY OF DENVER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 473. Argued January 7, 1913.—Decided June 10, 1913.

The fact that the plaintiff in a taxpayer's suit against a municipality was solicited to bring the suit and was indemnified against liability for costs and fees is not enough in itself in the absence of any illegal purpose to make the case collusive so as to deprive the court of jurisdiction. *Cashman* v. *Amador Canal Co.*, 118 U. S. 58, distinguished.

The motives of litigants in seeking Federal jurisdiction are immaterial. *Blair* v. *Chicago*, 201 U. S. 401.

A plaintiff is not to be charged with bad faith in bringing an action simply because after it was commenced the same issue was raised and decided adversely in an action between other parties.

THE case is here on a question of jurisdiction.

The appellants filed a bill in equity in the Circuit Court for the Eighth Circuit, District of Colorado, against the City and County of Denver and the other appellees, who constitute the Public Utilities Commission, to restrain them from paying out any moneys authorized by the provisions of an amendment to the charter of the city, and likewise to restrain them and each of them from issuing or attempting to issue $8,000,000 of bonds authorized at an election directed by the amendment to the charter of

the city. The bill also prayed an accounting of money already expended by reason of their supposed election and authority as members of the Public Utilities Commission and that they be required to reimburse the city therefor, that § 264A of the charter be declared unconstitutional and void, and all further action thereunder be forever restrained and enjoined, and all acts heretofore done and steps taken thereunder be declared wholly illegal, improper and without authority of law.

The bill alleges the requisite citizenship of the parties and the jurisdictional amount. It further alleges the following:

"Appellants Wheeler and Lusk were respectively owners of real estate in the City and County of Denver of the assessed valuation of $35,000 and $42,000 respectively. For the year preceding the filing of the suit the assessed valuation of all property within the City and County was $135,467,050. At a general city election held in May, 1910, it was claimed by the appellees that an amendment to the charter of the city was adopted, which amendment provided for the acquisition, by purchase or otherwise, by the city, of a water works system, provided a Public Utilities Commission to have charge and control of such works, named the persons who were to constitute the Commission, their terms of office, salaries, and duties, and authorized them to issue bonds to the extent of $8,000,000 for the construction or purchase of such water works system and other duties."

The bill attacks the amendment on various grounds, among which are—that it was not properly submitted to the voters of the city; that the amendment was void because it submitted to the electors divers questions in one, which, under the submission, could only be voted for as a whole; that the amendment established the office of Utilities Commission, and by the same act filled such office, and that the amendment violated the state and

Federal Constitutions; that another suit was pending in the Federal court in which the Circuit Court of Appeals for the Eighth Circuit had sustained a temporary injunction theretofore granted by the Circuit Court for the District of Colorado, and the court's order declared that the amendment violated the contractual rights of the Denver Union Water Company under a contract then existing between that company and the city, and that nevertheless the city was proceeding under the amendment, to spend the money of the tax-payers of the city. Appellants filed the bill as tax-payers of the city in behalf of themselves and all other tax-payers.

Appellees made a motion to dismiss the bill on the ground that the court had no jurisdiction of the cause in that it did not involve a dispute or controversy properly within the jurisdiction of the court and that the parties had been improperly and collusively made or joined for the purpose of attempting to create a case cognizable under the laws of the United States.

An affidavit of Edwin Van Cise, one of the Public Utilities Commission, was submitted with the motion. It averred that appellants (complainants in the bill) were respectively residents of Montana and Nevada, that appellant Lusk was formerly a resident of California and a personal friend of Mr. F. G. Moffat, of the City of Denver, a gentleman who was interested as a stockholder or bondholder, or both, or in some other capacity, in the Denver Union Water Company, and that Wheeler is a client of Edwin H. Park, solicitor for her and Lusk in this cause. On the nineteenth or twentieth of June, 1911, Moffat, by the authority or consent of the water company, sent Lusk a telegram as follows:

"Would you be willing as a non-resident taxpayer to bring suit in Federal Court to stop illegal expenditure of public moneys by Utilities Commission if protected by Water Company on expenses and all liabilities? If so,

wire me authority in your name to engage attorney and bring suit."

Lusk replied as follows:

"Please engage necessary counsel and take proper steps to protect against illegal expenditures by Utility Commission. Am owner of four lots corner Ninth and Sherman, and I object to the proposed expenditures."

It is averred on information and belief, that upon the latter telegram Moffat, or some one acting for the water company, retained Park in the name of Lusk, but really for the water company, to prepare and file the bill in this cause. It being found upon consultation, that the amount in controversy with Lusk as sole complainant was insufficient to give the court jurisdiction, it became necessary to procure another non-resident owning property in the city. Park was thereupon authorized to confer with his client Wheeler, with a view to securing her coöperation, she to be guaranteed against all expenses. Thereupon the following telegram was sent by Park to her:

"Will you permit use of your name in suit here to restrain misuse of taxes by City Officials? If so, wire me to bring such suit. I advise the bringing of the suit and will protect you against expenses." To the telegram the reply was sent, "Yes, use your judgment in the matter." The next day after the receipt of this telegram Park wrote Wheeler as follows:

"My dear Mrs. Wheeler: On yesterday I wired you for permission to bring a suit in your name against some of the city officials for misuse of taxes, and received your reply authorizing me to go ahead. I brought the suit and filed it on yesterday. The suit is to restrain the Water Commissioners of Denver from further expenditures looking toward the purchase of a water plant by the city of Denver. The city is already enjoined in another proceeding in which the Water Company was a party. Since that time the Water Commission has spent $31,000 to hold an

election, and about $25,000 for other purposes; and are seeking to compel the city to pay out on warrants about $20,000 more.

"The courts have already held that the amendment to the charter establishing a Water Commission for the purpose of purchasing or building a water plant is unconstitutional and void, and it is our purpose to stop the spending of any more of the people's money in that direction.

"I desire to bring suit in the Federal Court, and therefore had to get permission of a non-resident taxpayer to bring suit, which accounts for my telegraphing you for permission.

"You will not be charged with any expense or costs in the matter, either for court costs or attorney's fees; and I will see that you are absolutely protected in every way from any liability whatever. Thanking you for your permission to bring the suit in your name, I remain."

The affidavit expressed the conclusion that the parties to the bill were improperly and collusively joined for the purpose of creating a cause cognizable in the United States Circuit Court, in the interest and at the cost of the Denver Union Water Company, neither of the parties having knowledge of the joinder with the other, or of any connection of the other with the cause, and having no interest which was so imperiled as to cause them to proceed on their own motion and at their own expense.

The affidavits of Park and Moffat were filed in opposition to the motion to dismiss. Park's affidavit states the following: He is solicitor for complainants (appellants here). On June 11, 1911, the question of bringing a taxpayers' suit against the Public Utilities Commission was brought to his attention by Mr. Gerald Hughes, and he was asked if he would be willing to bring such suit for Lusk, that Moffat had received a telegram from Lusk authorizing him (Moffat) to retain counsel for him for the purpose of bringing suit in the Federal court.

Wheeler then owned property within the city and county subject to taxation for the expenditures of the Commission. Park had been her legal adviser for some time, and he suggested to Hughes the advisability of joining her in the suit so that she might receive the same protection and benefit as Lusk, provided she could be protected against costs and counsel fees. Park believed it to be for her interest to be so joined. He thereupon sent her the telegram and received the reply set out in the affidavit of Van Cise, and brought the suit for her and Lusk and all other tax-payers.

The affidavit set out the property owned by her and Lusk and that she is neither a stockholder nor a bondholder nor otherwise financially interested in the water company. It averred further as follows: It is not true that the suit was brought at the solicitation or request of the water company, but on the contrary, Park suggested the joinder of Wheeler because in his opinion, as her attorney, it was to her interest to be joined, provided she could be protected against costs and attorney's fees; he so advised her and she accepted his advice and authorized the suit. It is not true that the suit is one brought solely in the interest or for the benefit of the water company, but it is brought not only for the benefit of Wheeler and Lusk but of all other property owners, including the water company, which is a large property owner, its property being assessed for taxation at about $2,500,000, being approximately 2% of the total assessed valuation of all property within the city and county, and that, as Park was informed and believed, the water company, by reason of its large interest as a property owner and taxpayer, was willing to protect Wheeler and Lusk against costs and attorney's fees. Park denied the suits were collusive.

Moffat's affidavit is to the following effect: On June 19, 1911, he was treasurer of the water company. In May, 1911, the Circuit Court of Appeals for the Eighth Circuit,

in the case of the *New York Trust Company* v. *The City and County of Denver*, had rendered an opinion that the amendment to the charter of Denver was unconstitutional and void. The water company was a party to that suit and in a cross bill had alleged its property holdings in the city and that it paid approximately one-fiftieth of all the taxes assessed and collected in the city. Notwithstanding the opinion and decision of the court, the Utilities Commission and its members openly and publicly declared their purpose of ignoring the decision and continuing to disburse the public funds of the city; announced their intention of instituting other and independent litigation in the state courts for the purpose of raising the identical questions decided by the Circuit Court of Appeals. Many taxpayers, citizens of Colorado and of other States, complained to the officers of the water company of such illegal attempts and requested the officers of the company to take some proper and legal steps to stop such unwarranted action. These conditions were discussed between Moffat and Gerald Hughes, counsel for the company, and it being advisable that the litigation should remain in the Federal courts, free from local prejudice or influence or the attacks of local newspapers, Moffat suggested that Lusk, who had been a resident of Denver and knew the conditions surrounding the litigation, might have a sufficient interest and be willing to institute such other suits in the Federal court as might be necessary and proper to prevent further illegal expenditure of public funds affecting not only Lusk, but other taxpayers. Thereupon Moffat, with the consent and advice of Hughes, sent the telegrams set out in Van Cise's affidavit. Moffat, through Hughes, employed Park to institute the suit. Moffat informed Park that the water company would protect him in regard to expenses, but did not at that time inform him of the exchange of telegrams with Lusk. The latter's desire as a taxpayer to institute and maintain the suit is

averred, and it is denied that he is a stockholder or bondholder of the water company or that he has further or other interest than that of a taxpayer. It is averred that the water company is interested in the litigation, and has a right not only to maintain its rights as a taxpayer, but, if it sees fit, to join in this suit as a nominal party.

An affidavit of the members of the Commission was filed in reply in which they aver that they have not, nor has either of them, at any time declared the purpose as charged against them in Moffat's affidavit, nor have they done anything which might be construed as a violation of the injunction of the Circuit Court. The cause referred to by Moffat, as they have been advised and believe, involves the same questions as the present controversy, and in the event that they shall be compelled to answer they will so set up and aver. After the decision of the Circuit Court of Appeals was announced, they consulted with their counsel as to whether drawing warrants for their salaries and the expenses of the litigation could be construed as a violation of the injunction of the Circuit Court in any particular, and only issued warrants upon the assurance of counsel that they were not prohibited from doing so. They also readily acquiesced in the action of the Auditor and Treasurer of the city in requesting an opinion of the City Attorney as to their official status, after which they issued three certificates with a view of testing their right and authority so to do in the state courts, and in so doing were advised that they were not in any manner transgressing the mandate of the court. They aver their intention of bringing suits in the discharge of their duties with a view of recovering certain money believed to be due from certain collectors of water rent and such kindred matters as may arise from time to time, but not for the purpose of raising any question already raised or decided.

Mr. Edwin H. Park for appellants.

Mr. W. H. Bryant, with whom *Mr. William P. Malburn* and *Mr. Thos. R. Woodrow* were on the brief, for appellees.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court.

The merits of the controversy are not involved. The sole question is whether there was collusion to give the court jurisdiction of the cause, and, of course, the existence of collusion implies the existence of fraud. Is fraud shown? Between the parties there is the requisite diversity of citizenship, requisite amount and the complainants (appellants here) had such relation to the matters charged as to give them a standing to litigate their legality. They were solicited to bring the suit, however, and they were indemnified against liability for cost and counsel fees. Was this enough to make their proceeding collusive? To answer the question we must keep in mind the situation. The Utilities Commission was alleged to be an unconstitutional body and its expenditures illegal. Indeed this had been decided, but injury from its action still impended or was believed to impend. Litigation was threatened or believed to be threatened in the state courts; in other words, there was a purpose to change the forum of the litigation and possibly its results. The belief may have been unfounded; it cannot be said that it was not honestly entertained. Against these circumstances what is opposed? It is said that the water company was the party who desired the suit to be brought and that the suit was brought for its benefit and at its instance and request, and upon an express contract to pay the costs of litigation and counsel fees which might be incurred. A great deal of this is assumption, the water company admits

its interest, but the appellants also have interest; but mere unity of interest or difference in its degrees is not enough, there must be an illegal purpose. If the interest was real and the peril which threatened was real or thought to be real, unity of interest or contribution of expenses cannot be regarded as necessarily proof of collusion. *Chicago* v. *Mills*, 204 U. S. 321. And the cases are numerous in which it has been decided that the motives of litigants in seeking Federal jurisdiction are immaterial. *Blair* v. *Chicago*, 201 U. S. 400, and cases cited.

Cashman v. *Amador &c. Canal Co.*, 118 U. S. 58, is relied on. The case is distinguishable from the case at bar. Cashman was an alien and brought suit against the Canal Company claiming that his land was injured by the debris thrown on it by the working of certain mines by hydraulic process. The suit was instituted at the instance of the County of Sacramento, the County not being able to bring suit in the Federal court. There was a cause of action in Cashman; there was a disability on the part of the county to sue in the Federal court in its own name. So far there is resemblance to the case at bar, but there are material differences between the agreement in that case and the agreement between the parties in this. The County was to pay the expenses, engage counsel and indemnify Cashman against all charges and expenses, and he stipulated "not to compromise, dismiss, or settle the said suit without the consent of the County of Sacramento, and to allow said County and the attorneys aforesaid in its behalf to manage and conduct the said suit to the same extent and in the same manner as if such suit had been commenced by and was prosecuted in the name of the said County of Sacramento." It is manifest, as this court said, from the very beginning the suit was in reality the suit of the County, with a party plaintiff "collusively made" for the purpose of creating a case cognizable "by the Circuit Court of the United

States." In other words, as was said, the "dispute and controversy" which was "involved" was nominally between Cashman, an alien, and the defendants, citizens of California, but was "really and substantially" between one of the counties of California and citizens of that State, and thus not "properly within the jurisdiction" of the Circuit Court.

The case at bar has no such features. It is not under the control of the water company. It was brought by appellants, they having a justiciable controversy, well or ill-founded, and which it was desired to be determined in a Federal court, they being non-residents of Colorado and citizens of other States.

It is true by the decision of this court in *The City and County of Denver et al.* v. *The New York Trust Company et al.*, and *Same* v. *The Denver Union Water Company et al.*, *ante*, p. 123, the merits of the controversy have been decided against them, but they must be judged as of the time their suit was begun, and, so judged, we think the suit was not collusively brought and should not have been dismissed for want of jurisdiction. The decree dismissing it is, therefore,

Reversed.

MR. JUSTICE DAY dissents.

ADAMS v. RUSSELL, WARDEN.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 1048. Submitted May 12, 1913.—Decided June 10, 1913.

This court will not review the judgment of the state court when it rests not only on Federal, but also on non-Federal grounds, and the latter are sufficient to sustain it and were necessarily decided.

Whether state officers have power to grant a parole under a state indeterminate sentence act, and under what conditions, are for the state court to finally determine.

The state court having held that, under the applicable statutes, the parole granted to a prisoner was absolutely void and was therefore properly vacated, such ground is sufficient to sustain the judgment, and this court cannot review it on the asserted Federal question that the state officers had vacated the parole in such manner as to violate the prisoner's constitutional rights secured by the Fourteenth Amendment.

Whether a state statute allowing prisoners a reduction for "good time" is part of an indeterminate sentence act is for the state court to determine, and in this case it is a substantial local question on which to rest the judgment of the state court.

Writ of error to review 169 Michigan, 606, dismissed.

THE facts, which involve the jurisdiction of this court to review a judgment of the state court which rests upon non-Federal as well as Federal grounds, are stated in the opinion.

Mr. Fred A. Baker for plaintiff in error.

Mr. Grant Fellows, Attorney General of the State of Michigan, and *Mr. Thomas A. Lawler*, Assistant Attorney General, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Error to review the action of the Supreme Court of Michigan, denying plaintiff in error a writ of *habeas corpus*.

The facts, as alleged in the petition, are these:

Plaintiff in error was convicted in the Recorder's Court of the City of Detroit of the crime of seduction and sentenced to imprisonment for not less than two and one-half years and for not more than five years. The case was reviewed by the Supreme Court of the State on a bill of exceptions and a writ of error and the sentence and judgment of the court below affirmed. Pending the writ of error he was released from imprisonment, but after his sentence was affirmed he was recommitted to prison and ever since has remained there. He duly made application to the Advisory Board of Pardons for a parole under Act No. 184 of the Public Acts of 1905 (June 7, 1905, Pub. Acts, 1905, p. 268), as amended. On December 5, 1911, the board granted and delivered to the warden of the prison a certificate or warrant of parole by which he was paroled "for two months from and after January 29, 1912."

On December 11, 1911, the action of the board paroling plaintiff in error was vacated, for the reason, as the records show, that it was at that date "in possession of facts not known at the time of such action." The warden was notified of the action of the board.

This action of the board was without notice to plaintiff in error and gave him no opportunity to be heard or to disprove the charge or facts alleged against him.

Having served his minimum sentence and having been granted a parole he is not now imprisoned on any process, judgment, decree or execution specified in § 8 of the Habeas Corpus Act of the State.

On March 5, 1912, he presented a petition for a writ of *habeas corpus* to the Supreme Court of the State in which he set up the facts of his case as above stated and alleged the illegality of his imprisonment as follows: (1) The Advisory Board has no jurisdiction or authority to vacate the parole granted to him, the power and authority to retake and return any paroled convict to the prison being

within the exclusive jurisdiction and discretion of the warden or superintendent of the prison. (2) If the Indeterminate Sentence Act is construed to confer such power upon the board without notice to the convict, then said act is in conflict with the provision of the constitution of the State which prohibits cruel and unusual punishment or the taking of life, liberty or property without due process of law, and against the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. (3) If so construed, the convict would be twice punished for the same offense. (4) The Indeterminate Sentence Act and the rules and regulations promulgated thereunder contemplate that a convict's parole will not be annulled except when he violates the terms and conditions of his parole or the rules and regulations. (5) His term of imprisonment has expired.

The Supreme Court instead of granting a writ of *habeas corpus* as prayed, granted a writ of certiorari to inquire into the cause of detention, under the authority of § 9889 of the Michigan Compiled Laws of 1897. The court also granted a common law writ of certiorari to bring the record of the Advisory Board before it, and both writs were made returnable April 2, 1912.

Returns were made to the writs, which plaintiff in error traversed so far as they set forth facts which were alleged in a communication to the board, attached to the returns.

The case so made up was argued and submitted to the court on April 2, 1912.

The Attorney General made no attempt to sustain the power or jurisdiction of the Advisory Board to annul a parole without notice to the convict, but contended that as the Supreme Court in affirming the conviction of plaintiff in error had held that the time he was out on bail should not be included in determining the length of his

imprisonment, he was "subject to imprisonment under the sentence for the unexpired part thereof remaining at the time of his release" (on bail), his minimum sentence not expiring until January 29, 1912, and his parole was void because his application was made and acted upon before the expiration of his minimum sentence.

The court held that his parole was void on the ground taken by the Attorney General, and the petition was denied. 169 Michigan, 606.

Plaintiff in error and his counsel inadvertently overlooked the fact that he was entitled under the laws of Michigan to a deduction from his minimum sentence for the "good time" accorded to convicts in the prisons of the State. Under the laws of the State he had earned and was entitled during the first and second years of his sentence, to five days "good time" for each month, and, during the third year, to six days each month, making a total of one hundred and thirty-eight days, so that his minimum sentence of two years had expired before his application for parole.

The prison parole law of the State has been in existence since 1905, and down to the decision of the Supreme Court in his case, it was the constant practice of the Advisory Board to receive and act upon applications of convicts before and in anticipation of the expiration of their minimum sentences and to grant paroles from a designated date, at or after the expiration of the convict's minimum sentence. At the time of the decision there were a large number of paroles outstanding and these have been recognized as legal and valid, and, notwithstanding the decision, no paroled convict or prisoner other than plaintiff in error has been kept in or returned to prison on the ground that his parole was prematurely granted and void. Discrimination is alleged to result against him and a violation of the Fourteenth Amendment to the Constitution of the United States.

Twenty-eight cases are enumerated, and it is alleged that the board, since the decision, has continued the practice.

Plaintiff in error alleged the illegality of his imprisonment as follows: (1) His minimum sentence had expired at the time the board received and acted upon his application for parole, and the order of release was a valid warrant or instrument for his discharge. (2) The board had no power to vacate it, or, if it had such power, it was only upon notice. (3) The parole law, as enforced, discriminates against him and denies him the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. (6) The vacating of his parole was a violation of the due process clause of that Amendment. (7) He was not guilty of any violation of his parole. (8) The reasons given in his former petition were repeated and relied on.

It is not necessary to set forth the exhibits to the petition. They are sufficiently indicated in the petition. The board's action in vacating the parole was induced by a communication made to it by the prosecuting officer of the county, stating the circumstances of the crime for which Adams was convicted. They are not important, however, to the legal propositions involved, and even to a consideration of the latter a question of jurisdiction is interposed.

It will be observed that the questions in the second petition (that under consideration) are the same as those presented in the first. In both, local and Federal questions appear. We say Federal questions, for at least there are claims in words under the Constitution of the United States. They depend upon two propositions—(1) If the Indeterminate Sentence Act be construed as giving the Advisory Board power to annul the parole without notice, it violates the due process clause of the Constitution of the United States. (2) The parole as enforced denies plaintiff in error the equal protection of the law.

Granting for the time being that these propositions are not merely dependencies of the local questions, that is, are not dependent upon the statute, may we review them? We have seen that the Supreme Court decided that the parole was void, the Advisory Board having no power under the statute to grant it. The ground of the ruling was that plaintiff in error's minimum sentence had not expired. In his second petition he alleges that his term had expired on account of credit due him for "good time" accorded convicts in the prisons of the State, that his counsel had inadvertently overlooked the fact that he was entitled to such credit, which amounted to a total of one hundred and thirty-eight days, and that, therefore, his sentence had actually expired before his application for parole. The petition was denied without opinion and it is left indefinite upon what ground—whether the court entertained views adverse to plaintiff in error's on the Federal questions or whether it considered that its former decision determined his rights; whether, as a matter of procedure, a rehearing was his remedy, or whether the new claim of "good time" allowance was tenable under the statute. In such situation may we conjecture upon which ground the court decided and by conjecture acquire jurisdiction to review the judgment of the court?

In *Eustis* v. *Bolles*, 150 U. S. 361, it is decided that when there is a Federal and state question in the case and the latter is sufficient to sustain the judgment, this court will not review the judgment, and the logical course is to dismiss the writ of error. But we may be put to infer what points may have been raised and what was decided; in other words, whether the state court rested its decision upon a Federal ground or upon an independent ground. If the latter be contended, then it must appear that such ground was a good and valid one, sufficient to sustain the judgment. *Klinger* v. *Missouri*, 13 Wall. 257, 263. Other-

wise, as was said in *Neilson* v. *Lagow*, 12 How. 98, 110, "counsel might raise on the record some point of local law, however erroneous, and suggest that the court below may have rested its judgment thereon," and, therefore, if the independent ground be not good and valid it will not be presumed that the judgment was based upon it. See also *Magwire* v. *Tyler*, 8 Wall. 650. If, however, the state question have that quality, and there be uncertainty as to the ground of decision, this court will not assume jurisdiction. *Dibble* v. *Bellingham Bay Land Co.*, 163 U. S. 63, 69; *Allen* v. *Arguimbau*, 198 U. S. 149.

In *Commercial Bank* v. *Rochester*, 15 Wall. 639, a suit was brought to recover a tax charged to have been illegally levied and collected upon the capital stock of the bank alleged to have been invested in United States bonds. The case was dismissed for want of jurisdiction. We said, by Mr. Justice Miller: "It has been so often held by this court, that the question on which the plaintiff in error relies to give it jurisdiction must appear to have been decided by the state court, that it has become one of the settled principles on that subject." And further, "It is said in this case that the court [state court] *must* have decided in favor of the validity of the tax, which it is conceded would have given this court jurisdiction. But this does not appear either affirmatively or by necessary intendment. For the case may have been decided on the form of the remedy which the practice in the state courts required the plaintiff to adopt, or on the technical insufficiency of the pleading. In this uncertainty of the record as an indication we may, without going further, dismiss the case on that ground." It was objected that the state decision precluded the view that the case was decided on the local rules of pleading, to which it was replied that the state court was the proper tribunal to decide the question, and that we were not authorized to say that the court did not decide it correctly or that it made any deci-

sion adverse to the exemption of the securities of the United States from state taxation.

In *Railroad Company* v. *Rock*, 4 Wall. 177, and *Insurance Company* v. *Treasurer*, 11 Wall. 204, there was a possibility of two grounds of decision, Federal and local, and this court declined to review the judgments. See also *Todd* v. *Daniel*, 16 Peters, 521, 525.

In *Bachtel* v. *Wilson*, 204 U. S. 36, 41, 42, we said, by Mr. Justice Brewer, that before we can pronounce a judgment of a state court to be "in conflict with the Federal Constitution, it must be made to appear that its decision was one necessarily in conflict therewith and not that possibly, or even probably, it was." The case involved the consideration of a state statute which presented two questions, one of which, at least, presented no matter of a Federal nature, and in respect to each of which something might be said one way and the other, and until it was shown what the Supreme Court did in fact decide it was impossible to hold that the section as construed by it was in conflict with the Federal Constitution. Under these circumstances it was held that this court had no jurisdiction, and the writ of error was dismissed. *Johnson* v. *Risk*, 137 U. S. 300, was cited. No opinion was given by the state court in *Bachtel* v. *Wilson*, nor in the cited case. In neither case, therefore, did the record disclose the specific ground upon which the court proceeded. In such case, we said in *Johnson* v. *Risk*, by Mr. Chief Justice Fuller, that when the application of a state statute in a matter purely local was involved, if a plaintiff in error wished to claim that the cause was disposed of by the decision of a Federal question, he should obtain the certificate of the Supreme Court to that effect, or the assertion in the judgment that such was the fact. *DeSaussure* v. *Gaillard*, 127 U. S. 216, was adduced as deciding that to give this court jurisdiction of a writ of error to a state court it must appear affirmatively not only that a Federal

question was presented for decision but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been rendered without deciding it.

The rule is a salutary one in view of the different jurisdictions of the state courts and of this court. It leaves in both the full plenitude of their powers. It permits no evasion by the state court of the responsibility of determining the Federal question if necessary to be determined; it permits no assumption by this court of jurisdiction to review the decision of local questions. The sufficiency of the local question to sustain the judgment rendered, and the necessity for the determination of the Federal question necessarily we have to consider, but, as was said in *Johnson* v. *Risk*, "Where a defense is distinctly made, resting on local statutes, we should not, in order to reach a Federal question, resort to critical conjecture as to the action of the court in the disposition of such defense." And, of course, the principle is applicable whether the question is presented as a ground of defense or a ground of action.

It certainly cannot be said that in the case at bar, the Supreme Court had not grounds of decision based on the local law, whether considered substantively or administratively. The "good time" law and the indeterminate sentence law were enacted at different times. Whether the former is part of the latter is a state question, and whether the Supreme Court has decided in the present case contrary to its ruling in a prior case may or may not be true. And, again, it is a state question, whether the "good time" law applies to the minimum sentence imposed, which, it is contended by defendant in error, is fixed and certain, not subject to diminution, § 5 of the Indeterminate Sentence Act providing that "prisoners under the provisions of this act shall be eligible to parole after the expiration of their minimum term of imprisonment, and prisoners who have been twice previously con-

victed of a felony shall not be eligible to a parole." In other words, it is contended that the reduction for "good time" should be only from the maximum term, that being the sentence referred to in the "good time" law, which provides: "Every convict who shall have no infraction of the rules of the prison or the laws of the State recorded against him, shall be entitled to a reduction from his sentence," etc. It has been determined in other jurisdictions that the maximum term constitutes the sentence. See *Ex parte Spencer, Scholl and Moyer,* 228 U. S. 652; *Commonwealth* v. *Brown,* 167 Massachusetts, 144; *Oliver* v. *Oliver,* 169 Massachusetts, 592. In support of the contention that the Indeterminate Sentence Law and its provisions for parole did not in any way repeal or modify the Good Time Law plaintiff in error cites the last clause of § 6, which reads as follows:

"The convict so paroled, while at large, by virtue of such parole, shall be deemed to be still serving the sentence imposed upon him, and shall be entitled to good time the same as if confined in prison."

On the assumption made, the query yet remains, To what sentence is the good time to apply? We have seen, the Supreme Court has decided that a convict cannot be paroled until his minimum sentence has expired, and that good time does not apply to the minimum sentence, receives support from the fact that neither the counsel for the parties, nor the court upon the first petition, thought of the construction plaintiff in error now urges for the "good time" law and its operation to reduce his minimum sentence. We are not required to resolve the dispute. We have stated the respective contentions of the parties to show that there were substantial local questions in the case upon which the Supreme Court may have decided it.

It follows, therefore, upon the authority of the cases which we have cited, that the writ of error must be dismissed.

Dismissed.

McGOVERN *v.* CITY OF NEW YORK.

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

No. 15. Argued November 8, 1912.—Decided June 9, 1913.

Where the state statute requires condemnation commissioners to determine the just and equitable compensation, any wrong done, so far as amount is concerned, is due not to the statute, but to errors of the court as to evidence or measure of damages.

A judgment by which an owner of condemned property gets less than he ought, and in that sense is deprived of his property, cannot come to this court on the constitutional question unless there is something more than an ordinary honest mistake of law in the proceedings. *Backus* v. *Fort Street Depot*, 169 U. S. 557.

The final judgment of a state court in condemnation proceedings should not be held to violate the due process provision of the Fourteenth Amendment unless the rulings of law prevented the owner from obtaining substantially any compensation. *Appleby* v. *Buffalo*, 221 U. S. 524.

Enhanced value of property as a part of a great public work depends upon the whole land necessary being taken therefor. The chance that all the property necessary can be acquired without the exercise of eminent domain is too remote and speculative to be allowed. *C., B. & Q. Ry.* v. *Chicago*, 166 U. S. 226.

The owner of property taken in eminent domain proceedings is entitled to be paid only for what is taken as the title stands, *Chamber of Commerce* v. *Boston*, 217 U. S. 189; hypothetical possibilities of change cannot be considered. *United States* v. *Chandler-Dunbar Water Co.*, *ante*, p. 53, followed, and *Boom Co.* v. *Patterson*, 98 U. S. 403, distinguished.

A wide discretion is allowed the trial court in regard to admission of evidence as to the value of property taken by eminent domain, and this court will not interfere on the ground of denial of due process of law where there was no plain disregard of the owner's rights.

195 N. Y. 573, affirmed.

THE facts, which involve the validity of an award in a proceeding for condemnation of land for the water supply system of New York City, are stated in the opinion.

Mr. Edward A. Alexander, with whom *Mr. Jerome H. Buck*, *Mr. J. J. Darlington* and *Mr. George Gordon Battle* were on the brief, for plaintiff in error:

The Commissioners of Appraisal, and the courts of New York, confiscated claimant's property in entirely excluding from consideration, as an element of value, its adaptability for use as part of a reservoir site. An owner is entitled to have his interest valued upon a consideration of all the uses for which his property is available and adaptable.

The decision below overrules *Boom Co.* v. *Patterson*, 98 U. S. 403.

Just compensation means the fair and full money value of the property taken; this value of the property taken means its market value. As to what market value means, see *Wetmore* v. *Rymer*, 169 U. S. 115, 128.

There is no market value, in the strict sense of the term, for real estate, and especially for country real estate, in the sense that there is market value for stocks, bonds and produce. *Sargent* v. *Merrimac*, 196 Massachusetts, 171.

In New York the courts will not set aside awards of Commissioners, although the awards may be inadequate. An award must be so inadequate that it is shocking to the sense of justice before they will set it aside. *Flynn* v. *Brooklyn*, 19 App. Div. 602; *Long Island R. R. Co.* v. *Reilly*, 89 App. Div. 166.

An inadequate award, even though not shockingly so, is, nevertheless, not just compensation. Only an adequate award is just compensation.

The state courts have wholly, entirely and completely confiscated the claimant's property.

While the owner is not permitted to take advantage of the necessities of the condemning party, he is entitled to have the value of his property considered, with reference to its adaptability for any and all uses to which it may be devoted.

Fitness of lands for particular purposes is an element

in estimating their market value. *Boom Co.* v. *Patterson*, 98 U. S. 403; Sedgwick on Damages, § 1075; *Louisville Ry. Co.* v. *Ryan*, 64 Mississippi, 309; *Seattle Ry. Co.* v. *Murphine*, 4 Washington, 448, 456; *Matter of Staten Island R. R. Co.*, 10 N. Y. St. Rep. 393; *Russell* v. *St. Paul Ry. Co.*, 23 Minnesota, 210; *Sanitary District* v. *Loughran*, 160 Illinois, 362; *McGroarty* v. *Coal Co.*, 212 Pa. St. 53; *Paine* v. *Kansas Valley R. R. Co.*, 46 Fed. Rep. 546, 557; *Amoskeag Co.* v. *Worcester*, 60 N. H. 522; *Harwood* v. *West Randolph*, 64 Vermont, 41; *Gardiner* v. *Brookline*, 127 Massachusetts, 358; *Conness* v. *Commonwealth*, 184 Massachusetts, 541; *Gage* v. *Judson*, 111 Fed. Rep. 358.

It has been the uniform rule in ascertaining the value of property taken for a public use that all the capabilities of the property and the uses to which it may be applied, or for which it is adapted, are to be considered, and not merely the condition which it is in at the time and the use to which it is then applied by the owner. *Hooker* v. *M. & W. R. R. Co.*, 62 Vermont, 47; *Syracuse* v. *Stacy*, 45 App. Div. 249, 254; *Matter of N. Y., L. & W. R. Co.*, 27 Hun, 116; *Benham* v. *Dunbar*, 103 Massachusetts, 368. See also to the same effect: *Matter of Furman Street*, 17 Wend. 649, 669; *College Point* v. *Dennett*, 5 T. & C. 217; *Matter of Commissioners*, 37 Hun, 537, 555; *Matter of Union E. L. R. R. Co.*, 55 Hun, 163; *Matter of Daly*, 72 App. Div. 396.

In this case the city is condemning property from which it will derive a commercial profit, and in that respect is different from that of a public park or public school, or fortification, where the property is condemned exclusively and solely for public benefit.

The proposed testimony offered and rejected by the state courts is not speculative. *Matter of Gilroy*, 85 Hun, 424, 426.

Such testimony is no more guesswork in this case, than in any other where the special adaptability of property is taken into consideration. *Blake* v. *Griswold*, 103 N. Y.

429, 436; 12 Amer. & Eng. Encyc. of Law, 2d ed., 484, citing *Spring Valley Water Works* v. *Drinkhouse*, 92 California, 528; *Chandler* v. *Jamaica Pond Aqueduct*, 125 Massachusetts, 544; *Lake Shore Ry. Co.* v. *Chicago R. R. Co.*, 100 Illinois, 21, 33; *Read* v. *Barker*, 30 N. J. L. 378; *S. C.*, 32 N. J. L. 477; *Lowell* v. *Middlesex County*, 146 Massachusetts, 403; *Warren* v. *Spencer Water Co.*, 143 Massachusetts, 155.

Claimant is not seeking to measure the value of his land by the profits which the city will derive from its use. He contends, however, that the savings accruing to the condemning party by taking the particular land in question in preference to other land of a similar character, which saving would accrue to any person using the land for the same purposes, must be taken into consideration, as competent evidence of the market value of the property. *Boom Co.* v. *Patterson*, 98 U. S. 403; *Great Falls Mfg. Co.* v. *United States*, 16 Ct. Cl. 160, aff'd, 112 U. S. 645.

In Great Britain in reservoir site cases, availability and adaptability must be taken into consideration. *Manchester* v. *Countess Ossilinski* (unreported, but cited in *Re Brookfield*, 176 N. Y. 138, Vol. 2043, N. Y. Law Institute Library); *Currie* v. *Waverly &c. Ry. Co.*, 52 N. J. L. 381, 394; *In re Gough*, L. R. 1904, 1 K. B. 417.

The executive department of this State has always taken adaptability of property into consideration in making purchases, as may be seen in the acquisition of the forest reserves.

A prior demand for the particular property is entirely immaterial, but as a matter of fact there were a number of prior demands for this particular property for this very purpose, and offers were made to prove this.

The reasoning by which the Appellate Division of the Supreme Court of New York State reached its conclusion, which was affirmed without opinion by the Court of Appeals, so far as it is clear and to be understood, is un-

sound in principle and necessarily leads to a false result and to the confiscation of the property of plaintiff in error.

The market price considered by the Commissioners apparently was the value of the property in the local market, i. e., the adaptability to farm purposes.

But the local market, and the necessities of the rural community, should not govern the value of this property, if it can be shown that it has a special value for millions of citizens in New York, and for hundreds of thousands of people in other municipalities. The claimant offered to prove that it is available for this special purpose and that it has an enormous value in such broader market, but he has been deprived of all opportunity to produce evidence upon these two points. *Langdon* v. *Mayor*, 133 N. Y. 628, 630. *Boom Co.* v. *Patterson*, 98 U. S. 403, and *Matter of Gilroy*, 85 Hun, 424, are controlling authorities. The cases relied upon by the Appellate Division do not overrule these authorities. The cases of *Albany Northern R. R. Co.*, 16 Barb. 68; *Matter of Daly*, 72 App. Div. 394; *Matter of East River Gas Co.*, 119 App. Div. 350; *Moulton* v. *Newburyport Water Co.*, 137 Massachusetts, 163; *Matter of N. Y. L. & W. R. R. Co.* v. *Arnot*, 27 Hun, 151; *Daly* v. *Smith*, 18 App. Div. 197; *Matter of New York*, 118 App. Div. 272; *St. Johnsville* v. *Smith*, 184 N. Y. 34, can be distinguished.

Market value is not always the true measure of just compensation as between an unwilling seller and a willing purchaser. *Sloane* v. *Baird*, 162 N. Y. 327, 330; *Murray* v. *Stanton*, 99 Massachusetts, 345; *Matter of Furman Street*, 17 Wend. 648, 671.

The adaptability of land for use as a reservoir or for water purposes has been taken into consideration as an element of value of such land in a number of well decided and carefully considered cases, both in Great Britain and in the United States. See Cripps Law of Compensation; *Gearhart* v. *Clear Spring Water Co.*, 202 Pa. St. 232.

The fact that the plaintiff in error did not or could not alone use his property as a reservoir site does not deprive that property of its value as a reservoir site or a portion of a reservoir site. *Boom Co.* v. *Patterson, supra; C. N. W. R. R. Co.* v. *C. & E. R. R. Co.*, 112 Illinois, 609; *Hooker* v. *N. & W. R. R. Co.*, 62 Vermont, 47; *Railway Co.* v. *Woodruff*, 49 Arkansas, 381; *Mississippi Bridge Co.* v. *Ring*, 58 Missouri, 491.

The fact that plaintiff in error was the owner of only a part of the reservoir site does not prevent that element of value being considered. It only goes to the weight that should be given to the evidence and the amount that should be allowed for this element of value. See *Gilroy Case*, 85 Hun, 424; *San Diego Land Co.* v. *Neale*, 78 California, 63, 72.

By refusing to take into consideration, in estimating the value of the claimant's property, the value of its use or availability for use as a reservoir site, the plaintiff in error has been deprived of his property, without due process of law, and has been denied the equal protection of the law in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States. *Yesler* v. *Harbor Commissioners*, 146 U. S. 646; *People* v. *Supervisors*, 70 N. Y. 228, 234.

It is not due process of law, where the courts apply a rule of law in absolute disregard of the right to just compensation. *Chi., B. & Q. Rd. Co.* v. *Chicago*, 166 U. S. 226; *Backus* v. *Fort St. Depot Co.*, 169 U. S. 557, 565.

The term "just compensation" as used in this statute should be liberally construed in favor of the property owner and in case of any doubt the property owner should receive the benefit of the doubt.

Eminent domain statutes are construed most strictly against the condemning party. Cooley on Const. Lim. See also: *Appleby* v. *Buffalo*, 221 U. S. 524, 529; *Twining* v. *New Jersey*, 211 U. S. 78, 91; *Raymond* v. *Chicago Trac-*

tion Co., 207 U. S. 20, 35, 36; *Londoner* v. *Denver*, 210 U. S. 373, 386.

The capabilities of the property of the plaintiff in error, its adaptability and availability for use as part of a reservoir site, constitute commercial value and property. The term "property" means the right to use, exercise dominion over, and dispose of some particular thing or object. Property means ownership, the exclusive right of a person to freely use, enjoy and dispose of any object, whether real or personal. *Hamilton* v. *Rathbone*, 175 U. S. 421; *Buffalo* v. *Babcock*, 56 N. Y. 268; *Matter of Jacobs*, 98 N. Y. 98, aff'g, 33 Hun, 374.

Mr. Louis C. White, with whom *Mr. Archibald R. Watson* and *Mr. Wm. McM. Speer* were on the brief, for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is a proceeding for the taking of land to be used for a reservoir to secure an additional supply of water for the City of New York. Commissioners were appointed, as provided by the constitution of the State, to ascertain the compensation to be paid. Land belonging to the plaintiff in error, McGovern, was among the many parcels taken and the question brought here arises on the refusal of the Commissioners to admit certain evidence as to the exceptional value of the land for a reservoir site, the exclusion of which, it was alleged, had the effect of depriving McGovern of his property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States. The offer of proof as first made embraced many facts and covers six octavo pages of the record. This was rejected, the Commissioners, as we understand their ruling, considering it only as a unit, and as containing inadmissible elements, which probably it

did. The offer then was made "to prove the fair and reasonable market value of this piece of property taking into consideration that element of value which gives it an enhanced value because it is part of a natural reservoir site;" also "to prove the fair and reasonable value of the Ashokan reservoir site which the City of New York is now condemning," and that the Ashokan reservoir site (as a whole) was the best and most available site for the purpose of obtaining an additional water supply. These offers were enough to raise the question discussed, although the last one was only a reiteration of what was alleged in the original petition for the taking of the land and stood admitted on the record. The action of the Commissioners was affirmed by the courts of New York. 130 App. Div. 350, 356; 195 N. Y. 573.

The statute requires the Commissioners to determine 'the just and equitable compensation which ought to be made.' If there has been any wrong done it is due not to the statute but to the courts having made a mistake as to evidence, or at most as to the measure of damages. But of course not every judgment by which a man gets less than he ought and in that sense is deprived of his property can come to this court. The result of a judgment in trover, at least if satisfied (*Lovejoy* v. *Murray*, 3 Wall. 1; *Miller* v. *Hyde*, 161 Massachusetts, 472), is to pass property as effectually as condemnation proceedings—yet no one would contend that a plaintiff could come here under the Constitution simply because of an honest mistake to his disadvantage in laying down the rule of damages for conversion. If the plaintiff could bring such a case to this court, one might ask why not the defendant for a mistake in the opposite direction that will deprive him of money that he is entitled to keep.

When property is taken by eminent domain it equally is recognized that there must be something more than an ordinary honest mistake of law in the proceedings for

compensation before a party can make out that the State has deprived him of his property unconstitutionally. *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 575, 576. As it is put in the case most frequently cited in favor of the right to a writ of error, "we are permitted only to inquire whether the trial court prescribed any rule for the guidance of the jury that was in absolute disregard of the company's right to just compensation." And again the final judgment of a state court "ought not to be held in violation of the due process of law enjoined by the Fourteenth Amendment unless by the rulings upon questions of law the company was prevented from obtaining substantially any compensation." *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U. S. 226, 246, 247; *Appleby* v. *Buffalo*, 221 U. S. 524, 531, 532.

The present case of course does not show disregard of McGovern's rights or that he was prevented from obtaining substantially any compensation. Even if the plaintiff in error is right, it shows only that the Commissioners and courts of New York adopted too narrow a view upon a doubtful point in the measure of damages. It hardly even is so strong as that; for the ruling of the Commissioners is not to be taken as an abstract universal proposition, but the judgment concerning this particular case found by men presumably, as the plaintiff in error says, men of experience who had or were free to acquire outside information concerning the general conditions of the taking and the selected site. The plaintiff in error quotes authority that, probably for this reason, the New York courts will not set aside an award of such Commissioners unless so palpably wrong as to shock the sense of justice. It is conceded 'that the owner is not permitted to take advantage of the necessities of the condemning party,' and it would seem that it well might be that the Commissioners regarded it as too plain to be shaken by evidence, on the public facts, that the value of the land for a reservoir

site could not come into consideration except upon the hypothesis that the City of New York could not get along without it and that its only means of acquisition was voluntary sale by owners aware of the necessity and intending to make from it the most they could. It is just this advantage that a taking by eminent domain excludes.

But if the rulings complained of be taken as universal propositions they present no element of the arbitrary even if they should be thought to be wrong. The enhanced value of the land as part of the Ashokan reservoir depends on the whole land necessary being devoted to that use. There are said to have been hundreds of titles to different parcels of that land. If the parcels were not brought together by a taking under eminent domain, the chance of their being united by agreement or purchase in such a way as to be available well might be regarded as too remote and speculative to have any legitimate effect upon the valuation. See *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U. S. 226, 249. The plaintiff in error was entitled to be paid only for what was taken from him as the titles stood, and could not add to the value by the hypothetical possibility of a change unless that possibility was considerable enough to be a practical consideration and actually to influence prices. *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195. In estimating that probability the power of effecting the change by eminent domain must be left out. The principle is illustrated in an extreme form by the disallowance of the strategic value for improvements of the island in St. Mary's River in *United States* v. *Chandler-Dunbar Water Power Co.*, *ante*, p. 53.

The plaintiff in error relies upon cases like *Mississippi &c. Boom Company* v. *Patterson*, 98 U. S. 403, to sustain his position that while the valuation cannot be increased by the fact that his land has been taken for a water supply still it can be by the fact that the land is valuable for that purpose. The difficulties in the way of such evidence and

the wide discretion allowed to the trial court are well brought out in *Sargent* v. *Merrimac*, 196 Massachusetts, 171. Much depends on the circumstances of the particular case. We are satisfied on all the authorities that whether we should have agreed or disagreed with the Commissioners, if we had been valuing the land, there was no such disregard of plain rights by the courts of New York as to warrant our treating their decision, made without prejudice, in due form and after full hearing, as a denial by the State of due process of law.

Judgment affirmed.

MR. JUSTICE DAY dissents.

NASH *v.* UNITED STATES.

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

No. 197. Argued March 18, 19, 1913.—Decided June 9, 1913.

In many instances a man's fate depends upon his rightly estimating, that is as the jury subsequently estimates it, some matter of degree, and there is no constitutional difficulty in the way of enforcing the criminal provisions of the Sherman Anti Trust Act on the ground of uncertainty as to the prohibitions.

The Sherman Act punishes the conspiracies at which it is aimed on the common law footing and does not make the doing of any act other than the act of conspiring a condition of liability. In this respect it differs from § 5440 and the indictment need not aver overt acts in furtherance of the conspiracy. *Brown* v. *Elliott*, 225 U. S. 392, distinguished.

This court can see no reason for reading into the Sherman Act more than it finds there.

It is not necessary for an indictment under the Sherman Act to allege

or prove that all the conspirators proceeded against are traders. *Loewe* v. *Lawlor*, 208 U. S. 274.

Where the indictment under the Sherman Act alleges numerous methods employed by the defendants to accomplish the purpose to restrain trade, it is not necessary, in order to convict, to prove every means alleged but it is error to charge that a verdict may be permitted on any one of them when some of them would not warrant a finding of conspiracy.

186 Fed. Rep. 489, reversed.

THE facts, which involve the validity of a verdict and sentence for alleged violations of the Sherman Anti-Trust Act, are stated in the opinion.

Mr. Samuel B. Adams and *Mr. John C. Spooner*, with whom *Mr. George Rublee* was on the brief, for petitioners.

Mr. Assistant to The Attorney General Fowler, with whom *Mr. Alexander Akerman*, United States Attorney, was on the brief, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an indictment in two counts—the first for a conspiracy in restraint of trade, the second for a conspiracy to monopolize trade, contrary to the act of July 2, 1890, c. 647, 26 Stat. 209, commonly known as the Sherman Act. Originally there was a third count for monopolizing, but it was held bad on demurrer and was struck out.

The allegations of fact in the two counts are alike. Summed up in narrative form they are as follows: The American Naval Stores Company, a West Virginia corporation having its principal office in Savannah and branch offices in New York, Philadelphia, Chicago, etc., was engaged in buying, selling, shipping and exporting spirits of turpentine in and from Southern States to other States and abroad. Nash was the president; Shotter, chairman

of the board of directors; Myers, vice-president; Boardman, treasurer; DeLoach, secretary, and Moller, manager of the Jacksonville, Florida, branch. The National Transportation and Terminal Company, a New Jersey corporation, had warehouses and terminals for handling spirits of turpentine and naval stores at Fernandina, and other places named, in Florida, Alabama, Mississippi, etc., and was engaged in storing such turpentine and rosin and issuing warehouse receipts for the same. Myers was the president; DeLoach the secretary and Moller manager of the Jacksonville branch. On May 1, 1907, it is alleged, these corporations and individuals conspired to restrain commerce in the articles named, among the States and with foreign nations—the restraint to be effected in the following ways among others: (1) by bidding down turpentine and rosin so that competitors could sell them only at ruinous prices; (2) by causing naval stores receipts that naturally would go to one port to go to another; (3) by purchasing thereafter a large part of 'its' supplies at ports known as closed ports and, with intent to depress the market, refraining from purchasing any appreciable part at Savannah, the primary market in the United States for naval stores, where purchases would tend to strengthen prices, the defendants taking the receipts at the closed ports named on a basis of the market at Savannah; (4) by coercing factors and brokers into contracts with the defendants for the storage and purchase of their receipts and refusing to purchase from such factors and brokers unless such contracts were entered into; (5) by circulating false statements as to naval stores production and stocks on hand; (6) by issuing fraudulent warehouse receipts; (7) by fraudulently grading, regrading and raising grades of rosins and falsely gauging spirits of turpentine; (8) by attempting to bribe employés of competitors so as to obtain information concerning their business and stocks; (9) by inducing consumers, by payments and

threats of boycotts, to postpone dates of delivery of contract supplies and thus enabling defendants to postpone purchasing when to purchase would tend to strengthen the market; (10) by making tentative offers of large amounts of naval stores to depress the market, accepting contracts only for small amounts and purchasing when the market had been depressed by the offers; (11) by selling far below cost in order to compel competitors to meet prices ruinous to everybody; (12) by fixing the price of turpentine below the cost of production—all the foregoing being for the purpose of driving competitors out of business and restraining foreign trade or, in the second count, of doing the same and monopolizing the trade.

The two counts before us were demurred to on the grounds that the statute was so vague as to be inoperative on its criminal side; that neither of the counts alleged any overt act; that the contemplated acts and things would not have constituted an offence if they had been done, and that the same acts, etc., were too vaguely charged. The demurrer was overruled and this action of the court raises the important questions of the case. We will deal with them before passing to matters of detail.

The objection to the criminal operation of the statute is thought to be warranted by *The Standard Oil Co.* v. *United States*, 221 U. S. 1, and *United States* v. *American Tobacco Co.*, 221 U. S. 106. Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade. 221 U. S. 179. And thereupon it is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men.

The kindred proposition that 'the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty,' is cited from the late Mr. Justice Brewer sitting in the Circuit Court. *Tozer* v. *United States*, 52 Fed. Rep. 917, 919.

But apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. "An act causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it" by common experience in the circumstances known to the actor. "The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw." *Commonwealth* v. *Pierce*, 138 Massachusetts, 165, 178. *Commonwealth* v. *Chance*, 174 Massachusetts, 245, 252. "The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct." 1 East P. C. 262. If a man should kill another by driving an automobile furiously into a crowd he might be convicted of murder however little he expected the result. See *Reg.* v. *Desmond*, and other illustrations in Stephen, Dig. Crim. Law, art 223, 1st ed., p. 146. If he did no more than drive negligently through a street he might get off with manslaughter or less. *Reg.* v. *Swindall*, 2 C. & K. 230; *Rex* v. *Burton*, 1 Strange, 481. And in the last case he might be held although he himself thought that he was acting as a prudent man should. See *The Germanic*, 196 U. S. 589, 596. But without further argument, the case is very nearly disposed of by *Waters-Pierce Oil Co.* v.

Texas (No. 1), 212 U. S. 86, 109, where Mr. Justice Brewer's decision and other similar ones were cited in vain. We are of opinion that there is no constitutional difficulty in the way of enforcing the criminal part of the act.

Coming next to the objection that no overt act is laid, the answer is that the Sherman Act punishes the conspiracies at which it is aimed on the common law footing—that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability. The decisions as to the relations of a subsequent overt act to crimes under Rev. Stat., § 5440, in *Hyde* v. *United States*, 225 U. S. 347, and *Brown* v. *Elliott*, 225 U. S. 392, have no bearing upon a statute that does not contain the requirement found in that section. As we can see no reason for reading into the Sherman Act more than we find there, we think it unnecessary to offer arguments against doing so.

As to the suggestion that the matters alleged to have been contemplated would not have constituted an offence if they had been done, it is enough to say that some of them conceivably might have been adequate to accomplish the result, and that the intent alleged would convert what on their face might be no more than ordinary acts of competition or the small dishonesties of trade into a conspiracy of wider scope, as has been explained more than once. *Swift & Co.* v. *United States*, 196 U. S. 375, 396; *Loewe* v. *Lawlor*, 208 U. S. 274, 299. Of course this fact calls for conscience and circumspection in prosecuting officers, lest by the unfounded charge of a wider purpose than the acts necessarily import they convert what at most would be small local offences into crimes under the statutes of the United States. But we cannot say, as was the case in *United States* v. *Winslow*, 227 U. S. 202, 218, that no intent could convert the proposed conduct into such a crime.

Finally, we cannot pronounce the counts before us bad for uncertainty. On demand of the defendants a bill of

particulars was furnished, and there is no reason to fear that injustice was done in that respect.—There was no need to allege or prove that the conspirators themselves were all traders. *Loewe* v. *Lawlor*, 208 U. S. 274, 301.—The first count, at least, was well enough.

After the demurrer was overruled the defendants pleaded not guilty and there was a trial and a verdict finding that Nash, Shotter, Myers, Moller and Boardman were guilty and DeLoach not guilty, but saying nothing as to the corporations. Numerous exceptions were taken, but as writs of certiorari are not granted to bring up the ordinary incidents of a criminal trial we shall say little more than is necessary to dispose of the case. It was argued with a good deal of force that the only evidence of the alleged conspiracy was certain acts done on behalf of the corporations; that the only ground for charging the defendants who were found guilty was their relation to the companies and their being presumably cognizant of and more or less responsible for the corporate acts; that if those acts tended to prove a conspiracy they proved that the corporations more clearly than any one else were parties to it, and therefore that a verdict that was silent as to them ought to be set aside. We need not consider the effect of Rev. Stat., § 1036, or whether on the evidence it was possible to find the defendants guilty by reason of an intent not shown to be shared by the corporations, as the judgment must be reversed for another reason.

The reason is this. The court in its instructions told the jury to "consider the evidence of the means which it is insisted by the prosecution tends to show a conspiracy" and said: "You will consider carefully all the means which the indictment charges" and "It is sufficient if it be shown beyond a reasonable doubt that some of these means charged were a part of the common scheme, design or understanding or conspiracy by two or more of the defendants, and that these same means were of themselves

sufficient to cause an essential obstruction and restraint of the free and untrammelled flow of trade and commerce between the States and foreign nations." Thus while it may be admitted that not all the means alleged need be proved, the charge invited the jury to consider all and permitted a verdict upon any one of them. The fifth, sixth and eighth statements of means to be employed were withdrawn from the jury, but the jury's attention seems not to have been called to the fact that some of the charges were abandoned, in the connection in which it was important. Furthermore one of the means alleged was the false raising of grades and false gauging. Taken with other evidence, if it was shown to be systematic it would have had a tendency to show the scheme alleged. But taken by itself, as the jury might have taken it under the instructions, it showed only cheating and could not warrant a finding of the conspiracy with which the defendants were charged. It is unnecessary to consider whether there was any evidence sufficient to warrant a conviction upon some of the other means alleged, for instance the first, as the absence of such evidence only would add another reason for holding the instructions wrong upon a vital point.

Judgment reversed.

MR. JUSTICE PITNEY dissents.

UNITED STATES *v.* ADAMS EXPRESS COMPANY.

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

No. 652. Argued April 7, 1913.—Decided June 9, 1913.

The decision of the court below, granting a motion to quash the service on the ground that the statute on which the indictment is based does not include the defendant, is equivalent to a decision sustaining a demurrer to the indictment and is based upon the construction of the statute, and this court has jurisdiction under the Criminal Appeals Act of March 2, 1907.

Under § 10 of the Act to Regulate Commerce, as amended by the act of June 29, 1906, c. 3591, 34 Stat. 584, express companies are included in the term common carrier and made amenable to the act. Congress at that time had knowledge of the fact that some of the great express companies were organized as joint stock associations and the amendment was intended to bring such associations under the act.

A joint stock association is amenable to the provisions of the Act to Regulate Commerce and is subject to indictment for violations thereof.

Congress has power to charge the assets of joint stock associations with liability and to personify them so far as to collect fines by proceeding against them in the respective names of the associations.

THE facts, which involve the question of whether a joint stock association is amenable to the anti-discrimination provisions of the Act to Regulate Commerce, are stated in the opinion.

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

The words of the Interstate Commerce Act explicitly make "express companies" guilty of misdemeanor if they violate its provisions, and these words were intended to mean what they say and to cover all express companies.

There is no reason for limiting their scope to corporate, as distinguished from joint stock, "companies."

The duties imposed by the statute are imposed upon the express companies as companies and not on their members as individuals. *American Express Co.* v. *United States*, 212 U. S. 522; *Queen* v. *Commercial Co.* (1891), 2 Q. B. 588, 592 *et seq.*

All the real reasons which could have influenced Congress to apply the penal provisions of the act to corporate companies as entities equally exist in reference to joint stock companies as entities.

Prior to the passage of the Hepburn Act of June 29, 1906, which made the Interstate Commerce Act applicable to "express companies" the Elkins Law had provided that corporations should be subject to indictment as entities and the Hepburn Act, by using the words "express companies" rather than "express corporations" clearly indicated the intention of Congress to extend that principle to joint stock corporations engaged in the express business.

In §§ 3, 6, 9 and 10 of the Act to Regulate Commerce, the distinction is drawn between "corporations" and "companies" and it is therefore apparent that Congress was aware of the difference and did not intend by the words "express companies" to mean merely "express corporations."

The joint stock association express companies including the defendant have been repeatedly before this court even under indictment and the point has never heretofore been made that they were not subject to indictment. *Adams Express Co.* v. *Iowa*, 196 U. S. 147; *Express Companies* v. *Kentucky*, 206 U. S. 129, 138; *Adams Express Co.* v. *Kentucky*, 214 U. S. 218; *American Express Co.* v. *Iowa*, 196 U. S. 133; *United States* v. *Adams Express Co.*, 119 Fed. Rep. 240.

Several of the States treat these joint stock express

companies as entities precisely like foreign corporations. *Adams Express Co.* v. *State*, 161 Indiana, 328, 705, 706; *State* v. *Adams Express Co.*, 66 Minnesota, 271; *Adams Express Co.* v. *Schofield*, 111 Kentucky, 832; *Adams Express Co.* v. *State*, 55 Oh. St. 69; *Commonwealth* v. *Adams Express Co.*, 123 Kentucky, 720; *American Express Co.* v. *People*, 133 Illinois, 649; *United States Ex. Co.* v. *State*, 164 Indiana, 196; *State Commission* v. *Adams Ex. Co.*, 19 L. R. A. 93; *Southern Express Co.* v. *Commonwealth*, 92 Virginia, 59 (affirmed, 168 U. S. 705). See also *American Express Co.* v. *United States*, 212 U. S. 522; *Adams Express Co.* v. *Ohio*, 165 U. S. 194, 166 U. S. 185.

In general, joint stock associations have liabilities which partnerships have not, as, for instance, the liability for contempt of court (*J. & P. Coats, Ltd.*, v. *Chadwick* (1894), 1 Chancery, 347); and for torts, including fraud and libel, 1 Lindley on the Law of Companies, 6th ed., pp. 267–268; *Van Aerman* v. *Bleistein*, 152 N. Y. 355; *Whitney* v. *Backus*, 149 Pa. St. 29. As to penal actions, see *Pharmaceutical Society* v. *London & Provincial Supply Association, Ltd.*, 5 Appeal Cases, 857; *Queen* v. *Tyler & International Commercial Co., Ltd.* (1891), 2 Q. B. 588; *Pearks &c.* v. *Ward* (1902), 2 K. B. 1; *Lawler* v. *Egan, Ltd.* (1901), 2 Ir. 589.

It is not material whether the New York law distinctly treats joint stock companies as entities, for the Interstate Commerce Act does so and that is sufficient. *Liverpool Ins. Co.* v. *Massachusetts*, 10 Wall. 566, 574.

But even in New York these companies are entities. *National Bank* v. *Van Derwerker*, 74 N. Y. 234; *Westcott* v. *Fargo*, 61 N. Y. 542; *In re Jones*, 172 N. Y. 575; *Hibbs* v. *Brown*, 190 N. Y. 167; *People* v. *Coleman*, 133 N. Y. 279; *People ex rel. Platt* v. *Wemple*, 117 N. Y. 236; *Van Aerman* v. *Bleistein*, 102 N. Y. 355; *Waterbury* v. *Merchants' Union Ex. Co.*, 55 Barb. (N. Y.) 158; New York Constitution, art. VIII, sec. 3.

The Federal cases which held that they are not "citizens," as entities, under the diversity clause are distinguishable because they rest upon the individual liability of the members and not upon any lack of the quality of entities. *Chapman* v. *Barney*, 129 U. S. 677; *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449; *Thomas* v. *Board of Trustees*, 195 U. S. 207; *Liverpool Ins. Co.* v. *Massachusetts*, *supra*, p. 575.

The act as so construed is constitutional. *N. Y. C. & H. R. R. Co.* v. *United States*, 212 U. S. 481.

Mr. Joseph S. Graydon, with whom *Mr. Lawrence Maxwell* was on the brief, for defendant in error:

The court has no jurisdiction to review the decision and judgment of the court below.

The act of March 2, 1907, confers no jurisdiction on this court to review a criminal case generally on writ of error by the Government, but only in so far as it involves the invalidity or construction of the statute upon which the indictment is based. *United States* v. *Patten*, 226 U. S. 525; *United States* v. *Stevenson*, 215 U. S. 190, 195.

Statutes of the several States allowing appeals by the State in criminal cases are construed strictly so as to confine such appeals to the precise matters covered by the statute. *State* v. *Adams*, 193 Missouri, 196; *People* v. *Higgins*, 114 California, 63; *People* v. *Richter*, 113 California, 473; *State* v. *Evansville Ry. Co.*, 107 Indiana, 581; *People* v. *Snyder*, 44 Hun, 193; *State* v. *Moore*, 84 N. Car. 724; *State* v. *Simmons*, 49 Oh. St. 305; *Mick* v. *State*, 72 Oh. St. 388; *State* v. *Kemp*, 5 Washington, 212; *State* v. *Finstad*, 16 S. Dak. 422; *People* v. *Dundon*, 98 N. Y. S. 1048; *S. C.*, 113 App. Div. 369.

The present case does not fall within the statute. The defendant entered no appearance and filed no pleading in the court below. The cause was dismissed, but the

decision or judgment dismissing it was not a decision or judgment quashing, setting aside or sustaining a demurrer to the indictment. The court treated the motion to set aside and quash the return of the summons as a demurrer to the indictment, but this was not at the request or with the consent of defendant. The court had no authority to treat the motion of Barrett to set aside service as a demurrer of the Adams Express Company, and by so doing confer jurisdiction on this court not provided for in the Criminal Appeals Act.

The Adams Express Company is not a corporation but a joint stock association or co-partnership. *Chapman* v. *Barney*, 129 U. S. 677; *Great Southern Hotel Co.* v. *Jones*, 177 U. S. 449; *Platt* v. *Colvin*, 50 Oh. St. 703; *Boston & Albany R. R.* v. *Pearson*, 128 Massachusetts, 445; *Gregg* v. *Sanford*, 65 Fed. Rep. 151; Lindley on Companies, 5th ed. (1891).

Members of a joint stock association may be sued or indicted, but not in the company name, unless a statute so provides. *Taylor* v. *Weir*, 171 Fed. Rep. 636; 23 Cyc. 469, 477; *Van Aerman* v. *Bleistein*, 102 N. Y. 355; *Moore* v. *Brink*, 4 Hun, 402; *St. Paul Typothetae* v. *St. Paul Bookbinders*, 94 Minnesota, 352; *Romona Oolitic Stone Co.* v. *Bolger*, 179 Fed. Rep. 979; *Pearson* v. *Anderberg*, 28 Utah, 495; *Standard Oil Co.* v. *Commonwealth*, 122 Kentucky, 440; *Peterson & Fitch* v. *State*, 32 Texas, 477.

In the absence of an enabling statutory provision, a joint stock association cannot sue or be sued or prosecuted by indictment or otherwise in its associate name.

There is no statute of the United States which authorizes the institution of an action by or against a joint stock company in its associate name, or authorizes the prosecution of such a company by indictment in its associate name.

The rules of pleading and practice in criminal cases in the United States courts, except as modified by statute,

are the rules of the common law as of the year 1789. *United States* v. *Reid*, 12 How. 361; *United States* v. *Maxwell*, 3 Dill. 275; *United States* v. *Nye*, 4 Fed. Rep. 888; *Erwin* v. *United States*, 37 Fed. Rep. 470, 488; *Withaup* v. *United States*, 127 Fed. Rep. 530.

The definition of an indictable juridical person under the laws of the United States cannot be prescribed and governed by state law, common or statutory, and vary with the laws of the several States. *Logan* v. *United States*, 144 U. S. 263, 283.

The Government cites civil and criminal cases in this and other courts to which such companies have been parties in their associate name, but in no case was the Federal question of proper indictment raised. *Adams Exp. Co.* v. *Iowa*, 196 U. S. 147; *Express Companies* v. *Kentucky*, 206 U. S. 129, 138, 139; *Adams Exp. Co.* v. *Schofield*, 111 Kentucky, 832; *Commonwealth* v. *Adams Exp. Co.*, 123 Kentucky, 720; *Adams Exp. Co.* v. *State*, 55 Oh. St. 69; *Am. Exp. Co.* v. *People*, 133 Illinois, 649. The actual title of *Adams Express Company* v. *Ohio State Auditor*, 165 U. S. 185, 194, was *Henry Sanford, President of the Adams Express Company*, v. *Auditor &c. Adams Express Co.* v. *Indiana*, 161 Indiana, 328, was maintained by the State under the provisions of a special statute. In *Southern Express Co.* v. *Commonwealth*, 92 Virginia, 59, the plaintiff is a corporation under the laws of Virginia.

If jurisdiction has heretofore been taken *sub silentio*, this court does not consider itself bound. *Louisville Trust Co.* v. *Knott*, 191 U. S. 225; *United States* v. *More*, 3 Cranch, 159, 172; *United States* v. *Sanges*, 144 U. S. 310; *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429, 574.

Neither the Elkins Act of February 19, 1903, nor the Hepburn Amendment of June 29, 1906, makes the members of a joint stock association express company indictable in the company name. *United States* v. *Michigan Cent. R. R.*, 43 Fed. Rep. 26, 28; *Re Peasley*, 44 Fed. Rep.

271, 275; *N. Y. Cent. R. R.* v. *United States*, 212 U. S. 481, 495.

Section 1 of the Elkins Law has no application to a common carrier that is not a corporation.

The several amendments extended the application of the act to various kinds of common carriage other than those originally included, but did not extend or change the application of the act as affected by the personnel or particular form of organization adopted by the persons engaged in the several kinds of common carriage covered by the act from time to time.

If there be any fair doubt of the application of a criminal statute it must be resolved in favor of the accused; *United States* v. *Clayton*, 2 Dill. 219; *United States* v. *Wiltberger*, 5 Wheat. 76, 95; *Smith* v. *Townsend*, 148 U. S. 490, 497; *France* v. *United States*, 164 U. S. 676; *United States* v. *Biggs*, 157 Fed. Rep. 264; *Commonwealth* v. *Adams Express Co.*, 123 Kentucky, 720.

It is not denied that interstate express carriers, whether corporations, individuals or co-partnerships, are subject to the regulations imposed by the Interstate Commerce Act and to the jurisdiction of the Commission, but when they are charged in the courts with criminal offenses, the proceedings must be in accordance with fundamental principles of criminal law and procedure.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an indictment, under the Act to Regulate Commerce, of the Adams Express Company, by that name, alleging it to be 'a joint stock association, organized and existing under and by virtue of the common law of the State of New York.' A summons to the Adams Express Company was issued and returned served on Charles F. Barrett, general agent for said company. Thereupon Barrett moved to quash the service and return

'on the ground that the same are not authorized by law.' The entry with regard to the action upon this motion is that the court, "treating said motion as a demurrer to the indictment, finds that the indictment cannot be maintained against the Adams Express Company for the reason that it appears on the face of said indictment that the said Adams Express Company is not a corporation, but is a joint stock association . . . and for this reason the motion to quash service, treated as a demurrer to the indictment, is sustained and the defendant discharged, and the cause dismissed; to all of which the United States of America, by its counsel, excepts."

It is objected that this court has no jurisdiction of the present writ of error under the act of March 2, 1907, c. 2564, 34 Stat. 1246, and that the court below had no authority to treat the motion of Barrett as equivalent to a demurrer. Without following the defendant into the niceties by which it seeks to escape the jurisdiction of this court after having eluded that of the court below, it is enough to say that in our opinion, if we are to go behind the entry, the decision entered was one setting aside the indictment and was based upon the construction of the statute upon which the indictment is founded, within the meaning of the act of March 2, 1907.

We turn to the merits. The indictment alleges that the Adams Express Company had filed with the Interstate Commerce Commission its schedules of rates and charges, specifies what those charges were in certain cases, and sets forth in different counts instances in which the company demanded and received sums in excess of its schedule rates for the parcels carried—in short, disobeyed the act of February 4, 1887, c. 104, § 6, 24 Stat. 379, 380. By § 10 (amended by act of June 18, 1910, c. 309, § 10, 36 Stat. 539, 549), any common carrier subject to the provisions of the act, wilfully doing this is guilty of a misdemeanor and liable to a fine.

The objection to applying § 10 to the defendant has been indicated. It is confirmed in argument by the citation of many cases in which such companies are treated as simple partnerships, including those in which this court has declined to extend the legal fiction applied in determining jurisdiction over corporations so as to cover them. *Chapman* v. *Barney*, 129 U. S. 677. *Great Southern Fireproof Hotel Co.* v. *Jones*, 177 U. S. 449, 454, 456. *Thomas* v. *Board of Trustees*, 195 U. S. 207. But the argument is met by the plain words of the statute as it now stands. For by § 1 of the original act of 1887, as amended by the act of June 29, 1906, c. 3591, 34 Stat. 584, "The term 'common carrier' as used in this act shall include express companies and sleeping car companies." And thus the liability of common carriers created by § 10 stands as if it read that express companies violating § 6 should be guilty of a misdemeanor and liable to fine.

It has been notorious for many years that some of the great express companies are organized as joint stock associations, and the reason for the amendment hardly could be seen unless it was intended to bring those associations under the act. As suggested in the argument for the Government, no one, certainly not the defendant, seems to have doubted that the statute now imposes upon them the duty to file schedules of rates. *American Express Co.* v. *United States*, 212 U. S. 522, 531. (The American Express Company is a joint stock association.) But if it imposes upon them the duties under the words common carrier as interpreted, it is reasonable to suppose that the same words are intended to impose upon them the penalty inflicted on common carriers in case those duties are not performed. It is true that a doubt was raised by the wording of § 10 in the original act, whether corporations were indictable under it. This doubt was met by the act of February 19, 1903, c. 708, § 1, 32 Stat. 847. We do not preceive that any inference can be drawn

from this source in favor of a construction of the later amendment other than that we deem the natural one.

The power of Congress hardly is denied. The constitutionality of the statute as against corporations is established, *New York Central & Hudson River R. R. Co.* v. *United States*, 212 U. S. 481, 492, and no reason is suggested why Congress has not equal power to charge the partnership assets with a liability and to personify the company so far as to collect a fine by a proceeding against it by the company name. That is what we believe that Congress intended to do. It is to be observed that the structure of the company under the laws of New York is such that a judgment against it binds only the joint property, *National Bank* v. *Van Derwerker*, 74 N. Y. 234, and that it has other characteristics of separate being. *Westcott* v. *Fargo*, 61 N. Y. 542. *Matter of Jones*, 172 N. Y. 575. *Hibbs* v. *Brown*, 190 N. Y. 167. Indeed, Article VIII of the constitution of the State, after providing that the term corporations as there used shall be construed to include all joint stock companies, &c., having any of the powers or privileges of corporations not possessed by individuals or partnerships, as these companies do, *Matter of Jones*, 172 N. Y. 575, 579, goes on to declare that all corporations may sue and be sued 'in like cases as natural persons.' We do not refer to the law of New York in order to argue that by itself it would suffice to make applicable the principle of *Liverpool & London Life & Fire Ins. Co.* v. *Oliver*, 10 Wall. 566. We refer to it simply to show the semi-corporate standing that these companies already had locally as well as in the popular mind, and thus that the action of Congress was natural and to be expected, if we take its words to mean all that by construction they import.

Judgment reversed.

NATIONAL SAFE DEPOSIT, SAVINGS AND TRUST COMPANY OF THE DISTRICT OF COLUMBIA *v.* HIBBS.

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

No. 79. Argued April 14, 15, 1913.—Decided June 10, 1913.

A bank's trusted agent, in gross breach of his duty, took certain stock certificates belonging to the bank, endorsed and authenticated with evidence of title, to a broker who, in ordinary course of business and in good faith, sold them to third parties for full value and paid over the proceeds to such agent. *Held*, in a suit by the bank against the broker that:

Where one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.

Stock certificates are a peculiar kind of property; although, strictly speaking, not negotiable paper, they are frequently the basis of commercial transaction and bought and sold in open market as negotiable securities are. *Bank* v. *Lanier*, 11 Wall. 369.

The fact that principles affecting the matters involved are well known to business men and are constantly acted upon by them should be given due weight in determining the rights of parties in a transaction relating to the sale of stock certificates. *Russell* v. *Am. Bell Telephone Co.*, 180 Massachusetts, 467, approved.

Under the principles of equitable estoppel, the bank is estopped to make any claim against the broker.

32 App. D. C. 459, affirmed.

THE facts, which involve the question of liability of a broker for sale of stolen stock certificates, are stated in the opinion.

Mr. Charles L. Frailey, with whom *Mr. A. S. Worthington* was on the brief, for plaintiff in error.

Mr. J. J. Darlington and *Mr. W. C. Sullivan* for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

This case is in this court upon writ of error to the judgment of the Court of Appeals of the District of Columbia, 32 App. D. C. 459, affirming the judgment of the Supreme Court of the District of Columbia in an action brought by the plaintiff in error, hereinafter called the Bank, against the defendant in error for the alleged conversion of certain shares of stock. The case was tried upon an agreed statement of facts, from which it appears:

The plaintiff in error has been doing a general banking business in the City of Washington, including the making of loans to its customers on promissory notes secured by stock collateral and, to a limited extent, the buying and selling of stock for its customers and occasionally for itself.

On March 12, 1903, the Bank made a loan to one T. M. Kelley of $12,500, for which he gave his promissory note, payable on demand, and deposited with the Bank certain stock certificates of the Mergenthaler Linotype Company as collateral security. Each of the certificates stood in the name of T. M. Kelley and on its face recited that it was transferable by him, in person or by proxy, only upon the books of the company upon surrender of the certificate, and each upon its back contained an assignment with power of attorney to transfer the stock upon the books of the company, signed in blank by Kelley, whose signature was duly attested.

One Willard H. Myers had been in the continuous employ of the Bank for over twenty years and had committed no acts inconsistent with his duty to the Bank and was trusted as a faithful employé. During the last ten years of his employment he had been general bookkeeper and assistant note teller, a part of his duties being to receive and enter upon the cash book of the Bank the payment of loans by customers and to procure from one of the officers of the Bank and deliver to such customers

the collateral security pledged for the loans, it being usual, in the ordinary course of business, for the Bank to thus deliver certificates to him upon his request. He had no authority and it was not a part of his employment to dispose of, by sale, pledge or otherwise, any stock held as collateral by the Bank or owned by it or any of its customers.

On May 26, 1904, Myers requested the secretary of the Bank to procure from the vault where such securities were kept the certificates deposited by Kelley, whereupon the secretary delivered the certificates to Myers, in the usual course of business, for the purpose of having them returned to Kelley, similar requests having been made by Myers prior thereto. Kelley had not paid the loan or asked for the delivery of the stock, and Myers made no entry in the cash book.

The day following, May 27th, Myers delivered two of such certificates to the cashier of the defendant in error, a stock broker, for sale on his account, and at the request of the cashier, as was the usual custom where the signatures of the assignor and attesting witness are unknown, Myers, as a further identification of such signatures, signed his name to the attestation clause of the assignment. The defendant in error being out of the city, the certificates were turned over to another broker, by whom they were on that day sold on the Washington stock exchange, and on the same day Myers received the check of the defendant in error for the proceeds of the sale, which he subsequently cashed.

Myers did not represent to the cashier of the defendant in error that he was selling the stock for the Bank or that he was acting for it in any way, or indicate that he did not own the stock, nor did the defendant in error or his cashier know or have cause to suspect that the stock did not belong to Myers. The stock was sold, however, without the knowledge or consent of the Bank or Kelley. By

the custom of banks, brokers and others dealing in stock, which custom was known to the Bank, the possession of stock certificates assigned in blank and attested, as were the certificates here in controversy, has been recognized, in the absence of knowledge or cause of suspicion to the contrary, as evidence of ownership or of authority to sell, pledge or otherwise deal with such certificates as the owner might do.

Certain of the other certificates deposited by Kelley were disposed of by Myers, some in like manner through the defendant in error, for which Myers received the proceeds, others being hypothecated with The American Security & Trust Company, while the rest were surrendered by Myers to the authorities.

In this case conflicting legal principles are invoked and relied upon. For the defendant in error the familiar principle "that where one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss, must sustain it" is advanced. The plaintiff in error invokes the principle that where the owner of property, such as stock certificates, has lost it by the criminal or fraudulent act of another, the owner not voluntarily or negligently conferring upon such another the indicia of ownership or apparent title, cannot be deprived of his property by the attempted transfer of title to a third person for value, no matter how innocent the purchaser may be of knowledge of the crime or fraud by which the property was acquired.

In this case the diligence of counsel has called to the attention of the court many cases more or less applicable to the facts herein involved. We will not stop to pass them in review. It is enough to say that they have been attentively considered.

Stock certificates are a peculiar kind of property. Although not negotiable paper, strictly speaking, they are the basis of commercial transactions large and small, and

are frequently sold in open market as negotiable securities are. In *Bank* v. *Lanier*, 11 Wall. 369, 377, 378, this court said:

"Stock certificates of all kinds have been constructed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all the large cities of the country, and are sold in open market the same as other securities. Although neither in form or character negotiable paper, they approximate to it as nearly as practicable. . . . Whoever in good faith buys the stock, and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him."

These principles are well known to business men and are constantly acted upon by them. This circumstance should be given due weight in determining the rights of the parties in this case.

In *Russell* v. *American Bell Telephone Co.*, 180 Massachusetts, 467, a certificate of stock signed in blank was delivered to an agent for the purpose of surrendering it to the company in order to obtain a new certificate. He wrongfully obtained an advance on the strength of the certificate by putting it in pledge. Dealing with the contention that the case was like one where the certificate had been stolen and therefore no title could be transferred, Mr. Justice Holmes, delivering the opinion of the court, said: (p. 469)

"In *Scollans* v. *Rollins* it is admitted that the general principle there laid down would not apply to an instrument indorsed in blank and stolen before it had been transferred. We shall not examine the premises of this defence because we cannot accept the conclusion. The qualification of the rule, as not applying when the instrument is stolen, is not based upon the name of the agent's crime but upon the fact that in the ordinary and typical case of theft the owner has not intrusted the agent with the document and therefore is not considered to have

done enough to be estopped as against a purchaser in good faith. He certainly has not done enough if the estoppel is based upon the principle that when one of two innocent persons is to suffer the sufferer should be the one whose confidence put into the hands of the wrongdoer the means of doing the wrong. But in a case like the present the agent has been intrusted with the converted property, and it is totally immaterial whether, by a stretch which extends larceny beyond the true field of trespass, his wrong has been brought within the criminal law or not. The ground of the estoppel is present and the estoppel arises. The distinction is not new. On the one side are cases like *Knox* v. *Eden Musee Americain Co.*, 148 N. Y. 441, where an agent or servant simply had access to a document remaining in the possession of the owner; on the other, cases like *Pennsylvania Railroad's Appeal*, 86 Pa. St. 80, where possession is intrusted to the agent for one purpose and he uses it for another. It cannot matter in the latter class that the agent intended the fraud from the outset."

We think this case correctly states the principle, and applied to the case in hand is decisive of it. Here one of two innocent persons must suffer and the question at last is, Where shall the loss fall? It is undeniable that the broker obtained the stock certificates, containing all the indicia of ownership and possible of ready transfer, from one who had possession with the Bank's consent, and who brought the certificates to him, apparently clothed with the full ownership thereof by all the tests usually applied by business men to gain knowledge upon the subject before making a purchase of such property. On the other hand, the Bank, for a legitimate purpose, with confidence in one of its own employés, entrusted the certificates to him, with every evidence of title and transferability upon them. The Bank's trusted agent, in gross breach of his duty, whether with technical crim-

inality or not is unimportant, took such certificates, thus authenticated with evidence of title, to one who in the ordinary course of business sold them to parties who paid full value for them. In such case we think the principles which underlie equitable estoppel place the loss upon him whose misplaced confidence has made the wrong possible. Applying this principle, we think the Court of Appeals was right in affirming the judgment of the Supreme Court, and its judgment is

Affirmed.

PORTLAND RAILWAY, LIGHT AND POWER COMPANY *v.* RAILROAD COMMISSION OF OREGON.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 119. Argued May 1, 2, 1913.—Decided June 10, 1913.

A construction by the state court that the equality provisions of a state statute regulating railway fares applies to localities as well as to individuals is binding upon this court, and the constitutionality of the statute will be determined as so construed.

The authority of the States to control by appropriate legislation rates of fare to be charged by street railways and other common carriers wholly within their borders and subject to their laws is unquestioned.

A State may, without violating the Fourteenth Amendment, prohibit any unjust discrimination by a domestic railroad company against any localities upon its lines; and it may leave it to the Railroad Commission to determine whether the rates are or are not discriminatory, provision being made for notice and judicial review.

It is only in exceptional cases that this court does not accept the facts as found by the state Supreme Court; and where, as in this case, those facts are supported by competent testimony it will not retry issues of fact already properly heard and determined by courts of competent jurisdiction.

Where the record does not clearly disclose all facts necessary on which to base conclusions, this court will not overrule the state tribunal and declare rates fixed by it within its jurisdiction to be confiscatory and violative of rights secured by the Fourteenth Amendment.

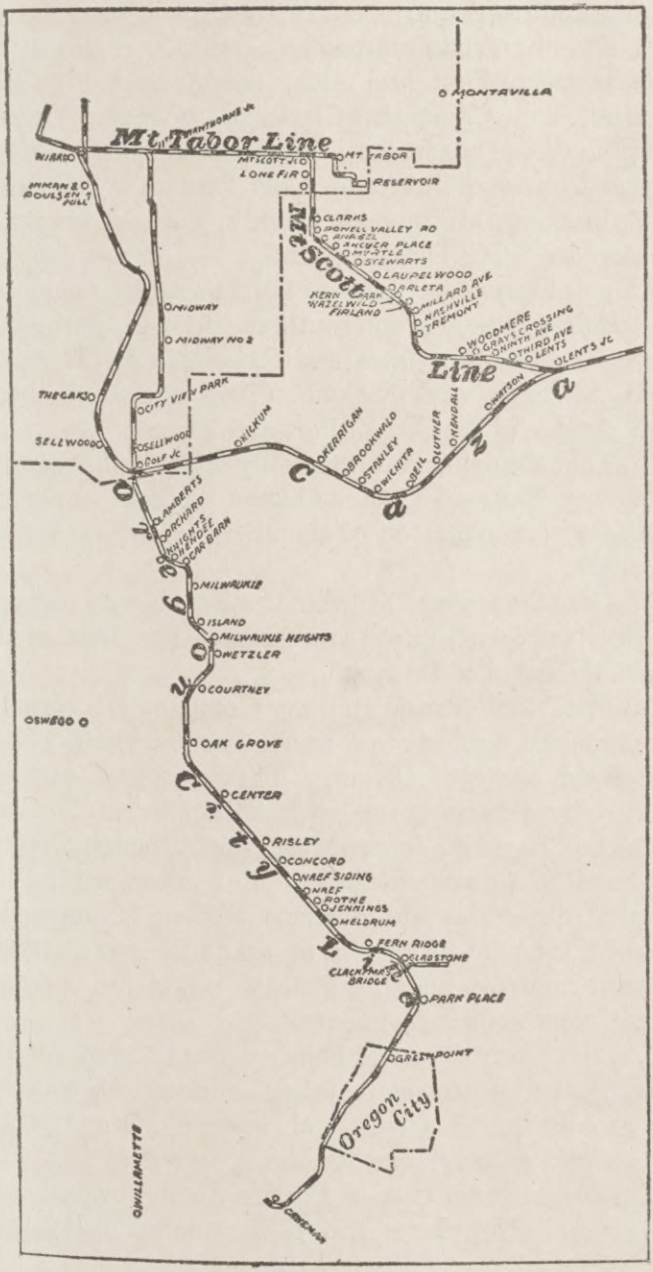
A rate may be *per se* reasonable and lawful and yet illegal as discriminatory against a shipper or a locality.
56 Oregon, 468, affirmed.

THIS case originated in a complaint made by the municipal corporation of Milwaukie, in the State of Oregon, before the Railroad Commission of that State, seeking an order restraining the Portland Railway, Light & Power Company, the plaintiff in error, operating a system of street railways in the City of Portland, Oregon, and certain suburban roads in connection therewith, from practicing certain alleged discriminations in rates of fare, and fixing reasonable fares between the City of Portland and the town of Milwaukie. Upon hearing, the Railroad Commission found that the fares charged by the Railway Company were unjustly discriminatory against the inhabitants of Milwaukie and ordered a reduction between Milwaukie and Portland from ten cents to five cents, and ordered the Railway Company to furnish to the passengers traveling between such points the same transfer privileges as were given to passengers on the Mt. Scott Line of the plaintiff in error. The Circuit Court refused to enjoin the enforcement of the order of the commission, and this judgment was affirmed by the Supreme Court of Oregon. 56 Oregon, 468. The case was then brought to this court upon writ of error.

An idea of the physical situation of this railroad may be had by an inspection of the attached plat which may be used for illustration, and which is reproduced from one appended to appellant's brief (the city limits of Portland being represented by the dotted line).

The Circuit Court made the following findings of fact:

"1. That the plaintiff Portland Railway Light & Power Company is a corporation duly organized and existing under and by virtue of the laws of the State of


Mt. Tabor Line
Mt. Scott Line
Oregon City
MONTAVILLA
MT. TABOR
RESERVOIR
LONE FIR
MT. SCOTT J.C.
INMAN & POULSEN'S MILL
CLARKS
POWELL VALLEY RD
ANGEL
ARCHER PLACE
MYRTLE
STEWARTS
LAURELWOOD
ARLETA
WILLARD AVE
NASHVILLE
TREMONT
KERN
WASTEWILD
FIRLAND
WOODMERE
GRAYS CROSSING
SMITH
THIRD AVE
LENTS
LENTS JC.
MIDWAY
MIDWAY NO 2
THE OAKS
CITY VIEW PARK
SELLWOOD
GOLF JC.
DICKUM
KERRIGAN
BROOKWALD
STANLEY
WICHITA
ORIEL
LUTHER
HERDALE
CHARTON
LAMBERTS
ORCHARD
KNIGHTS
CAR BARN
MILWAUKIE
ISLAND
MILWAUKIE HEIGHTS
METZLER
COURTNEY
OSWEGO
OAK GROVE
CENTER
RISLEY
CONCORD
WAREF SIDING
WAREF
ROTHE
JENNINGS
MELDRUM
FERN RIDGE
GLADSTONE
CLACKAMAS BRIDGE
PARK PLACE
GREEN POINT
WILLAMETTE
CANEMAH

Oregon, and owns and operates by electric power a suburban and interurban railroad as a common carrier in this state, between First and Alder Streets in the City of Portland, and Canemah, Clackamas County, Oregon, known as the 'Oregon City Division,' and also a line of railroad from said First and Alder Streets to Lents and Lents Junction, Multnomah County, Oregon, known as the 'Mount Scott Division,' and also a line of railroad from a point known as Golf Junction on the first mentioned line of railroad easterly and southerly through Multnomah County to Nickum, Gates and Cazadero, in Clackamas County, Oregon, said Nickum, Gates and Lents being points outside of the City of Portland, Oregon.

"2. That the defendant is the duly appointed, organized and acting Railroad Commission of Oregon, under the provisions of Chapter 53 of the Laws of Oregon for the year 1907.

"3. That the town of Milwaukie is a municipal corporation duly organized under and existing by virtue of the laws of the State of Oregon.

"4. That the Portland Railway Company is a corporation organized and existing under and by virtue of the laws of the State of Oregon. That its street cars are operated by electric power within the City of Portland and to the City of St. Johns, Multnomah County, Oregon, and that it is a common carrier. That a majority of the capital stock of the said Portland Railway Company is owned by the plaintiff herein; and that the said Portland Railway Company and the plaintiff herein are operated under a common management.

"5. That plaintiff has established rates of fare for the transportation of persons traveling as passengers *traveling* upon its said line of railway and between different points upon its said railways and its said terminus at First and Alder Streets in said City of Portland, and between Golf Junction and the places and points named below, the

following rates, fares and charges being those so established and the distances being as given below:

Between Portland and

On Oregon City Division.			
Golf Junction (within City of Portland)	5.36 miles	5 cents.	
Lambert	5.93 "	10 "	
Knight	6.29 "	10 "	
Hendee	6.44 "	10 "	
Milwaukie	6.71 "	10 "	
Island	7.05 "	10 "	
Milwaukie Heights	7.70 "	15 "	
Courtney	8.30 "	15 "	
Oak Grove	8.48 "	15 "	
Center	8.68 "	15 "	
Risley	9.26 "	15 "	
Oregon City	14.47 "	25 "	
Canemah	15.47 "	25 "	
On Mt. Scott Division.			
Reservoir (within City of Portland)	4.69 "	5 "	
Lents	7.69 "	5 "	
Lents Junction	8.31 "	10 "	
On Springwater Division.			
Golf Junction (within City of Portland)	5.35 "	5 "	
Nickum	6.51 "	5 "	
Kerrigan	7.26 "	10 "	
Bell	8.51 "	10 "	
Kendall	9.32 "	10 "	
Lents Junction	10.71 "	10 "	
Gilbert	11.65 "	10 "	
Gates	12.38 "	10 "	
Wilson	13.00 "	15 "	
Sycamore	13.48 "	15 "	
Jenne	14.42 "	15 "	

Between Golf Junction and				
On Oregon City Division.				
Lambert	.57	miles	5	cents.
Knight	.93	"	5	"
Hendee	1.08	"	5	"
Milwaukie	1.35	"	5	"
Island	1.69	"	5	"
Milwaukie Heights	2.34	"	10	"
Courtney	2.94	"	10	"
Oak Grove	3.12	"	10	"
Center	3.32	"	10	"
Risley	3.90	"	10	"
Oregon City	9.21	"	20	"
Canemah	10.21	"	20	"
On Springwater Division.				
Nickum	1.15	"	5	"
Kerrigan	1.90	"	5	"
Bell	3.15	"	5	"
Kendall	3.96	"	5	"
Lents Junction	5.35	"	5	"
Gilbert	6.29	"	10	"
Gates	7.02	"	10	"
Wilson	7.64	"	10	"
Sycamore	8.12	"	10	"
Jenne	9.07	"	10	"

"6. That the distance between Lents and the limits of the City of Portland on said plaintiff's line of railroad is 3.50 miles. That the station of Hazelwild on plaintiff's said Mt. Scott line, is a mile and one half from Lents, and two miles outside the limits of the City of Portland. That the distance on the line of the said Portland Railway Company from the terminus of said Company near First and Alder Streets in the said City of Portland, to the terminus in the City of St. Johns, Oregon, is to-wit: nine miles. The distance from the said terminus in the City of Portland, Oregon, to the city limits of the said

city of St. Johns is about seven miles, and from there to the terminus in the said City of St. Johns proper is about two miles.

"7. That the aforesaid places are suburbs of the City of Portland.

"8. That plaintiff's predecessor acquired about four miles of track and right of way which extended from Mt. Tabor Junction and Lents, on the 13th day of April, 1901, by and pursuant to an agreement wherein and whereby it was agreed in consideration thereof that not more than a five cent fare should be charged by plaintiff's said predecessor, its successors and assigns, for any ride between Lents and Portland, the plaintiff is carrying out said agreement. The said track and right of way are facilities, among other facilities, used by the plaintiff in the transportation of passengers between Lents and Portland.

"9. That before and at the time said Lents contract was entered into, the population of the territory contiguous to said railroad was small. That now the population of said territory is about 10,000; and the value of real estate in Lents and said territory has increased rapidly. That the said increase in population and land values has been and is due in a great measure to the fact that the plaintiff has charged and is charging but five cents for transportation of passengers between First and Alder Streets in the City of Portland, and Lents, and intermediate points.

"10. That at the time said Lents contract was entered into the town of Milwaukie had a population of about 500 people; that at all times since said Lents contract was entered into the plaintiff and its predecessor companies has charged ten cents for the transportation of passengers between First and Alder Streets in the City of Portland and the town of Milwaukie. That since the five cents fare between Lents and Portland has been in

operation it has caused the said Lents and Lents territory to increase in population as aforesaid, and said land values in said Lents and Lents territory to increase in value as aforesaid, and has stagnated the growth and population of the town of Milwaukie territory and its business has not appreciably increased.

"11. That by reason of the fact that the inhabitants of the town of Milwaukie are charged double the fare charged the inhabitants of Lents for transportation between their respective residences and the City of Portland, the inhabitants of the town of Milwaukie have paid to the plaintiff large sums of money in the aggregate for transportation from the town of Milwaukie in excess of the charges made inhabitants of Lents for transportation from Lents to First and Alder Streets in the City of Portland, to the great injury to the said inhabitants of Milwaukie; and that a just and reasonable rate, not discriminatory to be charged to persons between First and Alder Streets in the City of Portland and the town of Milwaukie, Oregon, is five cents.

"12. That the bulk of the inhabitants of the town and territory of Milwaukie are employed in the City of Portland, and go to and from their homes on the lines of plaintiff's said railroad to work mornings and evenings daily.

"13. That the population and territory between and including Lents and Hazelwild a distance of one and one-half miles, on plaintiff's Mt. Scott line, are substantially the same territory and population between Golf Junction on the City Limits of Portland and Milwaukie, a distance of 1.31 miles, on plaintiff's Oregon City Division. That the conditions and circumstances under which plaintiff transports passengers between First and Alder Streets in said City of Portland, and the stations on the Mount Scott line from Hazelwild to Lents inclusive, are substantially the same as the circumstances and conditions under which plaintiff transports passengers

from said First and Alder Streets to stations on the Oregon City line from said Golf Junction to Milwaukie inclusive, except as to the rate of fare charged and the giving of transfer privileges as hereinafter set forth, which fares and transfer privileges are in favor of the inhabitants of the territory from Hazelwild to Lents inclusive.

"14. That Nickum is a station on the plaintiff's Springwater Division, 1.15 miles easterly from Golf Junction, and about 3,000 feet outside the city limits of the city of Portland, Oregon. That the plaintiff operates but seven trains per day through Nickum, between Cazadero and Portland, in either direction. That otherwise, except as to the rates of fare charged and the giving of transfers, and conditions and circumstances as to the transportation of passengers between Nickum and the plaintiff's terminus at First and Alder Streets aforesaid, are substantially the same as between said terminus and Milwaukie, and except also that the travel between Milwaukie and Portland is greater than between Nickum and Portland.

"15. That from points on the Mt. Scott Division without the City of Portland, and Nickum on the Springwater Division, and other points on said division, the plaintiff furnishes to passengers who pay fare to First and Alder Streets in the City of Portland, transfers, entitling the holder thereof to transportation over the lines of the street railway of said Portland Railway Company in the City of Portland, and the City of St. Johns, and that such transfers are not furnished to the citizens of Milwaukie traveling and paying fare from Milwaukie to said First and Alder Streets.

"16. That the evidence does not show that, considered by themselves, or in comparison with other lines of travel, the charges of the plaintiff upon the Oregon City Division are unreasonable, but that compared with the charges made by the plaintiff upon the Springwater and Mt. Scott

Divisions, the charges of the plaintiff for the transportation of passengers between said First and Alder Streets and the town of Milwaukie are unjust and unreasonable, discriminatory and give undue preference.

"17. That the evidence is not sufficient to show the value of the property of the plaintiff used in the operation of its road or the value of any of the divisions thereof, heretofore mentioned; and that the evidence does not show the income, or expenditures, or profits or loss if any, from the operation of the respective divisions of the plaintiff's line above mentioned, or the cost of transporting passengers upon any of such divisions.

"18. That the plaintiff operates its cars and transports passengers between First and Alder Streets and Milwaukie either wholly over the Oregon City division, from the junction at the east end of the Madison Street bridge, or from said junction over what it terms its Sellwood division to Golf Junction, and then over the Oregon City division to Milwaukie. The plaintiff credits all of the Milwaukie business transported by way of the Sellwood division to that division, and no credit or account is taken of it as in part earned by the Oregon City division. That the evidence does not disclose the length of haul of any of the passengers transported by the plaintiff. That the court is therefore unable to find as to the traffic density to and from Milwaukie, or on the Oregon City division or any of the plaintiff's other divisions.

"19. That on to-wit: January 30th, 1908, the defendant, after due notice and full hearing, made and entered, and caused to be served upon the plaintiff, the certain order and finding set out as 'Exhibit A' attached to the plaintiff's complaint. That upon the resubmission of the said matter to the said defendant, as aforesaid, the said defendant made a certain amendment to the said order, and returned the same into this court, and that

the same is now on file herein. That the defendant has caused to be filed in this court a certified transcript of all its proceedings leading up to and including its said order and amendment. That the said order, amendment and transcript are hereby made a part of these findings."

It should be noticed that by the laws of Oregon, Portland being a city exceeding fifty thousand in population, a greater fare than five cents cannot be demanded for a continuous trip in one general direction between any two points in the city. B. & C. Comp., § 2096.

Mr. Franklin T. Griffith and *Mr. Joseph S. Clark*, with whom *Mr. Frederick V. Holman* was on the brief, for plaintiff in error.

Mr. A. M. Crawford, Attorney General of the State of Oregon, and *Mr. Clyde B. Aitchison*, with whom *Mr. R. R. Giltner* and *Mr. R. M. Sewell* were on the brief, for defendant in error.

Mr. Justice Day, after making the foregoing statement, delivered the opinion of the court.

The contentions of violation of Federal right alleged to have been set up and denied in the state court and therefore to be reviewable here arise under the Fourteenth Amendment to the Constitution, securing due process of law and equal protection of the laws as against state action.

The statute under which the Railroad Commission acted in this case provides:

"The term 'railroad' as used herein shall mean and embrace all corporations . . . that now, or may hereafter, own, operate by . . . electric . . . power, manage or control, any . . . interurban railroad . . . as a common carrier in this State." Laws of Oregon, 1907, chap. 53, § 11, p. 70.

"Upon complaint of any . . . municipal organization, that any of the . . . fares, . . . are in any respect unreasonable or unjustly discriminatory, . . . the commission may notify the railroad complained of that complaint has been made, and ten days after such notice has been given the commission may proceed to investigate the same. . . . If upon such investigation the . . . fares, . . . complained of shall be found to be unreasonable or unjustly discriminatory, . . . the commission shall have power to fix and order substituted therefor such . . . fares, . . . as it shall have determined to be just and reasonable and which shall be charged, imposed and followed in the future." Id., § 28, p. 82.

"Whenever, upon an investigation made under the provisions of this Act, the commission shall find any existing . . . fares, . . . are unreasonable or unjustly discriminatory, . . . it shall determine and by order fix a reasonable . . . fare . . . to be imposed, observed, and followed in the future in lieu of that found to be unreasonable or unjustly discriminatory." Id., § 30, p. 86.

"It shall be unlawful for any railroad to demand, charge, collect, or receive from any person, firm or corporation a less compensation for . . . any service rendered or to be rendered by said railroad, in consideration of said person, firm or corporation furnishing any part of the facilities incident thereto." Id., § 48, p. 93.

"If any railroad shall make or give any undue or unreasonable preference or advantage to any particular person, firm, or corporation, or shall subject any particular person, firm, or corporation . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such railroad shall be deemed guilty of unjust discrimination." Id., § 49, p. 94.

"The provisions of this Act shall be liberally construed

with a view to the public welfare, efficient transportation facilities, and substantial justice between . . . passengers and railroads." Id., § 59, p. 98.

"The duties and liabilities of the railroads defined in Section 11 of this Act, shall be the same as are prescribed by the common law, and the remedies against them the same, except where otherwise provided by the constitution or statutes of this State, and the provisions of this Act are cumulative thereto." Id., § 61, p. 98.

Section 32 of the Act provides that the railroad or the other party interested in any order of the Commission fixing fares may commence a suit in the Circuit Court of Marion County against the Commission to vacate any such order on the ground that the fares fixed are unlawful. Provision is made for the service of summons, the filing of an answer by the Commission and precedence of such a case, and that it shall be tried and determined as a suit in equity.

By § 34, if different or additional evidence is introduced by the plaintiff upon the trial, the court, before rendering judgment, is required, unless the parties stipulate otherwise, to transmit a copy of the evidence to the Commission, which may alter, modify, amend or rescind its order and report its action to the court. If the order is rescinded, the suit shall be dismissed; if it is changed, judgment shall be rendered on the modified order, and if it is not changed, judgment shall be rendered upon the original order.

Section 35 authorizes an appeal by either party to the Supreme Court, where also such a case shall have precedence.

The Supreme Court of Oregon held that the statute applied to localities as well as individuals and that fares that were unreasonable or unjustly discriminatory as against a given locality came within its terms. This construction of the statute is binding upon this court, and it

is to be considered as thus construed by the Supreme Court of Oregon.

The authority of the States to control by appropriate legislation the rates of fare to be charged by street railway companies and other common carriers wholly within their borders and subject to their laws is unquestionable. In the legitimate exercise of such authority we see no reason why a State may not consistently with due process of law prohibit any unjust discrimination by a domestic railroad company against certain localities upon its lines.

If the State may not thus legislate as to its domestic corporations they, by merely arbitrary action, may so exercise their rate-fixing power as to build up one community and destroy another, and prevent that equality of treatment which it has been the object of many statutes of this kind, passed under state and Federal authority, to secure. The statute does not define unjust discrimination, but leaves it to the Commission, upon hearing, to determine what rates are unjust and discriminatory, and to make orders for other fares, which in its judgment are not open to such objection. The statute expressly provides for a judicial review by the courts of the orders of the Commission to test the lawfulness of the fares fixed and the reasonableness of regulations prescribed by the Commission. We find nothing in the Fourteenth Amendment which prevents a State from making provision for such relief to communities unjustly discriminated against by companies subject to the laws of the State in which they operate and from which they derive their powers as common carriers and public service corporations.

Nor do we understand the Supreme Court of Oregon to have construed the statute as permitting no consideration, in determining the question of discrimination, of the circumstances and conditions which may justify differences in rates, other than the number of miles which passengers are carried, as contended by the plaintiff in error. For,

upon rehearing, this contention was noticed and the Supreme Court remarked that in the opinion in the case, notwithstanding it was said that the fares were not unreasonable when compared with the charges made by other railway companies for similar services, the court had held that the law extended to charges which were "unreasonable or unjustly discriminatory;" and it was said (56 Oregon, 487):

"'The fact that a rate is *per se* reasonable does not disprove the charge that it is unlawful,' say Messrs. Beale and Wyman in their work on Railroad Regulation, at § 839. 'If rates are relatively unjust, so that undue preference is afforded to one locality or undue prejudice results to another, the law is violated and its penalties incurred, although the higher rate is not in itself excessive.' The question presented for consideration is not the reasonableness *per se* of the charge, but its reasonableness considered in relation to charges made by plaintiff at other localities on its system for like and contemporaneous service; for the statute, as we have construed it, forbids undue preference or discrimination between localities. Circumstances, however, may so explain the difference between rates compared as to deprive the lower rate of any bearing on the higher, but the discrimination, without an excuse recognized by the law, would be in and of itself unjust and unreasonable. Beale and Wyman, § 838."

In the light of this consideration of the statute, we will consider the contention that in this particular case, there has been a deprivation of due process of law within the meaning of the Federal Constitution.

Ordinarily, in cases which come before us for review, this court accepts the facts as found by the state Supreme Court. An examination of the record in this case convinces us that the conclusions reached by the court do not bring the case within that exceptional class where this court will reëxamine the facts found, with a view to

ascertaining the correctness of the conclusions reached. *Kansas City Southern Railroad Co.* v. *Albers Commission Co.*, 223 U. S. 573; *Cedar Rapids Gas Co.* v. *Cedar Rapids*, 223 U. S. 655; *Oregon R. R. & N. Co.* v. *Fairchild*, 224 U. S. 510; *Creswill* v. *Knights of Pythias*, 225 U. S. 246; *Wood* v. *Chesborough*, 228 U. S. 672. In this case the facts found by the lower court and adopted in the Supreme Court are supported by competent testimony; and this court does not sit to retry issues of fact thus heard and determined by the properly constituted tribunals of the State having jurisdiction of the subject.

The findings show that the Railway Company carried passengers upon the Mt. Scott line between Portland and Lents for five cents each and gave them a free transfer for carriage upon the lines of the Portland Railway Company in the City of Portland and the adjacent City of St. Johns, but charged a ten-cent fare to Milwaukie and gave no transfers. The effect of such discrimination is found to have been the building up and development of Lents and the country along the line to Lents and the retarding of the settlement and growth of the localities and communities situated upon the less favored division. Findings are made showing the conditions and circumstances under which transportation is made upon the divisions of the road, and the similarity of circumstances and conditions, except as to the charging of the different rates and the giving of transfer privileges to the one and the withholding of such privileges from the other. In view of these findings, based upon evidence, we cannot say that the determination of the Commission, confirmed by the courts, that the rates of fare were discriminatory, was in deprivation of due process of law.

The contract set up by which the fares from Lents were required to be not greater than five cents cannot be held to justify the discrimination, as such contracts must be taken to have been made in view of the continuing power

of the State to control the transportation rates of common carriers subject to its jurisdiction. *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467.

It is also argued that the rates established by the order of the Commission are such as to be of a confiscatory nature and therefore within the prohibitions of the Fourteenth Amendment. Upon this branch of the case the Circuit Court found that there was not evidence sufficient to show the value of the property or its divisions used in the operation of the road, nor sufficient to show the income or expenditures, or profit or loss from the operation of the different divisions, or the cost of transporting passengers upon any such divisions. An examination of the testimony does not satisfy us that the court below was without substantial proof in reaching this conclusion. The Supreme Court of Oregon, in view of its findings upon the discriminatory character of the rates established, did not find it necessary to consider by itself the reasonableness of the charge, and the record before it did not present a case of confiscatory rates so clear that this court should interfere because of the protection afforded by the Federal Constitution.

We find no violation of the Fourteenth Amendment in the judgment of the Supreme Court of Oregon.

Affirmed.

PORTLAND RAILWAY, LIGHT AND POWER COMPANY *v.* RAILROAD COMMISSION OF OREGON (NO. 2).

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 120. Argued May 1, 2, 1913.—Decided June 10, 1913.

57 Oregon, 126, affirmed, on the authority of the preceding case.

THE facts are stated in the opinion.

Mr. Franklin T. Griffith, and *Mr. Joseph S. Clark,* with whom *Mr. Frederick V. Holman* was on the brief, for plaintiff in error.

Mr. A. M. Crawford, Attorney General of the State of Oregon, and *Mr. Clyde B. Aitchison,* with whom *Mr. R. R. Giltner* and *Mr. R. M. Sewell* were on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

The Oak Park Improvement Association, a voluntary organization of persons residing in and about the stations on the Oregon City Division of the plaintiff in error, the Portland Railway, Light and Power Company, known as the Oak Grove District and comprising Milwaukie Heights, Courtney, Oak Grove, Center and Risley, sought by complaint filed with the Railroad Commission of Oregon to have the Commission fix reasonable fares and to order their substitution for those found to be unreasonable and unjustly discriminatory. The Commission, upon hearing, found that the rate of fare of fifteen cents charged

by the Railway Company between the City of Portland and the Oak Grove District was unreasonable and unjustly discriminatory, and ordered the Railway Company to charge in lieu thereof a ten cent fare and to give the same transfer privileges to passengers traveling between Portland and the Oak Grove District that were accorded to passengers on the Mt. Scott Division of the plaintiff in error. The Supreme Court of Oregon, relying upon the conclusions reached by it in the *Milwaukie Case* (*Portland Railway, Light & Power Co.* v. *Railroad Commission*, 56 Oregon, 468), decided this day by this court, *ante*, p. 397, affirmed the decree of the Circuit Court confirming the order of the Commission, 57 Oregon, 126, and the case is here on writ of error.

The findings of fact in the present case are practically identical with those in the *Milwaukie Case*, *ante*, p. 397, except the exclusion of facts applying to Milwaukie alone and the substitution of facts pertinent to the Oak Grove District, and show that the circumstances and conditions under which the plaintiff in error transports passengers between Portland and certain stations named for a fare of ten cents, with transfer privileges, are substantially the same as the circumstances and conditions under which the plaintiff in error transports passengers between Portland and the Oak Grove District, except as to the rate of fare and the giving of transfers, and that, while the charges of the Railway Company upon the Oregon City Division are not in themselves unreasonable, they are "unjust and unreasonable, discriminatory and give undue preference."

This case, denominated the *Oak Grove Case*, and the *Milwaukie Case* were heard together in the Supreme Court of Oregon and have been presented together in this court. The contentions asserted in this case are the same contentions set up in the *Milwaukie Case*, and the opinion in the latter case (*ante*, p. 397) has dealt with the controversy

here presented. In view of the conclusions reached in that case, we see no reason to disturb the judgment of the Supreme Court of Oregon in the present case, and it is accordingly

Affirmed.

MacLEOD *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 259. Argued April 25, 1913.—Decided June 10, 1913.

The local government of a conquered country being destroyed, the conqueror may set up its own authority and make rules and regulations for the conduct of temporary government, and to that end may collect taxes and duties to support the military authority and carry on operations incident to the occupation.

An occupation giving the right to the conqueror to exercise governmental authority must be not only invasion but also possession of the enemy's country.

Messages and papers of the Presidents may be referred to by the courts as matters of public history.

The military occupation by the United States, during and after the war with Spain, of the Philippine Islands, and the conduct of the military government thereof, did not extend to places which were not in actual possession of the United States, until they were reduced to such possession.

Executive orders regarding the collection of duties on goods imported into the Philippine Islands during the military occupancy thereof by the United States did not apply to any ports, such as Cebu, during the time that they were not in the possession and under the control of the United States.

The principles of international law were recognized by the Executive in issuing orders concerning the government of the Philippine Islands during military occupancy thereof, and this court will not construe an order directing payment of duties on imports as relating to goods brought into ports in the possession of the *de facto* government of the insurgents.

The fact that the importer of goods brought into a port of the Philippine Islands which had not been reduced to possession by the United States but was still under control of a *de facto* government of the insurgents resided in Manila which was under military occupancy did not make him subject to the executive order of July 12, 1898, to pay duties on such goods.

A state of war, as to third persons, continued during and after the war with Spain until the ratification of the treaty of peace.

The act of June 30, 1906, c. 3912, 34 Stat. 636, ratifying executive acts imposing duties, does not apply to duties collected at points which the United States had not occupied and which were in possession of insurgent *de facto* governments. *United States* v. *Heinszen*, 206 U. S. 370, distinguished.

Statutes relating to territory occupied by the military forces of the Government should be construed in the light of the purpose of the Government to act within the principles of international law, the observance of which is essential to the peace and harmony of nations.

Duties collected by the United States on cargoes imported at ports in the Philippine Islands which had not been reduced to possession by the United States but were in possession of the *de facto* government of insurgents were an illegal and unwarranted exaction covered neither by the order of the President nor the ratifying acts of Congress.

45 Ct. Cl. 339, reversed.

THE appellant, William Stewart MacLeod, surviving partner of MacLeod & Company, brought suit in the Court of Claims to recover from the United States the amount of certain duties paid by the firm under protest upon a cargo of rice imported into the Island of Cebu at the city and port of the same name, in the Philippine Islands, on January 29, 1899. The Court of Claims decided in favor of the United States and rendered judgment dismissing the petition. 45 Ct. Cls. 339. The case was then appealed to this court.

The Court of Claims made findings of fact, the substance of which is as follows:

The claimant firm, comprised of the appellant (the survivor) and two others, all citizens of Great Britain, had its head office at Manila and was engaged in doing a

general mercantile business there and elsewhere in the Orient. On January 13, 1899, the claimants chartered an American steamship, the Venus, at Manila and cleared her in ballast for Saigon, China, whence she sailed for the port of Cebu with a cargo of rice on January 22nd, carrying the usual consular papers. Prior to that time it had been the practice of the military authorities at Manila to require importers, residing in that city and shipping rice to points in the Philippines not actually occupied by the United States forces, to present certified manifests covering their cargoes and to pay the duties thereon to the United States military collector of customs at Manila, which practice was a matter of common knowledge and discussion among the business men in that city, but there is no other evidence charging the claimants with knowledge of the fact.

The collector at Manila was informed by competitors of the claimants that the latter proposed to ship the cargo to Cebu without paying duty at Manila and that, as they complied with the requirements of the United States authorities, they would be unable to compete, under such unfair conditions, with the claimants; and the collector received confirmation of such report from the consul at Saigon on the twenty-first of January, and on the twenty-third officially notified the claimants that a certified manifest must be presented and duties paid on the cargo at the custom house at Manila. The next day one of the claimants presented in person to the collector a letter stating that there had been no secret as to the movement of the Venus; that she had been openly dispatched to Saigon to load a cargo of rice for the Philippines, and that the captain had instructions to secure consular papers, if ordered to Cebu, in case that port should be in the possession of the United States authorities upon his arrival, and that they presumed his papers were in order; that according to their advice Cebu was in the hands of the republican gov-

ernment, whose authorities would exact the payment of duties, the same in amount as under the Manila tariff; that in selling the cargo they had been required to guarantee that the duties would not exceed those under the Manila tariff; that the claimants protested against paying the duties twice, as it was through no fault of theirs that the duties went to the Cebu authorities, and that, desiring to respect the notification, they would, if instructed, request their Cebu friends to protest against the payment in Cebu because, according to the notification, the Cebu customs were under the control of the United States. At the same time the collector was informed that a ship of the claimants was about to leave Manila for Cebu, which would arrive in time to head off the Venus (which did in fact sail from Manila that day and arrived in Cebu before the Venus); that their intention in so advising the collector was that he might take the steps he thought most expedient, but that the claimants, unless otherwise ordered by the United States, intended to carry out their contract with the purchasers of the cargo, even if required to pay double duties.

Upon the arrival of the Venus at Cebu, January 29, 1899, the native government demanded the payment of duties on the cargo and refused to allow its discharge until such payment was made. On February 4, 1899, the duties were paid and the cargo delivered to the purchasers. Upon the arrival of the Venus thereafter at Manila, with a cargo from Cebu, she was at first prevented from discharging her cargo without paying the duties involved in this case, but later was permitted to do so. Subsequently the collector refused to receive further business from the claimants until the duties in question were paid, and because of such refusal and in order to transact further business with the collector, the claimants, involuntarily and under protest, paid the duties demanded.

War was declared with Spain on April 25, 1898, and on May 1, 1898, the forces of the United States captured Manila Bay and harbor. The following order of the President was thereafter promulgated:

"Executive Mansion, July 12, 1898.

"By virtue of the authority vested in me as Commander-in-Chief of the Army and Navy of the United States of America, I do hereby order and direct that upon the occupation and possession of any ports and places in the Philippine Islands by the forces of the United States the following tariff of duties and taxes, to be levied and collected as a military contribution, and regulations for the administration thereof, shall take effect and be in force in the ports and places so occupied.

"Questions arising under said tariff and regulations shall be decided by the general in command of the United States forces in those islands.

"Necessary and authorized expenses for the administration of said tariff and regulations shall be paid from the collections thereunder.

"Accurate accounts of collections and expenditures shall be kept and rendered to the Secretary of War.

"WILLIAM MCKINLEY."

The protocol of August 12, 1898, provided that "The United States will occupy and hold the city, bay and harbor of Manila, pending the conclusion of a treaty of peace which shall determine the control, disposition and government of the Philippines." Manila was opened as a port of entry on August 20, 1898, and Cebu on March 14, 1899. The executive order of July 12, 1898, was not proclaimed in Cebu until February 22, 1899, or later. The treaty of peace was signed on December 10, 1898, but ratifications were not exchanged until April 11, 1899. The Spanish forces evacuated the Island of Cebu on December 25, 1898, having first appointed a provisional governor. Shortly thereafter the native inhabitants, formerly in insurrection

against Spain, took possession of the Island, formed a so-called republic and administered the affairs of the Island until possession was surrendered to the United States on February 22, 1899, prior to which time no authorities of the United States had been in the Island and the United States had not been in possession or occupation of the Island, it having been up to that time in the actual physical possession of the Spanish and the people of the Island.

Mr. Barry Mohun and *Mr. L. T. Michener*, with whom *Mr. J. N. Wolfson* and *Mr. P. G. Michener* were on the brief, for appellant:

The court has jurisdiction. *Dooley* v. *United States*, 182 U. S. 222, 230; *Armstrong* v. *United States*, 182 U. S. 243.

The title of the United States to the Island of Cebu did not vest so far as the rights of individuals were concerned until the proclamation of the treaty of April 11, 1899. *Dooley* v. *United States*, 182 U. S. 222, 230; *Haver* v. *Yaker*, 9 Wall. 32.

The payment of duties by appellant to the *de facto* government in Cebu was lawful. *United States* v. *Rice*, 4 Wheat. 246, 253; *Coleman* v. *Tennessee*, 97 U. S. 536; *De-Lima* v. *Bidwell*, 182 U. S. 1, 184; *Downes* v. *Bidwell*, 182 U. S. 303; *Pearcy* v. *Stranahan*, 205 U. S. 257, 272; 1 Moore's Digest Int. Law, pp. 41 *et seq.*

The doctrine of the case of *United States* v. *Rice*, *supra*, has been uniformly recognized and enforced by the United States through its Department of State. *In Re Duties Collected at Mazatlan, Mexico*, 1 Wharton's Int. Law Dig., § 7, p. 29; *The Bluefields Case*, 1 Moore's Dig. Int. Law, pp. 49, 51.

The order of the President of July 12, 1898, could only be enforced at ports and places actually occupied by the military forces of the United States and was only ap-

plicable to imports made at such ports and places. *Lincoln* v. *United States*, 197 U. S. 419, 428; *DeLima* v. *Bidwell*, 182 U. S. 1, 199; Hall's Int. Law, 5th Ed., p. 448.

If there should be doubt as to the meaning of the Executive Order of July 12, 1898, it should be resolved in favor of appellant. *Hartranft* v. *Wiegmann*, 121 U. S. 609, 616; *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468, 474.

The temporary allegiance owed by appellant to the United States as conqueror in possession of Manila did not justify the exaction of these moneys from him as duties upon an importation into Cebu.

The military commander at Manila while above the laws of the Philippine Islands was not above the laws of his own country, *Dooley* v. *United States*, 182 U. S. 222, 234, and was further restricted by the order of the President dated July 12, 1898, which was in accordance with the rules of International Law. *United States* v. *Rice*, *supra;* Hall's Int. Law, 5th Ed., *supra.*

The ratification act of June 30, 1906, 34 Stat. 636, is not applicable to this case. *United States* v. *Heinszen & Co.*, 206 U. S. 370; *Dooley* v. *United States*, *supra; Fourteen Diamond Rings* v. *United States*, 183 U. S. 176; *Warner, Barnes & Co., Ltd.*, v. *United States*, 197 U. S. 419; on re-hearing 202 U. S. 484; *The Charming Betsy*, 2 Cranch, 64, 118, The Hague Convention, 32 Stat. 1803–1826. See Article 42.

The legislative history of the ratification act negatives an intention on the part of Congress to have ratified this collection. Senate Bill, 6362, 59th Cong. 1st Sess.

Mr. Frederick De C. Faust, Acting Assistant Attorney General, for the United States:

The collection of the duties in question at Manila was a valid and lawful exercise of the war power vested in the

military commander of the United States forces in the Philippine Islands.

The general right of a military commander, under the war power, to govern territory of the enemy after its conquest and prior to the ratification of a treaty of peace is not open to question. *Cross* v. *Harrison*, 16 How. 164; *Dooley* v. *United States*, 182 U. S. 222; *De Lima* v. *Bidwell*, 182 U. S. 1; *Fourteen Diamond Rings*, 183 U. S. 176.

The conquering power has the right to displace the preëxisting authority and to assume to such extent as it may deem proper the exercise by itself of all the powers and functions of government. There is no limit to the powers that may be exerted in such cases save those which are found in the laws and usages of war. These principles have the sanction of all publicists who have considered the subject. *New Orleans* v. *Steamship Company*, 20 Wall. 387, 394. See also *Thirty Hogsheads of Sugar* v. *Boyle*, 9 Cr. 191; *Fleming* v. *Page*, 9 How. 603; *American Ins. Co.* v. *Canter*, 1 Pet. 511.

It is conceded that the military forces of the United States did not take actual possession of the island of Cebu until after the first payment of the duties had been made to the native insurgents, but that fact does not affect the point at issue in this case.

The question here is as to the right of the military commander, under the war power, to prescribe rules and regulations governing importations of merchandise, not by inhabitants of Cebu, but by residents of Manila, claiming the protection of the United States, into the enemy's territory.

While it is true that the treaty of peace between the United States and Spain was signed December 10, 1898, the war did not cease nor title to the Island of Cebu vest in the United States, in so far as the rights of third parties were affected, until the exchange of ratifications on the

eleventh of April, 1899. *Haver* v. *Yaker*, 9 Wall. 32; *Dooley* v. *United States*, 182 U. S. 222.

Until such ratification the Island of Cebu continued to be hostile territory, and all commercial intercourse between its inhabitants and the inhabitants of Manila, then under military occupation of the United States, was prohibited by the rules of international law. Wheaton's Int. Law, 422; *Montgomery* v. *United States*, 15 Wall. 395.

The only recognized belligerents in the Philippine Islands, prior to the ratification of the treaty, were the United States and Spain.

Appellants landed their cargo and paid the alleged duties demanded by the native inhabitants of Cebu at their peril, well knowing that duties in the same amount would be exacted thereon by the military authorities at Manila. *United States* v. *Rice*, 4 Wheat. 246, 255, upon which appellants rely, directly supports the Government's contention in this case.

The importers were residents, not of the island of Cebu, but of the city of Manila, conducting their business under the protection of the United States military authorities. Their obligation to comply with the law was due, therefore, not to the Kingdom of Spain nor to the rebellious natives of Cebu, but to the United States. As to the executive order of July 12, 1898, see *Lincoln* v. *United States*, 202 U. S. 499.

Any doubt that might possibly exist as to the authority of the military collector at Manila to collect the duties here in question is completely removed by the terms of the ratification act of June 30, 1906. See *United States* v. *Heinszen*, 206 U. S. 381.

Mr. Justice Day, after making the foregoing statement, delivered the opinion of the court.

When the Spanish fleet was destroyed at Manila, May 1, 1898, it became apparent that the Government of the

United States might be required to take the necessary steps to make provision for the government and control of such part of the Philippines as might come into the military occupation of the forces of the United States. The right to thus occupy an enemy's country and temporarily provide for its government has been recognized by previous action of the executive authority and sanctioned by frequent decisions of this court. The local government being destroyed, the conqueror may set up its own authority and make rules and regulations for the conduct of temporary government, and to that end may collect taxes and duties to support the military authority and carry on operations incident to the occupation. Such was the course of the Government with respect to the territory acquired by conquest and afterwards ceded by the Mexican Government to the United States. *Cross* v. *Harrison*, 16 How. 164. See also in this connection *Fleming* v. *Page*, 9 How. 603; *New Orleans* v. *Steamship Co.*, 20 Wall. 387; *Dooley* v. *United States*, 182 U. S. 222; 7 Moore's International Law Digest, §§ 1143 *et seq.*, in which the history of this Government's action following the Mexican War and during and after the Spanish-American War is fully set forth: and also Taylor on International Public Law, chapter IX, Military Occupation and Administration, §§ 568 *et seq.*, and 2 Oppenheim on International Law, §§ 166 *et seq.*

There has been considerable discussion in the cases and in works of authoritative writers upon the subject of what constitutes an occupation which will give the right to exercise governmental authority. Such occupation is not merely invasion, but is invasion plus possession of the enemy's country for the purpose of holding it temporarily at least. 2 Oppenheim, § 167. What should constitute military occupation was one of the matters before The Hague Convention in 1899 respecting laws and customs of war on land, and the following articles were adopted

by the nations giving adherence to that Convention, among which is the United States (32 Stat. II, 1821):

"Article XLII. Territory is considered occupied when it is actually placed under the authority of the hostile army.

"The occupation applies only to the territory where such authority is established, and in a position to assert itself.

"Article XLIII. The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

A reference to the Messages and Papers of the Presidents, to which we may refer as matters of public history, shows that the President was sensible of and disposed to conform the activities of our Government to the principles of international law and practice. See 10 Messages and Papers of the Presidents, 208, executive order of the President to the Secretary of War, in which the President said (p. 210):

"While it is held to be the right of a conqueror to levy contributions upon the enemy in their seaports, towns, or provinces which may be in his military possession by Conquest, and to apply the proceeds to defray the expenses of the war, this right is to be exercised within such limitations that it may not savor of confiscation. As the result of military occupation the taxes and duties payable by the inhabitants to the former government become payable to the military occupant, unless he sees fit to substitute for them other rates or modes of contributions to the expenses of the government. The moneys so collected are to be used for the purpose of paying the expenses of government under the military occupation, such as the salaries of the judges and the police, and for the payment of the expenses of the army."

To the same effect, executive order of the President to the Secretary of the Treasury, in which the President said (p. 211):

"I have determined to order that all ports or places in the Philippines which may be in the actual possession of our land and naval forces by conquest shall be opened, while our military occupation may continue, to the commerce of all neutral nations, as well as our own, in articles not contraband of war, upon payment of the rates of duty which may be in force at the time when the goods are imported."

And the like executive order of the President to the Secretary of the Navy (p. 212).

In pursuance of this policy, the order of July 12, 1898, was framed. By its plain terms the President orders and directs the collection of tariff duties at ports in the occupation and possession of the forces of the United States. More than this would not have been consistent with the principles of international law, nor with the practice of this Government in like cases. While the subsequent order of December 21, 1898, made after the signing of the treaty of peace, is referred to in the brief of counsel for the Government, it was not alluded to in the findings of fact of the Court of Claims; but we find nothing in that order indicating a change of policy in respect to the collection of duties. While the signing of the treaty of peace between the United States and Spain on December 10, 1898, was stated, the responsible obligations imposed upon the United States by reason thereof were recited and acknowledged and the necessity of extending the government with all possible dispatch to the whole of the ceded territory was emphasized, no disposition was shown to enlarge the number of ports and places in the Philippine Islands at which duties should be collected so as to include those not occupied by the United States, and the President said (p. 220):

"All ports and places in the Philippine Islands in the actual possession of the land and naval forces of the United States will be opened to the commerce of all friendly nations. All goods and wares not prohibited for military reasons, by due announcement of the military authority, will be admitted upon payment of such duties and other charges as shall be in force at the time of their importation."

The occupation by the United States of the city, bay and harbor of Manila pending the conclusion of a treaty which should determine the control, disposition and government of the Philippines was provided for by the protocol of August 12, 1898, and the necessity of further occupation, until the exchange of ratifications by the Government of Spain and the United States, was recognized by the President in the order of December 21, 1898. We have been unable to find anything in the executive or congressional action prior to the importation of the cargo now in question having the effect to extend the executive order as to the collection of duties during the military occupation to ports and places not within the occupation and control of the United States.

The statement of the facts shows that the insurgent government was in actual possession of the custom-house at Cebu, with power to enforce the collection of duties there, as it did. Such government was of the class of *de facto* governments described in 1 Moore's International Law Digest, § 20, as follows:

"But there is another description of government, called also by publicists a government *de facto*, but which might, perhaps, be more aptly denominated a government of paramount force. Its distinguishing characteristics are (1) that its existence is maintained by active military power within the territories, and against the rightful authority of an established and lawful government; and (2) that while it exists it must necessarily be

obeyed in civil matters by private citizens who, by acts of obedience rendered in submission to such force, do not become responsible, as wrongdoers, for those acts, though not warranted by the laws of the rightful government. Actual governments of this sort are established over districts differing greatly in extent and conditions. They are usually administered directly by military authority, but they may be administered, also, by civil authority, supported more or less directly by military force." *Thornington* v. *Smith*, 8 Wall. 1, 9.

The attitude of this Government toward such *de facto* governments was evidenced in the Bluefields case, a full account of which is given in 1 Moore's International Law Digest, pp. 49 *et seq.* In that case General Reyes had headed an insurrectionary movement at Bluefields and acquired actual control of the Mosquito Territory in Nicaragua. His control continued for a short time only, February 3 to February 25, 1899, and after the reëstablishment of the Nicaraguan Government at Bluefields it demanded of American merchants the payment to it of certain amounts of duty which they had been compelled to pay to the insurgent authorities during the period of their *de facto* control. The American Government remonstrated, and the duties demanded by the Nicaraguan Government were by agreement deposited in the British consulate pending a settlement of the controversy. The Department of State of the United States, upon receiving sworn statements of the American merchants to the effect that they were not accomplices of Reyes, that the money actually exacted was the amount due on bonds which then matured for duties levied in December, 1898, payments being made to the agent of the titular government who was continued in office by General Reyes, that payment was demanded under threat of suspension of importations, and that from February 3 to February 25 General Reyes was in full control of the civil and mili-

tary agencies in the district, expressed the opinion that to exact the second payment would be an act of international injustice; and the money was finally returned to the American merchants with the assent of the Government of Nicaragua.

A similar case appears in 1 Moore's International Digest, p. 49, in which our Government was requested by Great Britain to use its good offices to prevent the exaction by the Mexican Government of certain duties at Mazatlan, which had been previously paid to insurgents. The then Secretary of State, Mr. Fish, instructed our Minister to Mexico as follows:

"It is difficult to understand upon what ground of equity or public law such duties can be claimed. The obligation of obedience to a government at a particular place in a country may be regarded as suspended, at least, when its authority is usurped, and is due to the usurpers if they choose to exercise it. To require a repayment of duties in such cases is tantamount to the exaction of a penalty on the misfortune, if it may be so called, of remaining and carrying on business in a port where the authority of the government had been annulled. The pretension is analogous to that upon which vessels have been captured and condemned upon a charge of violating a blockade of a port set on foot by a proclamation only, without force to carry it into effect."

See also Colombian Controversy, 6 Moore's International Law Digest, pp. 995 *et seq.*

While differing somewhat in its circumstances, the case of *United States* v. *Rice*, 4 Wheat. 246, is an instructive case. In that case, during the War of 1812, the port of Castine, Maine, was captured by the British forces and during its occupation the British Government exercised civil and military authority over the people, established custom-houses and collected duties on goods. After peace and the reëstablishment of the American Govern-

ment at Castine the collector of customs claimed the right to collect duties upon the goods, and this court held that the duties could not be collected a second time. Mr. Justice Story, delivering the opinion of the court, after stating that the British Government was in full control of the port and authorized to collect duties, said (p. 254):

"Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port; and goods imported into it by the inhabitants, were subject to such duties only as the British Government chose to require. Such goods were, in no correct sense, imported into the United States. The subsequent evacuation by the enemy, and resumption of authority by the United States, did not, and could not, change the character of the previous transactions. The doctrine respecting the *jus postliminii* are wholly inapplicable to the case. The goods were liable to American duties, when imported, or not at all. That they were not so liable at the time of importation, is clear from what has been already stated; and when, upon the return of peace, the jurisdiction of the United States was reassumed, they were in the same predicament as they would have been if Castine had been a foreign territory ceded by treaty to the United States, and the goods had been previously imported there. In the latter case, there would be no pretence to say that American duties could be demanded; and, upon principles of public or municipal law, the cases are not distinguishable. The authorities cited at the bar would, if there were any doubt, be decisive of the question. But we think it too clear to require any aid from authority."

We observe that the learned justice puts the case of the importation of goods into a foreign territory afterwards ceded to the United States as one which under no pretense would afford an authority to collect duties upon goods previously imported there. We do not think that it was

the purpose of the executive order under which the government at Manila was instituted and maintained at the time of this importation to direct the collection of duties at ports not in the occupation of the United States, and certainly not at one actually in the possession of a *de facto* government, as is shown in this case.

It is said, however, that the claimants resided and were doing business at Manila and therefore were subject to the military authority there, and the authority of a conquering power, recognized in *New Orleans* v. *Steamship Company*, *supra*, 394, to regulate trade with the enemy and in its country is cited in support of the proposition. That there is such general authority, there can be no doubt. It is, however, not without limitation, and a local commander is certainly bound by the orders of the President as commander in chief, which in this case had limited tariff collections to ports and places occupied by the United States. And such authority is subject to the laws and usages of war (*New Orleans* v. *Steamship Co.*, *supra*, p. 394) and, we may add, to such rules as are sanctioned by established principles of international law.

A state of war as to third persons continued until the exchange of treaty ratifications (*Dooley* v. *United States*, 182 U. S. 222, 230), and, although rice, not being contraband of war, might have been imported (7 Moore's International Law Dig., pp. 683, 684), the authority of the military commander, until the exchange of ratifications, may have included the right to control vessels sailing from Manila to trade in the enemy's country and to penalize violations of orders in that respect. But whatever the authority of the commander at Manila or those acting under his direction to control shipments by persons trading at Manila and in vessels sailing from there of American registration, such authority did not extend to the second collection of duties upon a cargo from a foreign port to a port occupied by a *de facto* government

which had compulsorily required the payment of like duties.

It is further contended that, if the collection of duties was originally without authority, it was ratified by the act of June 30, 1906 (34 Stat. 634, 636, c. 3912), which provides:

"That the tariff duties both import and export imposed by the authorities of the United States or of the provisional military government thereof in the Philippine Islands prior to March eighth, nineteen hundred and two, at all ports and places in said islands upon all goods, wares, and merchandise imported into said islands from the United States, or from foreign countries, or exported from said islands, are hereby legalized and ratified, and the collection of all such duties prior to March eighth, nineteen hundred and two, is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had by prior act of Congress been specifically authorized and directed."

The history of this act and others growing out of the Spanish-American War is fully set forth in *United States* v. *Heinszen & Co.*, 206 U. S. 370. This court had held that the President had no authority to order the imposition of duties subsequent to the ratification of the treaty, with reference to Porto Rico (*Dooley* v. *United States, supra*), and with reference to the Philippine Islands (*Fourteen Diamond Rings* v. *United States*, 183 U. S. 176). The act of July 1, 1902 (32 Stat. 691, c. 1369), was then passed by Congress, ratifying the action of the President in making the order of July 12, 1898, whereby duties had been collected at "all ports and places in the Philippine Islands upon passing into the occupation and possession of the forces of the United States," and amendments of that order, and ratifying such action of the authorities in the Philippines as was done in accordance with the orders of the President. In *Lincoln* v. *United States*, and

Warner, Barnes & Co., Ltd., v. *United States*, 197 U. S. 419, affirmed on rehearing in 202 U. S. 484, the act of July 1, 1902, was construed to apply only to duties collected prior to April 11, 1899 (when the treaty became effective). In this situation, the month following the decision of this court in 202 U. S. 484, *supra* (affirming the *Lincoln* and *Warner, Barnes & Co., Ltd., cases*) Congress passed the ratifying act now in question. *United States* v. *Heinszen & Co., supra*, 381.

Conceding that the act is broad enough in terms to cover tariff duties exacted under the authority of the President's orders before the ratification of the treaty, it is expressly limited to tariff duties, import and export, imposed by the authorities of the United States and of the provisional government of the Islands prior to March 8, 1902 (the date of the act of Congress temporarily providing revenue for the Philippine Islands, 32 Stat. 54, c. 140); and there is no expression of purpose in the statute to enlarge the executive orders of the President, which limited the collection of duties during our military occupation to ports and places actually held and occupied by the forces of the United States, or to ratify collections made where goods had been entered at a port not under American control and in possession of a *de facto* insurrectionary government, as is here shown.

The statute should be construed in the light of the purpose of the Government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe and which were founded upon the principles of international law.

The act has the scope given to it in the case of *United States* v. *Heinszen & Co.*, 206 U. S. 370, namely, to ratify

"the collection of the duties levied under the order of the President," which, as we have seen, were tariff duties imposed at ports in the occupation and possession of the United States. The tariff duties upon the cargo of rice here in question were paid to the *de facto* authorities at Cebu, where the cargo was entered, and the payment made at Manila was not a tariff duty but an illegal and unwarranted exaction in the nature of a penalty, covered by neither the orders of the President nor the ratifying acts of Congress.

We think the Court of Claims was in error in holding the duties collectible at Manila under the circumstances related, and in adjudging that the act of June 30, 1906, ratified the conduct of the military authorities at Manila in compelling such payment. Its judgment will therefore be reversed and the case remanded to the Court of Claims with instructions to enter judgment for the claimant.

Reversed.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK *v.* CHICAGO TITLE & TRUST COMPANY, TRUSTEE IN BANKRUPTCY OF PRINCE.

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

No. 741. Argued January 6, 1913.—Decided June 10, 1913.

To constitute a preferential transfer within the meaning of the Bankruptcy Act of 1898 there must be a parting with the bankrupts' property for the benefit of the creditor and a consequent diminution of the bankrupt's estate. *Newport Bank* v. *Herkimer Bank*, 225 U. S. 178.

In determining whether there has been a preferential payment, the

nature of the property transferred is not as essential as the facts showing exactly what transpired between the parties.

The arrangement involved in this action, made between a bank and a grain broker, in regard to transferring certificates of deposit held as collateral for dealings in grain on the Chicago Board of Trade, do not appear to have in any way diminished the estate and *held* not to have amounted to an illegal preference.

The purpose of § 68*a* of the Bankruptcy Act is to prevent debtors of the bankrupt from acquiring claims against him for use by way of set-off and reduction of their indebtedness by way of set-off; but the transaction in this case does not come under § 68*a*. *Western Tie & Timber Co.* v. *Brown*, 196 U. S. 502, distinguished.

THE facts, which involve the construction of certain provisions of the Bankruptcy Act of 1898, relating to preferential payments are stated in the opinion.

Mr. Horace Kent Tenney, with whom *Mr. Roger Sherman* was on the brief, for appellant.

Mr. Edwin Terwilliger, Jr., with whom *Mr. William J. Pringle* was on the brief, for appellee:

As to preferences. The transfer of the bankrupt's "open trades" to Anderson was a transfer of property for the benefit of the bank. *Nat. Bank of Newport* v. *Nat. Herkimer Bank*, 225 U. S. 178; Bank Act, ch. 1, § 1.

A preferential transfer includes every mode of disposing of property for the benefit of a creditor, and circuity of arrangement will not avail to save it. *Nat. Bank* v. *Nat. Herkimer Co. Bank, supra; Western Tie Co.* v. *Brown*, 196 U. S. 502; *Hackney* v. *Hargraves*, 99 N. W. Rep. 675.

The endorsement and delivery of the margin certificate to the bank was a transfer of the amounts of the margin securities held by the bank as a Board of Trade depository, to the bank as a creditor, and was a payment. *Traders' Nat. Bank* v. *Campbell*, 14 Wall. 87; *Ridge Ave. Bank* v. *Studheim*, 145 Fed. Rep. 798; *Lowell* v. *Trust Co.*, 158

Fed. Rep. 781; *Irish* v. *Citizens' Trust Co.*, 163 Fed. Rep. 880.

The deposit of more than enough to pay the specified checks under the special deposit arrangement was a preferential transfer. *N. Y. County Bank* v. *Massey*, 192 U. S. 138; *Western Tie Co.* v. *Brown*, 196 U. S. 502.

As to the right of set-off. There was no right of set-off as to the margin securities, because the same were deposited, as security, with the bank in its capacity as a Board of Trade depository, and not according to the custom of banks. They were special or specific deposits, and not general deposits, and created a trust relation and not a relation of debtor and creditor. Bolles on Banking, § 3; Morse on Banking, § 185; *Woodhouse* v. *Crandall*, 197 Illinois, 104; *Montague* v. *Pacific Bank*, 81 Fed. Rep. 602; *Moreland* v. *Brown*, 86 Fed. Rep. 257; *Peck* v. *Ellicott*, 30 Kansas, 156, 1 Pac. Rep. 499; *People* v. *Bank*, 96 N. Y. 92; *Anderson* v. *Pacific Bank*, 112 California, 598; *Libby* v. *Hopkins*, 104 U. S. 303; *Collins* v. *State*, 33 Florida, 439.

A bank has no lien or right of set-off against special deposits or money deposited for a specific purpose, as for collateral security or for the payment of a particular debt. 3 Am. & Eng. Ency., 2d Ed., 822, 837; 5 Cyc. 552; Morse on Banking, § 325; *Reynes* v. *Dumont*, 130 U. S. 390; *Wagner* v. *Citizens' Trust Co.*, 122 S. W. Rep. 245; *Smith* v. *Sanborn State Bank*, 126 N. W. Rep. 779; *Dolph* v. *Cross*, 133 N. W. Rep. 667; *In re Davis*, 119 Fed. Rep. 950; *Germania Sav. Bk.* v. *Loeb*, 188 Fed. Rep. 285; *Western Tie Co.* v. *Brown*, 196 U. S. 502; *Scott* v. *Armstrong*, 146 U. S. 499; *Gray* v. *Rollo*, 18 Wall. 632; *Munger* v. *Albany City Bank*, 85 N. Y. 589; *Rawleigh* v. *Rawleigh*, 35 Illinois, 512.

There was no right of set-off as to the $575.79, because it was not treated by the parties as a general deposit, but was made "under special circumstances" amounting to a

special deposit. *N. Y. County Bank* v. *Massey*, 192 U. S. 138; *Western Tie Co.* v. *Brown*, 196 U. S. 502; *Germania Sav. Bank* v. *Loeb*, 188 Fed. Rep. 285.

The bank and bankrupt were in collusion to turn all the bankrupt's available assets over for the benefit of the bank. The alleged right of set-off was acquired with a view to such use. *Western Tie Co.* v. *Brown*, 196 U. S. 502; *National Security Bank* v. *Butler*, 129 U. S. 223; *Yardly* v. *Philler*, 167 U. S. 344, 359.

Mr. Justice Day delivered the opinion of the court.

This is a controversy arising in a bankruptcy proceeding and involves questions of the right to certain property, as between the appellant, the Continental & Commercial Trust & Savings Bank, and the Chicago Title & Trust Company, as trustee in bankruptcy of Earl H. Prince, Bankrupt. Two items are involved, first, the sum of $4,250, the amount of certain margin certificates issued by the predecessor of the appellant Bank to the bankrupt Prince; and second, a balance of $575.79 remaining in Prince's checking account with the bank of the predecessor of the appellant, therein deposited by the bankrupt. The trustee brought the suit to recover the amount of the margin certificates and the bank balance as having been preferentially transferred within the terms of the Bankruptcy Act. The District Court held the trustee entitled to recover, and this decree was affirmed by the Circuit Court of Appeals, 199 Fed. Rep. 704, and the case comes here.

There is no controversy as to the facts. A petition in bankruptcy was filed against Prince, February 15, 1905. He had been for several years a member of the Board of Trade of Chicago, buying and selling on the Board and subject to its rules. The Federal Trust & Savings Bank, the predecessor of the appellant, was engaged in the gen-

eral banking business in the City of Chicago, and Prince did his banking business at that bank, and had a general deposit and checking account therein. By the rules of the Board of Trade purchasers and sellers might require of the other party to the trade a deposit of ten per cent. of the contract price of the property bought or sold, and further security from time to time as the margin might require. Certain banks, of which the Federal Trust & Savings Bank was one, were authorized to issue margin certificates, which were in the following form:

"Federal Trust and Savings Bank

Chicago No.....

"Deposited by E. H. Prince, $.....

..... Dollars.

As security on a contract or contracts between the depositor and ....., which amount is payable on the return of this certificate, or the duplicate of the same (one of which being paid, the other shall become void), duly endorsed by both of the above named parties, or on the order of the President of the Board of Trade of the City of Chicago, endorsed on either *of* the original or duplicate hereof, as provided by the rules of the Board of Trade under which the above named deposit has been made.

Original

Not negotiable or transferable

.....

Cashier."

Margin certificates on various days from September 15, 1904, to February 9, 1905, in the form above set forth had been issued to Prince, to procure which he had drawn his check against his checking account with the Bank or deposited with it the requisite sum of money. Each of the said certificates evidenced a liability of the Bank to Prince for the amount stated in the certificate, unless, because of the default by Prince on the contract for which

the certificate was held by the other party as security, it was paid to such other party. The record of certificates was kept in the margin register of the Bank.

On the fourteenth of February, 1905, the Vice President of the Bank and Prince had a conference concerning the financial troubles of Prince, and one W. P. Anderson, of W. P. Anderson & Company, was called to the Bank. A conference was had as to the best way of closing out Prince's open trades, with the result that Anderson agreed to act in the premises, and on the same day, February 14, and the day following, Prince transferred all his open trades in accordance with the rules of the Board to Anderson, for his company, and the latter agreed to carry out Prince's contracts, and proceeded to do so. Anderson & Company on February 15, 1905, substituted its own securities for Prince's trades, and thereby recovered the certificates deposited by Prince, which were turned over to the Federal Trust & Savings Bank. Prince was at that time indebted to the Bank in the sum of about $37,000, and the Bank, upon the return of the certificates from Anderson & Company, applied the money secured by the certificates to Prince's indebtedness to the Bank. The Master found:

"That taking the said open trades so transferred as a whole, the condition of the market at the time of the transfer was such that the aggregate sum of the amounts due thereon to Earl H. Prince from members of the Board of Trade, if he had then settled the trades, would have been greater than the aggregate sums of the amount then due thereon from Prince to others of said members of the Board; that among the open trades so transferred and settled were trades with the said members of the Board who held securities or margin certificates furnished by the said Prince.

"That on February 15, 1905, the market was constantly changing. If the trades with the members holding Prince's

margin certificates had been closed at the opening of the Board on that day by the members holding them, there would have been due from them to Prince in the aggregate a balance of approximately one-third of the amount of the certificates after deducting therefrom the amount that would have been due to them from Prince. If the trades had been closed later in the day, the balance coming to Prince would have been considerably less. However, if Prince had carried out all of these contracts, the profits which he would have made upon some of them would have been about balanced by the losses which he would have sustained on others."

Furthermore:

"That the plan adopted at the conference between Mr. Prince, Mr. Anderson and Mr. Castle was doubtless the best plan that could have been adopted to avoid serious loss to Prince, or to his creditors. The condition of the market was such at that time that had Anderson & Company not taken charge of Prince's trades and carried them through a panic might have ensued on the Board, and the market so fluctuated that the amount of all of the margin certificates, and quite likely a considerable more, would have been lost to Prince and his creditors."

The facts with respect to the bank balance of $575.79 are: On February 10, 1905, the Bank called the loans of Prince, and, such loans not being paid, the Bank applied to them the sum of $3,095 then on deposit in Prince's checking account, leaving the sum of $3.25 in that account. On the same day the Bank agreed with Prince that, if he would thereafter make deposits for such purpose, it would pay certain salary and payroll checks of Prince and checks issued to the Board of Trade Clearing House. Checks were paid on divers days between the fourth and fourteenth of February, 1905, to the amount of $2,506.46, and Prince deposited with the Bank between the tenth and fourteenth of February a total of $3,079,

all such items being entered upon the books of the Bank as of February 14, 1905. The amount deposited exceeded the amount checked out by $572.54, and this amount, with the $3.25 remaining to the credit of Prince, as above set forth, left a balance of $575.79, which the Bank on February 14 applied to Prince's general indebtedness to it.

The Bank had reasonable cause to believe that Prince was insolvent from and after February 10, and during the transactions from that date to and including February 15.

The trustee relies upon certain sections of the Bankruptcy Act, which he claims make the transaction with Prince by which the Bank acquired the certificates and the bank deposit a preferential one, and therefore void within the terms of the act. The act provides:

"SEC. 60a. A person shall be deemed to have given a preference, if, being insolvent, he has . . . made a transfer of any of his property, and the effect of the enforcement of such . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

"SEC. 60b. If a bankrupt shall have given a preference, and the person receiving it . . . shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. . . ."

On the other hand the Bank claims the right to set off the amount of the certificates and bank balance against the indebtedness of Prince to it by reason of § 68a of the Bankruptcy Act:

"SEC. 68a. In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

This case must be dealt with in the light of certain principles, established by decisions of this court, in determining the applicable provisions of the Bankruptcy Act. To constitute a preferential transfer within the meaning of the Bankruptcy Act there must be a parting with the bankrupt's property for the benefit of the creditor and a consequent diminution of the bankrupt's estate. *New York County National Bank* v. *Massey*, 192 U. S. 138, 147; *Newport Bank* v. *Herkimer Bank*, 225 U. S. 178, 184.

Much discussion appears in the briefs of counsel as to whether the deposits evidenced by the margin certificates were general deposits, creating between the Bank and the depositor the relation of debtor and creditor, or were special deposits which the Bank had no authority to mingle with its general funds. We do not deem it necessary to enter into a discussion of this question, with a view to determining the technical question as to the nature of the relation thus created between the Bank and the depositor. In cases of this character it is essential to learn just what has taken place between the parties, with a view to ascertaining whether a preferential transfer of property to a creditor has resulted.

The statement of facts already made shows that these certificates were payable to Prince, unless they were required to be paid to the party holding them as security for Prince's dealings upon the Board of Trade. It is further evident from the facts stated that without the coöperation of Anderson & Company, who took the place of Prince upon the Board of Trade, substituted their securities for those of Prince and carried out his obligations, the certificates would have had no value to the estate. By the arrangement made, Anderson & Company took hold of the situation, and, carrying out the deals upon which Prince was bound, cleared the certificates of any obligation to others, and they thereby be-

came payable to Prince. What was done did not in fact diminish the estate of Prince otherwise available to the creditors in the bankruptcy administration, for the traders holding them would have had the benefit of the deposits under the terms of the certificates and the rules of the Board of Trade. It therefore appears that this essential element of a preferential transfer within the meaning of the Bankruptcy Act, diminution of the bankrupt estate, is wanting. The fact that what was done worked to the benefit of the creditor and in a sense gave him a preference is not enough, unless the estate of the bankrupt was thereby diminished. *New York County National Bank* v. *Massey*, *supra*.

It is contended, however, that the set-off cannot be allowed because of the provisions of § 68b of the Bankruptcy Act, which provides:

"Section 68b. A set-off or counter-claim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or was transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy."

It is the main purpose of this statute, as its terms show, to prevent debtors of the bankrupt from acquiring claims against the bankrupt for use by way of set-off and reduction of their indebtedness to the estate. There is no question of the solvency of Prince when he deposited the money to secure the certificates, and what was done was not the acquisition of a claim against Prince with a view to setting it off against the Bank's indebtedness on the certificates, but was the satisfaction, without diminution of the estate of the bankrupt, of possible claims of others who, in the event of Prince's default, would have been entitled to the deposits represented by the certificates.

We do not think such transaction comes within the language or reason of § 68b.

It is said, however, that the case of *Western Tie & Timber Co.* v. *Brown*, 196 U. S. 502, holds to the contrary. In that case, it appears, one Harrison, a bankrupt, was a debtor of the Tie Company, which presented a claim against the bankrupt estate of $24,358; that for some years prior to the bankruptcy it had been engaged with Harrison in removing timber from certain lands of the Tie Company and converting it into ties. Harrison had conducted stores in the vicinity and gave laborers groceries and other supplies. The Tie Company received a payroll on which the name of each laborer was entered, together with the amount he earned and the value of the supplies he had received from Harrison, and it deducted from the earnings of the laborer the value of the supplies, a check for which was sent to Harrison, and a check for the balance was sent to the laborer. Four months before the filing of the petition in bankruptcy Harrison owed the Tie Company $20,000 and more. Within that time the Company refused to pay Harrison and retained and credited on its claim against him $2,210.73, which was due him for supplies he had furnished the laborers subsequent to November 30, 1902. Harrison was then insolvent, as the Tie Company knew, and it was found that it intended by retaining the amounts to secure to itself a preference over other creditors, but Harrison had no such intention. This court found that the application of the amounts advanced to the laborers did not amount to a voidable preference, since the agreement mentioned brought about no preference whatever, and, upon the question as to whether the Tie Company was entitled to set off the deductions from the payroll due Harrison, held that from the facts found it appeared that the Tie Company was obligated to remit to Harrison the amount of such deductions irrespective of the condition of the

account between itself and Harrison, and that therefore the Company stood to Harrison in the relation of trustee and the case was not one of mutual credits and debts within the provisions of § 68a. And furthermore that to allow the set-off would be in violation of § 68b, because, whether a trust relation existed or not, the result would be the same, for the Company's knowledge of Harrison's insolvency when it acquired the claims of the latter against the laborers with a view to using them by way of set-off was to enable it thus to obtain an advantage over the other creditors, which it could not lawfully do.

In that case there was a specific finding that the Tie Company had appropriated money which it really held in trust for Harrison and that it had acquired the claims of Harrison against the laborers with a view to the prohibited set-off. In the case at bar there was no finding that the Bank held the money in trust for a specific purpose so as to deny it the right of set-off or that it acquired any claim against the bankrupt with a view to making it a set-off. It is not shown that when Prince made the deposits for the margin certificates he was insolvent, and the deposits created no preference. What was done here, as we have said, consisted in procuring a broker to take up the trades of Prince so that the certificates became clear of the rights of any third persons and to do this without any diminution of the bankrupt estate. We think such a case as this is distinguishable from the case of *Western Tie & Timber Company* v. *Brown*, *supra*, and does not come within the obvious reason and purposes of the prohibitions against acquiring set-offs contained in § 68b.

As to the $575.79, we think the right to set off this deposit is established by the principles laid down in *New York County National Bank* v. *Massey*, *supra*. Here there was a deposit subject to be checked out by the bankrupt for specific purposes. The money was not placed

in the bank with a view to giving it a benefit, except indirectly, because of the deposit. It was subject to Prince's check, and all of it might have been checked out for the purposes intended.

The decrees of the Circuit Court of Appeals and of the District Court are reversed, and the case remanded to the District Court for further proceedings in conformity with this opinion.

CHARLTON *v.* KELLY, SHERIFF OF HUDSON COUNTY, NEW JERSEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 232. Argued April 18, 1913.—Decided June 10, 1913.

The rule that a writ of *habeas corpus* cannot be used as a writ of error applies to extradition proceedings; and if the committing magistrate had jurisdiction and there was competent evidence as to commission of the crime his decision may not be reviewed on *habeas corpus*.

The accused in an extradition proceeding has not the right to introduce evidence simply because it would be admissible on the trial on plea of not guilty, nor is this right given by § 3 of the act of August 3, 1882.

Section 3 of the act of August 3, 1882, does not make evidence relevant, legal or competent which would not theretofore have been competent on a proceeding in extradition.

The proceeding in extradition before the examining magistrate is not a trial, and the issue is not the actual guilt, but whether there is a *prima facie* case sufficient to hold the accused for trial.

There is not, nor can there be, a uniform rule as to admission of evidence for the accused in an extradition proceeding.

An examining magistrate may exclude evidence as to insanity of the accused; such evidence is in the nature of defense and should be heard at the trial or on preliminary examination in the jurisdiction of the crime.

Construing the supplementary treaty of extradition with Italy of 1884

in the light of the original treaty of 1882 and of § 5270, Rev. Stat., it is not obligatory thereunder that the formal demand should be proven in preliminary proceedings within forty days after the arrest.

In this case it appears that every requirement of the law, whether treaty or statute was substantially complied with.

The word "persons" etymologically considered includes citizens as well as those who are not; and while it is the practice of a preponderant number of nations to refuse to deliver its own citizens under a treaty of extradition silent on the point specifically, *held*, in view of the diplomatic history of the United States, there is no principle of international law by which citizens are excepted from the operation of a treaty to surrender persons where no such exception is made in the treaty itself. The United States has always so construed its treaties.

The construction of a treaty by the political department of the Government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is of great weight.

While a violation of the extradition treaties with Italy of 1882 and 1884 by that power might render the treaty denounceable by the United States, it does not render it void and of no effect; and so *held* that the refusal of Italy to surrender its nationals has not had the effect of abrogating the treaty but of merely placing the Government in the position of having the right to denounce it.

A government can waive violations of a treaty by the other party, and it remains in force until formally abrogated.

Where, as in this case, the Executive has elected to waive any right to free itself from the obligation to deliver its own citizens under an existing extradition treaty, it is the duty of the court to recognize the obligation to surrender a citizen thereunder as one imposed by the treaty as the supreme law of the land.

185 Fed. Rep. 880, affirmed.

THIS is an appeal from a judgment dismissing a petition for a writ of *habeas corpus* and remanding the petitioner to custody under a warrant for his extradition as a fugitive from the justice of the Kingdom of Italy.

The proceedings for the extradition of the appellant were begun upon a complaint duly made by the Italian Vice-Consul, charging him with the commission of a murder in Italy. A warrant was duly issued by the Hon. John A. Blair, one of the judges of New Jersey,

qualified to sit as a committing magistrate in such a proceeding, under § 5270, Rev. Stat. At the hearing, evidence was produced which satisfied Judge Blair that the appellant was a fugitive from justice and that he was the person whose return to Italy was desired, and that there was probable cause for holding him for trial upon the charge of murder, committed there. He thereupon committed the appellant, to be held until surrendered under a warrant to be issued by the Secretary of State. A transcript of the evidence and of the findings was duly certified as required by § 5270, Rev. Stat., and a warrant in due form for his surrender was issued by the Secretary of State. Its execution has, up to this time, been prevented by the *habeas corpus* proceedings in the court below and the pendency of this appeal.

The procedure in an extradition proceeding is that found in the treaty under which the extradition is demanded, and the legislation by Congress in aid thereof. Thus, Article I of the treaty with Italy of March 23, 1868 (vol. 1, Treaties, Conventions, etc., of the United States, 1910, p. 966), reads as follows (p. 967):

"The Government of the United States and the Government of Italy mutually agree to deliver up persons who, having been convicted of or charged with the crimes specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territories of the other: Provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial, if the crime had been there committed."

One of the crimes specified in the section following, is murder.

By Article V it is provided, that:

"When, however, the fugitive shall have been merely

charged with crime, a duly authenticated copy of the warrant for his arrest in the country where the crime may have been committed, or of the depositions upon which such warrant may have been issued, must accompany the requisition as aforesaid. The President of the United States, or the proper executive authority in Italy, may then issue a warrant for the apprehension of the fugitive, in order that he may be brought before the proper judicial authority for examination. If it should then be decided that, according to law and the evidence, the extradition is due pursuant to the treaty, the fugitive may be given up according to the forms prescribed in such cases."

That article was amended by the additional treaty of June 11, 1884 (vol. 1, Treaties and Conventions, pp. 985, 986), by a clause added in these words:

"Any competent judicial magistrate of either of the two countries shall be authorized after the exhibition of a certificate signed by the Minister of Foreign Affairs [of Italy] or the Secretary of State [of the United States] attesting that a requisition has been made by the Government of the other country to secure the preliminary arrest of a person condemned for or charged with having therein committed a crime for which, pursuant to this Convention, extradition may be granted, and on complaint duly made under oath by a person cognizant of the fact, or by a diplomatic or consular officer of the demanding Government, being duly authorized by the latter, and attesting that the aforesaid crime was thus perpetrated, to issue a warrant for the arrest of the person thus inculpated, to the end that he or she may be brought before the said magistrate, so that the evidence of his or her criminality may be heard and considered; and the person thus accused and imprisoned shall from time to time be remanded to prison until a formal demand for his or her extradition shall be made and supported by evidence as above provided; if, however, the requisition, together with the documents

above provided for, shall not be made, as required, by the diplomatic representative of the demanding Government, or, in his absence, by a consular officer thereof, within forty days from the date of the arrest of the accused, the prisoner shall be set at liberty."

Mr. R. Floyd Clarke, with whom *Mr. William D. Edwards* was on the brief, for appellant:

The admitted breach of the treaty presents a question of law and not of diplomacy, as to the respective rights of the Executive and citizen.

On such admitted breach the question is judicial not diplomatic and the judiciary are not foreclosed by the diplomatic construction to the contrary. *United States* v. *Rauscher*, 119 U. S. 407; *Chin Low* v. *United States*, 208 U. S. 8; *Wilson* v. *Wall*, 6 Wall. 83, 89; *In re Cooper*, 143 U. S. 472, 499; *The La Ninfa*, 75 Fed. Rep. 513; 44 U. S. App. 648.

In the absence of a statute or treaty, there is no power in the Executive to extradite criminals under the imperfect obligation of international law. 4 Moore on Int. Law, §§ 580–581; citing numerous cases.

It is not sufficient for a treaty to exist. Under this rule there must be a legal obligation under the treaty to extradite before the Executive can act.

Where the treaty provides that the contracting parties are not bound to deliver citizens, the Executive has no power to deport a citizen. Cases *supra* and *The Trimble Case*, 1 Moore on Ext., § 35, p. 167; 4 Moore on Int. Law, §§ 580 *et seq.; The Benevides Case*, 4 Moore's Int. Law, p. 302; *The Row Case, Id.; Ex parte McCabe*, 46 Fed. Rep. 363.

The treaty, if "persons" is to be construed as a covenant to surrender citizens of the asylum country, has been broken by Italy by the passage of the Italian Penal Code prohibiting the extradition of Italian citizens. Treaties

may be broken by inconsistent legislative action. *The Chinese Exclusion Cases*, 130 U. S. 581, 599; *The Chinese Deportation Cases*, 149 U. S. 730; 5 Moore's Dig. Int. Law, p. 366, § 776.

We have exercised the right at least five times. See French Act of 1798, 5 Moore's Dig. Int. Law, pp. 356, 357; *Chinese Exclusion Cases*, 130 U. S. 581, 599; *Chinese Deportation Cases*, 149 U. S. 698, 763; *Edye* v. *Robertson*, 112 U. S. 580, 600 (*Head Money Tax Cases*); *The Exchange Case*, 7 Cranch, 116, 136; 5 Moore's Dig. Int. Law, 357.

Italy has also broken the treaty by inconsistent executive action in refusing to surrender Italian citizens.

A sovereignty is bound in its international relations by the action of its executive independent of its legislative powers. *The Prize Cases*, 2 Black, 635; Dana's Wheaton, § 543, note 250, citing 1 Kent, 165; Heffter, § 84, Vattell, LIV, LV, c. 2, § 14; Wharton's Dig. Int. Law, § 131, *a* 11–20; 5 Moore's Dig. Int. Law, § 759, p. 231; 6 Id., p. 1017; Halleck, 854. See arguments of United States in *Mora's Case against Spain*, 6 Moore's Dig. Int. Law, 1017.

Italy's breach of the covenant to extradite citizens of the asylum country (the American construction assumed to be the correct one for the purpose of this argument) being thus established, there is no treaty obligation on this sovereignty to surrender. There remains under international law an option or arbitrary discretion in the premises. As to who has the option—the sovereignty consisting of executive, judicial and legislative departments—the question is whether in all or in what part of these is vested this option.

Italy having broken her entire and reciprocal covenant in this treaty, the sovereignty of the United States has the option to rescind the treaty for breach; and to insist upon Italy's compliance therewith; this can be done by

war, by arbitration or by acquiescence in the Italian construction.

The Executive cannot exercise the option of affirming by either war or arbitration but it can affirm the treaty, or can disaffirm it, to the extent of refusing Italy's demand as such action does not violate the constitutional rights of anyone.

The Executive has no power of affirmance by deporting a citizen in the absence of congressional authority.

The Executive has full power to suspend the treaty by reason of the alleged breach until the action of Congress. *The Winslow Case*, U. S. For. Rel. 1876, pp. 204–309; For. Rel. 1877, 271–289; 5 Moore's Int. Law, pp. 321, 322; *United States* v. *Rauscher*, 119 U. S. 407; *The Prize Cases*, 2 Black, 635, 699.

See, also, 1 Willoughby on the Constitution, p. 223, § 518; *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415; *Gelston* v. *Hoyt*, 3 Wheat. 246, 324; *Kenneth* v. *Chambers*, 14 How. 30; *United States* v. *Trumbull*, 48 Fed. Rep. 99, 104; *The Itata*, 56 Fed. Rep. 505, 510; *The Prize Cases*, 2 Black, 635, 670; Pomeroy on Constitutional Law, §§ 669, 670, 672.

As to the power to recognize the independence of a new foreign state, see Sen. Doc. No. 56, 54th Cong., 2d Sess.

See also precedent of the extension of the disarmament on the Great Lakes between Great Britain and the United States, 5 Moore on Int. Law, p. 322; *Cross* v. *Harrison*, 16 How. 164.

The act of a head of a department is in contemplation of law the act of the President. *Wolsey* v. *Chapman* (1879), 101 U. S. 755; *Wilcox* v. *Jackson*, 13 Pet. 498, 513; *Runkle* v. *United States* (1887), 122 U. S. 557; *McElrath's Case* (1876), 12 Ct. Cl. 202; *Belt's Case* (1879), 15 Ct. Cl. 107.

The constitutional limitation of due process of law prevents the exercise by the Executive of the arbitrary

discretion so as to deport the citizen. For meaning of due process of law see *Davidson* v. *New Orleans*, 96 U. S. 97; *Giozza* v. *Tiernan*, 148 U. S. 657; *Ekiu* v. *United States*, 142 U. S. 651; *United States* v. *Ju Toy*, 198 U. S. 253; *Chin Low* v. *United States*, 208 U. S. 8; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

These cases show the strength of the "due process of law" clause even as against a discretionary power expressly and properly granted by Congress under the circumstances arising in the matter.

The claim of the Government that the treaty, though broken as a contract, exists as a law binding on the Secretary, cannot be sustained.

The objection is likewise against reason in that although a treaty is a municipal law as well as an international contract, it cannot when broken be any more binding on the nation or the executive head of the nation having this discretion, as a law, than it can be as a contract.

As to the Government's position that appellant's argument assumes that the breach by Italy has abrogated the treaty so far as concerns this government, no such claim is made.

The Executive, under the facts of this case, cannot affirm this Italian treaty in view of its admitted breach, by deporting an American citizen, because in so doing he exercises an arbitrary discretion resting in him to extradite or not to extradite under the circumstances. To allow the Executive to so act is contrary to the constitutional provision protecting a citizen from the exercise by executive officers of such arbitrary discretion, and allowing his "life, liberty and property" to be only affected by "the law of the land."

The demand in this case is not a demand under the treaty, but a demand under international law.

When, in matters of this character, the treaty or statute requires some act to be done based on the presence or

absence of certain formal documents, the existence of such formal documents is jurisdictional—without them the case falls. See *Tucker* v. *Alexendroff*, 183 U. S. 424; *Compton* v. *Alabama*, 214 U. S. 46. Questions of this kind are of law for this court and are not political.

The material part of this formal demand reads as follows:

"Manchester, Mass., July 28, 1910.

Mr. Secretary of State:

Referring to previous communications and in accordance with the provisions of Article V of the Extradition Convention of March 23, 1868, I have the honor to lay before your Excellency a formal request for the extradition of Porter Charlton," etc.

"Montagliari."

By thus referring to former communications, it is seen that Italy refers to communications in which she states that she does not retreat from her position that the word "persons" does not include citizens of the asylum country, and thus knowing Charlton is a citizen of the asylum country she is asking for the extradition on the basis of the power this government has to grant it, but refuses to be bound by any construction of the treaty to the effect that she shall surrender her own citizens.

This word "request" is chosen with nice precision to characterize a request under international comity which this request is, but is the wrong term if, under the facts of this case and the former dispute, rights are claimed by Italy under the treaty.

The form of demand used in this case, a formal untruth as a demand under the treaty and in substance a request under international comity, should not be allowed by this court as the "formal demand" required by the treaty.

Since the right of a citizen is involved and the facts admitted, this is not a question to be foreclosed by the

fiat of the diplomatic construction. *United States* v. *Rauscher*, 119 U. S. 407.

It follows that the formal request in this case is of no more effect—not being of the *bona fide* kind required by the treaty under the circumstances—than if none had been made.

Mr. Pierre P. Garven for appellees.

Mr. Justice Lurton, after making the foregoing statement, delivered the opinion of the court.

A writ of *habeas corpus* cannot be used as a writ of error. If Judge Blair had jurisdiction of the person of the accused and of the subject-matter, and had before him competent legal evidence of the commission of this crime with which the appellant was charged in the complaint, which, according to the law of New Jersey, would justify his apprehension and commitment for trial if the crime had been committed in that State, his decision may not be reviewed on *habeas corpus*. *Terlinden* v. *Ames*, 184 U. S. 270, 278; *Bryant* v. *United States*, 167 U. S. 104; *McNamara* v. *Henkel*, 226 U. S. 520.

By a stipulation filed in the case for the purpose of this review, it is agreed that the evidence presented to Judge Blair of the murder with which the accused was charged, and of his criminality was sufficient to meet the treaty and statutory requirements of the case, and the errors assigned in this court questioning its legality and competency, as well as those as to the alleged absence of a warrant or deposition upon which such warrant was issued, have been withdrawn. But neither this stipulation, nor the withdrawal of the assignments of error referred to is to affect any of the matters raised by other objections pointed out in other assignments.

The objections which are relied upon for the purpose of

defeating extradition may be conveniently summarized and considered under four heads:

1. That evidence of the insanity of the accused was offered and excluded.

2. That the evidence of a formal demand for the extradition of the accused was not filed until more than forty days after the arrest.

3. That appellant is a citizen of the United States, and that the treaty in providing for the extradition of "persons" accused of crime does not include persons who are citizens or subjects of the nation upon whom the demand is made.

4. That if the word "person" as used in the treaty includes citizens of the asylum country, the treaty, in so far as it covers that subject, has been abrogated by the conduct of Italy in refusing to deliver up its own citizens upon the demand of the United States, and by the enactment of a municipal law, since the treaty, forbidding the extradition of citizens.

We will consider these objections in their order:

1. Was evidence of insanity improperly excluded?

It must be conceded that impressive evidence of the insanity of the accused was offered by him and excluded. It is now said that this ruling was erroneous. But if so, this is not a writ of error and mere errors in the rejection of evidence are not subject to review by a writ of *habeas corpus*. *Benson* v. *McMahon*, 127 U. S. 457, 461; *Terlinden* v. *Ames*, 184 U. S. 270, 278; *McNamara* v. *Henkel*, *supra*. In the *McNamara Case*, certain depositions had been received for the prosecution over objection. This court said that there was legal evidence on which to base the action of the commissioner in holding the accused for extradition, irrespective of the depositions objected to.

But it is said that the act of August 3, 1882, 22 Statutes,

215, c. 378, § 3, requires that the defendant's witnesses shall be heard. That section is most inartificially drawn. It reads as follows:

"That on the hearing of any case under a claim of extradition by any foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner before whom such claim for extradition is heard may order that such witnesses be subpœnaed; and in such cases the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner that similar fees are paid in the case of witnesses subpœnaed in behalf of the United States."

The contention is that the effect of this provision is to give the accused the right to introduce any evidence which would be admissible upon a trial under an issue of not guilty. To this we cannot agree. The prime purpose of the section is to afford the defendant the means for obtaining the testimony of witnesses and to provide for their fees. In no sense does the statute make relevant, legal or competent evidence which would not have been competent before the statute upon such a hearing. True, the statute speaks of evidence "material for his defense, without which he cannot safely go to trial," but we cannot discover that Congress intended to depart from the provisions of Article I of the treaty which requires that a surrender shall be made "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment, if the crime had been there committed." The provision is common to many treaties, and Congress, by § 5270, Rev. Stat., has, in aid

of such treaties, prescribed the procedure upon such a hearing in these words:

"Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, district, or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

Judge Blair made the certificate in form and substance in conformity with the statute, and upon the receipt of that, a warrant was duly issued for the surrender of the appellant to the agents of the Italian Government.

In *Benson* v. *McMahon, supra* (p. 462) this court said of a similar provision in the treaty with Mexico, in connection with Rev. Stat. § 5270

"Taking this provision of the treaty, and that of the Revised Statutes above recited, we are of opinion that

the proceeding before the commissioner is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations, which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him. The language of the treaty which we have cited, above quoted, explicitly provides that 'the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed.' This prescribes the proceedings in these preliminary examinations as accurately as language can well do it. The act of Congress conferring jurisdiction upon the commissioner, or other examining officer, it may be noted in this connection, says that if he deems the evidence sufficient to sustain the charge under the provisions of the treaty he shall certify the same, together with a copy of all the testimony, and issue his warrant for the commitment of the person so charged.

"We are not sitting in this court on the trial of the prisoner, with power to pronounce him guilty and punish him or declare him innocent and acquit him. We are now engaged simply in an inquiry as to whether, under the construction of the act of Congress, and the treaty entered into between this country and Mexico, there was legal evidence before the commissioner to justify him in exercising his power to commit the person accused to custody to await the requisition of the Mexican government."

To repeat, the act of 1882 does not prescribe the extent

to which evidence thus obtained shall be admitted, and we quite agree with the view expressed by Judge Brown, in *In re Wadge*, 15 Fed. Rep. 864, who said (p. 866):

"The phrase in § 3 of the act of August 3, 1882 'that he, (the accused) cannot safely go to trial without them,' (witnesses,) cannot be construed as giving a right to a full trial in violation of treaty stipulations; but it must be confined to such a preliminary hearing only as was already allowable under the existing practice, viz, such as is appropriate to a hearing having reference only to a commitment for future trial."

There is not and cannot well be any uniform rule determining how far an examining magistrate should hear the witnesses produced by an accused person. The proceeding is not a trial. The issue is confined to the single question of whether the evidence for the State makes a *prima facie* case of guilt sufficient to make it proper to hold the party for trial. Such committing trials, if they may be called trials in any legal sense, are usually regulated by local statutes. Neither can the courts be expected to bring about uniformity of practice as to the right of such an accused person to have his witnesses examined, since if they are heard, that is the end of the matter, as the ruling cannot be reversed.

In this case the magistrate refused to hear evidence of insanity. It is claimed that because he excluded such evidence, the judgment committing appellant for extradition is to be set aside as a nullity, and the accused set at liberty. At most the exclusion was error not reviewable by *habeas corpus*. To have witnesses produced to contradict the testimony for the prosecution is obviously a very different thing from hearing witnesses for the purpose of explaining matters referred to by the witnesses for the Government. This distinction was taken by Mr. Justice Washington in the case of *United States* v. *White*, 2 Washington C. C. 29, when he said:

"Generally speaking, the defendant's witnesses are not examined upon an application to bind him over to answer upon a criminal charge. The defendant's witnesses are never sent to the grand jury, except where the attorney for the prosecution consents thereto. But in this incipient stage of the prosecution, the judge may examine witnesses who were present at the time when the offence is said to have been committed, to explain what is said by the witnesses for the prosecution; and the cross-examination of the witnesses for the prosecution, is certainly improper."

We therefore conclude that the examining magistrate did not exceed his authority in excluding evidence of insanity. If the evidence was only for the purpose of showing present insanity by reason of which the accused was not capable of defending the charge of crime, it is an objection which should be taken before or at the time of his trial for the crime, and heard by the court having jurisdiction of the crime. If it was offered to show insanity at the time of the commission of the crime, it was obviously a defense which should be heard at the time of his trial, or by a preliminary hearing in the jurisdiction of the crime, if so provided for by its laws. By the law of New Jersey, insanity as an excuse for crime is a defense, and the burden of making it out is upon the defendant. *Graves* v. *State*, 45 N. J. L. 347; *State* v. *Maioni*, 78 N. J. L. 339, 341; *State* v. *Peacock*, 50 N. J. L. 34, 36. A defendant has no general right to have evidence exonerating him go before a grand jury, and unless the prosecution consents, such witnesses may be excluded: 1 Chitty Crim. Law, 318; *United States* v. *White*, *supra*; *Respublica* v. *Shaffer*, 1 Dallas, 236, 255; *United States* v. *Palmer*, 2 Cranch Circuit Court, 11; *United States* v. *Terry*, 39 Fed. Rep. 355, 362.

2. It is next objected that no formal demand for the extradition of the appellant was made within forty days after his arrest, and that he was therefore entitled to be

set at liberty. The objection is founded upon the supplemental convention with Italy of 1884, heretofore set out.

A "certificate," such as was indicated by that convention, was undoubtedly "exhibited" to the committing magistrate, and was the basis of his action. The other parts of the provision are not clear. What is referred to by the phrase, "the requisition, together with the documents above provided," etc., which is required to be made within forty days, or the person set at liberty? The "certificate" attesting "that a requisition has been made," etc., was "exhibited" to Judge Blair; and we fail to find in this clause of the treaty any requirement that the subsequent "formal demand" for the extradition shall be filed with the magistrate within forty days after the arrest of the accused, or at any other time. The whole of the convention should be read together and in connection with § 5270, Rev. Stat., which is applicable to all treaties. Under § 5270 any one of the judicial officers named therein, may, upon complaint, charging one of the crimes named in the treaty, issue his warrant of arrest and hear the evidence of criminality. This done, his duty is, if he deems the evidence sufficient to hold the accused for extradition, to commit him to jail, and to certify his conclusion, with the evidence, to the Secretary of State, who may then, "upon the requisition of the proper authorities of such foreign government, issue his warrant for the surrender of the accused." Rev. Stat., §§ 5272, 5273. Of course, the effect of the supplementary treaty of 1884, being later than the statutory requirements above referred to, is to supersede the statute in so far as there is a necessary conflict in the carrying out of the extradition obligation between this country and Italy. But, as observed in *Grin* v. *Shine*, 187 U. S. 181, 191, "Congress has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare

that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient. *Castro* v. *DeUriarte*, 16 Fed. Rep. 93. This appears to have been the object of § 5270, which is applicable to all foreign governments with which we have treaties of extradition." This section, by its very terms, applies "in all cases in which there now exists or hereafter may exist, any treaty or convention for extradition." Had there been no law of Congress upon the subject, the method of procedure prescribed by the supplementary treaty of 1884 would necessarily have been the proper one, and the committing magistrate could have proceeded only according to the treaty, for that would have been the only law of the land applicable to the case and the only source of his authority.

It was therefore competent for Judge Blair to act upon the complaint made before him independently of any preliminary mandate or certificate, such as was in fact issued and "exhibited" to him in this case, being plainly authorized so to do by the terms of § 5270. The personal rights of the accused are saved by the provisions of the same section, since he could only have been surrendered upon the warrant of the Secretary of State, based upon the evidence presented upon the hearing, and the conclusion of the sufficiency of the evidence of criminality certified to the Secretary of State, and upon a formal requisition for extradition. *Castro* v. *DeUriarte*, 16 Fed. Rep. 93, 97; *Grin* v. *Shine*, *supra*.

Construed in the light of the original and supplementary conventions with Italy and of § 5270, Rev. Stat., we do not find that it was obligatory that the "formal demand" referred to in the 1884 clause should be proven in the preliminary proceeding within forty days after the arrest. That is a demand made upon the executive authority of the United States by the executive authority of Italy. Its presentation was not necessary to give the examining magistrate jurisdiction. Such a formal demand

was in fact made on July 28, 1910, less than forty days after the arrest. That, together with the certificate of the magistrate and the evidence submitted to him, was the authority of law under which the Secretary of State issued his warrant of extradition. Every requirement of the law, whether it appears in the treaty or in the act of Congress, was substantially complied with. This was the construction placed upon the treaty by Mr. Secretary Knox in answer to the same objection made to him before he issued his warrant, and also of Judge Rellstab, who dismissed the petition for a writ of *habeas corpus* and from whose decree this appeal comes.

3. By Article I of the extradition treaty with Italy the two governments mutually agree to deliver up all persons, who, having been convicted of or charged with any of the crimes specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum in the other, etc. It is claimed by counsel for the appellant that the word "persons" as used in this article does not include persons who are citizens of the asylum country.

That the word "persons" etymologically includes citizens as well as those who are not, can hardly be debatable. The treaty contains no reservation of citizens of the country of asylum. The contention is that an express exclusion of citizens or subjects is not necessary, as by implication, from accepted principles of public law, persons who are citizens of the asylum country are excluded from extradition conventions unless expressly included. This was the position taken by the Foreign Minister of Italy in a correspondence in 1890 with the Secretary of State of the United States, concerning a demand made by the United States for the extradition of Bevivini and Villella, two subjects of Italy whose extradition was sought, that they might be tried for a crime committed in this country. Their extradition was refused

by Italy on account of their Italian nationality. The Foreign Minister of Italy advanced in favor of the Italian position these grounds: (a) That the Italian Penal Code of 1890, in express terms provided that, "the extradition of a citizen is not permitted;" (b) That a crime committed by an Italian subject in a foreign country was punishable in Italy, and, therefore, there was no ground for saying that unless extradited the crime would go unpunished; and (c) That it has become a recognized principle of public international law that one nation will not deliver its own citizens or subjects upon the demand of another, to be tried for a crime committed in the territory of the latter, unless it has entered into a convention expressly so contracting, and that the United States had itself recognized the principle in many treaties by inserting a clause exempting citizens from extradition. (United States Foreign Relations 1890, p. 555.) Mr. Blaine, then Secretary of State of the United States, protested against the position of the Italian government and maintained the view that citizens were included among the persons subject to extradition unless expressly excluded. His defense of the position is full and remarkably able. It is to be found in United States Foreign Relations for 1890, pp. 557, 566.

We shall pass by the effect of the Penal Code in preventing the authorities of Italy from carrying out its international engagements to surrender citizens, for that has no bearing upon the question now under consideration, which is, whether under accepted principles of international law, citizens are to be regarded as not embraced within an extradition treaty unless expressly included. That it has come to be the practice with a preponderant number of nations to refuse to deliver its citizens, is true; but this exception is convincingly shown by Mr. Blaine in his reply to the Foreign Minister of Italy and by the thorough consideration of the whole subject by Mr. John

Bassett Moore, in his treatise on extradition, ch. V, pp. 152, 193, to be of modern origin. The beginning of the exemption is traced to the practice between France and the Low Countries in the eighteenth century. Owing to the existence in the municipal law of many nations of provisions prohibiting the extradition of citizens, the United States has in several of its extradition treaties clauses exempting citizens from their obligation. The treaties in force in 1910 may, therefore, be divided into two classes, those which expressly exempt citizens, and those which do not. Those which do contain the limitation are by far the larger number. Among the treaties which provide for the extradition of "persons," without limitation or qualification are the following:

With Great Britain, August 9, 1842, extended July 12, 1889, United States Treaties, 1910, pp. 650 and 740.

With France, November 9, 1843, *supra*, p. 526.

With Italy, February 8, 1868, *supra*, p. 961.

With Venezuela, August 27, 1860, *supra*, p. 1845.

With Ecuador, June 28, 1872, *supra*, p. 436.

With Dominican Republic, February 8, 1867, *supra*, p. 403.

The treaty with Japan of April 29, 1886, *supra*, p. 1025, contains a qualification in these words:

"Art. VII. Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention, but they shall have the power to deliver them up if in their discretion it be deemed proper to do so."

The conclusion we reach is, that there is no principle of international law by which citizens are excepted out of an agreement to surrender "persons," where no such exception is made in the treaty itself. Upon the contrary, the word "persons" includes *all* persons when not qualified as it is in some of the treaties between this and other nations. That this country has made such an exception in some of

its conventions and not in others, demonstrates that the contracting parties were fully aware of the consequences unless there was a clause qualifying the word "persons." This interpretation has been consistently upheld by the United States, and enforced under the several treaties which do not exempt citizens. That Italy has not conformed to this view, and the effect of this attitude will be considered later. But that the United States has always construed its obligation as embracing its citizens is illustrated by the action of the executive branch of the Government in this very instance. A construction of a treaty by the political department of the Government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is nevertheless of much weight.

The subject is summed up by Mr. John Bassett Moore in his work on extradition, vol. 1, p. 170, § 138, where he says:

" 'Persons' includes citizens. In respect to the persons to be surrendered, the extradition treaties of the United States all employ the general term 'persons,' or 'all persons.' Hence, where no express exception is made, the treaties warrant no distinction as to nationality. Writing on the general subject of the extradition treaties of the United States and the practice thereunder, Mr. Seward said: 'In some of the United States' extradition treaties it is stipulated that the citizens or subjects of the parties shall not be surrendered. Where there is no express reservation of the kind, there would not, it is presumed, be any hesitation in giving up a citizen of the United States to be tried abroad.' Such has been the uniform and unquestioned practice under the treaty with Great Britain of 1842, in which the term 'all persons' is used."

The effect of yielding to the interpretation urged by Italy would have brought about most serious consequences as to other treaties then in force. One of these was the extradition treaty with Great Britain made as far back as

1843. Inasmuch as under the law of that country, as of this, crimes committed by their citizens within the jurisdiction of another country were punishable only where the crime was committed, it was important that the Italian interpretation should not be accepted.

4. We come now to the contention that by the refusal of Italy to deliver up fugitives of Italian nationality, the treaty has thereby ceased to be of obligation on the United States. The attitude of Italy is indicated by its Penal Code of 1900 which forbids the extradition of citizens, and by the denial in two or more instances to recognize this obligation of the treaty as extending to its citizens.

During a preliminary correspondence between the Department of State and the Italian Chargé d'Affaires, in reference to the provisional arrest and detention of the appellant under articles I and II of the treaty, as extended by article II of the additional convention of 1884, Mr. Knox, the then Secretary of State, inquired, "whether or not the Department is to understand that by initiating extradition proceedings for the surrender of this American citizen accused of committing murder in Italy, your Government wishes to be understood as surrendering its view heretofore entertained and as being now willing to adopt as to cases which may hereafter arise between the two Governments, the view that the Extradition Treaties of eighteen sixty-eight, eighteen sixty-nine and eighteen eighty-four between the United States and Italy require the surrender by each Government of any and all persons, irrespective of the nationality, who having been convicted for or charged with commission of any of the crimes specified in the treaty within the jurisdiction of one of the contracting parties shall seek an asylum or be found within the territory of the other, and further and specifically to inquire whether the Government of Italy now proposes as to all cases arising in the future to deliver to the Government of the United States under and in accordance with

the Treaty provisions those Italian subjects who committing crimes in the United States take refuge in Italy."

The reply to this was as follows:

"July 1, 1910.

"MR. SECRETARY OF STATE: By telegram of June 24, last, your Excellency inquired whether in instituting extradition proceedings in the case of Porter Charlton, who confessed having committed murder at Moltrasio, the King's Government intended to depart from the rule, heretofore observed, not to surrender its own subjects and whether it was to be inferred that Italians guilty of an offense committed on American territory, who should take refuge in Italy, should hereafter be delivered without fail to the American Government.

"I now have the honor to inform your Excellency that the King's Government cannot depart from the principle established by our law that our nationals cannot be surrendered to foreign powers. Furthermore, this principle does not conflict with the provisions of the Extradition Convention. Indeed it seems logical that so far as parity in the matter of extraditing their respective citizens or subjects is concerned, each party should, in the absence of specific provisions in the Convention itself, be guided by the spirit of its own legislation.

"The Italian law does not consent to the extradition of nationals, but the Italian courts are competent to try on the request of a foreign Government, their nationals who may have committed offenses on that Government's Territory.

"Contrariwise, the laws of the United States by not permitting local tribunals to try American citizens for offenses committed abroad seem to admit of their being extradited. Otherwise an offender would, under the egis of the law itself, escape the punishment he deserves.

"I have the honor to inform your Excellency that the requisite extradition papers in the case of Porter Charlton

will be forwarded to me without delay and in the meanwhile I beg you kindly to cause the prisoner to be held in provisional detention."

On July 28, 1910, the following communication was addressed to the Secretary of State, and was received on July 30, 1910:

"MR. SECRETARY OF STATE: Referring to previous communications and in accordance with the provisions of Article V of the Extradition Convention of March 23, 1868, I have honor to lay before your Excellency a formal request for the extradition of Porter Charlton who has confessed the crime of murder committed on the person of his own wife at Moltrasio, Como, which crime is specified in Article II, Section 1 of the said Convention.

"Your Excellency has already been so good as to forward to me, in note No. 864 of June 28 last, the preliminary certificate of arrest provided by Article II of the Additional Convention of June 11, 1884, with a view to the provisional arrest of the above named accused.

"In support of this request, I have the honor to transmit herewith to Your Excellency the record of proceedings conducted by the Court of Como in the case of the aforesaid murder. The papers are regularly visæd by the Embassy of the United States at Rome.

"Awaiting the Federal 'warrant' and the kind return of the enclosed papers for submisssion to the competent court, I avail myself of this opportunity to renew to Your Excellency, together with my thanks in advance, the assurance of my highest consideration."

To this the Secretary of State, after the conclusion of the hearing before Judge Blair and the receipt by the Department of his judgment and the evidence produced before him, replied as follows:

"WASHINGTON, December 10, 1910.

"EXCELLENCY: In compliance with the request made by your Embassy in its note of July 28 last, and in pursu-

ance of existing treaty stipulations between the United States and Italy, I have the honor to enclose a warrant of surrender in the case of Porter Charlton, charged with murder committed within the jurisdiction of the Kingdom of Italy, and examined and committed for surrender by the Honorable John A. Blair, Judge of the Court of Common Pleas in and for the County of Hudson, in the State of New Jersey.

"Accept, Excellency, the renewed assurance of my highest consideration."

The attitude of the Italian Government indicated by proffering this request for extradition "in accordance with Article V of the Treaty of 1868," is, as shown by the communication of July 1st set out above, substantially this,—

First. That crimes committed by an American in a foreign country were not justiciable in the United States, and must, therefore, go unpunished unless the accused be delivered to the country wherein the crime was committed for trial.

Second: Such was not the case with Italy, since under the laws of Italy, crimes committed by its subjects in foreign lands were justiciable in Italy.

Third: That as a consequence of the difference in the municipal law, "it was logical that so far as parity in the matter of extraditing their respective citizens or subjects is concerned, each party should, in the absence of specific provisions in the Convention itself, be guided by the spirit of its own legislation."

This adherence to a view of the obligation of the treaty as not requiring one country to surrender its nationals while it did the other, presented a situation in which the United States might do either of two things, namely: abandon its own interpretation of the word "persons" as including citizens, or adhere to its own interpretation and surrender the appellant, although the obligation had,

as to nationals, ceased to be reciprocal. The United States could not yield its own interpretation of the treaty, since that would have had the most serious consequence on five other treaties in which the word "persons" had been used in its ordinary meaning, as including *all persons*, and, therefore, not exempting citizens. If the attitude of Italy was, as contended, a violation of the obligation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its abrogation, or come to a rupture, the treaty would remain in force. It was only voidable, not void; and if the United States should prefer, it might waive any breach which in its judgment had occurred and conform to its own obligation as if there had been no such breach. 1 Kent's Comm., p. 175.

Upon this subject Vattel, page *452, says:

"When the treaty of peace is violated by one of the contracting parties, the other has the option of either declaring the treaty null and void, or allowing it still to subsist; for a contract which contains reciprocal engagements, cannot be binding on him with respect to the party who on his side pays no regard to the same contract. But, if he chooses not to come to a rupture, the treaty remains valid and obligatory."

Grotius says (book 3, ch. 20, par. 38):

"It is honourable, and laudable to maintain a peace even after it has been violated by the other parties: as Scipio did, after the many treacherous acts of the Carthaginians. For no one can release himself from an obligation by acting contrary to his engagements. And though it may be further said that the peace is broken by such an act, yet the breach ought to be taken in favour of the innocent party, if he thinks proper to avail himself of it."

In Moore's International Law Digest, Vol. 5, page 566, it is said:

"A treaty is primarily a compact between independent nations, and depends for the enforcement of its provisions on the honor and the interests of the governments which are parties to it. If these fail, its infraction becomes the subject of international reclamation and negotiation, which may lead to war to enforce them. With this judicial tribunals have nothing to do."

In the case of *In re Thomas*, 12 Blatchf. 370, Mr. Justice Blatchford (then District Judge) said:

"Indeed, it is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the action of Bavaria alone, without the consent of the United States. Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable, at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture."

In the case of *Terlinden* v. *Ames*, 184 U. S. 270, 287, the question was presented whether a treaty was a legal obligation if the state with whom it was made was without power to carry out its obligation. This court quoted with approval the language of Justice Blatchford, set out above, and said (p. 285):

"And without considering whether extinguished treaties can be renewed by tacit consent under our Constitution, we think that on the question whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance."

That the political branch of the Government recognizes the treaty obligation as still existing is evidenced by its action in this case. In the memorandum giving the rea-

sons of the Department of State for determining to surrender the appellant, after stating the difference between the two governments as to the interpretation of this clause of the treaty, Mr. Secretary Knox said:

"The question is now for the first time presented as to whether or not the United States is under obligation under treaty to surrender to Italy for trial and punishment citizens of the United States fugitive from the justice of Italy, notwithstanding the interpretation placed upon the treaty by Italy with reference to Italian subjects. In this connection it should be observed that the United States, although, as stated above, consistently contending that the Italian interpretation was not the proper one, has not treated the Italian practice as a breach of the treaty obligation necessarily requiring abrogation, has not abrogated the treaty or taken any step looking thereto, and has, on the contrary, constantly regarded the treaty as in full force and effect and has answered the obligations imposed thereby and has invoked the rights therein granted. It should, moreover, be observed that even though the action of the Italian Government be regarded as a breach of the treaty, the treaty is binding until abrogated, and therefore the treaty not having been abrogated, its provisions are operative against us.

"The question would, therefore, appear to reduce itself to one of interpretation of the meaning of the treaty, the Government of the United States being now for the first time called upon to declare whether it regards the treaty as obliging it to surrender its citizens to Italy, notwithstanding Italy has not and insists it can not surrender its citizens to us. It should be observed, in the first place, that we have always insisted not only with reference to the Italian extradition treaty, but with reference to the other extradition treaties similarly phrased that the word 'persons' includes citizens. We are, therefore, committed to that interpretation. The fact that

we have for reasons already given ceased generally to make requisition upon the Government of Italy for the surrender of Italian subjects under the treaty, would not require of necessity that we should, as a matter of logic or law, regard ourselves as free from the obligation of surrendering our citizens, we laboring under no such legal inhibition regarding surrender as operates against the government of Italy. Therefore, since extradition treaties need not be reciprocal, even in the matter of the surrendering of citizens, it would seem entirely sound to consider ourselves as bound to surrender our citizens to Italy even though Italy should not, by reason of the provisions of her municipal law be able to surrender its citizens to us."

The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land and as affording authority for the warrant of extradition.

Judgment affirmed.

CITY OF PADUCAH, KENTUCKY, *v.* EAST TENNESSEE TELEPHONE COMPANY.

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

No. 246. Argued April 22, 1913.—Decided June 10, 1913.

The test of finality of a decree for the purposes of appeal to this court is the face of the decree itself, and unless it is final the appeal will not lie.

A decree which continues an injunction against a municipality unless

it adopts an ordinance specified therein *held* not final prior to the passage of the ordinance or declaration not to do so, and appeal dismissed as premature.

THE facts, which involve determining whether a decree of the Circuit Court of the United States is final and whether an appeal will lie therefrom to this court, are stated in the opinion.

Mr. James Campbell, Jr., with whom *Mr. W. F. Bradshaw, Jr.*, *Mr. A. Y. Martin* and *Mr. H. S. Corbett* were on the brief, for appellant.

Mr. William L. Granbery, with whom *Mr. Hunt Chipley* was on the brief, for appellee.

MR. JUSTICE LURTON delivered the opinion of the court.

The appellee has raised a question as to the finality of the decree from which this appeal was taken, and has moved that the appeal be dismissed as premature.

The motion must be granted.

From the bill it appears that a controversy had arisen concerning the legality of a "tax" in the nature of an annual rental for the privilege of maintaining upon the streets the poles which had been placed there by "permission" of the city, many years before, and also as to the character and duration of the "permission" under which the Telephone Company, or its predecessors, had placed and maintained the poles and wires upon the streets for the conduct of a telephone system. It also appeared from the bill and its exhibits that for the purpose of settling every question at issue an agreement was made between the parties, whereby the terms of a new ordinance were settled upon, under which ordinance the Telephone Company was to purchase a franchise at public sale, if

it should be the highest bidder, the terms of which should be according to those arranged between the city and the company, which terms were to be enacted into an ordinance by the council. The company upon its part agreed to pay to the city in full settlement of the controversy, as to the pole rentals which had been imposed and of all other questions, a certain sum, and to dismiss its litigation concerning the same. The company made the payment and it was accepted by the city. An ordinance was thereupon passed, which granted to the company the right to maintain its poles and wires upon the streets for a term of twenty years, and imposed conditions as to the maximum charge for telephone service which the company claims *were radically different from those which had been agreed upon*, and which, the bill avers, were so unreasonably low as to prevent a profitable conduct of its business. For this reason it refused to accept the ordinance and reverted to its original rights under the permission heretofore referred to, and such other rights as had resulted from its long occupation of the streets with its poles and wires with the acquiescence of the city. Thereupon, the city council passed certain ordinances and resolutions and gave certain notices which the bill claims constituted an impairment of the company's contract and property rights in the streets, in contravention of the contract and due process clauses of the Constitution of the United States. A temporary injunction was granted against any action by the city interfering with the continuance of the company's poles and wires upon the streets and the conduct of its business as it had theretofore been carried on.

The city answered, denying, in substance, that it had entered into any such agreement as charged, and also its authority to make such an agreement. It admitted the receipt of the payment as charged and tendered its return, with interest. Upon a final hearing the contention of the

Telephone Company was upheld. That part of the judgment appealed from is in these words:

"And the defendant, City of Paducah, having, as shown by the record, failed to carry out the agreement of compromise entered into between it and the complainant, though receiving parts of the proceeds of said compromise, the said City of Paducah, its officers, agents, employés and all other persons are hereby enjoined and restrained from interfering with or obstructing the complainant in operating a telephone exchange in said city and in connection therewith erecting poles and stringing wires thereon until the defendant city shall duly enact and put into force an ordinance in the exact form and of the exact substance agreed upon between the parties as set forth in the bill of complaint, and also until, under such ordinance, the franchise therein referred to has been fairly and in good faith offered at public sale and has fairly and in good faith been sold in the way therein provided for; but nothing herein shall be deemed or taken to interfere with the power of the defendant, City of Paducah, in all reasonable and proper ways to regulate such setting of poles and stringing of wires in the legitimate exercise of the police power of said city as affecting said telephone exchange and its appliances, nor shall anything herein be construed as prohibiting the said city from making rates for telephone service lower than those named in said ordinance, if it shall hereafter result that said rates yield to the complainant, or any other person who may purchase the franchise at the sale made pursuant to such ordinance, more than a fair return upon the reasonable value of the property at the time it is being used. It is the intention of this judgment to give to the City of Paducah the option of permitting the present status to remain perpetually or else to enact the agreed-upon ordinance and fairly to put it into force, and the court now reserves the right and the power to make any orders that may be needful not only

to enforce the injunction but also to meet any emergency that may arise should the city, in the exercise of such option, enact and put into force the ordinance referred to, and the case is held open for these purposes."

Thereupon the city, without exercising its option or making any declaration of a purpose not to enact the ordinance, appealed.

No time within which the city was to elect to pass the ordinance, carrying out the contract, which the court held it had made with the Telephone Company, was fixed by the decree. If that had been done the mere failure to take action within that time might well be held as a conclusive rejection of the option to carry out the agreement, and would have the effect of making final the decree maintaining the pre-contract status. *Tuttle* v. *Claflin*, 66 Fed. Rep. 7. This decree on its face is not final, and the test of finality for the purposes of review by this court by appeal is the face of the decree appealed from. If the city had elected to carry out its agreement, and had passed an ordinance in supposed accord with the decree, it must be accepted by the court as a compliance. Judge Evans foresaw that there might arise many questions out of an attempt to exercise the option, and therefore, reserved power to deal with them when they should arise. An affirmance of the decree by this court would require that the cause be remanded for further proceedings to make the decree final. The right to elect will remain open, and until exercised or renounced by the city will leave both parties in a state of suspension as to their rights and duties until further action is had. Such a decree being interlocutory, is not final for the purposes of appeal. *Grant* v. *Insurance Co.*, 106 U. S. 429; *Jones* v. *Craig*, 127 U. S. 213.

This appeal must be dismissed as premature and the cause remanded for further proceedings.

SINGER SEWING MACHINE COMPANY OF NEW JERSEY *v.* BENEDICT, TREASURER, &c. OF DENVER, COLORADO.

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

No. 289. Argued May 5, 1913.—Decided June 9, 1913.

Under § 723, Rev. Stat., a bill in equity does not lie in the courts of the United States where a plain, adequate and complete remedy can be had at law.

Where it is obvious that there is a remedy at law, it is the duty of the court to interpose that objection *sua sponte* to a suit in equity.

Where, as in this case, there has been no waiver on the part of the defendant, the objection is available in the appellate court.

The illegality or unconstitutionality of a state or municipal tax is not itself a ground for equitable relief in the Federal courts. *Boise Water Co.* v. *Boise City*, 213 U. S. 276.

The state courts cannot define the equity jurisdiction of the Federal courts; but where the state courts have held that a suit in equity could be maintained in the courts of the state, the same suit can be maintained in the Federal court having jurisdiction in other respects.

In Colorado one paying an illegal tax has a remedy at law to recover it back, and the fact that the tax list is *prima facie* evidence of the amount due does not make it conclusive.

The fraud, accident or mistake necessary to justify an equitable action to enjoin the collection of a tax must be more than mere illegality.

179 Fed. Rep. 628, affirmed.

THE facts, which involve the construction of § 723, Rev. Stat., and the right to maintain a bill in equity to restrain the collection of taxes where the taxpayer has a plain and adequate remedy at law, are stated in the opinion.

Mr. R. H. Gilmore and *Mr. Henry A. Prince* for appellant:

The trial court, by overruling the demurrer, adjudged that the bill was sufficient, and this became the final law of the case upon this point, because it was not appealed

from and was not overruled by the trial court. Sufficiency of the bill cannot now be tested in this court. *Great Northern Ry.* v. *McLaughlin*, 17 C. C. A. 330, 333; *Foltz* v. *St. Louis &c.*, 8 C. C. A. 635, 641; *Huntington* v. *Laidley*, 79 Fed. Rep. 865; *Mercantile &c.* v. *Missouri &c.*, 84 Fed. Rep. 383; *Bryant &c.* v. *Robinson*, 79 C. C. A. 259, 267; *Kilbourne* v. *Sunderland*, 130 U. S. 505, 514; *Tyler* v. *Savage*, 143 U. S. 97.

Unless a full, complete and adequate remedy at law exists in a Federal court, the appellant has, by reason of diverse citizenship, the right to resort to a Federal court of equity; and this notwithstanding that the state statute may give an adequate remedy at law in a state tribunal. *Atchison, T. & S. F. Ry. Co.* v. *Sullivan*, 97 C. C. A. 1; *Brun* v. *Mann*, 85 C. C. A. 513; *Colar* v. *Stanley Co.*, 89 Fed Rep. 257, 259; *Smythe* v. *Ames*, 169 U. S. 466, 517; *Jones* v. *Mutual F. Co.*, 123 Fed Rep. 518; *United States &c.* v. *Cable*, 39 C. C. A. 264; *Yonley* v. *Lavender*, 21 Wall. 276; *Sheffield Co.* v. *Withrow*, 149 U. S. 574, 579.

The right to trial by jury, preserved by § 723 of the Federal statute, is not jurisdictional, but is a personal privilege and may be waived. *Waite* v. *O'Neal*, 72 Fed. Rep. 351; *Wamath* v. *O'Daniel*, 86 C. C. A. 277; *Foltz* v. *St. Louis &c.*, 8 C. C. A. 635; *Less* v. *English*, 29 C. C. A. 275; *International Co.* v. *Norwich &c.*, 17 C. C. A. 608.

Appellees' plea of the adequacy of legal remedy was waived by not being pressed before the trial court, and cannot be availed of here. *Huntington* v. *Laidley*, 79 Fed. Rep. 865; *Bryant Bros. Co.* v. *Robinson*, 79 C. C. A. 259, 267; *Adams* v. *Howard*, 20 Blatchf. 38; *Richardson* v. *Green*, 9 C. C. A. 565.

The bill should not be dismissed in this court for lack of equity, because if the trial court had not overruled the demurrer or if it had passed upon the plea a defect in the bill could have been cured by amendment. *Walla Walla* v. *Water Co.*, 172 U. S. 1.

As the trial court entered a decree on the merits in favor of appellees there must have been jurisdictional matter in the bill. It is not consistent to contend that the trial court had jurisdiction to find for the appellees but none to find for the appellant.

Though the tax in this case is absolutely void, the appellant has no adequate remedy at law within the decisions, and injunction is an available and appropriate remedy. *Gale* v. *Statler &c.*, 47 Colorado, 72, 77; *Fargo* v. *Hart*, 193 U. S. 490; *Colo. F. & L. S. Co.* v. *Beerbohm*, 43 Colorado, 464, 481; *Ex parte Young*, 209 U. S. 123; *Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 146, 164; *Western Un. Tel. Co.* v. *Anderson*, 216 U. S. 165.

Mr. J. A. Marsh, with whom *Mr. W. H. Bryant* was on the brief, for appellees.

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

This is a suit by the Singer Company, a New Jersey corporation, to enjoin the collection of taxes levied by the city and county of Denver, in the State of Colorado. The company made a return of taxable personal property at a valuation of $3,800, to which the assessor added other personalty at a valuation of $62,500, making a total assessment of $66,300, which was afterwards embodied in a tax list delivered to the treasurer for collection. The company tendered payment of $126.50, the amount of taxes due on the property returned by it, and refused to pay the amount attributable to the additional assessment. The treasurer declined to accept the tender, and was threatening to enforce the entire tax, when the suit was brought. The bill charged that the assessor, although required by law to give the company timely notice of the additional assessment, had failed to give it any notice, and that it was thereby prevented from presenting

objections to the increase and obtaining a hearing and ruling thereon by the assessor and by the proper reviewing authority to which it was entitled by the local law. There were also allegations to the effect that the company had no property within the city and county other than that returned by it; that the additional assessment and the taxes levied thereon were illegal because of the assessor's failure to give the required notice; and that to enforce the collection of such taxes would be violative of designated provisions of the Constitution of the United States. The defendants demurred on the ground that the bill did not state a case for equitable relief, but the demurrer was overruled. The defendants then answered repeating the objection made in the demurrer and interposing other defenses which need not be noticed now. Upon the hearing a decree was entered dismissing the bill, and the company appealed to the Circuit Court of Appeals. That court held that there was an adequate remedy at law, and affirmed the decree. 179 Fed. Rep. 628. The company then took the present appeal.

In the courts of the United States it is a guiding rule that a bill in equity does not lie in any case where a plain, adequate and complete remedy may be had at law. The statute so declares, Rev. Stat., § 723, and the decisions enforcing it are without number. If it be quite obvious that there is such a remedy, it is the duty of the court to interpose the objection *sua sponte*, and in other cases it is treated as waived if not presented by the defendant *in limine*. *Reynes* v. *Dumont*, 130 U. S. 354, 395; *Allen* v. *Pullman's Palace Car Co.*, 139 U. S. 658. There was no waiver here. The objection was made by the demurrer and again by the answer, and so, if it was well grounded, it was as available to the defendants in the Circuit Court of Appeals to prevent a decree against them there as it was in the Circuit Court. *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276.

In the last case it was said of the pertinency of the guiding rule in cases such as this (p. 281): "A notable application of the rule in the courts of the United States has been to cases where a demand has been made to enjoin the collection of taxes or other impositions made by state authority, upon the ground that they are illegal or unconstitutional. The decisions of the state courts in cases of this kind are in conflict, and we need not examine them. It is a mere matter of choice of convenient remedy for a State to permit its courts to enjoin the collection of a state tax, because it is illegal or unconstitutional. Very different considerations arise where courts of a different, though paramount, sovereignty interpose in the same manner and for the same reasons. An examination of the decisions of this court shows that a proper reluctance to interfere by prevention with the fiscal operations of the state governments has caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired. It has been held uniformly that the illegality or unconstitutionality of a state or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States. In such a case the aggrieved party is left to his remedy at law, when that remedy is as complete, practicable and efficient as the remedy in equity."

A statute of Colorado enacted in 1870 (Laws 1870, p. 123, § 106) and embodied in subsequent revenue acts (2 Mills' Ann. Stat., § 3777; Laws 1902, c. 3, pp. 43, 146, § 202; Rev. Stat. 1908, § 5750) declares that "in all cases where any person shall pay any tax, interest or costs, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to erroneous assessment, to improper or irregular levying of the tax, to clerical or others errors or irregularities, the board of county commissioners shall refund the same without abatement or discount to the taxpayer." This statute

imposes upon the county commissioners the duty of refunding, without abatement or discount, taxes which have been paid and are found to be illegal, and confers upon the taxpayer a correlative right to enforce that duty by an action at law. As long ago as 1879 the Supreme Court of the State, in holding that the invalidity of a tax afforded no ground for enjoining its enforcement, said of this statute: "Against an illegal tax complainant has a full and adequate remedy at law, and we see no reason why in this case he should not be remitted to that remedy." *Price* v. *Kramer*, 4 Colorado, 546, 555. And again: "The statute furnishes another remedy in such cases which is complete and adequate." *Woodward* v. *Ellsworth*, *Id.* 580, 581. And that this view of the statute still prevails is shown in *Hallett* v. *Arapahoe County*, 40 Colorado, 308, 318, decided in 1907, where, in refusing equitable relief against the collection of taxes alleged to be illegal, the court said (p. 318): "By § 3777, 2 Mills' Ann. Stat., it is provided that taxes paid which shall thereafter be found to be erroneous or illegal, shall be refunded, without abatement or discount, to the taxpayer. No statement appears in either of the complaints from which it can be deduced that the remedy afforded the plaintiff by this section is not adequate."

We refer to these cases, not as defining the jurisdiction in equity of the Circuit Court, for that they could not do (*Payne* v. *Hook*, 7 Wall. 425, 430; *Whitehead* v. *Shattuck*, 138 U. S. 146; *Smythe* v. *Ames*, 169 U. S. 466, 516), but as showing that the Colorado statute gave to one who should pay illegal taxes a right to recover back from the county the money so paid. This right was one which could be enforced by an action at law in the Circuit Court, no less than in the state courts, if the elements of Federal jurisdiction, such as diverse citizenship and the requisite amount in controversy, were present. *Ex parte McNiel*, 13 Wall. 236, 243; *United States Mining Co.* v. *Lawson*,

134 Fed. Rep. 769, 771. Thus it will be perceived that, if the taxes in question were illegal and void, as asserted, the company had a remedy at law. It could pay them and, if the commissioners refused to refund, have its action against the county to recover back the money. Such a remedy, as this court often has held, is plain, adequate and complete in the sense of the guiding rule before named, unless there be special circumstances showing the contrary. *Dows* v. *Chicago*, 11 Wall. 108, 112; *State Railroad Tax Cases*, 92 U. S. 575, 613–614; *Shelton* v. *Platt*, 139 U. S. 591, 597; *Allen* v. *Pullman's Palace Car Co.*, *Id.* 658, 661; *Indiana Manufacturing Co.* v. *Koehne*, 188 U. S. 681, 686.

But it is said that in an action to recover back the money the tax list would be treated as the judgment of a special tribunal conclusively determining all questions in favor of the validity of the tax. It well may be that, if the list were regular on its face, it would be presumptive evidence that the tax was valid, but we find nothing in the statutes of Colorado or in the decisions of its Supreme Court which goes to the length suggested. The plain implication of the section providing for repayment is otherwise. Another section (Rev. Stat., § 5677) declares that the tax list "shall be *prima facie* evidence that the amount claimed is due and unpaid," and the only decision cited by the company speaks of the assessment as being presumptively right "in the absence of any evidence to the contrary." *Singer Manufacturing Co.* v. *Denver*, 46 Colorado, 50.

It also is said that there were special circumstances calling for equitable relief, in that the act of the assessor in making the additional assessment without giving any notice of it was necessarily a fraud, an accident, or a mistake. No such claim was made in the bill, and even had it been it would be unavailing unless founded upon something more than the charge that no notice was given and that

the company had no property within the city and county other than that returned by it. We say this because the fraud, accident or mistake which will justify equitable relief must be something more than what is fairly covered by the charge here made, for otherwise the well settled rule that mere illegality in a tax affords no ground for such relief would be a myth. There really would be no case in which the illegality could not be said with equal propriety to be the result of fraud, accident or mistake, for it always arises out of some deviation from law or duty.

Concluding, as we do, that the company had a plain, adequate and complete remedy at law, the decree dismissing the bill is

Affirmed.

BOND *v.* UNKNOWN HEIRS OF BARELA.

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

No. 558. Submitted December 17, 1912.—Decided June 9, 1913.

The proceedings on which the grant involved in this case was issued are substantially the same as those in *United States* v. *Sandoval*, 167 U. S. 278.

Whether the original grant made in 1739 by royal authority of Spain was in severalty or communal, whatever was unallotted passed into the public domain of the United States upon the acquisition of the Territory.

In this case *held* that the confirmation of a Spanish grant under the act of July 22, 1854, on the application of a town claiming to be the owner, passed the title to that town unburdened with any trust for heirs or grantees of persons named in the original petition and royal decree.

16 New Mex. 660, affirmed.

THE facts, which involve the title to a large tract of land in New Mexico, are stated in the opinion.

Mr. Richard H. Hanna and *Mr. Francis C. Wilson* for appellants.

Mr. Frank W. Clancy for appellees.

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

This suit was begun by a petition for partition and to quiet title, filed by George W. Bond and eighty-two others in the District Court of Valencia County, New Mexico, against the unknown heirs of twenty-nine persons named, all deceased, and the unknown owners, proprietors and claimants of the premises commonly called the Tomé grant situate in that county and described as containing 121,594.53 acres. The plaintiffs alleged that they were owners of an undivided half interest.

The town of Tomé appeared and answered, denying any title or interest in the plaintiffs, averring that the grant by Spain was to the town in communal right, was confirmed by act of Congress to the town, a then existing municipality, was so patented by the United States, and was incorporated under the laws of New Mexico; that allotments were made of parts of the land to settlers on the grant in fee in severalty, and ownership of the residue was in the municipality and had been held by it exclusively and adversely since it was patented, April 5, 1871.

Doroteo Chaves, with three hundred and ninety-one others, appeared and answered, denying any individual right in any of the plaintiffs, adopting the answer of the town as to the communal character of the grant, averring that they were themselves severally owners in fee of parts of the grant, and resisting partition.

Translations of the title papers were, by stipulation, made parts of the answers. Demurrers to the latter were overruled, and a reply was filed, to which there was a demurrer. This demurrer was sustained, and, the plaintiffs electing to stand upon their reply, judgment was rendered dismissing the suit. Upon the plaintiffs' appeal the Supreme Court of the Territory affirmed the judgment, 16 New Mex. 660, and on a further appeal the case is now before this court.

The facts are settled by the pleadings. The questions here are, whether the original grant made by the Crown of Spain in 1739 was in fee in individual right or in communal right to the town, title remaining in the Crown except as to specific parcels allotted to individuals, and whether, if it was a grant in individual right, the confirming act of Congress, and the patent pursuant thereto, changed its character.

The facts, as shown by the record, are these: Juan Barela, with twenty-eight others, in 1739 petitioned that the governor "be pleased to donate to them the land called Tomé Dominguez, granted to those who first solicited the same and who declined settling thereon." The governor did "grant to them, in the name of His Majesty, whom may God preserve, the land petitioned for, called the land of Tomé Dominguez, for themselves, their successors, and whomever may have a right thereto under the conditions and circumstances required in such cases, and which is to be without prohibition to any one desiring to settle the same, holding and improving it during the time required by law. In view of which, I should order, and did order, that said senior justice or his lieutenant, whose duty it is, shall place them in possession of the aforementioned lands, giving in all cases to each one the portion he may be entitled to in order to avoid difficulties which may occur in the future."

There was a giving of "juridical possession," a form and

ceremony essential to the passing of title by grant under the Spanish law. The report of the officer conducting this ceremony, so far as here material, is as follows: "In the new settlement of 'Nuestra Señora de la Concepcion de Thomi Dominguez,' instituted and established by Don Gaspar Mendoza, actual governor and captain general of this Kingdom of New Mexico, on the thirtieth day of the month of July, in the year one thousand seven hundred and thirty-nine, . . . the parties concerned being together, I proceeded to the above-mentioned place, and all being present, I notified them of the decree; I took them by the hand, walked with them over the land; they cried out, pulled up weeds, threw stones, as required by law; and having placed the new settlers in possession of said lands, I gave them the title and vocation they should have in the settlement, which bears the name aforementioned. . . . And the first proceedings having been noted, I proceeded to establish the boundaries as contained in the first petition . . . at which principal boundaries I ordered them to perpetuate their existence with permanent land marks, pointing out to them also, as a means of good economy, their common pastures, water and watering places, and uses and customs for all, to be the same without dispute, with the condition that each one is to use the same without dispute, in equal portions, the richest as well as the poorest; and by virtue of what has been ordered, I pronounce this royal possession as sufficient title for themselves, their children, heirs and successors, to hold their lands now and forever at their will; directing them, as I do direct them, to settle the same within the time prescribed by the royal ordinances: and for their greater quietude, peace, tranquility and harmony, I proceeded to point out the land each family should cultivate, each one receiving in length a sufficient quantity to plant one fanega of corn, two of wheat, garden and house lot, as follows:" Here follow nineteen names of original

petitioners as given allotments of land, the name Manuel Carrillo appearing twice. Ten of the petitioners were not allotted lands, and among those who obtained allotments were five who were not petitioners.

It is unnecessary to discuss at length the question whether the grant made in 1739 passed a title to the persons therein named to the whole tract, or whether this was merely a grant in severalty of the lands allotted to the persons named in the report showing juridical possession, leaving title to the unallotted lands in the Crown, to be allotted to future settlers. Examination shows that the petition, decree and report of juridical possession are in form substantially like those in *United States* v. *Sandoval*, 167 U. S. 278, wherein the effect of such instruments is discussed at length. See also *United States* v. *Santa Fe*, 165 U. S. 675; *Rio Arriba &c. Co.* v. *United States*, 167 U. S. 298; *United States* v. *Pena*, 175 U. S. 500.

The fact that the governor made the grant "to be without prohibition to anyone desiring to settle the same," that the juridical possession was to be by "giving in all cases to each one the portion he may be entitled to," and that juridical possession and allotment of land was made to persons not petitioning—in the theory of the plaintiffs, not beneficiaries of the decree—while no land was allotted to ten of the petitioners, who, according to the same theory, were beneficiaries, is not explicable on any other theory than that the grant was communal, in which settlers and no others could by allotments obtain individual, several interests. On this construction the omission of allotments to petitioners not identifying themselves with the new settlement would be the necessary consequence, as also would be the allottments to new settlers who were not petitioners.

Had the matter stopped there—had no grant been made by Congress—the grant must have been effective only as to the lands allotted in several right to those named in

the report of juridical possession. Title to and power of disposal over the residue of the land remained in the Crown and passed to the United States upon the acquisition of the territory.

There was, however, Congressional confirmation of the grant. In 1856 the inhabitants of Tomé petitioned the surveyor-general for New Mexico for confirmation of the grant to the town, conformably to the act of July 22, 1854, 10 Stat. 308, c. 103. It was so confirmed by the act of December 22, 1858, 11 Stat. 374, c. 5; and, April 5, 1871, patent issued to the town of Tomé. It is said that the legal title so passed is subject to a trust for the heirs of the original petitioners, who, it is claimed, were beneficiaries of the decree of the Spanish governor in 1739.

As no benefit of that decree, and no title to any of the land, passed to any of the petitioners save those to whom allotments were made, and only to the allotted tracts, no further discussion is necessary. When patent to the entire grant issued to the town of Tomé, title to all the unallotted land passed from the United States to the town unburdened with any trust for heirs or grantees of persons named in the original petition and decree.

Judgment affirmed.

NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS *v.* PARRISH.

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

No. 678. Submitted May 5, 1913.—Decided June 9, 1913.

The exemption of the United States from payment of interest on claims in the absence of authorized engagement to pay it does not extend to subordinate governmental agencies.

While no rule is now laid down for all governmental agencies, this court holds that the National Home organized under statute now § 4825, Rev. Stat., is not exempt from payment of interest.

194 Fed. Rep. 940, affirmed.

THE facts, which involve the liability of governmental agencies for payment of interest, are stated in the opinion.

Mr. Assistant Attorney General Adkins, Mr. Assistant to the Attorney General Fowler and *Mr. Karl W. Kirchwey* for appellant.

Mr. R. E. L. Mountcastle for appellee.

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

This appeal brings under review a decree allowing interest on the amount found due a contractor upon two contracts for the construction of buildings for the Mountain Branch of the National Home for Disabled Volunteer Soldiers.

The Home is a Federal corporation created by legislation now embodied in Rev. Stat., §§ 4825 *et seq.* as "an establishment for the care of disabled volunteer soldiers

of the United States Army." The erection of the buildings was undertaken by the Home in pursuance of express Congressional authority and after an appropriation for that purpose had been made from the National treasury. January 28, 1901, 31 Stat. 745, c. 184. The contracts called for the completion of the work by the contractor on or before designated dates, which were extended. At the expiration of the last extension the contractor was in default, although the work was largely performed, and the Home, under power reserved in the contracts, proceeded with the completion of the buildings.

In a bill exhibited by the Home against the contractor, in the Circuit Court of the United States for the Eastern District of Tennessee, and in a cross-bill by the contractor, the parties presented for judicial determination various matters of difference arising out of the contracts and what was done under them. A hearing resulted in a decree awarding the contractor, upon the contracts, the sum of $21,139.12, to which interest was added from the date when the buildings were fully completed and occupied by the Home. From so much of the decree as allowed interest the Home appealed to the Circuit Court of Appeals, which rendered a decision of affirmance, 194 Fed. Rep. 940; and then the Home appealed here. The sole error assigned challenges the allowance of interest. It is not insisted, nor could it reasonably be, that this allowance was inequitable or an abuse of discretion in the particular circumstances; so, the only question is, whether in law there was an insuperable obstacle to allowing interest.

The Home is without capital stock, shares or shareholders; is an eleemosynary institution created by the Government to manifest and discharge its sense of gratitude towards those who rendered service in its defense; is under the ultimate supervision of Congress; is supported and maintained from the National treasury, and

is essentially a governmental agency. In defining its powers the statute declares that it shall "have perpetual succession, with powers to take, hold, and convey real and personal property, establish a common seal, and to sue and be sued in courts of law and equity; and to make by-laws, rules, and regulations, not inconsistent with law, for carrying on the business and government of the home, and to affix penalties thereto" (§ 4825); also "to procure . . . sites, . . . and to have the necessary buildings erected" (§ 4830).

It is not questioned that the Home was empowered to make the contracts upon which the recovery was had, or that it was suable thereon; but it is urged that interest is not recoverable against the United States in the absence of some statutory provision or authorized stipulation, and that, as the Home is a governmental agency, a like exemption applies to it.

It is quite true that the United States cannot be subjected to the payment of interest unless there be an authorized engagement to pay it or a statute permitting its recovery. *Angarica* v. *Bayard*, 127 U. S. 251, 260; *United States* v. *North Carolina*, 136 U. S. 211, 216. But this exemption has never as yet been applied to subordinate governmental agencies. On the contrary, in suits against collectors to recover moneys illegally exacted as taxes and paid under protest the settled rule is, that interest is recoverable without any statute to that effect, and this although the judgment is not to be paid by the collector but directly from the treasury. *Erskine* v. *Van Arsdale*, 15 Wall. 75; *Redfield* v. *Bartels*, 139 U. S. 694.

Without now attempting to lay down a rule for all governmental agencies, we think the exemption of the United States is not applicable to the Home. It is a distinct corporate entity, invested with powers, duties and responsibilities which, in the judgment of Congress, required that it be given power to sue in its own name

and be subjected to liability to be sued. Although under the ultimate supervision of Congress, it has a board of managers which exercises a general control over its affairs, and has a corps of other officers of its own, who are in immediate charge of its activities. It makes contracts and incurs contractual liabilities in its own name, expends and disburses the moneys available for its support and maintenance, and in general occupies a position which takes it without the reasons underlying the Government's exemption from interest. It is significant that the statute permitting suits in the Court of Claims against the Government contains a provision expressly restricting the allowance of interest (Rev. Stat., § 1091), while the statute authorizing suits against the Home contains no such restriction. And it is also significant that the latter authorization is not confined to any particular court, but extends generally to "courts of law and equity." It may be, as has been held elsewhere, that such authorization does not embrace suits for tortious acts of the officers of the Home (see *Overholser* v. *National Home*, 68 Ohio St. 236; *Lyle* v. *National Home*, 170 Fed. Rep. 842), but, if so, this does not prove or indicate that in suits to enforce contractual obligations the amount of the recovery is not to be determined by the standards applicable to other litigants.

We think the courts below took the right view of the question, and the decree is accordingly

Affirmed.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

UNITED STATES *v.* MILLE LAC BAND OF CHIPPEWA INDIANS IN THE STATE OF MINNESOTA.

APPEAL FROM THE COURT OF CLAIMS.

No. 736. Argued April 8, 9, 1913.—Decided June 9, 1913.

When Congress passed the act of January 14, 1889, adjusting relations with the Mille Lac Chippewas a real controversy was subsisting which was thereby adjusted and composed, and the act is to be construed according to its plain and unambiguous terms.

Indians, no less than the United States, are bound by the plain import of the language of an act of Congress and an agreement conferring substantial benefits on them.

Under the act of January 14, 1889, the Mille Lac Chippewas received substantial benefits in consideration whereof they released their claims to lands in the Red Lake Reservation upon which there were valid preëmption and homestead entries, and the United States is not bound to account to them for the proceeds of sale of such lands; but, as to the other lands, the United States held them in trust for the Mille Lac Chippewas who are entitled to damages under the act on the basis of the value of such lands in 1889.

In interpreting a proviso in a statute, it will not be given a meaning that would amount to entirely rejecting it.

In a contract with Indians, such as that embodied in the act of January 14, 1889, a reference to regular and valid preëmption and homestead entries of land within a reservation would include all that were not fraudulent and would not exclude all entries on the ground of invalidity because made on lands within an Indian reservation.

47 Ct. Cl. 415, reversed.

THE facts, which involve the construction and interpretation of the various treaties, agreements and statutes relating to the Mille Lac Reservation, are stated in the opinion.

Mr. Assistant Attorney General Adkins and *Mr. George M. Anderson* for the United States.

Mr. George B. Edgerton and *Mr. F. W. Houghton*, with whom *Mr. C. E. Richardson*, *Mr. Harvey S. Clapp* and *Mr. Daniel B. Henderson* were on the brief, for appellees.

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

This suit was begun under the act of February 15, 1909, 35 Stat. 619, c. 126, which authorized the Court of Claims "to hear and determine a suit or suits to be brought by and on behalf of the Mille Lac Band of Chippewa Indians in the State of Minnesota against the United States on account of losses sustained by them or the Chippewas of Minnesota by reason of the opening of the Mille Lac Reservation . . . to public settlement under the general land laws of the United States."

The lands to which the act and the suit relate are four fractional townships bordering on the Mille Lac in Minnesota, and three islands in that lake, comprising in all a little more than 61,000 acres. The suit was begun in the name of the Mille Lac Band, and the Court of Claims, two judges dissenting, gave judgment against the United States in the sum of $827,580.72, with a direction, in substance, that the amount recovered be credited to the Chippewas of Minnesota and distributed among them under the provisions of § 7 of the act of January 14, 1889, 25 Stat. 642, c. 24. 47 Ct. Cl. 415. The case is here upon the appeal of the United States.

The judgment was sought and was rendered on the theory that the lands were set apart and reserved for the occupancy and use of the Mille Lac Band by treaties of February 22, 1855, 10 Stat. 1165; March 11, 1863, 12 Stat. 1249, and May 7, 1864, 13 Stat. 693, and were subsequently relinquished to the United States pursuant to the act of January 14, 1889, *supra*, upon certain trusts therein named, and that in violation of those treaties and

that act they were opened to settlement and disposal under the general land laws of the United States and were disposed of thereunder, to the great loss and damage of the Mille Lac Band of the Chippewas of Minnesota.

The arguments at the bar and in the briefs are addressed to these questions: 1. The scope of the jurisdictional act. 2. The rights of the Indians in the lands under the treaties of 1863 and 1864. 3. The effect to be given to the act of 1889 and its acceptance by the Indians. 4. Whether the disposal of the lands, or any of them, under the general land laws was violative of the rights of the Indians.

The jurisdictional act makes no admission of liability, or of any ground of liability, on the part of the Government, but merely provides a forum for the adjudication of the claim according to applicable legal principles. Nor does it contemplate that recovery may be founded upon any merely moral obligation, not expressed in pertinent treaties or statutes, or upon any interpretation of either that fails to give effect to their plain import, because of any supposed injustice to the Indians. *United States* v. *Old Settlers*, 148 U. S. 427, 469; *United States* v. *Choctaw &c. Nations*, 179 U. S. 494, 735; *Sac and Fox Indians*, 220 U. S. 481, 489.

Under the treaty of 1855, *supra*, there were reserved for the occupancy and use of the Mississippi bands of Chippewas, of which the Mille Lac Band was one, six separate tracts of land in Minnesota. One of these embraced the townships and islands before mentioned, and came to be separately occupied by the Mille Lacs, although all the reservations were claimed in common by all the bands. By the treaty of 1863, *supra*, the lands in the six reservations, the one occupied by the Mille Lacs being in terms included, were expressly ceded to the United States (Art. I), and one large tract of other lands in Minnesota was reserved for the future home of all the bands, including

the Mille Lacs (Art. II). Provision was made (Art. IV) for clearing and breaking a limited area in the new reservation for each of the bands, the Mille Lacs being in terms included, and (Art. VI) for removing the agency and saw mill from one of the ceded reservations to the new. Article XII of this treaty was as follows,—special importance being now attached to its proviso (p. 1251):

"It shall not be obligatory upon the Indians, parties to this treaty, to remove from their present reservations, until the United States shall have first complied with the stipulations of Articles IV. and VI. of this treaty, when the United States shall furnish them with all necessary transportation and subsistence to their new homes, and subsistence for six months thereafter: *Provided*, That, owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites."

The treaty of 1864, *supra*, superseded that of 1863, and in so far as their provisions are material here they were identical, so we shall speak only of the later one. In addition to the creation of the single large reservation, provision was made for the payment of large annuities to the Indians in consideration for the cession of the six original reservations, and it is not questioned that these annuities were duly paid to all the bands, including the Mille Lacs, nor that there was a full compliance with Articles IV and VI.

A treaty negotiated in 1867, 16 Stat. 719, eliminated a considerable portion of the large tract reserved by Article II of the treaty of 1864 and substituted a new tract, consisting of thirty-six townships, which came to be known as the White Earth Reservation. This treaty is not important here, save as it explains subsequent references to the White Earth Reservation.

A controversy soon arose over the meaning and effect

of the proviso to Article XII of the treaty of 1864 declaring, "that, owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove [from the old reservation to the new one] so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites." On the part of the executive and administrative officers it was insisted—not, however, without some differences among themselves—that the proviso did not invest the Mille Lacs with any right in the old reservation expressly ceded by Article I of the treaty, but merely permitted them to remain thereon as a matter of favor; that one purpose of the cession was to enable the Government to survey the lands and open them to settlement, and that it was not intended that the permission to remain should interfere with this. But the Mille Lacs maintained that the proviso operated to reserve the lands for their occupancy and use indefinitely, and that the lands could not be opened to settlement while they remained and conducted themselves properly towards the whites in that vicinity. The survey was made, the lands were declared open to settlement and entry, and entries in considerable numbers were allowed from time to time; but the Mille Lacs persisted in their claim and refused to move, although repeatedly entreated to do so. This continued to be the situation until the act of 1889 was passed by Congress and accepted by the Mille Lacs and other Chippewas of Minnesota. In the meantime an order was issued by one Secretary of the Interior suspending the allowance of further entries, as also further action upon those already allowed, and this order was recalled by a succeeding Secretary. Congress then passed the act of July 4, 1884, 23 Stat. 76, 89, c. 180, directing that the lands should not "be patented or disposed of in any manner until further legislation." The entries allowed up to that time covered about 55,000 acres, or approximately nine-tenths of the lands, and some were under

investigation upon charges that they were fraudulent. After the passage of the act of 1884, all further action was suspended awaiting further legislation.

That legislation came in the act of 1889. It provided for a commission to negotiate with all the bands of Chippewas in Minnesota for the cession and relinquishment of all their reservations, excepting the White Earth and Red Lake Reservations, and for the cession and relinquishment of so much of them as should not be required for allotments. It further provided that the cession and relinquishment should be obtained as to each reservation, other than the Red Lake, through the assent in writing of two-thirds of the male adults of the band "occupying and belonging to" it, and, as to the Red Lake Reservation, through a like assent of two-thirds of the male adults of all the Chippewas in the State; that the cession and relinquishment as to each reservation should be subject to the approval of the President, and when approved should operate as a complete extinguishment of the Indian title "for the purposes and upon the terms" stated in the act; that thereupon all the Chippewas in the State, excepting those on the Red Lake Reservation, should be removed to and take up their residence on the White Earth Reservation and receive allotments in severalty therein, and allotments to those on the Red Lake Reservation should be made in that reservation; that any Indian residing on any of said reservations might, in his discretion, take his allotment "on the reservation where he lives . . . instead of being removed;" that the ceded lands not so allotted should be classified as "pine lands" and as "agricultural lands" and be disposed of in the manner and at the prices stated in the act; and (§ 7) that all moneys accruing from their disposal, after deducting expenses, should be placed in the treasury of the United States to the credit of all the Chippewas of Minnesota as a trust fund, drawing interest at five per cent. per annum, the interest to be used

for their benefit and the principal to be distributed among them at the end of fifty years. In § 6 there was a proviso, deemed important here, declaring "That nothing in this act shall be held to authorize the sale or other disposal under its provision of any tract upon which there is a subsisting, valid, preëmption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the time of its allowance, and if found regular and valid, patents shall issue thereon."

Through negotiations conducted under the authority of that act, the commissioners secured agreements with the Indians embodying the contemplated cessions and relinquishments, and these, upon submission to the President, were approved by him March 4, 1890. The agreement with the Mille Lacs, in addition to embodying a cession and relinquishment of the lands in the White Earth and Red Lake Reservations not required for allotments, contained an express assent to all the provisions of the act of 1889 and an express relinquishment of the lands in the Mille Lac Reservation, as is shown by the following excerpt from the agreement:

"We, the undersigned, being male adult Indians over eighteen years of age of the Mille Lac Band of Chippewas of the Mississippi, occupying and belonging to the Mille Lac Reservation under and by virtue of a clause in the twelfth article of the treaty of May 7, 1864 (13 Stat., p. 693), do hereby certify and declare that we have heard read, interpreted and thoroughly explained to our understanding the act of Congress, approved January 14, 1889, entitled 'An act for the relief and civilization of the Chippewa Indians in the State of Minnesota' (Public, No. 13), which said act is embodied in the foregoing instrument, and after such explanation and understanding, have consented and agreed to said act, and have accepted and ratified the same, and do hereby accept and consent to and ratify the said act, and each and all of the provisions

thereof, . . . and we do also hereby forever relinquish to the United States the right of occupancy on the Mille Lac Reservation, reserved to us by the twelfth article of the treaty of May 7, 1864."

This agreement was negotiated at a council of the Mille Lacs, wherein they reiterated their claim under Article XII and at first declined to assent to the act of 1889, but upon further consideration assented and then signed the agreement. The commission, in reporting the result of its labors, gave a tabulated statement of the reservations, with the area of each, covered by the relinquishments, and included the Mille Lac Reservation, with an area of 61,014 acres, in the statement. In submitting the agreements, including that with the Mille Lacs, to the President, with the recommendation that each be separately approved, as was done, the Secretary of the Interior referred to the prolonged controversy with the Mille Lacs and said: "The rights of the Indians upon this reservation have been a vexed question, full of difficulties and embarrassments, but it is hoped that this agreement will furnish a basis for its early and final solution." Upon approving the agreements (they were sometimes spoken of as constituting in the aggregate a single document) the President transmitted a copy of them and of the accompanying papers to Congress for its information, and in the letter of transmittal said: "Being satisfied from an examination of the papers submitted that the cession and relinquishment by said Chippewa Indians of their title and interest in the lands specified and described in the agreement with the different bands or tribes of Chippewa Indians in the State of Minnesota was obtained in the manner prescribed in the first section of said act, and that more than the requisite number have signed said agreement, I have, as provided by said act, approved the said instruments in writing constituting the agreement entered into by the commissioners with said Indians." Shortly

thereafter, and before the Mille Lacs removed from the old reservation, Congress passed the act of July 22, 1890, 26 Stat. 290, c. 714, whereby a railroad right of way, including station grounds, was granted through that reservation upon condition that compensation therefor be paid to the United States for the use of the Indians and that a failure to use the right of way and station grounds for railroad purposes should inure to the benefit of the Indians, thereby recognizing that the Indians had then come to have an interest in the disposal of the lands.

After the Mille Lacs gave their assent to the act of 1889 the entries theretofore allowed were examined and passed upon by the Land Department in regular course and such as were found to be regular and *bona fide* were passed to patent. The remaining lands in the reservation were subsequently disposed of, not under the act of 1889, but under the general land laws, in pursuance of directions contained in the joint resolutions of December 19, 1893, 28 Stat. 576, and May 27, 1898, 30 Stat. 745.

Whatever might be said of its merits, it is apparent that there was a real controversy between the Mille Lacs and the Government in respect of the rights of the former under Article XII of the treaty of 1864, and that the controversy was still subsisting when the act of 1889 was passed by Congress and assented to by the Indians. And we think it also is apparent that this controversy was intended to be and was thereby adjusted and composed. A manifest purpose of the act was to bring about the removal to the White Earth Reservation of all the scattered bands, residing elsewhere than on the Red Lake Reservation, the Mille Lacs as well as the others; and this was to be accomplished, not through the exertion of the plenary power of Congress, but through negotiations with and the assent of the Indians. The provision in § 6 for perfecting subsisting preëmption and homestead entries, if found regular and valid, pointed most persuasively to a

purpose to extend the negotiations to the Mille Lac Reservation. The commission, the Secretary of the Interior, and the President, in seeking, obtaining and approving the relinquishment of that reservation, all treated it as within the purview of the act, and the Mille Lacs did the same. Then, too, Congress recognized by the act of 1890, shortly following the approval of the agreement, that the Indians had come to have an interest in the disposal of the lands in that reservation.

But while the Government thus waived its earlier position respecting the status of the reservation and consented to recognize the contention of the Indians, this was done upon the express condition, stated in the proviso to § 6, "That nothing in this act shall be held to authorize the sale or other disposal under its provisions of any tract upon which there is a subsisting, valid preëmption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the time of its allowance, and if found regular and valid, patent shall issue thereon." In other words, the controversy was intended to be and was adjusted and composed by concessions on both sides, whereby the lands in the Mille Lac Reservation were put in the same category, and were to be disposed of for the benefit of the Indians in the same manner, as the lands in the other reservations relinquished under the act, but subject to the condition and qualification that all subsisting *bona fide* preëmption and homestead entries should be carried to completion and patent under the regulations and decisions in force at the time of their allowance.

True, it is said on behalf of the Indians that they did not so understand the act, that is, did not understand that existing entries could be thus carried to patent. But of this it is enough to observe that the language of the proviso to § 6 is plain and unambiguous; that the agreement recites that the Mille Lacs "do hereby accept and consent to and

ratify the said act, and each and all of the provisions thereof;" and that the Indians, no less that the United States, are bound by the plain import of the language of the act and the agreement. Not only so, but the act conferred upon the Mille Lacs many very substantial advantages which doubtless constituted the inducement to the adjustment and composition to which they assented. Among other advantages, it enabled them to share in the proceeds of the disposal of a vast acreage of lands in which they otherwise would have had no interest.

On behalf of the Indians it also is said that the proviso was limited to "regular and valid" preëmption and homestead entries, and that no entry of lands within an Indian reservation could come within that limitation. But this assumes the existence of the Mille Lac Reservation at the time of the entries, which was the very matter in dispute. Besides, the interpretation suggested could not be accepted without wholly rejecting the proviso, for if it was inapplicable to entries in the Mille Lac tract, it was equally inapplicable to any in the other tracts relinquished under the act. In saying this we do not indicate that there were other entries, for the reports of the Land and Indian Offices, which were before Congress when the act of 1889 was passed, disclosed the entries in the Mille Lac tract and did not show any others. Of course, the proviso cannot be rejected. It had an office to perform and must be given effect. It meant, as its terms plainly show, that entries made in accordance with existing regulations and decisions could, if *bona fide*, be carried to completion and patent in the usual way; and the phrase "if found regular and valid" was evidently used with special reference to the charge that some of the entries were fraudulent and with the purpose of eliminating such as were of that character.

We are accordingly of opinion that the act of 1889, to which the Indians fully assented, contemplated and

authorized the completion, and the issuing of patents on, all existing preëmption and homestead entries in the Mille Lac tract which in the course of proceedings in the Land Department should be found to be within the terms of the proviso to § 6, and therefore that no rights of the Indians were infringed in so disposing of lands embraced in such entries. And we think the evident purpose of the proviso requires that it be held to include entries of that class theretofore passed to patent, of which there were some instances during the early period of the controversy.

As respects other lands in that tract, that is, such as were not within the terms of the proviso, we are of opinion that they came within the general provisions of the act and were to be disposed of thereunder for the benefit of the Indians, in like manner as were the ceded lands in the other reservations, of which it was said in *Minnesota* v. *Hitchcock*, 185 U. S. 373, 394: "The cession was not to the United States absolutely, but in trust. It was a cession of all of the unallotted lands. The trust was to be executed by the sale of the ceded lands and a deposit of the proceeds in the Treasury of the United States to the credit of the Indians, such sum to draw interest at five per cent."

As before stated, the lands not within the proviso were disposed of, not under the act of 1889, but under the general land laws; not for the benefit of the Indians, but in disregard of their rights. This was clearly in violation of the trust before described, and the Indians are entitled to recover for the resulting loss. In principle it is as if the lands had been disposed of conformably to the act of 1889 and the net proceeds placed in the trust fund created by § 7, and the Government then had used the money, not for the benefit of the Indians, but for some wholly different purpose. That the wrongful disposal was in obedience to directions given in two resolutions of Congress does not make it any the less a violation of the trust. The resolu-

tions, unlike the legislation sustained in *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307, and *Lone Wolf* v. *Hitchcock*, *Id.* 553, 564, 568, were not adopted in the exercise of the administrative power of Congress over the property and affairs of dependent Indian wards, but were intended to assert, and did assert, an unqualified power of disposal over the lands as the absolute property of the Government. Doubtless this was because there was a misapprehension of the true relation of the Government to the lands, but that does not alter the result.

The Court of Claims gave no effect to the proviso to § 6, and the findings afford no basis for separating the damages rightly recoverable from those erroneously assessed on account of lands disposed of under preëmption and homestead entries allowed prior to the act of 1889. The case must therefore be remanded for a reassessment of the damages.

By reason of a contention advanced in the briefs, it is well to observe that the damages should be assessed on the basis of the prices which would have been controlling had the act of 1889 been rightly applied.

The judgment is reversed, and the case is remanded for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE MCKENNA and MR. JUSTICE DAY dissent.

CHICAGO, BURLINGTON & QUINCY RAILROAD CO. *v.* HALL.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 249. Submitted April 21, 1913.—Decided June 9, 1913.

Property exempted under the laws of the State of the bankrupt cannot be garnisheed in another State where similar property is not exempted under a judgment obtained within four months of the filing of the petition; and, after notice of the bankruptcy proceedings, the garnishee is not protected in paying over under the judgment by the full faith and credit provision of the Federal Constitution.

A state law relating to debts which is contrary to the provisions of the Federal Bankruptcy Act is nullified thereby, and when so nullified is not entitled to full faith and credit in the courts of other States under the Federal Constitution.

While title to property exempted under § 70f does not vest in the trustee, it does pass to him as part of the bankrupt's estate for the purposes named elsewhere in the statute, including the duty of segregation, identification and appraisal.

Section 67f does not defeat rights in exempt property acquired by contract or waiver of exemption; but where, as in this case, there has been no waiver, no rights can be acquired. *Lockwood* v. *Exchange Bank*, 190 U. S. 294, distinguished.

The decisions of the state and lower Federal courts in regard to annulment of liens on exempt property have been conflicting, and this court now holds that § 67f annuls all such liens obtained within four months of the filing of the petition, both as against the property which the trustee takes for benefit of creditors and that which may be set aside to the bankrupt as exempt. *In re Forbes*, 186 Fed. Rep. 76, approved.

88 Nebraska, 20, affirmed.

HALL, a resident of Douglas County, Nebraska, was employed by the Railroad as switchman in its yards in Omaha. His wages were exempt from garnishment by the laws of Nebraska. In July, 1907, he was insolvent, and

in that month while temporarily in the State of Iowa, two proceedings were instituted against him, in which he was personally served, and the Railroad, which owed him $122 as wages, was garnisheed. In one of these cases Rawles sued on an open account for $54.20, the Railroad being required to answer on August 10th. In the other, Torrey, holding a judgment for $22.40 rendered in 1894, served a summons of garnishment on the Railroad requiring it to answer on August 27, 1907.

While these proceedings were pending in the Iowa courts, Hall returned to Nebraska, and, on August 7, 1907, he was, on his own application, adjudged a bankrupt, his wages being claimed as exempt, and the two Iowa plaintiffs included in his list of creditors. Notice of the bankruptcy proceeding was given to them and to the Railroad.

Thereafter, on August 10 the Railroad answered in the Rawles suit admitting that it owed Hall $122, and a judgment was accordingly entered against the Railroad as garnishee for $61.60. On August 27, it answered in the Torrey suit and the court entered judgment against it as garnishee for $56.91. Hall, in the bankruptcy proceedings had asked that, as allowed by the laws of Nebraska, his wages be set apart as exempt and filed a petition praying that the Railroad should be summarily ordered to pay him the amount due for work done in June and July, 1907. The application was resisted by the Railroad and was denied by the court, which held, on the authority of *Ingram* v. *Wilson*, 125 Fed. Rep. 913, that the Bankruptcy Court could determine that the property was exempt but had no jurisdiction to compel its payment.

In view of that ruling Hall made a further application to have the $122 set off to him as exempt. An order to that effect was passed by the Referee. Hall was discharged as a bankrupt in April, 1908, and then sued the Railroad and recovered judgment, which was affirmed

by the Supreme Court (88 Nebraska, 20), and the case was brought here.

Mr. T. Byron Clark and *Mr. Arthur R. Wells* for plaintiff in error.

Mr. J. O. Detweiler for defendant in error.

Mr. Justice Lamar, after making the foregoing statement of facts, delivered the opinion of the court.

Hall, a married man, head of a family and insolvent, worked as a switchman for the railroad company in Nebraska, his wages being exempt from garnishment by the laws of that State. While temporarily absent in Iowa, two suits were there brought against him, summons of garnishment being served upon the Railroad's agent in Iowa where it had been held that the Nebraska exemption statute had no extra-territorial effect.

While these two suits were pending in Iowa, Hall returned to Nebraska, was adjudged a bankrupt, and claimed his wages as exempt. No defense was made to the Iowa suits, and in both cases judgment was entered against the Railroad as garnishee. For this reason it refused to pay Hall when he demanded the money, which had been set apart to him as exempt by the Referee. He then sued the company and recovered a judgment, which was affirmed by the Supreme Court of Nebraska. The Railroad sued out a writ of error to test its liability in this class of cases, which it insists are constantly arising, because of the employment of many persons on its lines, extending into different States, with varying garnishment laws. It contends that the laws of Iowa do not recognize the Nebraska exemption of wages from garnishment; that Hall was personally served in the Iowa suits, and that the judgments therein entered against the Railroad as garnishee

are unreserved and binding; that to compel it to pay Hall and these Iowa plaintiffs also is to impose upon it a double liability and to deny to the judgments of the Iowa courts the full faith and credit to which they are entitled under the Federal Constitution.

But if they were nullified by § 67f of the Bankruptcy Act they are entitled to no faith and no credit. That they were so nullified is Hall's contention; for he insists that if there was a lien against his wages it was obtained by garnishment served within four months of his bankruptcy and discharged by virtue of the provisions of § 67f, which declares that "all . . . liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same and shall pass to the Trustee as a part of the estate of the bankrupt."

The Railroad on the other hand, contends that under § 70 the trustee acquires no title "to property which is exempt," and that liens thereon are not discharged by § 67f, since that section has reference only to liens on property which can "pass to the trustee as a part of the estate of the bankrupt."

On this question there is a difference of opinion, some state and Federal courts holding that the Bankruptcy Act was intended to protect the creditors' trust fund and not the bankrupt's own property and that, therefore, liens against the exempt property were not annulled even though obtained by legal proceedings within four months of filing the petition. *In re Driggs*, 171 Fed. Rep. 897; *In re Durham*, 104 Fed. Rep. 231. On the other hand, *In re Tune*, 115 Fed. Rep. 906 and *In re Forbes*, 186 Fed. Rep. 79, hold that § 67f annuls all such liens, both as against the

property which the trustee takes and that which may be set aside to the bankrupt as exempt.

This view, we think, is supported both by the language of the section and the general policy of the act which was intended not only to secure equality among creditors, but for the benefit of the debtor in discharging him from his liabilities and enabling him to start afresh with the property set apart to him as exempt. Both of these objects would be defeated if judgments like the present were not annulled, for otherwise the two Iowa plaintiffs would not only obtain a preference over other creditors, but would take property which it was the purpose of the Bankruptcy Act to secure to the debtor.

Barring exceptional cases, which are specially provided for, the policy of the act is to fix a four months period in which a creditor cannot obtain an advantage over other creditors nor a lien against the debtor's property. "All liens obtained by legal proceedings" within that period are declared to be null and void. That universal language is not restricted by the later provision that "the property affected by the . . . lien shall be released from the same and pass to the Trustee as a part of the estate of the bankrupt." It is true that title to exempt property does not vest in the trustee and cannot be administered by him for the benefit of the creditors. But it can "pass to the Trustee as a part of the estate of the bankrupt" for the purposes named elsewhere in the statute, included in which is the duty to segregate, identify and appraise what is claimed to be exempt. He must make a report "of the articles set off to the bankrupt, with the estimated value of each article" and creditors have 20 days in which to except to the Trustee's report. Section 47 (11) and General Orders in Bankruptcy, 17. In other words, the property is not automatically exempted but must "pass to the Trustee as a part of the estate"—not to be administered for the benefit of creditors, but to enable him to perform

the duties incident to setting apart to the bankrupt what, after a hearing, may be found to be exempt. Custody and possession may be necessary to carry out these duties and all levies, seizures, and liens, obtained by legal proceedings within the four months, that may or do interfere with that possession are annulled, not only for the purpose of preventing the property passing to the trustee as a part of the estate, but for all purposes, including that of preventing their subsequent use against property that may ultimately be set aside to the bankrupt. This property is withdrawn from the possession of the Trustee not for the purpose of being subjected to such liens, but on the supposition that it needed no protection inasmuch as they had been nullified.

The liens rendered void by § 67f are those obtained by legal proceedings within four months. The section does not, however, defeat rights in the exempt property acquired by contract or by waiver of the exemption. These may be enforced or foreclosed by judgments obtained even after the petition in bankruptcy was filed, under the principle declared in *Lockwood* v. *Exchange Bank*, 190 U. S. 294. But Hall did not waive his exemption in favor of the Iowa plaintiffs and they had no right against his wages, except that which was obtained by a legal proceeding within four months of the bankruptcy. Those liens having been annulled by § 67f of the Bankruptcy Act, furnished no defense to the Railroad when sued by Hall for his wages, earned in Nebraska, exempt by the laws of that State, and duly set apart to him by the Referee in Bankruptcy. The judgment of the Supreme Court of Nebraska is

Affirmed.

AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE, *v.* MILLER, AGENT OF THE FIRST NATIONAL BANK OF MACON, GEORGIA.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 325. Argued May 9, 1913.—Decided June 9, 1913.

When a bank has performed the dual function of collecting and crediting a check the transaction is closed; and, in the absence of fraud or mutual mistake, the transaction is equivalent to payment in usual course as though presented to another bank and paid over the counter. *National Bank* v. *Burkhardt*, 100 U. S. 686.

While knowledge of an officer of a bank of a fact which it is his duty to declare, and not his interest to conceal, is to be treated as that of the bank; where it is his interest to conceal such knowledge the law does not, by a fiction, charge the bank with such knowledge.

There is a presumption that an officer of a bank will disclose his knowledge of matters which affect the bank and which it is not to his personal interest to conceal; and there is also presumption that he will not disclose those matters of which he has knowledge and which it is his interest to conceal, including his own bankruptcy and indebtedness to other banks.

A bank, on which the president of another bank just before his own bankruptcy drew a check in favor of the latter, cannot, after having paid the check by crediting it to the payee bank, cancel the credit and retain the money on the ground that the payee bank is to be imputed with constructive knowledge of its president's bankruptcy.

185 Fed. Rep. 338, affirmed.

THE facts, which involve the right of a bank to cancel payments made on a bankrupt's check on the ground of constructive knowledge of the bankruptcy on the part of the payee, are stated in the opinion.

Mr. John M. Gaut, with whom *Mr. J. S. Pilcher* was on the brief, for plaintiff in error:

The Nashville Bank, at the time when it made the book entries and mailed the letter of advice, was in total ignorance of the bankrupt's insolvency, suspension and bankruptcy.

Having acted under mistake of fact, that bank had the right, as between itself and the bankrupt or any one standing in his shoes, to revoke the book entries and make the set-off. *Re Farmers' Bank*, 13 Fed. Rep. 361; *Re Dickinson*, 5 Fed. B. R. 483; *Union Bank* v. *McKay*, 102 Fed. Rep. 662; *Kelley* v. *Solare*, 9 Meeson & Welsby, 54; *Bell* v. *Gardner*, 4 Man. & Gran. 10; *French* v. *DeBow*, 38 Michigan, 708; *Noble* v. *Doughten*, 72 Kansas, 336.

The Nashville Bank also had the right, as between itself and the First National, to revoke the book entries on the ground of mistake. The latter bank, having given no value for the check, and suffered no injury by its reception, the equities of the former were superior. *Guild* v. *Baldridge*, 2 Swan (Tenn.), 295; *Bank of Repub.* v. *Baxter*, 31 Vermont, 101; 5 Cyc. of Law & Pro. 542b. The check was not payment, but only means of payment.

It was a wrong upon the Nashville Bank for the bankrupt, in his condition of insolvency, to have drawn and delivered the check, and especially wrong, after his act of notorious insolvency, not to have notified that bank of the fact. Kerr on Fraud and Mistake, 109; *Mitchell* v. *Warden*, 20 Barb. 253; *Pegulus* v. *Taylor*, 38 Barb. 375; *Choffer* v. *Fort*, 2 Lansing, 81; *Sharkey* v. *Mansfield*, 90 N. Y. 227.

If the First National knew of his state of insolvency, it was *particeps criminis* in not informing the Nashville Bank. *Peterson* v. *Union Bank*, 52 Pa. St. 206.

The First National, independent of any imputation to it of the bankrupt's knowledge, did have knowledge of the insolvency before the contract of deposit was consummated.

The First National, at the time it received the check,

knew of this indebtedness by the imputation of Plant's knowledge. *St. Louis R. Co.* v. *Johnston*, 133 U. S. 566.

The doctrine of imputation exists in all cases where the agent is acting within the scope of his authority. The doctrine does not rest on a presumption that the agent will communicate his information to his principal.

Whether the act of payment itself is considered or the results of the payment, his interests certainly were not adverse to, but were concurrent with, those of the First National.

Even if the doctrine of imputation did rest on the probability of the agent communicating his knowledge to his principal, there was no improbability that the bankrupt would have communicated to the other officers of the bank, had there been any occasion to do so, the fact that he owed another bank.

Mr. Sloss D. Baxter for defendant in error.

Mr. Justice Lamar delivered the opinion of the court.

R. H. Plant, of Macon, Georgia, kept a deposit account with the American National Bank of Nashville, and, on May 16, 1904, was indebted to it in the sum of $50,000 on paper which matured two or three weeks later. He was generally regarded as a wealthy man, but was in fact insolvent. While so insolvent he, on May 13, 1904, gave to the First National Bank of Macon, of which he was President, a check for $3,000 on account of an indebtedness due by him to it.

The Macon Bank at once mailed the check to the Nashville Bank with instructions to place it to the credit of the Macon Bank. The check was received by the Nashville Bank at 8 o'clock Monday morning, May 16. The letter was opened shortly after nine o'clock, and was credited to the Macon Bank's account about 11 o'clock A. M.,—an hour or so after a petition in bankruptcy had

been filed against Plant in Macon. His failure precipitated a run on the Macon Bank, and, the same day, by direction of the Comptroller of the Treasury, a Receiver was appointed for it under § 5234, Rev. Stat.

The Nashville Bank was not advised of either of these failures, and about 2 o'clock it charged the $3,000 check to Plant's account and the same day mailed to the Macon Bank a letter stating that its account had been credited with $3,000. Four or five days later, having learned of Plant's bankruptcy, it charged off the $3,000, claiming that Plant's insolvency, on May 16, gave to the Nashville Bank the right of set-off even as against the unmatured drafts. *Carr* v. *Hamilton,* 129 U. S. 252, 256.

The plaintiff was subsequently appointed agent of the Macon Bank under Rev. Stat., § 5234, and brought suit against the Nashville Bank for the recovery of the $3,000. Most of the facts were agreed upon, but much evidence was taken for the purpose of showing that the Macon Bank had notice of Plant's insolvency, and at the conclusion of the testimony each party moved that a verdict be directed in its favor. *Beuttell* v. *Magone,* 157 U. S. 154. The court instructed the jury to find for the plaintiff. The judgment was affirmed (185 Fed. Rep. 338) by the Circuit Court of Appeals.

There are some disadvantages of sending a check for collection directly to the bank on which it is drawn, but when such bank performs the dual function of collecting and crediting the transaction is closed and, in the absence of fraud or mutual mistake, is equivalent to payment in usual course. *National Bank* v. *Burkhardt,* 100 U. S. 686, 689. In the present case it was as though an officer of the Macon Bank had presented the check to the Teller of the Nashville Bank and on receiving the money had paid it back over the counter for deposit to the credit of the Macon Bank.

The Nashville Bank, however, claims that there was

here the element of fraud and mistake which entitles it to cancel the credit; insisting that the Macon Bank, having notice that Plant was insolvent, could not collect the check for $3,000 without notifying the Nashville Bank of such insolvency so that it might assert its superior right under its banker's lien and set off the $3,000 deposit against Plant's debt of $50,000.

The law undoubtedly permits an insolvent to prefer one creditor over another and allows such creditor to retain such preferential payment against all persons,—except the Trustee in Bankruptcy, when the payment has been made within four months of the filing of the petition in bankruptcy and with reasonable cause to believe that a preference would be effected. We do not enter upon the question as to whether this right to be preferred is modified by principles of equity or whether the holder of a check, in presenting it to a bank for payment, is bound to give information that the bank's depositor and debtor was insolvent. For in this case it distinctly appears that the officers of the Macon Bank did not know that Plant was insolvent at the time he gave the check, at the time they mailed the check or at the time it was received by the Nashville Bank, nor did they know that Plant was indebted to the Nashville Bank. Such notice, however, is sought to be imputed to the Macon Bank because Plant was its President, and it is argued that what he knew the bank must be considered as knowing.

This presents another phase of the oft-recurring question as to when and how far notice to an agent is notice to his principal. In view of the many decisions on the subject it is unnecessary to do more than to apply them to the facts of this case. If Plant, within the scope of his office, had knowledge of a fact which it was his duty to declare and not to his interest to conceal, then his knowledge is to be treated as that of the bank. For he is

then presumed to have done what he ought to have done and to have actually given the information to his principal.

But if the fact of his own insolvency and of his personal indebtedness to the Nashville Bank were matters which it was to his interest to conceal, the law does not by a fiction charge the Macon Bank, of which he was President, with notice of facts which the agent not only did not disclose, but which he was interested in concealing.

Plant was a private banker in Macon and as such indebted to the First National Bank of Macon, of which he was President and so far dominated as to compel it to take care of the large balances against him in the clearing house, frequently more than 50 per cent. of the $200,000 capital of the Macon Bank. On May 13th Plant was indebted to the Macon Bank on this account between $75,000 and $100,000. A National Bank Examiner was in the city and it was expected that he would examine the books of the Macon Bank within a few days, when this illegal overdraft by the President would appear. Rev. Stat., § 5200; *Evans* v. *United States*, 153 U. S. 584. Plant thereupon gave the Bank checks and commercial paper to pay the balance. It was to his personal interest to conceal any fact which would prevent the Macon Bank from receiving paper in satisfaction of a debt which had been unlawfully contracted by reason of his official position. An element of that interest was that he should conceal not only the fact of his insolvency but the fact of his indebtedness to the Nashville Bank, lest the Macon Bank should thereby refuse to take the $3,000 check at its face value. Without, therefore, inquiring as to what would have been the duty of the Macon Bank had it known of Plant's insolvency and indebtedness on the $50,000 drafts, we hold that as it had no such knowledge in fact it was not charged with such knowledge in law. The judgment is

Affirmed.

STUDLEY, TRUSTEE IN BANKRUPTCY OF COLLVER TOURS COMPANY *v.* BOYLSTON NATIONAL BANK.

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

No. 899. Argued April 14, 1913.—Decided June 9, 1913.

Nothing in the Bankruptcy Act deprives a bank with which the insolvent is doing business of the rights of any other creditor taking money without reasonable cause to believe that a preference will result.

In this case it having been found that the deposits and payments of notes were not made to enable the bank to secure a preference by the right of set-off, the bank had a right under its agreement to set off the deposits against the notes within four months of the bankruptcy. *New York County Bank* v. *Massey*, 192 U. S. 138.

Section 68a of the Bankruptcy Act did not create the right of set-off but recognized its existence and provided a method for its enforcement even after bankruptcy.

The right of set-off is recognized by the Bankruptcy Act and it cannot be taken away by construction because of possibility of its abuse; nor will the act be so construed by denying such right as to make banks hesitate to carry on business and thus produce evils of serious consequence.

200 Fed. Rep. 249, affirmed.

THE facts, which involve the right of a bank to accept in good faith payments from an insolvent, are stated in the opinion.

Mr. J. Butler Studley, with whom *Mr. William H. Dunbar* and *Mr. Stewart C. Woodworth* were on the brief, for appellant.

Mr. Hollis R. Bailey for appellee.

MR. JUSTICE LAMAR delivered the opinion of the court.

The Collver Tours Company was engaged in the business of conducting touring parties around the world, charging

a lump sum for the tickets, which were paid for in advance. It had expended about $40,000 in advertising, which it carried on its books as an asset, and since the character of its business did not involve the possession of tangible property, it had nothing except cash on hand, good-will and its earning capacity as a means of paying debts.

In 1907 the company opened an account with the Boylston National Bank, with which it subsequently did all of its banking business of depositing, checking and borrowing. It notified the Bank in 1909 that it had no other liabilities except what was due to the Bank, and it was given a line of credit of $25,000. It borrowed that sum on the promise to repay it that year, but as it used a part of its funds to open a Letter-of-Credit Account in the Bank, it was permitted to renew the notes. In December, 1909, it made a statement to the Massachusetts Corporation Commission which showed that the company did not have assets sufficient to pay its liabilities, and an officer of the Bank saw this statement, but the representative of the Collver Company went over the matter with the bank officers, made an explanation and borrowed an additional sum of $5,000 in the spring or summer of 1910. During the year 1910 the debt of $25,000 was reduced to $10,000, went back to $25,000, was reduced again to $15,000 and increased to $30,000—the Collver Company making to the Bank encouraging statements of its prospects and of an anticipated large sale of tickets for round-the-world tours. One note for $5,000 was paid and the then debt of $25,000 was represented by five notes for $5,000 each, maturing Sept. 12, 20, 30, Oct. 3 and 14th.

The balances in bank to the credit of the Collver Company fluctuated greatly from time to time, varying from almost nothing up to as high as $54,000. As a result of sales of tickets, the company deposited large sums in August and September and smaller sums in October and November. During that period $22,500 was paid to the

Bank, the three notes due September 12, 20 and 30 being paid by checks on the Boylston National Bank. The note for $5,000 due Oct. 3, was charged to the Company's account and on the same day a renewal note for $2,500 was discounted. The note for $5,000 which fell due on October 14 was also charged to the deposit account according to the custom of the Bank, of which the Collver Company had notice and to which it assented. On the date of the payment by such charging of the last note to the account the Company had $19,000 left to its credit. The Collver Company continued to make deposits and to draw checks, and applied for a new loan, which was refused by the Bank. On Dec. 16, 1910, a petition in bankruptcy was filed against the Company and after his election the Trustee brought suit against the Bank to recover the $22,500, claiming that it had notice of the Collver Company's insolvency and that the payments of $22,500 were transfers which had operated to give the Boylston Bank a preference within four months of filing the petition.

In its answer the Bank alleged that it was informed and believed that the Company was doing a large and constantly increasing business and was in every way responsible; that the Company for a long time kept its general deposit with the Bank and was constantly making deposits therein, some large, some small, upon all of which the Bank had a lien and a right of set-off and that "this right of set-off was not affected by the fact, if it be a fact, that the Company was at any of the times of the exercise of said right of set-off, insolvent;" and it claimed that the exercise of its right of set-off did not and could not constitute a preference within the meaning of the Bankruptcy Act or any amendment thereto.

The case was tried by the Referee, who sustained the Bank's claim of set-off, holding that the payments were not transfers; or,—if transfers—that the Trustee could not

recover the money because the bank had no reasonable cause to believe that the payment of the notes would operate as a preference. On exceptions to the report it was sustained on the ground that the deposits had been honestly made in due course of business and that the defendant, by virtue of its banker's lien and right of set-off, could retain the money. That judgment was affirmed on the same ground by the Circuit Court of Appeals. (200 Fed. Rep. 249.) The case was then brought here by the Trustee, who insists that all the payments were transfers;—that if the notes charged to the account are not transfers certainly the giving of the three checks for $5,000 were transfers and that in receiving the same the Bank necessarily knew that it was obtaining a preference.

But if, as found by the Referee, the Bank had no reasonable cause to believe such transfers would effect a preference, the payments by checks for $15,000 drawn on the deposit account, are as much protected as if on the same dates similar checks had been given in payment of like amounts due another bank with which the Collver Company kept no account. For there is nothing in the statute which deprives a bank, with whom an insolvent is doing business, of the rights of any other creditor taking money without reasonable cause to believe that a preference will result from the payment. The Bankruptcy Act contemplates that by remaining in business and at work an insolvent may become able to pay off his debts. It does not prevent him from continuing in trade, depositing money in bank, drawing checks and paying debts as they mature, either to his own bank or any other creditor. It does provide, however, that if bankruptcy ensues all payments thus made, within the four months period, may be recovered by the Trustee, if the creditor had reasonable cause to believe that a preference would be thereby effected.

In this case the Referee found as a fact that the Bank

had no reasonable cause to believe that a preference would result. The District Judge made no finding of fact, though in his opinion, which cannot be considered as a finding of fact, he did state that the Bank had a right to examine the company's books and could have discovered that a preference would result. The Circuit Court of Appeals made no ruling on this subject, and we, therefore, pass to the consideration of the right of set-off in the light of the finding by the Referee, by the District Judge, and by the Court of Appeals that the deposits were honestly made in due course of business and without any intent to prefer the Bank.

The money so deposited was the proceeds of the sale of tickets to a large party of round-the-world tourists and was put in bank, not for the purpose of preferring it, but in the expectation of being used for carrying on the business in the future as in the past. Indeed, the payments were made with the statement that the company would expect the Bank to discount other notes. We find nothing in the record to indicate that the deposits were made for the purpose of enabling the Bank to secure a preference by the exercise of the right of set-off. The case, therefore, comes directly within the decision in *New York County National Bank* v. *Massey*, 192 U. S. 138, where $3,884 deposited by an insolvent customer, in good faith, four days before the filing of the petition against him was allowed to the Bank by way of set-off on notes of the bankrupt held by it.

An effort is made to distinguish that case from this, by calling attention to the fact that here, by checks drawn on the account or notes charged to the account, the parties themselves voluntarily made the set-off before the petition was filed,—while in the *Massey Case* the Trustee, under the supervision of the Referee stated an account and allowed the set-off as permitted by § 68a, which provides "that in all cases of mutual debts, or mutual credits be-

tween the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

That section did not create the right of set-off but recognized its existence and provided a method by which it could be enforced even after bankruptcy. What the old books called a right of stoppage—what business men call set-off, is a right given or recognized by the commercial law of each of the States and is protected by the Bankruptcy Act if the petition is filed before the parties have themselves given checks, charged notes, made book entries, or stated an account whereby the smaller obligation is applied on the larger.

The banker's lien on deposits, the right of retention and set-off of mutual debts are frequently spoken of as though they were synonymous, while in strictness, a set-off is a counterclaim which the defendant may interpose by way of cross-action against the plaintiff. But, broadly speaking, it represents the right which one party has against another to use his claim in full or partial satisfaction of what he owes to the other. That right is constantly exercised by business men in making book entries whereby one mutual debt is applied against another. If the parties have not voluntarily made the entries and suit is brought by one against the other, the defendant, to avoid a circuity of action, may interpose his mutual claim by way of defense and if it exceeds that of the plaintiff, may recover for the difference. Such counterclaims can be asserted as a defense or by the voluntary act of the parties, because it is grounded on the absurdity of making A pay B when B owes A. If this set-off of mutual debts has been lawfully made by the parties before the petition is filed, there is no necessity of the Trustee doing so. If it has not been done by the parties, then, under command of the statute, it must be done by the Trustee. But there is nothing in § 68a which prevents the parties from voluntа-

rily doing, before the petition is filed, what the law itself requires to be done after proceedings in bankruptcy are instituted.

The Bank was indebted to the Collver Company as a depositor some $54,000 for money deposited in good faith in the usual course of business and with no purpose of enabling the Bank to secure the right of set-off. The Collver Company, on the other hand, was indebted to the Bank $25,000 on notes maturing at various dates. These were mutual debts, and if on the date the first note became due, the Collver Company had failed to pay it, the Bank could have enforced its banker's lien or its right of set-off, by applying $5,000 of the deposits in payment of the note which matured that day, and so on as each of the other notes became due. It cannot have been illegal for the parties on September 12, 20, 30, October 3 and 14 to do what the law would have required the Trustee to do in stating the account after the petition was filed on December 16, 1910. No money passed in either instance; for, whether the checks for $5,000 were paid or notes for $5,000 were charged, was, in either event, a book entry equivalent to the voluntary exercise by the parties of the right of set-off.

The Bankruptcy Act recognizes this right and it cannot be taken away by construction because of the possibility that it may be abused. The remedy against that evil is found in the fact that the Trustee is authorized to sue and recover if it is shown that after insolvency the money was deposited for the purpose of enabling a bank or other creditor to secure a preference. But to deny the right of set-off, in cases like this, would in many cases make banks hesitate to honor checks given to third persons, would precipitate bankruptcy and so interfere with the course of business as to produce evils of serious and far-reaching consequence.

Affirmed.

CAMP *v.* BOYD.

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

No. 71. Argued February 28, March 3, 5, 1913.—Decided June 9, 1913.

Parties in possession of land under titles from various sources and having the equitable, as well as the legal, title to a portion of it and the equitable, but not the legal, title to the remainder, may, under the circumstances of this case, properly invoke the aid of equity to restrain other parties from maintaining ejectment suits and to adjudicate the title to the entire tract in a single suit.

A court of equity ought to do justice completely and not by halves.

As a court of equity should prevent multiplicity of suits, it may, to this end, if obliged to take cognizance of a suit for any purpose retain it for all purposes even though required to determine purely legal rights otherwise beyond its authority.

While a term, such as "ground rents," used in a conveyance may not be the recognized equivalent of any legal estate in lands, the court may ascertain the recognized meaning given to it and resort to that as evidence of the intent of the parties using it and thus determine what effect ought in equity to be given to it.

The term "ground rents" as used in the deeds and proceedings involved in this case did not import merely the rents that were to accrue during the residue of a 99 year lease renewable forever, but included the reversion as well, it appearing that the entire beneficial interest of the owner of the ground rents and the reversion was undoubtedly the subject of the sale and within the contemplation of the buyer and seller.

Deeds made by a public officer in pursuance of a decree of the court which are defective in form by reason of a mistake made by such public officer will pass the title to the property intended to be conveyed, as harmful consequences should not fall upon purchasers, who, in reliance upon apparent regularity have paid their money for the property.

Equity regards that as done which ought to be done. It looks to the true intent and meaning, rather than to the form. It relieves of consequences of accident and mistake as well as fraud.

35 App. D. C. 159, affirmed.

THE facts, which involve the title, legal and equitable, to certain real estate in the City of Washington, District of Columbia, are stated in the opinion.

Mr. Hugh T. Taggart, with whom *Mr. Wm. E. Ambrose* was on the brief, for appellant.

Mr. R. Ross Perry, with whom *Mr. Wm. F. Mattingly*, *Mr. John B. Larner* and *Mr. R. Ross Perry, Jr.*, were on the brief, for appellees.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is an appeal from a decree of the Court of Appeals of the District of Columbia, affirming a decree of the Supreme Court, establishing the title of the complainants, (now appellees) to a lot of land in the City of Washington, and granting a perpetual injunction against the further prosecution of an action of ejectment that was brought by the appellant, Joseph Parker Camp, against Caleb C. Willard, the devisor of the complainants, to recover possession; and also enjoining Camp and all persons claiming under him from instituting any further proceedings at law or in equity for the possession of, or for asserting any claim to, the land. The cause was heard in the Supreme Court upon a demurrer to the bill of complaint, which was overruled (37 Wash. Law Rep. 14); and the defendant having elected to stand upon his demurrer, a final decree followed as of course. The decision of the Court of Appeals is reported 38 Wash. Law Rep. 374; 35 App. D. C. 159.

Both parties claim under Samuel Blodget, Jr., who owned the property in the early days of the Federal Capital. The bill of complaint sets forth the full history of the title, with copies of the instruments of conveyance and other documents necessary to a complete under-

standing of the controversy. All the facts hereinafter stated respecting the title are derived from the averments of the bill and from the documents filed with it and by reference made parts of it.

The property in question is described as—"Original lot numbered Twenty, in Square numbered two hundred and fifty four, in the City of Washington, in the District of Columbia, as the same is laid down on the ground plan or map of said city." This square is bounded by E and F Streets, and by 13th and 14th Streets, in the Northwest section; Lot No. 20 being on the southerly side of F Street.

Under the act of Congress entitled—"An act for establishing the temporary and permanent seat of the Government of the United States," passed July 16, 1790 (1 Stat. 130, c. 28), three Commissioners were appointed by President Washington, and they in the following year made a friendly agreement with the original land-holders, which resulted in laying out the city in squares and streets, and the subdivision of the squares; and, in the year 1792, a partition of the lands was made between the original proprietors and the Commissioners. In that division this lot was amongst those set off to the Commissioners, and it, with some adjoining lots, was sold by them to Blodget in the same year. But no conveyance was made to him, and he therefore acquired only an equitable interest.

Blodget about that time organized a lottery under the sanction of the Commissioners, and advertised it as done "By the Commissioners appointed to prepare the public buildings, &c., within the City of Washington for the reception of Congress, and for the permanent residence after the year 1800." It was announced as "A lottery for the improvement of the Federal City." It was stated that the sole design of the lottery was to facilitate other improvements together with the public buildings. The capital prize announced was—"One superb hotel, with

baths, outhouses, etc., etc., to cost fifty thousand dollars," with cash prizes aggregating $300,000 in addition. The advertisement stated that "The keys of the hotel, when complete, will be delivered to the fortunate possessor of the ticket drawn against its number," and that "One hundred dollars will be given for the best plan of an elegant and convenient hotel or inn, with hot and cold baths, stable," etc. The advertisement was subscribed "S. Blodget, Agent for the Affairs of the City." Large sales of tickets having been made by Blodget, and by Colonel William Deakins, Jr., who appears to have been his partner in the scheme, and some time having elapsed without a drawing being made, the Commissioners became uneasy because of their real or supposed responsibility for the prizes, whereupon Blodget and Deakins gave them a written declaration under seal, dated September 20, 1793, agreeing to indemnify the Commissioners from all claims and demands by reason of any prize to be drawn. Afterwards, and at the request of the Commissioners, Blodget, who appears to have been a large land owner in the District, made a mortgage or deed of trust, under date of January 28, 1794, to Thomas Johnson, Jr., and Thomas Peter, as Trustees, for securing the payment of the prizes and for the indemnity of Thomas Johnson, David Steuart, and Daniel Carroll, the Commissioners, their successors, etc. By the mortgage, Blodget transferred in fee to Thomas Johnson, Jr., and Thomas Peter—"all the lands and real estate and property of him the said Samuel Blodget situate and being within the Territory of Columbia, with their . . . appurtenances, and all the estate, right, title, etc., in law and in equity" of Blodget therein. The defeasance clause provided that Blodget should "pay all prizes and sums of money with which he is or may be chargeable, or for which he may be liable for or on account of the said lottery, and shall in all things save, indemnify and keep harmless the said Thomas Johnson, David

Steuart and Daniel Carroll, their successors, etc., against all suits," etc.

Thereafter, and in the year 1801, Blodget made three leases of as many several parcels of Lot 20. The lot has a frontage of 51 feet 11 inches upon the southerly side of F Street, and a depth of 159 feet running to an alley. One lease was dated April 13, 1801, and demised to James Daugherty the easterly portion of the whole lot, having a frontage of 20 feet upon the street, and running the full depth to the alley; the second lease was to Edward Frethy, dated April 14, 1801, and covered the westerly portion of the lot, having a frontage of 19 feet 11½ inches and running of that width to the alley; the third lease, covering the intervening portion of the whole lot, having a frontage of 11 feet 11 inches on the street, and running the full depth, was dated April 15, 1801, and made to Edward Fennell. The Daugherty and Frethy leases were recorded within the year. The Fennell lease, for some reason, was not promptly acknowledged or recorded, and therefore a new lease was made by Blodget to Fennell, dated April 20, 1804, and recorded a few days later. These leases all ran for ninety-nine years from their respective dates in 1801, the terms, however, "to be renewable forever." They were sealed instruments, elaborate in form, signed and acknowledged by lessor and lessee in each instance, and recorded in the Land Records of the District of Columbia. A copy of the Daugherty lease is set forth in the margin.[1]

---

[1] [Copy of Lease—Samuel Blodget to James Daugherty.]

This indenture made the thirteenth day of April in the year of our Lord one thousand eight hundred and one Between Samuel Blodget of Philadelphia State of Pennsylvania of the one part and James Daugherty of the City of Washington in the Territory of Columbia of the other part witnesseth that the said Samuel Blodget for and in consideration of the payment of the rent and performance of the Covenants hereinafter mentioned on the part of the said James Daugherty his executors administrators and assigns to be paid and performed Hath

The Frethy lease was substantially like it. The Fennell lease of April 20, 1804, contained a recital of the previous lease to him and the failure to record it, and the making

---

demised granted leased and to farm let*t* and by these presents Doth demise grant lease and to farm let*t* unto the said James Daugherty his executors administrators and assigns. All that Lot*t* of twenty feet front on F Street in Lot*t* number twenty in square number two hundred and fifty four in the City of Washington aforesaid Together with all improvements, alleys, ways water & water courses privileges, easements and emoluments belonging or appertaining to said Lott. To have and to hold said lot*t* of ground with the appurtenances unto the said James Daugherty his executors administrators and assigns from this the thirteenth day of April above mentioned for and during and unto the full term of Ninety nine years from thence next ensuing and fully to be compleated and ended yielding and paying therefor yearly and every year during said term unto the said Samuel Blodget his heirs and assigns the yearly rent or sum—forty dollars current money of the United States free and clear of all taxes assessments or public dues nor or hereafter to be laid taxe- or assessed on sd. demised premises in annual payments on the said thirteenth day of April in each and every year—the said term of ninety nine years to be renewable forever. Provided always and it is the true intent and meaning of these presents that if it shall happen that if the said yearly rent shall be in arrear and unpaid by the space of forty days next after the time on which the same is above reserved to be paid, then it shall and may be lawful to and for the said Samuel Blodget his heirs or assigns unto the said demised premises or any part thereof in the name of the whole to re-enter and the same to have again repossess occupy and enjoy as in his or their former estate until all such arrearages of rent with legal interest thereof and all and every cost charge and expenses incurred by the said Samuel Blodget his heirs or assigns by reason of the non-payment of said rent shall be fully satisfied and paid or make distress therefor at his or their option and also if the said yearly rent Shall be in arrear and unpaid by the space of sixty days next after the time on which the same is above reserved to be paid then it may be lawful to and for the said Samuel Blodget his heirs and assigns unto the said demised premises or any part thereof in the name of the whole to re-enter and the same to have again repossess occupy and enjoy as in his or their former estate and that then in such case this Indenture and every clause matter and thing therein contained shall from henceforth be utterly void and of no effect and the said James Daugherty for himself his executors adminis-

of the present instrument in the place of it; the demise then proceeded in substantially the same form as in the other leases.

The Daugherty lease reserved a yearly rent of $40

---

trators and assigns doth covenant and agree to and with the said Samuel Blodget his heirs and assigns well and truly to pay the above reserved yearly rent or sum of forty dollars at the time before within mentioned and also that he the said James Daugherty his executors administrators and assigns shall and will erect and build a good and substantial dwelling house to be compleated and tenantable in the course of the present year at farthest which if not complied with he the said James Daugherty binds himself his heirs executors and administrators to satisfy and pay unto the said Samuel Blodget his heirs and assigns the damages which shall or may accrue to him or them for such compliance and moreover in case *of* a defalcation shall be made in payment of the rent as above mentioned then and in such case the improvements which shall be made on the above demised premises shall belong unto the said Samuel Blodget his heirs and assigns—and the said Samuel Blodget for himself his heirs and assigns doth covenant promise and agree to and with the said James Daugherty his heirs executors administrators and assigns that he the said James Daugherty his heirs or assigns at any time or times during the continuances of this present or future demise on the request and at the proper costs and charges of the said James Daugherty his heirs, or assigns and on his or their payment or tending in payment to the said Samuel Blodget his heirs or assigns the principal sum of five hundred dollars shall and will make and execute a deed in fee simple for said Lot*t* and premises above demised to the said James Daugherty his heirs and assigns forever with such clause of General Warrant*ee* as he or they may require. It is further agreed that the said James Daugherty his heirs or assigns may pay unto the said Samuel Blodget his heirs or assigns any proportion of the principal of five hundred dollars not less than one tenth of that sum and so much of the principal as shall be paid so much in proportion of the rent shall be lessened reserving unto the said Blodget his heirs or assigns all penalties and forf-itures within before mentioned until the whole sum of five hundred dollars, is paid when the whole rent shall cease. In witness whereof the said parties have hereunto interchangeably set their hands and seals the day and year first above written.

SAM BLODGET. [SEAL.]
JAMES DAUGHERTY. [SEAL.]

Signed, sealed and delivered, etc.

payable annually, with an option of purchase in fee at the price of $500; the Frethy lease was the same in these respects; the Fennell lease called for a rent of $24 per annum and a purchase price of $300. The leases were alike in that they provided for terms of 99 years each, with a right of perpetual renewals; with right of reëntry by the lessor for 40 days' default in payment of the rent, or distress at his option; two of them provided that for 60 days' default in the payment of the rent the lessor might reënter and terminate the lease; each lease contained an option for a purchase in fee at a price of which the annual rent was equivalent to 8%; each required the lessee to erect a dwelling house upon the premises during the year of the making of the lease. The Fennell lease differed in containing no provision for forfeiture of the term on nonpayment of the rent, and in some minor particulars.

In October, 1802, one Robert S. Bickley began suit against Samuel Blodget and others by bill in Chancery in the Circuit Court for the District of Columbia, setting up the history of the above-mentioned lottery; the public advertisement of the scheme; that Bickley, in reliance upon the proposed plan, purchased a ticket; and that the sale and disposal of the tickets was intrusted wholly to Blodget and to William Deakins, Jr., since deceased. The bill set out the making of the indemnity agreement of September 20, 1793, by Blodget and Deakins, and the making of the mortgage by Blodget on January 28, 1794, to Thomas Johnson, Jr. (since deceased), and Thomas Peter (still surviving), covering all the lands of Blodget within the Territory of Columbia. That he, Bickley, drew as a prize the "Superb Hotel with baths, outhouses, &c., &c., to cost fifty thousand dollars," as offered and promised in the advertisement, plan and scheme; "that the said hotel has never been finished and the keys thereof delivered to your orator as by the said scheme and plan of the lottery he was assured and promised it should be."

That in the year 1798 he, Bickley, instituted a suit at law in the Supreme Court of the Commonwealth of Pennsylvania, against Blodget, to recover damages by reason of his breach of undertaking; that this suit being at issue, and a jury impanelled to try the issue joined therein, it was mutually agreed between Bickley and Blodget, with the leave of the court, that the jury should be discharged from giving their verdict, and should be empowered to act as referees, to determine and order what sum of money, if any, should be paid by Blodget to Bickley, and if they thought proper, to order titles and conveyances and other acts by either party to the other as justice should require; whereupon the jury as referees awarded that Blodget should convey to Bickley, in fee simple, the hotel and the lots of ground belonging to it, and should also pay to Bickley the sum of $21,500 with costs, for the payment of which, and the performance of the award, the property in the City of Washington mortgaged by Blodget to the Commissioners was by the terms of the award to be first resorted to; that upon the report of the jury as referees the court gave judgment in favor of Bickley against Blodget, for said sum of $21,500 and costs, and that the report of the jury as referees should be in all its other parts confirmed and carried into full and complete execution. That by virtue of the deed of trust of January 28, 1794, all the real property which Blodget had within the limits of the Territory of Columbia was pledged and made answerable to make good to the fortunate adventurers the prizes they should draw in the lottery, and "that your orator has his claim to be paid out of that property still further confirmed by the award and the judgment hereinbefore set forth." The bill then set forth that the "lands and real estate and property" of Blodget situate within the Territory of Columbia "as well in law as in equity, as by the said deed is expressed, consisted of," etc., following with a detailed enumeration of many tracts and parcels

of land, among which is—"the following property which the said Blodget purchased of the said Commissioners at the times hereinafter mentioned, which being fully paid for by the said Blodget, certificates in due form have regularly issued therefor, but the Commissioners meaning to hold the same as security to themselves and to the fortunate adventurers in the said lottery, have not delivered the same to the said Blodget or caused them to be recorded, but whilst they remained in office held the same, and when they went out of office the same fell into the hands of Thomas Munroe, Superintendent of City Affairs, who now holds them, that is to say, Lots numbered twenty and twenty-one in square 254 in the said City, sold to the said Blodget on the 8th day of October, 1792," etc., etc. The bill specified by lot and square numbers those lots that had been appropriated by Blodget for the hotel, averring that the legal title to some of them was in Munroe, Superintendent for City Affairs, certain of them having been conveyed by Blodget to the Commissioners, others having remained in their ownership, and the legal title to the remainder being in Blodget. Sundry deeds of conveyance made by Blodget to various purchasers for portions of the lands covered by the deed of trust were then set forth. In this connection the leases made by Blodget to Daugherty and Frethy, respectively, in April, 1801, for parcels of lot No. 20 in Square 254, were set out, and these lessees were made parties defendant. The Fennell lease was not mentioned, apparently because it was not upon record at the time of the filing of the bill. The prayer was, that Blodget might be required to convey to Bickley the hotel with the lots pertaining thereto; that Munroe as Superintendent of the City should be compelled to convey to Bickley that portion of the lots pertaining to the hotel of which he held the certificates; and that the residue of the property set forth in the bill of complaint, or so much thereof as necessary, should be sold

to pay the money adjudged to Bickley by the award and judgment in the Pennsylvania suit.

Annexed to this bill of complaint as exhibits were copies of the deed of trust of January 28, 1794, a transcript of the proceedings in the Pennsylvania suit, and other documents sustaining and supplementing the averments of the bill. Among the parties named as defendants were Blodget, Thomas Munroe, Superintendent for City Affairs, Frethy, Daugherty, and other grantees of Blodget. Frethy was served with process and filed an answer setting up that he had assigned his lease to one Betz. Daugherty being a non-resident, notice appears to have been published against him. Blodget answered, admitting in part and denying in part the averments of the bill. Annexed to the answer was a formal admission of "the execution of the various exhibits at this time filed by complainant, and that they may be read in evidence." Thomas Munroe, as Superintendent of the City of Washington, filed an answer admitting the principal averments of the bill and setting up that he, as Superintendent, had in his hands the certificates of sale evidencing Blodget's purchases of various lots from the former Commissioners; that the Commissioners had withheld the certificates from Blodget's possession "as security for the fortunate adventurers in the said lottery who should have claims against the said Blodget." Lot 20 in Square 254 does not appear among the lots enumerated in this connection. Thomas Peter, the surviving trustee under the mortgage or deed of trust of January 28, 1794, does not appear among the parties named as defendants in the original bill filed by Bickley, but he filed an answer admitting the execution of that deed, and that it was made at the instance of the then Commissioners of the City of Washington to secure the punctual payment of the prizes drawn in the lottery therein mentioned; and—"That this defendant knows not what property is included or compre-

hended by the said deed, but this defendant further answering admits that whatever property he does hold in virtue of the said deed is held by him in trust for the purposes in the said deed mentioned and subject to any order or decree which this Honorable Court shall make respecting the same." Thereafter, Peter seems to have been treated as a party defendant. On September 24, 1804, a written stipulation was filed in the cause, signed by the respective solicitors for complainant and for the defendant Blodget, in the following terms: "It is agreed by the complainants and the defendants in this cause, by their solicitors, that a decree shall pass immediately by consent for conveying to the complainant the hotel and the lots appropriated for the same. That the execution and truth of all the exhibits referred to in and by the complainants is hereby admitted, all form as to the *of* (*sic*) proceeding waived. This admission in no wise to give validity or authenticity to the award obtained in the court of Pennsylvania or the judgment thereon rendered, but that is to stand on its own merits unaffected by this agreement. This cause set down by consent for hearing at the next term." An interlocutory decree was made accordingly, under date October 1, 1804, requiring Blodget and Thomas Peter to convey to Bickley, Lot 1 in Square 430, with the buildings and improvements thereon, and requiring Munroe, as Superintendent, to convey and assure to Bickley Lots 1, 2, 3, 4, and 5 in that square; and retaining the cause as to all other property and as to all other objects and purposes mentioned in the bill. October 4, 1805, a further decree was made, requiring the defendant Blodget to pay to the complainant, Bickley, on or before a date in November, the amount of the debt due to him, being the sum of $26,635.13, besides costs, and decreeing that on failure thereof certain designated sections and lots of ground, situate in the City of Washington, or so much thereof as should be sufficient

to raise and pay the said several sums of money, should be sold, and it was further decreed "that certain ground rents reserved by the said defendant Blodget, by indenture made between the said Blodget, of the one part, and Edward Frithey, one of the defendants, of the other part, bearing date on the 4th day of April 1801, and certain other ground rents reserved by the said Samuel Blodget by indenture made between the said Samuel Blodget of the one part, and James Daugherty, one of the said defendants, of the other part, bearing date on the 13th day of April, 1801, be also sold for the purposes aforesaid." Daniel Carroll Brent was appointed trustee for making the sale. He was directed to sell the property at public auction, after advertisement, report the sale to the court, and upon confirmation of it, and payment of the purchase money, "the said trustee by a deed or deeds good and operative in law, etc., shall give, grant, bargain and sell, release and confirm to the respective purchasers and their heirs respectively all the right, title and interest therein which was or is in the said Samuel Blodget, and all the right, title or interest therein which the said Thomas Peter derived in and thereto by virtue of the deed in the said bill of complaint mentioned (referring to the deed of trust of January 28, 1794) . . . and the purchaser or purchasers respectively, and their respective heirs, shall thereupon hold the same by them respectively purchased free, clear and discharged from all claims of the said Samuel Blodget and of the other defendants." It was further decreed that the defendant Thomas Peter, upon the request of the trustee, should join and become a party in and to all deeds to be executed by the trustee in virtue of this decree; and that in all cases where the outstanding legal title remained in Thomas Munroe as Superintendent, he, Munroe, should at the request of the trustee, join in and become a party to the deed. "And lastly, as to all the property in the said bill of complaint mentioned,

and as to all the objects of the said bill not in and by this decree specially and particularly decreed upon, this cause is retained for further proceedings hereafter to be had thereupon, and for that purpose is ordered to be continued."

Brent accepted the appointment as trustee, gave bond, and, after advertisement, made a public sale of the property. The notices, after describing many tracts of land by lot and square numbers, contained the following: "Also several certain ground rents reserved by said Blodget, amounting in the whole to eighty dollars per annum." His report of sale was made under date of January 21, 1806. It mentions "Ground Rent on James Daugherty's lease" as sold to Henry Pratt for $360, and "Ground Rent on Edward Frithy's lease" as sold to Robert F. Howe for $400. No mention is made of the remainder of Lot 20 in Square 254, nor of the ground rent on the Fennell lease. By decree made under date June 25, 1806, the report was approved and the sales confirmed (with an exception not now material), and it was ordered that the proceeds of sale, after paying expenses, taxes, etc., be paid over to complainant towards the discharge of the moneys theretofore decreed to be due from the defendant Blodget to him. It further appears that the purchases made by Pratt (including the Daugherty ground rent) were made for the benefit of Bickley, the complainant; and Pratt assigned his bids to Bickley, October 31, 1806. Brent reported this to the court and asked for leave to make deeds for the Pratt purchases to Bickley, and the court accordingly made an order that Brent, together with Thomas Peter and Thomas Munroe, should convey to Bickley all the property purchased by Pratt at the sale.

Pursuant to these proceedings, Brent, Trustee, Thomas Peter, and Thomas Munroe, Superintendent, etc., joined in a deed dated April 3, 1807, to Bickley, reciting the decree of October 4, 1805, ordering among other things

"that sundry squares, lots and portions of ground and ground rents in the said City of Washington" be sold, reciting the advertisement and sale made in pursuance thereof, and that at the sale certain lots particularly mentioned "And the ground rent reserved by the said Samuel Blodget by Indenture made between him and James Daugherty, one of the defendants, bearing date on the 13th day of April, 1801," were sold to Pratt; the assignment of Pratt's bid to Bickley, etc. Brent as trustee thereby conveyed "all the right, title and interest of, in, and to the before mentioned squares, lots and portions of ground and ground rents in the City of Washington aforesaid which was in the said Samuel Blodget. Peter conveyed all his right, title and interest under the mortgage or deed of trust of January 28, 1794; and Munroe joined in conveying certain of the lands described in the deed, but not the "ground rents" in question.

By indenture dated January 15, 1807, Daniel C. Brent, Trustee, and Thomas Peter conveyed to Robert F. Howe the property purchased by the latter at the trustee's sale. The deed recites the decree, and the sale made thereunder, and that "among other property and ground rent so set up and exposed to sale was the ground rent reserved by the said Blodget by Indenture made between him and the said Edward Frethy, one of the defendants, bearing date on the fourth day of April, 1801, when the said Robert F. Howe being the highest bidder therefor became the purchaser thereof at and for the sum of four hundred dollars," and in consideration thereof, conveyance is made to Howe of "all the right, title and interest of, in and to, the said ground rent, reserved by the said Samuel Blodget by Indenture made between him and the said Edward Frethy, dated on the fourth day of April, 1801, as aforesaid, which was in the said Samuel Blodget, previous to and at the time of making the said decree, and all the right, title and interest therein which

the said Thomas Peter derived in and thereto, by virtue of the deed referred to in the said decree to have been given by the said Samuel Blodget to the said Thomas Peter and Thomas Johnson, Jr., since deceased, bearing date on the twenty-eighth day of January, 1794," etc.

On May 28, 1810, a supplemental bill was filed, reciting that the sale made by Brent had fallen short of paying the money decreed to be due to Bickley, and that he had lately discovered other property not included in the former bill and decree, consisting of sundry lots particularly described, and—"That the said Samuel Blodget was also on the said 28th day of January, in the year 1794, seised and possessed of and entitled to sundry lots in the said City, which he afterwards let on ground rent, reserving an annual rent for the said property, to divers persons hereinafter particularly set forth, which tenants your petitioner does not wish to disturb or interfere with, but wishes to leave them in the quiet enjoyment of their leases under the said Blodget, under the terms and conditions expressed in the said leases respectively, but wishes and prays of this court to direct the ground rents reserved thereon, and the reversionary interests of the said Blodget therein, whatsoever the same may be, to be sold for the benefit of your petitioner, which lots so leased on ground rent are as follows, to wit, eleven feet, eleven inches more or less fronting on F Street, North, extending in depth one hundred and fifty-nine feet to an alley, being part of Lot No. 20 in Square No. 254, leased to a certain Edward Fennell, his Executor &c., for a term of years renewable from time to time forever, reserving the quarterly rent of twenty four dollars payable to the said Blodget." Several other like leases are mentioned, and this averment follows—"To all of which ground rents the said Blodget now claims title, and is in the actual receipt thereof." The prayer was for a sale of the property thus mentioned, to raise the balance due to complainant.

Blodget answered, admitting the facts stated in the supplemental bill, with an exception not now material, and stating that he had no objection to a decree as prayed. A decree was made accordingly, under date November 5, 1813, and Washington Boyd was appointed trustee to make the sale. Some years later he made a report of sale in writing, and afterwards represented to the court that in consequence of ill health he would be required to leave the District for some time, and requested the court to appoint some other person to make conveyances, suggesting John Davidson for this purpose. The court appointed Davidson accordingly.

By indenture dated May 8, 1818, Davidson, as such Trustee, conveyed to Charles Glover, in consideration of $405.50, "all the interest claim and right of the said Samuel Blodget" in certain lots sold by Boyd as Trustee, pursuant to the decree of November 5, 1813, and, among others, "part of Lot twenty, in square two hundred and fifty four, fronting eleven feet eleven inches on north F Street, leased to Edward Tennell (*sic*) for ninety nine years, renewable forever, under the annual ground rent of twenty four dollars."

This completes the recital of the proceedings in the Chancery suit of Robert S. Bickley against Samuel Blodget and others, and of the sales and conveyances made pursuant to the decrees therein, so far as they pertain to the interest of Blodget in the land now in controversy. We proceed to a statement of the subsequent transfers, so far as necessary for a determination of the questions presented.

By indenture dated May 1, 1813, Bickley, in consideration of $400, conveyed to James Daugherty, his heirs and assigns, "all that part of Lot No. 20 in Square No. 254, fronting on F Street North, twenty feet" which was leased by Blodget to Daugherty. The deed mentions the date of the lease, and recites that "all the estate, interest and claim of the said Samuel Blodget in and to the said part

of a lot and premises, was afterwards sold and conveyed by Daniel C. Brent as trustee, under a decree of the said Circuit Court of the District of Columbia for the County of Washington to the said Robert S. Bickley." This deed contained a covenant of general warranty.

Assuming the above-mentioned deed from Brent, Trustee, and others to Bickley had the effect to vest in Bickley all the reversion that was in Blodget, subject to the Daugherty lease, this deed from Bickley to Daugherty brought about a merger of the leasehold and the reversion.

By mesne conveyances, all of Daugherty's interest came to be vested in one Benjamin F. Isherwood in the year 1852.

As already pointed out, the ground rents under the Frethy lease were conveyed by Brent, Trustee, and Thomas Peter, by deed dated January 15, 1807, to Robert F. Howe. It appears that Frethy had assigned his lease to one Frederick Betz, by recorded deed, dated September 19, 1801; Frederick Betz assigned it to George Betz by recorded deed of January 24, 1803; and George Betz assigned it to John Thorp by recorded deed of February 15, 1804. Each of these instruments transferred all right and interest of the assignor in the land, describing it by measurements and abuttals, and referring to the lease thereof made by Blodget to Frethy for "ninety-nine years, renewable forever."

It is admitted that William Dowling probably succeeded to the ownership of this leasehold by an unrecorded assignment of Thorp's interest. Dowling claimed in a deed made by him to Robert F. Howe, presently to be mentioned, that he was the owner of the leasehold interest.

In 1830 the corporation of the City of Washington made a tax deed to Dowling for "Part of Lot 20 and the improvements in Square 254" for unpaid taxes assessed against it "as the property and in the name of Robert F. Howe," for the years 1819 to 1824, inclusive. Dowling

by a deed made in 1831, reciting this tax title, conveyed to Howe and his heirs "all the right, title, interest, and estate of him, the said William Dowling," in the part of the lot conveyed to him by the tax deed, "except the leasehold right belonging to him in the same," the deed declaring it to be the intention of the parties "that the said William is not to surrender his leasehold interest in the said part of lot and premises." Robert F. Howe, by his will, dated in 1830, authorized his executors to sell all his estate for the purpose of paying certain legacies, and thereafter his executors, by deed dated in 1835, conveyed this plot to William Dowling, the deed reciting that Robert F. Howe "held under a deed of conveyance to him from Daniel C. Brent, Trustee, and Thomas Peter, made the fifteenth day of January, in the year of our Lord 1807," and that at the time of the making of that deed the property "was subject to a lease for ninety-nine years, renewable forever," as will appear "by reference to an indenture of lease dated April fourth, 1801, and recorded," etc.

Under the will of William Dowling, and by mesne conveyances thereafter, whatever estate Dowling had in this parcel became vested in Benjamin F. Isherwood in the year 1865.

As already pointed out, the ground rents of the Fennell lease—for the word *Tennell* in the deed is obviously a mistake—became vested in Charles Glover; but that deed likewise included "all the interest, claim and right" of Blodget in that part of Lot 20 that was covered by the Fennell lease; thus evidently conveying the reversion. The bill avers that this part of Lot 20 was conveyed by Abraham Bradley's heirs to Benjamin F. Isherwood in 1852. It does not appear when or how (if at all) Fennell's leasehold became merged in the reversion. Nor does it seem to be material, for if not merged, it lapsed on the expiration of the 99-year term and failure to renew, and this

before the ejectment suit was commenced. Respecting this parcel, the contention of appellant is, that the bill of complaint of the appellees shows no reason for equitable relief, because, if they have the title they claim to have, it is a sufficient title to constitute a good defense to an action at law.

Whatever interests Benjamin F. Isherwood may have acquired by the above-mentioned conveyances in the several portions of Lot 20 admittedly became vested in Caleb C. Willard, the devisor of the appellees, in or about the year 1882.

On the other hand, whatever reversionary rights (if any) remained in Samuel Blodget have admittedly become vested in the appellant.

The bill of complaint herein avers that the defendant, now appellant, claims to be the assignee of the heirs-at-law of Blodget; and that he claims that after the execution of the leases there remained in Blodget and his heirs a reversion in fee in Lot 20; that only a rent-charge passed under the proceedings in *Bickley* v. *Blodget;* that as the leases have expired without purchase or renewal by the lessees the reversion has come into possession, and that therefore as plaintiff in ejectment he has the right to recover possession and title in fee simple.

These contentions are in fact made here in behalf of the appellant with respect to so much of Lot 20 as was leased to Daugherty and to Frethy respectively.

As to the Fennell lot, it is insisted that by the very language of the supplemental bill in the Bickley suit, and the decree for sale made pursuant to it, and the terms of the deed made by Davidson, Trustee, thereunder, the purchaser acquired a legal title to the reversion, and not merely to the ground-rents; and that therefore, on the theory that the averments of the bill are true, the appellees have an absolute fee simple title to the Fennell lot, such as to constitute a plain, adequate and complete defense

to the ejectment suit. And it is pointed out that under the local practice (Code D. C., §§ 993, 1000) defendants may separately defend as to that parcel.

The question for decision, therefore, is whether the appellees have a good title as against the appellant; and, if so, whether the nature of their title is such as to render it unavailable at law and to require the intervention of a court of equity for their relief against appellant's claims.

It is suggested, rather than urged, as a ground of equitable jurisdiction, that because Blodget never received a deed of conveyance from the Commissioners for Lot 20 in Square 254, his title was never more than an equitable title; and that since both parties claim under him, the controversy is a matter proper for the cognizance of a court of equity, whatever be the grounds of controversy as between the parties. We doubt whether this view is tenable. There is no question that Blodget, and those claiming under him, have openly asserted title to the property, at least from the year 1801 down to the present time; and while the bill herein contains no averments respecting possession, it may be assumed that, for a long time at least, possession has followed the title. Assuming Blodget and those inheriting from him, and under whom appellant claims, were equitably entitled to the reversion, subject only to the ninety-nine year terms, any possession of the lessees has been, as against the outside world, the possession of the appellant and his predecessors in title. Therefore it is more than probable that any legal title remaining in the Commissioners has become barred by long possession. Besides, it might perhaps, after 120 years, be presumed at law, as well as in equity, that the Commissioners had made a deed or deeds to Blodget that had since been lost. And, since both parties to the present controversy claim under Blodget, and would probably in an action of ejectment be required to trace title no further back than the common source, it is better, we think, to lay aside for

present purposes the theory that the equitable jurisdiction in this action can be supported upon the ground that Blodget derived only an equitable title from the Commissioners.

This brings us to the real controversy, which is the effect of the proceedings and decree in the Bickley suit, and the deeds made thereunder by Brent, Trustee, to the purchasers of the "ground-rents."

For present purposes, we may accede to the contention of appellant that the bill of complaint herein shows, with respect to the parcel that was covered by the Fennell lease, the title to which passed under the supplemental bill and decree in the Bickley suit, that the effect of the proceedings, and the language of the decree, and of the deed made by Davidson, Trustee, thereunder, was such as to pass to the purchaser a legal title to the reversion.

Assuming this, however, it does not follow that the appellees, if they have the *equitable as well as the legal title to the Fennell parcel*, and if at the same time they have the *equitable but not the legal title to the Daugherty and Frethy parcels*, may not properly invoke the aid of equity against the ejectment suit. If the appellant had limited his action at law to the Fennell parcel, his contention that if the Willard title to that parcel is good at all, it is as good at law as in equity, and therefore available as a defense in the ejectment suit, would demand consideration.

But appellant brought the action of ejectment for an entire lot made up of three parcels, of which the Fennell plot lies between the other two. The appellees, if driven to invoke the aid of equity against that action because they had an equitable and not a legal title to the Daugherty and Frethy parcels, were fairly entitled to bring the entire controversy into the court of equity, so that it might be adjudicated in a single suit.

A court of equity ought to do justice completely, and not by halves. *Decker* v. *Caskey*, 1 N. J. Eq. 427, 433;

Williams v. *Winans*, 22 N. J. Eq. 573, 577; *Knight* v. *Knight*, 2 Eq. Cas. Abr. 169, pl. 25; *S. C.*, 24 Eng. Rep. 1088, 1089; Story Eq. Pl., §§ 72, 174.

One of the duties of such a court is to prevent a multiplicity of suits, and to this end a court of equity, if obliged to take cognizance of a cause for any purpose, will ordinarily retain it for all purposes, even though this requires it to determine purely legal rights that otherwise would not be within the range of its authority. *Oelrichs* v. *Spain*, 15 Wall. 211, 228; *Holland* v. *Challen*, 110 U. S. 15; *Reynes* v. *Dumont*, 130 U. S. 354, 395; *Kilbourn* v. *Sunderland*, 130 U. S. 505, 514; *Gormley* v. *Clark*, 134 U. S. 338, 349. And since there is no question that the equitable title of appellees to the Fennell lot is good, if their equitable title to the Daugherty and Frethy lots is good, we may proceed at once to the question of the effect of the proceedings and decree in the Bickley suit, and the deeds made thereunder, as bearing upon these two lots.

In strictness of law, the deeds made by Brent, Trustee, purporting to convey the "ground rents" on the Daugherty and Frethy leases cannot be deemed to have included the reversion. The rule at law is, that by a grant of the reversion the rent reserved will pass; but that by a grant of the rent the reversion will not pass. "The incident, accessary, appendant, and regardant, shall in most cases pass by the grant of the principal, without the words *cum pertinentiis*, but not *é converso;* for the principal doth not pass by the grant of the incident, &c. *Accessorium non ducit, sed sequitur, suum principale.*" Shepp. Touch. 89. And see Co. Litt. 152a; Broom. Leg. Max. (7th ed.), 491, 493.

The contention of appellant is that the term "ground rents," as employed in the decree of the court in the case of *Bickley* v. *Blodget*, has a plain and clear meaning, ascertainable without recourse to outside evidence; and it is insisted that the rents referred to were limited to the

terms of ninety-nine years, because the only rents mentioned in the leases are the annual rents reserved by Blodget in each demise, to be paid during the respective terms of ninety-nine years, and which therefore would cease with the expiration of the term.

The argument elaborates the legal status of the lessor and lessee under the leases. It is said that the import of the contract is plain; that a lease for a specific and definite term of ninety-nine years, and no longer, was created; and that an option was given in connection therewith to the respective lessees and their successors in interest for other and further terms of similar duration, and also an option for the purchase of the demised premises during the terms created or any future term. And it is insisted that the leases extended only until the expiration of their respective terms, and did not, *proprio vigore*, extend or continue such terms for a definite or indefinite period; that the options made the existence of new leases in the future possible, but not certain; that the creation of future leases depended wholly on the exercise of the privilege of a renewal by each lessee or his successor in interest; and that the privilege not having been exercised in either instance, all rights of the lessees expired at the end of ninety-nine years.

All this may be assumed, as matter of law, without advancing us far towards the solution of the real question presented. If the appellant is entitled to the reversion, the question whether the appellees or their predecessors in title have lost the right of renewal or purchase by failure to exercise the option, and whether equity will relieve them by decreeing a renewal on proper terms, may require consideration.

But the question must first be answered whether, in the sight of equity, the appellant is entitled to the reversion. The appellees, besides showing a title to the leasehold interests of Daugherty and Frethy, respectively claim

to have acquired also the reversion in fee that remained in Blodget; and this they claim under the decree in the Bickley suit, and the deeds made thereunder, in which the interest was denominated "ground rents." Now, while we cannot say that this term is the recognized equivalent of any legal estate in lands, it is clear that as a descriptive term it has, and had at the time of the proceedings under consideration, some recognized meaning that may be resorted to as evidence of the intent of the parties, and from which may be determined what effect ought in equity to be given to the proceedings and decree in the Bickley suit.

In *Bosley* v. *Bosley's Exrs.* (1852), 14 How. 390, 396, this court (by Mr. Chief Justice Taney) said, with respect to a somewhat similar lease made by a resident of the City of Baltimore for lands in Baltimore County:

"In the case before us, the interest which the testator had in this land at the time of making his will, was converted into money by his contract with Armstrong. It was a sale and an agreement to convey his whole interest in the land. It is, therefore, unlike the case of a lease for years, or of ninety-nine years, renewable forever, in which the lessor retains the reversion, and does not bind himself to convey it on any terms to the lessee. The form of the contract adopted in this instance, between the testator and Armstrong, is in familiar use in the sale of lots in the city of Baltimore and the adjacent country. It has nearly, if not altogether superseded the old forms of contract, where the vendor conveyed the lands, and took a mortgage to secure the payment of the purchase money—or gave his bond for the conveyance, and retained the legal title in himself until the purchase money was paid. And it has taken the place of these forms of contract, because it is far more convenient, both to the seller and the purchaser. For it enables the vendee to postpone the payment of a large portion of the purchase money

until he finds it entirely convenient to pay it; and, at the same time, it is more advantageous to the vendor, as it gives him a better security for the punctual payment of the interest; and while an extended credit is given to the vendee, it is to the vendor a sale for cash. For if his ground rent is well secured, he can, at any time, sell it in the market for the balance of the purchase money left in the hands of the vendee. It will be observed that the rent reserved is precisely the interest on the amount of the purchase money remaining unpaid."

That leases for ninety-nine years, renewable forever, were common in Maryland, and therefore presumably well understood in Washington at the time of the Eickley foreclosure, appears from *Banks* v. *Haskie* (1876), 45 Maryland, 207, 213, 217; *Myers* v. *Silljacks* (1882), 58 Maryland, 319, 330; *Ogle* v. *Reynolds* (1891), 75 Maryland, 145, 150; *Jones* v. *Rose*, 96 Maryland, 483, 484. It is contended that these cases, and especially *Banks* v. *Haskie*, show a departure from the principles that anciently obtained in that State, and that the contracts between Blodget and his lessees were made in view of the law as understood in the year 1801. We need not stop to discuss this, because we are dealing with the term "ground rents," not as a term of law, but as a term of description, and we cite the Maryland cases as historical authorities, irrespective of their authority as law.

The contention of the appellant that the term *ground rents* as used in the proceedings and deeds in question, imported, only the rents that were to accrue during the residue of the 99-year terms of the Daugherty and Frethy leases, respectively, will not bear analysis.

In the first place, it was of the essence of both leases, that the terms were "ninety-nine years, *renewable forever.*" The rent was to be the same for the extended terms as for the initial term of ninety-nine years. It certainly cannot have been within the contemplation of

the parties that the lessee or his assigns would not find it advantageous to renew at the end of ninety-nine years. The lessees were required to put substantial buildings upon the lots. And all the circumstances show that the parties contemplated that long before the expiration of the lease, the lands demised would be in the midst of a real, and not a "paper" city.

Moreover, the theory that it was intended to separate the right to the rentals until the year 1900 from the right to those that would accrue under renewals of the term, presupposes that the parties intended to separate the ground rents from the reversion. But such a separation is hardly conceivable. The only real security that the lessor had for the payment of the rents was the right reserved to him to enter and repossess the land until the arrearages were paid, or to terminate the lease should they not be paid. It is obvious that if the owner of the ground rents had no right to the estate upon the termination of the lease, his action in terminating it would benefit not himself, but the owner of the reversion. In short, this view would leave the payments to accrue during the residue of the ninety-nine years, no longer entitled to be designated as "ground rents." They would in effect stand as ordinary choses-in-action, resting for security upon the personal responsibility of the lessees, or their assignees in possession; subject to be rendered valueless by the insolvency of the lessee, or perhaps defeated, so far as the assignee's liability was concerned, by an assignment to a pauper. *Valliant* v. *Dodemede*, 2 Atk. 546; 26 Eng. Reprint, 728; *Lekeux* v. *Nash*, 2 Stra. 1221.

Nor is it reasonable to suppose that the parties intended to reserve in Blodget any estate in the lands, present or future. We say *the parties*, because in equity the decree, and the deed made thereunder, must, we think, be deemed to be the act of Blodget as well as of Bickley and the other parties to the cause.

The action was not, as it has been termed by counsel, a "creditor's suit." It was a foreclosure suit, brought to enforce the mortgage that Blodget had given for the purpose of securing to the fortunate holders of winning tickets in his much advertised lottery the prizes he had promised them. That all of Blodget's interest in the lands was pledged under the mortgage has already been stated; that he recognized his equitable obligation is evident from the record. In the common law action brought by Bickley against him in Philadelphia, he agreed that the jury might act as arbitrators not only with respect to the amount of money due from him to Bickley, but with respect to enforcing the award upon his land in the District of Columbia. When the foreclosure suit was commenced, he aided it by admissions, consents, and stipulations, showing himself in every way willing to forward the object aimed at by Bickley, namely, to subject the mortgaged property to the performance of his obligations arising out of the lottery scheme.

It was clearly the purpose to sell all the beneficial interest that Blodget had in the several plots in question, subject to the leases. This reserved interest was denominated "ground rents," (using a phrase evidently in popular use), without distinction as to their duration, and therefore presumably meaning that they should be perpetual, as well as the leases under which they were derived; but subject, of course, to commutation by the exercise of the lessee's option of purchase at an amount of which the annual rental was the equivalent of eight per centum.

The proceedings in the Bickley-Blodget suit show beyond cavil or question that it was the purpose not only of the parties to the action, but of the court, that all of Blodget's right, title and interest in Lot 20 should be sold towards paying the debt he owed to the complainant. The reservation of any interest in Blodget was inconsistent with

the very object of the suit. The reversion would be practically valueless for approximately ninety years; its then present purchase-value would be altogether insignificant. A purpose to reserve it in Blodget is not supposable. If it had been thought of as a substantial interest, separate from that described as "ground rents," it would have been mentioned, as it was mentioned, and in terms included, in the decree made on the supplemental bill. In no event would Blodget have been permitted to retain it.

Nor is there any room to doubt that bidders at the sale, including the successful bidders who became the purchasers, supposed that in buying the "ground rents" they were buying an investment security representing the substantial fruits, and the entire fruits, of ownership reserved by Blodget on the leases;—and not for mere terms of ninety nine years, but for such terms "*renewable forever*." That the interest of Blodget sold for its fair market value is beyond question, for otherwise the court would not have confirmed the sales.

After the sales were confirmed, only two things remained to be done in order to carry the decree of the court into effect so far as concerned the passing of title. One was—"The payment of the whole purchase money for the respective parts of the said property so sold;" the other was that "the said trustee by a deed or deeds good and operative in law, to be acknowledged, etc., shall give, grant, bargain and sell, release and confirm to the respective purchasers and their heirs respectively" the property sold; with Peter and Munroe joining, in order to make sure that no legal title should remain outstanding.

There is no doubt that the purchase price was paid; indeed, one of the purchasers in question was Bickley, the complainant, for whose benefit the sale was made. Such payment being made, the purchasers at once became the owners, in equity, of the reversionary interest of

Blodget. But the decree entitled them to the legal title.

And deeds of conveyance were made in order to carry out the decree. But one thing was lacking; the deeds were *not* "good and operative in law," because, although they described well enough according to the common intent what was intended to be conveyed, they did not define it according to the legal formula. And so the form of the deeds was undoubtedly defective. This, upon all the evidence, was a mistake, pure and simple. And it was the mistake of a public officer. To say that when such a mistake occurs in carrying out the decree of a court of equity,—a court possessed of full jurisdiction over the subject-matter and all the parties—harmful consequences shall be permitted to fall upon the purchasers who, in reliance upon the apparent regularity of the proceedings, have paid the purchase-money to the officer of the court in the belief that they would get as good a title as the court could give them, and as good as the court could require any of the parties before it to give them,—would be nothing less than a reproach upon the administration of justice.

The equitable principles upon which our decision must turn, are simple and fundamental. Equity regards that as done which ought to be done. It looks to the true intent and meaning, rather than to the form. It relieves against the consequences of accident and mistake, as well as of fraud.

In *Lytle* v. *State of Arkansas*, 9 How. 314, 333, this court (by Mr. Justice McLean) said: "It is a well established principle, that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him." In *Williams* v. *United States*, 138 U. S. 514, 517, the court (by Mr. Justice Brewer), said: "It cannot be doubted

that inadvertence and mistake are, equally with fraud and wrong, grounds for judicial interference to divest a title acquired thereby. This is equally true, in transactions between individuals, and in those between the government and its patentee. If, through inadvertence and mistake, a wrong description is placed in a deed by an individual, and property not intended to be conveyed is conveyed, can there be any doubt of the jurisdiction of a court of equity to interfere and restore to the party the title which he never intended to convey? So of any other inadvertence and mistake, vital in its nature, by which a title is conveyed when it ought not to have been conveyed." See, also, *Morrison* v. *Stalnaker*, 104 U. S. 213; *Ard* v. *Brandon*, 156 U. S. 537, 541; *Duluth & Iron Range R. Co.* v. *Roy*, 173 U. S. 587, 590.

In our opinion the averments of the bill herein, admitted by the demurrer, show that, with respect to the Daugherty and Frethy lots, the appellees have a good title in equity, but not at law, as against the appellant, and therefore are entitled to restrain him, and those claiming under him, from prosecuting an action of ejectment, or otherwise asserting title to those plots. And, with respect to the Fennell plot, the same result follows, for reasons above given, although appellees' title, besides being good in equity as against that of the appellant, is also good at law, and therefore might have been availed of as a legal defense.

Decree affirmed.

CAMPBELL *v.* NORTHWEST ECKINGTON IMPROVEMENT COMPANY.

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

No. 251. Argued April 23, 24, 1913.—Decided June 9, 1913.

A deed for an undivided interest in unimproved real estate heavily encumbered given to a third party in pursuance of prior agreements to undertake to aid in the financial and practical development of the property *held* to have been given for the undertaking and not for the performance and to have presently vested the grantee with the interest conveyed absolutely as stated on its face and not by way of security only.

The burden is on the complainant seeking to give a different effect to a deed than that of its face and where the bill does not waive an answer under oath, and defendant does answer under oath, weight must be given to the answer. *Vigil* v. *Hopp*, 104 U. S. 441.

To justify the setting aside of a solemn instrument of conveyance deliberately made by parties *sui juris* and giving it an effect different from its plain purport, the evidence should be clear, unequivocal and convincing. *Maxwell Land Grant Case*, 121 U. S. 325, 381.

An agreement to give skill and experience as a builder and contractor does not necessarily imply that he is to personally act as superintendent of construction; nor, under the circumstances of this case, should his accounts be surcharged with the amounts paid for wages to a superintendent employed by him.

One, who under an agreement is to be reimbursed for his outlay, should keep proper account of his receipts and disbursements and preserve the vouchers therefor.

36 App. D. C. 149, reversed.

THE facts, which involve the construction of contracts relating to, and rights of co-adventurers in, a real estate enterprise in the District of Columbia, are stated in the opinion.

Mr. John Ridout for appellant.

Mr. Holmes Conrad, for appellees, submitted.

Mr. Justice Pitney delivered the opinion of the court.

This appeal brings under review a decree of the Court of Appeals affirming a decree of the Supreme Court of the District of Columbia that declared a deed of conveyance, absolute on its face, made by the Northwest Eckington Improvement Company to Charles M. Campbell, to have been intended only to secure to Campbell his share of the profits of an enterprise previously undertaken by the parties to the action for the development of the lands described in the deed. The decree also canceled the contracts between the parties respecting the enterprise, settled an account between them, decreed that Campbell should pay a certain sum found due from him on balance, required him to reconvey the land, and granted incidental relief. The decree thus affirmed was rendered pursuant to the mandate of the Court of Appeals upon the reversal of a former decree which was in Campbell's favor. The successive decisions, so far as reported, are to be found in 28 App. D. C. 483 (35 Wash. Law. Rep. 62); 38 Wash. Law Rep. 79; 36 App. D. C. 149 (39 Wash. Law Rep. 69).

The present appellant assails the decree in respect of its main features, and also in respect of the principle adopted in the accounting. A somewhat particular recital of the facts in evidence, with the grounds of decision in the courts below, seems to be called for.

In the year 1902, The Eckington Company held the legal title to a tract of land lying in a suburb of Washington, containing about ten and a half acres. The appellees, Daniel and Redman, were the owners and holders of practically all the stock in the company, and had entire

charge of its affairs. Redman was President, and Daniel, Secretary; Daniel, with Redman's assent, represented the latter, and also the company, in the various transactions out of which the controversy arises. The property was unimproved and unproductive, and its value problematical. It was encumbered with a deed of trust, held by a Mrs. Franz, given to secure promissory notes of Daniel, upon which approximately $32,000 were due. Interest and taxes were in arrears. In the early part of the year negotiations took place between Daniel and Redman, on the one hand, and Campbell, the appellant, on the other, with the object of interesting Campbell, who was a builder and a manager of real estate developments, and as a result a written agreement was made between them, of which the following is a copy:

WASHINGTON, D. C. *March 13, 1902.*

Whereas T. C. Daniel and S. C. Redman, of Washington, D. C., acting for themselves and the Northwest Eckington Improvement Co., of the District of Columbia, a corporation incorporated under the laws of the State of Virginia, are owners of a certain tract of land in northwest Eckington subject to trust interest and taxes fully described by the plats and printed matter of the above Company, consisting of ten and a half acres more or less, desire to dispose of the same, they hereby agree with C. M. Campbell, of Washington, D. C., in consideration of one dollar in hand paid by him, and other valuable consideration, that if he will organize or be instrumental in organizing a company, even with the assistance of T. C. Daniel or others, for the purchase of said ground, and give the necessary time and attention to that end, they agree, in case his plans work out so that they accept the consideration said Company offers for said ground, to give him a third of the amount they receive, whether of money, stock or property, and that in the event of such sale or disposition of said property he is to become

possessed of an undivided one-third interest in the property. In case less than the whole tract is sold then said Campbell is to become possessed of an undivided one-third interest in the amount sold.

Northwest Eckington Improvement Co. [Seal.]
T. Cushing Daniel. [seal.]
Samuel C. Redman. [seal.]
C. M. Campbell. [seal.]

Approved and accepted.

Northwest Eckington Improvement Co.
S. C. Redman, *Prest.* T. C. Daniel, *Scc.*"

Pursuant to this agreement, Campbell caused a corporation to be formed, with the title of "Washington Sanitary Dwellings Company," and endeavored to sell enough of its stock to provide for taking over the property and constructing sanitary dwellings thereon for workingmen and their families.

Mrs. Franz was pressing for money, and, in order to satisfy her, Campbell agreed to pay her, and did pay her, $500 on account of the amount due upon the deed of trust, and at the same time a memorandum was signed, of which the following is a copy:

Washington, D. C., *June 19th, 1902.*

Whereas a certain agreement was entered into March 13, 1902, between T. Cushing Daniel, S. C. Redman and C. M. Campbell, which agreement was accepted by the Northwest Eckington Improvement Co., now this further memorandum witnesseth: That the Company which said Campbell agreed to organize, as stipulated in said agreement, has been organized to our satisfaction; that the deed conveying said property to said Company has been prepared and properly executed and that the five hundred dollars which said Campbell this day advances to meet the requirements of the holder of the deed of trust on said property, is done upon acceptance of the above facts. Said transfer will be made upon the terms of acceptance noted

in the minutes of the Sanitary Dwellings Co., which are accepted. *Any monies advanced by said Campbell in handling the property in question shall be returned* returned *to him out of first sales.*

And all rights of said Campbell under said agreement of March 13, 1902, shall remain unimpaired.

[SEAL.] T. C. DANIEL,

[SEAL.] C. M. CAMPBELL.

NORTHWEST ECKINGTON IMPROVEMENT COMPANY,

—— ——, *President.* T. C. DANIEL, *Sec'r.*"

According to Campbell's testimony—undisputed so far as we have observed—the clause italicized was inserted by Daniel in his own handwriting in order to emphasize the assurance that Campbell was to have rights prior to the others to the extent of reimbursement of his advances. The paper was not signed by Redman, nor formally by the company—a matter that is of no present consequence in view of its subsequent recognition.

Besides the $500 paid to Mrs. Franz, Campbell paid out in June $122.91 for taxes upon the property, and during the spring and summer incurred expenses aggregating $481.81 in organizing and promoting the Washington Sanitary Dwellings Company. Daniel himself, called as a witness for the complainants, testified upon the subject as follows: "Mr. Campbell worked on the sale of stock in the company; employed others to assist him in placing the stock, but after finding that he could not make it a success he admitted the same to me and asked whether something could not be done to save the $1,000 that he had spent in that effort; we then agreed to abandon the Sanitary Dwellings enterprise." After some discussion the parties, under date of October 23, 1902, entered into a further agreement in writing of which the following is a copy:

"Whereas a contract was entered into March 13, 1902,

between T. C. Daniel and S. C. Redman and the Northwest Eckington Improvement Co., a corporation, and C. M. Campbell, stipulating for the services of said Campbell, it is further agreed, while preserving to said Campbell any rights he may have under said contract, as follows:

"1. In consideration of the services *of* said Campbell has already performed and for the purpose of securing his further services and co-operation in the handling and improvement of said property, it is agreed to make certain extension of the provisions of said contract.

"2. It is now decided to release the Sanitary Dwellings Company, if necessary, from any obligations, it may have assumed in regard to any agreement to purchase said property.

"3. The said Daniel, Redman and the Northwest Eckington Improvement Company have decided to improve and market said property, as fast as may be possible, by building houses thereon.

"4. To this end they desire to utilize the skill of said Campbell as a builder and his assistance financially.

"5. It is agreed by said Daniel, Redman and the Northwest Eckington Improvement Company to employ said Campbell as a skilful builder in the erection of said houses, he to take charge of said work, with such assistance as the other parties to this contract may be able to furnish, and pursue such work industriously and with all the ability and skill he can bring to the work.

"6. In the borrowing of the money that may be needed in developing said enterprise he is to use his credit by joining the other parties to this contract in the making or endorsing of any notes that may be required in negotiating the necessary loans for the making of said improvements and in paying off the loan of $32,000 now due on said property. In doing this account is to be taken of all moneys and interest he has already advanced under contracts in

relation to said property already entered into between the parties hereto. And any sums advanced or to be advanced by any of said parties for the same purpose under said agreements is likewise to be accounted for.

"7. It is proposed to erect at once five houses on said property and follow them with others as soon as such a course is warranted by the results and approved by the judgment of the parties to this agreement, said Campbell to industriously push said improvements with his best skill and ability, as provided in paragraph 5 herein, without any further compensation for his services than are provided for herein.

"8. In return for said undertaking on said Campbell's part he is to become possessed of an undivided one-third interest in said property.

Witness our hands and seals this 23rd day of October, 1902.

NORTHWEST ECKINGTON IMPROVEMENT CO.,
By SAMUEL C. REDMAN, *Pres.*
THOS. C. DANIEL, *Sec'y.*
SAMUEL C. REDMAN.
T. C. DANIEL.
C. M. CAMPBELL."

The execution of this instrument, at least by the Eckington Company, appears to have been deferred until the latter part of the month of November, awaiting its approval by a stockholders' meeting. Shortly afterwards, and in order to carry out the provisions of the seventh paragraph, an agreement in writing was made under date December 2d between the individuals Daniel, Redman, and Campbell, of the one part, and Mrs. Franz, of the other, whereby the amount due upon the promissory notes of Daniel secured by her deed of trust was ascertained at $32,938.66; she agreed to release a plot sufficient for five houses on payment of a specified consideration, to be credited as part payment upon the notes; they agreed to

erect five substantial brick dwellings, to cost not less than $3,000 each, and pay off the taxes on the entire property; and they (including Campbell, who was not until then personally responsible to Mrs. Franz), guaranteed the payment of the balance remaining due upon the promissory notes, when and as they should respectively become due; but it was agreed that upon the making of the part payment provided for, the time for payment of the balance was to be extended for two years.

Pursuant to this, the plot upon which the five houses were to be built was released by Mrs. Franz from the deed of trust, and conveyed by the Eckington Company to Daniel, Redman and Campbell as individuals, and they placed upon it a new mortgage for the amount of $12,500, paying a part of this money to Mrs. Franz as consideration for her release, and placing the residue of the loan at the disposal of Campbell, to be used in the construction of the houses.

Under the agreement with Mrs. Franz, Campbell found it necessary to pay $957.55 for the taxes upon the entire property, and this he paid from his own funds on December 8. This, with some small items that need not be specified, added to his expenditures prior to October 23, already mentioned ($500 to Mrs. Franz, $122.91 for taxes, and $481.81 advanced on behalf of the Sanitary Dwellings Company enterprise), made an aggregate of $2,094.62. Campbell became uneasy respecting his position in the matter, and an agreement was drawn up by his counsel, bearing date December 10, 1902, for execution by the Eckington Company, and by Daniel, Redman, and Campbell as individuals, and was tendered by Campbell to Daniel for the purpose; which paper, after a preamble that recited the agreement of October 23d, contained a repetition of the provisions of that agreement, with the addition of several clauses, by one of which "The Eckington Company agrees to execute at once a conveyance of said un-

divided one-third interest to said Charles M. Campbell in fee simple."

This instrument was never executed, and, after some further discussion, the deed in question was prepared and presented by Campbell to Daniel. The latter testified: "He [Campbell] said that Mr. Ridout had drawn that contract up for him, and he did not see any reason why we should not sign. I read it over pretty carefully, and when I saw that it was a deed for a one-third undivided interest, I knew or thought that it tied Mr. Campbell to the proposition so that he could not get any way of deeding that third interest away until he had earned it by the carrying out of his contract, and, thinking it over, it seemed to me that it would be a rather reasonable request, if he was going to put in a great deal of money to build up that entire property, and I thought he should have insisted upon some security on the record; I think I would have insisted upon something like that myself, and it was a business proposition, and I submitted it to Mr. Redman and told him I did not think there was anything wrong about it—(interrupted)—I told Mr. Campbell after thinking it over, I would be perfectly willing to execute that as security to him, to protect him. . . . At that time I believed that he was going to carry out the contract, and it would be all satisfactory."

The deed was actually executed and delivered on January 16, 1903, and thereby the Northwest Eckington Improvement Company, for "divers valuable considerations, and the sum of ten dollars," conveyed to Campbell, his heirs and assigns, an undivided one-third interest in the property in question, excepting the portions theretofore conveyed. It contained a special warranty excepting recorded encumbrances.

Before the first five houses were completed, and in the spring of 1903, the parties proceeded with the construction of another row of five houses under an arrangement similar

to the former one, including a building loan to pay the cost of construction, the proceeds (over and above the amount necessary to procure the release from the deed of trust) being placed in Campbell's hands. While matters were thus progressing, and when the first five houses were nearly or quite completed, the opportunity was offered to dispose of a considerable plot of the unimproved land to one Malnati, and the sale was made in November, 1903, and consummated during the following month, at the price of $15,200; a price evidently deemed highly favorable by the owners. Of the proceeds, $6,000 were paid on the Franz mortgage and the taxes. Before the sale was consummated Campbell demanded that out of the balance he should be paid a sum approximating $4,000 for what was due to him for advances on the joint account, including the $2,094.62 that he had expended prior to the making of the deed and the excess cost of the ten houses to date, over and above the proceeds of the building loans. Campbell's position seems to have been that the agreement expressed in the memorandum of June 19, 1902, to the effect that all moneys advanced by him in handling the property should be returned to him out of the first sales, was still in force; and that as the sale to Malnati was the first sale, he was entitled to be reimbursed out of the proceeds in order to put him upon an equality with the others, who had advanced nothing or practically nothing. Daniel resisted Campbell's demand, his view being that the June memorandum was superseded in this respect by the sixth clause of the October agreement, and that while "account was to be taken" of Campbell's advances, they were not to be returned to him out of the first sales. Daniel asked Campbell for an accounting and an informal account was rendered, to which Daniel made objections on the ground that it was unaccompanied with vouchers; and an arrangement was made whereby $4,000 of the proceeds of the sale to Malnati were left in the hands of

a third party to await the settlement of the controversy, and the balance was divided, one-third to Campbell and the remainder to the Eckington Company.

The controversy continued, however, with increasing acrimony until February 8, 1904, when the appellees filed in the Supreme Court of the District their present bill in equity against Campbell, setting up the history of the above transactions from their standpoint, and asserting that the deed of January 16, 1903, was given not as an absolute conveyance, but by way of security. The bill further alleged that he had failed to perform his obligations under the contract of October 23, 1902, had involved the complainants in debt, refused to inform them as to the cost of buildings, or in any satisfactory manner to account for the large sums of money placed at his disposal for the building operations, and threatened to embarrass complainants in making any disposition whatever of the property, etc. The prayer was that Campbell be required to account; that all contracts between the parties be canceled; and that he be required to reconvey to the Improvement Company the undivided third interest conveyed to him by that company.

Campbell answered under oath, denying that the conveyance was intended as security, and averring that the complainants had recognized his right to such a conveyance, and that it was made to convey absolute title to him in consideration of his undertakings, set out in the agreement of October 23, 1902, and the other agreements between the parties.

Voluminous testimony was taken on both sides, the essence of which we have endeavored to state, and the cause was brought on to a hearing before the Supreme Court. That court, by Mr. Justice Anderson, delivered an opinion reviewing the history of the transactions, the successive written agreements between the parties, and the evidence respecting various items of disbursement claimed to have

been made by Campbell, and claimed by the complainants not to have been satisfactorily accounted for by him. Upon the principal issue the view of the court was expressed as follows:

"Coming now to the specific question whether the deed to Campbell was intended to be absolute or merely as security, there are but two witnesses testifying about it. One is Daniel, who says that it was understood to be only as security, and that thereafter in July 1903 Campbell for the second time presented the proposed contract of Dec. 10, 1902, providing for a conveyance to him of an undivided third interest in fee simple, and said that his attorney advised that it be executed. The other is Campbell, who says that the deed was intended to be absolute, and that the proposed agreement of Dec. 10, 1902, was never presented to Daniel after the execution of the deed. In this state of the case, it may be inquired what light the circumstances of the case throw upon this question; but such inquiry would seem rather to bear out, if anything, the position of Campbell than that of Daniel. Campbell and the other parties went into the joint enterprise to endeavor by their conjoint efforts to make something out of a piece of property which was heavily encumbered and becoming more and more encumbered every day, because it could not take care of the fixed charges upon it continually arising. They all recognized that something might be made out of the property, if diligent effort was made to develop it, but the hope of making anything out of it seemed to reside more in diligent efforts to be made than in the property itself. Accordingly, the joint enterprise was undertaken. They all joined together, Campbell being joined because of his skill as a builder in addition to his general business ability and the assistance which he might give, together with the others, in the way of making and endorsing notes; and the other parties being joined to contribute to the enterprise the property which

it was sought to so develop as to make it a success, instead of the failure which it had theretofore been, as also to contribute their general business ability. In such an arrangement it certainly was not unreasonable to give Campbell a status as the owner of an undivided interest in the enterprise. On the contrary, it would have been rather unusual and unreasonable to treat him in any other manner, because he was, by virtue of the contract, made a sharer in the failure as well as in the success of the enterprise. He stood to lose as well as to gain, and in the event of loss, nothing whatever could be reaped by him for his contribution of skill and money.

"But even if the circumstances in the case could be construed as in some manner tending to support the position of the complainants, certainly it could not be said that they are of a strength equal to the testimony of a witness, which would be required in order to establish the complainants' position, they not having waived by their bill answer under oath, and the defendant having answered under oath. *Vigel* v. *Hopp*, 104 U. S. 441."

The court therefore held that the prayers of the bill asking that the deed to Campbell be declared to be a security merely, and that the contracts be canceled, should be denied; and that the cause should be referred to the Auditor for a full accounting respecting the affairs of the joint enterprise, including that portion relating to the Sanitary Dwellings Company. A decree was entered accordingly, bearing date January 4, 1906.

The complainants appealed, and the Court of Appeals (28 App. D. C. 483) held that the deed of January 16, 1903, was not absolute, but intended merely as security for Campbell in the event of his performance of the agreement of October 23, 1902. The decree of the Supreme Court, so far as it denied the prayers for a cancellation of the agreements and a reconveyance from the defendant, was reversed, and the cause remanded with direction to

enter a decree declaring the true intent and purpose of the deed of January 16, 1903, to be as indicated in the opinion of the Court of Appeals.

That court, while conceding the evidential weight of Campbell's sworn answer, under the rule laid down in *Vigel* v. *Hopp*, 104 U. S. 441, differed from Mr. Justice Anderson in his view of the circumstances surrounding the transaction under inquiry. The liberal terms conceded to Campbell in the agreement of March 13, 1902, were attributed to the fact that the complainants were then apprehensive of the foreclosure of the mortgage upon the land. The view was expressed that the condition of the property had greatly improved during the succeeding months, on account of certain railroad developments; that the parties were agreed as to the reasonable prospect of building houses thereon and securing income therefrom; that it was apparent the cash value of the land had advanced considerably beyond the amount of the Franz mortgage, and apprehension of its loss by foreclosure was greatly if not entirely relieved; that Campbell submitted estimates for the erection of as many as forty houses, and the probable income therefrom, as indicating successful development in that way; and the parties then entered into the contract of October 23, 1902. The opinion proceeds (28 App. D. C. 494):

"The legal effect of this contract was to make the complainants partners with Campbell in the development of the land by building houses; they furnishing the land and Campbell undertaking the erection of the houses. All were to join in using their credit in obtaining money to erect houses, and pay off the $32,000 encumbrance; and the sums advanced by the respective parties were to be accounted for. Five houses were to be erected at once, to be followed by others if results were approved. The last paragraph of the agreement was that 'in return for said undertaking on said Campbell's part he is to become

possessed of an undivided one-third interest in said property.' Clearly this did not contemplate that Campbell should at once become the absolute owner of this one-third of the land. It was necessarily conditioned upon the terms of his undertaking, before recited in the contract. He had no immediate right to demand a conveyance thereunder, and none when the deed was actually executed and delivered to him on January 16, 1903. Complainants contended that this deed was made, at Campbell's request, to secure him in his rights under the contract."

And again (p. 496):

"When the deed was executed, on January 16, 1903, it is not pretended that there was any new consideration for its execution. It was founded wholly upon the provisions of the contract of October 23, 1902, no matter what may have been the private opinion of the respective parties as to Campbell's rights thereunder; and its meaning, purpose, and effect are determined thereby.

"The difficulty attending the correction of a deed or instrument carrying into effect a previous parol agreement is obviated when it appears to have been prepared and executed in pursuance of a written agreement. When it appears that the instrument intended to give effect to a written agreement is inconsistent with its terms there is a manifest equity to correct the error. Adams, Eq. 169; *Elliot* v. *Sackett*, 108 U. S. 132, 141.

"As before stated, there is nothing which tends to show that Campbell was to become the absolute owner of one-third of the complainants' land without regard to the performance of the joint undertaking contemplated in the contract of October 23, 1902. It is true that contract is inartificial and somewhat vague, but no such meaning can be imputed to it.

"In the light of the circumstances pointed out, we can come to no other conclusion than that complainants' statement of the purposes of this deed is the correct one.

They represent it as given to secure Campbell in their performance of the contract. It was not a security, or an additional security, in the ordinary sense, but it did make Campbell secure, in the case of his endeavor to carry out that contract, by giving him at once the conveyance that he might thereafter become entitled to, and enabling him, by its registration, to give notice of his rights under the contract, to all persons who might thereafter acquire any interest from the complainants.

"The decree, in so far as this conveyance is concerned, is interlocutory in its nature, and for the guidance of the auditor in stating the account between the parties, and, instead of virtually establishing it as an absolute deed, should have declared it to be merely a conditional one dependent upon the performance of the agreement in accordance with which it was made. The question whether it shall be canceled is a final one that can only be properly determined upon the coming in of the auditor's report with the account that has been ordered to be taken by him."

Upon the going down of the mandate, the Supreme Court entered an interlocutory decree in accordance with it, and thereafter the hearing before the Auditor proceeded; but the accounting was made, or at least attempted to be made, not upon the original theory of a joint ownership in the property, but upon a theory of the rights of the parties under the agreement of October 23, 1902, that resulted from the decision of the Court of Appeals.

The Auditor stated an account charging the defendant with his actual receipts from the proceeds of the building loans, and from other sources connected with the enterprise, and giving him credit for his expenditures for construction and payments made to the complainants. An elaborate report was made, to which exceptions were filed by the complainants, and these the Supreme Court sustained in part and overruled in part, reserving certain of

the questions for disposition on the final hearing, and meanwhile ordering the Auditor to restate the account, which was done, and to this second report both parties took exceptions.

The case then came on for final hearing before the Supreme Court upon the whole record, including the pleadings, the evidence, and the exceptions. Respecting the disputed matters in the accounting, we need say no more than that the court sustained Campbell's right to credit for the $500 paid by him to Mrs. Franz in June, 1902, and $122.91 paid about the same time for taxes, but overruled his claim for an allowance of the $481.81 paid on account of the Sanitary Dwellings Company, upon the ground that this expenditure was made for his own account and at his own risk, and had not benefited the common enterprise.

Upon the main questions the court (38 Wash. Law Rep. 79), following the lines laid down in the opinion of the Court of Appeals, held as follows:

(1) That the deed of January 16, 1903, was not intended to convey a present absolute title, but was only to secure the defendant his share of the profits of the enterprise when he should perform his share of the work of building houses and making sales; and that to the extent that he had performed his contract obligations, the security should be kept intact;

(2) That as to the ten houses and the land on which they stood, the defendant had an undivided one-third interest under the two deeds executed to him and to the complainants Daniel and Redman, that title being absolute, subject to encumbrances;

(3) That the contracts which were executed between the parties plaintiff and defendant ought to be canceled, because there was no prospect of any amicable continuation of operations under them, even if there were any desire by either party to continue;

(4) That the defendant should reconvey to the Eckington Company the title received from it by the deed of January 16, 1903, on being paid or satisfactorily secured what, if anything, remained due to him on settlement of accounts on the lines previously indicated;

(5) That if the defendant had become bound to pay any portion of the encumbrance on the unimproved land held by Mrs. Franz, the complainants should either obtain his release therefrom or indemnify him against the same.

This result was carried into the final decree, with a variance that is unexplained by anything in the opinions, or elsewhere in the record, so far as we have observed, viz., the decree subjects Campbell's interest in the ten houses to a charge in favor of Daniel and Redman of $1,237.65, "being the balance due by him on his one-third of the excess cost of building said houses and obtaining a release of the said ten lots from a mortgage or deed of trust thereon known as the Franz mortgage or deed of trust, over and above the money obtained for this purpose by loans secured by Daniel, Redman and Campbell." Perhaps it was intended to charge Campbell's interest in the ten houses, in favor of his co-tenants, with a sum found to be due upon the theory of accounting that resulted from the decision of the Court of Appeals.

The defendant Campbell appealed to the Court of Appeals, where the decree was affirmed, the court adhering (36 App. D. C. 149) to its former view. As to the item of $481.81, the court expressed concurrence with the view of the Supreme Court, saying: "This item benefited the complainants in no way, and we do not think its repayment was contemplated by the October contract."

Upon the main question, the court treating the deed of January 16, 1903, as given only to secure Campbell for his share of the profits when he should perform his part of the agreement, proceeded to consider the question of his conduct after the making of the deed. The court found him

at fault, because he stopped when ten houses were constructed, although the income upon them was not sufficient to liquidate the fixed charges upon the balance of the property. It was in effect held that he was at fault in employing a superintendent of construction, and in failing to keep careful accounts of receipts and expenditures, and preserve all vouchers. His conduct in demanding reimbursement of the moneys he had advanced, and a third of the net proceeds, upon the sale to Malnati, "although under his contract he was fully protected," was characterized as arbitrary, as was his receipt of one-third of the balance, "when that sum, as he was informed and had every reason to know, was needed to develop the remaining land." His conduct after the Malnati sale was likewise criticised, and the opinion concludes (36 App. D. C. 158):

"From a careful examination of the entire record, we are forced to the conclusion that the decree was right. It is difficult to perceive wherein the defendant has been injured. He was to receive a one-third interest in certain property upon the theory of services performed in the improvement and sale of that property. To the extent that he has performed the obligation imposed upon him by the contract, his interests have been fully protected by the decree: more he has no right to expect, and more a court of equity certainly ought not to award him."

From our examination of the record, we are constrained to the view that the Court of Appeals erred in adjudging that the deed in question was given as security merely, and not as an absolute conveyance. The court conceded that the burden was upon the complainants to prove that this instrument did not express the intention of the parties at the time, and that if the general rule laid down by this court in *Vigel* v. *Hopp*, 104 U. S. 441, were applicable, the bill must in that respect be dismissed. The opposite conclusion was reached in view of the circumstances

surrounding the transaction, and because of the construction that the learned court placed upon the contract of October 23, 1902.

We place a different construction upon that contract, and also take a different view of the circumstances under which it was made. Avoiding repetition so far as possible, our view may be expressed as follows:

We agree that the legal effect of this contract was to make the complainants in effect partners with Campbell in the development of the land by building houses, they furnishing the land and he undertaking the erection of the houses. But it seems to us that the agreement recognized that the joint enterprise had commenced in March and had continued ever since; and that Campbell was not only entitled to consideration for the services he had "already performed"—that is, for what he had done under the March agreement—but was entitled to reimbursement for whatever money he had advanced, with interest on those moneys.

The March agreement shows upon its face (and all the circumstances corroborate this) that the prime object of the parties was to dispose of the property, and that the particular method of disposing of it was not of the essence of the matter. This is plain from the language—"That if he [Campbell] will organize or be instrumental in organizing a company, even with the assistance of T. C. Daniel or others, for the purchase of said ground, and give the necessary time and attention to that end, they agree, in case his plans work out so that they accept the consideration said company offers for said ground, to give him a third of the amount they receive, whether of money, stock, or property, and that in the event of such sale or disposition of said property he is to become possessed of an undivided one-third interest in the property. In case less than the whole tract is sold then said Campbell is to become possessed of an undivided one-third interest

in the amount sold." This agreement is inartificially expressed, and requires construction. It was hardly intended that Campbell should have one-third of the consideration received by the vendors, and also an undivided one-third interest in the property. Neither did it mean that in case less than the whole tract should be sold he was to become possessed of an undivided one-third interest in the land sold. What it meant was, that he should have, directly or indirectly, one-third interest in the proceeds of the property. In short, he was to be a "partner" in the enterprise.

The court seems to have considered that this agreement virtually expired with the failure of the scheme for financing the Sanitary Dwelling Company. We do not so regard it. The conduct of the parties from March until October, the wording of the memorandum of June 19th, the negotiations leading up to the abandonment of the Sanitary Dwellings Company scheme, and the making of the October agreement instead—one of the inducements to which, according to complainants' uncontradicted evidence, was to enable Campbell to recoup the money he had expended on the Sanitary Dwellings Company—and finally the language of the October agreement, all go to show that the main purpose, and the association of the parties to accomplish it, were never abandoned.

We do not think this agreement can be properly considered as foreclosing all rights that Campbell had under previous agreements, saving as expressly reserved. By its terms, after reciting the contract of March 13, it declared: "It is further agreed, *while preserving to said Campbell any rights he may have under said contract,* as follows: 1. In consideration of the *services said Campbell has already performed,* and for the purpose of securing his further services and cooperation in the handling and improvement of said property it is agreed to make cer-

tain *extension of the provisions of said contract.*" Then follow the clause providing for a release of the Sanitary Dwellings Company; the recital of the purpose to improve and market the property as fast as possible by building houses upon it, the desire to utilize the skill of Campbell as a builder, and his assistance financially, the agreement that he is to "take charge of said work, with such assistance as the other parties may be able to furnish;" that in borrowing the money needed for developing the enterprise he is to use his credit by joining with the other parties in making notes, etc., for the necessary loans; and that "in doing this, *account is to be taken of all moneys and interest he has already advanced under contracts in relation to said property already entered into between the parties hereto.* And any sums advanced or to be advanced by any of said parties for the same purpose under said agreements is likewise to be accounted for." The seventh clause is: "It is proposed to erect at once five houses on said property and follow them with others as soon as such a course is warranted by the results and approved by the judgment of the parties to this agreement, said Campbell to industriously push said improvements, etc., without further compensation for his services than are provided for herein." And 8: "*In return for said undertaking on said Campbell's part he is to become possessed of an undivided one-third interest in said property.*"

The agreement reads plainly that Campbell was to have this interest in the property, not for performance, but for *his undertaking.* In short, as we think, he was to be presently vested with a one-third interest in the equity of the property, and to be thereby put upon an equal footing with Daniel and Redman, who through their stock interest in the Eckington Company would be entitled to a two-third's interest.

The view adopted by the court below would leave Campbell's position—he being the only one of the party

able and willing to advance cash for the development of the enterprise—altogether precarious. It was in contemplation that the expenditures made by him should be made for the common benefit, and that the property would be enhanced in value if the enterprise proved successful. And it seems most improbable that he should be willing to devote his time and experience, and also pledge his credit to the extent necessary to pay off the existing loan of $32,000, and whatever more was needed to put up the houses, and await a successful outcome before being assured of his reward.

Besides, the undertaking would not be fully completed *until the property had been marketed;* that is, had passed into the hands of third parties. How could he then "become possessed" of an undivided one-third interest in it?

It is not strange that Campbell very shortly found that his position was insecure without a deed that should vest in him the legal title to the undivided one-third. Shortly after the execution of the agreement of October 23d, he began to insist that his rights under it should be secured to him. The proposed agreement of December 10, 1902, was submitted and rejected. Afterwards, and in response to his insistent demands, the deed in question was made and delivered to him in January. For a sufficient consideration, it is not necessary to look beyond the situation evidenced by the agreement of October 23d; for it seems to us that the act of the parties in making the deed is clearly in accord with the view we take of that contract, and amounted to a practical interpretation of it; the purpose in making the deed being to simply put into legal form what equity would perhaps have required to be done for carrying that contract into effect.

If we need to look elsewhere for the intent of the parties, then in addition to the rule respecting the weight that shall be given to a sworn answer in Chancery, invoked

and relied upon in *Vigel* v. *Hopp*, 104 U. S. 441, and in numerous other cases—*Union R. R. Co.* v. *Dull*, 124 U. S. 173, 175; *Southern Development Co.* v. *Silva*, 125 U. S. 247, 249; *Beals* v. *Illinois &c. R. R. Co.*, 133 U. S. 290, 295; *Monroe Cattle Co.* v. *Becker*, 147 U. S. 47, 54—this case is a proper one for the application of the well-known principle that to justify the setting aside of a solemn instrument of conveyance, deliberately made by parties *sui juris*, and the giving to it of an effect different from its plain purport, the evidence should be clear, unequivocal, and convincing. *Maxwell Land-Grant Case*, 121 U. S. 325, 381. The evidence of the complainants does not, we think, measure up to the standard.

The result of these views is that the decree, in so far as it sets aside the deed of January 16, 1903, as being merely conditional and dependent upon performance by Campbell of the agreement of October 23, 1902, should be reversed, because the deed must be held to be, what it purports to be, an absolute conveyance.

For the same reasons the decree, so far as it cancels the contracts of March 13, 1902, and of October 23, 1902, should be reversed.

The original prayer of the complainants for an accounting should be sustained; but the accounting should be made upon the basis of the agreement; Campbell and the others being treated as *quasi*-partners respecting the improvement and marketing of the property in question from the making of the agreement of March 13, 1902. He should be charged with all moneys received by him as proceeds of loans or otherwise, and, on the other hand should be credited with whatever he has fairly and properly expended for the common enterprise, whether the particular expenditure can be shown to have ultimately profited the enterprise or not. This includes the $481.81 disbursed on account of the Sanitary Dwellings Company, and other expenditures made under the agreement of

March 13, 1902; his right thereto being preserved by the contract of October 23d, as moneys "advanced under contracts in relation to said property already entered into between the parties hereto;" and, under the same clause, he is entitled to interest upon his advances.

We need not pass upon other questions raised respecting the accounting, except to say that we of course do not agree with the view expressed by the Court of Appeals respecting the conduct of Campbell subsequent to the making of the deed. The court deemed that in employing a superintendent of construction he violated the letter or spirit of the contract of October 23d. That agreement contemplated that his skill as a builder, and his assistance generally, should be utilized, and he was to take charge of the work, with such assistance as the other parties might be able to furnish. It does not necessarily follow that he was personally to fill the place of superintendent of construction. It is of course true that Campbell ought to have kept a proper account of his receipts and disbursements, and so far as he failed to do this or to preserve proper vouchers, the matter may be dealt with on the accounting according to the usual principles.

The decree of the Court of Appeals reversed, with costs in this court and costs of both appeals in the Court of Appeals; and the cause remanded with directions to reinstate and affirm the decree of the Supreme Court of the District of Columbia bearing date January 4, 1906, and to reverse and set aside all subsequent decrees so far as inconsistent therewith, and remand the cause to said Supreme Court with directions to proceed to an accounting between the parties, or a revision of the accounting already had in that court, and further proceedings thereon as equity may require, and in accordance with the views above expressed.

LEM WOON *v.* STATE OF OREGON.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 261. Submitted April 25, 1913.—Decided June 9, 1913.

The "due process of law" clause of the Fourteenth Amendment does not require the State to adopt the institution and procedure of a grand jury; nor does it require an examination, or the opportunity for one, prior to a formal accusation by the district attorney by information. *Held* that the Information Law of 1899 of Oregon is not unconstitutional as denying due process of law.

Ross v. *Oregon*, 227 U. S. 150, followed to the effect that the subsequent amendment to the constitution of Oregon affecting prosecutions affected only prosecutions thereafter instituted and had no effect on those which had already been instituted although based on information.

57 Oregon, 482, affirmed.

THE facts, which involve the constitutionality under the due process clause of the Fourteenth Amendment of the "Information Act" of 1899, of the State of Oregon and the validity of a conviction thereunder, are stated in the opinion.

Mr. James E. Fenton, Mr. John F. Logan, Mr. Frank F. Freeman and *Mr. Ralph E. Moody* for plaintiff in error.

Mr. A. M. Crawford, Attorney General of the State of Oregon, *Mr. Walter H. Evans* and *Mr. Dan J. Malarkey* for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

On March 9, 1908, Lem Woon, the plaintiff in error, was accused by a sworn complaint, made before a committing magistrate of the City of Portland, of the crime

of murder in the killing of Lee Tai Hoy, and, being arraigned before the magistrate, waived examination, and was held to answer the charge. On April 1, 1908, the district attorney of the proper district filed in the proper circuit court an information charging him with the crime of murder in the first degree in respect of the same homicide. The institution of the prosecution by such an information was at that time authorized by § 1 of an act of February 17, 1899, known as the "Information Law," Sess. Laws 1899, p. 99, Bellinger and Cotton's Codes, § 1258, which reads as follows:

"Hereafter it shall be lawful for the district attorney of any judicial district of this state, and it is hereby made his duty, to file in the proper circuit court an information charging any person or persons with the commission of any crime defined and made punishable by any of the laws of this state, and which shall have been committed in the county where the information is filed."

The constitution and laws of Oregon at that time in force did not require any examination, or commitment by a magistrate, as a condition precedent to the institution of a prosecution by an information filed by the district attorney, nor require any verification other than his official oath. *State* v. *Belding*, 43 Oregon, 95, 99; *State* v. *Guglielmo*, 46 Oregon, 250.

On June 12, 1908, the plaintiff in error, having pleaded not guilty, was placed on trial before the Circuit Court and a jury, and, being found guilty as charged in the indictment, was afterwards sentenced to death.

On June 1, 1908, after the filing of the information, and before his trial thereunder, § 18 of Article VII of the constitution of Oregon, under which, as it previously stood, prosecutions by information were permitted, was amended so as to provide as follows: "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 indictment found by a grand jury."

Plaintiff in error appealed to the supreme court of the State, which affirmed the judgment of conviction (107 Pac. Rep. 974), and denied a petition for a rehearing (112 Pac. Rep. 427), and the case comes here under § 709, Rev. Stat., Judicial Code, § 237.

Two Federal questions were raised in the state courts and there decided adversely to the plaintiff in error and are here assigned for error.

First, that the "Information Act" of February 17, 1899, is in contravention of the "due process of law" clause of the Fourteenth Amendment of the Constitution of the United States.

Second, that the adoption of the amendment of the state constitution after the plaintiff in error was charged with the crime, operated to repeal all laws in conflict therewith immediately upon its adoption, and therefore he could not be tried, convicted, and sentenced without indictment by grand jury.

The second point was abandoned upon the argument, doubtless because it was considered to be foreclosed by the decision of this court in the recent case of *Ross* v. *Oregon*, 227 U. S. 150, 164. In that case the plaintiff in error was tried and convicted in a prosecution instituted by information, and his case was pending on appeal in the state court at the time of the adoption of the constitutional amendment. He advanced the contention that the amendment had the effect of repealing the "Information Law," and made it impossible to enforce the judgment against him because of the due process of law clause. But the state court ruled (55 Oregon, 450, 479), that the amendment of the state constitution was prospective, and did not affect pending cases. This court held that this decision involved nothing more than the construction of the amend-

ment, which was a question of local law, not reviewable here.

The case of the present plaintiff in error is not distinguishable upon the ground that he had not yet been put upon trial when the amendment was adopted; for the construction placed by the Supreme Court of Oregon upon the amendment is that it had no effect upon the "Information Law" except with respect to prosecutions *thereafter instituted.* So it was held in *State* v. *Ju Nun*, 53 Oregon, 1, 9; 98 Pac. Rep. 513, 514, the court saying: "It will be observed that the amendment does not provide that a person shall not be 'tried' or 'prosecuted' for a criminal offense, except upon indictment, but simply that he shall not be charged therewith. . . . When we speak of charging a person with the commission of a crime, we ordinarily mean the commencement of the proceeding, by the filing of a written complaint or accusation, and in our opinion it was in this sense that the words were used in the constitutional amendment in question." The decision of this point in the *Ross Case* was rested by the state court upon the authority of the *Ju Nun* decision; and it was upon the same authority that in the present case the court set aside the contention that the "Information Law" was repealed by the constitutional amendment. Therefore our decision in *Ross* v. *Oregon*, 227 U. S. 150, 164, is controlling.

And so the only question is whether the Information Law is in conflict with the "due process of law" clause. This would seem to be sufficiently set at rest by repeated decisions. *Hurtado* v. *California*, 110 U. S. 516, 532, 538; *McNulty* v. *California*, 149 U. S. 645; *Hodgson* v. *Vermont*, 168 U. S. 262; *Bolln* v. *Nebraska*, 176 U. S. 83; *Maxwell* v. *Dow*, 176 U. S. 581; *Davis* v. *Burke*, 179 U. S. 399; *Dowdell* v. *United States*, 221 U. S. 325.

The Supreme Court of Oregon has upheld the validity of the Information Law in several decisions, based upon the

authority of the *Hurtado Case; State* v. *Tucker*, 36 Oregon, 291; *State* v. *Guglielmo*, 46 Oregon, 250, 251, 262; *State* v. *Ju Nun*, 53 Oregon, 1.

The distinction sought to be drawn between the present case and that of *Hurtado*, on the ground that the Oregon system did not require that the information be preceded by the arrest or preliminary examination of the accused, is untenable.

Although the plaintiff in error waived examination, we prefer not to rest upon that circumstance as a ground of decision. For if (as seems to be conceded) the preliminary examination had no lawful status under the laws of Oregon, it is not easy to see how his position was altered for the worse by his waiving such examination.

But since, as this court has so often held, the "due process of law" clause does not require the State to adopt the institution and procedure of a grand jury, we are unable to see upon what theory it can be held that an examination, or the opportunity for one, prior to the formal accusation by the district attorney, is obligatory upon the States.

The matter is so clearly settled by our previous decisions that further discussion is unnecessary.

Judgment affirmed.

WILKINSON *v.* McKIMMIE.

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

No. 273. Argued May 1, 1913.—Decided June 9, 1913.

A court of equity looks to substance rather than to form. Whether the contract of the principal has been so altered as to discharge the surety is to be decided according to the essentials.

In this case *held* that an arrangement as to a reservation in a convey-

ance made simply to save expense of reconveyance and which did not alter the position of the principal or his surety was not such a material change as would discharge the surety.

36 App. D. C. 336, affirmed.

THE facts, which involve questions of liability of sureties on a bond and what constitutes a variation of contract sufficient to release them, are stated in the opinion.

Mr. Charles Poe and *Mr. Alfred D. Smith* for plaintiffs in error.

Mr. John Ridout, with whom *Mr. Wm. E. Ambrose* was on the brief, for defendants in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

By the judgment here under review the Court of Appeals affirmed a judgment in favor of the Messrs. McKimmie against Wilkinson and Kemp in an action upon a bond they had signed as sureties for one Horton. By an agreement in writing, the McKimmies agreed with Horton to convey to him four lots in Block 9 of Todd and Brown's subdivision of Mount Pleasant and Pleasant Plains for $11,500, which he agreed to take and pay for as follows: To assume a mortgage of $3,000 and pay $1,000 on delivery of the deed; to reconvey to the Messrs. McKimmie two lots, each 16 feet 8 inches front on Brightwood Avenue (part of the land above described), free and clear of encumbrances, and erect on each of these lots a two-story brick dwelling, according to approved plans and specifications, within eight months from the date of the agreement, for which construction and completion, clear of mechanics' liens or other encumbrances, Horton agreed to furnish a sufficient and satisfactory bond to the McKimmies; and for the balance of the purchase price, $500, Horton was

to give two notes, secured by a second deed of trust upon two other lots in the tract, "upon which he is to erect houses similar to those herein described." The agreement expressly provided that "The said houses contracted for to be constructed as aforesaid shall be delivered upon their completion to the parties of the first part [the Messrs. McKimmie] as their property in fee simple and shall be free and clear of all encumbrances or liens."

The bond in suit recited the agreement, and was conditioned for its faithful performance by Horton.

The opinion of the Court of Appeals (36 App. D. C. 336) sets forth the full history of the controversy and the course of the trial. We deem it necessary to mention only one of several matters that were discussed in argument before us, and that is, the contention that the plaintiffs in error were discharged from responsibility as sureties because of the fact that by arrangement made between the Messrs. McKimmie and Horton, instead of their conveying to him the two lots that were to be theirs in the outcome, and upon which he was to build the houses that were to become their property, they had, with his consent, reserved these two lots from the conveyance.

We agree with the Court of Appeals that while in form the contract required the plaintiffs to convey the whole of the land to Horton, who was to erect certain houses upon the two lots and reconvey them to the plaintiffs free and clear of encumbrances, the real purpose and effect of the agreement was that Horton was to have title to the remainder of the land in consideration of his erecting these two houses for the plaintiffs; and that, notwithstanding the form of the contract, its essence was such that if the McKimmies had conveyed the whole plot to Horton they would nevertheless have remained in equity the owners of the two lots. For a court of equity looks to substance rather than to form.

It is hardly necessary to say that the question whether

the contract of the principal has been altered so as to discharge the surety, is to be decided according to the essentials, in whatever jurisdiction it may be raised. And so we think the court correctly held that the arrangement that was made between the McKimmies and Horton, of reserving the two lots from the conveyance in order to save the expense of a reconveyance, was not a material change in the contract; that it did not alter the position of either Horton or his sureties, and therefore did not discharge the latter. *Read* v. *Bowman*, 2 Wall. 591, 603; *Reese* v. *United States*, 9 Wall. 13, 21; *Cross* v. *Allen*, 141 U. S. 528, 537.

Judgment affirmed.

DISTRICT OF COLUMBIA *v.* PETTY.

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

No. 316. Argued May 8, 1913.—Decided June 9, 1913.

Sureties on the official bond of a public officer are not, in the absence of statutory provisions, responsible for his failure to account for moneys received and held by him extra-officially and not specified in the bond.

Moneys received by the Commissioner of the District of Columbia from citizens for street improvements under the permit system were not public moneys in any legal sense, but funds of private citizens held extra-officially by the public officers.

Prior to the making of the order of June 13, 1888, establishing the Permit Fund there was no law, rule or regulation making the Auditor of the District of Columbia accountable for public moneys, nor is there anything in that order or in the act of March 3, 1891, c. 246, imposing responsibility on the Auditor for faults of the disbursing clerk provided for therein or of the pay clerk referred to in said order.

37 App. D. C. 156, affirmed.

THE facts, which involve the liability of sureties on an official bond and the responsibility of a public officer for moneys other than public, are stated in the opinion.

Mr. Edward H. Thomas for plaintiff in error.

Mr. J. J. Darlington for defendants in error, Church and Deering.

Mr. W. C. Sullivan filed a brief for defendant in error Petty.

Mr. Jackson H. Ralston, Mr. Frederick L. Siddons and *Mr. William E. Richardson* filed a brief for defendant in error Wilson.

MR. JUSTICE PITNEY delivered the opinion of the court.

This action was founded upon the official bond of James T. Petty, Auditor of the District of Columbia, given by him and his sureties, bearing date May 1, 1888, and conditioned as follows:

"Whereas, the above bounden James T. Petty has been appointed to the office of Auditor in and for the District of Columbia; Now, therefore, the condition of said obligation is such that if the said James T. Petty shall faithfully and efficiently perform all the duties of his said office, as provided for by law, and the rules and regulations from time to time duly prescribed for the government of the civil service of said District; and shall well and truly pay over, disburse, and account for all moneys that shall come to his hands, as the law and orders governing said service shall require, then said obligation to be void, otherwise to remain in full force."

The Supreme Court of the District sustained a general demurrer to the original declaration, and to several successive amended ones. Upon the last occasion an appeal was taken from the judgment of that court to the Court of Appeals, resulting in an affirmance (37 App. D. C. 156), and the present writ of error was then sued out.

The declaration in its final form sets forth the several acts of Congress under which it was sought to charge the defendant Petty, as Auditor, with the custody of or responsibility for certain moneys mentioned in the several breaches assigned; and also sets forth certain rules and regulations prescribed by the Commissioners of the District concerning the office of Auditor, that are said to impose such responsibility.

If the averments do not show a liability on the part of the Auditor and his sureties, it is no fault of the pleader. The fact is, as was frankly avowed at the Bar, that it was not intended to charge that any of the moneys in question came into the hands of Mr. Petty personally, or were by him misappropriated; that in fact it was the disbursing clerk in the Auditor's office who cashed certain checks and embezzled the proceeds. The theory of the declaration is that Petty, as Auditor, is responsible for the moneys represented by the checks, and bound to make good the defalcation of the disbursing officer; and this because of the character of the duties imposed upon the Auditor in respect of certain funds known as the "Permit Fund," or the "Deposit and Assessment Fund, whole-cost work," etc.

The history of the legislation under which the government of the District was organized and its affairs conducted, down to and during the period covered by this action, is rehearsed in the opinion of the Court of Appeals, and it would serve no useful purpose to repeat it here. The history of the office of Auditor and the peculiar statutes under which it is sought to hold him responsible for

the custody and disbursement of moneys, and other duties aside from those that belong to the office *ex vi termini*, are rehearsed. Certain rules promulgated by an order of the District Commissioners, under date June 13, 1888, are likewise set forth. They have to do with the disposition of moneys deposited with the Collector of Taxes of the District by citizens of the District for (*inter alia*) "Permit Work." Certain duties akin to the normal functions of an Auditor are by these rules imposed upon that officer, among which are the examination of vouchers and pay-rolls prepared by the superintendents of streets and of sewers, respectively, for services rendered or material furnished, payable from the Permit Fund; approval of such pay-rolls and vouchers if found correct; and the making of requisitions upon the Collector of Taxes for the amount thereof. A separate section provides that "Once a month, upon a day regularly set apart for the purpose, the pay clerk of the Auditor's office shall take the rolls thus prepared, with the money necessary to meet the same, repair to the places where the work is being done, and, after proper identifications, and receipt given, pay in cash to each claimant the amount found to be due. He shall give bond with approved security in the sum of five thousand dollars for the faithful performance of the duties required of him." By another section the Auditor is to debit the Collector of Taxes with deposits on account of Permit and License Funds, and credit him with requisitions honored by the Collector. By another section the Auditor is to "Debit himself with the moneys received from the Collector of Taxes upon requisition made as provided in section 1, and credit himself with payments upon vouchers duly certified and approved, as in sections 2 and 7." By § 7, after the work for which a deposit has been made has been completed and paid for, the Auditor is to state the account with the depositor, make requisition upon the Collector for any balance due the depositor,

and repay the same upon presentation of the original certificate of deposit.

The meaning of the terms "Permit Work" and "Permit Fund," is explained in the declaration as follows: "That in the course of administration the Commissioners found it expedient that all work done by the District of Columbia as the result of cuts made in streets, avenues, roads, and alleys in said District, be paid from a fund known as the 'Deposit and Assessment Fund,' which was whole-cost work, and thereupon the said Commissioners, on February 6, 1897, ordered that for convenience in keeping the accounts in cases of repairs made by the District of cuts in pavements and other work done by the District which were paid for from private deposits, a general account be opened, styled 'Deposit and Assessment Fund,' and that all material and labor for such work be charged against said account and be paid by assessment against the deposits made for such purposes."

Until the making of the order of June 13, 1888, there was no law, rule, or regulation making the Auditor of the District accountable for public moneys, and we agree with the Court of Appeals that since there was no statute authorizing the District Commissioners to receive or expend such permit work deposits, the order imposed no liability upon the Auditor's bondsmen, because the moneys received from citizens for street improvements under the permit system, were not public moneys in any legal sense, but funds of private citizens held extra-officially by the public officers.

The act of Congress of March 3, 1891 (26 Stat. 1062, 1064, c. 546), provided for a disbursing clerk, and authorized him to pay laborers and employés of the District "with moneys advanced to him by the Commissioners in their discretion, upon pay-rolls or other vouchers audited and approved by the Auditor of the District of Columbia and certified by the Commissioners as now required by

law." This clerk was made subordinate to the Commissioners, and they were held responsible for his acts and defaults. The declaration avers that this disbursing clerk was the same as the "pay clerk" referred to in the order of June 13, 1888.

Be this as it may, we find nothing in the law, nor in that order, to impose responsibility for the faults of the disbursing clerk upon the Auditor.

Moreover, the breaches assigned in the declaration do not appear to pertain to any of the duties imposed upon the Auditor by any of the laws, or rules, or regulations to which we are referred.

Four of the assigned breaches set up that certain checks, some drawn by the disbursing officer and countersigned by the Auditor, and others drawn by the Auditor, all payable to his order as Auditor and indorsed by him as such, should have been deposited by him, "in accordance with law and the rules governing the conduct of his office," with the Treasurer of the United States; or should, "in accordance with law and the rules and regulations aforesaid," have been deposited in a certain bank as reimbursement of the Deposit and Assessment Fund; or should have been deposited in bank to the credit of Petty as Auditor for the benefit of the whole-cost work, etc.; that in each instance, the checks having been indorsed, were not so deposited, but were cashed and the proceeds never paid or accounted for to the plaintiff, etc. For reasons already mentioned, the pleader has studiously refrained from averring that these checks were cashed by Petty, or that the proceeds thereof in any way came to his hands. The legitimate inference is to the contrary, and that some other official, for whose misconduct Petty was not by law responsible, took the proceeds. For in none of the breaches is the duty attributed to Petty covered by any of the laws, rules, or regulations that are cited. The fifth breach charged, is that Petty, as Auditor, failed to account for

moneys of the District of Columbia which came to his hands, represented by certain specified checks, from funds belonging to the whole-cost work, unlawfully drawn by Petty as Auditor, the checks being payable to the order of Petty "as disbursing agent, Rock Creek Park, D. C."; that these checks and the proceeds thereof were unlawfully used by Petty in his capacity as such disbursing agent, etc., etc. Upon the argument no attempt was made to support this breach, and as it appears to charge duties that are not covered by any of the laws or rules cited, we dismiss it without further mention.

Judgment affirmed.

JOURNAL OF COMMERCE AND COMMERCIAL BULLETIN *v.* BURLESON, AS POSTMASTER GENERAL OF THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 818. Submitted March 11, 1913.—Decided March 17, 1913.

A restraining order against the Postmaster General enforcing the statute, the constitutionality of which is involved in this action (see *ante*, p. 288) granted pending the decision on application of the appellant.

PETITION of The Journal of Commerce and Commercial Bulletin for restraining order.

Mr. Robert C. Morris for petitioner:

The petition alleged among things that at the time of taking the appeal and during the proceedings, it was agreed between counsel for the appellant, the Department of Justice and the Post-Office Department that pending the decision by this court upon said appeal in this case no action would be taken by the Post-Office Department to either compel the appellant or other newspaper publishers throughout the country to comply with the provisions of the act of August 24, 1912, or to enforce against them the penalties for non-compliance or to deny to them the privileges of the mail upon their failure to file and publish the required statements. That the only condition attached to such understanding was the condition that counsel for the appellant should prosecute this appeal with all reasonable diligence, so that the questions involved might be presented to this court for determination without undue delay.

That notwithstanding the agreement, appellant had re-

ceived from the Postmaster of New York a communication to the effect that the provisions of said statute would be enforced forthwith without awaiting the decision of this court on the appeal which had been argued on December 2 and 3, 1912, and had not yet been decided.

That The Solicitor General of the United States had accepted service of the motion.

The appellant prayed the court to grant herein an order restraining the defendants or their successors in office, as the case may be, and all persons acting through or under them, until the decision of this court herein, from enforcing or attempting to enforce the provisions of said statute, and particularly restraining them from denying to appellant and other newspaper publishers the privileges of the mail by reason of the failure or neglect of appellant and such other publishers to comply with the provisions of said law and file the statements required thereby.

PER CURIAM. On consideration of the motion for a restraining order of the appellees herein,

It is now here ordered by the court that the motion be, and the same is hereby, granted.

OPINIONS PER CURIAM, ETC., FROM MARCH 11, 1913, TO JUNE 16, 1913.

No. 189. EDWIN J. BROWN, PLAINTIFF IN ERROR, *v.* THE STATE OF WASHINGTON. In error to the Supreme Court of the State of Washington. Argued by the plaintiff in error, and submitted for the defendant in error March 14, 1913. Decided March 17, 1913. *Per Curiam.* Dismissed for the want of jurisdiction, on the authority of *Kansas City Star Co.* v. *Julian*, 215 U. S. 590, last paragraph; *Rogers* v. *Jones*, 214 U. S. 204. *Mr. Edwin J. Brown pro se.* *Mr. W. V. Tanner* for the defendant in error.

No. —. Original. *Ex parte:* IN THE MATTER OF CHARLES F. WILCOX, PETITIONER. Submitted March 24, 1913. Decided April 7, 1913. Motion for leave to file petition for a writ of mandamus and for leave to proceed *in forma pauperis* denied. *Mr. Chas. F. Wilcox pro se.*

No. 234. THE ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* A. W. BURCKETT. In error to the District Court of the Parish of Caddo, State of Louisiana. Submitted by the plaintiff in error April 21, 1913. Decided April 28, 1913. *Per Curiam.* Judgment reversed with costs, and case remanded for further proceedings upon the authority of *Railroad Co.* v. *Hefley*, 158 U. S. 98; *Texas & Pacific Ry.* v. *Mugg*, 202 U. S. 242; *United States* v. *Miller*, 223 U. S. 599; *Ill. Central R. R.* v. *Henderson Elevator Co.*, 226 U. S. 441. *Mr. Taliaferro*

Alexander, Mr. S. H. West, Mr. C. C. Collins and *Mr. Roy T. Britton* for the plaintiff in error. No appearance for the defendant in error.

No. 911. THE UNITED STATES EX REL. SALI ZIMMERSPITZ, APPELLANT, *v.* P. L. PRENTIS ET AL. Appeal from the District Court of the United States for the Northern District of Illinois. Submitted April 11, 1913. Decided April 28, 1913. *Per Curiam.* Dismissed for the want of jurisdiction. *Lampasas* v. *Bell*, 180 U. S. 276, 282; *American Sugar Refining Co.* v. *United States*, 211 U. S. 155, 161. *Mr. Benjamin C. Bachrach* for the appellant. *The Attorney General* and *Mr. Assistant Attorney General Harr* for the appellees.

No. 223. MARION A. MORSE, PLAINTIFF IN ERROR, *v.* SIDNEY A. BROWN, SHERIFF OF NEW LONDON COUNTY, CONN. In error to the Supreme Court of Errors of the State of Connecticut. Submitted April 17, 1913. Decided April 28, 1913. *Per Curiam.* Dismissed for the want of jurisdiction. *Anderson* v. *Connecticut*, 226 U. S. 603. *Mr. Donald G. Perkins* and *Mr. Chas. W. Comstock* for the plaintiff in error. *Mr. Chas. B. Whittlesey* for the defendant in error.

No. 321. CHARLES WILSON, ARRESTED UNDER THE NAME OF CHARLES WILLARD, APPELLANT, *v.* THE UNITED STATES. Appeal from the District Court of the United States for the Northern District of Illinois. Motion to dismiss submitted April 28, 1913. Decided May 5, 1913.

Per Curiam. Appeal dismissed upon the authority of *Johnson* v. *Hoy*, 227 U. S. 245. *Mr. Elijah N. Zoline* for the appellant. *The Attorney General* and *Mr. Assistant Attorney General Harr* for the appellee.

No. 2. Colorado & Northwestern Railroad Company, Plaintiff in Error, *v.* The United States. In error to the District Court of the United States for the District of Colorado. Submitted October 21, 1912. Decided May 5, 1913. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Union Trust Co. of St. Louis* v. *Westhus*, 228 U. S. 519. (See *United States* v. *The Colorado & N. W. R. R. Co.*, 157 Fed. Rep. 321; *S. C.*, 209 U. S. 544.) *Mr. E. E. Whitted* for the plaintiff in error. *The Attorney General, Mr. Assistant to the Attorney General Fowler* and *Mr. Henry E. Colton* for the defendant in error.

No. 238. S. D. Harper, Plaintiff in Error, *v.* Grant Victor, United States Marshal, etc. In error to the Circuit Court of the United States for the Eastern District of Oklahoma. Submitted April 18, 1913. Decided May 5, 1913. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Fisher* v. *Baker*, 203 U. S. 174, 182, and cases cited, and cause remanded to the District Court of the United States for the Eastern District of Oklahoma. *Mr. Jas. S. Davenport* for the plaintiff in error. *The Attorney General* and *Mr. Assistant Attorney General Adkins* for the defendant in error.

No. 253. The United States, Plaintiff in Error, *v.* Atlanta Journal Company et al. In error to the

Circuit Court of the United States for the Northern District of Georgia. Argued April 24, 1913. Decided May 5, 1913. *Per Curiam.* Dismissed for the want of jurisdiction, on the authority of *United States* v. *Patten*, 226 U. S. 525, 535, and cases cited, and cause remanded to the District Court of the United States for the Northern District of Georgia. *The Attorney General* and *Mr. Assistant Attorney General Harr* for the plaintiff in error. *Mr. Alex. C. King* and *Mr. Chas. T. Hopkins* for the defendant in error.

No. 276. JOHN ASHON, APPELLANT, *v.* THE CONSERVATION COMMISSION OF LOUISIANA ET AL.; and

No. 277. LEONG MOW, APPELLANT, *v.* THE CONSERVATION COMMISSION OF LOUISIANA ET AL. Appeals from the Circuit Court of the United States for the Eastern District of Louisiana. Argued for the appellees and submitted for the appellants May 2, 1913. Decided May 5, 1913. *Per Curiam.* Appeals dismissed without costs to either party (*Mills* v. *Green*, 159 U. S. 651; *Board* v. *Glover*, 161 U. S. 101), and cases remanded to the District Court of the United States for the Eastern District of Louisiana. *Mr. E. Howard McCaleb* for the appellants. *Mr. Harry Gamble* and *Mr. R. G. Pleasant* for the appellees.

No. 281. THE OREGON RAILROAD & NAVIGATION COMPANY, PLAINTIFF IN ERROR, *v.* F. V. MARTIN, AS SOLE SURVIVING PARTNER, ETC. In error to the Supreme Court of the State of Oregon. Submitted for the plaintiff in error, May 2, 1913. Decided May 5, 1913. *Per Curiam.* Judgment reversed with costs on the authority of *C., R. I. &c. Ry. Co.* v. *Hardwick Elevator Co.*, 226 U. S. 426, and

cause remanded for further proceedings. *Mr. Maxwell Evarts* and *Mr. W. W. Cotton* for the plaintiff in error. No appearance for the defendant in error.

No. 409. GEORGE HARRINGTON ET AL., APPELLANTS, *v.* THE ATLANTIC & PACIFIC TELEGRAPH COMPANY ET AL. Appeal from the United States Circuit Court of Appeals for the Second Circuit. Motion to dismiss submitted December 2, 1912. Decided May 5, 1913. *Per Curiam.* Dismissed for the want of jurisdiction. (*United States* v. *Jahn*, 155 U. S. 109, 114 (3); *Carter* v. *Roberts*, 177 U. S. 496, 500; *Cary Mfg. Co.* v. *Acme Flexible Clasp Co.*, 187 U. S. 427; *Macfadden* v. *United States*, 213 U. S. 288.) *Mr. Frederick J. Stone* and *Mr. Alton B. Parker* for the appellants. *Mr. Rush Taggart* and *Mr. John F. Dillon* for the appellees.

No. 410. GEORGE HARRINGTON ET AL., APPELLANTS, *v.* THE ATLANTIC & PACIFIC TELEGRAPH COMPANY ET AL. Appeal from the Circuit Court of the United States for the Southern District of New York. Motion to dismiss submitted December 2, 1912. Decided May 5, 1912. *Per Curiam.* Dismissed for the want of jurisdiction. (*Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S. 31; *Brown* v. *Alton Water Co.*, 222 U. S. 326; *Metropolitan Co.* v. *Kaw Valley District*, 223 U. S. 519; *Union Trust Co. of St. Louis* v. *Westhus*, 228 U. S. 519.) *Mr. Frederick J. Stone* and *Mr. Alton B. Parker* for the appellants. *Mr. Rush Taggart* and *Mr. John F. Dillon* for the appellees.

No. 1035. MISSOURI, KANSAS & TEXAS RAILWAY COMPANY ET AL., PLAINTIFFS IN ERROR, *v.* L. E. GOOD-

RICH. In error to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas. Motion to dismiss or affirm submitted April 21, 1913. Decided May 5, 1913. *Per Curiam.* Dismissed for the want of jurisdiction, upon the authority of *York* v. *Texas*, 137 U. S. 15; *Kauffman* v. *Wootters*, 138 U. S. 285. *Mr. Jos. M. Bryson, Mr. Alex. S. Coke*, and *Mr. Aldis B. Browne* for the plaintiff in error. *Mr. J. A. L. Wolfe* for the defendant in error.

No. 1000. JULIAN MUNSURI, APPELLANT, *v.* C. O. LORD, TRUSTEE, ETC. Appeal from the District Court of the United States for Porto Rico. Motion to dismiss submitted April 28, 1913. Decided May 12, 1913. *Per Curiam.* Appeal dismissed for the want of jurisdiction. *Mr. Frederic R. Coudert* and *Mr. Howard Thayer Kingsbury* for the appellant. *Mr. N. B. K. Pettingill* and *Mr. Wm. H. Hawkins* for the appellee.

No. ——. Original. *Ex parte:* IN THE MATTER OF MRS. WILBUR R. FORCE ET AL., PETITIONERS. Submitted May 12, 1913. Decided May 26, 1913. Motion for leave to file petition for writs of mandamus and certiorari denied. *Mr. S. H. King* for the petitioner.

No. ——. Original. *Ex parte:* IN THE MATTER OF EDWARD H. PATTERSON, PETITIONER. Submitted May 26, 1913. Decided June 10, 1913. Motion for leave to file petition for a writ of mandamus denied. *Mr. George Whitefield Betts, Jr.*, for the petitioner.

Decisions on Petitions for Writs of Certiorari From March 11, 1913, to June 16, 1913.

No. 726. THE CITY OF CHICAGO, PETITIONER, *v.* WILLIAM MUNROE ET AL., EXECUTORS, ETC., ET AL. March 17, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John W. Beckwith* and *Mr. Charles M. Haft* for the petitioner. No appearance for the respondents.

No. 980. HENRY LAIR, PETITIONER, *v.* THE UNITED STATES. March 17, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Marshall B. Woodworth* for the petitioner. *The Attorney General* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 1001. SAN FRANCISCO CHEMICAL COMPANY, PETITIONER, *v.* MORSE S. DUFFIELD ET AL.; and

No. 1002. SAN FRANCISCO CHEMICAL COMPANY, PETITIONER, *v.* MORSE S. DUFFIELD ET AL. March 17, 1913. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. D. Worth Clark, Mr. Aldis B. Browne, Mr. Alexander Britton,* and *Mr. Evans Browne* for the petitioner. No appearance for the respondents.

No. 1003. CITIZENS WHOLESALE SUPPLY COMPANY, PETITIONER, *v.* D. H. SNYDER ET AL. March 17, 1913. Petition for a writ of certiorari to the United States

Circuit Court of Appeals for the Third Circuit denied. *Mr. T. Walter Fowler* for the petitioner. No appearance for the respondents.

No. 838. THEODORE KHARAS, PETITIONER, *v.* THE UNITED STATES. March 24, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. T. J. Mahoney* for the petitioner. *The Attorney General* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 1009. THE J. F. ROWLEY COMPANY, PETITIONER, *v.* E. H. ROWLEY. March 24, 1913. Petitions for a writ of certiorari and a cross-writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. L. P. Loving* for the petitioner. *Mr. Lowrie C. Barton* for the respondent.

No. 1010. THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, PETITIONER, *v.* THE HOME SAVINGS BANK. March 24, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. William H. Bryant, Mr. Chas. S. Thomas, Mr. Milton Smith* and *Mr. Chas. R. Brock* for the petitioner. No appearance for the respondent.

No. 1018. CHARLES G. DADE, PETITIONER, *v.* THE UNITED STATES. April 7, 1913. Petition for a writ of certiorari to the Court of Appeals of the District of

Columbia denied. *Mr. Henry E. Davis* for the petitioner. *The Attorney General* and *Mr. Assistant Attorney General Adkins* for the respondent.

No. 1019. WELCH MANUFACTURING COMPANY, PETITIONER, *v.* SAMUEL D. YOUNG, TRUSTEE. April 7, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Fred L. Chappell* and *Mr. Wm. S. Hodges* for the petitioner. *Mr. Nathan Heard* and *Mr. Chas. E. Riordan* for the respondent.

No. 1024. THE PORTLAND GOLD MINING COMPANY ET AL., PETITIONERS, *v.* CHARLES DANIELS ET AL. April 7, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Chas. S. Thomas, Mr. Wm. H. Bryant, Mr. Wm. P. Malburn,* and *Mr. Geo. L. Nye* for the petitioners. *Mr. Edward C. Stimson* and *Mr. James J. Banks* for the respondents.

No. 1004. WARNER U. GRIDER ET AL., PETITIONERS, *v.* MINNIE C. GROFF ET AL. April 14, 1913. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Aldis B. Browne, Mr. Frank Doster, Mr. Hunter M. Meriwether, Mr. Alexander Britton* and *Mr. Evans Browne* for the petitioners. No appearance for the respondent.

No. 1005. THE BUNKER HILL AND SULLIVAN MINING & CONCENTRATING COMPANY, PETITIONER, *v.* THOMAS

WILLIAMS. April 14, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Myron A. Folsom* for the petitioner. *Mr. H. Lowndes Maury* and *Mr. B. K. Wheeler* for the respondent.

No. 1023. WILLIAM B. STRANG, PETITIONER, *v.* J. A. EDSON. April 14, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Justin D. Bowersock* for the petitioner. *Mr. S. W. Moore* for the respondent.

No. 1027. JACOB SALSBURG, PETITIONER, *v.* GEORGE A. BLACKFORD, TRUSTEE, ETC. April 14, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Andrew Jackson Montague* for the petitioner. No appearance for the respondent.

No. 1044. EMMA JANE KIRKPATRICK, PETITIONER, *v.* HARRIET ELIZABETH MCBRIDE. April 14, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Chas. H. Burr* for the petitioner. *Mr. Wm. B. Sanders* and *Mr. H. M. Russell* for the respondent.

No. 1046. THE UNITED STATES, PETITIONER, *v.* JAMES B. REGAN. April 21, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for

the Second Circuit granted. *The Attorney General* and *Mr. Assistant Attorney General Harr* for the petitioner. *Mr. Max D. Steuer* for the respondent.

No. 1052. JOHN B. GLEASON, PETITIONER, *v.* HARRY K. THAW. April 21, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. John B. Gleason pro se.* No appearance for the respondent.

No. 1011. WILLIAM T. KETTENBACH ET AL., PETITIONERS, *v.* THE UNITED STATES. April 21, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Aldis B. Browne, Mr. Alexander Britton, Mr. Evans Browne, Mr. C. C. Cavanah* and *Mr. James E. Babb* for the petitioners. *The Attorney General, Mr. Assistant Attorney General Adkins* and *Mr. Peyton Gordon* for the respondent.

No. 987. THE OLD DOMINION COPPER MINING & SMELTING COMPANY, PETITIONER, *v.* FREDERICK LEWISOHN ET AL., EXECUTORS, ETC. April 21, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis D. Brandeis* and *Mr. Edward F. McClennen* for the petitioner. *Mr. Eugene Treadwell* and *Mr. Edward Lauterbach* for the respondent.

No. 1020. GAY-OLA COMPANY, PETITIONER, *v.* COCA COLA COMPANY. April 21, 1913. Petition for a writ of

certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frederick S. Tyler* for the petitioner. *Mr. W. D. Thomson* and *Mr. Harold Hirsh* for the respondent.

No. 1039. A. M. WINTERS, PETITIONER, *v.* THE UNITED STATES. April 21, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Carr W. Taylor* for the petitioner. *The Attorney General* and *Mr. Assistant Attorney General Denison* for the respondent.

No. 1045. C. M. SUMMERS, PETITIONER, *v.* THE UNITED STATES. April 28, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Albert Fink, Mr. Louis P. Shackleford, Mr. Aldis B. Browne, Mr. Alexander Britton, Mr. Evans Browne* and *Mr. Kurnel R. Babbitt* for the petitioner. *The Attorney General* and *Mr. Assistant Attorney General Adkins* for the respondent.

No. 1066. WILLIAM MCCOACH, COLLECTOR, ETC., PETITIONER, *v.* D. F. PRATT ET AL., EXECUTORS, ETC. April 28, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted. *The Attorney General* and *Mr. Assistant Attorney General Harr* for the petitioner. No appearance for the respondent.

No. 972. FRANCES HARVEY, PETITIONER, *v.* FIDELITY & CASUALTY COMPANY. April 28, 1913. Petition for a

writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John W. Shine* and *Mr. Wade H. Ellis* for the petitioner. *Mr. Edwin A. Jones* for the respondent.

No. 1034. CHARLES NEMCOF ET AL., PETITIONERS, *v.* THE UNITED STATES. April 28, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. E. Clinton Rhoads* for the petitioner. *The Attorney General, Mr. Assistant Attorney General Denison* and *Mr. Louis G. Bissell* for the respondent.

No. 1059. MISSOURI-EDISON ELECTRIC COMPANY ET AL., PETITIONERS, *v.* MORGAN JONES ET AL. April 28, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. H. S. Priest, Mr. B. Schnurmacher* and *Mr. Wade H. Ellis* for the petitioners. *Mr. D. T. Bomar, Mr. Eleneious Smith* and *Mr. Ford W. Thompson* for the respondents.

No. 1061. T. F. BAKER ET AL., PETITIONERS, *v.* THE UNITED STATES. April 28, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. I. W. Stevens* and *Mr. Geo. E. Miller* for the petitioners. *The Attorney General* and *Mr. Assistant Attorney General Adkins* for the respondent.

No. 1063. LEONARD A. HOCHSTADTER, PETITIONER, *v.* ALBERT O. BROWN ET AL., ETC. April 28, 1913. Petition

for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Irving L. Ernst* and *Mr. Jas. L. Bishop* for the petitioner. *Mr. Dix W. Noel* for the respondents.

No. 963. THOMAS J. LYNCH, EXECUTOR, ETC., PETITIONER, *v.* THE TRAVELERS' INSURANCE COMPANY. May 5, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Geo. W. Heselton* for the petitioner. *Mr. R. Ross Perry, Mr. R. Ross Perry, Jr.,* and *Mr. Harvey D. Eaton* for the respondent.

No. 1050. ELIJAH WATT SELLS, PETITIONER, *v.* THE CITY OF CHICAGO. May 5, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Oliver C. Carpenter, Mr. Delevan A. Holmes* and *Mr. M. M. Townley* for the petitioner. *Mr. William H. Sexton* and *Mr. Chas. M. Haft* for the respondent.

No. 1065. THE NATIONAL SURETY COMPANY, PETITIONER, *v.* THE WESTERN PACIFIC RAILWAY COMPANY. May 5, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. F. R. Coudert, Mr. Wm. J. Griffin, Mr. E. S. Heller* and *Mr. G. W. McEnerney* for the petitioner. *Mr. F. W. M. Cutcheon* for the respondent.

No. 1075. JACOB DOLL & SONS (INCORPORATED), PETITIONER, *v.* GIOVANNI TOMASO RIBETTI. May 5, 1913.

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. W. S. Dalzell* for the petitioner. No appearance for the respondent.

No. 1051. RITER-CONLEY MFG. CO., PETITIONER, *v.* NELLIE C. AIKEN AND NELLIE C. AIKEN, JR. May 12, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. E. W. Bradford, Mr. Wm. G. Doolittle* and *Mr. Henry P. Doolittle* for the petitioner. *Mr. Robert D. Totten* and *Mr. James I. Kay* for the respondents.

No. 1082. JOHN M. RHEA, PETITIONER, *v.* THE UNITED STATES. May 12, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Wm. P. Bynum* for the petitioner. *The Attorney General* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 1084. JOSEPH G. MAY ET AL., PETITIONERS, *v.* THE UNITED STATES. May 12, 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. 1088. CORNELIUS A. DAVIS ET AL., PETITIONERS, *v.* SMOKELESS FUEL COMPANY. May 12, 1913. Petition

for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Chas. C. Burlingham* and *Mr. Chauncey I. Clark* for the petitioners. *Mr. Louis Sturcke* for the respondent.

No. 1089. H. G. Hastings et al., Petitioners, *v.* W. D. Malone. May 12, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Wm. F. Ramsey* and *Mr. Samuel Wm. Fisher* for the petitioners. *Mr. Will G. Barber* for the respondent.

No. 1092. William A. Wright, Comptroller, etc., Petitioner, *v.* Louisville & Nashville Railroad Company et al. May 12, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Thos. S. Felder, Mr. Jno. C. Hart* and *Mr. Samuel H. Sibley* for the petitioner. *Mr. Joseph B. Cumming* and *Mr. Alex. C. King* for the respondent.

No. 1093. Cuno H. Rudolph et al., Petitioners, *v.* Lynchburg Investment Corporation et al. May 12, 1913. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *Mr. Edward H. Thomas* for the petitioners. *Mr. Jos. W. Cox* and *Mr. W. C. Sullivan* for the respondents.

No. 1000. Julian Munsuri, Petitioner, *v.* C. O. Lord, Trustee, etc. May 12, 1913. Petition for a writ

of certiorari to the District Court of the United States for Porto Rico granted. *Mr. Frederic R. Coudert* and *Mr. Howard Thayer Kingsbury* for the petitioner. *Mr. N. B. K. Pettingill* and *Mr. Wm. H. Hawkins* for the respondent.

No. 1107. THE UNITED STATES, PETITIONER, *v.* LEXINGTON MILL & ELEVATOR COMPANY. May 26, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *The Attorney General* and *Mr. Assistant Attorney General Adkins* for petitioner. *Mr. E. L. Scarritt* for respondent.

No. 949. EUGENE MOSIER, PETITIONER, *v.* THE UNITED STATES. May 26, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Milton Brown* for the petitioner. *The Attorney General* and *Mr. Assistant Attorney General Denison* for the respondent.

No. 1025. WILLIAM E. PEARSON, PETITIONER, *v.* WILLIAM J. HARRIS. May 26, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John M. Gearin* for the petitioner. No appearance for the respondent.

No. 1071. PACIFIC CREOSOTING COMPANY, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. May 26, 1913. Petition for a writ of certiorari herein to the United States

Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George E. de Steiguer* for the plaintiff in error in support of the petition. *The Attorney General* and *Mr. Assistant Attorney General Adkins* in opposition thereto.

No. 1104. Union Steamboat Company, Petitioner, *v.* The Administrators of the Estate of Walter Chafin, Deceased, et al. May 26, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Aldis B. Browne, Mr. Frank H. Scott, Mr. Edgar A. Bancroft, Mr. John E. MacLeish* and *Mr. W. O. Johnson* for the petitioner. *Mr. Samuel B. King* for the respondents.

No. 1108. Detroit Fire & Marine Insurance Company et al., Petitioners, *v.* Federal Insurance Company et al. May 26, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frank S. Masten, Mr. F. H. Canfield, Mr. Harvey D. Goulder* and *Mr. G. L. Canfield* for the petitioners. *Mr. Hermon A. Kelley* for the respondent.

No. 990. The United States Telephone Company, Petitioner, *v.* Central Union Telephone Company et al. June 10, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. D. J. Cable* and *Mr. H. M. Daugherty* for the petitioner. *Mr. John H. Doyle* and *Mr. Murray Seasongood* for the respondents.

No. 1090. AMERICAN STREET FLUSHING MACHINE COMPANY, PETITIONER, *v.* ST. LOUIS STREET FLUSHING MACHINE COMPANY ET AL. June 10, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Clifton V. Edwards* for the petitioner. *Mr. John D. Johnson* and *Mr. Jas. A. Carr* for the respondents.

No. 1106. JULIUS MARQUSEE, PETITIONER, *v.* HARTFORD FIRE INSURANCE COMPANY. June 10, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Frederick M. Czaki* for the petitioner. *Mr. William M. Ivins* for the respondent.

No. 1111. C. E. DOLBEAR, PETITIONER, *v.* THE FOREIGN MINES DEVELOPMENT COMPANY. June 10, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Simon Lyon* and *Mr. R. B. H. Lyon* for the petitioner. *Mr. Charles W. Slack* and *Mr. Conrad H. Syme* for the respondent.

No. 1112. WILLIAM D. HOLDEN, TRUSTEE, ETC., PETITIONER, *v.* J. A. HARING, BANKRUPT. June 10, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Benn M. Corwin* for petitioner. *Mr. H. M. Dunham* for respondent.

No. 1114. SUSAN C. HIGGINS, PETITIONER, *v.* HERVEY E. EATON, EXECUTOR, ETC. June 10, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. A. F. Freeman* for the petitioner. *Mr. Edwin H. Risley* for the respondent.

No. 1121. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS, PETITIONER, *v.* THE UNITED STATES. June 10, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. E. B. Perkins* and *Mr. Edward A. Haid* for the petitioner. *The Attorney General* and *Mr. Assistant Attorney General Fowler* for the respondent.

No. 1122. NORTH GERMAN LLOYD, CLAIMANT, ETC., PETITIONER, *v.* HAMBURG-AMERICAN LINES ET AL. June 10, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph Larocque* for the petitioner. *Mr. C. C. Burlingham* for the respondent.

No. 1123. JULIUS H. BLACKBURN, PETITIONER, *v.* ELLSWORTH C. IRVINE, RECEIVER, ETC. June 10, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Daniel B. Henderson* and *Mr. Edwin W. Smith* for the petitioner. *Mr. Thomas Patterson* and *Mr. M. W. Acheson, Jr.*, for the respondent.

No. 1136. NEWPORT NEWS SHIP BUILDING & DRY DOCK COMPANY, PETITIONER, *v.* THE STEAMBOAT SARATOGA, ETC. June 10, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel Park*, *Mr. H. E. Mattison* and *Mr. J. E. Carpenter* for the petitioner. *Mr. C. C. Burlingham* for the respondent.

No. 1141. THE MARIAN COAL COMPANY, PETITIONER, *v.* JOHN W. PEALE. June 10, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Henry H. Glassie* for the petitioner. No appearance for the respondent.

No. 1110. WIDOW W. W. SHIPP, PETITIONER, *v.* THE TEXAS & PACIFIC RAILWAY COMPANY. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit. June 10, 1913. *Per Curiam.* Petition denied. (*Re Tampa Suburban Railroad Co.*, 168 U. S. 583, 587–588; *Texas & Pacific Ry. Co.* v. *Bourman*, 212 U. S. 538.) *Mr. Charles Louque* for the petitioner. No appearance for the respondent.

No. 1134. LAURA R. CRAMER, PETITIONER, *v.* LEE M. HURD, EXECUTOR, ETC. June 16, 1913. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Arthur A. Birney* and *Mr. Wharton E. Lester* for the petitioner. *Mr. Richard A. Ford* for the respondent.

No. 1135. THE FARMERS' LOAN & TRUST COMPANY, TRUSTEE, PETITIONER, *v.* FRANK W. BLAIR ET AL. June 16, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frederick Geller, Mr. Hinton E. Spalding* and *Mr. Edward H. Blanc* for the petitioner. *Mr. Henry M. Campbell, Mr. Hal H. Smith, Mr. Henry E. Bodman* and *Mr. Roberts Walker* for the respondent.

No. 1148. SILVER KING COALITION MINES COMPANY, PETITIONER, *v.* SILVER KING CONSOLIDATED MINING COMPANY. June 16, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William H. Dickson* for the petitioner. *Mr. Edward B. Critchlow* for the respondent.

No. 1151. MARGARET ALICE THROCKMORTON ET AL., PETITIONERS, *v.* SAMUEL T. RUGGLES, TRUSTEE, ET AL. June 16, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. David K. Watson* for the petitioner. *Mr. Francis B. James* for the respondents.

No. 1155. THE STAR RUBBER COMPANY, PETITIONER, *v.* THE FAULTLESS RUBBER COMPANY. June 16, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George W. Rea* for the petitioner. No appearance for the respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM MARCH 11, 1913, TO JUNE 16, 1913.

No. 186. THOMAS A. FIELDS, APPELLANT, *v.* GEORGE F. WHITE, UNITED STATES MARSHAL, ETC. Appeal from the Circuit Court of the United States for the Southern District of Georgia. March 11, 1913. Dismissed with costs, on motion of *Mr. Frederick T. Saussy* for the appellant, and cause remanded to the District Court of the United States for the Southern District of Georgia. *Mr. J. R. Saussy, Mr. Frederick Tupper Saussy* and *Mr. A. S. Bradley* for the appellant. *The Attorney General* for the appellee.

No. 185. JUAN Z. RODRIGUEZ, APPELLANT, *v.* THE PEOPLE OF PORTO RICO. Appeal from the Supreme Court of Porto Rico. March 12, 1913. Dismissed with costs, on motion of counsel for the appellant. *Mr. Leonard J. Mather* for the appellant. *Mr. Felix Frankfurter* for the appellee.

No. 196. CHARLES F. NEWCOMB, PLAINTIFF IN ERROR, *v.* THE STATE OF WASHINGTON. In error to the Supreme Court of the State of Washington. March 14, 1913. Dismissed with costs, pursuant to the tenth rule. *Mr. Conrad H. Syme* for the plaintiff in error. *Mr. W. V. Tanner* for the defendant in error.

No. 214. THE DAKOTA CATTLE COMPANY, APPELLANT, *v.* THE UNITED STATES AND THE SIOUX INDIANS;

No. 215. CATHERINE HOWARD, APPELLANT, *v.* THE UNITED STATES AND THE SIOUX INDIANS; and

No. 216. THE KEYSTONE LAND & CATTLE COMPANY, APPELLANT, *v.* THE UNITED STATES AND THE SIOUX INDIANS. Appeals from the Court of Claims. March 20, 1913. Dismissed, on motion of *Mr. Archibald King*, in behalf of counsel for the appellants. *Mr. William B. King* and *Mr. William E. Harvey* for the appellants. *The Attorney General* and *The Solicitor General* for the appellees.

No. —. Original. OSCAR W. WHITE, PLAINTIFF, *v.* DON ENRIQUE BORJA. Motion for leave to file declaration submitted March 3, 1913. March 7, 1913. Motion for leave to withdraw motion for leave to file declaration granted, on motion of *Mr. John Ridout* for the plaintiff. *Mr. John Ridout* for the plaintiff.

No. 280. THE GUARDIAN ASSURANCE COMPANY OF LONDON, LIMITED, PLAINTIFF IN ERROR, *v.* DOMINGO QUINTANA. In error to the District Court of the United States for Porto Rico. April 7, 1913. Dismissed with costs, per stipulation. *Mr. Frederic D. McKenney, Mr. F. H. Dexter, Mr. John Spalding Flannery* and *Mr. William Hitz* for the plaintiff in error. *Mr. Clement L. Bouvé* and *Mr. H. H. Scoville* for the defendant in error.

No. 1007. BUNYAN LUCAS, APPELLANT, *v.* ROBERT LEE LUCAS ET AL., EXECUTORS, ETC., ET AL. Appeal from the District Court of the United States for the Southern District of California. April 7, 1913. Dismissed with

costs on motion of counsel for appellant. *Mr. F. M. Etheridge* and *Mr. J. M. McCormick* for the appellant. No appearance for the appellee.

No. 655. CHICAGO & NORTHWESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* HUGH ROWLANDS. In error to the Supreme Court of the State of Wisconsin. April 7, 1913. Dismissed without costs to either party, per stipulation. *Mr. Edward M. Smart* for the plaintiff in error. *Mr. John J. Cook* for the defendant in error.

No. 597. JOHN FLETCHER, APPELLANT, *v.* C. T. ELLIOTT, AS UNITED STATES MARSHAL, ETC. Appeal from the Circuit Court of the United States for the Northern District of California. April 14, 1913. Dismissed with costs, on motion of *Mr. Henry F. Woodard* for the appellant, and cause remanded to the District Court of the United States for the Northern District of California. *Mr. Arthur A. Birney* and *Mr. Henry F. Woodard* for the appellant. *The Attorney General* for the appellee.

No. 298. AUSTRO-AMERICAN STEAMSHIP COMPANY, LIMITED, PETITIONER, *v.* PETER RAMJAK. April 14, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit dismissed, on motion of *Mr. Edgar H. Farrar* for the petitioner. *Mr. Edgar H. Farrar* for the petitioner. *Mr. John D. Grace* for the respondent.

No. 308. ADAMS EXPRESS COMPANY, PLAINTIFF IN ERROR, *v.* HECTOR VERVAEKE. In error to the Supreme

Court of the State of Pennsylvania. April 21, 1913. Judgment reversed with costs, per stipulation of counsel, and cause remanded for further proceedings. *Mr. Chas. F. Patterson, Mr. John Lewis Evans,* and *Mr. Thos. De-Witt Cuyler* for the plaintiff in error. *Mr. George Clinton* for the defendant in error.

No. 258. JOHN MEEKER ET AL., PLAINTIFFS IN ERROR, *v.* MARTIN KAELIN, MARY KAELIN, HIS WIFE, ET AL. In error to the Circuit Court of the United States for the Western District of Washington. April 22, 1913. Dismissed with costs, pursuant to the tenth rule, and cause remanded to the District Court of the United States for the Western District of Washington. *Mr. Benjamin S. Grosscup* for the plaintiffs in error. *Mr. S. Warburton* for the defendants in error.

No. 262. JOSE AVALO SANCHEZ, APPELLANT, *v.* CONCEPCION VEVE Y DIAZ AND HER HUSBAND, JOSE SASTRANO. Appeal from the District Court of the United States for Porto Rico. April 23, 1913. Dismissed with costs, pursuant to the tenth rule. *Mr. Hector H. Scoville* for the appellant. *Mr. N. B. K. Pettingill* for the appellees.

No. 260. THE TEXAS & PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* JOHN LACEY. In error to the United States Circuit Court of Appeals for the Fifth Circuit. April 25, 1913. Dismissed with costs, on authority of counsel for the plaintiff in error. *Mr. Chas. Payne Fenner* for the plaintiff in error. No appearance for the defendant in error.

No. 288. SAMUEL O'BRIEN, PLAINTIFF IN ERROR, *v.* RUDOLPH B. SCHNEIDER ET AL. In error to the Supreme Court of the State of Nebraska. May 2, 1913. Dismissed with costs, pursuant to the tenth rule. *Mr. I. L. Albert* for the plaintiff in error. *Mr. Wm. J. Courtright* for the defendants in error.

No. 294. ERNEST M. COLLINS, PLAINTIFF IN ERROR, *v.* JOHN W. DANFORTH COMPANY OF BUFFALO, NEW YORK. In error to the Court of Appeals of the District of Columbia. May 5, 1913. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Wilton J. Lambert* for the plaintiff in error. No appearance for the defendant in error.

No. 306. ADAMS EXPRESS COMPANY, PLAINTIFF IN ERROR, *v.* ABE DAVIDSON, TRADING AS DAVIDSON & SON. In error to the Supreme Court of the State of Pennsylvania. May 6, 1913. Judgment reversed with costs, per stipulation of counsel, and cause remanded for further proceedings. *Mr. John Lewis Evans* and *Mr. Thos. DeWitt Cuyler* for the plaintiff in error. *Mr. J. Percy Keating* for the defendant in error.

No. 307. ADAMS EXPRESS COMPANY, PLAINTIFF IN ERROR, *v.* DAISY WRIGHT. In error to the Supreme Court of the State of Pennsylvania. May 6, 1913. Judgment reversed with costs, per stipulation of counsel, and cause remanded for further proceedings. *Mr. Jno. Lewis Evans* and *Mr. Thos. DeWitt Cuyler* for the plaintiff in error. *Mr. G. W. Pepper* for the defendant in error.

No. 318. HENRY D. PHILLIPS, APPELLANT, *v.* WALTER L. FISHER, SECRETARY OF THE INTERIOR. Appeal from the Court of Appeals of the District of Columbia. May 7, 1912. Dismissed with costs, pursuant to the tenth rule. *Mr. Chas. Cowles Tucker* and *Mr. J. Miller Kenyon* for the appellant. *The Attorney General* for the appellee.

No. 869. LOUISE SAVART, APPELLANT, *v.* SAMUEL BACKUS, COMMISSIONER OF IMMIGRATION, ETC. Appeal from the District Court of the United States for the Northern District of California. May 12, 1913. Dismissed with costs, on motion of *Mr. Corry M. Stadden* for the appellant. *Mr. Corry M. Stadden* for the appellant. *The Attorney General* for the appellee.

No. 724. CLARENCE W. BARRON, PLAINTIFF IN ERROR, *v.* JOHN W. MCKINNON, SHAREHOLDERS' AGENT, ETC. In error to the United States Circuit Court of Appeals for the First Circuit. May 12, 1913. Dismissed without costs to either party, per stipulation of counsel, on motion of *Mr. Evans Browne,* in behalf of counsel. *Mr. Wm. R. Sears* for the plaintiff in error. *Mr. Chester M. Pratt* for the defendant in error.

No. 270. GEORGE W. CURETON, PLAINTIFF IN ERROR, *v.* THE STATE OF GEORGIA. In error to the Court of Appeals of the State of Georgia. May 12, 1913. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. J. J. Lynch, Mr. S. P. Maddox* and *Mr. Geo. D. Lancaster* for the plaintiff in error. *Mr. Thos. S. Felder* for the defendant in error.

No. 279. GEORGE W. CURETON, PLAINTIFF IN ERROR, *v.* THE STATE OF GEORGIA. In error to the Court of Appeals of the State of Georgia. May 12, 1913. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. J. J. Lynch, Mr. S. P. Maddox* and *Mr. Geo. D. Lancaster* for the plaintiff in error. *Mr. Thos. S. Felder* for the defendant in error.

No. 989. BONITA DIAZ DE NOYA, APPELLANT, *v.* SAMUEL W. BACKUS, COMMISSIONER OF IMMIGRATION. Appeal from the District Court of the United States for the Northern District of California. May 26, 1913. Dismissed with costs, on motion of *Mr. Corry M. Stadden* for the appellant. *Mr. Marshall B. Woodworth* and *Mr. Corry M. Stadden* for the appellant. *The Attorney General* for the appellee.

No. 665. WILLIAM BLACKWELL *v.* THE SOUTHERN PACIFIC COMPANY. On a certificate from the United States Circuit Court of Appeals for the Ninth Circuit. May 26, 1913. Stricken from the docket on motion of *Mr. Edward M. Cleary* for William Blackwell. *Mr. Edward M. Cleary* for Blackwell. No appearance for The Southern Pacific Company.

No. 826. ADAMS EXPRESS COMPANY, PLAINTIFF IN ERROR, *v.* CHAMBERLIN-JOHNSON-DUBOSE COMPANY. In error to the Supreme Court of the State of Georgia. May 26, 1913. Dismissed with costs, on motion of counsel

for the plaintiff in error. *Mr. Robert C. Alston* for the plaintiff in error. No appearance for the defendant in error.

No. 827. ADAMS EXPRESS COMPANY, PLAINTIFF IN ERROR, *v.* CHAMBERLIN-JOHNSON-DUBOSE COMPANY. In error to the Supreme Court of the State of Georgia. May 26, 1913. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Robert C. Alston* for the plaintiff in error. No appearance for the defendant in error.

No. 1166. WILSON COAL COMPANY, APPELLANT, *v.* THE UNITED STATES ET AL.; and

No. 1167. WILSON COAL COMPANY, APPELLANT, *v.* THE UNITED STATES ET AL. Appeals from the United States Circuit Court of Appeals for the Ninth Circuit. May 26, 1913. Docketed and dismissed on motion of *Mr. Assistant to the Attorney General Fowler* for the appellees. *The Attorney General* for the appellees. No one opposing.

No. 411. ADOLPH SUESSKIND, APPELLANT, *v.* WILLIAM J. GAYNOR, MAYOR OF THE CITY OF NEW YORK, ET AL. Appeal from the Circuit Court of the United States for the Southern District of New York. June 10, 1913. Dismissed, per stipulation, and cause remanded to the District Court of the United States for the Southern District of New York. *Mr. Julius M. Mayer* and *Mr. A. S. Gilbert* for the appellant. *Mr. Terence Farley* for the appellee.

No. 509. JOHN V. DOBSON ET AL., PLAINTIFFS IN ERROR, *v.* THE VIRGINIA-CAROLINA CHEMICAL COMPANY. In error to the Supreme Court of the State of Tennessee. June 10, 1913. Dismissed with costs, on authority of the plaintiff in error. *Mr. John V. Dobson, p. p. . Mr. William A. Henderson* for the defendant in error.

No. 673. W. S. WRIGHT ET AL., PLAINTIFFS IN ERROR, *v.* MERCHANTS' TRUST COMPANY, EXECUTOR, ETC. In error to the Supreme Court of the State of California. June 10, 1913. Dismissed, per stipulation. *Mr. Ernest E. Wood* for the plaintiff in error. No appearance for the defendant in error.

No. 993. COL. CHARLES G. TREAT, APPELLANT, *v.* PASCUAL OROZCO, SR.; and

No. 994. COL. CHARLES G. TREAT, APPELLANT, v. DAVID DE LA FUENTE. Appeals from the District Court of the United States for the Western District of Texas. June 16, 1913. Dismissed with costs, on motion of counsel for the appellant. *The Attorney General* for the appellant. No appearance for the appellees.

INDEX.

ADMINISTRATION.

AMENDMENT OF PLEADING.

AMENDMENTS TO CONSTITUTION

ANTI-TRUST ACT.

1. *Construction; attitude of court.*

This court can see no reason for reading into the Sherman Act more than it finds there. *Nash* v. *United States*, 373.

APPEAL AND ERROR.

BANKRUPTCY.

CASES FOLLOWED.

CERTIFICATE.

See PRACTICE AND PROCEDURE, 3.

CERTIFICATES OF STOCK.

See BANKRUPTCY, 2, 3, 4, 5;
STOCK AND STOCKHOLDERS.

CERTIORARI.

1. *Nature of remedy; anticipation as to use.*

The writ of certiorari is an extraordinary remedy, and in deciding that it will not issue in a particular case this court does not anticipate in what cases exceptional facts may call for its use. *Degge* v. *Hitchcock*, 162.

2. *Scope of writ in Federal jurisdiction.*

The scope of the writ of certiorari as it exists at common law has not been enlarged by any statute in the Federal jurisdiction, and cases in which it has issued under statute from state courts to state officers are not controlling in the Federal courts. *Ib.*

COMMON CARRIERS.

See EMPLOYERS' LIABILITY ACT, 3; RATES;
INTERSTATE COMMERCE; SAFETY APPLIANCE ACTS;
STATES.

COMMON LAW.

See EMPLOYERS' LIABILITY ACT, 3.

CONDEMNATION OF LAND.

See CONSTITUTIONAL LAW, 7;
EMINENT DOMAIN;
JURISDICTION, A 8.

CONFLICT OF LAWS.

See CONSTITUTIONAL LAW, 18; EMPLOYERS' LIABILITY ACT, 1. 9;
COURTS, 2; PATENTS, 3.

CONGRESS, ACTS OF.

See ACTS OF CONGRESS.

CONGRESS, POWERS OF.

1. *Over joint stock associations; personification of.*

Congress has power to charge the assets of joint stock associations with liability and to personify them so far as to collect fines by proceeding against them in the respective names of the associations. *United States* v. *Adams Express Co.*, 381.

2. *Effect of decree of court on; quære as to.*

Quære what the effect is on subsequent action by Congress of a decree of a court in an action determining that a bridge was properly erected over a navigable stream pursuant to grant in an earlier act of Congress. *United States* v. *Baltimore & Ohio R. R. Co.*, 244.

3. *Grants; effect of, as limitation on power of Congress; quære as to.*

Quære, how far if at all a statutory grant to erect a bridge over navigable waters of the United States on specified terms in an act of Congress without reservation of the right to alter or amend, operates to limit Congress to directly legislate as to removal or alteration of such bridge. *Ib.*

See CONSTITUTIONAL LAW, 1;
MAILS, 1, 2;
NAVIGABLE WATERS, 2, 3, 6, 10, 13, 14, 15, 16.

CONSTRUCTION.

See CONTRACTS; RECLAMATION OF ARID LANDS;
PRACTICE AND PROCEDURE, 2, 7; STATUTES, A;
TREATIES, 1.

CONSTRUCTIVE NOTICE.

See BANKS AND BANKING, 2, 3, 4.

CONTRACTS.

1. *Accounts; obligation to keep.*

One, who under an agreement is to be reimbursed for his outlay, should keep proper account of his receipts and disbursements and preserve the vouchers therefor. *Campbell* v. *Northwest Eckington Co.*, 561.

2. *Building; obligations embraced within; accounting.*

An agreement to give skill and experience as a builder and contractor does not necessarily imply that he is to personally act as superintendent of construction; nor, under the circumstances of this case, should his accounts be surcharged with the amounts paid for wages to a superintendent employed by him. *Ib.*

3. *Government; delivery under; what constitutes.*

Where a contractor is unable to make deliveries under a contract with the Government for continuous deliveries of a specified article and agrees with the properly authorized official to meet the emergency by delivering goods of a different class to be paid for according to actual value, the delivery is not one under the contract but is an emergency purchase, nor is an acceptance by the Government an acceptance under the contract; if the goods so delivered are not of the value of the goods contracted for the Government may offset the difference against future deliveries under the contract. *Barry* v. *United States*, 47.

4. *Government; emergency purchase contemplated by act of April 23, 1904.*

The failure, by reason of a strike, of contractors to deliver coal as required by a contract for continuous delivery for the Philippine Division, creates a condition contemplated by the act of April 23, 1904, providing for open market emergency purchases, and a purchase of coal other than that contracted for so made from the contractor is an emergency purchase and not an outside purchase to meet contractor's default and accepted as fulfilment. *Ib.*

5. *Government; right to offset against one of two contracts.*

Where a contractor is indebted to the Government under one contract

COPYRIGHTS.

See PATENTS, 3, 8, 9.

COURT AND JURY.

See NEGLIGENCE, 4.

COURTS.

1. *Application of § 723, Rev. Stat., as to suits in equity.*

Section 723, Rev. Stat., declaring that suits in equity shall not be sustained where a plain, adequate and complete remedy may be had at law, by its own terms applies only to courts of the United States; and *quære* whether it applies to a territorial court, the procedure of which has been prescribed according to the law of an adjoining State, and to c. 18, Rev. Stat., which does not include § 723. *Dill* v. *Ebey*, 199.

2. *Duty of state court where case controlled by Federal statute under which recovery cannot be had.*

Where plaintiff's petition states a case under the state statute, but on the evidence it appears that the case is controlled by the Federal statute, and the defendant has duly excepted, the state court is bound to take notice of the objection and dismiss if plaintiff is not entitled to recover under the Federal statute. *St. Louis, S. F. & T. Ry. Co.* v. *Seale*, 156.

3. *Federal; without power to direct judgment non obstante veredicto.*

A Federal court is without authority to reverse a judgment in favor of one party and direct a judgment in favor of the other *non obstante veredicto*. (*Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364.) *Pedersen* v. *Delaware, L. & W. R. R. Co.*, 146.

4. *Interference with proceeding before executive officer.*

So long as proceedings before an executive officer are *in fieri* the courts will not interfere with them. (*Plested* v. *Abbey*, 228 U. S. 42.) *Degge* v. *Hitchcock*, 162.

5. *Reference to messages and papers of Presidents.*

Messages and papers of the Presidents may be referred to by the courts as matters of public history. *MacLeod* v. *United States*, 416.

6. *State; question for determination of; power of state officers as.*

Whether state officers have power to grant a parole under a state indeterminate sentence act, and under what conditions, are for the state court to finally determine. *Adams* v. *Russell*, 353.

CRIMINAL APPEALS ACT.

CRIMINAL LAW.

CUSTOM.

CUSTOMS DUTIES.

DAMAGES.

EQUAL PROTECTION OF THE LAW.

See CONSTITUTIONAL LAW, 5, 9–14.

EQUITABLE ESTOPPEL.

See ESTOPPEL.

EQUITY.

1. *Aid of, to enjoin maintenance of ejectment suits and adjudicate title.*

Parties in possession of land under titles from various sources and having the equitable, as well as the legal, title to a portion of it and the equitable, but not the legal, title to the remainder, may, under the circumstances of this case, properly invoke the aid of equity to restrain other parties from maintaining ejectment suits and to adjudicate the title to the entire tract in a single suit. *Camp* v. *Boyd*, 530.

2. *Attitude and functions.*

Equity regards that as done which ought to be done. It looks to the true intent and meaning, rather than to the form. It relieves of consequences of accident and mistake as well as fraud. *Ib.*

3. *Functions of court.*

A court of equity ought to do justice completely and not by halves. *Ib.*

4. *Intent of parties; meaning of term "ground rents" as used in conveyance; ascertainment and application.*

While a term, such as "ground rents," used in a conveyance may not be the recognized equivalent of any legal estate in lands, the court may ascertain the recognized meaning given to it and resort to that as evidence of the intent of the parties using it and thus determine what effect ought in equity to be given to it. *Ib.*

5. *Multiplicity of suits; prevention of; determination of purely legal rights.*

As a court of equity should prevent multiplicity of suits, it may, to this end, if obliged to take cognizance of a suit for any purpose retain it for all purposes even though required to determine purely legal rights otherwise beyond its authority. *Ib.*

6. *Jurisdiction to enjoin collection of tax.*

The fraud, accident or mistake necessary to justify an equitable action

ESCROW.

1. *Liability of holder in dealing with one party without consent of other.*

One holding in escrow an agreement and money to be paid to one of two parties according to the terms of the agreement, acts at his peril in dealing with either party without the consent of the other; and if the party to whom he pays the amount deposited is not entitled thereto he is liable to the other party. *Citizens' National Bank* v. *Davisson*, 212.

2. *Liability of holder failing in duty to act impartially.*

In this case a bank acting as escrow-holder with notice of the contract, having by paying over to one party failed in its duty to act impartially, it is liable to the other party who was entitled to the money under the contract. *Ib.*

3. *Liability of holder for violation of agreement; effect of ignorance of facts.*

The fact that no officer of the bank has read an escrow agreement does not relieve the bank of responsibility for its action based on a separate memorandum made by one of its officers and which does not express the terms of the agreement. *Ib.*

4. *Act of agent of escrow-holder; effect on liability for act inconsistent with agreement.*

An endorsement on the outside of the envelope containing the escrow, made by an officer of the bank acting as escrow-holder, does not protect the bank if it is not in accordance with the escrow agreement itself. *Ib.*

ESTATES IN LAND.

ESTATE OF BANKRUPT.

STOPPEL.

Equitable; application as between bank and broker selling stock stolen therefrom.

A bank's trusted agent, in gross breach of his duty, took certain stock certificates belonging to the bank, endorsed and authenticated with evidence of title, to a broker who, in ordinary course of business and in good faith, sold them to third parties for full value and paid over the proceeds to such agent. *Held*, in a suit by the bank against the broker that:

Where one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.

Under the principles of equitable estoppel, the bank is estopped to make any claim against the broker. *National Safe Deposit Co.* v. *Hibbs*, 391.

See NOTICE.

EVIDENCE.

See ANTI-TRUST ACT, 3;
CONTRACTS, 6;
CONVEYANCES, 2, 3;
EMINENT DOMAIN, 10;
EQUITY, 4;
EXTRADITION, 7, 8, 9, 10;
HOURS OF SERVICE LAW, 2, 3;
LOCAL LAW (Colo.).

EXCEPTIONS.

See INSTRUCTIONS TO JURY, 2, 3.

EXECUTIVE OFFICERS.

See CERTIORARI, 4, 5;
COURTS, 4.

EXECUTIVE ORDERS.

See PHILIPPINE ISLANDS, 2–6.

EXEMPTIONS.

See BANKRUPTCY, 6, 7, 8;
CLAIMS AGAINST THE UNITED STATES;
CONSTITUTIONAL LAW, 14, 17;
EXTRADITION, 1;
TAXES AND TAXATION, 1.

EX POST FACTO LAWS.

See CONSTITUTIONAL LAW, 15.

EXPRESS COMPANIES.

See INTERSTATE COMMERCE, 2.

EXTRADITION.

INDIAN TERRITORY.

See INDIANS, 5.

INDICTMENT AND INFORMATION.

See ANTI-TRUST ACT, 2, 3, 4;
INTERSTATE COMMERCE, 3;
JURISDICTION, A 12.

INJUNCTION.

INSANITY.

INSTRUCTIONS TO JURY.

1. *As to assumption of risk; when properly refused.*

It is not error to refuse an instruction as to assumption of risk which is couched in such sweeping terms that it could not enlighten the jury as to the particular phase of the case to which it is deemed applicable. *Norfolk & Western Ry. Co.* v. *Earnest*, 114.

2. *Objections to; duty of counsel.*

Fairness to the court requires one objecting to a particular part of the charge as misleading to call special attention to the words in order that the court may either modify or explain them. *Ib.*

3. *Objections; sufficiency of general exception.*

Where an instruction embodies several propositions of law to some of which no objection can properly be taken, a general exception does not entitle the exceptor to take advantage of a mistake or error in some single or minor proposition of law. *Ib.*

INSTRUMENTALITIES OF COMMERCE.

INTEREST.

INTERNATIONAL LAW.

1. *Conquered territory; governmental powers over; taxation.*

The local government of a conquered country being destroyed, the conqueror may set up its own authority and make rules and regulations for the conduct of temporary government, and to that end may collect taxes and duties to support the military authority and carry on operations incident to the occupation. *MacLeod* v. *United States*, 416.

MASTER AND SERVANT.

NAVIGATION.

NAVY.

NEGLIGENCE.

1. *Emergency judgment; accountability for.*

One obliged to form a judgment in an emergency on the spot is not to be held accountable in the same measure as one able to judge the situation in cold abstraction. (*The Germanic*, 196 U. S. 589.) *Chicago, R. I. & P. Ry. Co.* v. *Brown*, 317.

2. *Contributory; movement of trains; failure to anticipate possibility of injury.*

The movement of trains requires prompt action, and one engaged therein should not be held guilty of contributory negligence because he did not anticipate that he might be injured if he selected one of several ways of performing his duty even though he had knowledge of the existence of that which caused his injury. *Ib.*

3. *Contributory; direction of verdict; damages on affirmance.*

There being evidence to sustain the verdict that plaintiff was not guilty of contributory negligence, the court below properly denied a motion to direct a verdict for the defendant, and this court affirms the judgment with ten per cent. damages. *Texas & Pacific Ry. Co.* v. *Prater*, 177.

4. *Fellow-servants; duty to each other; function of jury.*

The truth of evidence tending to show a custom as to where switchmen walk in a railroad yard, is for the jury to determine; and if true it is the duty of an engineer, in the exercise of ordinary care to watch for a switchman whom he knows is in the usual locality and in front of his engine. *Norfolk & Western Ry. Co.* v. *Earnest*, 114.

PAROLES.

See COURTS, 6;
JURISDICTION, A 7.

PARTIES.

See JURISDICTION, D 2;
REMOVAL OF CAUSES, 4, 5, 6, 7.

PATENTS.

1. *Statutory rights.*

The right to make, use and sell an invented article existed without, and before, the passage of the patent law; the act secured to the inventor the exclusive right to make, use and vend the thing patented. *Bauer* v. *O'Donnell*, 1.

2. *Construction of patent law.*

While the patent law should be fairly and liberally construed to effect the purpose of Congress to encourage useful invention, the rights and privileges which it bestows should not be extended by judicial construction beyond what Congress intended. *Ib.*

3. *Law of, and that of copyrights, differentiated.*

The patent law differs from the copyright law in that it not only confers the right to make and sell, but also the exclusive right to use the subject-matter of the patent. *Ib.*

4. *Phraseology of patent law not technical.*

In framing the patent act and defining the rights and privileges of patentees thereunder Congress did not use technical or occult phrases, but in simple terms gave the patentee the exclusive right to make, use and vend his invention for a definite term of years. *Ib.*

5. *Monopoly created by patent law; when article beyond limits of.*

While the patent law creates to a certain extent a monopoly by the inventor in the patented article, a patentee who has parted with the article patented by passing title to a purchaser has placed the article beyond the limits of the monopoly secured by the act. (*Adams* v. *Burke*, 17 Wall. 453.) *Ib.*

6. *Sales of patented articles; right of patentee to limit price.*

A patentee may not by notice limit the price at which future retail sales of the patented article may be made, such article being in the hands of a retailer by purchase from a jobber who has paid to the

RATIFICATION.

See PHILIPPINE ISLANDS, 5, 6.

REAL PROPERTY.

1. *Conveyances under decree of court; defective; sufficiency to pass title.*

Deeds made by a public officer in pursuance of a decree of the court which are defective in form by reason of a mistake made by such public officer will pass the title to the property intended to be conveyed, as harmful consequences should not fall upon purchasers, who, in reliance upon apparent regularity have paid their money for the property. *Camp* v. *Boyd*, 530.

2. *Ground rents defined.*

The term "ground rents" as used in the deeds and proceedings involved in this case did not import merely the rents that were to accrue during the residue of a 99 year lease renewable forever, but included the reversion as well, it appearing that the entire beneficial interest of the owner of the ground rents and the reversion were undoubtedly the subject of the sale and within the contemplation of the buyer and seller. *Ib.*

See BANKRUPTCY, 9, 15, 16;
EQUITY, 1, 4;
PRACTICE AND PROCEDURE, 8.

RECLAMATION OF ARID LANDS.

1. *Cost of irrigation projects; assessment of; expense of maintenance during Government-held period; act of 1902 construed.*

The history of the Reclamation Act of 1902 shows that it was the intent of Congress that the cost of each irrigation project should be assessed against the property benefited and that the assessments as fast as collected should be paid back into the fund for use in subsequent projects without diminution. This intent cannot be carried out without charging the expense of maintenance during the Government-held period as well as the cost of construction. *Swigart* v. *Baker*, 187.

2. *Cost of irrigation projects; legislative construction of act of 1902.*

Subsequent legislative construction of a prior act may properly be examined as an aid to its interpretation: and so *held* that statutes passed since the Reclamation Act of 1902 indicate that Congress has construed the provisions of that act as authorizing the Secretary of the Interior to assess cost of maintenance as well as of construction of irrigation projects upon the land benefited. ***Ib.***

REMOVAL OF CAUSES.

1. *Proceeding in nature of process.*

Removal proceedings are in the nature of process to bring the parties before the Federal court. *Mackay* v. *Uinta Co.*, 173.

2. *Proceedings for; regularity; waiver of defects.*

The defendant may waive defects in removal proceedings if jurisdiction actually exists, and if he does so the court will not of its own motion inquire into the regularity of the proceedings. *Ib.*

3. *Functions of state and Federal courts.*

While issues of fact arising on the controverted allegations in a petition for removal are only triable in the Federal court, the state court may deny the petition if it is insufficient on its face. *Chicago, R. I. & P. Ry. Co.* v. *Dowell*, 102.

4. *Joinder of defendants; fraudulent; motive of plaintiff immaterial.*

Mere averment that a resident defendant, in this case an employé of small means, is fraudulently joined with a non-resident defendant of undoubted responsibility for the purpose of preventing removal by the latter, is not sufficient to raise an issue of fraud in the absence of other averments of actual fraud. The motive of plaintiff in such a case is immaterial; if the right of joinder exists he can exercise it. *Ib.*

5. *Joinder of defendants; propriety question for state court.*

If the state court so decides, a plaintiff may joint tort-feasors even though the liability of one is statutory and the liability of the other rests on the common law. *Ib.*

6. *Joinder of defendants; plaintiff's election.*

If plaintiff alleges that the concurrent negligence of both defendants caused his injury, he may join them in one action; and if he do so the fact that he might have sued them separately furnishes no ground for removal. *Ib.*

7. *Joinder of defendants; propriety question for state court.*

Whether or not defendants are jointly liable depends on plaintiff's averments in the statement of his cause of action, and it is a question for the state court to decide. *Ib.*

RENTS.

See REAL PROPERTY, 2.

STOCK AND STOCKHOLDERS.

1. *Certificates of stock; character as negotiable securities.*

Stock certificates are a peculiar kind of property; although, strictly speaking, not negotiable paper, they are frequently the basis of commercial transaction and bought and sold in open market as negotiable securities are. (*Bank* v. *Lanier*, 11 Wall. 369.) *National Safe Deposit Co.* v. *Hibbs*, 391.

2. *Certificates of stock; sales; principles governing in determining rights of parties.*

The fact that principles affecting the matters involved are well known to business men and are constantly acted upon by them should be given due weight in determining the rights of parties in a transaction relating to the sale of stock certificates. *Russell* v. *Am. Bell Telephone Co.*, 180 Massachusetts, 467, approved. *Ib.*

See BANKRUPTCY, 2, 3, 4, 5.

STREET RAILWAYS.

See STATES, 1.

STREETS AND HIGHWAYS.

See DISTRICT OF COLUMBIA, 2;
EMINENT DOMAIN, 6.

TAXES AND TAXATION.

1. *Classification in; implication from power of exemption.*

Power of exemption from taxation seems to imply the power of discrimination; and in taxation, as in other matters of legislation, classification is within the legislative power—and it may be even to a greater extent. *Citizens' Telephone Co.* v. *Fuller*, 322.

2. *Classification; discrimination in; power of States.*

The numerous decisions of this court reviewed in this opinion illustrate the power of the legislature of the State over the subjects of taxation and the range of discrimination that may be exercised in classification. *Ib.*

3. *Classification; basis for; power of State as to.*

The legislature, having the power of classification, has also the power to select the differences on which to base the classification. *Ib.*

See CONSTITUTIONAL LAW, 14; JURISDICTION, D 6;
EQUITY, 6; LOCAL LAW (Colo.);
INTERNATIONAL LAW, 1; PHILIPPINE ISLANDS, 2–6;
STATUTES, A 9.

TELEPHONE COMPANIES.

See CONSTITUTIONAL LAW, 14.

TERRITORIAL COURTS.

See COURTS, 1;
JURISDICTION, A 9;
PRACTICE AND PROCEDURE, 3.

TESTAMENTARY TRUSTS.

See TRUSTS AND TRUSTEES, 2, 3.

TITLE.

See BANKRUPTCY, 6, 20;
EMINENT DOMAIN, 13;
EQUITY, 1;
NAVIGABLE WATERS, 10–13;
PATENTS, 7;
PRACTICE AND PROCEDURE, 8, 9;
PUBLIC LANDS, 3;
REAL PROPERTY, 1;

TORT-FEASORS.

See REMOVAL OF CAUSES, 5.

TREATIES.

1. *Construction by political department of government; weight of.*

The construction of a treaty by the political department of the Government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is of great weight. *Charlton* v. *Kelly*, 447.

2. *Violation of; waiver.*

A government can waive violations of a treaty by the other party, and it remains in force until formally abrogated. *Ib.*

See EXTRADITION;
INTERNATIONAL LAW, 3.

TRIAL.

See EXTRADITION, 5;
INSTRUCTIONS TO JURY, 1.

TRUSTS AND TRUSTEES.

1. *Interference by court of equity at instance of beneficiaries.*

Trustees having the power to exercise discretion will not be interfered with by a court of equity, at the instance of the beneficiaries, so long as they are acting *bona fide*. *Shelton* v. *King*, 90.

WILLS.

1. *Bequests free from claims of assignees or creditors; power of testator as to.*

While one may not by his own act preserve to himself the enjoyment of his own property in such manner that it shall not be subject to claims of creditors or to his own power of alienation, a testator may bestow his own property in that manner upon one to whom he wishes to secure beneficial enjoyment without being subject to the claims of assignees or creditors. *Claflin* v. *Claflin*, 149 Massachusetts, 19, approved. *Shelton* v. *King*, 90.

2. *Bequests free from claims of creditors; English rule repudiated.*

The courts of this country have rejected the English doctrine that liability to creditors and freedom of alienation are necessary incidents to enjoying the rents and profits from the property by the object of bounty of a testator. *Ib.*

3. *Testamentary intent; duty of court as to.*

One of the highest duties resting upon a court is to carry out the intentions of a testator as expressed in valid provisions not repugnant to well settled principles of public policy. *Ib.*

See TRUSTS AND TRUSTEES, 2.

WORDS AND PHRASES.

"*Enter*" as used in Post-office Appropriation Act (see Mails, 6). *Lewis Publishing Co.* v. *Morgan*, 288.

"*Ground rents*" as used in deeds (see Real Property, 2). *Camp* v. *Boyd*, 530.

"*Persons*" (see Extradition, 1). *Charlton* v. *Kelly*, 447.

"*Vend*" and "*vending*" as used in §§ 4884, 4952, Rev. Stat. (see Patents, 8, 9). *Bauer* v. *O'Donnell*, 1.

Generally.—*See* PATENTS, 4.

WRIT AND PROCESS.

See ATTACHMENT; EXTRADITION, 11; CERTIORARI; JURISDICTION, A 12; C; REMOVAL OF CAUSES, 1.