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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1913

CHARLES HENRY BUTLER

REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.[1]

EDWARD DOUGLASS WHITE, Chief Justice.
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.

JAMES C. McREYNOLDS, Attorney General.
JOHN WILLIAM DAVIS, Solicitor General.[2]
JAMES HALL McKENNEY, Clerk.[3]
JAMES D. MAHER, Clerk.[4]
JOHN MONTGOMERY WRIGHT, Marshal.

[1] For allotment of The Chief Justice and Associate Justices among the several circuits see next page.

[2] On July 28, 1913, President Wilson nominated Mr. John William Davis of West Virginia as Solicitor General. He was confirmed by the Senate July 28, 1913, and qualified August 30, 1913. His commission was filed on the opening day of October Term, 1913.

[3] Died October 13, 1913, see p. v, *post*.

[4] On October 20, 1913, by order of the court, Mr. James D. Maher of the District of Columbia and Deputy Clerk of the court since November 1, 1907, was appointed Clerk of the Supreme Court of the United States to succeed James Hall McKenney, deceased. On October 27, 1913, by order of the court, Henry C. McKenney of the District of Columbia was appointed Deputy Clerk.

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.

SUPREME COURT OF THE UNITED STATES.

TUESDAY, OCTOBER 14, 1913.

At the opening of Court The Chief Justice said:

It is my sad duty to announce to the gentlemen of the bar the death last night of Mr. James H. McKenney, the clerk of this court. He was associated for more than 50 years with the work of the court, and the expression of our sorrow needs no elaboration. As a mark of respect to his memory the court will do no further business to-day, and will adjourn until to-morrow morning.

SUPREME COURT OF THE UNITED STATES.

MONDAY, OCTOBER 20, 1913.

ORDER: It is hereby ordered that James D. Maher be appointed clerk of this court in the place of James H. McKenney, deceased, and that he forthwith take the oath of office and give bond conditioned according to law.

The Chief Justice then said:

In entering the order appointing a clerk because of the death of Mr. McKenney, the court is unwilling to let the occasion pass without making some note on its records of the character of the services rendered by Mr. McKenney to the court and the country for so long a time, and also without expressing for permanent record the sorrow which the members of the court feel at the loss which has been occasioned by the death of Mr. McKenney. Mr. McKenney became connected with the work of the court as far back as 1858, first as a junior clerk, then as acting

deputy, then, when the statute authorized it, as the deputy clerk; and finally, in 1880, upon the death of Mr. Middleton, he became clerk of the court. During all that long period of more than 50 years, with diligence, with fidelity, and with honor, he served the court and the country. The consolation at his loss to the court and the country is this: That no one can look over the period of time during which he served and consider the grave subjects with which the court dealt during that time, and with reference to which the clerk was called upon within his sphere of duty to act, and deny that the effect of those services so faithfully rendered redounded to the benefit of the people of the country and to the preservation of our constitutional system of government which remains as the safeguard of every right and the guaranty of the liberties of all. The consolation of those united to him by ties of kindred and personal affection is that they have the heritage of a long, virtuous, and well-spent life which, if contemplated in the light of faith, brings to them the assurance that its rectitude finds place on the minutes of that court of everlasting and infinite power to which all human conduct must come for ultimate judgment; and that that record affords ground for faith to believe that the one whose loss they deplore is gone to his everlasting reward.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1913.

WOOD *v.* VANDALIA RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

No. 11. Argued December 17, 1912.—Decided October 20, 1913.

An order of a state railroad commission prescribing maximum freight rates on specified intrastate traffic will not be declared unconstitutional as confiscatory and depriving a railroad company of its property without due process of law where there is no proof of the value of the company's property within the State or of its receipts from its entire intrastate traffic, or of the value of that portion of the property affected by the order.

It does not necessarily follow from the mere fact that the total operating expenses of a railroad or of a division thereof bear a given relation to the entire receipts of that road or division, that the same ratio of expenses to receipts are maintained in regard to each particular class of traffic, and this court will not declare an order of a state railroad commission unconstitutional as confiscatory without proof as to the actual facts in regard to the particular rates complained of.

THE facts, which involve the constitutionality under the due process clause of the Fourteenth Amendment of an order of the Railroad Commission of Indiana prescribing maximum railroad freight rates for certain intrastate traffic, are stated in the opinion.

Mr. Charles W. Smith and *Mr. James E. McCullough*, with whom *Mr. Henry H. Hornbrook*, *Mr. Albert P. Smith*, *Mr. Thomas M. Honan*, Attorney General of the State of Indiana, *Mr. Bernard Korbly* and *Mr. Willard New* were on the brief, for appellants.

Mr. John G. Williams, with whom *Mr. Frederic D. McKenney*, *Mr. D. P. Williams* and *Mr. S. O. Pickens* were on the brief, for appellees.

MR. JUSTICE HUGHES delivered the opinion of the court.

The bill in this suit was filed by the Vandalia Railroad Company, appellee, to restrain the enforcement of an order made by the Railroad Commission of Indiana, on December 14, 1906, prescribing maximum freight rates for certain intrastate traffic. The ground of attack was that the rates so fixed would not yield sufficient revenue to pay the actual cost of the transportation covered by the order and, hence, that the order violated the Fourteenth Amendment of the Constitution of the United States. The case was referred to a Special Master who made a report, sustaining the contention of the railroad company, which was confirmed by the Circuit Court. Decree was entered accordingly setting aside the order and permanently enjoining proceedings to enforce it. Members of the Commission, and the shippers on whose petition this action was taken (who were made the defendants below), prosecute this appeal.

The assignments of error are addressed to the single point that the evidence failed to warrant the conclusion that the prescribed rates were so unreasonably low that, if they were maintained, the Company would be deprived of its property without due process of law.

The Vandalia Railroad Company is a consolidated corporation, organized on January 1, 1905, under the

laws of Indiana and Illinois, pursuant to an agreement made by five railroad companies. Of these the Terre Haute and Indianapolis Company owned a railroad extending from Indianapolis westward to the boundary between the States of Indiana and Illinois, and the St. Louis, Vandalia and Terre Haute Company owned a railroad extending from that point to East St. Louis, Illinois. These two lines, forming a continuous route between Indianapolis and East St. Louis, constituted what was called the St. Louis division of the new company. The other lines entering into the consolidation were the Terre Haute and Logansport, from Terre Haute to Logansport and South Bend, Indiana; the Logansport and Toledo, from Logansport to Butler, Indiana; and the Indianapolis and Vincennes, from Indianapolis to Vincennes, Indiana.

The order applied to that portion of the Vandalia Company's road which lay between Indianapolis and the western boundary of Indiana, a distance of about eighty miles, which originally belonged to the Terre Haute and Indianapolis Company. The order was further limited to the freight traffic moving on "class rates," that is, to the traffic, having its origin and destination on this part of the Company's line, which was embraced in the six classes of the "official classification" as theretofore established by the Company. The existing class rates were found by the Commission to be unreasonably high and the maximum rates in question were ordered to be substituted as just and reasonable.

There was no proof of the value of the complainant's property within the State of Indiana or of the return it received from its entire intrastate business. Nor was there proof of the value of that portion of its road which was affected by the order, or of the return from all of its intrastate business upon that part of its lines. No attempt was made to supply proof of that sort. For all that appears,

the Vandalia Company might enjoy, notwithstanding the enforcement of the rates in question, ample revenue from its intrastate operations to give it a fair return both as to all its lines within the State and also as to that portion to which the order referred.

The total tonnage of all kinds of freight on the eighty miles of railroad from Indianapolis to the Illinois boundary cannot be ascertained from the evidence. The amount of traffic moving on commodity rates is not shown. It was found by the Master, and it is undisputed, that the gross revenue from the transportation of that portion of the traffic which constituted the classified intrastate freight, on the described eighty miles of road, during the three years prior to the making of the order, was as follows: 1904, $79,803.80; 1905, $91,067.56; 1906, $102,241.15; and that the gross revenue from the same traffic, under the rates prescribed by the Commission, would have been in 1904, $52,222.12; in 1905, $60,079.13; in 1906, $66,936.99. This would have been a large reduction in the gross revenue from that particular traffic, but it must not be overlooked that the Commission found that the former rates were excessive; and the effect of this reduction upon the Company's net return was to be satisfactorily proved and could not be assumed.

The conclusion in the court below was reached in the following manner. The complainant showed, and the Master found, that for the year 1904 the operating expenses upon the line between Indianapolis and the Illinois boundary were 74.50 per cent. of the whole earnings upon that line from every source, and that after consolidation, in the years 1905 and 1906, the operating expenses of the entire St. Louis division were respectively 73.03 and 72.64 per cent. of the entire earnings of that division. These ratios were then applied for the purpose of determining the expense of transporting that part of the freight which moved under class rates between stations on the road from

Indianapolis to the Illinois boundary. Thus, it was assumed that, as the gross revenue from this classified freight was $79,803.80 in 1904, the expense of transporting it was 74.50 per cent. of that amount or $59,453.83; that, in 1905, with a gross revenue of $91,067.56, the expense was 73.03 per cent. thereof or $66,506.64; and that in 1906, with a gross revenue of $102,241.15, the expense was 72.64 per cent. or $74,267.97. According to this method of calculation, the revenue which would have been received under the order of the Commission would have been less than the expense of transportation.

It is plain, however, that it does not follow from the mere fact that the total operating expenses of a railroad, or of a division of a railroad, bear a given relation to the entire receipts of that road or division, that the cost of transportation in the case of a particular class of traffic bears the same relation to the revenue derived from that class. The ratio, in the first case, is found by bringing together a great variety of operations involving various rates and different outlays for different sorts of traffic. It is predicated of the whole volume of business considered as such, and may be far from true of some part of it considered separately. It does not purport to be an expression of the relative cost of any specified part but simply of that of the entire traffic to which it applies.

How hazardous may be the use of such a ratio to determine the relative cost of a fragment of the business is apparent in this case. Thus it appeared that the total gross earnings of the complainant's St. Louis division in the year 1905 was $4,750,811.13. Of this, the entire gross receipts from the classified freight here in question were only $91,067.56, or less than two per cent. The expenses of the division for that year were $3,469,544.81, or 73.03 per cent. of the total earnings as stated. In 1906, the earnings of the St. Louis division were $5,480,094.77, and the expenses were $3,980,906.90, or 72.64 per cent. These

amounts embrace interstate and intrastate traffic, freight and passenger, and all freight whether moving on class or commodity rates. A large increase or reduction in the class rates on the particular intrastate freight in question, the volume of business being the same (as is the assumption), would have had a very slight effect upon the ratio of cost to earnings based on the entire operations. To illustrate: Had the rates on the small portion of freight here under consideration been fifty per cent. higher than they actually were in 1905 and 1906, and had the gross revenue on this traffic been increased accordingly, the total receipts of the division would have been so little enlarged that the ratio of expenses to earnings for the entire division would still have been about 72.33 per cent. and 71.97 per cent. in those years respectively. If, on the same amount of traffic, the gross revenue from this classified freight in 1905 had thus been $136,601.34 instead of $91,067.56, and the above ratio were applied to determine the cost of its transportation, that cost would be made to appear to be $98,803.74. On such a calculation, it would follow, of course, that a reduction of thirty per cent. even in such rates, would bring the revenue on the same amount of business below its cost. Again, it is to be observed that had the rates prescribed by the Commission been in force in 1905 and 1906, and had other conditions been the same, the expense ratios for the whole volume of business of the St. Louis division would have been only 73.51 and 73.11 per cent. respectively.

In these circumstances, the ratio of total expense to total earnings affords, in itself, no sufficient basis for determining the cost of the transportation of the particular traffic covered by the order under review. It alone furnishes no ground for invalidating the finding of the Commission that the existing rates were exorbitant and that the substituted rates would be fair. Before such a ratio could properly be used in setting forth the cost of a speci-

fied portion of the traffic, it would be necessary to have evidence either justifying the conclusion that the cost in proportion to the revenue was substantially the same for that part of the traffic as for the whole, or, if there were a material difference, satisfactorily showing its nature and extent.

In defending the use of the method adopted below, appellee relies upon the case of *Smyth* v. *Ames*, 169 U. S. 466. There, the legislature of Nebraska had established a classification for all intrastate freight carried by railroad and had fixed the maximum rates to be charged therefor. With other evidence, the court had before it the testimony and exhibits furnished by one of the defendants in that case, a Secretary of the State Board of Transportation and a principal witness for that Board, who gave the results of his investigations with respect to the traffic of each company within the State. The ratio of expense to earnings on all business done within the State was thus shown, but reliance was not placed upon that alone. This witness also testified that upon the local business the percentage of expense to earnings would be at least ten per cent. more. We need not follow the elaborate analysis of the exhibits in *Smyth* v. *Ames*, *supra*, by which the appellants undertake to elucidate the differences between the traffic conditions there disclosed and those here involved. It is sufficient to say that the case cited cannot be regarded as affording basis for a contention that a ratio of expense to earnings on the entire business of a railroad, or of a division, can be taken to show the cost of some particular item or class of traffic in the absence of evidence with respect to that traffic which would warrant the conclusion that its cost in proportion to the revenue therefrom could properly be so expressed.

Each case, as was pointed out in *Smyth* v. *Ames*, must depend upon its special facts; and the record in the present case is barren of the necessary proof. Attention is

called to the expense ratio for the former Terre Haute and Indianapolis Company in the year 1904, that is, prior to the consolidation. But this was based on the total business of the road and no details are furnished showing that this ratio could rightly be applied to that part of it which made up the classified freight in question. There are certain statements with respect to the heavier cost of the operation of local as compared with through trains, but these statements are clearly inadequate. Local traffic may cost more per unit of freight movement than through traffic, but whether it costs more in proportion to revenue is another matter. That, of course, depends upon the rates charged and is a fact to be proved. (*Minnesota Rate Cases*, 230 U. S. 352, 462–465; *Missouri Rate Cases*, 230 U. S. 474, 505, 506.) There was testimony with respect to the cost of handling freight over the platform at the Indianapolis terminal, but this fell far short of the showing required, and it appeared that of the six classes of freight, to which the order applied, the fifth and sixth classes constituting much more than one-half in tonnage of the classified freight always moved in carload lots loaded by the shipper.

The evidence showed that the class rates on local traffic on the line between Indianapolis and the Illinois boundary, which were maintained by the Vandalia Company and condemned by the Commission as unreasonable, were higher than the class rates for corresponding distances to local stations in Indiana on other lines (including one of the Vandalia Company's divisions) running out of Indianapolis to the east and south. It wholly failed to sustain the contention that the action of the Commission in ordering the reduction complained of transcended the limits imposed by the Fourteenth Amendment.

The decree is reversed and the case remanded with direction to dismiss the bill without prejudice.

LURIA *v.* UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 27. Argued April 23, 1913.—Decided October 20, 1913.

Where a point involving sufficiency of the complaint is not raised and defendant does not challenge the statement of the court that it supposes the point will not be raised, it is too late to raise it in this court.

This court concurs in the conclusion reached by the District Court that the residence in a foreign country of one whose certificate of naturalization was attacked as fraudulent was intended to be and was of a permanent nature and justified the proceeding on the part of the United States to cancel the certificate under § 15 of the act of June 29, 1906.

Unverified certificates of unofficial parties as to residence of a naturalized person in a foreign country *held* insufficient to overcome the presumption of permanent residence created under § 15 of the act of June 29, 1906.

The provisions of the second paragraph of § 15 of the act of June 29, 1906, dealing with the evidential effect of taking up a permanent residence in a foreign country within five years after securing a certificate of naturalization applies not only to certificates issued under that law but also to those issued under prior laws.

The words "provisions of this section" used in a statute naturally mean every part of the section, one paragraph as much as another.

A paragraph in a statute which is plain and unambiguous, must be accepted as it reads even though inserted as an amendment by one branch of the legislature.

The statutes, as they existed prior to June 29, 1906, conferred the right to naturalization upon such aliens only as contemplated the continuance of a residence already established in the United States.

Citizenship is membership in a political society and implies the reciprocal obligations as compensation for each other of a duty of allegiance on the part of the member and a duty of protection on the part of the society.

Under the Constitution of the United States a naturalized citizen stands on an equal footing with the native citizen in all respects save that of eligibility to the Presidency.

That which is contrary to the plain implication of a statute is unlaw-

ful, for what is clearly implied is as much a part of a law as that which is expressed.

The spirit of the naturalization laws of the United States has always been that an applicant if admitted to citizenship should be a citizen in fact as well as name and bear the obligations and duties of that status as well as enjoy its rights and privileges.

The provisions of § 15 of the act of June 29, 1906, are not unconstitutional as making any act fraudulent or illegal that was honest and legal when done, or as imposing penalties, or doing more than providing for annulling letters of citizenship to which the possessors were never entitled. *Johannessen* v. *United States*, 225 U. S. 227.

The establishment of a presumption from certain facts prescribes a rule of evidence and not one of substantive right; and if the inference is reasonable and opportunity is given to controvert the presumption, it is not a denial of due process of law, *Mobile &c. R. R. Co.* v. *Turnipseed*, 219 U. S. 35, even if made applicable to existing causes of action.

The right to have one's controversy determined by existing rules of evidence is not a vested right and a reasonable change of such rules does not deny due process of law.

The taking up of a permanent residence in a foreign country shortly after naturalization has a bearing upon the purpose for which naturalization is sought, and it is reasonable to make it a presumption that such action indicates an absence of intention to reside permanently in the United States; and the provision in § 15 of the act of June 29, 1906, making such action a presumption, rebuttable by proof to the contrary, of intention not to reside permanently in the United States, is not unconstitutional as a denial of due process of law.

A proceeding under § 15 of the act of June 29, 1906, to cancel a certificate of naturalization on the ground that it was fraudulently issued is not a suit at common law but a suit in equity similar to a suit to cancel a patent for land or letters patent for an invention and the defendant is not entitled to a trial by jury under the Seventh Amendment. *United States* v. *Bell Telephone Co.*, 128 U. S. 315.

184 Fed. Rep. 643, affirmed.

THE facts, which involve the construction of § 15 of the act of June 29, 1906, 34 Stat. 596, 601, c. 3592, relating to citizenship and naturalization and the validity of a decree setting aside a certificate of naturalization on the ground that it was fraudulently issued, are stated in the opinion.

Mr. Louis Marshall, with whom *Mr. A. M. Friedenberg* was on the brief, for appellant:

In so far as the act of 1906 assumes (though appellant claims that it does not), to deprive the appellant of the citizenship lawfully and without fraud secured by him in 1894, by the decree of a court of competent jurisdiction, twelve years before the passage of that act, it is unconstitutional, in that it violates Art. I, § 8, of the Constitution of the United States, and § 1 of the Fourteenth Amendment thereto.

For purposes of citizenship, persons born and persons naturalized in the United States are placed on an exact equality by the Constitution. *Minor* v. *Happersett*, 21 Wall. 162, 165; *United States* v. *Cruikshank*, 92 U. S. 542; *Lynch* v. *Clarke*, 1 Sandf. Ch. 583, 641, 642; *Dred Scott* v. *Sandford*, 19 How. 393; *Boyd* v. *Thayer*, 143 U. S. 162.

The only distinction between citizenship by birth and citizenship by naturalization, is the provision of the Constitution making only natural born citizens eligible to the office of president. *Elk* v. *Wilkins*, 112 U. S. 94, 101.

Citizenship by birth and by naturalization being thus, for all practical purposes, absolute equivalents, it would seem as though it were as much beyond the power of Congress to deprive one who has become a naturalized citizen, of his citizenship, as it would be to deprive a natural born citizen of that right.

For limitations on the power of Congress to deal with the subject of naturalization, see *Osborn* v. *United States Bank*, 9 Wheat. 825; *United States* v. *Wong Kim Ark*, 169 U. S. 702, 703. *Johannessen* v. *United States*, 225 U. S. 227, does not depart from the decisions cited or determine any of the questions which are now presented for consideration.

The contention that the act merely enacts a rule of evidence cannot be sustained. It affects substantial rights.

While it is true that it is within the province of a legislature to enact that proof of one fact shall be *prima facie* evidence of another, the inference must not be arbitrary, and there must be a rational relation between the two facts. *Bailey* v. *Alabama*, 219 U. S. 219; *People* v. *Cannon*, 139 N. Y. 32, 43.

The inference of a lack of *bona fide* intention to become a citizen from appellant's subsequent action, is purely arbitrary, and is unreasonable, unnatural and extraordinary.

The cases cited in the opinion of the court below do not sustain this legislation.

That portion of § 15 of the act of 1906 which is involved in this action, is confined in its operation to cases of naturalization under the act of 1906, and does not include persons naturalized under the prior act. See *Johannessen Case*, 225 U. S. 227; *United States* v. *Mansour*, 170 Fed. Rep. 671.

Under the Naturalization Act as it existed at the time of the issuance to the appellant of his certificate of citizenship, there was no requirement that the applicant should intend to reside permanently within the United States. No oath to that effect was called for. On the other hand, the act of 1906 requires an oath from the applicant, that it is his intention to reside permanently within the United States.

While it is true that most of the provisions of § 15 are remedial, and are, therefore, properly applicable to any case relating to naturalization which comes within their terms, irrespective of the time when the naturalization takes place, that paragraph constitutes an exception, not only by necessary implication, but by its express terms, to the general and remedial provisions contained in the section.

Conclusive evidence of this statutory purpose is afforded by the history of the second paragraph of § 15, now under consideration.

A court may refer to the public history of the times, and to legislative documents, to ascertain the reason of an enactment as well as the meaning of particular provisions therein, and to that end may consider the evil which it is designed to remedy, contemporaneous events, and the existing situation with regard to the subject-matter of the legislation as it was pressed upon the attention of the legislative body. *United States* v. *Union Pacific R. R. Co.*, 91 U. S. 72, 79; *Platt* v. *Union Pacific R. R. Co.*, 99 U. S. 60; *Holy Trinity Church* v. *United States*, 143 U. S. 463; *The Delaware*, 161 U. S. 472; *Shaw* v. *Kellogg*, 170 U. S. 331; *Binns* v. *United States*, 194 U. S. 495; *Johnson* v. *Southern Pacific Co.*, 196 U. S. 19; *McLean* v. *Arkansas*, 211 U. S. 339; *Wadsworth* v. *Boysen*, 148 Fed. Rep. 771, 775; *Tenement House Department* v. *Moeschen*, 179 N. Y. 325; *Musco* v. *United Surety Co.*, 196 N. Y. 459, 465.

For the genesis and passage of the act of 1906, see Report of Commission of November 8, 1905, House Doc. No. 46, 59th Cong., 1st. Sess.; Cong. Rec., vol. 40, pt. 8, pp. 7869–7871, 7874.

For its history in the Senate see Vol. 40, Cong. Rec., pp. 7913, 9009, 9359–9361, 9407, 9411, 9505, 9620, 9691.

Even if § 15 were in terms applicable to the appellant and were as to him constitutional, he did not take up a permanent residence at Johannesburg, but continued to be a legal resident of the United States.

Residence is always a matter of intention. His intention to remain a resident and citizen of the United States was manifested over and over again. *Dupuy* v. *Wurtz*, 53 N. Y. 556; *Moorhouse* v. *Lord*, 10 H. L. C. 272; *Marchioness of Huntly* v. *Gaskell*, 1906 App. Cas. 56 and *Matter of Newcomb*, 192 N. Y. 238.

This legislation violates Art. I, § 9, of the Federal Constitution, because it is in effect a bill of attainder.

A bill of attainder is a legislative act which inflicts

punishment without judicial trial. *Cummings* v. *Missouri*, 4 Wall. 323; *In re Yung Sing Hee*, 36 Fed. Rep. 437.

The act is also an *ex post facto* law, so far as the present case is concerned, because the defendant is punished for acts committed prior to the enactment of the statute.

A statute belongs to the class of *ex post facto* laws which, by its necessary operation, and in its relation to the offense, or its consequences, alters the situation of the accused to his disadvantage. *Cummings* v. *Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333; *Thompson* v. *Utah*, 170 U. S. 351; *Calder* v. *Bull*, 3 Dallas, 386; *Green* v. *Shumway*, 39 N. Y. 418. *Johannessen* v. *United States*, 225 U. S. 227, far from being adverse to this contention, practically sustains it.

The appellant was entitled to a trial by jury, of the issues presented in the pleadings under the Seventh Amendment. See *Parsons* v. *Bedford*, 3 Pet. 432, 446; *Knickerbocker Insurance Co.* v. *Comstock*, 16 Wall. 258; *Garnhart* v. *United States*, 16 Wall. 162; *The Sarah*, 8 Wheat. 391; *Morris* v. *United States*, 8 Wall. 507; *Elliott* v. *Toeppner*, 187 U. S. 327. *United States* v. *Mansour*, 170 Fed. Rep. 671, does not apply. It has no application to a case where citizenship was unquestionably acquired through valid naturalization proceedings, and where it is sought to take away such right of citizenship because of an alleged change of residence or domicile subsequent to naturalization. In its essential nature such a proceeding seeks the imposition of a penalty or forfeiture, and therefore involves common law as distinguished from equitable rights.

Mr. Assistant Attorney General Harr for the United States:

Section 15 of the Naturalization Act of June 29, 1906, is constitutional, even as applied to certificates of naturalization procured under prior statutes. *Johannessen* v. *United States*, 225 U. S. 227.

The provisions of the second paragraph of the act of

1906, making the taking up of permanent residence abroad within five years after an alien's naturalization *prima facie* evidence of a lack of intention on his part to become a permanent resident of the United States at the time of filing his application for citizenship, is valid and constitutional.

The rule declared is only *prima facie*, and yields, as expressly provided by the statute itself and as held by the District Court, to countervailing evidence. Congress may establish such a presumption. *Mobile, J. & K. C. R. R.* v. *Turnipseed*, 219 U. S. 35, 42; *Bailey* v. *Alabama*, 219 U. S. 219, 238.

The fact that the presumption applies to the trial of an issue to be determined by facts which occurred before the presumption existed is immaterial. *Webb* v. *Den*, 17 How. 576; *Howard* v. *Moot*, 64 N. Y. 262; *Rich* v. *Flanders*, 39 N. H. 304.

This is only a species of the general regulation of procedure which the legislature may always change, even when, as in the case of criminal statutes passed by the States, it is subject to the prohibition against *ex post facto* legislation. *Hopt* v. *Utah*, 110 U. S. 574; *Thompson* v. *Missouri*, 171 U. S. 380. How far back such an inference shall reach is a question of degree. *Keller* v. *United States*, 213 U. S. 149.

The provisions of the second paragraph of § 15 of the Naturalization Act of 1906 apply to persons who have secured certificates of citizenship under the provisions of previous acts.

The second paragraph of the act of 1906 merely creates a rule of evidence which is equally applicable to certificates of naturalization secured under prior statutes, and Congress intended, as it said in the fourth paragraph, that "the provisions of this section" should apply as well to such certificates as to those secured under the act of 1906.

For the purposes of this case, it is immaterial whether

the second paragraph of the act of 1906 applies to certificates of naturalization secured under prior statutes.

The Government was forced to establish and did establish, not only that appellant had established a permanent residence in South Africa, but that he went there under such circumstances as to indicate that at the time of his naturalization he did not intend to reside permanently in the United States.

A case of fraud is presented therefore independent of the *prima facie* rule declared by the second paragraph of § 15 of the act of 1906. The requisite fraudulent intent could be inferred, under such circumstances, without the assistance of that rule. *Bailey* v. *Alabama*, 219 U. S. 219; *Commonwealth* v. *Rubin*, 165 Massachusetts, 453; *Keller* v. *United States*, 213 U. S. 149 (dissent).

Even if the rule of evidence established by the second paragraph of § 15 of the act of 1906 be held not to apply to certificates of naturalization secured under prior acts, the provisions of the first paragraph nevertheless authorize their cancellation for fraud or illegality, by virtue of the express declaration of the fourth paragraph.

The evidence shows that appellant took up his permanent residence in South Africa under such circumstances as to justify the presumption that he had no intention of residing permanently in the United States at the time of his naturalization.

The District Court correctly construed the words "permanent residence" in the second paragraph of the Naturalization Act of June 29, 1906, as meaning domicil.

As to what facts are necessary to prove a change of domicil see *Ennis* v. *Smith*, 14 How. 422; *Morris* v. *Gilmer*, 129 U. S. 328; *Anderson* v. *Watt*, 138 U. S. 706.

Appellant was not entitled to trial by jury.

A suit to cancel a certificate of naturalization on the ground of fraud in no wise differs from a suit to cancel a patent for lands, and is clearly an equitable proceeding.

United States v. *Mansour*, 170 Fed. Rep. 671, affirmed 226 U. S. 604.

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

This appeal brings under review a decree setting aside and canceling, under § 15 of the act of June 29, 1906, 34 Stat. 596, 601, c. 3592, as fraudulently and illegally procured, a certificate of citizenship theretofore issued to George A. Luria by the court of common pleas of the city and county of New York. 184 Fed. Rep. 643.

The petition was not carefully prepared, and yet it doubtless was designed to charge that the certificate was fraudulently and illegally procured in that Luria did not at the time intend to become a permanent citizen of the United States but only to obtain the indicia of such citizenship in order that he might enjoy its advantages and protection and yet take up and maintain a permanent residence in a foreign country. There was a prayer that the certificate be set aside and canceled because "procured illegally." The sufficiency of the petition was not challenged, and the case was heard and determined as if the issue just described were adequately tendered. In the opinion rendered by the District Court it was said, after observing that the petition was subject to criticism: "That point, however, was not raised, and I suppose the defendant does not mean to raise it." This view of his attitude passed unquestioned then, and it is too late to question it now.

The case was heard upon an agreed statement and some accompanying papers, from all of which it indubitably appeared that Luria was born in Wilna, Russia, in 1865 or 1868 and came to New York in 1888; that he entered a medical college of that city the next year and was graduated therefrom in 1893; that he applied for and procured

the certificate of citizenship in July, 1894; that in the following month he sought and obtained a passport from the Department of State, and in November left the United States for the Transvaal, South Africa, arriving there in December; that from that time to the date of the hearing, in December, 1910, he resided and practiced his profession in South Africa; that he joined the South African Medical Association and served in the Boer war; that his only return to the United States was for four or five months in 1907, for the temporary purpose of taking a postgraduate course in a medical school in New York; and that when entering that school he gave as his address, Johannesburg, South Africa. From the facts so appearing the District Court found and held that within a few months after securing the certificate of citizenship Luria went to and took up a permanent residence in South Africa, and that this, under § 15 of the act of 1906, constituted *prima facie* evidence of a lack of intention on his part to become a permanent citizen of the United States at the time he applied for the certificate. In the papers accompanying the agreed statement there were some declarations which, if separately considered, would tend to engender the belief that he had not taken up a permanent residence in South Africa and was only a temporary sojourner therein, but the District Court, upon weighing and considering those declarations in connection with all the facts disclosed, as was necessary, concluded that the declarations could not be taken at their face value and that the residence in South Africa was intended to be, and was, permanent in character. We concur in that conclusion.

In his answer, Luria interposed the defense that his presence in the Transvaal was solely for the purpose of promoting his health, the implication being that when he went there his health was impaired in such a way that a residence in that country was necessary or advisable

and therefore that taking up such residence ought not to be accepted as indicating that when he was naturalized it was not his intention to become a permanent citizen of the United States. He does not appear to have been present at the hearing, and, although there was ample time (ten months after filing his answer) to take his deposition, it was not taken, and there was substantially no attempt to sustain this defense or to explain his permanent removal to the Transvaal so soon after he procured the certificate of citizenship. True, it appeared that in 1909 he filed at the United States Consulate in Johannesburg, in support of an application for registration as a citizen of the United States, two certificates from medical practitioners, stating, in effect, that his residence in the Transvaal was for purposes of health; but those certificates did not rise to the dignity of proof in the present case. Besides being *ex parte*, they were meagre, not under oath, and not accepted by the consular officers as adequate or satisfactory. Thus, we think the District Court rightly held that there was no countervailing evidence sufficient to overcome the evidential effect of taking up a permanent residence in the Transvaal so shortly following the naturalization.

Section 15 of the act of 1906, under which this suit was conducted, is as follows (34 Stat. 601):

"SEC. 15. That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship *on the ground of fraud or on the ground that such certificate of citizenship was illegally procured.* In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have

sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

"*If any alien who shall have secured a certificate of citizenship under the provisions of this Act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective jurisdictions who have such certificates of citizenship and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship.*

"Whenever any certificate of citizenship shall be set aside or canceled, as herein provided, the court in which such judgment or decree is rendered shall make an order canceling such certificate of citizenship and shall send a certified copy of such order to the Bureau of Immigration and Naturalization; and in case such certificate was not originally issued by the court making such order it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such cer-

tificate of citizenship shall have been originally issued. And it shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the court to enter the same of record and to cancel such original certificate of citizenship upon the records and to notify the Bureau of Immigration and Naturalization of such cancellation.

"*The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws.*"

One of the questions arising under this section is, whether the second paragraph, dealing with the evidential effect of taking up a permanent residence in a foreign country within five years after securing a certificate of citizenship, is confined to certificates issued under the act of 1906, or applies also to those issued under prior laws, as was Luria's. If that paragraph were alone examined, the answer undoubtedly would be that only certificates under the act of 1906 are included. But the last paragraph also must be considered. It expressly declares that "the provisions of this section" shall apply, not only to certificates issued under the act of 1906, but also to all certificates theretofore issued under prior laws. The words "the provisions of this section" naturally mean every part of it, one paragraph as much as another, and that meaning cannot well be rejected without leaving it uncertain as to what those words embrace. Counsel refer to the Congressional Record, which shows that the second paragraph was inserted by way of amendment while the section was being considered in the House of Representatives. But as the section was in its present form when it was finally adopted by that body, as also when it was adopted by the Senate and approved by the President, it would seem that the last paragraph, in view of its plain and unam-

biguous language, must be accepted as extending the preceding paragraphs to all certificates, whether issued theretofore under prior laws or thereafter under that act.

But it is said that it was not essential to naturalization under prior laws, Rev. Stat., §§ 2165–2170, that the applicant should intend thereafter to reside in the United States; that, if he otherwise met the statutory requirements, it was no objection that he intended presently to take up a permanent residence in a foreign country; that the act of 1906, differing from prior laws, requires the applicant to declare "that it is his intention to reside permanently within the United States"; and therefore that Congress, when enacting the second paragraph of § 15, must have intended that it should apply to certificates issued under that act and not to those issued under prior laws. It is true that § 4 of the act of 1906 exacts from the applicant a declaration of his intention to reside in the United States, and it is also true that the prior laws did not expressly call for such a declaration. But we think it is not true that under the prior laws it was immaterial whether the applicant intended to reside in this country or presently to take up a permanent residence in a foreign country. On the contrary, by necessary implication, as we think, the prior laws conferred the right to naturalization upon such aliens only as contemplated the continuance of a residence already established in the United States.

Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other. Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency. *Minor* v. *Happersett*, 21 Wall. 162, 165; *Elk* v. *Wilkins*, 112 U. S. 94, 101; *Osborn* v. *Bank*, 9 Wheat. 738, 827. Turning to the naturalization laws preceding the act of 1906, being

those under which Luria obtained his certificate, we find that they required, first, that the alien, after coming to this country, should declare on oath, before a court or its clerk, that it was *bona fide* his intention to become a citizen of the United States and to renounce forever all allegiance and fidelity to any foreign sovereignty; second, that at least two years should elapse between the making of that declaration and his application for admission to citizenship; third, that as a condition to his admission the court should be satisfied, through the testimony of citizens, that he had resided within the United States five years at least, and that during that time he had behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; and, fourth, that at the time of his admission he should declare on oath that he would support the Constitution of the United States and that he absolutely and entirely renounced and abjured all allegiance and fidelity to every foreign sovereignty. These requirements plainly contemplated that the applicant, if admitted, should be a citizen in fact as well as in name—that he should assume and bear the obligations and duties of that status as well as enjoy its rights and privileges. In other words, it was contemplated that his admission should be mutually beneficial to the Government and himself, the proof in respect of his established residence, moral character, and attachment to the principles of the Constitution being exacted because of what they promised for the future, rather than for what they told of the past.

By the clearest implication those laws show that it was not intended that naturalization could be secured thereunder by an alien whose purpose was to escape the duties of his native allegiance without taking upon himself those of citizenship here, or by one whose purpose was to reside permanently in a foreign country and to use his natural-

ization as a shield against the imposition of duties there, while by his absence he was avoiding his duties here. Naturalization secured with such a purpose was wanting in one of its most essential elements—good faith on the part of the applicant. It involved a wrongful use of a beneficent law. True, it was not expressly forbidden; neither was it authorized. But, being contrary to the plain implication of the statute, it was unlawful, for what is clearly implied is as much a part of a law as what is expressed. *United States* v. *Babbit*, 1 Black, 55, 61; *McHenry* v. *Alford*, 168 U. S. 651, 672; *South Carolina* v. *United States*, 199 U. S. 437, 451.

Perceiving nothing in the prior laws which shows that Congress could not have intended that the last paragraph of § 15 of the act of 1906 should be taken according to the natural meaning and import of its words, we think, as before indicated, that it must be regarded as extending the preceding paragraphs of that section to all certificates of naturalization, whether secured theretofore under prior laws or thereafter under that act.

Several contentions questioning the constitutional validity of § 15 are advanced, but all, save the one next to be mentioned, are sufficiently answered by observing that the section makes no discrimination between the rights of naturalized and native citizens, and does not in anywise affect or disturb rights acquired through lawful naturalization, but only provides for the orderly cancellation, after full notice and hearing, of certificates of naturalization which have been procured fraudulently or illegally. It does not make any act fraudulent or illegal that was honest and legal when done, imposes no penalties, and at most provides for the annulment, by appropriate judicial proceedings, of merely colorable letters of citizenship, to which their possessors never were lawfully entitled. *Johannessen* v. *United States*, 225 U. S. 227. See also *Wallace* v. *Adams*, 204 U. S. 415.

Objection is specially directed to the provision which declares that taking up a permanent residence in a foreign country within five years after the issuance of the certificate shall be considered *prima facie* evidence of a lack of intention to become a permanent citizen of the United States at the time of the application for citizenship, and that in the absence of countervailing evidence the same shall be sufficient to warrant the cancellation of the certificate as fraudulent. It will be observed that this provision prescribes a rule of evidence, not of substantive right. It goes no farther than to establish a rebuttable presumption which the possessor of the certificate is free to overcome. If, in truth, it was his intention at the time of his application to reside permanently in the United States, and his subsequent residence in a foreign country was prompted by considerations which were consistent with that intention, he is at liberty to show it. Not only so, but these are matters of which he possesses full, if not special, knowledge. The controlling rule respecting the power of the legislature in establishing such presumptions is comprehensively stated in *Mobile &c. Railroad Co.* v. *Turnipseed*, 219 U. S. 35, 42, 43, as follows:

"Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue, is but to enact a rule of evidence, and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous. . . .

"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary

mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.

"If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

Of like import are *Fong Yue Ting* v. *United States*, 149 U. S. 698, 729; *Adams* v. *New York*, 192 U. S. 585, 599; *Bailey* v. *Alabama*, 219 U. S. 219, 238; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 81; *Reitler* v. *Harris*, 223 U. S. 437, 441.

Nor is it a valid objection to such legislation that it is made applicable to existing causes of action, as is the case here, the true rule in that regard being well stated in Cooley's Constitutional Limitations, 7th ed. 524, in these words:

"It must also be evident that *a right to have one's controversies determined by existing rules of evidence is not a vested right.* These rules pertain to the remedies which the State provides for its citizens; and generally in legal contemplation they neither enter into and constitute a part of any contract, nor can be regarded as being of the essence of any right which a party may seek to enforce. Like other rules affecting the remedy, they must therefore at all times be subject to modification and control by the legislature; and the changes which are enacted may lawfully be made applicable to existing causes of action, even in those States in which retrospective laws are forbidden. For the law as changed would only prescribe rules for presenting the evidence in legal controversies in the future; and it could not therefore be called retrospective

even though some of the controversies upon which it may act were in progress before."

This court applied that rule in *Webb* v. *Den*, 17 How. 576, 578; *Hopt* v. *Utah*, 110 U. S. 574, 590; *Thompson* v. *Missouri*, 171 U. S. 380; and *Reitler* v. *Harris, supra.*

That the taking up of a permanent residence in a foreign country shortly following naturalization has a bearing upon the purpose with which the latter was sought and affords some reason for presuming that there was an absence of intention at the time to reside permanently in the United States is not debatable. No doubt, the reason for the presumption lessens as the period of time between the two events is lengthened. But it is difficult to say at what point the reason so far disappears as to afford no reasonable basis for the presumption. Congress has indicated its opinion that the intervening period may be as much as five years without rendering the presumption baseless. That period seems long, and yet we are not prepared to pronounce it certainly excessive or unreasonable. But we are of opinion that as the intervening time approaches five years the presumption necessarily must weaken to such a degree as to require but slight countervailing evidence to overcome it. On the other hand, when the intervening time is so short as it is shown to have been in the present case, the presumption cannot be regarded as yielding to anything short of a substantial and convincing explanation. So construed, we think the provision is not in excess of the power of Congress.

Lastly it is urged that the District Court erred in not according to the defendant a trial by jury. The claim is predicated upon the Seventh Amendment to the Constitution, which declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." This, however, was not a suit at common law. The right asserted and the remedy sought were essentially equitable,

not legal, and this, according to the prescribed tests, made it a suit in equity. *Parsons* v. *Bedford*, 3 Pet. 433, 447; *Irvine* v. *Marshall*, 20 How. 558, 565; *Root* v. *Railway Company*, 105 U. S. 189, 207. In this respect it does not differ from a suit to cancel a patent for public land or letters patent for an invention. See *United States* v. *Stone*, 2 Wall. 525; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273; *United States* v. *Bell Telephone Co.*, 128 U. S. 315.

Finding no error in the record, the decree is

Affirmed.

UNITED STATES *v.* SANDOVAL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

No. 352. Argued February 27, 1913.—Decided October 20, 1913.

Congress has power to make conditions in an Enabling Act, and require the State to assent thereto, as to such subjects as are within the regulating power of Congress. *Coyle* v. *Oklahoma*, 221 U. S. 559, 574.

Such legislation, when it derives its force not from the resulting compact but solely from the power of Congress over the subject, does not operate to restrict the legislative power of the State in respect to any matter not plainly within the regulating power of Congress. *Coyle* v. *Oklahoma*, 221 U. S. 559, distinguished.

The status of the Pueblo Indians in New Mexico and their lands is such that Congress can competently prohibit the introduction of intoxicating liquors into such lands notwithstanding the admission of New Mexico to statehood.

The power and duty of the United States under the Constitution to regulate commerce with the Indian tribes includes the duty to care for and protect all dependent Indian communities within its borders, whether within its original limits or territory subsequently acquired and whether within or without the limits of a State. *United States* v. *Kagama*, 118 U. S. 375.

Congress may not bring a community or body of people within range of its power by arbitrarily calling them Indians; but in respect of distinctly Indian communities the questions whether and for how long they shall be recognized as requiring protection of the United States are to be determined by Congress and not by the courts.

In reference to all political matters relating to Indians it is the rule of this court to follow the executive and other political departments of the Government whose more special duty it is to determine such affairs. If they recognize certain people as a tribe of Indians, this court must do the same.

Quære, and not decided, whether the Pueblo Indians of New Mexico are citizens of the United States.

The fact that Indians are citizens is not an obstacle to the exercise by Congress of its power to enact laws for the benefit and protection of tribal Indians as a dependent people.

Congress has power to exclude liquor from the lands of the Pueblo Indians, for although the Indians have a fee simple title, it is communal, no individual owning any separate tract. *United States* v. *Joseph*, 94 U. S. 614, distinguished.

It was a legitimate exercise of power on the part of Congress to provide in the Enabling Act under which New Mexico was admitted as a State against the introduction of liquor into the Indian country and the prohibition extends to lands owned by the Pueblo Indians in New Mexico.

198 Fed. Rep. 539, reversed.

THE facts, which involve the validity, as applied to the Pueblo Indians of New Mexico, of the act of January 30, 1897, as supplemented by the Enabling Act of June 20, 1910, in regard to the introduction of intoxicating liquor into Indian country and the status of the Pueblo Indians of New Mexico, are stated in the opinion.

Mr. Solicitor General Bullitt, with whom *Mr. Louis G. Bissell* was on the brief, for the United States:

Congress had the power in admitting New Mexico to statehood to impose conditions relative to the Pueblo Indians within its borders.

Conditions imposed by Congress upon new States

through their enabling acts are valid when they result from the exercise of powers conferred upon the Federal Government. *Coyle* v. *Oklahoma*, 221 U. S. 559.

The Federal power over Indians is of this character. *Coyle* v. *Oklahoma*, 221 U. S. 559; *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188; *Ex parte Webb*, 225 U. S. 663.

This power permits prohibitions against the sale of intoxicants to the Indian wards of the United States, its introduction upon Indian lands and the exemption of such lands from state taxation. *Choate* v. *Trapp*, 224 U. S. 665; *The Kansas Indians*, 5 Wall. 737; *United States* v. *Dick*, 208 U. S. 340; *United States* v. *Holliday*, 3 Wall. 407; *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188; *United States* v. *Rickert*, 188 U. S. 432.

The Pueblo Indians of New Mexico are Indians and, therefore, subject to the constitutional power of Congress over Indians.

Federal jurisdiction cannot be excluded merely by implication. *Hallowell* v. *United States*, 221 U. S. 317; *United States* v. *Celestine*, 215 U. S. 278.

Federal jurisdiction over the Pueblo Indians was not precluded or ousted by any of their four essential characteristics. Their organization in villages is consistent with Federal jurisdiction. Pueblo Indians are tribal Indians within the true meaning of the words "Indian Tribes" in the "Commerce Clause."

As to the meaning of "Indian Tribes" see Articles of Confederation, Art. IX; 1 Story, Const. (1873), §§ 1097–98; Farrand, Records of Const. Conv. Form of Pueblo Indian organization; Report by Bandelier to Archeol. Inst. of Amer.; Report No. 23—Bureau of Amer. Ethnology, pages cited.

There is a presumption in favor of jurisdiction. *Dartmouth College* v. *Woodward*, 4 Wheat. 518; Willoughby, Constitution, § 150; 1 Kappler, Indian Laws and Treaties, p. 880.

Federal jurisdiction also arises by implication from the Indians' need of governmental protection. *Heckman* v. *United States*, 224 U. S. 413; *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *United States* v. *Celestine*, 215 U. S. 278; *United States* v. *Kagama*, 118 U. S. 375.

The Pueblo Indians require protection. They were wards of Spanish and Mexican governments under Spanish laws. Report by Bandelier, *supra; Sunol* v. *Hepburn*, 1 California, 254; *United States* v. *Pico*, 5 Wall. 536; *United States* v. *Ritchie*, 17 How. 575.

Authorities cited in opposition to Federal jurisdiction: *United States* v. *Joseph*, 94 U. S. 614; *United States* v. *Lucero*, 1 New Mex. 422; *United States* v. *Santistevan*, 1 New Mex. 583, involved construction of a statute only and not the present paramount reason for exercise of Federal jurisdiction over Indians, i. e., protection of Indians. *Worcester* v. *Georgia*, 6 Pet. 515; *Matter of Heff*, 197 U. S. 488; *Jones* v. *Meehan*, 175 U. S. 10; *Rainbow* v. *Young*, 161 Fed. Rep. 830; *United States* v. *Kagama*, 118 U. S. 375; *United States* v. *Rickert*, 188 U. S. 432.

Their civilization is not inconsistent with their wardship. Report of Bandelier, *supra*.

Their citizenship is consistent with their wardship. The Pueblo Indians were citizens of New Mexico. *United States* v. *Ritchie*, 17 How. 525.

Citizens may well be wards of the Government. *Bowling* v. *United States*, 191 Fed. Rep. 22; *Hallowell* v. *United States*, 221 U. S. 317; *Rainbow* v. *Young*, 161 Fed. Rep. 835; *United States* v. *Celestine*, 215 U. S. 278; *United States* v. *Logan*, 105 Fed. Rep. 240; *United States* v. *Sutton*, 215 U. S. 291.

The relinquishment of Federal jurisdiction is a political question. *Hallowell* v. *United States*, 221 U. S. 317; *Heckman* v. *United States*, 224 U. S. 413; *Matter of Heff*, 197 U. S. 488; *Lone Wolf* v. *Hitchcock*, 185 U. S. 555; *Tiger* v. *Western Imp. Co.*, 221 U. S. 317; *United States* v.

Celestine, 215 U. S. 278; *United States* v. *Holliday*, 3 Wall. 407.

The ownership of lands in fee by Indian Pueblos is consistent with wardship; Pueblo ownership in fee is ownership in common. *United States* v. *Joseph*, 94 U. S. 614; 10 Stat. 308; 11 Stat. 374.

Federal governmental power over Indians does not depend upon property rights or title. *Heckman* v. *United States*, 224 U. S. 413; *Peters* v. *Malin*, 111 Fed. Rep. 244; *United States* v. *Allen*, 179 Fed. Rep. 13; *United States* v. *Rickert*, 188 U. S. 432.

The affirmative evidence of guardianship relation between United States and Pueblo Indians appears in appropriations made for farming implements, teachers, agents and an attorney. 10 Stat. 315, 330; 11 Stat. 169; 18 Stat. 146; 22 Stat. 83; 30 Stat. 571, 594.

The presumption against pure gratuities implies the wardship of the Indian beneficiaries. *Allen* v. *Smith*, 173 U. S. 389; *United States* v. *Realty Co.*, 163 U. S. 427.

Decisions by the territorial courts for New Mexico, denying the wardship of the Pueblo Indians, have immediately been nullified by Congress. *Territory* v. *Delinquent Taxpayers*, 12 New Mex. 139, 33 Stat. 1048, 1069; *United States* v. *Mares*, 14 New Mex. 1; Enabling Act, 36 Stat. 558.

Assertion of jurisdiction in the Enabling Act. The power of Congress was not previously lost because unsurrendered to a State. *Matter of Heff*, 197 U. S. 488; *United States* v. *Sutton*, 215 U. S. 291; *Wiggan* v. *Connelly*, 163 U. S. 56.

The real interests of the Pueblo Indians require Federal supervision to the extent to which it was asserted in the Enabling Act for New Mexico.

Mr. A. B. Renehan for defendant in error:

The Indians known as "Pueblo Indians" are not

Indians in the contemplation of the Indian Intercourse Act, but are citizens of the United States and of the State of New Mexico.

It is clear from a careful study of the Spanish laws that the Indians, meaning the Pueblo Indians, as distinct from the "savages" or "Indios Barbaros," were entitled, under the law, to own and control property both real and personal, and, subject to certain restrictions, could sell and dispose of the same.

Under the Spanish rule the Pueblo Indians were on an equality with European Spaniards and entitled to all the rights of European Spaniards, subject, however, to certain restrictions upon their rights of alienation of property.

Under the Mexican Government the Pueblo Indians were full fledged citizens upon an equality with all other citizens of the Mexican republic.

Being citizens of the Mexican republic at the date of the treaty of Guadalupe Hidalgo, they became citizens of the United States, with all the rights, privileges and immunities of such citizenship. *United States* v. *Ritchie*, 17 How. 525; *United States* v. *Joseph*, 94 U. S. 614; *United States* v. *Lucero*, 1 New Mex. 422; *United States* v. *Joseph*, 1 New Mex. 593; *United States* v. *Santistevan*, 1 New Mex. 583; *United States* v. *Mares*, 14 New Mex. 1; *Pueblo Indian Tax Cases*, 12 New Mex. 139; *De La O* v. *Pueblo of Acoma*, 1 New Mex. 226.

The lands of the Pueblo Indians are not such lands as are known as Indian country, but are held by them in fee simple, segregated from the public domain, free from all conditions. They are not, and never have been, held in trust by the Federal Government.

The Pueblo Indians are not, and never have been, wards of the Federal Government, nor are they under the charge of any Indian superintendent or agent.

The Pueblos are not Indians over whom the Govern-

ment, through its departments, has ever exercised, or now exercises, guardianship.

While there were certain restrictions upon the right of the Pueblo Indians to sell their property in real estate, under the Spanish regime, these restrictions were entirely removed under the Mexican Government. The Pueblos held their lands, with all the rights of alienation, by a fee simple title at the date of the treaty of Guadalupe Hidalgo.

Their title was fully recognized by the United States Government, all claims of the Government having been quitclaimed to the Pueblo Indians in 1858.

The provisions of the Enabling Act of June 20, 1910, and of the constitution of the State of New Mexico, attempting to bring the Pueblo Indians and their lands within the terms of the Intercourse Act are a nullity.

The Pueblo Indians, prior to the passage of the Enabling Act, were not within the provisions of the act of January 30, 1897, 29 Stat. 506. They were not wards of the Government; they were not in charge of any agent; their lands were not held in trust by the Government, nor did the Government exercise any rights of guardianship over them, nor had the Government ever negotiated any treaty with them as an Indian tribe.

The congressional power to legislate for the Indians flows from one of five sources: 1st, The treaty-making power; 2d, The power to regulate interstate commerce; 3d, The power to regulate commerce with Indian tribes; 4th, The ownership as sovereign of lands to which the Indian title has not been extinguished; 5th, The plenary authority arising out of the Nation's guardianship of the Indians as an alien but dependent people. *United States Express Company* v. *Friedman*, 191 Fed. Rep. 673. See also *United States* v. *Boss*, 160 Fed. Rep. 132.

None of these apply to the Pueblo Indians of New Mexico.

Although Congress has at various times legislated in

behalf of the Pueblo Indians within the Territory of New Mexico, these congressional acts cannot be said to make them wards of the National Government. Rather, they are mere gratuities given by the Federal Government to a certain class of citizens residing within a Territory. See *United States Express Co.* v. *Friedman*, 191 Fed. Rep. 673, 680; *Moshier* v. *United States*, 198 Fed. Rep. 54; *Matter of Heff*, 197 U. S. 488; *Keller* v. *United States*, 213 U. S. 147; *Ward* v. *Racehorse*, 163 U. S. 504 and cases cited; *Coyle* v. *Oklahoma*, 221 U. S. 559.

The Federal Government never had any title to these lands. By the treaty of Guadalupe Hidalgo the Pueblos had been fully recognized as citizens of the United States, and yet by the provisions of the Enabling Act, without the consent of the individual citizen, Congress seeks to deprive them of the rights and privileges of national, and therefore state, citizenship.

There is no power conferred by the Constitution of the United States upon the United States authorizing it to undertake to regulate, manage and control private property and the administration of private property in any one of the States. Such matters are left to the State and its legislative bodies alone.

The Federal Government, in creating a new State, cannot arbitrarily segregate out of the State privately owned lands to which the United States has no title or claim whatsoever, and say that these lands shall be subject to the laws of the United States.

The power which Congress attempted to exercise in § 2 of the Enabling Act of June 20, 1910, so far as it affects the Pueblo Indians, must be traced to some definite constitutional authority in order to sustain it. It cannot emanate from any of the sources referred to in the case of *United States Express Company* v. *Friedman*. In fact neither that case nor any of the later cases relied on by the plaintiff in error hold that Congress has power to

carve out of a new State privately owned lands and say, that while they are within the new State for certain purposes, for other purposes they shall be subject to Federal control. See *Coyle* v. *Oklahoma*, 221 U. S. 559.

Congress cannot deprive a newly admitted State or any State, by a compact declared to be irrevocable, of its right to regulate its own internal police affairs. *Keller* v. *United States*, 213 U. S. 147; *Ward* v. *Race Horse*, 163 U. S. 504.

If Congress had no power to impose these restrictions upon New Mexico, the State of New Mexico had no right to surrender any of the powers which are expressly reserved to the States by the Federal Constitution. *Coyle* v. *Smith, supra; Permoli* v. *First Municipality*, 3 How. 589; *Pollard's Lessee* v. *Hagan*, 3 How. 212; *Texas* v. *White*, 7 Wall. 700; *Ward* v. *Race Horse*, 163 U. S. 504.

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

This is a criminal prosecution for introducing intoxicating liquor into the Indian country, to wit, the Santa Clara pueblo, in the State of New Mexico. In the District Court a demurrer to the indictment was sustained and the indictment dismissed upon the theory that the statute upon which it is founded is invalid, as applied to Indian pueblos in New Mexico, because usurping a part of the police power of the State and encroaching upon its equal footing with the other States. 198 Fed. Rep. 539.

The indictment is founded upon the act of January 30, 1897, 29 Stat. 506, c. 109, as supplemented by § 2 of the act of June 20, 1910, 36 Stat. 557, c. 310, being the New Mexico Enabling Act. The first act makes it a punishable offense to introduce intoxicating liquor into the Indian country, and the second, in naming the conditions upon which New Mexico should be admitted into the Union,

prescribed,[1] in substance, that the lands then owned or occupied by the Pueblo Indians should be deemed and treated as Indian country within the meaning of the first act and of kindred legislation by Congress.

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[1] The pertinent portions of the Enabling Act are:

SEC. 2. That . . . the said convention shall be, and is hereby, authorized to form a constitution and provide for a state government for said proposed State, all in the manner and under the conditions contained in this Act. . . .

"And said convention shall provide, by an ordinance irrevocable without the consent of the United States and the people of said State—

"First. That . . . the sale, barter or giving of intoxicating liquors to Indians and *the introduction of liquors into Indian country, which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico, are forever prohibited.*

"Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title . . . to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States *or any prior sovereignty*, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; . . . but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe . . .

"Eighth. That whenever hereafter any of the lands contained within Indian reservations or allotments in said proposed State shall be allotted, sold, reserved, or otherwise disposed of, they shall be subject for a period of twenty-five years after such allotment, sale, reservation, or other disposal to *all the laws of the United States prohibiting the introduction of liquor into the Indian country; and the terms "Indian" and "Indian country" shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them.*"

Whether without this legislative interpretation the first act would have included the pueblo lands we need not consider. The Territorial Supreme Court had but recently held that it did not include them (*United States* v. *Mares*, 14 New Mex. 1), and Congress, evidently wishing to make sure of a different result in the future, expressly declared that it should include them. That this was done in the Enabling Act and that the State was required to, and did, assent to it, as a condition to admission into the Union, in no wise affects the force of the congressional declaration, if only the subject be within the regulating power of Congress. As was said by this court in *Coyle* v. *Oklahoma*, 221 U. S. 559, 574: "It may well happen that Congress should embrace in an enactment introducing a new State into the Union, legislation intended as a regulation of commerce among the States, or with Indian tribes situated within the limits of such new State, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and, therefore, would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress." To the same effect are *Pollard* v. *Hagan*, 3 How. 212, 224–225, 229; *Ex parte Webb*, 225 U. S. 663, 683, 690–691.

The question to be considered, then, is, whether the status of the Pueblo Indians and their lands is such that Congress competently can prohibit the introduction of intoxicating liquor into those lands notwithstanding the admission of New Mexico to statehood.

There are as many as twenty Indian pueblos scattered

over the State, having an aggregate population of over 8,000. The lands belonging to the several pueblos vary in quantity, but usually embrace about 17,000 acres, held in communal, fee simple ownership under grants from the King of Spain made during the Spanish sovereignty and confirmed by Congress since the acquisition of that territory by the United States. 10 Stat. 308, c. 103, § 8; 11 Stat. 374, c. 5. As respects six of the pueblos, one being the Santa Clara, adjacent public lands have been reserved by executive orders for the use and occupancy of the Indians.

The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government. Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetichism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed and inferior people. Upon the termination of the Spanish sovereignty they were given enlarged political and civil rights by Mexico, but it remains an open question whether they have become citizens of the United States. See treaty of Guadalupe Hidalgo, Articles VIII and IX, 9 Stat. 922, 929; *United States* v. *Joseph*, 94 U. S. 614, 618; *Elk* v. *Wilkins*, 112 U. S. 94. Be this as it may, they have been regarded and treated by the United States as requiring special consideration and protection, like other Indian communities. Thus,[1] public moneys have been expended in presenting them with farming implements and utensils,

[1] See, *inter alia*, 10 Stat. 330, c. 167; 17 Stat. 165, c. 233; 18 Stat. 147, c. 389; 21 Stat. 130, c. 85; 22 Stat. 83, c. 163; 26 Stat. 337, 353, c. 807; 30 Stat. 594, c. 545; 36 Stat. 278, c. 140; Reports Com'r Indian Affairs, 1907, p. 58; 1908, p. 55; 1909, p. 48; 1 Kappler, 878, 880; Executive Orders relating to Indian Reservations (1912), 124–127, 129–130.

and in their civilization and instruction; agents and superintendents have been provided to guard their interests; central training schools and day schools at the pueblos have been established and maintained for the education of their children; dams and irrigation works have been constructed to encourage and enable them to cultivate their lands and sustain themselves; public lands, as before indicated, have been reserved for their use and occupancy where their own lands were deemed inadequate; a special attorney has been employed since 1898, at an annual cost of $2,000, to represent them and maintain their rights; and when latterly the Territory undertook to tax their lands and other property, Congress forbade such taxation, saying: "That the lands now held by the various villages or pueblos of Pueblo Indians, or by individual members thereof, within Pueblo reservations or lands, in the Territory of New Mexico, and all personal property furnished said Indians by the United States, or used in cultivating said lands, and any cattle and sheep now possessed or that may hereafter be acquired by said Indians, shall be free and exempt from taxation of any sort whatsoever, including taxes heretofore levied, if any, until Congress shall otherwise provide." 33 Stat. 1048, 1069, c. 1479. An exempting provision was also inserted in § 2 of the Enabling Act.

The local estimate of this people is reflected by a New Mexico statute adopted in 1854 and carried into subsequent compilations, whereby they were "excluded from the privilege of voting at the popular elections of the Territory" other than the election of overseers of ditches in which they were interested and the election of the officers of their pueblos "according to their ancient customs." Laws 1853–4, p. 142, § 3; Comp. Laws 1897, § 1678.

With one accord the reports of the superintendents charged with guarding their interests show that they are

dependent upon the fostering care and protection of the Government, like reservation Indians in general; that, although industrially superior, they are intellectually and morally inferior to many of them; and that they are easy victims to the evils and debasing influence of intoxicants. We extract the following from published reports of the superintendents:

Albuquerque, 1904: "While a few of these Pueblo Indians are ready for citizenship and have indicated the same by their energy and willingness to accept service from the railroad companies and elsewhere, and by accepting the benefits of schools and churches, a large per cent. of them are unable, and not yet enough advanced along the lines of civilization, to take upon themselves the burden of citizenship. It is my opinion that in the event taxation is imposed it will be but a short time before the masses of the New Mexico Pueblo Indians will become paupers. Their lands will be sold for taxes, the whites and Mexicans will have possession of their ancient grants, and the Government will be compelled to support them or witness their extermination."

Santa Fe, 1904: "The Pueblo have little or no money, and they cannot understand why they should be singled out from all other Indians and be compelled to bear burdens [Territorial taxes] which they are not able to assume. . . . They will not vote, nor are they sufficiently well informed to do so intelligently."

Zuni, 1904: "Last November when they had their Shaleco dance I determined to put a stop to the drunkenness. I wrote to the Indian Office asking for a detachment from Fort Wingate. I soon received a reply that my request had been granted. I said nothing to anyone. The afternoon the Shaleco arrived the detachment rode in, the Indians thinking they were passing through, and were making preparations to have a good time. When they were notified that a Navaho was celebrating, they

promptly arrested him and brought him over to the guard-house, and during the evening two others were arrested with whiskey in their possession, and also a Pueblo Indian. The detachment remained until the dance was over and the visiting Indians had left for their homes."

Santa Fe, 1905: "Until the old customs and Indian practices are broken among this people we cannot hope for a great amount of progress. The secret dance, from which all whites are excluded, is perhaps one of the greatest evils. What goes on at this time I will not attempt to say, but I firmly believe that it is little less than a ribald system of debauchery. The Catholic clergy is unable to put a stop to this evil, and know as little of same as others. The United States mails are not permitted to pass through the streets of the pueblos when one of these dances is in session; travelers are met on the outskirts of the pueblo and escorted at a safe distance around. The time must come when the Pueblos must give up these old pagan customs and become citizens in fact."

Santa Fe, 1906: "There is a greater desire among the Pueblo to live apart and be independent and have nothing to do with the white race than among any other Indians with whom I have worked. They really care nothing for schools, and only patronize them to please their agent and incidentally to get the issues given out by the teacher. The children, however, make desirable pupils, and if they could be retained in school long enough more might be accomplished. The return student going back to the pueblo has a harder task before him than any other class of returned students, I know. It is easier to go back to the Sioux tepee and lead a white man's life than to go back to the pueblo and retain the customs and manners taught in the school.

"In pueblo life the one-man domination—the fear of the wrath of the governor of the pueblo—is what holds this people down. The rules of the pueblo are so strict that

the individual cannot sow his wheat, plant his corn, or harvest same in the autumn without the permission of the pueblo authorities. The pueblos under my jurisdiction that adhere religiously to old customs and rules are Taos, Picuris, Santo Domingo, and Jemez, tho there are none of them that have made much progress away from the ancient and pagan rites.

"Intemperance is the besetting sin of the Pueblo. . . . If the law against selling intoxicants to this simple and ignorant people is allowed to stand as now interpreted [Act of 1897 as construed by Territorial court], it simply means the ultimate extermination of the Pueblo and the survival of the fittest."

Santa Fe, 1909: "While apparently the Pueblo Indians are law-abiding, it has come to my notice during the past year that in the practice of the Pueblo form of government cruel and inhuman punishment is often inflicted. I have strongly advised the Indians against this, and your office has, through me, done likewise. The Pueblos, however, are very insistent upon retaining their ancient form of government. As long as they are permitted to live a communal life and exercise their ancient form of government, just so long will there be ignorant and wild Indians to civilize. The Pueblo form of government recognizes no other form of government and no other authority. While apparently they submit to the laws of the Territory and the government, they do so simply because they are compelled to acquiesce. The returned student who has been five years at the boarding school is compelled to adopt the Indian dress upon his return to the pueblo; he is compelled to submit to all the ancient and heathen customs of his people. If he rebels he is punished. He therefore lapses back and becomes like one who has never seen the inside of a school."

Zuni, 1909: "The Zunis, especially the old people, are very much opposed to sending their children to school and

to every influence that tends to draw them away from their old ways and habits of living; but by persistent effort, and by appealing to their reason, we succeeded in filling the school with children. The children are happy and contented while at school, but when they go home for a visit, their mothers and older sisters talk with them and make them dissatisfied and they do not wish to return. This is especially true of the girls. . . . Immorality and a general laxness in regard to their family relations, together with their Pagan practices, are the great curse of this tribe. They have no marriage ceremony that is binding, and a man will often live with two or three different women during one year. This custom is very demoralizing. In some cases the father will sell his daughters and the husband his wife for the purpose of prostitution. If marriage and divorce laws could be enforced, it would be a great blessing to these people. . . . We have had very little trouble with liquor on the reservation during the past year, and the Pueblo officers cooperate with me in trying to keep it from being brought on the reservation."

This view of Pueblo customs, government and civilization finds strong corroboration in the writings of ethnologists, such as Bandelier and Stevenson, who, in prosecuting their work, have lived among the Pueblos and closely observed them. Papers Arch. Inst. Am. Ser. Vol. 3, part 1 (1890); Bureau Am. Ethn. Reports, Vols. 11 (1889–'90) and 23 (1901–'02).

During the Spanish dominion the Indians of the pueblos were treated as wards requiring special protection, were subjected to restraints and official supervision in the alienation of their property, and were the beneficiaries of a law declaring "that in the places and pueblos of the Indians no wine shall enter, nor shall it be sold to them." *Chouteau* v. *Molony*, 16 How. 203, 237, Laws of the Indies, Book 6, title 1, laws 27 and 36, title 2, law 1; Book 5,

title 2, law 7; Book 4, title 12, laws 7, 9, 16–20; Cedulas and Decrees shown in Hall's Mexican Law, §§ 162–171. After the Mexican succession they were elevated to citizenship and civil rights not before enjoyed, but whether the prior tutelage and restrictions were wholly terminated has been the subject of differing opinions. *United States* v. *Pico*, 5 Wall. 536, 540; *Sunol* v. *Hepburn*, 1 California, 255, 279–280, 291–292; 1 Nuevo Febrero Mexicano, pp. 24–25; Hall's Mexican Laws, § 161; *United States* v. *Ritchie*, 17 How. 525, 540. In the last case this court observed: "The improvement of the Indians, under the influence of the missionary establishments in New Spain, which had been specially encouraged and protected by the mother country, had, doubtless, qualified them in a measure for the enjoyment of the benefits of the new institutions. In some parts of the country very considerable advancement had been made in civilizing and christianizing the race. From their degraded condition, however, and ignorance generally, the privileges extended to them in the administration of the government must have been limited; and they still, doubtless, required its fostering care and protection." And in the *Pico Case* the court, referring to the status of an Indian pueblo and its inhabitants during the Mexican regime, said: "The disposition of the lands assigned was subject at all times to the control of the government of the country. The pueblo of Las Flores was an Indian pueblo, and over the inhabitants the government extended a special guardianship."

But it is not necessary to dwell specially upon the legal status of this people under either Spanish or Mexican rule, for whether Indian communities within the limits of the United States may be subjected to its guardianship and protection as dependent wards turns upon other considerations. See *Pollard* v. *Hagan*, 3 How. 212, 225. Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but

long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State. As was said by this court in *United States* v. *Kagama*, 118 U. S. 375, 384: "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes." In *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 315, prior decisions were carefully reviewed and it was further said: "Taking these decisions together, it may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the Government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not for the courts, to determine when the true interests of the Indian require his release from such condition of tutelage."

Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts. *United States* v. *Holliday*, 3 Wall. 407, 419;

United States v. *Rickert*, 188 U. S. 432, 443, 445; *Matter of Heff*, 197 U. S. 488, 499; *Tiger* v. *Western Investment Co.*, *supra*.

As before indicated, by an uniform course of action beginning as early as 1854 and continued up to the present time, the legislative and executive branches of the Government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes, and, considering their Indian lineage, isolated and communal life, primitive customs and limited civilization, this assertion of guardianship over them cannot be said to be arbitrary but must be regarded as both authorized and controlling. As was said in *United States* v. *Holliday*, *supra*: "In reference to all matters of this kind, it is the rule of this court to follow the executive and other political departments of the Government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same. If they are a tribe of Indians, then, by the Constitution of the United States, they are placed, for certain purposes, within the control of the laws of Congress. This control extends, as we have already shown, to the subject of regulating the liquor traffic with them. This power residing in Congress, that body is necessarily supreme in its exercise." In that case the Congressional enactment prohibiting the sale of liquor to Indian wards and forbidding its introduction into the Indian country was applied to a sale in the State of Michigan to an Indian who had and exercised the right to vote under the laws of the State, and other applications of the statute to Indians and Indian lands in other States are shown in *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188, 197; *Dick* v. *United States*, 208 U. S. 340; *United States* v. *Sutton*, 215 U. S. 291; *Hallowell* v. *United States*, 221 U. S. 317; *United States* v. *Wright*, 229 U. S. 226.

It is said that such legislation cannot be made to em-

brace the Pueblos, because they are citizens. As before stated, whether they are citizens is an open question, and we need not determine it now, because citizenship is not in itself an obstacle to the exercise by Congress of its power to enact laws for the benefit and protection of tribal Indians as a dependent people. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 308; *United States* v. *Rickert*, 188 U. S. 432, 445; *United States* v. *Celestine*, 215 U. S. 278, 290; *Hallowell* v. *United States*, *supra*.

It also is said that such legislation cannot be made to include the lands of the Pueblos, because the Indians have a fee simple title. It is true that the Indians of each pueblo do have such a title to all the lands connected therewith, excepting such as are occupied under executive orders, but it is a communal title, no individual owning any separate tract. In other words, the lands are public lands of the pueblo, and so the situation is essentially the same as it was with the Five Civilized Tribes, whose lands, although owned in fee under patents from the United States, were adjudged subject to the legislation of Congress enacted in the exercise of the Government's guardianship over those tribes and their affairs. *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 488; *Cherokee Nation* v. *Hitchcock*, *supra*; *Heckman* v. *United States*, 224 U. S. 413; *Gritts* v. *Fisher*, *id.* 640; *United States* v. *Wright*, *supra*. Considering the reasons which underlie the authority of Congress to prohibit the introduction of liquor into the Indian country at all, it seems plain that this authority is sufficiently comprehensive to enable Congress to apply the prohibition to the lands of the Pueblos.

We are not unmindful that in *United States* v. *Joseph*, 94 U. S. 614, there are some observations not in accord with what is here said of these Indians, but as that case did not turn upon the power of Congress over them or their property, but upon the interpretation and purpose of a statute not nearly so comprehensive as the legislation

now before us, and as the observations there made respecting the Pueblos were evidently based upon statements in the opinion of the territorial court, then under review, which are at variance with other recognized sources of information, now available, and with the long-continued action of the legislative and executive departments, that case cannot be regarded as holding that these Indians or their lands are beyond the range of Congressional power under the Constitution.

Being a legitimate exercise of that power, the legislation in question does not encroach upon the police power of the State or disturb the principle of equality among the States. *United States* v. *Holliday*, *United States* v. *43 Gallons of Whiskey*, *United States* v. *Kagama*, *Hallowell* v. *United States* and *Ex parte Webb*, *supra*.

The judgment is accordingly reversed, with directions to overrule the demurrer to the indictment and to proceed to the disposition of the case in regular course.

Reversed.

NATIONAL CITY BANK OF NEW YORK *v.* HOTCHKISS, AS TRUSTEE IN BANKRUPTCY OF HASKINS.

HOTCHKISS, AS TRUSTEE IN BANKRUPTCY OF HASKINS, *v.* NATIONAL CITY BANK OF NEW YORK.

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

Nos. 459, 460. Argued October 17, 20, 1913.—Decided November 3, 1913.

Courts may go far in giving financial transactions between banks and customers any form which will carry out the mutually understood intent, *Sexton* v. *Kessler*, 225 U. S. 90; but if the intent is doubtful or inconsistent with the legal effect of dominant facts it will fail.

An understanding that the proceeds of a loan made by a bank to a customer and placed to the credit of his general account are to be used to take up certain securities does not, in the absence of any special agreement to that effect, create a lien upon those securities, and the delivery of such securities to the bank with notice of the customer's impending insolvency is an illegal preference under the Bankruptcy Act.

A trust cannot be established in an aliquot share of a man's whole property, as distinguished from a particular fund, by showing that trust monies have gone into it.

Although a loan may be made for a specified purpose, if the lender places it in the stream of the borrower's general property there is no right of subrogation.

A general creditor may increase the bankrupt's estate by his advances and lose the right to take them back.

Time may sometimes be disregarded when it is insignificant, but not where it has sufficed to materially change the financial positions of the parties.

These cases are distinguished from *Gorman* v. *Littlefield*, 229 U. S. 19, and other cases in which there was a specific *res* which identified the fund and separated it from the general mass of the estate.

A notice to a bank demanding securities for a loan made to the bank-

rupt that bankruptcy was impending and that it was receiving a preference is sufficient to show that the bank had cause to believe that it was obtaining a preference.

Under an agreement, made in a suit by a receiver against a bank to recover securities in specie as an illegal preference, that the bank should hold them pending the decision of the suit with a power to sell in its discretion which had not been exercised, *held* that the bank was only liable for the securities and not for their value at the time the agreement was made.

201 Fed. Rep. 664; 120 C. C. A. 92, affirmed.

THE facts, which involve the determination of whether the delivery of securities by a broker, immediately preceding his bankruptcy, to a bank to secure its loan was an illegal preference, are stated in the opinion.

Mr. John A. Garver for appellant in No. 459 and for appellee in No. 460:

The law presumes an agreement or transaction to be legal, when it is capable of a construction which makes it valid. Jones on Evidence (2d ed.), § 85; *King* v. *Hawkins*, 10 East, 211; *Curtis* v. *Gokey*, 68 N. Y. 300, 304; *Ormes* v. *Dauchy*, 82 N. Y. 443.

So as to securing a just debt. *Getts* v. *Janesville Co.*, 163 Fed Rep. 417; *Re Neill Co.*, 170 Fed. Rep. 481, 484; *Re Leech*, 171 Fed. Rep. 622; *Sexton* v. *Kessler*, 172 Fed. Rep. 535, 537.

The right to recover a preference is exclusively statutory. The common law favors the diligent creditor. *Tompkins* v. *Hunter*, 149 N. Y. 117, 121; *Dodge* v. *McKechnie*, 156 N. Y. 514, 520; *Huntley* v. *Kingman*, 152 U. S. 527, 532.

A trustee in bankruptcy has, therefore, no power to avoid a preference, except on the precise grounds specified in the statute; and, as the right given is in derogation of the common law, it must be strictly pursued. Plowden, Comm. 113; Sutherland, Stat. Con., § 371; *Atkins* v. *Kinnan*, 20 Wend. 241, 249, 250.

A remedy which is given by statute must be strictly followed. *East Tenn. &c. R. Co.* v. *Southern Tel. Co.*, 112 U. S. 306, 310; *Campbellsville Lumber Co.* v. *Hubbert*, 112 Fed. Rep. 718, 724–750; affd., 191 U. S. 70; *Matter of Bryce*, 16 Daly, 443.

A transaction, such as this, which does not diminish the fund distributable among the creditors is not repugnant to the statute. *County Bank* v. *Massey*, 192 U. S. 138, 147; *Bank of Newport* v. *Herkimer Bank*, 225 U. S. 178, 184; *Gorman* v. *Littlefield*, 229 U. S. 19, 25; *Continental Trust Co.* v. *Chicago Title Co.*, 229 U. S. 435.

This rule applies even where the account is not active and where two payments have been made without any intermediate sale. *Re Sagor*, 121 Fed. Rep. 658; *Jaquith* v. *Alden*, 189 U. S. 78; *Yaple* v. *Dahl-Milliken Co.*, 193 U. S. 526; *Wild* v. *Provident Trust Co.*, 214 U. S. 292, 296.

There are no other creditors of the same class.

A payment is objectionable under § 60 only when it has the effect of enabling one creditor to obtain a greater percentage of his claim than other creditors of the same class. *Swartz* v. *Fourth Natl. Bank*, 117 Fed. Rep. 1; *Crooks* v. *People's Bank*, 46 App. Div. 335.

The classification referred to in § 60*a* is not the same as that providing for a priority in the payment of debts in § 64*b*. As to differences in classification, see *Re Belknap*, 129 Fed. Rep. 646; *Re Barrett*, 6 Am. Bkcy. Rep. 199; *Re Harpke*, 116 Fed. Rep. 295, 297; *Re Denning*, 114 Fed. Rep. 219, 221; *Gomila* v. *Wilcombe*, 151 Fed. Rep. 470.

There is no proof that the bankrupts intended to give preference.

Prior to the amendment of 1910, the trustee in bankruptcy was required to prove, in a suit of this kind, that the creditor knew that the bankrupt actually intended to give a preference. *Hardy* v. *Gray*, 144 Fed. Rep. 992; *Re First Natl. Bank*, 155 Fed. Rep. 100 (C. C. A. 6th); *Bank* v. *Graves*, 156 Fed. Rep. 168; *Tumlin* v. *Bryan*, 165

Fed. Rep. 166; *Re Leech*, 171 Fed. Rep. 622; *In re Sayed*, 185 Fed. Rep. 962; *Kimmerle* v. *Farr*, 189 Fed. Rep. 295; *Debus* v. *Yates*, 193 Fed. Rep. 435. As to the effect of the amendment, see *Alexander* v. *Redmond*, 180 Fed. Rep. 192, and cases cited in brief for appellant, in *Mechanics Bank* v. *Ernst* (*post*, p. 64).

Defendant did not have reasonable cause to believe it was obtaining a preference. *Irish* v. *Citizens' Trust Co.*, 163 Fed. Rep. 880.

The conduct of defendant's officers in asking for the securities on that day is entirely consistent with the understanding and usage of the business, and is in direct accord with the written contract, that clearance loans shall be taken care of before the close of business hours.

Subrogation exists. The tendency is to extend subrogation to every possible case for the protection of one advancing money for discharging obligations carrying security. *Matthews* v. *Fidelity Title Co.*, 52 Fed. Rep. 687, 689.

Subrogation is allowed in every instance in which one party pays a debt for which another is primarily liable, and which, in equity and good conscience, the latter should have discharged. *Stevens* v. *King*, 84 Maine, 291; *Dunlop* v. *Adams*, 174 N. Y. 411, 416; *Atlantic Trust Co.* v. *Kinderhook Co.*, 17 App. Div. 212; *Louis* v. *Bauer*, 33 App. Div. 287, 293; *Peters* v. *Meyer*, 72 App. Div. 585; *Gans* v. *Thieme*, 93 N. Y. 225; *Pease* v. *Egan*, 131 N. Y. 262, 273; *Moorehouse* v. *Bklyn. Heights Co.*, 185 N. Y. 520, 524; *Title Guarantee Co.* v. *Haven*, 196 N. Y. 487; *Lidderdale* v. *Robinson*, 2 Brock. 159, 168.

The only exception is that it will not be applied to defeat the superior or equal equities of third persons. 4 Pom. Eq. Juris. (3d Ed.), § 1419, *note; Union Tr. Co.* v. *Monticello R. R. Co.*, 63 N. Y. 311, 314.

The bankruptcy courts should apply the doctrine recognized in the state courts. *Hewitt* v. *Berlin Works*, 194 U. S. 296; *Thompson* v. *Fairbanks*, 196 U. S. 516;

Humphrey v. *Tatman*, 198 U. S. 93; *Sabin* v. *Camp*, 98 Fed. Rep. 974.

Equity will not permit technicalities or even serious obstacles to stand in the way of the enforcement of the principle of subrogation. *Peters* v. *Meyer*, 72 App. Div. 585; *Gans* v. *Thieme*, 93 N. Y. 225; *Pease* v. *Egan*, 131 N. Y. 262; *Cobb* v. *Dyer*, 69 Maine, 494.

It is not necessary that the person to be subrogated should pay the creditor directly. It is sufficient if he advances the money for the purpose of enabling the debtor to pay the debt. *Building Assn.* v. *Thompson*, 32 N. J. Eq. 133; *Merchants' Bank* v. *Tillman*, 106 Georgia, 55; *Sgobe* v. *Cappadonia*, 8 App. Div. 303; *Peters* v. *Meyer*, 72 App. Div. 585.

The proceeds of the loan constituted a trust fund. *Sexton* v. *Kessler*, 172 Fed. Rep. 535, 544.

This loan was made in conformity with an established custom between banks and their broker customers. A general custom is the common law itself, or a part of it; even written contracts will yield to such custom. *Walls* v. *Bailey*, 49 N. Y. 464, 471; Elkus on Secret Liens, 83, § 150.

There was a special fund held by the bankrupts for a specific purpose, to be used in protecting and enhancing the value of the general assets, and having, consequently, such character that no general creditor could claim any right to share in it. *Gorman* v. *Littlefield*, 229 U. S. 19, 25; *Fourth Street Bank* v. *Yardley*, 165 U. S. 634.

Mr. Abram I. Elkus, with whom *Mr. Wesley S. Sawyer* was on the brief, for appellees in No. 459 and appellants in No. 460.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit by a trustee in bankruptcy to recover certain securities alleged to have been transferred to the

defendant bank by way of preference. The plaintiff had a judgment in the District Court, 200 Fed. Rep. 287, *id.* 299, and in the Circuit Court of Appeals, 201 Fed. Rep. 664; 120 C. C. A. 92. Both parties appeal; the plaintiff upon a subordinate question as to its right to elect damages instead of a return of the securities.

The case arose upon what is known in New York as a clearance loan. Brokers need large sums to clear or pay for the stocks that they receive in the course of the day, and as the stocks must be paid for before they are received and can be pledged to raise the necessary funds, these sums are advanced by the banks. They are returned later on the same day by making deposits to the borrower's account and drawing a check to the order of the bank. Perhaps such a general course of dealing might be arranged so as to give a lien on the loan or its proceeds until payment, but the question whether such a lien has been created rarely, if ever, has arisen, the whole business being finished in a few hours. It is, however, the main issue in this case.

The bankrupts were brokers in partnership and at ten o'clock on January 19, 1910, had assets exceeding their liabilities by nearly half a million dollars. These assets consisted largely in the stock of a coal and iron company in which there was a pool. Before twelve, there was a break in the market, the stock went down and at about noon the suspension of the firm was announced. A petition in involuntary bankruptcy was filed at ten minutes after four on the same day. At about ten, the bank made a clearance loan to the bankrupts of $500,000 in the usual way to enable them to meet their current obligations and to get the stocks deliverable on that day, the bank receiving demand notes and both parties acting in good faith. The sum was credited in the deposit account of the firm, in addition to $54,319.98 already there, and soon after the bank certified and subsequently paid checks amounting

to $535,920.74. During the day the firm made deposits which are not in question, but there remained due upon the loan $166,166.69. Officers of the bank noticing the drop in the stock went to the firm, demanded payment or securities to make good the obligations to the bank, and were told of the suspension and that a petition in bankruptcy would be filed. After two hours discussion the securities in question were delivered between 2 and 3 p. m., but the officers were told that the delivery was a preference. Some of the securities bore no relation to the loan; others and, it may be assumed for purposes of argument, most, had been released by the money thus obtained.

In dealing with transactions of this kind we may go far in giving them any form that will carry out the mutually understood intent. *Sexton* v. *Kessler*, 225 U. S. 90, 96, 97. But if the intent was doubtful or inconsistent with the legal effect of dominant facts, it must fail. For instance, apart from possible exceptions, a man cannot retain a domicil in one place when he has moved to another and intends to reside there for the rest of his life, by any wish, declaration or intent inconsistent with the dominant facts of where he actually lives and what he actually means to do. *Dickinson* v. *Brookline*, 181 Massachusetts, 195. In the present case it is agreed that it was expected and understood that no portion of the clearance loan was to be used for any purpose other than to clear securities. But on the other hand, by consent of the bank as it seems, the loan was put into the general deposit account, which was drawn upon for general purposes, at least to the extent of the balance above the loan; the securities released were not kept separate but were used like any others; and no separate account was kept of money received from deliveries of stock so released. What happened as between these parties was simply that all monies received in the course of the day from whatever source went into the firm's

deposit account with the bank. So that, even if we take it, as a corollary of what was understood, that the use of the clearance loan was expected to enable the firm to repay the loan, it does not appear to have been expected that the proceeds should be appropriated specifically to that end, but simply that the addition of such proceeds to the general funds of the firm would enable the latter to pay within the time allowed. This is the view of the facts taken by the master and both of the courts below. They also found that an attempt to give the matter a different complexion by custom had failed; and if we went behind their findings we should take the same view.

A trust cannot be established in an aliquot share of a man's whole property, as distinguished from a particular fund, by showing that trust monies have gone into it. On similar principles a lien cannot be asserted upon a fund in a borrower's hands, which at an earlier stage might have been subject to it, if by consent of the claimant it has become a part of the borrower's general estate. But that was the result of the dealings between these parties, and it cannot be done away with by a wish or intention, if such there was, that alongside of this permitted freedom of dealing on the part of the bankrupts, the security of the bank should persist. It is not like the case of property wrongfully mingled with general funds and afterwards traced. All that the parties agreed either expressly or by implication was that the debt incurred at ten o'clock should be paid by three. Some banks seem to have required the dealing to be conducted on the footing of a fund identified and subject to a trust at every step, but between these parties there was no attempt to follow a specific fund through a series of changes until it was returned. See *Dillon* v. *Barnard*, 21 Wall. 430.

As all trace of the bank's money was lost when it entered the stream of the firm's general property there can be no right of subrogation. Neither can a claim be upheld on

the ground that there was no diminution of the bankrupt's assets, or that the transaction should be regarded as instantaneous and one. The consent to become a general creditor for an hour, that was imported, even if not intended to have that effect, by the liberty allowed to the firm, broke the continuity and established the loan as part of the assets. No doubt many general creditors have increased a bankrupt's estate by their advances, but they have lost the right to take them back. Time sometimes can be disregarded when it is insignificant. But in this case half the time between the loan and the transfer of securities sufficed to change the position of the borrowers from a fortune of half a million to a deficit of double that amount.

In both *Gorman* v. *Littlefield*, 229 U. S. 19, and *Richardson* v. *Shaw*, 209 U. S. 365, in addition to the personality of the holder there was also a specific stock, which identified the fund relied upon and separated it from the general mass of the estate. *Hurley* v. *Atchison, Topeka & Santa Fé Ry. Co.*, 213 U. S. 126, stood on the peculiar facts of the case, which were held to point to an identified *res* and give an immediate claim against it. The case established no general proposition contrary to what we now decide.

The suggestions that it does not appear that the bankrupts intended to give a preference or that the bank had reasonable cause to believe that it was obtaining one, hardly need answer. The bank did not confine its demand to proceeds of the loan but asked for and obtained securities without regard to their source. It was notified in terms that it was receiving a preference and that the firm was going into bankruptcy. If this was not sufficient notice it is hard to imagine what would be enough.

The cross appeal depends upon the frame of the bill and effect of an agreement between the parties. On April 5, 1910 it was agreed that the securities in question might be sold by the bank "at the best price obtainable, at such

times as may seem best to the officers of" the bank; that the rights of both parties "shall attach to the proceeds realized from the sale" and "the amount realized from the sale of the said securities shall stand in lieu of the securities and shall represent the amount of the liability" of the bank to the trustee in bankruptcy in case of judgment against it. "The making of this stipulation shall not alter the rights or claims of any of the parties, nor change the jurisdiction of any court . . . it being the intention of the stipulation that the securities in the possession of the National City Bank shall be converted into money at the best prices obtainable, and that all rights of the parties shall remain as against the proceeds of the sale of the said securities the same as they existed against the securities themselves at the time of making this stipulation."

It seems that no sale took place. The decree was for a delivery of the securities with all interest and dividends thereon received and in default thereof for $161,740.62 with interest from the date of the master's report. But as the securities have declined a good deal below their value at the time of conversion and again below their value at the date of the foregoing agreement, the trustee claims the right to take the sum named, with corrections. This was answered sufficiently by Judge Hand in the District Court. As he observed, the suit was in equity to recover the securities in specie. After the agreement the bank was authorized to hold them until it thought it wise to sell. If it had sold, there can be no doubt that the plaintiff's claim would have been limited to the proceeds, by the words of the contract. Its judgment not to sell, exercised for the benefit of both parties, cannot have been intended to put it in a worse position. Such an understanding would have deprived the plaintiff of the judgment of the bank.

Decree affirmed.

MECHANICS' AND METALS NATIONAL BANK OF THE CITY OF NEW YORK *v.* ERNST ET AL., AS TRUSTEES IN BANKRUPTCY OF HUMPHREY.

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

No. 446. Argued October 20, 1913.—Decided November 3, 1913.

National City Bank v. *Hotchkiss*, *ante*, p. 50, followed to effect that the delivery by the bankrupt of securities to a bank to secure a clearance loan constituted an illegal preference.

This court approves the findings of the court below that the bank knew of the impending bankruptcy when it demanded and accepted security for an existing loan.

An unusual proceeding in the banking business, such as an officer leaving the bank and going to the customer's office and demanding additional security for a loan made earlier the same day, indicates knowledge of the impending bankruptcy of such customer.

A general promise to give security on demand puts the creditor in no better position than an agreement to pay money and does not justify a delivery of securities after knowledge of impending bankruptcy. It is an illegal preference.

A deposit made after the bank's officers have forbidden payment of checks against the bankrupt's deposit account is a payment and a preference and a set-off cannot be allowed.

200 Fed. Rep. 295, affirmed.

THE facts, which involve the determination of the question of whether the delivery of securities by a broker immediately preceding his bankruptcy to a bank to secure its loan was an illegal preference, are stated in the opinion.

Mr. Lewis H. Freedman, with whom *Mr. Adrian H. Larkin* and *Mr. Leland B. Garretson* were on the brief, for appellant:

Under the agreement when the loan was made, as amplified and modified by the general custom, appellant acquired an equitable lien upon, or right in or to, the money constituting the "day" or "clearance" loan and in or to all securities or proceeds of whatever nature realized, cleared or obtained possession of by the bankrupt Fiske & Co. by the use of such loan in so far as such securities or proceeds were or could be identified as so realized, cleared or reduced to possession.

"A general custom is the common law itself, or a part of it." Written contracts, by implication, incorporate custom into them. *Underwood* v. *Greenwich Ins. Co.*, 161 N. Y. 413, 423; *Newhall* v. *Appleton*, 114 N. Y. 140; *Walls* v. *Bailey*, 49 N. Y. 464; *Botany Works* v. *Wendt*, 22 Misc. Rep. 156; *Hostetter* v. *Park*, 137 U. S. 30, 40; *Robinson* v. *United States*, 13 Wall. 363; *Hazard* v. *New England Ins. Co.*, 8 Pet. 557; *Hartshorne* v. *Union Ins. Co.*, 36 N. Y. 172.

There was an equitable lien, and equity regards as done that which ought to be done. Pom. Eq. Jur., 3d ed., § 1235; *Walker* v. *Brown*, 165 U. S. 654, 664; *Goodnough Co.* v. *Galloway*, 156 Fed. Rep. 504, 510; *Howard* v. *Delgado*, 121 Fed. Rep. 26, 30; *Chattanooga Bank* v. *Rome Iron Co.*, 102 Fed. Rep. 755, 758; *Ingersoll* v. *Coram*, 211 U. S. 335, 368; *Hovey* v. *Elliott*, 118 N. Y. 124; *Holroyd* v. *Marshall*, 10 H. L. C. 191.

One may by express agreement create a charge or claim in the nature of a lien on property of which he is the owner or possessor, and equity will establish and enforce such charge or claim not only against the party who stipulated to give it, but also against third persons, who are either volunteers, or who take the estate on which the lien is agreed to be given, with notice of the stipulations. *Ketchum* v. *St. Louis*, 101 U. S. 306; *Hauslet* v. *Harrison*, 105 U. S. 401; *Carr* v. *Hamilton*, 129 U. S. 252; *Fourth Street Bk.* v. *Yardley*, 165 U. S. 634; *Walker* v. *Brown*, 165 U. S. 654;

Ingersoll v. *Coram*, 211 U. S. 335; *Hurley* v. *Atchison &c. Ry. Co.*, 213 U. S. 126; *Sexton* v. *Kessler*, 225 U. S. 90; *Dressel* v. *Lumber Co.*, 119 Fed. Rep. 531; *First National Bank* v. *Penn. Trust Co.*, 124 Fed. Rep. 968; *Fisher* v. *Zollinger*, 149 Fed. Rep. 54; *Union Trust Co.* v. *Bulkeley*, 150 Fed. Rep. 510; *Mills* v. *Virginia-Carolina Co.*, 164 Fed. Rep. 168; *Re Farmers Supply Co.*, 170 Fed. Rep. 502; *Goodnough Co.* v. *Galloway*, 171 Fed. Rep. 940; *Re National Cash Register Co.*, 174 Fed. Rep. 579.

If such a contract is shown to exist payments made in pursuance thereof will not be invalidated as preferences by the operation of the Bankruptcy Act. *Humphrey* v. *Tatman*, 198 U. S. 91; *Thompson* v. *Fairbanks*, 196 U. S. 516; *Re Perlhefter*, 177 Fed. Rep. 299, 303.

The agreement creating the lien may be either verbal or in writing. *Riddle* v. *Hudgins*, 58 Fed. Rep. 490; *National Bank* v. *Rogers*, 166 N. Y. 380; *Hamilton Trust Co.* v. *Clemes*, 163 N. Y. 423; *Am. Sugar Co.* v. *Fancher*, 145 N. Y. 552; *Hovey* v. *Elliott*, 118 N. Y. 124; *Coats* v. *Donnell*, 94 N. Y. 168; *Spring* v. *Short*, 90 N. Y. 538; *Husted* v. *Ingraham*, 75 N. Y. 251; *Payne* v. *Wilton*, 74 N. Y. 348; *McCaffrey* v. *Woodin*, 65 N. Y. 459; *Parshall* v. *Eggert*, 54 N. Y. 18; *Rochester Bank* v. *Jones*, 4 N. Y. 497.

Sexton v. *Kessler*, 225 U. S. 90, governs this case.

Appellee was entitled to set off the fifty-four thousand dollar deposit.

The moment the checks composing that deposit were received by appellant and passed to the credit of the brokers the funds became appellant's property and the relation of debtor and creditor was created and the right of set-off established. *New York County Bank* v. *Massey*, 192 U. S. 138; *National Bank* v. *Burkhart*, 100 U. S. 686; *Cassidy* v. *Uhlman*, 170 N. Y. 505, 515; *Joyce* v. *Auten*, 179 U. S. 591; *Scott* v. *Armstrong*, 146 U. S. 499; *Straus* v. *T. N. Bank*, 122 N. Y. 379.

The case involves no question of actual fraud and

appellees failed to establish by a preponderance of evidence that appellant received a voidable preference.

The burden is on the trustee to prove by a preponderance of evidence every element necessary to constitute a preference. *Barbour* v. *Priest*, 103 U. S. 293; *Kimmerle* v. *Farr*, 189 Fed. Rep. 295; *In re Leech*, 171 Fed. Rep. 622. The insolvent's estate must have been diminished as a result of the transaction. *Coder* v. *Arts*, 213 U. S. 223; aff'g 152 Fed. Rep. 949; *Hardy* v. *Gray*, 144 Fed. Rep. 922; *Calhoun Bank* v. *Cain*, 152 Fed. Rep. 983; *Tumlin* v. *Bryan*, 165 Fed. Rep. 166; *In re Neill-Pinckney Co.*, 170 Fed. Rep. 481; *Sparks* v. *Marsh*, 177 Fed. Rep. 739; *Kimmerle* v. *Farr*, 189 Fed. Rep. 295; Remington on Bank., §§ 1276 *et seq.*; Collier on Bank. (9th ed.), 790–791.

The debtor must have been insolvent within the meaning of the statute, and insolvency in that sense has a different meaning from that ordinarily understood, namely, an inability to meet maturing obligations. *Pirie* v. *Chicago Title Co.*, 182 U. S. 438, 451; *McDonald* v. *Clear-Water Short Line*, 164 Fed. Rep. 1007; *Hardy* v. *Gray*, 144 Fed. Rep. 922; *Re Klein*, 197 Fed. Rep. 241; *Butler Paper Co.* v. *Goembel*, 143 Fed. Rep. 295; Remington, § 1343; Collier (9th ed.), 8.

The payment must have been in satisfaction of or on account of an antecedent debt. *Coder* v. *Arts*, 152 Fed. Rep. 943; *S. C.*, 213 U. S. 223.

Payment within four months of the filing of the petition must be established, and insolvency as defined by the statute must have existed at the time when the payment was made. *Tumlin* v. *Bryan*, 165 Fed. Rep. 166, 168; *Rutland County Bank* v. *Graves*, 156 Fed. Rep. 168; *Butler Paper Co.* v. *Goembel*, 143 Fed. Rep. 295; *In re Rome Planing Co.*, 96 Fed. Rep. 812; *Troy Wagon Works* v. *Vastbinder*, 130 Fed. Rep. 232, 234.

The inhibition of the statute applies only to preferences given when the debtor is insolvent in fact, and a lien per-

fected before such insolvency is not affected. *In re Wittenberg Veneer Co.*, 108 Fed. Rep. 593; aff'd *sub nom. McDonald* v. *Daskam*, 116 Fed. Rep. 276.

Where quotations vary enormously in a few moments, as in "panicky" times, the law will recognize the fraction of a day and the rule that the law takes no notice of the fraction of a day is inapplicable. *Upson* v. *Mount Morris Bank*, 103 N. Y. App. Div. 367.

The adjudication of bankruptcy did not relate back to the filing of the petition and is not evidence of insolvency prior to such filing. *Tumlin* v. *Bryan*, 165 Fed. Rep. 166; *In re Chappell*, 113 Fed. Rep. 545; *In re Alexander*, 102 Fed. Rep. 464; *In re Rome Planing Co.*, 96 Fed. Rep. 812.

The payment did not enable the bank to obtain a greater percentage of its claims than any other creditor of the same class.

There being no other creditor of this class there could be no violation of the statute. *Swarts* v. *Fourth National Bank*, 117 Fed. Rep. 1; *Crooks* v. *People's Bank*, 46 N. Y. App. Div. 335.

The debtor making such payment must have intended to give such a preference. *Alexander* v. *Redmond*, 180 Fed. Rep. 92; *Hardy* v. *Gray*, 144 Fed. Rep. 922; *Kimmerle* v. *Farr*, 189 Fed. Rep. 295; *In re Leech*, 171 Fed. Rep. 622; *Tumlin* v. *Bryan*, 165 Fed. Rep. 166; *Debus* v. *Yates*, 193 Fed. Rep. 427.

Silence as to one's financial condition cannot be construed as an admission of insolvency. *Wilson* v. *City Bank*, 17 Wall. 473; *Re Jackson Mfg. Co.*, Fed. Cas. No. 7153; *Sawyer* v. *Turpin*, 91 U. S. 114; *Clark* v. *Iselin*, 21 Wall. 360; *Watson* v. *Taylor*, 21 Wall. 378; *Cook* v. *Tullis*, 18 Wall. 322; Remington on Bank., § 1829.

The creditor receiving the payment must have knowledge or have had reasonable cause to believe he was receiving a preference. *Collett* v. *Bronx Nat'l Bk.*, 200 Fed. Rep. 111; *Re Klein*, 197 Fed. Rep. 241; *Re The Leader*,

190 Fed. Rep. 624; *Re Pfaffinger*, 154 Fed. Rep. 523; Collier on Bank. (9th ed.), 816.

Mere suspicion of insolvency is not sufficient to satisfy the statutory requirement. *Grant* v. *National Bank*, 97 U. S. 80; *Powell* v. *Gates City Bank*, 178 Fed. Rep. 609. See, also, *Stucky* v. *Masonic S. Bank*, 108 U. S. 74; *Barbour* v. *Priest*, 103 U. S. 293; *Sparks* v. *Marsh*, 177 Fed. Rep. 739; *First National Bank* v. *Abbott*, 165 Fed. Rep. 852; *In re Pfaffinger*, 154 Fed. Rep. 523; *Off* v. *Hakes*, 142 Fed. Rep. 364; *In re Eggert*, 102 Fed. Rep. 735.

The insolvent's estate was not diminished as a result of the transaction. *N. Y. County Bank* v. *Massey*, 192 U. S. 138, 147; *Continental Trust Co.* v. *Chicago Title Co.*, 229 U. S. 435; *Newport Bank* v. *Herkimer Bank*, 225 U. S. 178; *Wild* v. *Provident Trust Co.*, 214 U. S. 292; *Jaquith* v. *Alden*, 189 U. S. 78; *In re Sagor*, 121 Fed. Rep. 658; *Gans* v. *Ellison*, 114 Fed. Rep. 734; *Dressel* v. *North State Lumber Co.*, 107 Fed. Rep. 225; Remington on Bank., § 1296; Collier on Bank. (9th ed.), 802.

Appellees as trustees in bankruptcy acquired no greater rights than had the bankrupts. *Zartman* v. *First Nat'l Bank*, 216 U. S. 134, 138; *Hurley* v. *Atchison &c. Ry. Co.*, 213 U. S. 126; *Thomas* v. *Taggart*, 209 U. S. 385; *Richardson* v. *Shaw*, 209 U. S. 365; *Security Warehousing Co.* v. *Hand*, 206 U. S. 415; *York Mfg. Co.* v. *Cassell*, 201 U. S. 344; *Thompson* v. *Fairbanks*, 196 U. S. 516.

Mr. Daniel P. Hays, with whom *Mr. Edwin D. Hays* was on the brief, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of Appeals reached upon the same opinion that disposed of *The National City Bank* v. *Hotchkiss*, just decided, *ante*, p. 50. (The judgment of the District Court will be found

in 200 Fed. Rep. 295.) This case arose at the same time and differs but little from that in its facts, as to which, as in the other case, the master, the District Court and the Circuit Court of Appeals all agree.

The advance in this case was made at about ten on the following note to the firm signing it "Please loan us today $400000. Crediting this amount to our account and oblige. J. M. Fiske & Company." This sum was credited on the firm's deposit account, on which there was already $36,239.47. Before noon the bank certified and afterwards paid checks for $276,679.67. Between 11 and 12 the cashier, hearing that there was trouble in the stock market and with J. M. Fiske & Co., ordered that no more checks should be paid or certified. He then went to the brokers' office; saw Mr. Sherwood, a member of the firm, at about twelve and after getting an evasive answer to an inquiry as to the rumor, said that the firm had made no deposits on that day, and was told that one was on its way. ($54,048.08 were in fact paid in after the cashier's order to stop payment.) He then told Mr. Sherwood that he had better give him some securities, that he ought to give additional securities on the bank's loans, and after consultation Mr. Sherwood did so and the cashier returned to the bank. We may assume for purposes of decision that the securities with a small exception were obtained by the use of the clearance loan.

At forty minutes after twelve the brokers gave notice to the stock exchange that they were unable to meet their obligations and an involuntary petition in bankruptcy was filed against them at twenty-five minutes past three. This suit is for the proceeds of the securities, (which were sold by the bank), and for the sum deposited as we have stated. In view of our decision in the other case only one or two matters need mention. It is somewhat more pressed that the bank had not reasonable ground to believe that the brokers' property at a fair valuation would be in-

sufficient to pay their debts, and therefore had not ground to believe that the brokers were insolvent within the meaning of the Bankruptcy Act of July 1, 1898, c. 541, § 1 (15), 30 Stat. 544. We think it too plain to need argument that the findings below that the firm was insolvent, knew that it was insolvent and intended a preference, were correct. These brokers were ruined by the collapse of the pool mentioned in the other case, and apart from any knowledge that the bank may have had as to their interest in the stock concerned, the entirely unusual course of the cashier in leaving his bank to get additional security (not merely proceeds of the clearance loan upon a claim of lien) and the circumstances are sufficient to prevent our going behind the findings below. Really no other conclusion could have been reached.

On the question of lien the evidence does not differ enough from that in the other case to need further discussion. The bankrupts were under an agreement with the bank, of the usual sort, giving the bank a general lien on all securities in its hands for all liabilities of the firm and a right to require additional approved securities to be lodged with it, &c. But a general promise to give security on demand puts the creditor in no better position than an agreement to pay money. *Sexton* v. *Kessler*, 225 U. S. 90, 98.

The so-called deposit of $54,048.08 was paid in after the cashier had forbidden the payment of checks against the deposit account and therefore rightly was held to be a payment and a preference. A set-off properly was denied.

Decree affirmed.

BALTIC MINING COMPANY *v.* COMMONWEALTH OF MASSACHUSETTS.

S. S. WHITE DENTAL MANUFACTURING COMPANY *v.* COMMONWEALTH OF MASSACHUSETTS.

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

Nos. 30, 353. Argued April 29, 30, 1913.—Decided November 3, 1913.

While a State may not burden interstate commerce or tax the carrying on of such commerce, the mere fact that a corporation is engaged in interstate commerce does not exempt its property from state taxation.

While interstate commerce itself cannot be taxed, the receipts of property or capital employed therein may be taken as a measure of a lawful state tax.

A State may, so long as it does not violate any principle of the Federal Constitution, exclude from its border a foreign corporation or prescribe the conditions upon which it may do business therein.

Where a foreign corporation carries on a purely local business separate from its interstate business, the State may impose an excise tax upon it for the privilege of carrying on such business and measure the same by the authorized capital of the corporation.

The excise tax, imposed by Part III of c. 490 of the Statutes of Massachusetts of 1909, on certain classes of foreign corporations, which excise is measured by the authorized capital of such corporations but limited to a specified sum, is not an unconstitutional burden on interstate commerce, nor does it deprive such corporations of their property without due process of law or deny them the equal protection of the law. *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Southern Railway Co.* v. *Green*, 216 U. S. 400, distinguished.

207 Massachusetts, 381; 212 Massachusetts, 35, affirmed.

THE facts, which involve the validity under the commerce, due process and equal protection clauses of the Federal Constitution of an act of the Commonwealth of

Massachusetts imposing a tax on foreign corporations within the Commonwealth, are stated in the opinion.

Mr. William P. Everts and *Mr. Charles A. Snow* for plaintiffs in error:

The Massachusetts statute is void because repugnant to the "commerce" and "due process" clauses of the Federal Constitution.

A State cannot lawfully impose an excise measured by the entire capital stock of a foreign corporation engaged in interstate commerce as a condition of its right to transact domestic business.

Such a measure, in its necessary effect and operation, directly and substantially burdens interstate commerce and is, therefore, a regulation of interstate commerce. And this is so even though professedly exacted for the privilege of transacting domestic commerce.

It is also unconstitutional, because it conflicts with the "due process" clause. *Western Union* and *Pullman Cases*, 216 U. S. 1, 56; *Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 146; *West. Un. Tel. Co.* v. *Andrews*, 216 U. S. 165; *Southern Railway Co.* v. *Greene*, 216 U. S. 400; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 163; *Atchison &c. R. R. Co.* v. *O'Connor*, 223 U. S. 280.

This Massachusetts excise differs in no material respect from the Kansas excise.

There is no suggestion in the *Western Union* or *Pullman Cases* or later cases limiting their scope to palace car, telegraph, or other *quasi*-public corporations.

The necessary effect of an excise based on the entire capital of an interstate commerce corporation is to burden directly and substantially the interstate portion of its business, even though professedly imposed for the privilege of transacting domestic business and also to tax its property located beyond the borders of the taxing State.

The mere fact that a company is not a *quasi*-public

corporation cannot alter the necessary effect and operation of such an excise.

In the Massachusetts, as well as in the Kansas, case the excise was exacted as a condition of granting local privileges. No reason can be suggested why such an effect and result should be limited to *quasi*-public corporations, when the same excise is involved.

The insertion of a maximum limit does not help the tax, especially where, as here, the maximum limit has no application to the companies before the court. *Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 146; *West. Un. Tel. Co.* v. *Andrews*, 216 U. S. 165; *Atchison &c. Ry. Co.* v. *O'Connor*, 223 U. S. 280; *Mulford Co.* v. *Curry*, 44 California, 80.

Any occupation or privilege tax, license fee, or other excise, which directly and substantially burdens interstate commerce, is unconstitutional.

Where a tax necessarily affects and burdens interstate commerce, its effect cannot be altered by the mere fact that the corporation is not a *quasi*-public corporation.

The cases holding that a State may, at its pleasure, totally exclude foreign corporations from its limits or admit them to the privilege of transacting domestic business upon such terms and conditions as it deems best, such as *Osborne* v. *Florida*, 164 U. S. 160; *Pullman Co.* v. *Adams*, 189 U. S. 420; *Allen* v. *Pullman Co.*, 191 U. S. 171; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305; *Pembina Co.* v. *Pennsylvania*, 125 U. S. 181, did not involve interstate commerce in any way.

They have no application to a case where the necessary effect of a particular excise is to burden interstate commerce directly and substantially.

A statute is unconstitutional which requires a foreign corporation to waive right to litigate in Federal courts as a condition of right to transact domestic business.

If an excise, by its necessary effect, directly and sub-

stantially burdens interstate commerce, it is unconstitutional, though professedly exacted for a local privilege.

In considering effect and purpose of a tax, this court looks through forms and attempts to reach the substance.

The theory of the Massachusetts court that the principles of the *Pullman* and *Western Union Cases* have no application where the company is free to renounce or abandon its domestic business, and only apply where the interstate and domestic business are inextricably interwoven, has no support in reason or upon the authorities.

Pullman Co. v. *Adams,* 189 U. S. 420, did not involve interstate commerce.

The measure of the excise and its necessary effect and operation in burdening interstate commerce are the material factors. An excise measured by the entire capital is based upon an erroneous measure, because it necessarily burdens in a direct and substantial manner the interstate portion of company's business. *Allen* v. *Pullman Co.,* 191 U. S. 171; *Kehrer* v. *Stewart,* 197 U. S. 60; *Osborne* v. *Florida,* 164 U. S. 650. *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305, distinguished.

See *Norfolk & Western R. R. Co.* v. *Pennsylvania,* 136 U. S. 114.

Sales of goods or contracts for their sale made in one State, for delivery in another State, or requiring transportation through more than one State, constitute transactions of interstate commerce, notwithstanding the fact that the transportation is conducted, not by the seller, but by common carriers.

A tax upon the seller of goods is a tax upon the goods themselves. *Kehrer* v. *Stewart,* 197 U. S. 60.

Sales or contracts of sale made or negotiated in one State for delivery in another, or requiring transportation to the purchaser in another State, are transactions of interstate commerce.

The sale and barter of goods for delivery in other

States was the original conception of interstate commerce and the transportation of goods and passengers was a later development.

The negotiation of sales of goods for the purpose of introducing into another State is interstate commerce.

Transportation by common carrier is not the test of interstate commerce which may exist without intervention of any form of transportation.

The protection of the "commerce" clause is not limited to *quasi*-public corporations.

The negotiation of sales by ordinary trading corporations engaged in interstate commerce comes within the protection of the "commerce" clause, as against state statutes imposing excises, whether in the form of occupation or privilege taxes, or of license fees. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Corson* v. *Maryland*, 120 U. S. 502; *Welton* v. *State of Missouri*, 91 U. S. 275; *Brown* v. *Maryland*, 12 Wheat. 419; *Asher* v. *Texas*, 128 U. S. 129; *Walling* v. *Michigan*, 116 U. S. 446; *Brennan* v. *Titusville*, 153 U. S. 289; *Stockard* v. *Morgan*, 185 U. S. 27.

A State cannot tax people representing the owners of property outside of the State for the privilege of soliciting orders within it as agents of such owners for property to be shipped to persons within the State; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Dozier* v. *Alabama*, 218 U. S. 124; or for maintaining an office; *McCall* v. *California*, 136 U. S. 104; *Norfolk & Western R. Co.* v. *Pennsylvania*, 136 U. S. 114; *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727; *Parsons-Willis Lumber Co.* v. *Stuart*, 182 Fed. Rep. 779.

The Massachusetts excise is unconstitutional and void, because it is also repugnant to the equal protection of the laws clause.

A State cannot subject a foreign corporation, which is already in the State in compliance with its laws and has

there acquired property of a fixed and permanent nature, to a new or additional excise, for the privilege of doing local business, which is not at the same time imposed upon domestic corporations. *Southern Railway Co.* v. *Greene*, 216 U. S. 400.

The fact that this excise has a maximum limit cannot help its constitutionality, especially where the maximum is not applicable to the corporation before the court.

Mr. James M. Swift and *Mr. Andrew Marshall* for defendant in error:

The exactions in question are excises and not property taxes; the history of the taxes shows them to be excise taxes.

In Massachusetts property taxes and excise taxes are perfectly distinct and always have been. *Portland Bank* v. *Apthorp*, 1815, 12 Massachusetts, 252.

Any property tax, to be valid under the Constitution, must be proportional, and any such tax assessed upon certain property at a rate different from that on other property is disproportional. *Oliver* v. *Washington Mills*, 11 Allen, 268, 275; *Cheshire* v. *County Commissioners*, 118 Massachusetts, 386, 389; *Northampton* v. *County Commissioners*, 145 Massachusetts, 108, 109; *Opinion of the Justices*, 195 Massachusetts, 607; *Opinion of the Justices*, 208 Massachusetts, 616; *S. S. White Co.* v. *Commonwealth*, 212 Massachusetts, 35, 38.

It has never been held that excises need be more than reasonable.

The policy of imposing excises upon corporations has been applied gradually but consistently by the legislature to an increasing number of kinds of corporations. *West. Un. Tel. Co.* v. *Massachusetts*, 125 U. S. 536; *Massachusetts* v. *West. Un. Tel. Co.*, 141 U. S. 40; *Oliver* v. *Liverpool & London Ins. Co.*, 100 Massachusetts, 531; *Connecticut Life Ins. Co.* v. *Commonwealth*, 133 Massachusetts, 161; *At-*

torney General v. *Bay State Mining Co.*, 99 Massachusetts, 148.

The statute itself describes the tax as an excise tax. The declared purpose of the act is to be accepted as true, unless incompatible with its meaning and effect. *Hazen* v. *Essex Co.*, 12 Cush. 475, 477; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 145.

The taxes have been defined by the Supreme Court of Massachusetts, in this case as well as in other cases, as excise taxes and not taxes on property. *Pratt* v. *Street Commissioners*, 139 Massachusetts, 559; *Commonwealth* v. *Barnstable Savings Bank*, 126 Massachusetts, 526; *In re Suffolk Bank*, 151 Massachusetts, 103, 106; *Attorney-General* v. *Massachusetts Pipe Line Co.*, 179 Massachusetts, 15, 19; *Greenfield Bank* v. *Commonwealth*, 211 Massachusetts, 207; *Farr Alpaca Co.* v. *Commonwealth*, 212 Massachusetts, 156, 162.

The construction and interpretation given by the Massachusetts court to the provision of law under which the taxes in question were imposed are conclusive upon this court, if in actual operation and effect the statute is consistent with that construction and interpretation. *Brown-Forman Co.* v. *Kentucky*, 217 U. S. 563, 572; *Stockard* v. *Morgan*, 185 U. S. 27, 30; *Osborne* v. *Florida*, 164 U. S. 650; *Hamilton Co.* v. *Massachusetts*, 6 Wall. 632.

The required payment is strictly of an excise tax, and not of a tax upon property. The fact that it is estimated upon the par value of the capital stock, with a maximum limit of $2,000 as the highest tax that can be imposed upon the largest corporation, does not make it a tax upon property. *Attorney-General* v. *Bay State Mining Co.*, 99 Massachusetts, 148; *Commonwealth* v. *Lancaster Savings Bank*, 123 Massachusetts, 493; *Pratt* v. *Street Commissioners*, 139 Massachusetts, 559, 562; *Provident Institution* v. *Massachusetts*, 6 Wall. 632; *Hamilton Co.* v. *Massachu-*

setts, 6 Wall. 632; *Society for Savings* v. *Coite*, 6 Wall. 594, 608; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107.

Since the tax is in its nature an excise tax, authorized by the state constitution, the legislature has wide discretion as to the method to be prescribed for computing the amount of the tax. *Delaware Railroad Tax*, 18 Wall. 206, 231; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305; *Provident Institution* v. *Massachusetts*, 6 Wall. 627.

A license tax may be exacted as a condition of the corporation keeping an office within the State for the use of its officers. *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181. See also *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107.

The Massachusetts statute as applied to the plaintiffs in error does not conflict with the commerce clause of the Constitution of the United States.

A State may tax a foreign corporation for the privilege of a domicile for local business if the effect is not to regulate interstate commerce.

A State has power to exclude or condition the entrance of foreign corporations within its limits. *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Security Mut. Life Ins. Co.* v. *Prewitt*, 202 U. S. 246; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, and cases cited; *Osborne* v. *Florida*, 164 U. S. 650, 655; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305; *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181; *Cooper Manfg. Co.* v. *Ferguson*, 113 U. S. 727; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 343.

The argument of the defendant in error gives full effect to the limitation which forbids imposing upon corporations engaged in interstate commerce conditions so directly affecting the interstate commerce as to amount to a restriction of that commerce or to a regulation of it, within the meaning of the Constitution of the United States. *Commonwealth* v. *Petranich*, 183 Massachusetts,

217, 219; *Attorney-General* v. *Electric Battery Co.*, 188 Massachusetts, 239; *Pickard* v. *Pullman Car Co.*, 117 U. S. 34; *Cooper Manfg. Co.* v. *Ferguson*, 113 U. S. 727; *Leloup* v. *Mobile*, 127 U. S. 640; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Post. Tel. Cable Co.* v. *Charleston*, 153 U. S. 692; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56; *International Text Book Co.* v. *Pigg*, 217 U. S. 91; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305; *Baltic Mining Co.* v. *Commonwealth*, 207 Massachusetts, 381; *S. S. White Dental Co.* v. *Commonwealth*, 212 Massachusetts, 35.

If the tax denominated as an excise is not in reality a tax upon interstate commerce or a tax upon property, the mode of its measure, however arbitrary and capricious, is wholly immaterial in this court. *Delaware Railroad Tax*, 18 Wall. 206, 231.

Whether the excise regulates interstate commerce is a practical question to be determined by analyzing its effect in operation. *Galveston &c. Ry. Co.* v. *Texas*, 210 U. S. 217, 227; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, *Id.* 56; *Ludwig* v. *West. Un. Tel. Co.*, *Id.* 146; *West. Un. Tel. Co.* v. *Andrews*, *Id.* 165; *Atchison, Topeka &c. Ry.* v. *O'Connor*, 223 U. S. 280.

The exaction in question, considered with reference to the whole taxation system of Massachusetts and as construed by the courts and as applied to the facts in these cases, does not as a practical matter regulate interstate commerce in which either plaintiff in error is engaged.

The Baltic Company is not directly engaged in interstate commerce in Massachusetts, and its place of business therein is not maintained or used for the purposes of interstate commerce.

The White Company was engaged both in interstate and intrastate business in Massachusetts and maintained its place of business therein for the purposes of both inter-

state and intrastate business. *Osborne* v. *Florida*, 164 U. S. 650.

The only thing conditioned in either of the cases at bar was the privilege of maintaining an office in Massachusetts for the purposes of purely local or intrastate business.

It is for the Commonwealth to say whether it will grant or withhold from the plaintiffs in error the privilege of maintaining those places of business in the Commonwealth, and to fix the conditions upon which it would grant that privilege. *Gibbons* v. *Ogden*, 9 Wheat. 1, 7.

A tax by a State for such a privilege under similar circumstances does not amount to a regulation of interstate commerce. *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181; *McCall* v. *California*, 136 U. S. 104; *Kehrer* v. *Stewart*, 197 U. S. 60; *Pennsylvania R. R.* v. *Knight*, 192 U. S. 21; *Cooper* v. *Ferguson*, 113 U. S. 727, 736. See, also, *Reymann Brewing Co.* v. *Brister*, 179 U. S. 445; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305; *Pullman Co.* v. *Adams*, 189 U. S. 420; *Allen* v. *Pullman Co.*, 191 U. S. 171; *Osborne* v. *Florida*, 164 U. S. 650; *The Daniel Ball*, 10 Wall. 565; *Coe* v. *Errol*, 116 U. S. 517; *Detroit &c. Ry. Co.* v. *Int. Comm. Comm.*, 167 U. S. 633; *Rhodes* v. *Iowa*, 170 U. S. 412; *Kelley* v. *Rhoades*, 188 U. S. 1; *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82.

A tax is not a regulation of interstate commerce merely because it is assessed upon and paid by a corporation which is engaged in interstate commerce. *Postal Tel. Co.* v. *Adams*, 155 U. S. 688.

It is not everything that affects commerce that amounts to a regulation of it within the meaning of the Constitution. *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Delaware Railroad Tax*, 18 Wall. 206.

The excise stands the test of the principles declared in *Western Un. Tel. Co.* v. *Kansas* and *Pullman Co.* v. *Kansas*, and is constitutional under the commerce clause. *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107.

The decisions of the Massachusetts court do not deny to ordinary business corporations engaged to some extent in interstate commerce the protection of the commerce clause of the Constitution. *Attorney General* v. *Electric Storage Battery Co.*, 188 Massachusetts, 239. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, and the other drummer and canvasser cases distinguished.

The exaction, if true to its history, its nature, its name and its purpose as an excise, did not tax property outside the Commonwealth of Massachusetts or in any manner without due process of law.

An excise under the constitution of Massachusetts is no different in this respect from an excise under the Constitution of the United States containing a similar provision. *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 152.

The right to select the measure and objects of taxation devolves upon the legislature and not upon the courts. *McCray* v. *United States*, 195 U. S. 27, 58.

The statute does not deny the plaintiffs in error the equal protection of the laws. It applies alike to all corporations in the same situation. *Southern Railway Co.* v. *Greene*, 216 U. S. 400, distinguished.

The classification is reasonable. *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232; *Brown-Forman Co.* v. *Kentucky*, 217 U. S. 563, 572; *Adams Express Co.* v. *Ohio*, 165 U. S. 194, 228.

The statute does not discriminate against the plaintiffs in error.

Mr. Justice Day delivered the opinion of the court.

These cases present the question of the constitutional validity of an act of the Commonwealth of Massachusetts (St. 1909, c. 490, Part III, § 54 *et seq.*), undertaking to impose a tax on foreign corporations within the Commonwealth. While the cases are not in all respects parallel

they were argued together and present the same questions, and we shall accordingly dispose of them as one.

The cases were heard upon agreed statements of fact, which show:

The Baltic Mining Company, a Michigan corporation, organized for the purpose of mining, producing and selling copper, with a total authorized capital stock of $2,500,000, consisting of 100,000 shares of the par value of $25 each, all of which have been issued and are outstanding, $18 having been paid on each share, owns a copper mine with equipment in Michigan and has its principal place of business in that State. It has an office in the City of Boston, for the use of its president and treasurer, residing in Boston, for the general financial management and direction of its affairs and for the meetings of its board of directors and the transfer of its stock. The Copper Range Consolidated Company, a New Jersey corporation, owns and holds 99,659 shares of its stock, and also has an office and place of business in Boston. The Baltic Mining Company was admitted to do business in Massachusetts and complied with the foreign corporation laws of that State. Its total property and assets amount to $10,776,000, but none of the property is in Massachusetts except current bank deposits and a certificate for $80,000 of stock in another Michigan corporation. It is engaged in the mining and refining of copper in Michigan, which is sold for delivery in the several States of the United States and in foreign countries. The United Metals Selling Company, a New Jersey corporation, with its principal office in New York City and with no office in Massachusetts, has the exclusive agency for marketing the Baltic Mining Company's copper, it making no sales directly itself. Considerable quantities of the copper are sold for delivery in Massachusetts, as well as in other States, and transported from the Michigan smelter to the purchaser. In exceptional instances sales are made in Massachusetts

for delivery there, but this is out of the usual course of business, not more than five per cent. of the total sales being made, the larger part being regularly consummated in New York City. The petition was brought to recover an excise tax of $500 imposed by the Commonwealth, pursuant to § 56 of the act, and paid by the Company, and was dismissed by the Supreme Judicial Court of Massachusetts. 207 Massachusetts, 381.

The S. S. White Dental Manufacturing Company is a Pennsylvania corporation, engaged in manufacturing and buying and selling artificial teeth and dental supplies, with an authorized capital stock of $1,000,000 and with its principal office in Philadelphia. Its assets aggregate $5,711,718.29. It has a usual place of business in Boston, consisting of large salesrooms, stockrooms, offices and storerooms, occupied under lease, where it keeps a supply of goods displayed for sale and in stock. Books are kept here, a New England sales agent is in charge, and fifty-four persons are employed, twelve being salesmen who travel through the New England States, except Connecticut, and the maritime provinces; but no manufacturing is done in Massachusetts. It sells goods over the counter from its Boston store and also for delivery in Massachusetts by messenger, mail and express, fifty per cent. of the sales made at that store being to persons residing in Massachusetts and fifty per cent. for delivery to persons residing outside of the State. Goods sold from the Boston stock for delivery other than over the counter or by mail or messenger are billed from the Boston salesrooms directly to the purchaser as consignee from the Company as consignor. Orders are also accepted at the Boston salesrooms for delivery from the New York and Pennsylvania factories, such orders being sent to the principal office in Pennsylvania and filled either in New York or in Pennsylvania and the goods being billed directly to the purchaser. Except in intrastate deliveries by messenger,

the Company uses public carriers in the transportation of the goods, and a large percentage of the total sales require transportation from the New York or Pennsylvania factories into other States. The stock on hand in the Boston store, the fixtures and the current bank deposits represent the tangible property in Massachusetts and amount to about $100,000. The company maintains fourteen places of business other than the ones in Pennsylvania and Massachusetts, located in New York and other States. Ten per cent. of the sales are made in Massachusetts, of which approximately one-half are for delivery in that State. The Company complied with the requirement of the laws relating to foreign corporations for ten years, and seeks to recover an excise tax of $200 levied pursuant to the statute and paid by it. The Supreme Judicial Court of Massachusetts held that the act was valid and dismissed the petition. 212 Massachusetts, 35.

The act provides (§ 54) for the filing of a certificate annually by foreign corporations, showing their authorized capital stock and assets and liabilities, and (§ 55) that such certificate shall be accompanied by an auditor's sworn statement and shall be submitted to the commissioner of corporations, who shall assess an excise tax upon the corporation, in accordance with the provisions of § 56 of the act, and that the certificate shall not be filed until approved by him and the tax paid.

Section 56 reads:

"Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the commonwealth, an excise tax to be assessed by the tax commissioner of one-fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars."

It is further provided (§ 58) for notice to foreign corporations failing to file their proper certificates, and thereafter for the forfeiture and collection of penalties and for the issuance of injunctions until the payment of such penalties and the filing of such certificates.

The specific objections of the plaintiffs in error to the imposition of this tax under the facts shown in the records are threefold: First, the tax is a regulation of interstate commerce, in that it imposes a direct burden upon that portion of the business and capital of the plaintiffs in error which is devoted to interstate commerce; second, the tax is in violation of the due process of law clause, because it attempts to impose taxes upon property beyond the jurisdiction of the Commonwealth of Massachusetts; and third, the tax denies to the plaintiffs in error the equal protection of the law.

It is well settled and requires no review of the decisions of this court to that effect that the power of Congress over interstate commerce is supreme under the Federal Constitution and that the States may not burden such commerce, it being the purpose of the Constitution of the United States to bring commerce of this character under one supreme control and to vest the exercise of authority over it in the general government. It is equally well settled that forms of regulation prohibited to the State by the Constitution may consist of efforts to tax the carrying on of such commerce and of attempted levies of taxes upon the receipts of interstate commerce as such. *Galveston, Harrisburg &c. Ry. Co.* v. *Texas*, 210 U. S. 217; *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56; *Minnesota Rate Cases*, 230 U. S. 352, 400, and previous cases in this court therein cited.

While this is true, other equally well established principles must be borne in mind in considering the validity of a state tax attacked upon grounds of unconstitutionality. The mere fact that a corporation is engaged in

interstate commerce does not exempt its property from state taxation. *United States Express Co.* v. *Minnesota*, 223 U. S. 335, 344. It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive Federal authority over it. A resort to the receipts of property or capital employed in part at least in interstate commerce, when such receipts or capital are not taxed as such but are taken as a mere measure of a tax of lawful authority within the State, has been sustained. *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217; *Provident Institution* v. *Massachusetts*, 6 Wall. 611; *Hamilton Co.* v. *Massachusetts*, 6 Wall. 632; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 162–5; *United States Express Co.* v. *Minnesota*, *supra*.

The right of a State to exclude a foreign corporation from its borders, so long as no principle of the Federal Constitution is violated in such exclusion, has been repeatedly recognized in the decisions of this court, and the right to prescribe conditions upon which a corporation of that character may continue to do business in the State, unless some contract right in favor of the corporation prevents or some constitutional right is denied in the exclusion of such corporation, is but the correlative of the power to exclude. *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 343; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202; *Barron* v. *Burnside*, 121 U. S. 186; *Insurance Co.* v. *Morse*, 20 Wall. 445; *Herndon* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 135. For example, a State may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without due process of law, or you may transact business in interstate commerce subject to the regulatory power of the State. To allow a State to exercise such authority would permit it to deprive of fundamental rights those entitled to the protection of the Constitution in every part of the Union. Having these general prin-

ciples in mind, we will proceed to a consideration of the statute of Massachusetts directly involved in these cases.

The Supreme Judicial Court of Massachusetts in considering the character of the tax assessed under the statute of 1909 said (207 Massachusetts, 388):

"The required payment is strictly of an excise tax, and not of a tax upon property. . . . This excise tax is for the commodity or privilege of having an establishment for business in Massachusetts, with the protection of our laws and the financial and other advantages of a situation here."

We have no fault to find with the conclusion that this is an excise tax. See also *Provident Institution* v. *Massachusetts, supra; Hamilton Co.* v. *Massachusetts, supra,* in which this court had occasion to consider the taxing system of Massachusetts. That the State may impose a tax upon a corporation, foreign or domestic, for the privilege of doing business within its borders is undoubted, and such has long been the legislative policy of the Commonwealth of Massachusetts, as appears from the history of legislation set forth in the opinions in the cases last cited. Construing the act in question, the Supreme Judicial Court of Massachusetts has held that it does not apply to corporations engaged in railroad, telegraph, telephone, etc., business which are taxed on another plan under the provisions of the statute. It is held not to apply to corporations whose business is interstate commerce or who carry on interstate and intrastate business in such close connection that the intrastate business cannot be abandoned without serious impairment of the interstate business of the corporation. And the statute, it is held, does not apply to corporations which have places of business for the transaction solely of interstate commerce. *Attorney General* v. *Electric Storage Battery Co.*, 188 Massachusetts, 239. The tax is levied upon the privilege of carrying on business within

the State and not upon property therein which is otherwise taxed.

It is said, notwithstanding, that this tax is a direct burden upon interstate commerce and an attempt to tax property beyond the jurisdiction of the State within the authority of the Kansas cases, *Western Union Telegraph Co.* v. *Kansas, supra; Pullman Co.* v. *Kansas, supra.* These cases have been followed by others similar in character. *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146; *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165; *Atchison, Topeka & Santa Fé Ry. Co.* v. *O'Connor*, 223 U. S. 280; *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S. 298.

In *Western Union Telegraph Co.* v. *Kansas*, and *Pullman Co.* v. *Kansas*, the statute under which the State of Kansas undertook to levy a charter fee of one-tenth of one per cent. of their authorized capital upon the first $100,000 of the capital stock of foreign corporations and one-twentieth of one per cent. upon the next $400,000, and for each million or major part thereof, $200, making a tax of $20,100 against the Western Union Telegraph Company and $14,800 against the Pullman Company, was declared to be unconstitutional, as having the effect not simply to exert the lawful power of taxing a foreign corporation for the privilege of doing local business, but to burden interstate commerce and to reach property represented by the capital stock of the companies, which was duly paid in and invested in property in many States and therefore beyond the taxing jurisdiction of Kansas. Every case involving the validity of a tax must be decided upon its own facts, and having no disposition to limit the authority of those cases the facts upon which they were decided must not be lost sight of in deciding other and alleged similar cases. In the Kansas cases the business of both complaining companies was commerce, the same instrumentalities and the same agencies carrying on in the same places the business of the companies of state and inter-

state character. In the *Western Union Telegraph Company Case*, the company had a large amount of property permanently located within the State and between 800 and 900 offices constantly carrying on both state and interstate business. The Pullman Company had been running a large number of cars within the State, in state and interstate business, for many years. There was no attempt to separate the intrastate business from the interstate business by the limitations of state lines in its prosecution.

An examination of the previous decisions in this court shows that they have been decided upon the application to the facts of each case of the principles which we have undertaken to state, and a tax has only been invalidated where its necessary effect was to burden interstate commerce or to tax property beyond the jurisdiction of the State. In the cases at bar the business for which the companies are chartered is not of itself commerce. True it is that their products are sold and shipped in interstate commerce, and to that extent they are engaged in the business of carrying on interstate commerce and are entitled to the protection of the Federal Constitution against laws burdening commerce of that character. Interstate commerce of all kinds is within the protection of the Constitution of the United States, and it is not within the authority of a State to tax it by burdensome laws. From the statement of facts it is apparent, however, that each of the corporations in question is carrying on a purely local and domestic business quite separate from its interstate transactions. That local and domestic business, for the privilege of doing which the State has imposed a tax, is real and substantial and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business of the companies involved. In these cases the ultimate contention is not that the receipts from interstate commerce are taxed as such, but that the property of the corporations, including

that used in such commerce, represented by the authorized capital of the corporations, is taxed and therefore interstate commerce is unlawfully burdened by a state statute. While the tax is imposed by taking a percentage of the authorized capital, the agreed facts show that the authorized capital is only a part of the capital of the corporations, respectively. In the *Baltic Mining Company Case*, the authorized capital is $2,500,000, while the entire property and assets are $10,776,000; and in the *White Dental Company Case* the authorized capital is $1,000,000, while the assets aggregate $5,711,718.29. Further, the Massachusetts statute limits the tax to a maximum of $2,000. The conclusion, therefore, that the authorized capital is only used as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the State. So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the State's jurisdiction, for the property itself is not taxed. In so far as it is represented in the authorized capital stock it is used only as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable.

It is further contended that the imposition of the tax denies the equal protection of the laws, and this upon the authority of *Southern Railway Co.* v. *Greene*, 216 U. S. 400. In that case the railway company had gone into the State of Alabama and, under authority of the State, acquired a large amount of railroad property upon which it paid taxes as well as a license tax imposed by the State. After the payment of all such taxes and in this condition of affairs, the State undertook to levy upon the railroad company a privilege tax because it was a foreign corporation, not imposing the same tax upon domestic corporations doing precisely the same business. This court held that the railroad company was a person within the meaning

of the Constitution and entitled to the equal protection of the laws and that by the taxation of its railroad property under such circumstances it was denied the equal protection of the law, no like tax being levied upon domestic corporations. It was said in that case (p. 416):

"We have here a foreign corporation within a State, in compliance with the laws of the State, which has lawfully acquired a large amount of permanent and valuable property therein, and which is taxed by a discriminating method not employed as to domestic corporations of the same kind, carrying on a precisely similar business."

The conditions existing in the *Southern Railway Co.* v. *Greene Case* are not presented here. It is true that the plaintiffs in error paid taxes assessed against foreign corporations before the passage of the law of 1909 and that the White Dental Company had a leasehold for storerooms in the State, but we do not find in this situation an acquisition of permanent property, such as was shown in the *Greene Case*. And there is no question of the continued authority of the State to tax a foreign corporation for the privilege of doing business within its borders, which authority the State possesses so long as it does not violate rights secured by the Federal Constitution. Even if, as plaintiffs in error contend, under the statute, domestic corporations are favored, the statute is not invalid, for no limitation upon the power of a State to exclude foreign corporations requires identical taxes in all cases upon domestic and foreign corporations.

As this statute has been construed by the Supreme Judicial Court of Massachusetts, and applied in these cases, we are unable to find that the tax imposed violates the constitutional rights of the plaintiffs in error.

Judgments affirmed.

Dissenting: THE CHIEF JUSTICE, MR. JUSTICE VAN DEVANTER and MR. JUSTICE PITNEY.

COMMONWEALTH OF VIRGINIA *v.* STATE OF WEST VIRGINIA.

MOTION OF THE STATE OF VIRGINIA TO PROCEED TO A FINAL HEARING.

No. 2, Original. Submitted October 14, 1913.—Decided November 10, 1913.

In a controversy between States, this court will not refuse a request made in good faith by one of the parties for reasonable time to effect a settlement, but will comply therewith as near as it can consistently with justice.

On complainant's motion to proceed to final hearing and respondent's request for reasonable time to proceed with negotiations for amicable adjustment the case is assigned for next April.

THE facts are stated in the opinion.

Mr. Samuel W. Williams, Mr. William A. Anderson, Mr. John B. Moon and *Mr. Randolph Harrison* for the State of Virginia.

Mr. Holmes Conrad and *Mr. Sanford Robinson* for the bond-holding creditors.

Mr. A. A. Lilly, Attorney General of the State of West Virginia, *Mr. V. B. Archer, Mr. Charles E. Hogg* and *Mr. John H. Holt* for the State of West Virginia.

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

In March, 1911 (*Virginia* v. *West Virginia,* 220 U. S. 1), our decision was given "with respect to the basis of liability and the share of the principal of the debt of Virginia that West Virginia assumed." In view, however, of the

nature of the controversy, of the consideration due the respective States and the hope that by agreement between them further judicial action might be unnecessary, we postponed proceeding to a final decree and left open the question of what, if any, interest was due and the rate thereof, as well as the right to suggest any mere clerical error which it was deemed might have been committed in fixing the sum found to be due upon the basis of liability which was settled. In October, 1911, we overruled without prejudice a motion made by Virginia to proceed at once to a final determination of the cause on the ground that there was no reasonable hope of an amicable adjustment. *Virginia* v. *West Virginia*, 222 U. S. 17.

The motion on behalf of the State of Virginia now before us is virtually a reiteration of the former motion to proceed and is based upon the ground that certain negotiations which have taken place between the Virginia Debt Commission representing Virginia, and a Commission representing West Virginia, appointed in virtue of a joint resolution of the legislature of that State, adopted in 1913, make it indubitably certain that no hope of an adjustment exists. But without reviewing the course of the negotiations relied upon, we think it suffices to say that in resisting the motion the Attorney General of West Virginia on behalf of that State insists that the view taken by Virginia of the negotiations is a misapprehension of the purposes of West Virginia, as that State since the appointment of the Commission on its behalf has been relying upon that Commission "to consummate such an adjustment and settlement of said controversy as to commend the result of its negotiations to the favorable consideration of the Governor and the legislative branch of its government, and thus terminate said controversy to the satisfaction of her people and the Commonwealth of Virginia, and upon the principles of honor and justice to both States, and in fairness to the holders of the debt

for whose benefit this controversy is still pending." The Attorney General further stating that in order to accomplish the results just mentioned, a sub-committee of the Commission of West Virginia has been and is engaged in investigating the whole subject with the purpose of preparing a proposition to be submitted to the Virginia Debt Commission, to finally settle the whole matter and that a period of six months' time is necessary to enable the Committee to complete its labors.

Having regard to these representations, we think we ought not to grant the motion to proceed at once to consider and determine the cause, but should, as near as we can do so consistently with justice, comply with the request made for further time to enable the Commissioners of West Virginia to complete the work which we are assured they are now engaged in performing for the purpose of effecting a settlement of the controversy. As, however, the granting of six months' delay would necessitate carrying the case possibly over to the next term and therefore be in all probability an extension of time of more than a year, we shall reduce somewhat the time asked and direct that the case be assigned for final hearing on the 13th day of April next at the head of the call for that day.

SUMMERS *v.* UNITED STATES.

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

No. 502. Argued October 22, 23, 1913.—Decided November 10, 1913.

The court will if possible avoid construing a code of procedure as establishing a dual instead of a single procedure in the prosecution of crimes committed within the same territorial jurisdiction.

The fact that the courts of Territories may have such jurisdiction of cases arising under the Constitution and laws of the United States as that vested in the circuit and district courts does not make them circuit and district courts of the United States.

The Alaskan Code of Criminal Procedure is very complete and circumstantial. It covers every step in a criminal proceeding including the form of indictment of all crimes whether specifically defined therein or not.

Prior to the amendment of 1913, § 43 of Title II of the Alaskan Code of Criminal Procedure providing that the indictment must charge but one crime and in one form only, applied to the indictment for any offense whether specifically defined in that Code or not.

It is a substantial right, and not a mere matter of procedure, to have the indictment confined to one offense and in one form only; and the amendment of 1913 to such § 43, permitting the joinder of several offenses, did not have retrospective operation.

The principle that one good count will support a judgment of conviction does not apply where the accused has the right to defend against the validity of the indictment for joining the counts and this right has not been lost by failure to plead the defect.

Fault cannot be imputed by the appellate court to the accused for standing on a right under the law as it existed at the time of the trial because the law has been so amended meanwhile as to eliminate such right.

This court, having sustained appellant's contention that the indictment was insufficient, refrains from expressing any opinion on other contentions of appellant.

202 Fed. Rep. 457, reversed.

THE facts, which involve the validity of an indictment

charging more than one offense, found in Alaska, are stated in the opinion.

Mr. Albert Fink, with whom *Mr. Lewis P. Shackleford*, *Mr. Aldis B. Browne*, *Mr. Alexander Britton*, *Mr. Evans Browne* and *Mr. Kurnal R. Babbitt* were on the brief, for petitioner.

Mr. Assistant Attorney General Adkins, with whom *Mr. John Rustgard*, United States Attorney and *Mr. Karl W. Kirchwey* were on the brief, for the United States:

Petitioner has not been deprived of any constitutional or statutory right to trial by jury. *Diaz* v. *United States*, 223 U. S. 442, 454.

The right to trial by jury is the right as it existed at common law. *Thompson* v. *Utah*, 170 U. S. 343, 349; *Callan* v. *Wilson*, 127 U. S. 540, 549; *Schick* v. *United States*, 195 U. S. 65, 69; *West* v. *Gammon*, 98 Fed. Rep. 426; *United States* v. *Lair*, 195 Fed. Rep. 47, 52; *Hallinger* v. *Davis*, 146 U. S. 314, 318; *Craig* v. *State*, 49 Oh. St. 415; *People* v. *Chew Lan Ong*, 141 California, 550; *State* v. *Almy*, 67 N. H. 274.

At common law when a demurrer to an indictment, whether for misdemeanor or felony, was overruled, the defendant had no right to plead over, but the court entered judgment and imposed sentence; however, in some cases the court in its discretion permitted the demurrer to be withdrawn and a plea to be entered. 2 Hawkins P. C., c. 31, §§ 5, 7; 2 Hale P. C. 257; Archbold, Cr. Pl. (24th ed., 1910), 174; Wharton, Cr. Pl. and Pr. (9th ed.), §§ 404, 405; 2 Bishop, New Cr. Proc. (2d ed.), §§ 782, 784; Beale's Cr. Pl. & Pr., § 60, p. 53; *Reg.* v. *Hendy*, 4 Cox C. C. 243; *Reg.* v. *Faderman*, 4 Cox C. C. 359, 370; *State* v. *Norton*, 89 Maine, 290; *State* v. *Passaic Co. Ag. Society*, 54 N. J. L. 260; *People* v. *Taylor*, 3 Denio, 91.

All statutory rights were fully accorded petitioner. Section 1026 gave the right, but did not impose the necessity,

of trial by jury. It, and the statute which it embodied (17 Stat. 1580) were intended to modify the common-law rule and to give to every defendant, as a matter of right, an opportunity to defend on the facts after an indictment against him had been held good on demurrer. But Congress did not intend to make necessary a jury trial, if a defendant preferred to receive sentence on demurrer, either because he had no defense on the facts, or was content to rely on questions of law on appeal. See *Walden* v. *Holman*, 2 Ld. Raym. 1015; 7 Wentworth, 347; Keigwin's Precedents of Pl., p. 348.

The practice followed in the case was in strict accordance with the petitioner's right. The judgment overruled the demurrer without more. *Smith* v. *Harris*, 12 Illinois, 462, 466.

Section 1032, Rev. Stat., is not applicable to this case. 2 Hale P. C. 315.

The common law is legislated into Alaska by § 218 of the Penal Code of 1899 and by § 367 of the act of June 6, 1900 (31 Stat. 321).

Under the common law, as shown, a judgment is final when the party stands on his demurrer. *People* v. *King*, 28 California, 265. *Re McQuown*, 11 L. R. A. (N. S.) 1136, distinguished.

Section 1026 did not therefore go to the jurisdiction of the court; it merely invested petitioner with a right which he was free to assert, but which he might waive by his voluntary act. When he declined to proceed to trial and persuaded the court to impose sentence on the demurrer, he was bound by his election. *Diaz* v. *United States*, 223 U. S. 442, 454; *Schick* v. *United States*, 195 U. S. 72; *Queenan* v. *United States*, 190 U. S. 548, 551; *Rodriguez* v. *United States*, 198 U. S. 156, 164; *Powers* v. *United States*, 223 U. S. 303, 312.

This court will decide the case on the present law; that law authorizes the joinder of several offenses, and the

judgment below will not be reversed if upon rehearing the same order must be entered.

Even if § 43 of the Alaskan Code governed at the time of trial, that section has now been amended to accord with § 1024, Rev. Stat.

An appellate court will decide a matter upon the law in force at the time of its decision; so that an error may become immaterial by reason of a change in the law. *United States* v. *Schooner Peggy*, 1 Cr. 103; *Pugh* v. *McCormick*, 14 Wall. 361; *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115; *Keller* v. *State*, 12 Maryland, 322; *Muskogee Nat. Tel. Co.* v. *Hall*, 64 S. W. Rep. 600; *Hubbard* v. *Gilpin*, 57 Missouri, 441; *Wayne Co.* v. *St. Louis &c. Railroad*, 66 Missouri, 77; *Myers* v. *Hollingsworth*, 26 N. J. L. 186, 191. See also *Wade* v. *St. Mary's School*, 43 Maryland, 178; *Simpson* v. *Stoddard*, 173 Missouri, 421, 476; *St. Louis &c. Ry. Co.* v. *Berry*, 42 Tex. Civ. App. 470; *Perry* v. *Minneapolis Street Ry. Co.*, 69 Minnesota, 165; *People* v. *Syracuse*, 128 App. Div. 702.

Petitioner could not neglect to make full defense, and speculate on a reversal because of an error of law which in a legal sense occasioned no possible prejudice. *Royal Ins. Co.* v. *Miller*, 199 U. S. 353, 369.

The amended statute is not *ex post facto* as applied to offenses committed before its passage. It is a mere change in the rules of procedure, which dispenses with none of the substantial protections with which the law surrounds the accused. Cooley, Const. Lim. (7th ed.), 326; *Mallett* v. *North Carolina*, 181 U. S. 589; *Duncan* v. *Missouri*, 152 U. S. 377; *Hopt* v. *Utah*, 110 U. S. 57; *Gibson* v. *Mississippi*, 162 U. S. 565, 590; *Thompson* v. *Missouri*, 171 U. S. 380, 386; *Hallock* v. *United States*, 185 Fed. Rep. 417.

As to other statutes, see *Watson* v. *Commonwealth*, 16 B. Mon. 15; *State* v. *Ryan*, 13 Minnesota, 370, 376; *State* v. *Hoyt*, 47 Connecticut, 518; *South* v. *State*, 86 Alabama, 617; *Mathis* v. *State*, 31 Florida, 291; *Commonwealth* v. *Brown*,

121 Massachusetts, 69, 78; *State* v. *Pell*, 140 Iowa, 655; *Marion* v. *State*, 20 Nebraska, 233.

Petitioner received no greater sentence than must have been imposed on a conviction of one crime only.

One good count will support a judgment. *Claasen* v. *United States*, 142 U. S. 140.

Prejudice cannot be shown because the error might have been cured had petitioner gone to trial; if he had been acquitted on all counts there would have been nothing to appeal from.

Where there is a misjoinder of counts in an indictment and a conviction on one only, the error is immaterial. *Myers* v. *State*, 92 Indiana, 390, 394; *Commonwealth* v. *Packard*, 5 Gray, 101; *Commonwealth* v. *Adams*, 127 Massachusetts, 15; *Pointer* v. *United States*, 151 U. S. 396; *State* v. *Buck*, 59 Iowa, 382; *Mills* v. *State*, 52 Indiana, 187.

The error was one of form cured by § 1025, Rev. Stat. *United States* v. *Nye*, 4 Fed. Rep. 888; *United States* v. *Durland*, 65 Fed. Rep. 408, 413; *Connors* v. *United States*, 158 U. S. 408.

The practice in this case is governed by § 1024, Rev. Stat., and not by § 43 of the Alaskan Code.

The Penal and Criminal Procedure Codes of Alaska apply only to the crimes therein mentioned, and not to crimes defined in the Revised Statutes or other general laws of the United States. See 30 Stats. 1253, § 1891, Rev. Stat.; act of May 17, 1884, 23 Stat. 53, §§ 7, 9; *Kie* v. *United States*, 27 Fed. Rep. 351; Carter's Alaska Codes, p. xvii.

Under the act of 1899 those Oregon statutes which Congress deemed applicable to Alaska were codified.

The Penal and Criminal Procedure Codes are coextensive, and the provisions of the Procedure Code relate only to those offenses defined in the Penal Code.

The general laws of the United States not locally inapplicable, including § 1024, Rev. Stat., are in force in

Alaska. Section 1891, Rev. Stat., applies to Alaska since it became an organized Territory by the act of May 17, 1884. *Int. Comm. Com.* v. *Humboldt S. S. Co.*, 224 U. S. 474, 481; *Nagle* v. *United States*, 191 Fed. Rep. 141; act of May 17, 1884; *Kie* v. *United States*, 27 Fed. Rep. 351; *Fitzpatrick* v. *United States*, 178 U. S. 304.

Section 1024 is locally applicable to Alaska. It applies to all courts of the United States. Whenever the District Court for Alaska is exercising the jurisdiction of a district court of the United States the Federal rules apply. *McAllister* v. *United States*, 141 U. S. 174; *Steamer Coquitlam* v. *United States*, 163 U. S. 346; *In re Cooper*, 138 U. S. 404; *S. C.*, 143 U. S. 494; *United States* v. *Pacific & Arctic Co.*, 228 U. S. 87. See also *Embry* v. *Palmer*, 107 U. S. 3, 9; *Benson* v. *Henkel*, 198 U. S. 1, 13; *Hyde* v. *Shine*, 199 U. S. 62, 75; *United States* v. *Haskins*, 3 Sawy. 262; *Moss* v. *United States*, 23 App. D. C. 475.

A dual system of procedure does exist in Alaska. There is a dual jurisdiction both Federal and territorial. *Ex parte Crow Dog*, 109 U. S. 556; § 10, Code Crim. Proc.; *United States* v. *Folsom*, 38 Pac. Rep. 70; *Benson* v. *Henkel*, 198 U. S. 1, 13.

If a dual practice exists as to these things there can be no objection to other differences in practice as applied to prosecutions for Federal crimes. The cases cited by petitioner do not support his contention. *Clinton* v. *Englebrecht*, 13 Wall. 434; *Hornbuckle* v. *Toombs*, 18 Wall. 648; *Reynolds* v. *United States*, 98 U. S. 145; *Miles* v. *United States*, 103 U. S. 304, 310; *Good* v. *Martin*, 95 U. S. 90; *Thiede* v. *Utah*, 159 U. S. 510, 514, are not opposed to the Government's argument.

This case is governed by *Page* v. *Burnstine*, 102 U. S. 664, 668.

As to the difference between the ordinary Territory and Alaska, see *Thiede* v. *Utah*, 159 U. S. 510; *Bird* v. *United States*, 187 U. S. 118.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Petitioner was indicted under § 5209 of the Revised Statutes, relating to national banks, and was charged with fifty-six separate violations of the section. He demurred to the indictment on the ground, among others, that it violated § 43 of the Criminal Code of Alaska, known as Carter's Code, in that more than one crime was charged. Act of March 3, 1889, Title II, c. 429, 30 Stat. 1253, 1290.

The demurrer was overruled, to which ruling petitioner excepted. He then gave written notice "of election to stand upon the said demurrer and not further plead and to take advantage of the provisions of section 97 of the Alaskan Code of Criminal Procedure, and to submit to judgment thereunder and forthwith take his appeal to the Circuit Court of Appeals for the Ninth Circuit."

The Government objected to the entry of judgment until the cause had been submitted to a jury for trial and a verdict rendered, urging that § 97 of the Code of Alaska (30 Stat. 1267) did not apply but that §§ 1026 and 1032 [1] of the Revised Statutes governed the procedure. After argument, the court ruled that the Federal procedure prevailed in all proceedings in the cause, but that the de-

[1] SEC. 1026. In every case in any court of the United States, where a demurrer is interposed to an indictment, or to any count or counts thereof, or to any information, and the demurrer is overruled, the judgment shall be *respondeat ouster;* and thereupon a trial may be ordered at the same term, or a continuance may be ordered as justice may require.

SEC. 1032. When any person indicted for any offense against the United States, whether capital or otherwise, upon his arraignment stands mute, or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury.

fendant (petitioner) might waive trial by jury, if he so elected, and have judgment entered against him pursuant to the provisions of § 97 of Title II.[1]

The court then asked petitioner if he was guilty or not guilty of the crime. Petitioner stood mute, refused to plead, elected to stand on his demurrer and have judgment rendered against him in accordance with § 97. He was then adjudged guilty and sentenced to imprisonment for five years for each of the offenses, to run concurrently, the entire sentence to be completed at the end of five years.

Judgment was affirmed by the Circuit Court of Appeals. 202 Fed. Rep. 457.

The first question in the case is whether § 43 of Title II of the Alaskan Criminal Code applies or § 1024 of the Revised Statutes. They read, respectively, as follows:

"SEC. 43. That the indictment must charge but one crime, and in one form only; except that where the crime may be committed by use of different means the indictment may allege the means in the alternative." 30 Stat. 1290.

"SEC. 1024. When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

The trial court and the Circuit Court of Appeals held, as we have seen, that § 1024 applied, and this is the conten-

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[1] SEC. 97. That if the demurrer be disallowed, the court must permit the defendant, at his election, to plead, which he must do forthwith, or at such time as the court may allow; but if he do not plead, judgment must be given against him. 30 Stat. 1295.

tion of the Government. Petitioner asserts the applicability of § 43 of the Alaskan Code.

The trial court expressed its recognition of the difference between a district and circuit court of the United States and a territorial court, such as the District Court of Alaska was expressed to be, but was of opinion that when the latter court exercises jurisdiction to enforce the laws of the United States, "not only the substantive law but the machinery, the procedure which enables the court to enforce the substantive law," applied. The Circuit Court of Appeals, in a circumstantial opinion, reached the same general result and considered that the Alaskan Code, by its title and some of its provisions, explicitly specialized the crimes relating to Alaska and the procedure applicable to them. The title of the act is, it was said, "An Act to define and punish crimes in the District of Alaska, and to provide a code of criminal procedure for said district"; the enacting clause is, "That the penal and criminal laws of the United States of America and the procedure thereunder relating to the District of Alaska shall be as follows," and § 2, c. 1, Title 1, provides "That the crimes and offenses defined in this Act committed within the District of Alaska shall be punished as herein provided." It was hence concluded that as the offense charged in the indictment was not one mentioned in the Alaskan Code, it was not one to be governed by the local procedure but was left under the procedure prescribed in § 1024 of the Revised Statutes. The conclusion was fortified by a consideration of the genesis of the respective provisions. The result of the conclusion will be the existence of a dual procedure in the prosecution of different crimes committed within the same territorial jurisdiction. The result may have examples but it is certainly undesirable, and the systematic character of the Alaskan Code indicates a contrary intention.

Section 43 is a continuation of the procedure that had

been prescribed for Alaska. The act providing a civil government for that Territory, passed May 17, 1884, c. 53, § 7, 23 Stat. 24, 25 and 26, made the general laws of Oregon applicable to it, and those laws require "that the indictment must charge but one crime and in one form only." It is contended, however, that the laws of Oregon were declared to be the law of Alaska only in so far as they were applicable and not in conflict with the laws of the United States, and that necessarily the provision above-quoted in regard to the indictment was in conflict with § 1024 of the Revised Statutes. And it is further contended that the conflict is not reconciled, or rather that the difference in procedure is not removed, by § 43 of the Alaskan Code. We concede strength to these considerations but there are countervailing ones.

The Alaskan Code is quite an elaborate code of substantive and adjective law, the former containing twelve chapters of definitions of offenses against the person and property, the public safety and the public peace; the other containing elaborate and circumstantial provisions for the indictment and trial of offenders, their sentence and punishment, and a provision for appellate review. It seems to omit nothing of circumstance or detail necessary to a careful and advanced procedure. But its enumeration of offenses does not include all crimes against the United States, does not include the one under review, and it is hence contended that the procedure prescribed does not apply to the crimes not enumerated, and therefore, does not apply to the crime under review. In other words, it is contended that the procedure prescribed is complementary only to the crimes defined and has no broader application, leaving all other crimes to be governed by § 1024 of the Revised Statutes.

It is established that the courts of the Territories may have such jurisdiction of cases arising under the Constitution and laws of the United States as is vested in the cir-

cuit and district courts, but this does not make them circuit and district courts of the United States. It has been hence decided that the manner of impaneling grand juries prescribed for the circuit and district courts does not apply to the territorial courts. *Reynolds* v. *United States*, 98 U. S. 145, 154. See, as to trial juries, *Clinton* v. *Englebrecht*, 13 Wall. 434. In the latter case it was said "that the whole subject matter of jurors in the Territories is committed to territorial regulation" (p. 445).

This principle was applied to the mode of challenging petit jurors, *Miles* v. *United States*, 103 U. S. 304; to give defendants the right to separate trials and for the regulation of peremptory challenges to jurors, *Cochran et al.* v. *United States* (Circuit Court of Appeals, Eighth Circuit), 147 Fed. Rep. 206, 207. In *Fitzpatrick* v. *United States*, 178 U. S. 304, 307–8, it was said that the laws of Oregon must be looked to for the requisites of an indictment for murder rather than the rules of the common law. And this by virtue of the act providing a civil government for Alaska, presently referred to. See also *Thiede* v. *Utah Territory*, 159 U. S. 510.

In the case at bar there is direct legislation by Congress. Does the principle apply in such case? The first legislation for Alaska was an act of May 17, 1884, entitled "An Act providing civil government for Alaska," § 7 of which was as follows: "That the general laws of the State of Oregon now in force are hereby declared to be the law in said district so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States." Chapter 53, 23 Stat. 25, 26. But what constitutes conflict? Mere difference, the Court of Appeals decided, citing *Kie* v. *United States*, 27 Fed. Rep. 351, 356. That, however, depends upon the purpose. Congress was legislating directly for Alaska; manifestly intended to distinguish it and intended the laws of Oregon to be its laws, regarding them as more suitable to its con-

ditions than general laws determined by or addressed to different conditions. See *United States* v. *Pridgeon*, 153 U. S. 48. And this appears to have been the view taken by the court in other cases.

In *Endleman* v. *United States*, 86 Fed. Rep. 456, the laws of Oregon were referred to to sustain an indictment to which a demurrer had been filed on the ground that it contained only one count and that several distinct offenses were charged in that count. The case, however, may be said to have only negative value in the discussion. It referred to the Criminal Code as constituting the law of the district but did not refer to or base the decision on that provision which required an indictment to charge "one crime and in one form only." The law of Oregon necessarily was decided to be controlling.

In *Jackson* v. *United States*, 102 Fed. Rep. 473, 477, the court resorted to the laws of Oregon to determine the qualifications of grand jurors, considering them as applicable under the organic act providing a civil government for the Territory.

In *Corbus* v. *Leonhardt*, 114 Fed. Rep. 10, the court refused to apply § 858 of the Revised Statutes which provides that in actions by or against executors and administrators neither party shall be allowed to testify against the other, and applied instead the law of Oregon permitting such testimony. And this by virtue of the provision of the act already cited making the laws of Oregon the laws of Alaska.

In *Ball* v. *United States*, 147 Fed. Rep. 32, 36, it was assigned as error that the trial court overruled the motion of Ball to require the district attorney to furnish him a list of all of the witnesses to be produced against him on the trial in accordance with § 1033 of the Revised Statutes. It was held that the section applied only to the trial of treason and capital cases in the courts of the United States. The court said, "The present case was

tried in a territorial court under the Penal Code and Code of Criminal Procedure of Alaska. Those codes contain no requirement that a list of witnesses be furnished the accused upon demand or otherwise." *Thiede* v. *Utah*, 159 U. S. 510, 514, was cited as holding that § 1033 does not control practice and procedure in territorial courts.

These cases in the Court of Appeals apply the principle of the cases in this court, which we have cited, that Congress by its legislation intends always special regulations for the Territories, to be exercised, it may be, through territorial legislatures or, as in the case of Alaska, by making the laws of Oregon the laws of Alaska, and subsequently by the code enacted for that Territory.

It is, however, the contention, as we have seen, that the limitations of the title of the Alaskan Codes and the omission from them of the crime under review make § 1024 applicable, or, to state it differently, make § 43 of Title II of the Code, which provides that "the indictment must charge but one crime and in one form only," applicable only to the crimes and offenses specifically defined in the act. If it be true that there is such limitation, it would follow that if the laws of Oregon were, before the enactment of the codes, applicable to other offenses in Alaska, they are still applicable. But we are not disposed so to limit the procedure in Alaska. It is, as we have said, very complete and circumstantial. It covers every step in a criminal proceeding, the first accusation, arrest, preliminary inquiry of guilt, duties of officers and magistrates, formation of grand juries, the indictment, trial and its conduct, verdict, sentence and judgment. The reason given for denying its application seems to us not adequate. It is said that § 1024 was originally contained in the act of February 26, 1853, c. 80, 10 Stat. 161, to regulate the fees of clerks, marshals and attorneys of the courts of the United States, and finally became § 823 of the Revised Statutes and by it made applicable to all of the States and

Territories. And it is said that the purpose of the act of 1853 and its continuance was to prevent the officers of the United States from increasing their fees by filing separate indictments when the offenses might be properly charged in one. But such a general purpose might easily be considered as yielding to the special provisions for Alaska expressed in the laws of Oregon and declared to be the law of Alaska and in the repetition of the provisions of those laws in the Code of Alaska, that but one offense shall be charged in the indictment. We cannot suppose that the purpose of regulating the fees of officers was more essential and dominant than that special provision, to have no effect as to the great body of crimes of ordinary and everyday commission defined in the Code, and yet apply to offenses less frequent.

By an act of the territorial legislature, approved April 26, 1913, c. 39, Session Laws, 1913, § 43 was amended so as to permit the joinder of two or more offenses or crimes of the same class in one indictment in separate counts, and it is hence contended by the Government that the act makes valid the indictment in the case at bar. It is therefore insisted that "the only result of a reversal will therefore be that petitioner will be re-tried under the present indictment or under a new indictment identical in form." If the trial court erred, it is further insisted, the error has become immaterial.

We are not disposed to give the act retrospective operation, so as to give validity to indictments found before its enactment, assuming for the argument's sake that it could have been given such operation. The evil of so considering it is manifest. Petitioner stood on his demurrer in reliance upon the then existing law, and fault cannot be imputed to him for doing so. Had the law been different his pleading might have been different, and instead of submitting to judgment he might have contested the charges against him. This is certainly a substantial right. The Govern-

ment seems to urge that he was in fault for not contesting the charges and by not doing so took all chances of the change of the law, and that besides, it is urged, he received no greater sentence than must have been imposed on a conviction of one crime only, as the minimum sentence under § 5209 is five years. It is contended that the principle that one good count will support a judgment is applicable. But this overlooks the right of petitioner to have defended against the indictment, the right which, we repeat, he did not lose by pleading its defects under the then existing law.

It is contended by petitioner that the trial court in imposing sentence and judgment upon him denied him the constitutional right of trial by jury, and that, the offenses charged against him being felonies, he was without power to waive a jury trial. Of this contention, we are not required to express opinion, having found the indictment against him insufficient.

Judgment reversed and cause remanded to the District Court for the District of Alaska, Division No. 1, with directions to sustain the demurrer to the indictment.

ALZUA *v.* JOHNSON.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 306. Motion to affirm submitted October 27, 1913.—Decided November 10, 1913.

This court is slow to revise the judgment of the highest court of a Territory on matters of local administration.

Judges of United States courts are not liable to civil actions for their judicial acts. *Bradley* v. *Fisher*, 13 Wall. 335.

The principle of immunity of judges from civil action for their official acts is so deep seated in the system of American jurisprudence that this court will regard it having been carried into the Philippine Islands as soon as the American courts were established therein.

The immunity of judges of the Supreme Court of the Philippine Islands from civil actions for official acts is the same as that of judges of the United States.

Act No. 190 of the Philippine Commission did not impose any liability to civil actions for official acts on any judge of the Supreme Court of the Philippine Islands; that act related only to inferior judges.

A statute, such as that involved in this case, providing that no judge shall be liable to civil action for official acts done in good faith, will not be construed as rendering such judges liable to civil action for acts done in bad faith by implication.

Quære whether the Philippine Commission has power to enact legislation making any judge liable to civil action for official acts,

21 Philippine Reports, 308, affirmed.

THE facts are stated in the opinion.

Mr. Evans Browne, Mr. A. B. Browne, Mr. Alexander Britton and *Mr. W. A. Kincaid* for defendant in error, in support of the motion.

Mr. Harry W. Van Dyke, Mr. Charles A. Douglas, Mr. Thomas Ruffin and *Mr. Hugh H. Obear* for plaintiffs in error, in opposition thereto.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the plaintiffs in error against a justice of the Supreme Court of the Philippine Islands. Its allegations much abridged are as follows: The plaintiff Alzua had a judgment, in Cause No. 3274, declared to be a first lien upon two stores, among other things, of Martinez, widow of Soler, and Riu, the judgment debtors; the sheriff levied; two Solers, sons of Martinez, demanded that the sheriff dismiss the levy as they were owners of the stock levied upon; the plaintiff Alzua gave the sheriff a bond, on October 14, 1905, and thereupon the sheriff proceeded to advertise and sell the property concerned. On the same October 14 the above mentioned Solers brought

suit (No. 4017) against the sheriff and the present plaintiff, Alzua, alleging that the Solers owned and were entitled to possession of the property and praying for an injunction and damages. The trial court decided for the sheriff and Alzua and the Solers appealed to the Supreme Court. On March 27, 1907, that court including the defendant affirmed the decision, postponing a statement of the grounds, and ordered judgment in twenty days and a return of the record ten days thereafter. The term ended on March 31. In vacation, on April 8, the defendant without consulting the other judges changed the judgment of affirmance to one of reversal and gave orders accordingly, so that on July 29 the record was returned to the court below with judgment reversed. The defendant then prepared a decision, filed September 14, which was signed by five justices including the defendant, and with intent to injure Alzua falsely stated therein that the Solers were preferred creditors of Martinez and Riu, well knowing that they alleged themselves to be owners and that Martinez and Riu were not parties to the suit and could not be bound by the decision. No final judgment has been rendered in the cause.

On August 22, 1907, the Solers brought another suit (No. 5719), against the sheriff, Alzua, her husband and the other obligors on the bond given to the sheriff, to which Martinez and Riu afterwards were made parties, alleging that the Solers had a preferred credit in the previously mentioned property. On November 29, the court dismissed the suit as to all but Martinez who confessed liability, and entered judgment against her. The Solers appealed to the Supreme Court and the case was submitted to six judges including the defendant. The defendant prepared a decision and with intent to injure the plaintiff set forth further false statements, viz: that in the demand on the sheriff that he dismiss the levy, the guardian *ad litem* of the Solers alleged that their claim was a

preferred claim, whereas they claimed as owners and partners; that the Supreme Court had decided in the former suit, No. 4017, that the Solers had a preferred credit for P. 9868.29, whereas the defendant knew that the decision in 4017 had not been pleaded or put in evidence; that the cause No. 5719 was brought upon the bond for the above sum together with damages, &c. P. 11068; the defendant knowing that the sheriff, acting sheriff, Martinez, and Riu were also defendants and that the first named sum alone was in issue and no damages proved; that the cause No. 5719 was instituted on October 1, 1907, well knowing that it was begun on August 22, before, not after the last decision (of September 14), in the former case; that the record in No. 5719 shows that the bond was given to the sheriff after the issue of an injunction in No. 4017, whereas it does not; and finally that the sureties on the bond had bound themselves thereby to respond to the Solers for the amount of the claim that the Solers had against Martinez and Riu, whereas the bond was given to the sheriff and the Solers were not parties to it.

The declaration goes on to allege that with the same intent the defendant did not discuss the actual questions or evidence; that he obtained the signatures of the other judges upon his representation that the decision set forth an impartial and fair statement of the case, he knowing the contrary; and further that Justice Elliott who sat at the hearing did not sign the decision and was not informed of it. It further alleges that defendant omitted the names of Martinez and Riu and directed the clerk to enter judgment against the other defendants only, knowing who were parties and what had been the judgment below. Thereafter on February 8, 1910, pursuant to the decision and defendant's orders, judgment was entered against Alzua and three others for P. 11068 with interest, on the ground that the Solers were creditors of Martinez and Riu and preferred to Alzua; although, it is said, Mar-

tinez and Riu were absolved by the judgment. Averments are reiterated that the defendant performed all the acts alleged in relation to Nos. 4017 and 5719 wrongfully with intent to injure the plaintiff with knowledge of the facts set forth and that such knowledge appears from inspection of the decisions in Nos. 4017 and 5719. Execution issued and the present plaintiffs paid the judgment in 5719, but to do so had to sell their property at a great sacrifice. The plaintiffs therefore seek judgment for the actual value of the property sold, the income that would have been realized, and punitive damages; P. 115000 in all. A demurrer to the declaration was sustained by both courts below, and the plaintiffs being unable to better their case by amendment, judgment was entered and the complaint dismissed.

Abridged once more this complaint is that the defendant without jurisdiction entered a judgment against the plaintiff contrary to an order of the full court, and in the opinion by which the full court ratified the change made a false statement of fact; that in the opinion of the full court in a second suit he inserted various false statements, including one attributing to the first judgment an effect that it could not have in the circumstances, all with full knowledge and intent to injure the plaintiff, which knowledge appears from inspection of the opinions, and that the plaintiff had to pay the second judgment at a sacrifice.

It is apparent that there are other difficulties beside the immunity of the judge in the way of such a suit. In the first place the Supreme Court of the Philippines decides that the judge had jurisdiction to make the change—a matter of local administration on which we should be very slow to revise the judgment. *Gray* v. *Taylor*, 227 U. S. 51, 57; *Fox* v. *Haarstick*, 156 U. S. 674, 679. Next, the judges, on inspection of the opinions and records which they regard as incorporated in the complaint and for which they were responsible by their assent, are of opinion that the statements in the former opinions were

correct and that the decisions were right, and of course reject the suggestion that they were deceived when they rendered the judgments. It might be added that the complaint hardly makes it clear that any of the alleged misstatements, some of which at least were irrelevant to the result, were the determining causes of the judgment of which the plaintiff complains.

But however it may be as to the matters that we have stated, we regard it as fundamental that the immunity of the defendant from this suit is the same as that of judges in the United States, which is established beyond dispute. *Bradley* v. *Fisher*, 13 Wall. 335; *Randall* v. *Brigham*, 7 Wall. 523. Whatever may have been the Spanish law this is a principle so deep seated in our system that we should regard it as carried into the Philippines by implication as soon as we established courts in those islands. Vol. I, Acts of Philippine Commission Nos. 136, 222, pp. 252, 556. Act of Congress of July 1, 1902, c. 1369, §§ 1, 5, 32 Stat. 691, 692. Reasons somewhat analogous to those adverted to in *Carrington* v. *United States*, 208 U. S. 1, 7, make the rule perhaps more important in the Philippines than it is here. It is true that in Act No. 190, § 9, of the Philippine Commission (1901), it is provided that "no judge, justice of the peace or assessor shall be liable to a civil action for the recovery of damages by reason of any judicial action or judgment rendered by him in good faith, and within the limits of his legal powers and jurisdiction," and it is argued that this imports that any judge shall be liable for a judgment rendered in bad faith. But without considering the question of power, we are of opinion for the reasons to which we have referred that this should not be construed to convey such an implication, at least as to judges of the Supreme Court. The section is shown to have had in mind inferior judges and the like by its mention of justices of the peace and assessors as to whom a different rule has been held to prevail.

We think it manifest that the question on which the decision of this cause depends needs no further argument and that the judgment should be affirmed.

Judgment affirmed.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS *v.* UNITED STATES.

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

No. 439. Submitted October 24, 1913.—Decided November 10, 1913.

Under the Hours of Service Act of March 4, 1907, c. 2939, 34 Stat. 1415, when several employés are kept on duty beyond the specified time of sixteen hours, a separate penalty is incurred for the detention of each employé although by reason of the same delay of a train.

Each overworked railroad employé presents towards the public a distinct source of danger.

The wrongful act under the statute is not the delay of the train but the retention of the employé; and the principle that under one act having several consequences which the law seeks to prevent there is but one liability attached thereto does not apply.

An employé, who is waiting for the train to move and liable to be called and who is not permitted to go away, is on duty under the Hours of Service Act.

The penalty under the Hours of Service Act, not being in the nature of compensation to the employé but punitive and measured by the harm done, is to be determined by the judge and not by the jury.

THE facts, which involve the construction of the Hours of Service of Railway Employés Act, are stated in the opinion.

Mr. Joseph M. Bryson, Mr. Cecil H. Smith, Mr. Alexander S. Coke, Mr. A. H. McKnight for petitioners:

The Hours of Service Act imposes a penalty for each act of requiring or permitting employés to work overtime, whether one or more employés be involved, and not a penalty for each employé required or permitted to work beyond the hours prescribed.

While it is clear that a penalty can be recovered for each and every violation, what constitutes a violation is the question at issue.

While in *United States* v. *Chicago, M. & P. S. Ry. Co.*, 197 Fed. Rep. 624, and *United States* v. *Denver & R. G. Ry. Co.*, 197 Fed. Rep. 629, the trial court imposed a penalty for each member of a train crew, in none of them was the question of the right to impose a penalty for each employé discussed.

In *B. & O. S. W. R. R. Co.* v. *United States*, 220 U. S. 94, reversing 159 Fed. Rep. 33, it was held that under the Cruelty Act a penalty was recoverable for each act of confinement beyond the statutory period.

For civil cases involving recovery of more than one penalty in state courts, see *M., K. & T. Ry. Co.* v. *State*, 97 S. W. Rep. 724; *Porter* v. *Dawson Bridge Co.*, 157 Pa. St. 367; *Railroad Co.* v. *Green*, 86 Pa. St. 427; *Hill* v. *Williams*, 14 Serg. & R. 287; *People* v. *Spencer*, 201 N. Y. 105; *S. C.*, 94 N. E. Rep. 614; *Sturgis* v. *Spofford*, 45 N. Y. 446; *Fisher* v. *N. Y. Cent. R. R. Co.*, 46 N. Y. 644; *Cox* v. *Paul*, 175 N. Y. 328; *Griffin* v. *Interurban S. R. Co.*, 72 N. E. Rep. 513; *State Board* v. *Bellinger*, 138 App. Div. 12; *Apothecaries Co.* v. *Jones*, L. R. 1893, 1 Q. B. 89; *Parks* v. *Railway Co.* (Tenn.), 13 Lea, 1; *Washburn* v. *McInroy*, 7 Johns. 134.

Cumulative penalties are not recoverable unless the legislative intent to impose them is clear. *State* v. *Wis. C. R. R. Co.*, 133 Wisconsin, 478.

As to the rule in criminal cases, see 12 Cyc. 289, 383; 25 Cyc. 61; 1 Bishop's New Crim. Law, §§ 793, 1061; Bishop on Stat. Crimes (2d ed.), § 1121, citing *People* v.

Tinsdale, 10 Abb. Pr. (N. S.) 374; *State* v. *Comfort*, 22 Minnesota, 271.

For cases in which the act, though involving two or more persons or things, was held to constitute a single offense, see *Crepps* v. *Durden*, Cowp. 640; *Regina* v. *Giddens*, 41 E. C. L. 344; *Clem* v. *State*, 42 Indiana, 420; *Hoiles* v. *United States*, 3 McArthur, 370; *United States* v. *Patty*, 2 Fed. Rep. 664; *United States* v. *Scott*, 74 Fed. Rep. 213; *Hurst* v. *State*, 86 Alabama, 604; *Ben* v. *State*, 22 Alabama, 9; *Westfall* v. *State*, 62 S. E. Rep. 558; *Peck* v. *State*, 111 S. W. Rep. 1019; *Scott* v. *State*, 81 S. W. Rep. 950; *State* v. *Warren*, 39 Am. St. Rep. 401; *State* v. *Nelson*, 29 Maine, 329; *Woodford* v. *People*, 62 N. Y. 117; *Gordon* v. *State*, 46 Oh. St. 607.

The working of five employés engaged on the same piece of work at one and the same time is but a single offense. *Muckenfuss* v. *State*, 55 Tex. Crim. 229; *State* v. *Hennessy*, 25 Oh. St. 339; *Smith* v. *State*, 59 Oh. St. 350; *State* v. *Egglesht*, 41 Iowa, 547; *Commonwealth* v. *Crowell* (Ky.), 60 S. W. Rep. 179; *State* v. *Batson*, 108 Louisiana, 479; *Ward* v. *State*, 90 Mississippi, 294; *State* v. *Douglas*, 26 Nevada, 196; *People* v. *Thomas*, 17 Wardell, 475; *State* v. *Clark*, 46 Oregon, 140; *Cornell* v. *State*, 104 Wisconsin, 527; *State* v. *Stevens*, 70 Atl. Rep. 1060.

A consideration of other acts of Congress leads to the same conclusion. Had it been intended that a penalty should be incurred for each employé, Congress would have clearly so provided, as it did in other statutes. See §§ 4, 5, of the Alien Immigration Act of March 3, 1903; § 2 of the Accidents Reports Act of May 6, 1910; § 20 of the Act to Regulate Commerce as amended June 24, 1906; § 6 of the Act to Regulate Commerce as amended June 18, 1910.

Cases arising under the Safety Appliance Acts holding that a penalty can be recovered for each car or each engine handled in violation of the statute are by the Circuit

Courts of Appeals and the District Courts, and this court has not passed upon the question. It may reach a different conclusion. See *United States* v. *Chi. G. W. Ry. Co.*, 162 Fed. Rep. 775.

A member of a train crew while not actually engaged in or having a duty to perform in connection with the movement of his train, his time being at his disposal, is off duty within the meaning of the Hours of Service Act.

The term "on duty" cannot be made plainer by discussion. *United States* v. *Denver & R. G. R. R. Co.*, 197 Fed. Rep. 629; *Atchison &c. Ry. Co.* v. *United States*, 177 Fed. Rep. 118; *S. C.*, 220 U. S. 37; but see *United States* v. *Chi., M. &c. R. Co.*, 197 Fed. Rep. 627.

Under the Federal eight-hour law for laborers, the meal hour is never treated as time on duty.

During periods of waiting brakemen are not actually engaged in the movement of the train nor are they connected with the movement thereof. *Atchison, T. & S. F. R. Co.* v. *United States*, 177 Fed. Rep. 118; *United States* v. *Illinois Central R. R. Co.*, 180 Fed. Rep. 630; *United States* v. *Chicago, M. & P. S. Ry. Co.*, 195 Fed. Rep. 183; *United States* v. *Kansas City So. R. Co.*, 189 Fed. Rep. 471; *United States* v. *Chicago, M. & P. S. Ry. Co.*, 197 Fed. Rep. 624; *United States* v. *D. & R. G. Ry. Co.*, 197 Fed. Rep. 629.

The failure of an injector, caused by impure water, where, owing to a protracted drouth, water cannot be procured that will not foam and thus cause injector failures, is an unavoidable accident within the meaning of the Hours of Service Act.

As to what is an unavoidable accident within the meaning of this proviso, see *United States* v. *Kansas City So. R. Co.*, 189 Fed. Rep. 471; *S. C.*, 202 Fed. Rep. 828.

Under the facts in these cases the delay was the result of a cause not known to the defendant or its officer or agent

in charge of the employés at the time they left the terminal, and which could not have been foreseen.

Upon the request of either party the penalty to be assessed in a case arising under the Hours of Service Act should be submitted to the jury, even where the court instructs a verdict for the Government.

Suits by the Government for penalties under the Hours of Service Act are actions at law for debt, and, as such, are civil suits. *Hepner* v. *United States*, 213 U. S. 103; *United States* v. *Atlantic C. L. R. Co.*, 182 Fed. Rep. 285; *United States* v. *St. Louis S. W. Ry. Co.*, 184 Fed. Rep. 32; *United States* v. *Sioux City Stock Yards Co.*, 167 Fed. Rep. 126; *United States* v. *Kansas City So. R. Co.*, 202 Fed. Rep. 828.

In a civil suit, where the damages or penalties are not made certain and fixed by the terms of a contract or statute, the court, upon request, should submit to the jury the question of assessing the damages or penalties. *Renner* v. *Marshall*, 1 Wheat. 215; *Aurora* v. *West*, 7 Wall. 104; *Armstrong* v. *Carson*, 2 Dall. 302; *Kenyon* v. *Gilmer*, 131 U. S. 22; *Hines* v. *Darling*, 57 N. W. Rep. 1081; *McDaniel* v. *Gate City Gas Light Co.*, 3 S. E. Rep. 693.

In a consolidated cause, involving two suits of five counts each, where in any event but one penalty can be recovered in each case, it is plain error for the court to instruct the jury to find against defendant on each count and to assess a penalty on each count. *United States* v. *T. & C. R. Co.*, 176 U. S. 242; *United States* v. *Pennsylvania*, 175 U. S. 500; *School District* v. *Hall*, 106 U. S. 428.

Mr. Assistant Attorney General Denison for the United States:

The question whether separate penalties are to be imposed for every employé who is worked over hours is exclusively a question of construction of the statute involved, and this statute clearly so intends. Hours of

Service Act, 34 Stat. 1415; Twenty-Eight-Hour Law, 34 Stat. 607; *Baltimore & Ohio R. R. Co.* v. *United States*, 220 U. S. 94; *Chicago &c. R. R. Co.* v. *People*, 82 Ill. App. 679; *Commonwealth* v. *Jay Cooke*, 50 Pa. St. 201; *O'Neil* v. *Vermont*, 144 U. S. 323; *People* v. *Spencer*, 201 N. Y. 105; *People* v. *New York Cent. R. Co.*, 13 N. Y. 78; *Southern Ry. Co.* v. *State*, 165 Indiana, 613; *United States* v. *Chicago &c. R. Co.*, 197 Fed. Rep. 624; *United States* v. *Denver & R. G. R. Co.*, 197 Fed. Rep. 629; *United States* v. *St. Louis S. W. R. Co.*, 184 Fed. Rep. 28; *United States* v. *Chicago G. W. Ry. Co.*, 162 Fed. Rep. 775.

The train crew in this case were "on duty," within the meaning of the act, 19 hours and 40 minutes. *United States* v. *C., M. & P. S. R. Co.*, 195 Fed. Rep. 625; *United States* v. *Denver & R. G. R. Co.*, 197 Fed. Rep. 629; *United States* v. *C., M. & P. S. R. Co.*, 195 Fed. Rep. 783; *United States* v. *Kan. City Ry. Co.*, 189 Fed. Rep. 471; *United States* v. *St. Louis S. W. R. Co.*, 189 Fed. Rep. 954; *United States* v. *Ill. Cent. Ry. Co.*, 180 Fed. Rep. 630.

The cause of the delay to train No. 404 was not within the exception. *Gleeson* v. *Virginia Midland R. Co.*, 140 U. S. 435; *The Majestic*, 166 U. S. 375; *United States* v. *Garbish*, 222 U. S. 257.

The size of the penalty (within the maximum) was a question for the court and not for the jury. *Atchison &c. Ry. Co.* v. *United States*, 178 Fed. Rep. 12; *Boyd* v. *United States*, 116 U. S. 616; *Chi., B. & Q. R. Co.* v. *United States*, 220 U. S. 559; *Hepner* v. *United States*, 213 U. S. 103; *Hines* v. *Darling*, 57 N. W. Rep. 1081; *Johnson* v. *So. Pac. Co.*, 196 U. S. 1; *Lees* v. *United States*, 150 U. S. 476; *Missouri, K. & T. Ry. Co.* v. *United States*, 178 Fed. Rep. 15; *McDaniel* v. *Gate City Co.*, 3 S. E. Rep. 693; *O'Connell* v. *O'Leary*, 145 Massachusetts, 311; *United States* v. *Zucker*, 161 U. S. 475; *United States* v. *Atlantic Coast Line*, 173 Fed. Rep. 764; *United States* v. *Southern Pacific Co.*, 162 Fed. Rep. 412; *United States* v. *Southern Pacific Co.*, 157

Fed. Rep. 459; *United States* v. *Boston & Albany R. Co.*, 15 Fed. Rep. 209.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case brings up two suits that were consolidated and tried together, both being suits for penalties under the Hours of Service Act of March 4, 1907, c. 2939, 34 Stat. 1415, for keeping employés on duty for more than sixteen consecutive hours. The main question is whether, when several persons thus are kept beyond the proper time by reason of the same delay of a train, a separate penalty is incurred for each or only one for all. The Circuit Court of Appeals decided for the Government without discussion.

The petitioner cites many cases in favor of the proposition that generally, when one act has several consequences that the law seeks to prevent, the liability is attached to the act, and is but one. It argues that the delay of the train was such an act and that the principle, which is a very old one, applies. *Baltimore & Ohio Southwestern R. R. Co.* v. *United States*, 220 U. S. 94. But unless the statute requires a different view, to call the delay of the train the act that produced the wrong, is to beg the question. See *Memphis & Charleston R. R. Co.* v. *Reeves*, 10 Wall. 176. *Denny* v. *New York Central R. R. Co.*, 13 Gray, 481. The statute was not violated by the delay. That may have made keeping the men overtime more likely, but was not in itself wrongful conduct *quoad hoc*. The wrongful act was keeping an employé at work overtime, and that act was distinct as to each employé so kept. Without stopping to consider whether this argument would be met by the proviso declaring a 'delay' in certain cases not to be within the statute, it is enough to observe that there is nothing to hinder making each consequence a separate cause of action or offence, if by its proper construction the law does so; see *Flemister* v. *United States*, 207 U. S. 372,

375; so that the real question is simply what the statute means. The statute makes the carrier who permits 'any employé' to remain on duty in violation of its terms, liable to a penalty 'for each and every violation.' The implication of these words cannot be made much plainer by argument. But it may be observed as was said by the Government that as towards the public every overworked man presents a distinct danger, and as towards the employés each case of course is distinct. *United States* v. *St. Louis Southwestern Ry. Co.*, 184 Fed. Rep. 28; *People* v. *Spencer*, 201 N. Y. 105, 111.

One of the delays was while the engine was sent off for water and repairs. In the meantime the men were waiting, doing nothing. It is argued that they were not on duty during this period and that if it be deducted, they were not kept more than sixteen hours. But they were under orders, liable to be called upon at any moment, and not at liberty to go away. They were none the less on duty when inactive. Their duty was to stand and wait. *United States* v. *Chicago, M. & P. S. Ry. Co.*, 197 Fed. Rep. 624, 628; *United States* v. *Denver & R. G. R. Co.*, 197 Fed. Rep. 629.

It is urged that in one case the delay was the result of a cause, a defective injector, that was not known to the carrier, and could not have been foreseen when the employés left a terminal, and that therefore by the proviso in § 3 the act does not apply. But the question was raised only by a request to direct a verdict for the defendant and the trouble might have been found to be due to the scarcity and bad quality of the water, which was well known. See *Gleeson* v. *Virginia Midland Ry. Co.*, 140 U. S. 435. *The Majestic*, 166 U. S. 375, 386.

The statute provides for a penalty not to exceed five hundred dollars. It is argued that the amount of the penalty was for the jury, the proceeding being a civil suit. But the penalty is a deterrent not compensation. The

amount is not measured by the harm to the employés but by the fault of the carrier, and being punitive, rightly was determined by the judge. *United States* v. *Atlantic Coast Line R. Co.*, 173 Fed. Rep. 764, 771. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 178 Fed. Rep. 12, 15.

Judgment affirmed.

CLEMENT NATIONAL BANK, *v.* STATE OF VERMONT.

ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

No. 29. Argued April 28, 29, 1913.—Decided November 10, 1913.

A tax upon deposits in a national bank to be paid by the depositors *held* in this case not to be a tax upon the franchise of the bank.

An interpretation by the state court of a state statute is controlling on this court; and this court determines whether the statute as so delimited conflicts with Federal law.

The National Bank Act does not withdraw credits of depositors in national banks from the taxing power of the State.

Under its broad powers of classification for taxation, a State may classify depositors in national banks so long as the tax is not essentially inimical to such banks in frustrating the purpose of the legislation or impairing their efficiency as Federal agencies.

The object of § 5219, Rev. Stat., is to prevent hostile discrimination against national banks; and a state tax to be in conflict therewith must constitute such a discrimination.

A provision in a statute permitting a bank to stipulate with the State to pay the taxes on deposits and thereby relieve its depositors from making returns does not place the bank under duress.

This court finds no basis for the charge of injurious discrimination against national banks in § 815 of Chapter 37 of the Public Statutes of Vermont.

While a national bank can only transact such business as the Federal statutes permit, it may, under its incidental powers, make reasonable business agreements in regard to its deposits including the payment

of state taxes thereon pursuant to the laws of the State in which it is located. Such an agreement is not *ultra vires*.

A State may provide for garnishment or trustee process to collect a valid tax and may constitute a bank its agent to collect the tax from its depositors.

A state tax on interest-bearing deposits in national banks does not deny equal protection of the law on account of exemptions which it is within the power of the State to allow or on account of the exemption of non-interest-bearing accounts. The classification is reasonable.

A state tax of a specified per cent. on deposits in national banks paid by the bank under agreement with the State pursuant to statute and which is otherwise valid, does not amount to denial of due process of law because the depositor had no notice in advance of the assessment, where, as in this case, the tax was recoverable by suit in which the depositor would have full opportunity to resist any illegal demand.

A lawful state tax on deposits in bank is imposed in the exercise of a power subject to which deposits are made, and does not impair the contract obligation of the bank to the depositors by requiring the bank to act as agent in collecting it. *North Missouri R. R. Co.* v. *Maguire*, 20 Wall. 46.

84 Vermont, 167, affirmed.

THE facts, which involve the legality of a statute of Vermont imposing a tax on deposits in national banks, are stated in the opinion.

Mr. Marvelle C. Webber and *Mr. Maxwell Evarts* for plaintiff in error:

The Vermont statute constitutes an unlawful interference with national banks as Federal instrumentalities.

The tax the bank is required to pay is in effect and reality and by design a tax upon its franchises as a national bank, being based upon the average of deposits of the class created.

The title of the statute, while not absolutely controlling, indicates the purpose to tax the bank. Gray on Taxing Power, p. 42, § 55, n. 49; *Holy Trinity Church* v. *United States*, 143 U. S. 457; *United States* v. *Fisher*, 2 Cr. 358,

386; *United States* v. *Palmer*, 3 Wheat. 610, 631; Machen, Federal Corp. Tax Law of 1909, p. 5 of introduction, n. 1.

The deposits become the property of the bank, not of the depositor, while the depositor becomes a creditor of the bank to the amount of the deposit. *Bank* v. *Millard*, 10 Wall. 152; *Scammon* v. *Kimball*, 92 U. S. 362, 369; 1 Morse on Banking, § 289; *State* v. *Franklin Co. Sav. Bank*, 74 Vermont, 246; *Manhattan Co.* v. *Blake*, 148 U. S. 412, 424.

They are assessable to the depositor only and as debts owing by the bank. *People* v. *Nat'l Bank &c.*, 123 California, 53; *County of Yuba* v. *Adams*, 7 California, 35.

The phraseology of the statute discloses the real purpose to tax the bank itself.

The stipulation and the return formulated by the state officials show that in actual operation of the statute it was construed as a tax on the bank itself.

The statute, being an attempt to tax national banks, is absolutely void. *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 283; *Bank* v. *New York*, 121 U. S. 138; *Bank* v. *Dearing*, 91 U. S. 29; *McCullough* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *Bank*, 9 Wheat. 738; *Howley* v. *Hurd*, 72 Vermont, 122; *Owensboro Bk.* v. *Owensboro*, 173 U. S. 664.

The sum the bank is called upon to pay is based on the average of the deposits for the period. This measures the amount to be paid by the bank. Such taxes are privilege or franchise taxes on the privilege of doing business, Gray on Taxing Power, pp. 43–44, § 56; *Socy. for Sav.* v. *Coite*, 6 Wall. 594; *Provid. Inst.* v. *Massachusetts*, 6 Wall. 611; *Commonwealth* v. *People's Bank*, 5 Allen, 428; *State* v. *Bradford Sav. Bank*, 71 Vermont, 234, 238; *Commonwealth* v. *Lancaster Sav. Bank*, 123 Massachusetts, 493; *Jones* v. *Winthrop Sav. Bank*, 66 Maine, 242.

The Supreme Court of the State of Vermont has held

that a tax based upon the average amount of deposits in savings banks is a franchise tax. *State* v. *Bradford Bank*, 71 Vermont, 234; *State* v. *Franklin Bank*, 74 Vermont, 246. See also *New Orleans* v. *Houston*, 119 U. S. 265.

The facts show that the tax is on the business of the bank. It is also on the bank itself because it cannot recoup the amount paid from the depositor. Gray on Taxing Power, § 801a; Cooley on Taxation, 3d ed., vol. 1, p. 717, n. 1; *Farmers Bank* v. *Hoffman*, 93 Iowa, 119; *New Orleans* v. *Houston*, 119 U. S. 265; *Boston* v. *Beal*, 51 Fed. Rep. 306; *Stapylton* v. *Thaggard*, 91 Fed. Rep. 93; *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440.

The statute by design and in effect is a duress, as it compels the banks to execute the stipulation or to lose their depositors. 15 Cyc. 249. There is really no choice. *Swift* v. *United States*, 111 U. S. 22; *Maxwell* v. *Griswold*, 10 How. 241; *Robertson* v. *Frank Brothers*, 132 U. S. 17; *Atchison, Topeka &c. Ry. Co.* v. *O'Connor*, 223 U. S. 280; *Gaar, Scott & Co.* v. *Shannon*, 223 U. S. 468, 471.

The statute interferes with existing contracts between the bank and its depositors and impairs their obligation.

The act of the bank is *ultra vires* and not enforceable. *McCormick* v. *Bank*, 165 U. S. 538, quoted in *Bowen* v. *Needles National Bank*, 94 Fed. Rep. 925, 930; *Metropolitan Stock Exchange* v. *National Bank*, 76 Vermont, 303; *First National Bank* v. *National Exchange Bank*, 92 U. S. 122; *Concord First National Bank* v. *Hawkins*, 174 U. S. 364; *Central Transportation Co.* v. *Pullman Car Co.*, 139 U. S. 24; 6 Century Digest, col. 1655–1662; 21 Am. & Eng. Ency. (2d ed.) 376 (9) and cases cited; *Commercial National Bank* v. *Pirie*, 82 Fed. Rep. 799, 801–802; *Norton* v. *Bank*, 61 N. H. 589.

As to the effect of stipulations somewhat analogous to the one in question, see *Home Ins. Co.* v. *Morse*, 20 Wall. 445; *Baron* v. *Burnside*, 121 U. S. 186.

To enforce a stipulation on the part of the defendant

agreeing to pay such tax, would clearly cast upon it additional burden, and which was not contemplated in, and is not authorized by the statutes to which it owes its existence. *First National Bank* v. *Converse*, 200 U. S. 425; *Merchants National Bank* v. *Wehrman*, 202 U. S. 295; *Dolley* v. *Abilene Nat. Bank*, 179 Fed. Rep. 461.

The stipulation in the case at bar subjects a national bank to the supervision of another sovereignty; and this the bank cannot voluntarily or involuntarily submit to.

There was no valid consideration and, as the tax is one upon the depositors, it violates the Fourteenth Amendment by denying the equal protection of the laws in selecting depositors in national banks and making an arbitrary classification of them.

It exempts from that class certain specified corporations, and thereby in some of these exemptions discriminates among the depositors constituting the class.

It discriminates between depositors in national banks and depositors in state banks and trust companies.

It discriminates between depositors in national banks and individuals generally. *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Nicol* v. *Ames*, 173 U. S. 509, 521; *Magoun* v. *Illinois Trust Co.*, 170 U. S. 283, 293; *Keeney* v. *New York*, 222 U. S. 525; *Mutual Loan Co.* v. *Martell*, 222 U. S. 225, 235.

Such a selection is an arbitrary classification. *Gulf, Colo. &c. Ry.* v. *Ellis*, 165 U. S. 150, 165; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *State* v. *Hoyt*, 71 Vermont, 59.

The act discriminates among the depositors constituting the class by the exceptions made in § 819. Certain depositors would be left to taxation at the place of their residence at a higher rate. *Magoun* v. *Illinois &c. Bank*, 170 U. S. 283; *State* v. *Hoyt*, 71 Vermont, 59; *Aluminum Co.* v. *Ramsey*, 222 U. S. 251.

The statute discriminates against national banks by requiring the disclosure of names of banks holding this class of deposits.

The statute discriminates against the general taxpayer.

The act violates the Fourteenth Amendment, as the taxes so levied would take the property of the depositors without due process of law. There was no valid assessment, and none provided for.

The tax is assessed, if assessed at all, without proper notice to the depositors. 27 Am. & Eng. Ency. (2d ed.) 660, 663; Cooley's Const. Limit. 259; *Commonwealth* v. *Del. D. C. Co.*, 123 Pa. St. 594, 600; *Commonwealth* v. *Lehigh V. R. Co.*, 104 Pa. St. 89, 91, 101; *Jones* v. *Winthrop Savings Bank*, 66 Maine, 242, 245; *State* v. *Bradford Savings Bank*, 71 Vermont, 234, 238; 1 Cooley on Taxation, 600, 753; *People* v. *Hastings*, 29 California, 449.

Dollar Savings Bank v. *United States*, 19 Wall. 227; *King* v. *United States*, 99 U. S. 229; *United States* v. *Erie Ry. Co.*, 107 U. S. 1, and *United States* v. *Phil. & Read. R. R. Co.*, 123 U. S. 113, holding that there are some classes of property as to which a legislative assessment is sufficient without a special valuation, do not apply to this case.

There is no proper notice to the depositors. In *Turpin* v. *Lemon*, 187 U. S. 51, 57; *McMillen* v. *Anderson*, 95 U. S. 37; *State Railroad Tax Cases*, 92 U. S. 575, 610; *Kentucky Railroad Tax Cases*, 115 U. S. 321; *Davidson* v. *New Orleans*, 96 U. S. 97, 104, there was a hearing; in this case there is none.

There is no independent scheme of taxation, such as is required to preserve constitutional rights. A special tax law must make such provision for an independent scheme. *Commonwealth* v. *Lehigh Valley R. R. Co.*, 104 Pa. St. 89, 101. *Winona &c. Co.* v. *Minnesota*, 159 U. S. 526; *Hagar* v. *Reclamation District*, 111 U. S. 701, distinguished.

Mr. Clarke C. Fitts and *Mr. Hale K. Darling* for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

The judgment under review awarded a recovery in favor of the State of Vermont against the plaintiff in error, The Clement National Bank, upon an agreement which the bank had made pursuant to § 815 of Chapter 37 of the Public Statutes of Vermont entitled "Taxation of National Bank Deposits," originally enacted as No. 41 of the Acts of 1906. The chapter is set forth in the margin.[1] The Federal questions relate to the validity of the

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[1] CHAPTER 37.

TAXATION OF NATIONAL BANK DEPOSITS.

SEC. 804. *Depositor's report to commissioner.* Every person having, on the first day of April and October, an interest bearing deposit in a national bank in this state, shall, except as otherwise provided by this chapter, within twenty days thereafter, report the amount thereof and the name of such bank to the commissioner of state taxes, on blanks prepared and furnished by him to such depositor on application therefor.

SEC. 805. *Depositor's report to listers.* Every resident of this state so having an interest bearing deposit in a national bank in this state shall annually, except as otherwise provided in this chapter, report to the listers of the town wherein he resides, the names of all banks located in this state wherein he then has or has had any such deposits during the year next preceding the first day of April in the year wherein such report is made, and the amount of such deposits.

SEC. 806. *Interrogatories in inventories.* The secretary of state shall incorporate into the tax inventory interrogatories so framed as to require the person subscribing to the same to state in writing and under oath whether or not he then has or has had during the year next preceding the first day of such April, any such deposits; and, if such interrogatories are answered in the affirmative, he shall also state the name of such bank and the amount of such deposit with all accrued interest.

SEC. 807. *Reports by listers.* The listers in every town shall, on or

bank's stipulation in view of the scheme of taxation which induced the making of it.

The plaintiff in error was organized under the Federal

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before the tenth day of May, upon blanks to be furnished by the commissioner of state taxes, report the names of all persons whose inventories show that they had in a national bank in this state on the first day of the preceding April, deposits of the character and kind described in the third preceding section, together with the amount of each individual deposit so held on such first day of April and the name of the bank holding such deposit.

SEC. 808. *Reports filed; inspection.* Such reports shall be kept on file by said commissioner for three years from and after the dates on which the taxes based thereon became due and payable to the state. Such reports shall not be subject to the inspection of any person other than said commissioner and the employés in his office, the attorney general, and the state's attorney of the county wherein such bank has its principal place of business or said depositor, if a resident of this state, has his domicile. Any information contained in such reports shall not be disclosed by any person authorized to examine the same, except by the direction of a court of competent jurisdiction.

SEC. 809. *Assessment of tax; payment.* Every person so having a deposit in a national bank as aforesaid shall semi-annually, except as otherwise provided by this chapter, pay a tax to the state, which is hereby assessed at the rate of seven-twentieths of one per cent semi-annually upon the amount of such deposit so held by such national bank on the first day of April and October; and no deduction therefrom shall be made on account of any exemption. The taxes imposed by this section shall be paid to the state treasurer semi-annually on or before the last day of May and November next following the dates whereon the reports provided for in the fourth preceding section are required to be made.

SEC. 810. *Exempt from other taxes.* No other tax shall be assessed on such deposits in national banks, nor against the depositors on account thereof.

SEC. 811. *Penalty.* A depositor who wilfully fails to make returns or pay the taxes provided by this chapter shall forfeit ten per cent of such deposit to the use of the state for each month's delay in filing such return. Such tax and forfeiture may be recovered in an action on this statute commenced by the commissioner of state taxes in the name of the state, in any county, municipal or city court.

SEC. 812. *Trustee process.* A person having any of the moneys,

statutes and does business at Rutland, Vermont. For several years it has maintained a "savings department," allowing depositors therein interest at a rate exceeding

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goods, chattels, effects, rights or credits of said depositor in his possession may be summoned as trustee in any action instituted under the preceding section, notwithstanding that the amount of such tax or the amount in his hands may be less than ten dollars.

SEC. 813. *Waiver of penalty.* If the commissioner of state taxes or the court wherein such action is pending for the recovery of such tax or forfeiture becomes satisfied that such failure was not wilful on the part of the depositor, said commissioner or said court may, in its discretion, waive any part or all of such penalty.

SEC. 814. *Bank may elect to pay.* If a national bank in this state so elects it may pay to the state all taxes provided by this chapter; and it shall be lawful for such bank to deduct such taxes so paid from the interest or deposits then or thereafter held by it belonging to the person from whom such tax became due.

SEC. 815. *Same, stipulation.* If a national bank elects to so pay such taxes to the state and to make returns as hereinafter provided, it shall semi-annually, on or before the first day of April and October, file with the commissioner of state taxes a stipulation setting forth such fact; and thereupon such bank shall become liable to the state for such tax for the six months named in such stipulation and to make returns as hereinafter provided; and no depositor in such bank shall be required to make the returns hereinbefore specified covering the six months' period for which such stipulation was filed.

SEC. 816. *Commissioner's certificate to bank.* Upon such stipulation being filed, said commissioner shall issue in duplicate to such bank a certificate showing that it has filed such stipulation.

SEC. 817. *Bank's liability.* Every bank filing such stipulation shall thereupon become liable to the state for the amount of such tax of seven-twentieths of one per cent of the average amount of such deposits held by such bank during the six months beginning with the first day of April and October respectively, for which such stipulation was filed.

SEC. 818. *Bank's return.* If such bank, on or before the first day of April, files a stipulation as hereinbefore provided, it shall, on or before the thirty-first day of the following October, file a return with the state treasurer and commissioner of state taxes, verified by the oath of its president, cashier, or one of its directors, showing the average amount of such deposits for the six months ending the thirtieth day of Septem-

two per cent. per annum, payable on the first days of January and July in each year on deposits remaining in bank on those days. Certain other depositors have received certificates of deposit with interest at the rate of three per cent. per annum for each calendar month that the deposit continued. Prior to the year 1906, depositors in national banks in Vermont, whether or not their deposits bore interest, were taxable at the local tax rate, in the districts in which they resided, in common with other owners of credits (or debts due from solvent debtors) under the general plan of local taxation. Pub. Stat. (Vt.) 1894 ed., §§ 374, 398–399. Depositors in savings banks and trust companies, organized under the laws of the State, had long been exempt from all taxation upon their deposits to a specified extent (at first $1,500, and later $2,000 in any one institution), these organizations being subject to a state tax of seven-tenths of one per

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ber in that year, and shall pay to the state treasurer the amount of such semi-annual tax. In case such bank, on or before the first day of October, files a like stipulation, it shall, on or before the thirtieth day of the following April, file a like return with the first named officers, showing the average amount of such deposits for the six months ending with the thirty-first day of March next preceding the making of such return, and shall, in like manner, pay such taxes.

Sec. 819. *Exemptions.* The provisions of this chapter shall not apply to municipalities; nor to corporations organized solely for charitable, educational or religious purposes; nor to railroad, insurance, guaranty, express, telegraph, telephone, steamboat, car, transportation, sleeping car, parlor car, mortgage, loan or investment companies; nor to savings banks, trust companies, and savings banks and trust companies which have interest bearing deposits in national banks; nor to national banks having an interest bearing deposit in another national bank; nor to any person having any sum of money on deposit in a national bank whereon interest not exceeding the rate of two per cent per annum is paid or allowed him by such national bank.

Sec. 820. *Exemptions restricted.* Nothing in this chapter shall be construed as exempting from taxation any deposit in any national bank, except as hereinbefore provided.

cent. per annum computed upon the average amount of deposits; in this computation, deposits in excess of the above-stated limit were deducted and upon these the depositors were taxable locally. Pub. Stat. (Vt.) 1894 ed., §§ 582–584; Acts of 1902, No. 20, § 41; Acts of 1906, No. 28, § 1; Pub. Stat. 1906 ed., §§ 744–746.

This system being continued as to the state institutions and the depositors therein, the General Assembly passed the statute in question which provides for a state tax on interest-bearing deposits in national banks (where the interest exceeds two per cent. per annum) of seven-twentieths of one per cent. semi-annually. Persons having deposits of this sort, unless specially excepted (§ 819), are required to report them at specified periods (§§ 804–806), and to pay the tax without deduction on account of any exemption (§ 809). No other tax is to "be assessed on such deposits in national banks, nor against the depositors on account thereof" (§ 810).

It is further provided that, if a national bank so elects, it may pay to the State all the prescribed taxes and deduct them from the interest or deposits of the persons from whom they became due (§ 814). On such election, the bank is, semi-annually, to file with the state commissioner a stipulation to that effect; no depositor is required to make returns for the period covered by the stipulation (§ 815); the state commissioner is to issue to the bank a certificate showing that it has been filed (§ 816); and the statute provides that upon such filing the bank shall "become liable to the State for the amount of such tax of seven-twentieths of one per cent. of the average amount of such deposits" held by the bank during the six months to which the stipulation refers (§ 817).

This suit was brought by the State upon the following stipulation which was filed by the plaintiff in error, on October 1, 1908, the returns and payment therein specified not having been made:

"STATE OF VERMONT:

"The Clement National Bank, whose banking house is located at Rutland, in the State of Vermont for the consideration hereinafter named, hereby stipulates and agrees with the State of Vermont that on or before the thirtieth day of April 1909, it will make sworn returns to the State Treasurer and Commissioner of State Taxes showing the average amount of all deposits held by it during the six months beginning with the first day of October 1908, whereon the rate of interest paid or allowed by said bank to the depositors thereof exceeds two per cent per annum; and that on or before the thirtieth day of April 1909, it will pay to the State Treasurer a tax of seven-twentieths of one per cent of the average amount of all such deposits so held by it.

"This stipulation is made and is to be filed with said Commissioner in consideration and for the purpose of carrying out the provisions of the statutes of Vermont which provides that upon the making and filing hereof as aforesaid no depositor having an interest bearing deposit or deposits in said bank whereon the rate of interest paid or allowed by said bank exceeds two per cent per annum shall be required on or before the 20th day of October 1908, to make returns to the State Treasurer and Commissioner of State Taxes showing the amount of such deposit or deposits in said bank on the first day of October 1908; and that no such depositor shall be required to pay to the State Treasurer on or before the thirtieth day of November 1908 a tax of seven-twentieths of one per cent of the amount of such interest bearing deposit or deposits so held by said bank on the first day of October 1908.

"This stipulation is also made and is to be filed as aforesaid for the purpose of obtaining from said Commissioner as the law provides a certificate in duplicate setting forth that the same has been filed and of showing that said bank has elected to pay and will pay to the State Treasurer

on or before the thirtieth day of April 1909 a tax of seven-twentieths of one per cent of the average amount of all such deposits held by said bank during the six months beginning with the first day of October 1908 on account of which the depositors thereof shall be by said bank paid or allowed interest exceeding the rate of two per cent per annum.

"In witness whereof said bank has on this 30th day of September 1908 at Rutland, in the State of Vermont caused its corporate name to be hereunto affixed by its cashier duly empowered so to do by vote of said bank.

CLEMENT NATIONAL BANK,
Rutland, Vermont,
by C. H. HARRISON, *Cashier.*

"Endorsed: Received October 1, 1908, J. E. Cushman, Commissioner of State Taxes."

The case was tried upon an agreed statement of facts. It appeared that the state commissioner issued to the bank his certificate, which was conspicuously posted in its banking room, that the stipulation had been filed and that therefore depositors, having deposits upon which the rate of interest exceeded two per cent. per annum, would not be required to make returns. In consequence, none of the depositors' reports was made, and there was no valuation of the individual deposits by any official during the period covered by the stipulation.

It was also set forth that, under the bank's method of allowing interest on deposits, it was impossible for it to determine, at the time it was required to make its semi-annual returns under the stipulation, upon what deposits interest exceeding two per cent. per annum would actually be allowed. Thus, deposits might be withdrawn prior to January first or July first, the dates on which interest was credited on amounts then in bank. In practice, in former periods for which the plaintiff in error had made payments under similar stipulations, it had included all

deposits belonging to the class upon which interest was allowable in excess of two per cent. per annum, in arriving at the average amount of deposits, whether or not interest was in fact paid. The monthly averages were ascertained by averaging the aggregate deposits held at the close of each day, and the average for the six months was taken by averaging the monthly averages. Thus computed, the average amount of deposits of the class above-described (including those of non-residents) for the six months beginning October 1, 1908, was $594,357.74. The average deposits exempted for the period in question, under § 819, were $15,688.15, and the net average for the six months was $578,669.19 upon which the State sought to recover $2,025.33.

The State also declared upon a similar stipulation filed by the bank on April 1, 1909, covering the ensuing six months. The court of first instance rendered judgment in favor of the State for the full amount demanded. This was reversed by the Supreme Court of the State which held that the statute did not apply to non-residents and that the amount of the recovery should be determined by a computation based on the credits of resident depositors. Final judgment was then entered against the bank, covering the two periods, in the sum of $3,989.85. *State* v. *Clement National Bank*, 84 Vermont, 167.

1. It is contended that the statute imposed a tax upon the franchises of national banks and hence exceeded the state power. *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, 667, 668, and cases there cited.

But it is apparent that, whatever other objections may lie, the tax complained of is not laid upon the national bank itself, its property or franchises. It is imposed upon the depositors; they alone are required to pay it. If they fail to make returns, as provided by the statute, they are subject to penalty; and both tax and penalty are recoverable by suit against them in the name of the State. If

they escape the tax, it is because of the bank's stipulation. If the bank becomes liable, it is by virtue of its agreement and not otherwise. The statute was so interpreted by the Supreme Court of the State which said: "The transaction which makes the money the property of the bank gives the depositor a credit of equal amount, and the term 'deposit' may be used to indicate the money deposited or the credit which the depositor receives for it. The last must be taken to be the meaning here, for the statute lays the tax upon the depositor in so many words." 84 Vermont, 167, 181. There is no difficulty in the interpretation of the statute as to the prescribed incidence of the tax and, aside from that, the decision of the state court is controlling as to the persons upon whom the statute fixed responsibility. It was the province of that court to determine what the terms of the statute authorized, commanded or forbade, and it is for this court to say whether in view of its operation, thus delimited, it conflicts with the Federal law. *People* v. *Weaver*, 100 U. S. 539, 541, 542; *First National Bank of Garnett* v. *Ayers*, 160 U. S. 660, 664; *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440, 444; *Commercial Bank* v. *Chambers*, 182 U. S. 556, 560.

2. It is not urged that the legislation of Congress relating to national banks, either expressly or by implication, withdraws from the reach of the taxing power of the State the credits belonging to depositors, whether or not interest-bearing. "No one contends," says the plaintiff in error, that a State "has not the right to include in its taxation of a person's property the amount which he may have on deposit in the savings department of a national bank." It must also be recognized that in exercising its authority to tax property within its jurisdiction, the State is not limited to one method. It has a broad range of discretion in classifying subjects of taxation and in employing different methods for different sorts of property.

Bell's Gap R. R. Co. v. *Pennsylvania*, 134 U. S. 232, 237; *Home Insurance Co.* v. *New York*, 134 U. S. 594, 606; *Citizens' Telephone Co.* v. *Fuller*, 229 U. S. 322, 329–331. The objection made by the bank to the State's plan must rest not upon the mere fact that the depositors in national banks are taxed upon their credits or that they are taken out of the system of local taxation, but upon the ground that the measure adopted is essentially inimical to national banks, frustrating the purpose of the national legislation or impairing their efficiency as federal agencies. *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 283; *McClellan* v. *Chipman*, 164 U. S. 347, 357. And that, in substance, is the position taken.

To be open to such an objection, it must appear that the scheme of taxation constitutes an injurious discrimination. Even in the case of shares of the capital stock of national banks, which cannot be taxed save with the consent of Congress (*People* v. *Weaver*, 100 U. S. 539, 543), taxation by the State is expressly permitted if it is not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens. Rev. Stat., § 5219. The object is to prevent hostile discrimination and for this purpose a standard is fixed. *Mercantile Bank* v. *New York*, 121 U. S. 138, 154, 155. With respect to the taxation of depositors' credits, the Federal statute does not prescribe a rule; and, the property being normally subject to the State's taxing power, there is no warrant for implying a restriction which would extend beyond the requirements of protection from the prejudicial effect of such exactions as would be unjustly discriminatory.

It follows that the comparison must have regard to business and property which may be deemed to have, generally speaking, a similar character; and, in the present case, there is no basis for the contention that the statute unfairly discriminates against national banks unless it may be found in the method of dealing with deposits in

banking institutions organized under the state law. The institutions thus brought to our attention are savings banks and trust companies. Formerly there were also state banks of circulation, discount and deposit; but these, shortly after the passage of the National Banking Act, ceased to exist and were succeeded by trust companies or "savings banks and trust companies." The latter were organized under special charters and had, except as to the issuance of notes of circulation, very nearly the same powers as those possessed by the earlier state banks. *State* v. *Franklin County Savings Bank & Trust Co.*, 74 Vermont, 246, 257–258.

These state organizations, as it has already been observed, for many years had been subject to a special state tax upon the average amount of deposits, after certain deductions. This has been held to be a franchise tax (*State* v. *Bradford Savings Bank*, 71 Vermont, 234; *State* v. *Franklin County Savings Bank & Trust Co.*, *supra.*) Having laid this tax, the State exempted the depositors in these savings banks and trust companies from taxation upon their respective credits not exceeding $2,000 in any one institution. Individual deposits over this amount, as we have seen, were to be deducted in computing the tax to be paid by the state banks and trust companies and were to be listed by the depositors for local taxation at their places of residence. The situation then was, with respect to the state institutions, that they paid the tax of seven-tenths of one per cent. per annum upon average deposits, and the depositors were exempted from taxation upon those deposits which entered into the calculation of this average. National banks did not pay, and could not be compelled to pay, a franchise tax, or other tax upon their deposits, and their depositors, having credits bearing interest at a rate exceeding two per cent. per annum, were required by the statute in question to pay upon such credits a tax of seven-twentieths of one per cent. semi-

annually. Or, if any national bank desired to do so, it could agree to pay an amount computed at the same rate upon the average amount of deposits of the described class, and thus save its depositors both from the tax and the inconvenience of making returns.

With respect to those interest-bearing deposits of the described class which did not exceed severally the sum of $2,000, it is evident that there was no hostile discrimination against the national banks by reason of the rate of the tax imposed upon their depositors. True, in the one case the depositor was exempted to the specified amount, and in the other the depositor was taxed. But the depositor in the state bank was relieved because the bank paid. The amount received by the State was substantially the same in each case, that is, at the rate of seven-tenths of one per cent. a year. The state banks transacted their business under this charge. As to national banks, the State could not follow the course taken with the state institutions and lay a tax upon the bank computed upon the amount of its deposits with a corresponding exemption to the depositors. Nor was the State bound to extend its exemption to cases where the reason for it did not exist. But the national bank, not being subject to the tax which the state banks had to pay, had the opportunity to give its depositors, if it chose, an equivalent benefit in interest rates. So far as the amount of the tax upon these deposits was concerned, the national bank was not put at a disadvantage as compared with the state banks.

Then, as to deposits in excess of $2,000 for which depositors in the state institutions were taxable locally, it does not appear that the difference in method was to the prejudice of national banks. The depositors in the latter, with respect to the interest-bearing deposits in question, had a low flat rate and were free from what the state court properly called "the greater burden and uncertain demands of local taxation." The agreed statement of

facts sets forth that the average local rate throughout the State for the year beginning April 1, 1908, was $16.70 per $1,000 of taxable property set in the grand list; the minimum being $7.50 per $1,000, and the maximum being $39.80 per $1,000. While deduction for debts was allowed in the ascertainment of the amount of personal estate subject to the local tax, and this was laid only once a year, the allowance of a much lower rate on deposits to any amount in a national bank might well be regarded as a compensatory, if not a greater, advantage in its general operation. It is said that no such publicity was required of the other taxpayers regarding their personal property as was demanded of depositors in national banks. This argument refers to the requirement that the latter should report the amount of their deposits and the names of the banks in which they were kept. But, in the case of local taxes, a "full statement of all taxable property" was required from each taxpayer, who was obliged to make oath that his inventory was "a full, true and correct list and description." Pub. Stat. (Vt.) 1906, §§ 536–540. What difference there may be in the form of the two statements is plainly not important. The requirements in the case of the depositors in national banks went no further than to secure the payment of the tax, and the returns were subject to official inspection only. Pub. Stat. (Vt.) 1906, § 808, quoted *ante*, p. 127.

It was in these circumstances that the legislature adopted the provision that, if the national bank agreed to pay an amount which might fairly be regarded as equivalent to the sum demanded of the depositors, the latter should be free from the necessity of making any returns. In no proper sense, could this be deemed to place the bank under duress. It may well be that the State desired by substituting the flat exclusive rate in place of local taxation to facilitate the appearance in larger amount of a class of property which easily escapes

taxation. 84 Vermont, 167, 195. But the exaction it imposed upon the depositors was not relatively unfair, and in providing that the bank might, if it saw fit, make the returns and payment stipulated, the State left no possible ground for objection on the score of inconvenience in practical administration. That the plaintiff in error, in the conduct of its savings department, did not fail to perceive the business advantages of the State's plan is apparent from the excerpts from the advertisements it published during the period covered by the stipulation in suit and prior thereto. The following are illustrative:

"We pay 4 per cent. on savings accounts, in any amount from one dollar upwards. All taxes are paid by the bank, and you do not need to report deposits in this bank to the listers."

"Be sure and take advantage of the law governing taxes on deposits in National banks. Our depositors do not make any report of their deposits to the listers."

"Under the law governing savings deposits in National banks, we pay all taxes on any amount. There is no $2,000 limit. You can carry any amount tax free, and no report of your deposit is made by the bank to the listers."

We find no basis for the charge of injurious discrimination.

3. With this view of the scheme of the statute, we come to the question of the validity of the stipulation in suit. The bank contends that it was *ultra vires*. There is no suggestion that the bank did not have the power to allow interest upon deposits, or to conduct its savings department. Neither party questions the bank's authority in that respect. The practice of maintaining savings departments seems to have become extensive in recent years, without challenge by the Government. (Report of the Comptroller of the Currency; Treasury Reports, 1912, p. 361.) The position of the plaintiff in error is that, as-

suming its right to transact business of this sort, still it could not lawfully enter into the agreement which the State seeks to enforce.

The applicable principles are not in dispute. The Federal statutes relative to national banks constitute the measure of the authority of such corporations, and they cannot rightfully exercise any powers except those expressly granted or which are incidental to carrying on the business for which they are established. *California Bank* v. *Kennedy*, 167 U. S. 362, 366; *Logan County Bank* v. *Townsend*, 139 U. S. 67, 73. These incidental powers are such "as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently." *First National Bank* v. *National Exchange Bank*, 92 U. S. 122, 127; *Western National Bank* v. *Armstrong*, 152 U. S. 346, 351. The bank was authorized to receive deposits. Arising from these deposits were credits to the depositors, forming part of their property and subject to the taxing power of the State. It cannot be doubted that the property being taxable, the State could provide, in order to secure the collection of a valid tax upon such credits, for garnishment or trustee process against the bank or in effect constitute the bank its agent to collect the tax from the individual depositors. *National Bank* v. *Commonwealth*, 9 Wall. 353, 361–363; *Merchants Bank* v. *Pennsylvania*, 167 U. S. 461, 465, 466. Further, it would seem to be highly appropriate that, the credits of depositors being taxable by the State, the bank should be free to make reasonable agreements, and thus promote the convenience of its business, with respect to the making of returns and the payment of such amounts as the State might lawfully require of its depositors. Provision for such agreements, instead of constituting an interference with a Federal instrumentality would aid it in performing its functions

and would remove unnecessary obstacles to the successful prosecution of its business.

The contention, however, is that in this case the bank, under the statute, stipulated to pay at the specified rate upon an average amount of deposits and it is insisted that this amount did not correspond precisely to the amounts upon which interest was actually paid to the depositors and upon which accordingly they would have been taxable. That is, as already stated, certain deposits being withdrawn between the interest dates fixed by the bank, there would be deposits belonging to the interest-bearing class upon which interest would not in fact be paid. The facts in regard to the fluctuations in deposits during the period in question are shown in the excerpts from the agreed statement set forth in the margin.[1] But we are of the

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[1] "Deposits to the amount of $4,514, were made subsequent to July 1, 1908, and were withdrawn prior to January 1, 1909; and deposits to the amount of $3,002.12 were made subsequent to January 1, 1909, and withdrawn, prior to July 1, 1909, some being withdrawn prior to April 1, and some subsequent thereto. No interest was paid by the defendant on any of the deposits mentioned in this article.

"Deposits to the amount of $7,069.24 were made after October 1, 1908, and were withdrawn prior to April 1, 1901, of which $5,723.29 were in the bank January 1, 1909, and drew interest at the aforesaid rate; deposits in said bank on October 1, 1908, to the amount of $20,726.28 whereon interest at said rate was then allowed by the defendant, were withdrawn prior to March 31, 1909. Eleven of the individual depositors having interest bearing deposits, not exceeding in the aggregate $4,561.95 became such after October 1, 1908, and ceased to be depositors before March 31, 1909; and forty-eight depositors of this class having deposits on October 1, 1908, not exceeding in the aggregate $22,530.54 ceased to be depositors before March 31, 1909."

It also appeared that the aggregate of such interest-bearing deposits on October 1, 1908, was $569,393.75 of which $36,424.27 were deposited by non-residents; and on April 1, 1909, such aggregate was $623,242.75 of which $39,361.98 were deposited by non-residents. The aggregate on the last-named date was $28,885.01 in excess of the average for the semi-annual period ending March 31, 1909. (Rec. pp. 16, 17.)

opinion that this lack of an exact correspondence between the amount upon which the depositors would have been taxed and the average amount upon which the bank agreed to pay cannot be said to furnish a ground for holding the agreement to be invalid. There was, and in the ordinary course of business there naturally would be, a substantial equivalency. The arrangement to make the computation upon the average amount of deposits of the class was a simple and convenient method which could fairly be said to offset in its advantages such risks as might be incident to the fluctuations. It is further said that the agreement did not contemplate a charge against the depositors' accounts of the amount paid by the bank. The bank, however, was free to adjust its interest rates accordingly. We find no ground for sustaining the contention that the agreement was beyond the bank's power.

4. But it is also insisted that the agreement cannot be enforced for the reason that it was without valid consideration. The proposition is that the tax considered as one upon the depositors would, if enforced, constitute a denial of the equal protection of the laws, and would take the property of the depositors without due process of law.

What has already been said with respect to the charge of discrimination as against the bank is applicable here and need not be repeated. Reference is also made to the exemptions granted by § 819 of the statute (*ante*) which makes its provision for the tax inapplicable to municipalities; to corporations organized solely for charitable, educational or religious purposes; and to various corporations which were otherwise taxed. All these exemptions it was manifestly within the power of the State to allow. Similarly, with respect to persons whose deposits did not bear interest exceeding two per cent. per annum, the legislature took this method of recognizing a practical difference between deposit accounts of the ordinary commercial sort and those which partook, generally speaking,

of the character of savings accounts. It cannot be said that the classification adopted was purely arbitrary or beyond the power of the State. *Citizens' Telephone Co.* v. *Fuller*, 229 U. S. 322.

In support of the contention that the tax would deprive the depositors of their property without due process of law it is said (1), that there was no valid assessment, and none was provided for and (2), that the tax was assessed, if at all, without proper notice to the depositors. The statute laid the tax at a specified rate upon bank credits; no other assessment than that made by the statute itself was necessary; and no other notice to the depositor than that thus given by law was required. The tax was recoverable by suit in which the depositor would have full opportunity to resist any illegal demand. *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 240; *King* v. *United States*, 99 U. S. 229, 233; *United States* v. *Erie Railway Co.*, 107 U. S. 1, 2; *United States* v. *Chamberlin*, 219 U. S. 250, 263, 264.

5. Further objection is made that the statute interfered with existing contracts between the bank and its depositors, impairing their obligation. But this is clearly untenable. The statute did not act upon such contracts; it imposed a tax upon the property of depositors in the exercise of a power subject to which the deposits were made. *North Missouri R. R. Co.* v. *Maguire*, 20 Wall. 46, 61.

The judgment is affirmed.

Affirmed.

UNITED STATES *v.* WHITRIDGE, RECEIVER OF THE THIRD AVENUE RAILROAD COMPANY.

UNITED STATES *v.* JOLINE AND ROBINSON, RECEIVERS OF THE METROPOLITAN STREET RAILWAY COMPANY.

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

Nos. 466, 467. Argued October 21, 1913.—Decided November 10, 1913.

The Corporation Tax Law of 1909 was adopted before the ratification of the Sixteenth Amendment and imposed an excise tax on the doing of business by corporations, and not in any sense a tax on property or upon income merely as such. *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107.

The Corporation Tax Law does not in terms impose a tax upon corporate property or franchises as such, nor upon the income arising from the conduct of business unless it be carried on by the corporation.

The act of August 5, 1909, c. 6, § 38, 36 Stat. 11, 112, does not impose a tax upon the income derived from the management of corporate property by receivers under the conditions of this case.

193 Fed. Rep. 289; 198 Fed. Rep. 774, affirmed.

THE facts, which involve the construction of the Federal Corporation Tax Act and the determination of whether the same imposed a tax upon the income derived from the management of corporate property by receivers appointed by the court, are stated in the opinion.

Mr. Assistant Attorney General Graham for the United States:

An insolvent corporation, operated by a receiver duly appointed by a court of equity, is, while in the hands of such receiver, "doing business" within the meaning of § 38 of the Corporation Tax Act of August 5, 1909, 36 Stat. 11, 112.

Such corporation being engaged in business, the receiver thereof is obliged to make the return provided for in the statute. *Central Trust Co.* v. *New York City*, 110 N. Y. 250, 256; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 145; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *In re Metropolitan Ry. Receivership*, 208 U. S. 90; *Morrison* v. *Forman*, 177 Illinois, 427; *New York Terminal Co.* v. *Gaus*, 204 N. Y. 512, 515; *Joline* v. *Williams*, 200 N. Y. 528; *P. & R. R. R. Co.* v. *Commonwealth*, 104 Pa. St. 80.

Mr. Joseph H. Choate, Jr., with whom *Mr. Matthew C. Fleming* was on the brief, for respondents in No. 466.

Mr. Arthur H. Masten, with whom *Mr. Ellis W. Leavenworth* was on the brief, for respondents in No. 467.

Mr. Justice Pitney delivered the opinion of the court.

These cases were heard together in the District Court and in the Circuit Court of Appeals (*sub nom. Pennsylvania Steel Company* v. *New York City Railway Company*, 193 Fed. Rep. 286; 198 Fed. Rep. 774). They were argued together in this court, and may be disposed of in a single opinion.

In the years 1909 and 1910 certain lines of street railway in the City of New York, that may be conveniently designated as the Third Avenue system, were in the hands of the respondent Whitridge, as receiver, under orders made in the year 1908 by the Circuit Court of the United States for the Southern District of New York in actions pending therein against the several proprietary companies. One of these actions was a foreclosure suit; the others were creditors' actions based upon the insolvency of the respective companies. The powers conferred upon the receiver did not vary in any respect now

material, and so a recital of the substance of one of the orders will suffice as an example. This order constituted Whitridge receiver of all the railroads and other property of the company, including tracks, cars and other rolling stock and equipment, easements, privileges and franchises, and the tolls, earnings, income, rents, issues and profits thereof, with authority "to run, manage, and operate the said railroads and properties, to collect the rents, income, tolls, issues and profits of said railroads and property, to exercise the authority and franchises of said defendant, and discharge its public duties, acting in all things subject to the supervision of this court." By the same order the officers, agents and employés of the company were required to turn over and deliver to the receiver all of the said property in their hands or under their control, and the company was enjoined from interfering in any way with his possession or management.

In the same years (1909 and 1910) certain other lines of street railway in the City of New York, which may be described as the Metropolitan system, were in the possession of the respondents Joline and Robinson as receivers, appointed in the year 1907 by the Circuit Court of the United States for the same district, in several actions therein pending against the corporations which were owners of these lines. The orders appointing these receivers contain provisions substantially similar to those already recited. (See *In re Metropolitan Railway Receivership*, 208 U. S. 90, 93–96.)

In the year 1911, petitions were filed in the Circuit Court in behalf of the United States praying for orders directing the receivers to make returns of the net income of the respective railway corporations for the years 1909 and 1910, to the collector of internal revenue, in the manner required by the provisions of the Corporation Tax Law. (Tariff Act of August 5, 1909, § 38, 36 Stat., c. 6, pp. 11, 112–117.)

The applications were resisted by the receivers on the ground that the respective corporations did not during the years 1909 and 1910 carry on any business in respect of the property that was in their hands as such receivers; that they as such receivers managed, controlled and operated the same, and carried on all the business in respect thereto, and received all the income arising therefrom, not acting in place of the directors and officers of the respective companies, but as officers of the court; and that they were therefore not subject to the provisions of the act.

Jurisdiction of the controversy having been transferred to the District Court by virtue of the new Judicial Code, § 290, 36 Stat. 1167, that court sustained the contention of the receivers (193 Fed. Rep. 286) and the Circuit Court of Appeals affirmed this decision (198 Fed. Rep. 774). The cases are brought here by writs of certiorari.

As repeatedly pointed out by this court, the Corporation Tax Law of 1909—enacted, as it was, after Congress had proposed to the legislatures of the several States the adoption of the Sixteenth Amendment to the Constitution, but before the ratification of that Amendment—imposed an excise or privilege tax, and not in any sense a tax upon property or upon income merely as income. It was enacted in view of the decision of this court in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, which held the income tax provisions of a previous law (Act of August 27, 1894, 28 Stat., c. 349, pp. 509, 553, § 27, etc.) to be unconstitutional because amounting in effect to a direct tax upon property within the meaning of the Constitution and because not apportioned in the manner required by that instrument.

As was said in *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 145, respecting the act of August 5, 1909—"The tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or in-

surance business and with respect to the carrying on thereof, in a sum equivalent to one per centum upon the entire net income over and above $5,000 received from all sources during the year; that is, when imposed in this manner it is a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organizations of the character described. As the latter organizations share many benefits of corporate organization it may be described generally as a tax upon the doing of business in a corporate capacity." This interpretation was adhered to and made the basis of decision in *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187, and *McCoach* v. *Minehill Railway Co.*, 228 U. S. 295, 300.

A reference to the language of the act [1] is sufficient to

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[1] SEC. 38. That every corporation . . . organized for profit and having a capital stock represented by shares . . . organized under the laws of the United States or of any State . . . and engaged in business in any State . . . shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation . . . equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations . . . subject to the tax hereby imposed. . . .

Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation . . . received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties. . . .

And on or before the first day of March, nineteen hundred and ten, and the first day of March in each year thereafter, a true and accurate return under oath or affirmation of its president, vice-president, or other principal officer, and its treasurer or assistant treasurer, shall be made by each of the corporations . . . subject to the tax imposed by this section, to the collector of internal revenue for the district in which such corporation . . . has its principal place of business. 36 Stat. 112.

show that it does not in terms impose a tax upon corporate property or franchises as such, nor upon the income arising from the conduct of business unless it be carried on by the corporation. Nor does it in terms impose any duty upon the receivers of corporations or of corporate property, with respect to paying taxes upon the income arising from their management of the corporate assets, or with respect to making any return of such income.

And we are unable to perceive that such receivers are within the spirit and purpose of the act, any more than they are within its letter. True, they may hold, for the time, all the franchises and property of the corporation, excepting its primary franchise of corporate existence. In the present cases, the receivers were authorized and required to manage and operate the railroads and to discharge the public obligations of the corporations in this behalf. But they did this as officers of the court, and subject to the orders of the court; not as officers of the respective corporations, nor with the advantages that inhere in corporate organization as such. The possession and control of the receivers constituted, on the contrary, an ouster of corporate management and control, with the accompanying advantages and privileges.

Without amplifying the discussion, we content ourselves with saying that, having regard to the genesis of the legislation, the constitutional limitation in view of which it was evidently framed, the language employed by the lawmaker, and the reason and spirit of the enactment, all considerations alike lead to the conclusion that the act of 1909 did not impose a tax upon the income derived from the management of corporate property by receivers, under such conditions as are here presented.

Decrees affirmed.

MUNSEY *v.* WEBB, ADMINISTRATOR OF PENNINGTON.

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

No. 40. Argued November 4, 5, 1913.—Decided November 17, 1913.

Where the possibility of their occurrence is clear to the ordinarily prudent eye, one operating an elevator must guard against accidents even though they may occur in an unexpected manner. *Washington & Georgetown R. R. Co.* v. *Hickey*, 166 U. S. 521.

Where the jury may properly find that negligence to guard against a possible, although unusual, accident in an elevator was the proximate cause of the injury, the appellate court will not reverse because the negligence was merely a passive omission.

Where there is a special source of danger in operating an elevator this court will not say, against the finding of a jury, that such danger need not be constantly guarded against.

37 App. D. C. 185, affirmed.

THE facts, which involve questions of negligence in operating an elevator and questions of proximate cause of an injury sustained by a passenger therein, are stated in the opinion.

Mr. Charles A. Douglas and *Mr. John W. Price*, with whom *Mr. Hugh H. Obear, Mr. Wilton J. Lambert, Mr. C. K. Mount, Mr. J. Norment Powell, Mr. H. H. Shelton* and *Mr. Thos. Ruffin* were on the brief, for plaintiff in error:

The law looks to the proximate and not to the remote cause. Defendant is not liable in this case, because the negligence complained of was merely the means and not the proximate cause of the injury. The proximate cause being the unknown thing which caused deceased to fall and which, being absolutely unknown, cannot be imputed to defendant. Also the accident which happened to the deceased when apparently he was in an entirely normal

condition, alone in the car, except for the operator, and without apparent reason, but absolutely without any fault on the part of the defendant and consequent injury—was not the natural and probable consequence of the acts of negligence complained of and could not reasonably have been anticipated by the defendant as likely to occur by reason of such negligence.

Where there is an intervening efficient cause, such intervening cause is the proximate cause of the injury, and responsible.

Where an act could not have been foreseen, nor anticipated, as the result of an act of negligence it is not actionable.

In this case the fall of the plaintiff's intestate, for which defendant was not responsible, was the intervening efficient cause.

The fall and injury of deceased without apparent cause could not have been foreseen nor reasonably anticipated. *Milwaukee &c. R. R. Co.* v. *Kellogg*, 94 U. S. 469; *Ins. Co.* v. *Tweed*, 7 Wall. 44, 52; *Ins. Co.* v. *Transportation Co.*, 12 Wall. 194, 199; *Sheffer* v. *Railroad Co.*, 105 U. S. 249; *Atchison, T. & S. F. R. Co.* v. *Calhoun*, 213 U. S. 1; 1 Cooley on Torts, 3d ed., 99; Wharton on Negligence, 134; *Cole* v. *German Savings Society*, 124 Fed. Rep. 113; *Zopfi* v. *Postal Tel. Co.*, 60 Fed. Rep. 987; *Teis* v. *Smuggler Mining Co.*, 158 Fed. Rep. 260; *Empire State Cattle Co.* v. *Atchison*, 135 Fed. Rep. 135; *Butts* v. *Railway Co.*, 110 Fed. Rep. 329; *Chicago &c. Ry. Co.* v. *Elliott*, 55 Fed. Rep. 949; *Goodlander* v. *Standard Oil Co.*, 63 Fed. Rep. 400; *Am. Bridge Co.* v. *Seeds*, 144 Fed. Rep. 609; *Little Rock &c. R. R. Co.* v. *Barry*, 84 Fed. Rep. 930; *St. Louis &c. Ry. Co.* v. *Bennett*, 69 Fed. Rep. 528.

Among the state court cases sustaining the position of plaintiff in error are *Cleghorn* v. *Thompson* (Kan.), 54 L. R. A. 402; *Stone* v. *Boston & A. R. R. Co.* (Mass.), 51 N. E. Rep. 1; *Huber* v. *La Crosse Ry. Co.* (Wis.), 31

L. R. A. 583; *Herr* v. *City of Lebanon*, 149 Pa. St. 222; *Loftus* v. *Dehail*, 133 California, 214; *Hoge* v. *Lake Shore &c. R. R. Co.*, 85 Pa. St. 293; *Board of Trade* v. *Cralle* (Va.), 22 L. R. A. (N. S.) 297; *Mahany Township* v. *Watson*, 116 Pa. St. 344; *Texas Pac. Ry. Co.* v. *Beckworth* (Texas), 32 S. W. Rep. 347; *Schaeffer* v. *Jackson* (Pa.), 24 Atl. Rep. 629; *Galveston &c. R. R. Co.* v. *Chambers*, 73 Texas, 296; *Nelson* v. *Lighting Co.* (R. I.), 67 L. R. A. 116; *Railroad Company* v. *Trich*, 117 Pa. St. 390; *Atchison &c. R. R. Co.* v. *Dickens*, 103 S. W. Rep. 750; *McClain* v. *Garden Grove*, 83 Iowa, 254; *Hunter* v. *Wanamaker* (Pa.), 2 Cent. Rep. 70; *Hershey* v. *Mill Creek Township* (Pa.), 8 Cent. Rep. 252; *McGahan* v. *Indianapolis Gas Co.*, 37 N. E. Rep. 601; *Russe* v. *Morris Bldg. Assn.*, 104 Louisiana, 438; *O'Connor* v. *Brucker* (Ga.), 43 S. E. Rep. 731; *Beall* v. *Athens*, 81 Michigan, 536; *Lewis* v. *Flint & P. M. Ry. Co.* (Mich.), 19 N. W. Rep. 744; *Claypool* v. *Wigmore* (Mass.), 71 N. E. Rep. 509; *Mo. Pac. R. Co.* v. *Columbia* (Kan.), 58 L. R. A. 399.

To the same effect are: *Reeves* v. *Wallace*, 10 Wall. 176; *Morrison* v. *Davis*, 20 Pa. St. 293; *Cuff* v. *N. & M. Y. R. Co.*, 35 N. J. L. 18; *Smith* v. *Kanawha County* (West Va.), 8 L. R. A. 82; *Moulton* v. *Sanford*, 52 Maine, 127; *Brown* v. *Wabash*, 20 Mo. App. 222; *Cornell* v. *Ches. & O. Ry. Co.* (Va.), 24 S. E. Rep. 467; *Fowlks* v. *Southern Ry. Co.* (Va.), 32 S. E. Rep. 464; *Winfree* v. *Jones* (Va.), 51 S. E. Rep. 153; *S. C.*, 1 L. R. A. (N. S.), 201.

In order to recover plaintiff must show some negligent act on the part of the defendant and, also, that the accident and injury complained of were not only the natural and probable consequence of such act claimed to be negligent, but, also, that the accident and injury were, in fact, occasioned by such act, and, in addition, that the accident and injury so suffered should have been foreseen and anticipated, and therefore guarded against, by a man of ordinary care and prudence.

This plaintiff has failed to do. *McGrell* v. *Buffalo Bldg. Co.*, 153 N. Y. 265; *Dougan* v. *Champlain Transp. Co.*, 56 N. Y. 1; *Cleveland* v. *N. J. Steamboat Co.*, 68 N. Y. 306; *Loftus* v. *Ferry Co.*, 84 N. Y. 455; *Lafflin* v. *Buffalo & S. W. R. Co.*, 106 N. Y. 136; *Frobisher* v. *Fifth Ave. Trans. Co.*, 151 N. Y. 431.

Whether defendant could reasonably have anticipated the happening of the accident must be measured by the circumstances before the accident, not afterwards. *Am. Exp. Co.* v. *Smith*, 33 Oh. St. 511; *Libby* v. *Maine Cent. R. R. Co.* (Me.), 20 L. R. A. 812; *Cornman* v. *Eastern Counties R. R. Co.*, 4 Hurlst. & N. 781; *American Assn.* v. *Talbot*, 141 Missouri, 674; *Nash. & Chatt. R. R. Co.* v. *Davis*, 6 Heisk. 261; Cooley on Torts, 15; *McGrell* v. *Buffalo Co.*, 153 N. Y. 265; *Empire State Cattle Co.* v. *Atchison*, 135 Fed. Rep. 135; *Smith* v. *Western Ry. Co.*, 91 Alabama, 455.

The cases relied on by defendant in error, such as *Patton* v. *Southern Ry. Co.*, 82 Fed. Rep. 980; *Hayes* v. *Michigan Central*, 111 U. S. 228; *McDowell* v. *Toledo Ry. Co.*, 74 Fed. Rep. 104; *Choctaw Ry.* v. *Holloway*, 191 U. S. 334, are not in conflict with the doctrine of anticipation, and are not applicable to this case. While the question, What is the proximate cause? is ordinarily for the jury, where the whole evidence offers no substantial dispute on material points, and is of such conclusive character that the court in an exercise of sound judicial discretion would be compelled to set a verdict aside returned in opposition to it, it is not only the province but the duty of the court to direct a verdict. *Guenther* v. *Met. R. R. Co.*, 23 App. D. C. 493; *Teis* v. *Smuggler Mining Co.*, 158 Fed. Rep. 260.

In this case there was nothing to be submitted to the jury for determination. Under the undisputed facts of the case the court should have directed a verdict for the defendant. *Sheffer* v. *Railroad Co.*, 105 U. S. 249; *Rail*

road Co. v. *Elliott*, 55 Fed. Rep. 949; *Empire State Cattle Co.* v. *Atchison*, 135 Fed. Rep. 135; *Butts* v. *Railroad Co.*, 110 Fed. Rep. 329; *Goodlander* v. *Standard Oil Co.*, 63 Fed. Rep. 400; *Cole* v. *German Savings Ass'n*, 124 Fed. Rep. 113; *Cleghorn* v. *Thompson* (Kan.), 54 L. R. A. 402; *Stone* v. *Boston & Albany* (Mass.), 41 L. R. A. 794; *Huber* v. *LaCrosse Ry.* (Wis.), 31 L. R. A. 583; *Nelson* v. *Lighting Co.* (R. I.), 67 L. R. A. 116; *Hoag* v. *Lake Shore Ry.*, 85 Pa. St. 293; *Railroad Co.* v. *Trich*, 117 Pa. St. 390; *McClain* v. *Garden Grove*, 83 Iowa, 235; *McGrell* v. *Buffalo Bldg. Co.*, 153 N. Y. 165.

Under the particular circumstances of the case the car was stopped in as short a distance as possible, and a jury could not have found the facts to be otherwise. Even if any act of omission of defendant relied upon by plaintiff was negligence, it was not the proximate cause of the injury.

Mr. Arthur Peter, with whom *Mr. Preston B. Ray* and *Mr. Julian W. Whiting* were on the brief, for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is an action brought against the owner of a building for causing the death of the plaintiff's intestate in an elevator in which the deceased was being carried to his place of employment. Negligent construction and negligent management of the elevator are alleged. The plaintiff had a verdict against a request by the defendant that one be directed for him, the judgment was affirmed by the Court of Appeals, 37 App. D. C. 185, and the defendant brought the case here.

The elevator car did not quite fill the well, or shaft, and the bottom of the floor that it was approaching projected at right angles into the well about three and one-half inches. The car was equipped with a collapsible door,

which was open at the time of the accident and the boy in charge did not have his arm across the space as he had been instructed to do. Between the fourth and fifth floors the deceased fell and his head was caught between the projecting bottom of the fifth floor and the floor of the car and was crushed. The negligence relied upon is the leaving of the door open and failure to guard the space; the not having a flange or piece of metal inclining from the projecting floor to the shaft wall, and the failure to use an emergency switch, the quickest means of stopping the car, the boy in charge not having been instructed in the use of it.

The plaintiff in error argued at some length that there was no negligence, because the fall of the deceased was something wholly out of the ordinary course and not to be foreseen; or that, if there was negligence in any sense, it was not the proximate cause of the death but merely a passive condition made harmful by the fall. Neither argument can be maintained. It is true that it was not to be anticipated specifically that a man should drop from internal causes into the open door of the car. But the possibility and the danger that in some way one in the car should get some part of his person outside the car while it was in motion was obvious and was shown to have been anticipated by the door being there. In some circumstances at least it was a danger that ought to be and was guarded against. It is said that the danger was manifest only when the car was crowded, and that the door was needed only for that. If the duty to have the car shut on all sides had been created with reference only to conditions different in kind from those of the accident it may be that the plaintiff could not avail himself of a requirement imposed *alio intuitu*. *Eugene F. Moran*, 212 U. S. 466, 476. But the accident was similar in kind to those against which the door was provided, and we are not prepared to say, contrary to the finding of the jury, that

the duty to keep it shut or to guard the space with the arm did not exist in favor of all travellers in an elevator having the structure that we have described. It was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye. *Washington & Georgetown R. R. Co.* v. *Hickey*, 166 U. S. 521, 526, 527.

If there was negligence it very properly could be found to have been the proximate cause of the death. See *Milwaukee & St. Paul Ry. Co.* v. *Kellogg*, 94 U. S. 469. Even if it were true that the neglect was merely a passive omission, the deceased was invited into the elevator and the principle of the trap cases would apply. *Corby* v. *Hill*, 4 C. B. (N. S.) 556, 563. *Sweeney* v. *Old Colony & Newport R. R. Co.*, 10 Allen, 368, 374. But that is not the case. The defendant is sued for having crushed the head of the deceased by forces that he put in motion. He replies that it would not have happened but for the unforeseen fall of the deceased without the defendant's fault, and to this the plaintiff rejoins, and the jury has found that the defendant was bound to take the easy precaution which he had provided against any and all ways by which a passenger's body could get outside the car while it was going up. *Hayes* v. *Michigan Central R. R. Co.*, 111 U. S. 228, 241. *Choctaw, Oklahoma & Gulf R. R. Co.* v. *Holloway*, 191 U. S. 334, 339. The whole question comes down to whether we are prepared to say as matter of law against the finding of the jury that, in an elevator constructed as this was with a special source of danger in the shaft outside the car, to require the defendant to guard the door space *in transitu*, at his peril, is too strict a rule. We cannot go so far. *McDonald* v. *Toledo Consol. S. Ry. Co.*, 74 Fed. Rep. 104, 109.

There was perhaps evidence sufficient to warrant a finding that there was negligence in not stopping the car

after the fall and before the harm was done, and a finding on that ground would not open the questions that have been discussed; but we have preferred to deal with the case on the matters principally argued, as they seem to offer the most obvious reasons for the verdict, and therefore have assumed that the jury found the facts and standard of conduct to be as we have supposed.

Judgment affirmed.

BUCHSER *v.* BUCHSER.

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

No. 641. Submitted November 3, 1913.—Decided November 17, 1913.

Unless the statutes of the United States control, this court follows the state court as to whether real estate is separate or community property.

Until the title of an entryman is completed the laws of the United States control; but after completion the land becomes immediately subject to state legislation. *McCune* v. *Essig*, 199 U. S. 382.

Even if the United States could impress a peculiar character upon land within a State after parting with it, it would only be by clearly expressing it in a statute, which has not been done. *Wright* v. *Morgan*, 191 U. S. 55.

A state law that after completion of the entryman's title the property becomes community property is not like a contract for sale to a third party; but is consistent, and not in conflict, with the provisions of the act of March 3, 1891, prohibiting alienation of homestead entries.

The highest court of the State of Washington having held that immediately on completion of title of an entryman the property becomes community property, and that on the death of the wife after such completion her children have an interest therein, this court follows that decision.

202 Fed. Rep. 854; 121 C. C. A. 212, affirmed.

THE facts, which involve the construction and application of statutes of the State of Washington relating

to property acquired by an entryman under the laws of the United States, are stated in the opinion.

Mr. F. M. Dudley, *Mr. W. E. Cullen* and *Mr. David Herman* for appellant:

The lower court erred in holding that the State of Washington has uniformly held grants of the Federal Government under the homestead laws to be the community property of the entryman and his wife. *Bolton* v. *La Camas Water Co.*, 10 Washington, 246, held that the homestead was the separate property of the entryman. *Ahern* v. *Ahern*, 31 Washington, 334, holding otherwise, was disapproved in *Hall* v. *Hall*, 41 Washington, 186, and *Cunningham* v. *Krutz*, 41 Washington, 190.

Since the Circuit Court of Appeals rendered its decision herein, the Supreme Court of Washington has held these cases to be out of harmony and irreconcilable. *Teynor* v. *Heible*, 133 Pac. Rep. 1.

To allow the States to ignore Federal land laws, to interpret the grants made by the Federal Government and designate the persons who are the beneficiaries thereof according to their own local laws, brings about the anomalous situation of citizens of the United States holding different rights under grants issued by the Federal Government in pursuance of the same and identical laws, simply because one happens to live in one State and the other in another State. California, also possessing the community property law, has uniformly held that the homestead becomes the sole and separate property of the entryman. *Noe* v. *Cord*, 14 California, 577; *Wilson* v. *Castro*, 31 California, 421; *Wood* v. *Hamilton*, 33 California, 698; *Lake* v. *Lake*, 52 California, 428; *Harris* v. *Harris*, 71 California, 314; *Morgan* v. *Lones*, 80 California, 317.

The State of Washington has been vacillating and under certain conditions holds that the homestead is not the separate property of the entryman, but the com-

munity property of himself and his wife, and that one-half of the property belongs to her or her children, even if they are by a former husband.

The State cannot confiscate one-half of the entryman's grant by calling it the community property as that would be the taking of property without due process of law. If the Federal Government grants the homestead to the entryman himself personally, it becomes his separate property, and not the community property of himself and his wife.

The rights of a grantee from the Federal Government present a Federal question on which the decisions of the Federal courts are controlling, and in the administration of the Federal land laws the community system is unknown. *Phœnix Mining Co.* v. *Scott*, 20 Washington, 48; *Cunningham* v. *Krutz*, 41 Washington, 190; *Hall* v. *Hall*, 41 Washington, 186.

Each of the three cases last cited holds the grant from the Government to be the separate property of the entryman and grantee.

Congress alone has the power to enact laws for the disposition of the lands belonging to the United States. No State can abridge that right nor interfere with the grantee's enjoyment or possession of the lands granted by the Federal Government. *Irvine* v. *Marshall*, 20 How. 558; *Gibson* v. *Chouteau*, 13 Wall. 92.

The Washington enabling act (§ 4) provides that the public lands shall remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

With the right to dispose of the public lands necessarily goes the right to protect the grants made by the Federal Government.

The wife has no interest in the lands entered by her husband whilst he is living. See §§ 2289, 2290, 2291, United States Comp. Stat. 1901.

A homestead acquired under the laws of the United

States is the sole and separate property of the entryman. Any other conclusion is inconsistent with the clear and explicit provisions of the United States statutes applicable to homestead entries. *Gibson* v. *Chouteau*, 13 Wall. 92; *McCune* v. *Essig*, 199 U. S. 382; *Hall* v. *Hall*, 41 Washington, 186.

Wilcox v. *McConnell*, 13 Pet. 496, 516, does not warrant the conclusion that after title has passed from the Federal Government the State can take one-half of the land from the grantee and give it to his wife by simply designating it as community property.

In this case there is no question of descent as the entryman is still living. The fact that the entryman's wife died cannot affect his individual and separate property, nor give the probate court any jurisdiction over the same.

Mr. Frank T. Post, *Mr. B. B. Adams*, *Mr. John Salisbury* and *Mr. W. W. Zent* for appellees:

It is the settled law of the State of Washington that the property in controversy is community property. *Kromer* v. *Friday*, 10 Washington, 621; *Ahern* v. *Ahern*, 31 Washington, 334; *Cox* v. *Tompkinson*, 39 Washington, 70; *Hall* v. *Hall*, 41 Washington, 186; *Cunningham* v. *Krutz*, 41 Washington, 190; *Kreig* v. *Lewis*, 56 Washington, 196; *Teynor* v. *Heible*, 133 Pac. Rep. 1.

See also the decisions of this court in *Wilcox* v. *McConnel*, 13 Pet. 516; *McCune* v. *Essig*, 199 U. S. 382; *Bernier* v. *Bernier*, 147 U. S. 242.

To reverse the decision of the court below would invite a system of litigation more portentous than our jurisprudence has yet known and upset thousands of titles which depend upon it. Having received this construction for so long a time by the courts, it would seem that if the decisions are wrong the matter should be left to the legislature to correct.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill to quiet title, alleging that the plaintiff, a married man, made entry and acquired title to the land in question under the homestead laws of the United States by patent issued December 17, 1903; that thereafter his wife died, and that the defendants, the children of the marriage, claim an interest in the land. By the laws of the State of Washington, in which the property is situated, it became community property unless the statutes of the United States forbid. *Teynor* v. *Heible*, 133 Pac. Rep. 1. On that point we follow the Washington decisions. There was a demurrer, which was sustained by the District Court; *sub nom. Buchser* v. *Morss*, 196 Fed. Rep. 577, and by the Circuit Court of Appeals, 202 Fed. Rep. 854. 121 C. C. A. 212.

There is no doubt, of course, that until the title is completed the laws of the United States control. *Wadkins* v. *Producers Oil Co.*, 227 U. S. 368. *Bernier* v. *Bernier*, 147 U. S. 242. *Hall* v. *Russell*, 101 U. S. 503. *Gibson* v. *Chouteau*, 13 Wall. 92. But when the title has passed then the land 'like all other property in the State is subject to state legislation.' *Wilcox* v. *Jackson*, 13 Peters, 498, 517. *Irvine* v. *Marshall*, 20 How. 558, 564. *McCune* v. *Essig*, 199 U. S. 382, 390. If the United States could impress a peculiar character upon land within a State after parting with all title to it, at least the clearest expression would be necessary before such a result could be reached. *Wright* v. *Morgan*, 191 U. S. 55, 58. But it has not tried to do anything of the sort.

No one would doubt that this title was subject to the same incidents as any other so far as events subsequent to its acquisition were concerned. See *Wright* v. *Morgan*, *supra*. It could be lost by adverse occupation for the time prescribed by state law, and in a State that adopted the common law as to dower it would be subject to dower

if the settler subsequently married. The only semblance of difficulty is due to the coincidence in time of the acquisition of a separate right by the settler and the beginning of a community right in the wife. But this is by no means an extreme illustration of the division of an indivisible instant that is practiced by the law whenever it is necessary. A statute may give a man a right of action against another for causing his death, that accrues to him at the instant that he is *vivus et mortuus*. *Higgins* v. *Central New England & Western R. R. Co.*, 155 Massachusetts, 176, 179. In the present case the acquisition under the United States law is complete and that law has released its control before the state law lays hold, and, upon grounds in no way connected or interfering with the policy of Congress, brings the community regime into play. The special family relations thus created are not like contracts with third persons impliedly forbidden by the act of March 3, 1891, c. 561, § 5, 26 Stat. 1097, amending Rev. Stat., § 2290. They are consistent with the policy of the statute which is to enable the settler and his family to secure a home. See § 2291.

Decree affirmed.

STRAUS *v.* FOXWORTH.

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

No. 191. Submitted October 20, 1913.—Decided November 17, 1913.

A statement that a statutory sale was not sufficiently advertised is a pure conclusion of law and, in the absence of allegations of fact to sustain it, is an empty assertion that is not admitted by demurrer.

Statements that the amount of taxes for which the property was sold was excessive must be read in connection with other statements in the pleading admitting that the taxes were delinquent and therefore augmented by the statutory penalties.

A construction by the Supreme Court of the Territory that is not manifestly wrong will not be rejected by this court, and so *held* as to a construction of the words "in accordance with this act" as meaning "under this act." *Treat* v. *Grand Canyon Railway Co.*, 222 U. S. 448.

A statute correcting irregularities in compliance with statutory provisions in regard to tax sales is remedial in nature and unless violative of constitutional restrictions is not a denial of due process of law as retrospective legislation; and so *held* as to § 25 of c. 22 of the laws of New Mexico of 1899, providing that sales for taxes made under that act shall not be invalidated except on the ground of prior payment of the taxes or exemption of the property from taxation.

One attacking a statute on the ground that it is unconstitutional is limited to his own case as the statute has been applied therein; he cannot rely on a possible construction of the statute that might make it unconstitutional. *Castillo* v. *McConnico*, 168 U. S. 674.

16 New Mex. 442, affirmed.

THE facts, which involve the validity of a tax sale and the constitutionality of a statute of New Mexico relative to tax deeds, are stated in the opinion.

Mr. William C. Reid and *Mr. James M. Hervey* for appellant:

The case being on appeal from a Territory, this court has jurisdiction to consider both the questions of "due process of law" under the Fourteenth Amendment, and the essentials under the territorial statute, which constitute due process of law.

Section 25, ch. 22, Laws of 1899 of New Mexico, permits the taking of property for taxation, without assessment, levy, or notice of sale, as after sale the same cannot be attacked, except on the ground that the tax had been paid, or that the property was not subject to taxation.

DeTreville v. *Smalls*, 98 U. S. 517; *Keely* v. *Sanders*, 99 U. S. 441; *Sherry* v. *McKinley*, 99 U. S. 496, relied upon by appellee, all arose under the Insurrection Acts of 1862 and 1863 and do not apply to other times. They are not usually cited, except as establishing the rule that a tax

deed may be made *prima facie* evidence of its validity. This rule is not questioned in this case.

A legislature may not provide machinery for the collection of taxes, and then disregard the steps required, and cure the failure to follow the essentials by a curative statute or concurrent statute. 1 Cooley on Taxation (3d ed.), p. 518.

While the legislature of a State may declare that a tax deed shall be *prima facie* evidence of the regularity of the sale, and of all proceedings prior thereto, it cannot make such a deed conclusive evidence of the grantee's title. *Marx* v. *Hanthorn*, 148 U. S. 172; *S. C.*, 30 Fed. Rep. 579; *Taylor* v. *Deveaux*, 100 Michigan, 581; *McKinnon* v. *Weston*, 104 Michigan, 642; *Weeks* v. *Merkle*, 6 Oklahoma, 714; *Wilson* v. *Wood* (Okla.), 61 Pac. Rep. 1045; *Kelly* v. *Herrall*, 20 Fed. Rep. 364; *Bannon* v. *Burns*, 39 Fed. Rep. 892.

A statute making a tax deed conclusive evidence of a complete title, and precluding the owner of the original title from showing its invalidity, is void, because not a law regulating evidence, but an unconstitutional confiscation of property. Cases *supra* and *McCready* v. *Sexton*, 29 Iowa, 356; *Railroad Co.* v. *Galvin*, 85 Fed. Rep. 811; *Cairo &c. R. Co.* v. *Parks*, 32 Arkansas, 131; *Little Rock &c. R. Co.* v. *Payne*, 33 Arkansas, 816; *Wampole* v. *Foote*, 2 Dakota, 1; *Dickerson* v. *Acosta*, 15 Florida, 614; *White* v. *Flynn*, 23 Indiana, 46; *Corbin* v. *Hill*, 21 Iowa, 70; *Powers* v. *Fuller*, 30 Iowa, 476; *Taylor* v. *Miles*, 5 Kansas, 498; *Baumgardner* v. *Fowler*, 82 Maryland, 631; *Groesbeck* v. *Seeley*, 18 Michigan, 329; *Case* v. *Dean*, 16 Michigan, 12; *Dawson* v. *Peter*, 119 Michigan, 274; *Abbott* v. *Lindenbower*, 42 Missouri, 162; *S. C.*, 46 Missouri, 291; *Roth* v. *Gabbert*, 123 Missouri, 29; *Wright* v. *Cradlebraugh*, 3 Nevada, 341, 349; *Young* v. *Beardsley*, 11 Paige, 493; *East Kingston* v. *Fowle*, 48 N. H. 57; *Sheets* v. *Paine* (N. Dak.), 86 N. W. Rep. 117; *Strode* v. *Washer*, 17 Oregon, 50; *Mather* v. *Darst*, 13 S. Dak. 75.

The notice is bad if it differs from the assessment in giving the name of the person to whom the land is taxed. *Marx* v. *Hanthorn*, 148 U. S. 172; *S. C.*, 30 Fed. Rep. 579; *Harness* v. *Cravens*, 126 Missouri, 233; *Bettison* v. *Budd*, 21 Arkansas, 578, citing *Wait* v. *Gilmore*, 2 Yeates, 330; *Shimmin* v. *Inman*, 26 Maine, 332; *Castillo* v. *McConnico*, 168 U. S. 674; *Alvord* v. *Collin*, 20 Pick. 418; *Workingmen's Bank* v. *Lannes*, 30 La. Ann. 871.

A tax deed cannot be made conclusive evidence of title in the grantee. An attempt to do so is a violation of the great principle of Magna Charter and would in many cases deprive the citizen of his property, by proceedings absolutely without warrant of law or of justice. It is not in the power of any American legislature to deprive one of his property by making his adversary's claim to it conclusive of its own validity. It cannot, therefore, make the tax deed conclusive evidence of the holder's title to the land, or of the jurisdictional facts which would make out title. Cases *supra* and *Martin* v. *Barbour*, 34 Fed. Rep. 701; *Tracy* v. *Reed*, 38 Fed. Rep. 69; *Davis* v. *Minge*, 56 Alabama, 121; *Oliver* v. *Robinson*, 58 Alabama, 46; *Radcliffe* v. *Scruggs*, 46 Arkansas, 96; *Townsend* v. *Martin*, 55 Arkansas, 192; *Cooper* v. *Freeman Lbr. Co.*, 61 Arkansas, 36; *Ramish* v. *Hartwell*, 126 California, 443; *Manguiar* v. *Henry*, 84 Kentucky, 1; *Larson* v. *Dickey*, 39 Nebraska, 463; *Roberts* v. *First Nat. Bk.*, 8 N. Dak. 504; *Dever* v. *Cornwall* (N. Dak.), 86 N. W. Rep. 227; *Simpson* v. *Meyers*, 197 Pa. St. 522; *Salmer* v. *Lathrop*, 10 S. Dak. 216; *State* v. *Dugan*, 105 Tennessee, 245; *Virginia Coal Co.* v. *Thomas*, 97 Virginia, 527. *Springer* v. *United States*, 102 U. S. 594; *Turpin* v. *Lemon*, 187 U. S. 551; *Ontario Land Co.* v. *Yordy*, 212 U. S. 152; *Central Railway* v. *Georgia*, 207 U. S. 127; *King* v. *Mullins*, 171 U. S. 404; *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140; *Castillo* v. *McConnico*, 168 U. S. 674, are not in point.

Marx v. *Hanthorn*, *supra*, has been followed in *Clark* v.

Mead, 102 California, 519; *Bennett* v. *Davis*, 90 Maine, 107; *Baumgardner* v. *Fowler*, 82 Maryland, 639; and see *Soper* v. *Lawrence Bros. Co.*, 201 U. S. 370; *Wilson* v. *Wood*, 10 Oklahoma, 284; *Meyer* v. *Kuhn*, 65 Fed. Rep. 705; *Bannon* v. *Barnes*, 39 Fed. Rep. 895.

A legislature cannot enact a statute which denies the owner the right to show that the defects were in excess of those authorized by the levy. *Lufkin* v. *Galveston*, 11 S. W. Rep. 340.

In this case the essential or jurisdictional steps provided by the statute were not complied with. The publication was defective. Cooley, p. 918; *Games* v. *Stiles*, 14 Pet. 322; *Martin* v. *Barbour*, 34 Fed. Rep. 701; *S. C.*, 140 U. S. 634.

The affidavit of publication is the only evidence admissible of the facts required to be stated therein, and cannot be supplemented by parol evidence. *Rustin* v. *Merchants' Co.*, 23 Colorado, 351; *Salinger* v. *Gunn*, 61 Arkansas, 414; *Martin* v. *Allard*, 55 Arkansas, 218; *Coit* v. *Wells*, 2 Vermont, 318; and see §§ 4079, 4080, Comp. Laws of New Mexico, 1897.

As to necessity of tax officers following this provision of the statute, see *Martin* v. *Barbour*, 140 U. S. 644; 1 Cooley on Taxation, 3d ed., 518.

Plaintiffs are entitled to equitable relief. *Ely* v. *New Mexico &c. Ry. Co.*, 129 U. S. 291.

Where property is sold for more than is due, whether the excess is due to an illegal levy or illegal penalties and costs, the officer has no jurisdiction to sell, and it is void, notwithstanding curative statutes. *Lufkin* v. *Galveston*, 11 S. W. Rep. 340; *Treadwell* v. *Patterson*, 51 California, 637; *Huse* v. *Merrim*, 2 Greenl. 375; *Case* v. *Dean*, 16 Michigan, 12; *Eustis* v. *Henrietta*, 91 Texas, 325; *Alexander* v. *Gordon*, 101 Fed. Rep. 91; *Ensign* v. *Barse*, 107 N. Y. 329; *Harper* v. *Rowe*, 53 California, 233; *Warden* v. *Brown* (Cal.), 98 Pac. Rep. 252; *Devoe* v. *Cornell*, 10 N. Dak. 123.

A deed of land sold for non-payment of taxes which discloses that the sale was made on a day which was not the day authorized by law, is void on its face, *Redfield* v. *Parks*, 132 U. S. 239; *Coulton* v. *Stafford*, 56 Fed. Rep. 569, and a curative statute cannot aid it. *Rickett* v. *Knight*, 16 S. Dak. 395; *Rush* v. *Lewis & Clark Co.* (Mont.), 95 Pac. Rep. 836; *Hannerkratt* v. *Hamil*, 10 Oklahoma, 219; *Magill* v. *Martin*, 14 Kansas, 7; *Dyke* v. *Whyte*, 17 Colorado, 296.

Mr. Harry H. McElroy and *Mr. Harry M. Dougherty* for appellee.

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

This was a suit to quiet the title to three tracts of land in Quay County, in the Territory of New Mexico. In the court of first instance a demurrer to the complaint was sustained and, the plaintiff declining to amend, a decree of dismissal was entered, which subsequently was affirmed by the Supreme Court of the Territory. 16 N. Mex. 442. An appeal from the decree of affirmance brings the case here, under the act of March 3, 1885, 23 Stat. 443, c. 355.

The complaint purported to state four causes of action. In the first, embracing all the tracts, it was alleged that the plaintiff was the owner in fee simple and that the defendant was making some adverse claim, not described. In the others, each embracing a single tract, the plaintiff's ownership was reiterated and it was alleged that the defendant was claiming title under tax deeds issued in consummation of tax sales which were characterized as void for designated reasons. But notwithstanding its form, the complaint, as the record discloses, was treated in both of the territorial courts, with the acquiescence of the parties, as intended to challenge the validity of the tax deeds only upon the grounds designated in the last

three causes of action; that is, as if the general charge in the first cause of action was intended to be restrained and limited by the more specific charges in the others. We therefore treat the complaint in the same way.

It was not alleged that the lands were not subject to taxation, or that the taxes on account of which the sales were had were in any wise invalid, or that the taxes or any part of them had been paid or tendered, or that they had not been delinquent for such a period as justified their enforcement by a sale of the lands, or that the sales were in any wise tainted with fraud, or that there had been any attempt to redeem the lands, or any of them, within the three years allowed therefor, or that that period had not elapsed after the sales and before the deeds were issued. On the contrary, the sole grounds on which the complaint assailed the tax title were (a) that the sales were "not sufficiently advertised," (b) that proof of publication of the notice of sale was not transmitted by the printer to the county collector "immediately after the last publication," (c) that the collector did not cause to be made an affidavit of the public posting of the notice of sale and did not cause proof of publication or of posting to be deposited with the probate clerk, (d) that the probate clerk did not "carefully preserve" any such proofs, and (e) that the amount of the delinquency sought to be satisfied by the sales was in one instance 16 cents, and in another 24 cents, more than the taxes levied on the particular tract.

Plainly, the allegation that the sales were "not sufficiently advertised" was purely a conclusion of law, and must be disregarded. No facts being set forth to sustain it, the statement of the conclusion was merely an empty assertion, and, under the rule that a demurrer admits only facts well pleaded, the conclusion was not admitted.

The charge that the delinquency sought to be satisfied by the sales was in excess of the taxes levied must be read in connection with the fact, otherwise appearing in

the complaint, that the taxes were delinquent, and in connection with the statutory provisions augmenting the delinquency by designated penalties and costs. When this is done it is quite evident that the amount sought to be collected was not excessive.

The remaining objections advanced in the complaint are founded upon a failure to comply with local statutory provisions directing the making and preserving of proofs of the publication and posting of the notice of sale. The Supreme Court of the Territory held, in effect, that compliance with these statutory provisions was not essential in a constitutional sense to the validity of tax sales and therefore that the territorial legislature was free to declare that non-compliance should not render the sales invalid; and with this as a premise the court further held that the objections could not prevail, because the statute under which the sales were had contained a provision that "no bill of review or other action attacking the title to any property sold at tax sale in accordance with this act shall be entertained by any court, nor shall such sale or title be invalidated by any proceedings, except upon the ground that the taxes, penalties, interest and costs had been paid before the sale, or that the property was not subject to taxation." Laws New Mexico, 1899, c. 22, § 25.

The appellant assigns error upon this ruling and insists that the provision just quoted (a) is in terms restricted to sales made "in accordance with this act" and so cannot be applied to any sale wherein some requirements of the act were not followed, and (b) is repugnant to the due process of law clause of the Fourteenth Amendment as applied to the Territory by the organic act.

The Supreme Court of the Territory construed the words "in accordance with this act" as meaning "under this act," and we think this was right. At least, we cannot say that it was manifestly wrong, as must be done

to justify us in rejecting the local interpretation of a territorial statute. *Fox* v. *Haarstick*, 156 U. S. 674, 679; *Treat* v. *Grand Canyon Railway Co.*, 222 U. S. 448, 452. Of course, the provision was intended to have some operation and effect, and it hardly could have any if restricted to sales made in accordance with the act, in the stricter sense, for such sales would be as valid without the provision as with it.

While statutes authorizing tax sales often provide for making and preserving some designated form of record evidence of compliance with the requirements respecting notice of the sale, the subject is one which rests in legislative discretion, being quite apart from those fundamental rights which are embraced in a right conception of due process of law. And if there be legislative provision upon the subject, it does not assume the dignity of an essential element of due process of law in the constitutional sense (*Castillo* v. *McConnico*, 168 U. S. 674, 683), but belongs to that class of regulations of which it is said in *Williams* v. *Supervisors of Albany*, 122 U. S. 154, 164: "Where directions upon the subject might originally have been dispensed with, or executed at another time, irregularities arising from neglect to follow them may be remedied by the legislature, unless its action in this respect is restrained by constitutional provisions prohibiting retrospective legislation." We are not here concerned with retrospective legislation or with any prohibition of it, for, as before shown, the remedial or relieving provision was embodied in the act under which the sales were had.

It is contended, however, that the remedial or relieving provision is so broad in its terms as to give effect to a sale not founded upon a prior assessment or where no opportunity was afforded for a hearing in opposition to the tax, and therefore that it is violative of due process. To this it is a sufficient answer to repeat what was said in *Castillo* v. *McConnico* (p. 680), in disposing of a like contention:

"But, as thus stated, the proposition presents a purely moot question. The plaintiff in error has no interest to assert that the statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. His right is limited solely to the inquiry whether in the case which he presents the effect of applying the statute is to deprive him of his property without due process of law."

As none of the objections advanced in the complaint against the defendant's tax title appears to have been well taken, we think the demurrer was rightly sustained.

Decree affirmed.

TORRES *v.* LOTHROP, LUCE & COMPANY.

APPEAL FROM AND IN ERROR TO THE SUPREME COURT OF PORTO RICO.

No. 17. Argued October 31, 1913.—Decided December 1, 1913.

The due process clause of the Federal Constitution does not control mere forms of procedure provided only the fundamental requirements of notice and opportunity to defend are afforded. *Louisville & Nashville R. R. Co.* v. *Schmidt*, 177 U. S. 230.

Where the appellate court is without authority to consider errors of the trial court, which were not there assigned, this court cannot reverse the appellate court for error in not deciding matters which it had no authority to pass on.

Although proceeds of a crop received by a mortgagee of the land may by law be imputed to payment of interest on the mortgage and not to other advances, they may, under a special contract with the mortgagor and by his subsequent acquiescence, be applied to payment of advances instead of interest.

In the absence of clear conviction of error, this court follows the conclusions of the court below in applying the local law.

One who has transferred his mortgaged premises by deed recorded prior to the foreclosure suit cannot set the foreclosure aside on the ground

that the court excluded testimony offered to show that the transfer was fictitious and that he was still the owner and entitled to notice. 16 Porto Rico 172, affirmed.

THE facts, which involve the validity of a sale of real estate in Porto Rico made in judicial proceedings for the foreclosure of a mortgage, are stated in the opinion.

Mr. C. M. Boerman for appellant and plaintiff in error:

This court has jurisdiction on this appeal, as the property claimed and involved is far exceeding the value of $5,000. *Royal Ins. Co.* v. *Martin*, 192 U. S. 149.

The summary proceedings under the mortgage law of Porto Rico are contrary to the provisions of the Constitution of the United States.

There is really no defense to the proceedings on a mortgage under this law. The mortgagor cannot have his day in court. The court virtually does not act as a court, but simply as an executive officer would act. It deprives a man of his property without due process of law.

The general guarantees of life, liberty and property contained in the Constitution of the United States apply to Porto Rico. *Downes* v. *Bidwell*, 182 U. S. 277.

All the laws in force in Porto Rico are so only through the act of Congress which declared them so to be after the change of sovereignty. Article 8, Organic Act of April 12, 1900.

For definitions given by this court to the words "due process of law" see *Hovey* v. *Elliot*, 167 U. S. 409; *Simon* v. *Craft*, 182 U. S. 427. See also *Health Department* v. *Trinity Church*, 17 N. Y. 510, 512; *Stuart* v. *Palmer*, 74 N. Y. 183, 189; *Ieck* v. *Anderson*, 57 California, 251, 253.

The rule of justice which forbids the taking of property except according to the law of the land, means that there shall be no taking, no condemnation, before hearing. *First Nat. Bank* v. *Swan*, 3 Wyoming, 356. See also

People v. *Essex County Supr's*, 70 N. Y. 228, 234; *Wright* v. *Cradlebaught*, 3 Nevada, 341, 349; *State* v. *Cutshall*, 110 N. Car. 538; *Lumbering Co.* v. *Wasco County*, 35 Oregon, 498; *Simmons* v. *West. Un. Tel. Co.*, 63 S. Car. 525; *Bennet* v. *Davis*, 90 Maine, 102; *Babcock* v. *City of Buffalo*, Sheld. 317, 340.

Judicial orders or judgments affecting the life or property of citizens in the absence of notice and opportunity to be heard to the party affected, are violative of the fundamental principles of our laws, and cannot be sustained. *In re Rosser*, 101 Fed. Rep. 562, 567; *Holden* v. *Harvey*, 167 U. S. 366; *Jensen* v. *Union Pac. Ry. Co.*, 6 Utah, 253; *In re Jensen*, 59 N. Y. 653, 655; *San Mateo* v. *So. Pac. Ry. Co.*, 13 Fed. Rep. 722, 752.

The provisions of the mortgage law itself were not complied with in the proceedings to foreclose the mortgage and therefore those proceedings are null and void.

Mr. Malcolm Donald for appellees and defendants in error.

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

The plaintiff in error, Marcelino Torres Zayas, in January, 1908, brought this suit to set aside a sale of real estate, made in judicial proceedings, of a summary or executory character, for the foreclosure of a mortgage and to recover the property with fruits, revenues and damages. The right to the relief sought was based, broadly speaking, upon the following grounds: *a*, the prematurity of the suit to foreclose because there was nothing due when the proceedings were commenced; *b*, the absence of a necessary party; *c*, vices in the proceedings, of such a character as to cause them to be absolutely void. The trial court dismissed the suit. On appeal, the Supreme Court of Porto Rico

affirmed and it is to reverse such judgment that the writ of error and the appeal in this record were prosecuted. Having the power to review only by appeal, (*Garzot* v. *de Rubio*, 209 U. S. 283) the writ of error is dismissed and we consider the case on the appeal.

The court below directed attention to the slovenly and ill arranged record, but despite its admonition nothing seems to have been done to re-arrange the record for the purposes of review by this court. We are not authorized to reëxamine the evidence, but a statement of facts made by the court below, and in a case where there was no such statement our duty would be to affirm because it would be impossible to decide that error had been committed. There is a statement of facts in the record, but it is unsatisfactory in many respects since in matters which are important it is silent where it should speak and in negligible matters speaks with unnecessary prolixity, being confusedly arranged and in important particulars but states evidentiary facts without any attempt to find the ultimate fact properly to be deduced from the stated evidence. We mention these subjects in order to direct the attention of the court below to them and to avoid the making of like statements of fact in the future. As the court delivered a full opinion which throws light on the statement and as in substance our conclusion will be rested upon documents which are uncontroverted and facts which are clearly found by the court below and are undisputed, we come to dispose of the case, giving, as a prelude, a statement which we deem necessary to an understanding of the matters for decision.

Torres owed a debt of $47,000 to W. S. H. Lothrop which Torres had assumed in 1898 on the purchase of certain real estate upon which the debt was secured by a conventional mortgage. The firm of De Ford & Company had acquired this debt from Lothrop, and in February, 1901, gave Torres an extension of four years to

February, 1905, new notes being furnished as evidence of the debt bearing ten per cent. interest payable annually and the notes being secured by a conventional mortgage on two pieces of property belonging to Torres and upon a third piece belonging to a commercial firm who intervened in the act and mortgaged its property to secure the debt of Torres. By the ninth clause of the act of mortgage it was agreed that the crops made by Torres on the property mortgaged by him, should be shipped to De Ford & Company who should sell them, applying the proceeds first to the interest and then to the principal of the debt. The mortgage, while indivisible as between the parties, was as to third persons made divisible, a specific portion of the debt being assigned to each of the three properties. The original mortgage due by Torres was cancelled and erased on the execution of the new one. The crops were shipped to De Ford & Company in 1902 and 1903, and were sufficient to pay the interest. In the crop year 1904, Torres solicited advances from De Ford and Company to enable him to make his crop, and acceding to his request the firm either directly advanced or paid off advances made by others, charging the same to Torres. When the crops came in and were sold, their proceeds were inadequate to pay these advances and the interest. They were imputed primarily to the advances leaving the interest unpaid, this being done with the assent of Torres, who had monthly accounts rendered him and made no objection whatever to the debiting of advances or the imputation of payment. The interest for 1904 remained unpaid and a suit to foreclose the mortgage was commenced by a summary, or executory process in accordance with the local mortgage law. There was filed with this suit a certificate reciting that the mortgaged property stood upon the public records in the name of Torres, this certificate having been issued by the registering office a day or two before the commencement of the suit. On the day the foreclosure suit was filed,

whether before or after does not appear, Torres sold the property to Alvarado for a small sum in cash and a large amount secured by mortgage and this deed of sale was put upon the registry before any cautionary notice of the suit was, or could have been recorded. Conformably to law, the court ordered a demand made upon Torres notifying him of the suit and calling upon him to pay the debt within thirty days, in default of which, the property would be sold. Although he was served with this notice, Torres ostensibly took no heed of the proceedings, but Alvarado as the registered owner of the property filed a petition to enjoin the foreclosure proceedings on grounds which, although they are not fully set out in the record, it is conceded were substantially identical with those here relied upon. No injunction was granted and the suit having been twice called for hearing, was dismissed for want of prosecution. An order for the seizure of the property was in due season awarded by the court, as was also another order stating the amount of the debt and directing the sale of the property. It was seized, advertised and sold by the marshal and bought in by one Rosaly, who assumed the mortgage sued upon in the foreclosure proceedings and paid a small cash price. It then developed that the deed to Alvarado which was on the records was an insurmountable obstacle to the completion of the purchase made by Rosaly under the foreclosure and in those proceedings he began what was tantamount to an hypothecary action against Alvarado as a third possessor to compel him to pay the mortgage debt or cancel the inscription of his deed of purchase. Alvarado appeared in these proceedings, admitted that he could not pay the mortgage debt and could not hold the property unless he did, that he had brought his suit to enjoin and had intentionally abandoned the same and consented to the erasure of the inscription of his deed of sale. This being done, the marshal made a deed to Rosaly in confirmation of the

foreclosure sale, which was duly inscribed. Subsequently, Rosaly having given a mortgage in favor of the firm of De Ford, Luce & Company who were the successors in right of De Ford & Company, by legal proceedings obtained an erasure of the inscription of the Torres mortgage which he, Rosaly, had assumed at the foreclosure sale on the ground that the same had been discharged.

A little more than a year after, that is, on the twentieth of April, 1907, Torres and Alvarado, in a notarial act, rescinded the sale which had apparently taken place between them, it being recited in the act that the rescission was the result of an agreement which had taken place between the parties in 1905 and that it was caused by the refusal of the wife of Alvarado to join in the mortgage which was given by him in the deed of sale.

Eight months afterwards, as we have seen, in January, 1908, Torres commenced this suit upon the general grounds which we have at the outset outlined. The assignments of error which are relied upon to reverse the judgment, affirming the action of the trial court, in dismissing the suit, are nineteen in number. While we think their inherent weakness is apparent from the facts which we have just stated, we briefly notice them.

1st. The summary or executory process provided by the mortgage law, which was followed in foreclosing the Torres mortgage, it is insisted was so deficient in notice or so wanting in opportunity to defend as to cause that law to be repugnant to the due process clause of the Constitution of the United States. Without pausing to apply the elementary doctrine that the due process clause does not control the mere forms of procedure provided only the fundamental requirements of notice and opportunity to defend are afforded (*Louisville & Nashville Railroad Co.* v. *Schmidt*, 177 U. S. 230), and without stopping to indicate how clearly these fundamental rights were provided for as demonstrated by the facts which we have enumerated, we

think it suffices to say that it does not appear that the contention of want of due process was urged either upon the trial court, or was assigned as error in the court below, or was passed upon by that court. And as in its opinion in this case concerning another subject the court below pointed out that it was without authority to consider errors complained of which were not presented to the trial court, it follows that in any view, it could not be held that the court below erred in deciding a matter which it did not decide and which it had no authority to pass upon.

2nd. It is contended that the ninth clause of the act of mortgage of 1901 was mandatory and prohibited the firm of De Ford & Company from advancing to Torres, at his request, money to make his crop for the year 1904, and therefore such advances were not properly chargeable against the proceeds of the crop and hence the interest was paid because the whole proceeds of the crop, if so imputed, disregarding the advances, would have been adequate to have paid the interest. But we think the court below was right in refusing to sustain this fictitious payment of interest or to uphold the construction of the contract upon which it was based. We concur with the court below that the contract did not exclude the right of the firm to advance to Torres at his request, sums to aid him in making a crop and thus to enable him to carry out instead of disregarding the letter and the spirit of the contract. This view, of course, disposes of the contention that error was committed in admitting proof of the agreement to make the advances and of their receipt by Torres and his acquiescence in and approval of the accounts which were rendered him on the subject.

3rd. It is urged, although Torres was fully informed of the institution of the foreclosure proceedings by the demand made upon him under the order of court, conformably to the mortgage law, and had the opportunity to defend afforded by that law, nevertheless the proceedings

were void because no copy of the petition of foreclosure and citation, as provided by the Code of Civil Procedure in ordinary cases, was issued and served. The contention is based upon the proposition that the Code of Procedure in force at the time the suit to foreclose was brought to the extent that it directed service of citation and summons in ordinary cases was cumulative and applicable to proceedings under the mortgage law, because not incompatible with such law. But construing and applying the local law the court below held that this contention was without merit, a conclusion which we follow in the absence of a clear conviction that error was committed, which is far from being the case, and because in any event, for reasons which we shall hereafter state, the contention was additionally without merit.

4th. We group under this paragraph all the other errors relied upon, specifying only those which we consider of importance: *a*, That the wife of Torres as a widow in community was not made a party defendant in the foreclosure suit; *b*, that the notes secured by the mortgage were not annexed to the petition to foreclose or filed therewith; *c*, that the order of the court directing the notice of demand was signed only by two out of the three judges composing the court, and by an attorney at law who was then acting as judge because of the recusation of a member of the court; *d*, because the act of mortgage did not contain a specification of value or appraisement for the purposes of foreclosure; *e*, because of an asserted defect in the advertisement which preceded the sale; *f*, because of the absence from the foreclosure record of the order finding the amount due and directing its payment. The court disposed of all these objections separately upon considerations of local law which we see no reason to reverse, but which we do not refer to in detail, because, in addition it held them all untenable upon a general and we think, conclusive ground to which we refer.

It is not challenged, as pointed out by the court, that under the law of Porto Rico the state of the public record as to title is the dominant factor controlling proceedings for the foreclosure of a mortgage and therefore that the one in whose name a property stands, recorded upon the public records, is the essential party to a proceeding to foreclose. Nothing could better illustrate the correctness of these propositions than do the proceedings in this case, since in consequence of the existence of the registry of the title in Alvarado, resulting from the sale made to him by Torres, the foreclosure proceedings against Torres and the judicial sale thereunder were inefficacious to transmute the title and it became essential for Rosaly, the purchaser at such sale, to commence proceedings to enforce the mortgage as against Alvarado as a third possessor. Applying these principles the court held, in view of the existence of the record title in Alvarado, of his suit to restrain the foreclosure proceeding and its dismissal for want of prosecution, of the steps taken against him as a third possessor and his admissions on the subject and consent to the erasure of the inscription of his title, that the foreclosure proceedings were binding and it was not open to Torres who so far as the record was concerned had parted with his title, to assail them on the grounds which we have stated. The correctness of the premise and of the conclusion itself abstractly considered is not denied, but it is insisted that they are here inapplicable because the sale made by Torres to Alvarado was a mere fiction or simulation and one of the matters complained of which we have not specified is that error was committed in refusing to permit proof of the simulation.

The court below, however, considered and disposed of the alleged distinction in so conclusive and succinct a manner that we adopt and place our own conclusion upon it:

"Alvarado was the record owner and the ostensible

owner. He not only had a duly recorded public document in his favor, but he had begun a suit similar to the present one and this course of action was inconsistent with the possession by anyone else.

"The appellant complains that the court erred in not permitting him to show that the conveyance made from Torres Zayas to Alvarado was fictitious or simulated and that the real party in interest was always Torres Zayas. We cannot see that the court committed an error in refusing to admit such testimony; at most Alvarado would have to be considered as the agent or representative of Torres Zayas and the maxim *qui facit per alium facit per se* may be held to apply. The registry system in Porto Rico exists to apprise purchasers and others who are the true owners of property, and if a man after treating with the apparent owner, may still have his title impugned by a secret agreement existing between such record owner and the alleged true owner there would be no security in the acquisition of property."

Affirmed.

NORTHERN PACIFIC RAILWAY COMPANY *v.* HOUSTON.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 57. Submitted November 11, 1913.—Decided December 1, 1913.

Decided on the authority of *Northern Pacific Railway Company* v. *Wass*, 219 U. S. 426.
109 Minnesota, 273, reversed.

THE facts are stated in the opinion.

Mr. Charles W. Bunn for plaintiff in error.

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

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

In *Northern Pacific Ry. Co.* v. *Wass*, 104 Minnesota, 411, it was decided that lands claimed under an indemnity grant, and described in lists of indemnity selections filed in the appropriate United States Land Office and which were rightfully pending for action by the proper officer were nevertheless subject to entry by others to the destruction of the right to select and to the frustration of the governmental power to approve the selections and award the land under the granting law. The judgment below which is now under review, was expressly rested by the court on the ruling in the *Wass Case*. *Houston* v. *Northern Pacific Ry.*, 109 Minnesota, 273. The identity between the controversies here presented and the one which was passed on in the *Wass Case* is additionally shown by the fact that it is stated in the printed argument on behalf of the railroad company, the plaintiff in error, there being no argument on behalf of the defendant in error, that the land involved in this case was covered by selections made at the same time the selections which were involved in the *Wass Case* were made, and were embraced in the identical lists which were the subject of contest in that case. But since this case was decided by the court below, its ruling in the *Wass Case* was reviewed by this court and it was reversed, thereby destroying the only foundation upon which the judgment in this case could possibly rest. *Northern Pacific Railway Company* v. *Wass*, 219 U. S. 426. It follows for the reasons stated in the *Wass Case*, and upon the authority of that case, the judgment below must be

reversed and the case be remanded to the court below for further proceedings not inconsistent with the opinion in the *Wass Case* and the action which we now take in applying the decision in that case.

Reversed.

UNITED STATES *v.* DAVIS.

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

No. 395. Argued October 17, 1913.—Decided December 1, 1913.

On a direct appeal from an order quashing an indictment this court assumes the correctness of the meaning affixed to the indictment by the court below and determines only whether the statute was correctly construed.

Section 29 of the Penal Code is practically a reproduction of § 5421, Rev. Stat., which in turn represents § 1 of the act of March 3, 1823, c. 38, 3 Stat. 771, and this court follows the construction already given by this court to the last named statute to the effect that it embraces fraudulent documents as well as those that are forged or counterfeited. *United States* v. *Staats*, 8 How. 41.

The enumeration of certain classes of forged and false documents in § 5421, Rev. Stat., does not exclude other fraudulent documents which might be used to perpetrate the wrong which it is the purpose of the statute to prevent.

THE facts, which involve the construction of §§ 28 and 29 of the Penal Code (§§ 5421 and 5479, Rev. Stat.), are stated in the opinion.

Mr. Assistant Attorney General Knaebel for the United States:

The false writings intended by the third clause of § 5421,

Rev. Stat., are not confined to forgeries, but include also writings genuine as to execution but false and fraudulent in substance. *United States* v. *Staats*, 8 How. 41; *United States* v. *Barney*, 5 Blatchf. 294; *S. C.*, 24 Fed. Cas., No. 14524; *United States* v. *Bickford*, 4 Blatchf. 337; *S. C.*, 24 Fed. Cas., No. 14591; *United States* v. *Spaulding* (Dakota), 13 N. W. Rep. 357; *United States* v. *Hansee*, 79 Fed. Rep. 303; *Dolan* v. *United States*, 133 Fed. Rep. 440, 450. See also *United States* v. *Gowdy*, 37 Fed. Rep. 332.

It was expressly held in the *Bickford Case*, *supra*, that the third clause applies to a case in which the claim is one for bounty land; and a like ruling was made in *United States* v. *Wilcox*, 4 Blatchf. 385; *S. C.*, 28 Fed. Cas., No. 16691.

In view of the nature of a soldier's additional right, those cases cannot be distinguished from the case at bar. *United States* v. *Lair*, 118 Fed. Rep. 98; *Barnes* v. *Poirier*, 64 Fed. Rep. 14; *Webster* v. *Luther*, 163 U. S. 331. *United States* v. *Fout*, 123 Fed. Rep. 625; *United States* v. *Reese*, 4 Sawy. 629, distinguished.

Mr. Thomas M. Seawell, with whom *Mr. Oscar T. Hamlin* was on the brief, for defendants in error:

The construction of the indictment by the lower court is without doubt correct, but even if it were not, this court cannot review that question in this proceeding because the construction of the indictment made by the lower court is final in this court. *United States* v. *Biggs*, 211 U. S. 507; *United States* v. *Keitel*, 211 U. S. 370.

Sections 28 and 29 of the Penal Code, namely, the act of Congress approved March 4, 1909, relate and refer solely to forged, false and counterfeited instruments, public records, affidavits and other writings, and not to instruments, public records, affidavits and other writings containing false statements; therefore, the indictment

does not state facts sufficient to constitute the offense under § 37 of the Penal Code, of conspiracy to commit an offense prohibited by §§ 28 and 29 thereof. *United States* v. *Staats*, 8 How. 41; *United States* v. *Howell*, 11 Wall. 432; *United States* v. *Moore*, 60 Fed. Rep. 738; *United States* v. *Glasener*, 81 Fed. Rep. 566; *United States* v. *Albert*, 45 Fed. Rep. 552; *United States* v. *Wentworth*, 11 Fed. Rep. 52; *United States* v. *Barney*, 5 Blatchf. 294; *United States* v. *Reese*, 4 Sawy. 629; *State* v. *Willson*, 28 Minnesota, 52; *Mann* v. *People*, 15 Hun, 155; *State* v. *Young*, 46 N. H. 266; *Commonwealth* v. *Baldwin*, 11 Gray, 197; Barb. Cr. Law, 97; Whart. Cr. Law, § 653.

The decision of the lower court is correct as the instruments mentioned in the statutes construed by it do not include the affidavit, assignment, written guaranty and instruments set forth in each of the counts of the indictment. This court is not confined to a review merely of the single reason given by the lower court, but if in the construction of the statutes under consideration there are other reasons why the judgment of the lower court should be sustained, this court has a right to so decide so long as the decision is confined to the construction of the statutes.

The object of the statute of 1907 was to confine this court to a review of decisions of the lower court concerning the subjects embraced within the clauses of the statutes. *United States* v. *Keitel*, 211 U. S. 371; *United States* v. *Stevenson*, 215 U. S. 190.

The subject of soldiers' additional homesteads is governed by §§ 2306, 2307, Rev. Stat., and under them no affidavits of any kind are required. In this case the affidavit of the claimant is unofficial in character and initiates no right to any tract of land, being a mere *ex parte* declaration under oath by persons having no official relation to the Government. See *Barnes* v. *Poirier*, 64 Fed. Rep. 14; *Webster* v. *Luther*, 163 U. S. 331; *United States* v.

Gridley, 186 Fed. Rep. 544; *Robinson* v. *Lundrigan*, 178 Fed. Rep. 230.

The instruments being unknown to the law, cannot be made the basis of a criminal offense, and therefore a proper construction of §§ 28 and 29, Penal Code, does not include the instruments contained in the indictment. *United States* v. *Dupont*, 176 Fed. Rep. 823.

Even if there were rules and regulations of the Land Department providing for such instruments, still as they are not authorized by any law of the United States, such requirements cannot be made the basis of a criminal offense. *Williamson* v. *United States*, 207 U. S. 425; *Webster* v. *Luther*, 163 U. S. 331: *United States* v. *Eaton*, 144 U. S. 677.

The indictment upon its face discloses that the alleged conspiracy was for the purpose of transferring additional homestead rights to third persons by means of the written instruments therein set forth.

If, therefore, there be any fraudulent purpose disclosed in the indictments it is not to defraud the Government, but individuals who may be allured into the purchase of such rights. The statute does not include such conduct towards individuals.

A conspiracy formed for the purpose of committing a crime against the State is no offense against the laws of the United States. *Pettibone* v. *United States*, 148 U. S. 419; *United States* v. *Thompson*, 29 Fed. Rep. 86; *United States* v. *Fout*, 123 Fed. Rep. 625.

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

The indictment charged the defendants under Penal Code, § 37 (Rev. Stat. § 5440), with a conspiracy to commit offenses against the United States, that is, to violate §§ 28 and 29 of the Penal Code. These sections, leaving

aside additions, irrelevant to this case, are reproductions of §§ 5421 and 5479, Revised Statutes, in force in 1909 when the acts charged were committed. All the overt acts concerned the making or use of false affidavits and documents, in support of a fraudulent claim for land under Rev. Stat. §§ 2304 and 2307, giving honorably discharged soldiers of the Civil War the right to make an additional entry under the circumstances stated in the statutes and the privilege also conferred upon the widow of such honorably discharged soldier to make a claim for land as therein provided. In passing on demurrers, the court treating all the counts as relating solely to the making and use of documents which were merely false and fraudulent but not forged, and construing §§ 5421 and 5479, Rev. Stat., and Penal Code, §§ 28 and 29 as embracing only documents which were forged and counterfeited, held that none of the counts charged acts embraced by the provisions in question and therefore the indictment was quashed because it stated no offense against the United States. On this direct appeal we assume the correctness of the meaning affixed to the indictment by the court below and come only to determine whether the statute was correctly construed. This duty is narrowed by a concession made in argument by the Government to the effect that the construction given by the court to the statute was correct except as to the last paragraph of § 5421, and that even if as to that paragraph it be held that the court below was wrong and that the terms of the paragraph include affidavits, documents, etc., which were merely fraudulent and not forged, only the fourth count would in that contingency be within the section. This consequently confines the issue to a consideration of the third paragraph of the section. For convenience of reference the entire section is in the margin.[1]

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[1] SEC. 5421. Every person who falsely makes, alters, forges, or counterfeits; or causes or procures to be falsely made, altered, forged, or

Coming to the text of the third paragraph, we think it is at once apparent that its provisions are so comprehensive as to prevent us from holding that they include only documents which are forged or counterfeited and hence exclude all other documents, however fraudulent they may be. The all-embracing words "any deed, power of attorney, order, certificate, receipt, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited" leave room for no other conclusion. The context of the section reinforces this view, since the contrast between the narrow scope of the first two paragraphs and the enlarged grasp of the third shows the legislative intent, after fully providing in the first two paragraphs for forged and counterfeited documents, instruments, etc., to reach by the provisions of the third paragraph, any and all fraudulent documents, whether forged or not forged, and thus efficiently to deter

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counterfeited; or willingly aids or assists in the false making, altering, forging, or counterfeiting, any deed, power of attorney, order, certificate, receipt, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum of money;

or who utters or publishes as true, or causes to be uttered or published as true, any such false, forged, altered, or counterfeited deed, power of attorney, order, certificate, receipt, or other writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited;

or who transmits to, or presents at, or causes or procures to be transmitted to, or presented at, any office or officer of the Government of the United States, any deed, power of attorney, order, certificate, receipt, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, shall be imprisoned at hard labor for a period of not less than one year nor more than ten years; or shall be imprisoned not more than five years, and fined not more than one thousand dollars.

from committing the wrong which it was the purpose of the section to prohibit. It is not, however, necessary to fix the true meaning of the provision by a resort as an original question to its text, since its significance has been authoritatively determined contrary to the construction adopted by the court below. The section represents the first section of the act of March 3, 1823, c. 38, 3 Stat. 771, the title of which, "An act for the punishment of frauds committed on the Government of the United States," manifests the purpose which Congress had in mind in enacting it. As long ago as 1850, in *United States* v. *Staats*, 8 How. 41, the court was called upon to determine whether an indictment charging the transmission of a false (but not forged) affidavit touching a claim for pension was sustainable under the third clause of the section. The court fully analyzed the statute and while conceding that other clauses of the act dealt with forged instruments in a technical sense, concluded that the case was within both the letter and the spirit of the act and therefore that the acts charged in the indictment constituted an offense within the provisions of the law. When then the question before us is determined in the light of the text of the third paragraph and the context of the section, especially as elucidated by the ruling in the *Staats Case*, we think it clearly results that the court below was wrong in the construction which it gave the statute and therefore its judgment must be reversed. In saying this we do not overlook the fact that in the argument for the defendant in error it is insisted that even although it be found that the construction which the court below gave was an erroneous one, nevertheless its judgment should be affirmed because from other points of view, the statute, if rightly construed, would exclude the possibility of holding that the facts charged in the indictment were within its terms. But without going into detail on this subject, we content ourselves with saying that in our opinion all the propositions

relied upon to sustain this result are so obviously unsound or so plainly concern the construction of the indictment as not to call for particular notice.

Reversed.

UNION PACIFIC RAILROAD COMPANY *v.* LARAMIE STOCK YARDS COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WYOMING.

No. 570. Submitted October 14, 1913.—Decided December 1, 1913.

The first rule of construction of statutes is that legislation is addressed to the future and not to the past. This rule is one of obvious justice.

Unless its terms unequivocally import that it was the manifest intent of the legislature enacting it, a retrospective operation will not be given to a statute which interferes with antecedent rights or by which human action is regulated.

The right of way granted under the Land Grant Act of July 1, 1862, was a very important aid to the railroad, and was a present absolute grant subject to no conditions except those absolutely implied, such as construction and user.

The act of June 24, 1912, c. 181, 37 Stat. 138, permitting state statutes of limitation to apply to adverse possession of portions of the right of way granted to the railroad company under the act of July 1, 1862, did not have a retroactive effect. *Sohn* v. *Waterson*, 17 Wall. 596.

Congress did not intend by the act of June 24, 1912, to exercise powers to alter and amend the charters of the railroad companies reserved by the acts of July 1, 1862, and July 2, 1864.

This court will not assume that Congress intends to forfeit or limit any of the rights granted to the transcontinental railroads unless it does so explicitly.

An amendment to an existing charter enacted under the reserved power to alter and amend will not be construed as having a retroactive effect as to vested property rights in absence of clear intent of the legislature enacting it.

THE facts, which involve the construction and application of the Union Pacific Land Grant Act of July 1, 1862, the act of June 24, 1912, and the extent of rights claimed to have been acquired under the latter act by adverse possession in the railroad right of way, are stated in the opinion.

Mr. John W. Lacey, Mr. N. H. Loomis and *Mr. Herbert V. Lacey* for plaintiff in error:

Prior to the act of June 24, 1912, title to the right of way could not have been acquired by adverse possession. *Nor. Pac. R. R. Co.* v. *Townsend,* 190 U. S. 267; *Kindred* v. *Un. Pac. R. R. Co.,* 225 U. S. 582, 597; *Nor. Pac. R. R. Co.* v. *Smith,* 171 U. S. 260, 275; *Nor. Pac. R. R. Co.* v. *Ely,* 197 U. S. 1; *Stuart* v. *Un. Pac. R. R. Co.,* 227 U. S. 353.

Under the Wyoming statute of limitations (1910, § 4295) sufficient time had not elapsed since June 24, 1912, for the acquisition of title by adverse possession. Nor has title been acquired by adverse possession by virtue of the act of June 24, 1912. That act, in so far as it attempts to convey title by adverse possession, is not retroactive.

It is apparent that the statute is intended to have a prospective and not a retrospective operation. Not only is the language subject to that construction, but no other reasonable construction is possible. The omission of any express declaration regarding the past is worthy of notice. Had Congress intended to give retrospective effect it would have been a very simple matter to have expressly recorded such intention in that part of the act.

An act of Congress will not be construed as having a retrospective operation unless the language imperatively demands it. *United States* v. *Burr,* 159 U. S. 78, 82; *United States* v. *Am. Sugar Co.,* 202 U. S. 563, 577; *Twenty Per Cent. Cases,* 20 Wall. 179, 187.

This rule is always applied where the result of a retrospective operation would be to injuriously affect an existing status. *United States* v. *Heth*, 3 Cr. 413; Black's Const. Law, 2d ed., p. 627, § 286; *Reynolds* v. *McArthur*, 2 Pet. 417, 434; *Dash* v. *Van Kleeck*, 7 Johnson, 447, 503; *Society* v. *Wheeler*, 2 Gall. 105; *S. C.*, 22 Fed. Cas. 756, 767; *Calder* v. *Bull*, 3 Dall. 386; *Winfree* v. *Nor. Pac. Ry. Co.*, 227 U. S. 296, 301.

If construed as retroactive, the act operates immediately and by virtue of itself alone, to take from the plaintiff its vested right and title to the property in controversy and transfer the same to the defendant without due process of law, and is, therefore, unconstitutional.

Congress has not the power to accomplish this without the consent of the present owner of the property. *Sinking Fund Cases*, 99 U. S. 700, 718; *United States* v. *Un. Pac. R. R. Co.*, 160 U. S. 1, 33. See also *Wallbridge* v. *Commissioners*, 74 Kansas, 341.

Titles vested under act of Congress could not, without the consent of the grantee or its successor, be legislated back to the United States, or legislated into the ownership of anyone else; nor could the title or tenure created by the grant of said lands or right of way be changed, without such consent, by subsequent act of Congress. *Proprietors* v. *Laboree*, 2 Maine (2 Greenleaf), 275, 288; *Webster* v. *Cooper*, 14 How. 488; *Thistle* v. *Frostburg Coal Co.*, 10 Maryland, 129, 144; *Osborn* v. *Jaines*, 17 Wisconsin, 592; *Fletcher* v. *Peck*, 6 Cr. 87, 135; *Sturges* v. *Crowninshield*, 4 Wheat. 122, 206; *Sohn* v. *Waterson*, 17 Wall. 596, 599; *Herrick* v. *Boquillas Land Co.*, 200 U. S. 96, 102.

From the cases cited the statute under consideration must be construed as prospective only, if that be reasonably possible. If the statute be found clearly retroactive, then, under the same authorities, it must be held unconstitutional, as taking from the plaintiff in error its property without due process of law.

Nor. Pac. Ry. Co. v. *Ely*, 197 U. S. 1, is not in point. The statute in that case validated certain conveyances of the railroad company, and was held to operate retrospectively because it contained a provision that it should have no validating force until accepted in writing by the company, 33 Stat. 538, c. 1782. The railroad company did file written acceptance and could not claim that it was deprived of its property without due process of law, because it had accepted and assented to every transfer within the terms of the act.

Mr. Roderick N. Matson and *Mr. T. Blake Kennedy* for defendant in error:

The act in controversy is an alteration or an amendment of the original grants to the Pacific Railroad Companies, and as such violates no constitutional provision.

Congress had the right to, and did take notice that these railroad companies had silently assented for long periods of time to the absolute and undisputed possession of large portions of this right of way, had removed in many instances their fences, making a right of way of fifty feet on each side of their main track, and in other cases erecting in the first instance their fences along a line fifty feet distant from either side of said track.

The United States has by this act stated that those persons who have held portions of this right of way outside of a space fifty feet in width on either side of the main track for a period of time, which in the State where said controversy arises shall amount to adverse possession, that the title by adverse possession may be invoked as against such right of way.

Congress has taken notice of the fact that the railroad companies to whom the original rights of way were granted, and their successors, have consistently and continuously used but one hundred feet of that right of way.

The right of Congress to alter, amend and repeal

franchises where the power is reserved has been frequently sustained. See *Miller* v. *State*, 15 Wall. 478, 498; *Holyoke* v. *Lyman*, 15 Wall. 500, 519; *Tomlinson* v. *Jessup*, 15 Wall. 454, 459; *Railroad Company* v. *Maine*, 96 U. S. 499, 510; *Shields* v. *Ohio*, 95 U. S. 319, 324; *Sinking Fund Cases*, 99 U. S. 700; *Calder* v. *Michigan*, 218 U. S. 591; *Looker* v. *Maynard*, 179 U. S. 46, 52.

In applying the law as laid down by this court no vested right has been impaired, or contract obligation violated; nor has there been any attempt on the part of Congress to pass a law, which would permit the taking away from the railroad company any portion of its right of way which had been put by it to its corporate uses.

Considered as a retrospective act it was intended by Congress as such, and contravenes no constitutional provision.

The construction contended for by counsel for plaintiff in error, that it operates only prospectively, makes an almost absurd situation. At any time within the next ten to twenty years, depending upon the statutes governing adverse possession in the various States, the railroad company may go into court and recover possession of the original four hundred foot right of way, exclusive of the one hundred feet now in use, and those interests which are thereby affected are without standing in court, and have no defense which may be maintained. Such a construction would clearly be against the public interest, and the act itself would avail nothing, except a notice to the railroad that it must within the succeeding twenty years proceed to take some action against those interests which have been occupying certain portions of this right of way unforbidden by the company or assented to by it.

A retrospective law is not in itself unconstitutional. *Satterlee* v. *Matthewson*, 2 Pet. 380, 413; *Curtis* v. *Whitney*, 13 Wall. 68, 70; *Charles River Bridge Case*, 11 Pet. 420, 540; *Watson* v. *Mercer*, 8 Pet. 88, 110; *Balt. & Susq. R. R.*

Co. v. *Nesbit*, 10 How. 395, 401; *Blount* v. *Windley*, 95 U. S. 173, 180; *Calder* v. *Bull*, 3 Dall. 386, 391.

Laws retrospective in their nature do not offend against the Constitution, but have frequently been held to be beneficial in their nature, and to operate for the general good of the community. *United States* v. *Un. Pac. R. R. Co.*, 160 U. S. 1, 33; *Munn* v. *Illinois*, 94 U. S. 113, 134.

The question of vested rights is closely associated with the question of the enjoyment of contracts, which are guaranteed by constitutional provision; and as to what may be considered within the scope of legislative powers, so far as impairing contract obligations under constitutional restriction is concerned, the field is very broad. *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347; *Morley* v. *Lake Shore Ry. Co.*, 146 U. S. 162; *Curtis* v. *Whitney, supra.*

It is evident that the act in controversy was passed by Congress for the public good, and while in a way it might be said to enhance the difficulty of performance, in that in the far distant future the railroad company might have use for a right of way four hundred feet in width, and yet the contract between the Government and the railroad in the nature of its original charter and grant remains in full force by virtue of the terms of the act guaranteeing to the railroad a right of way not less than one hundred feet in width. *Pearsall* v. *Great Northern R. R. Co*, 161 U. S. 646, 673.

The act of the legislature absolutely forbidding the exercise of powers originally granted to the corporation, was sustained in the interest of the public, where those powers remain unexecuted. In the case at bar Congress has enacted a law in the interest of the public diminishing the grant to the Pacific Railroad Companies from a right of way as originally granted of four hundred feet to a right of way as amended of one hundred feet, but only as to those portions of the original right of way outside of the

one hundred foot width which have remained unused by the companies for long periods of time. *L. & N. R. R. Co.* v. *Kentucky*, 161 U. S. 677, 700.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Ejectment to recover certain described lands alleged to constitute part of the right of way of plaintiff (being such in the court below, we will so call it).

The allegations of the complaint are that plaintiff and defendant are corporations, and that plaintiff is engaged in the operation of a railroad from Ogden, in Utah, easterly through certain States to Council Bluffs, Iowa, and over the lands in controversy, they being portions of its right of way made by the act of Congress of July 1, 1862, c. 120, 12 Stat. 489, of the width of 400 feet. The right of way was acquired under said act of Congress, which is entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes." Section 2 of the act provides as follows: "That the right of way through the public lands be, and the same is hereby, granted to said company [the Union Pacific Railroad Company] for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, work-shops, and depots, machine shops, switches, sidetracks, turntables, and water stations."

By virtue of said act of Congress and amendatory acts, certain railroad companies, which are enumerated, theretofore organized and existing in pursuance of said acts and subject to and enjoying the rights created thereby, were consolidated into a new corporation known as "The Union Pacific Railway Company," and the corporation thus created became vested with all the rights of the said constituent corporations, and the plaintiff has become the successor of the Union Pacific Railway Company and is entitled to the possession of the land in controversy and that defendant wrongfully keeps it out of the possession thereof. The ground of the asserted right of defendant is alleged to be an act of Congress entitled "An act legalizing certain conveyances heretofore made by the Union Pacific Railroad Company," approved June 24, 1912, c. 181, 37 Stat. 138, which act, it is alleged, is unconstitutional in that it seeks to deprive plaintiff of its vested rights and titles in and to the lands and to deprive it of its lands and property without due process of law.

The answer of defendant admits all of the allegations of the complaint except the possession of the legal title to the lands in plaintiff and that they are unlawfully held from it and alleges that defendant and its immediate grantors have been for more than ten years prior to the filing of the complaint in the adverse possession thereof under the act of Congress of June 24, 1912, and that such possession constitutes a bar to the action.

Plaintiff demurred to the answer as not constituting a defense. The demurrer was overruled and, plaintiff declining to plead further, judgment was entered that it "take nothing in said action" and that the defendant have and recover costs. This appeal was then prosecuted.

The crux of the controversy is the act of June 24, 1912. There is no question of the grant of the right of way and its extent or that the lands in suit are within it.

The act provides that all conveyances and agreements

heretofore made by the enumerated railway or railroad companies "of or concerning land forming part of the right of way" under the act of Congress of July 1, 1862, "and all conveyances or agreements confining the limits of said right of way, or restricting the same, are hereby legalized, validated, and confirmed to the extent that the same would have been legal or valid if the land involved therein had been held by the corporation making such conveyance or agreement under absolute or fee simple title.

"That in all instances in which title or ownership of any part of said right of way heretofore mentioned is claimed as against said corporations, or either of them, or the successors or assigns of any of them, by or through adverse possession of the character and duration prescribed by the laws of the State in which the land is situated, such adverse possession shall have the same effect as though the land embraced within the lines of said right of way had been granted by the United States absolutely or in fee instead of being granted as a right of way."

Two contentions are made by plaintiff, (1) The act is not retroactive; (2) If it be so construed, it is unconstitutional because it takes plaintiff's vested right and title to the property and transfers the same to defendant without due process of law.

It is established that the right of way to the several railroads was a present absolute grant, subject to no conditions except those necessarily implied, such as that the roads should be constructed and used. And it has been decided that the right of way was a very important aid given to the roads, (*Railroad Company* v. *Baldwin*, 103 U. S. 426; *Stuart* v. *Union Pacific Railroad Co.*, 227 U. S. 342), and that it could not be voluntarily transferred by the companies nor acquired against them by adverse possession. *Northern Pacific Railway Co.* v. *Townsend*, 190 U. S. 267; *Northern Pacific Railroad Co.* v. *Smith*, 171

U. S. 260, 275; *Northern Pacific Railway Co.* v. *Ely*, 197 U. S. 1, 5. Of this defect of power in the companies and the defect of right in the possessors of the right of way, the act of June 24 was intended to be corrective. But of what time was it intended to speak—to the past or future?—to apply to that which was done, or that which was to be done? There is no doubt as to the answer in the case of agreements or conveyances by the company. The act is explicit that they are those "heretofore made" by the enumerated companies. There is no such qualifying word of the "title or ownership" "claimed as against" the corporation by adverse possession. Construction, therefore, becomes necessary, and the first rule of construction is that legislation must be considered as addressed to the future, not to the past. The rule is one of obvious justice and prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed. The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights or by which human action is regulated, unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." *United States* v. *Heth*, 3 Cranch, 399, 413; *Reynolds* v. *McArthur*, 2 Pet. 417; *United States* v. *American Sugar Refining Co.*, 202 U. S. 563, 577; *Winfree, Admr.*, v. *Northern Pac. Railway Co.*, 227 U. S. 296. Surely such imperative character cannot be assigned to the words of the act of June 24; and the intention is not so manifest as to strengthen the insufficiency of the words. Indeed, all reasonable considerations determine the other way.

We have seen that the conveyances and agreements which were legalized were those theretofore made, that is, consummated acts of the company deliberately done to transfer its right. Can it be said that the adverse

possession which was to transfer the right was to be less complete, not fully adverse in fact and law, at once assertive of title and concessive of it? It is to be remembered that there was no sanction of a right to the possession of the defendant or possibility of a right by the railroad company's non-action. There was not a moment of time in which the railroad was called upon to act or lose its right; there was not a moment of time when the possession of defendant initiated an adverse right or constituted an adverse right. This being the situation, it is difficult to believe—or certainly a belief is not compelled—that Congress intended to give to the past conduct of the railroad company a consequence it was not intended to have and did not have. A statute having such a result may incur the opposition of the Constitution. When such may be the result a different construction of the statute is determined. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408; *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407.

In *Sohn* v. *Waterson*, 17 Wall. 596, the questions we are now discussing came up for consideration. We there expressed, in considering a statute of limitations whose literal interpretation would have had the effect of making it applicable to actions which had accrued prior to its passage, the rule against retrospective operation, the injustice and unconstitutionality of it. We said that a statute of limitations may affect actions which have accrued as well as those to accrue, and "whether it does or not will depend upon the language of the act and the apparent intent of the legislature to be gathered therefrom." But it was said that, even against a literal interpretation of the terms of the statute, "it will be presumed that such was not the intention of the legislature. Such an intent would be unconstitutional. To avoid such a result, and to give the statute a construction that will enable it to stand, courts have given it a prospective

operation." And three modes were pointed out as having been adopted by the courts: (1) to make the statute apply only to causes of action arising after its passage; (2) to construe the statute as applying to such actions only as have run out a portion of the time, but which still have a reasonable time left for the prosecution of the action before the statutory time expires—which reasonable time is to be estimated by the court—leaving all other actions accruing prior to the statute unaffected by it; and (3) the rule announced in *Ross* v. *Duval*, 13 Peters, 45, 62, and *Lewis* v. *Lewis*, 7 Howard, 776, 778.

Of the first two modes there was condemnation. The third was approved. It was said of the first that it left "all actions existing at the passage of the act, without any limitation." Which would not be presumed as intended. The second was said to be founded on no better principle than the first, and was a more arbitrary rule than that, as it left "a large class of actions entirely unprovided with any limitation whatever, or, as to them, unconstitutional."

Speaking of the rule announced in the cited cases, it was said: "In those cases certain statutes of limitation—one in Virginia and the other in Illinois—had originally excepted from their operation non-residents of the State, but this exception had been afterwards repealed; and this court held that the non-resident parties had the full statutory time to bring their actions after the repealing acts were passed, although such actions may have accrued at an earlier period. 'The question is,' says Chief Justice Taney (speaking in the latter of the cases just cited), 'From what time is this limitation to be calculated? Upon principle, it would seem to be clear, that it must commence when the cause of action is first subjected to the operation of the statute, unless the legislature has otherwise provided.'"

Sohn v. *Waterson* was cited and its principle applied in *Herrick* v. *Boquillas Cattle Co.*, 200 U. S. 96. A paragraph

in the statutes of Arizona prescribed a limitation of actions as follows: "Any person who has a right of action for recovery of any lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using and enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward." Rev. Stats. of Arizona, 1901, par. 2938.

It will be observed that the language of the paragraph, as of the statute passed on in *Sohn* v. *Waterson*, or, it may be, the act of June 24 under review, literally interpreted, would apply to causes of action which have accrued. The Supreme Court of the Territory refused to give that effect to the provision, and "decided," as this court said, "that under no canon of construction or rule giving a retroactive effect to a new statute of limitations could paragraph 2938 be made to apply to this case." And, after considering all possible constructions of the statute expressed by the Supreme Court of the Territory, among others, that if it be construed as absolutely barring causes of action existing at the time of its passage, it was unconstitutional, citing *Sohn* v. *Waterson*, this court approved the views expressed and said that the court committed no error in determining that under no possible hypothesis could the limitation prescribed operate to bar the plaintiff's action.

The principle of these cases forbids a retrospective operation to be given to the statute under consideration. To do so would cause in a high degree the evil and injustice of retroactive legislation. As said by plaintiff's counsel, the possession of defendant prior to the statute "had no effect on the title, and was not, as between the parties, even a threat against it." And we are loath to believe that Congress intended by an imperative declaration of law, immediately operating, to give defendant's possession another character—one hostile to the title.

Defendant does not combat plaintiff's contentions based

on considering the act of June 24, 1912, as one of limitation. Indeed, the admission is "that prior to the passage of the Act in controversy, title by adverse possession could not be acquired as against the plaintiff in error in its original right of way grant, and it is further admitted that title could not have been acquired by adverse possession subsequent to the passage of the Act." Defendant does not regard the act as a limitation of the remedy but as amendatory of the charter of the company, an exercise of a right reserved in the acts of July 1, 1862 [1] and July 2, 1864.[2] The argument is, disregarding its involutions, that the right of way was not a right in fee but only a right to use, which was forfeited by non-use, and that the right which thereby reverted to the United States was, by the act of June 24, conveyed to those in possession of the land. And the exercise of the right reserved, it is contended, neither impairs any contract with the railroad nor divests its property. Nor does it come under the condemnation of being retroactive legislation, it is further contended. We need not follow the discussion by which these contentions are attempted to be supported. We meet them all by the declaration that Congress by the act of June 24 did not intend to exercise the power over the charters of the companies reserved to it. The exercise of such power would naturally only find an impulse in some large national purpose and would hardly be provoked by a desire to legalize the encroachments here and there on the right of way of a transcontinental railroad.

We are constrained to believe that when Congress intends to forfeit or limit any of the rights conveyed to aid that great enterprise, it will do so explicitly and directly

[1] "Congress may at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act." 12 Stat. 497.

[2] "And be it further enacted, That Congress may, at any time, alter, amend, or repeal this act." C. 216, 13 Stat. 356, 365.

by a measure proportionate to the purpose and not leave it to be accomplished in a piece-meal and precarious way—not by confirming a few conveyances which may have been made or legalizing trespasses which may be made.

But if it could be conceded that the act of June 24 was intended as an amendment of the charters of the companies, the question would still occur as to its effect—as to what time it should be considered as applying, whether to the past or the future. That question we have decided.

Judgment reversed and cause remanded with directions to sustain the demurrer to the answer.

MR. JUSTICE HUGHES dissents.

MR. JUSTICE HOLMES, MR. JUSTICE LURTON, and MR. JUSTICE PITNEY, took no part in the decision.

UNION PACIFIC RAILROAD COMPANY *v.* SNOW.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 682. Submitted October 14, 1913.—Decided December 1, 1913.

Courts will not enforce a literal interpretation of a statute if antecedent rights are affected or human conduct given a consequence the statute did not intend.

Union Pacific Railroad Co. v. *Laramie Stock Yards*, *ante*, p. 190, followed to effect that the act of June 24, 1912, c. 181, 37 Stat. 138, permitting state statutes of limitation to apply to adverse possession of portions of the right of way granted to railroads under the act of July 1, 1862, did not have retroactive effect.

Courts are repelled from giving such a construction to a statute as will raise grave doubts of its legality as well as of its justice.

The act of June 24, 1912, did not amount to a forfeiture of that part of the right of way granted under the act of July 1, 1862, not actually occupied by the railroads; *quære* whether such a construction of the act of 1912 would not render it illegal.

133 Pac. Rep. 1037, reversed.

THE facts, which involve the construction and application of the Railroad Land Grant Act of July 1, 1862, and the act of June 24, 1912, and the extent of rights claimed to have been acquired under the latter act by adverse possession in a railroad right of way, are stated in the opinion.

Mr. N. H. Loomis, Mr. C. C. Dorsey and *Mr. E. I. Thayer* for plaintiff in error.

Mr. Milton Smith, Mr. Charles R. Brock and *Mr. W. H. Ferguson* for defendants in error:

Any title which plaintiff or its predecessors ever had in or to the premises in controversy emanated from the act of July 1, 1862, and was a limited or determinable fee conditioned upon the continued use of said right of way for railroad purposes. *Stuart* v. *Un. Pac. R. R. Co.*, 227 U. S. 342; *M., K. & T. R. Co.* v. *Kan. P. R. Co.*, 97 U. S. 491, 494; *United States* v. *Kan. P. R. Co.*, 99 U. S. 455; *Nor. Pac. Ry. Co.* v. *Smith*, 171 U. S. 260; *Nor. Pac. Ry. Co.* v. *Townsend*, 190 U. S. 267, 271; *Nor. Pac. Ry. Co.* v. *Ely*, 197 U. S. 1; *Oregon Short Line* v. *Quigley*, 10 Idaho, 770; *Universalist Society* v. *Boland*, 155 Massachusetts, 171; Greenleaf's Cruise on Real Property, Tit. 13, c. 2, § 64; 2 Blackstone, 155; 4 Kent's Comm. (13th ed.), 134; *D. & S. F. Ry. Co.* v. *School District*, 14 Colorado, 327.

Under the allegations contained in the second defense of the answers, the title or ownership of the land in controversy was claimed by or through adverse possession of the character and duration prescribed by the laws of Colorado, and the Supreme Court of Colorado in these cases held that the allegations of said second defense were sufficient under the state statutes to establish title by adverse possession. *Snow* v. *Un. Pacific R. R. Co.*, 133 Pac. Rep. 1037; *Sides* v. *Un. Pacific R. R. Co.*, 133 Pac. Rep. 1040; *Laas* v. *Newkirk*, 39 Colorado, 78; *Hurd* v. *McLellan*, 1 Colo. App. 327; *Latta* v. *Clifford*, 47 Fed. Rep.

614, 619; *Elder* v. *McClaskey*, 70 Fed. Rep. 529; *Scott* v. *Mineral Development Co.*, 130 Fed. Rep. 497; *S. C.*, certiorari denied, 196 U. S. 640; *Harending* v. *Reformed Dutch Church*, 16 Pet. 455; *Santee River Cyprus Co.* v. *Jones*, 60 Fed. Rep. 360; *United States* v. *One Lot of Land*, 178 Fed. Rep. 334; *Green* v. *Neal*, 6 Pet. 291.

The title acquired by defendants under the adverse-possession statutes of Colorado was precisely equivalent in contemplation of law to such title as they would have acquired had the railroad company expressly granted to them all its right, title, and interest in the premises. *Nor. Pac. Ry. Co.* v. *Ely*, 197 U. S. 1; *Sharon* v. *Tucker*, 144 U. S. 533, 543; *Toltec Ranch Co.* v. *Cook*, 191 U. S. 532, 538; 3 Washburn on Real Property (5th ed.), 176.

The implication of a grant from the railroad company arising out of the adverse possession of the defendants is conclusive evidence of a voluntary abandonment of the premises by the railroad company. *Stevens* v. *Norfolk*, 42 Connecticut, 377; *Livermore* v. *White*, 74 Maine, 452; *Myers* v. *Spooner*, 55 California, 257; *Davis* v. *Perley*, 30 California, 630; *North American Co.* v. *Adams*, 104 Fed. Rep. 404.

The act of June 24, 1912, was equivalent to a reëntry or declaration of forfeiture or reverter upon the part of the United States of the land in controversy, because of its abandonment and non-user as a railroad right of way, and had the effect of confirming in the defendants the title acquired by them by adverse possession and under the patent issued by the United States to their predecessor in title on November 5, 1878. *Nor. Pacific Ry. Co.* v. *Ely*, 197 U. S. 1; *Atl. & Pac. R. R. Co.* v. *Mingus*, 165 U. S. 413, 430; *Schulenberg* v. *Harriman*, 21 Wall. 44; *Spokane & B. C. Ry. Co.* v. *Washington &c. Ry. Co.*, 219 U. S. 166.

A legislative act passed subsequent to the entry of a judgment in a lower court, and while a case is pending in an appellate court on appeal or writ of error, may be con-

sidered and applied by the appellate court. *Pennsylvania* v. *Wheeling Bridge Co.*, 18 How. 421, 430; *Nor. Pac. Ry.* v. *Ely*, 197 U. S. 1; *United States* v. *Schooner Peggy*, 1 Cr. 103, 110; *Am. Sugar Co.* v. *New Orleans*, 119 Fed. Rep. 691; *Canal Co.* v. *Western Md. R. R. Co.*, 99 Maryland, 570.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case was submitted at the same time as No. 570, just decided. It is ejectment for lands, part of the right of way granted to the Leavenworth, Pawnee & Western Railroad Company by the act of July 1, 1862, c. 120, 12 Stat. 489, to which right of way plaintiff in error (designated herein as plaintiff) is the successor. The action was brought in the District Court of Arapahoe County, State of Colorado.

The sufficiency of the complaint is not questioned, and it is enough to say that it is, in legal effect, the same as in case No. 570, with only such differences as are necessary.

The answer of defendants in error (called herein defendants) set up three defenses and a counter claim. The first answer admits the incorporation of plaintiff and denies all other allegations of the complaint. The second defense alleges that under certain acts of Congress, subsequent to the act of 1862 and prior to the incorporation of the companies, the right of way of the companies was made 200 feet wide instead of 400 feet, that is, 100 feet from the center line of the railroad track. That the land sued for, which is in possession of the defendants, is more than 100 feet from such center line; that neither plaintiff nor any of its predecessors have been in possession of any portion thereof and have not used the same, nor has it needed to use the same for railroad purposes. That defendants, and those under and through whom they claim title, acquired the title under and by virtue of a patent from the

United States issued November 5, 1878, and various mesne conveyances and have been in the adverse possession of all of the property described continuously since the patent was issued, which is more than the full period of seven years next before the institution of the action; have paid and caused to be paid taxes thereon, and that defendants now plead and rely upon the statute of limitations of the State of Colorado.

The third defense alleges that the right received by the corporation which was created by the act of Congress of 1862 or by its successors or assigns was at most, the grant of a limited fee and made on the condition that the property should revert to the United States if it should not be appropriated and used for a railroad within a reasonable time or should cease to be used for railroad purposes. That thereafter, before the land was used for such purposes, the right of reverter which was retained by the United States, was conveyed by the United States to defendants and their grantors by a patent which was issued by the United States to the vendor of defendants in 1878. That neither plaintiff nor any of its predecessors used or occupied the land for railroad purposes or for any purposes whatever and on account thereof lost any and all right thereto and the property reverted to the United States and to defendants; that neither plaintiff nor any of its predecessors ever needed the property or any part thereof for railroad purposes and can never use the same for such purposes. That on account of failure to use or occupy the land for a period which now approximates fifty years next ensuing after the approval of the act of 1862, the limited fee which may have been granted to plaintiff ceased and determined and the property reverted to the United States and its grantees.

The counter claim repeats some of the allegations in regard to the width of the right of way and defendants' adverse possession of the land outside of the 100 feet on

either side of the center of the railroad track, alleges the value of improvements made thereon by defendants at $1,500 and claims the reimbursement thereof in case of recovery by plaintiff.

Plaintiff demurred to the second and third defenses and to the counter claim. The demurrer was sustained. The case was subsequently tried on the issues made by the complaint and the first answer thereto.

At the trial the defendants objected to any testimony being introduced and moved to dismiss the complaint on the ground that no right of way was granted to plaintiff "at the place in dispute" or no grant of right of way in excess of 100 feet on either side of the center line of plaintiff's track. The objection was overruled and defendants excepted.

It was then stipulated that witnesses would testify to the various steps in the title of plaintiff, that the railroad was constructed over the right of way described in the complaint, and that the railroad and the main track thereof are now in the same location in which they were at the time of the original construction; that the predecessors in title of plaintiff complied with all of the requirements of the various acts of Congress in the complaint mentioned, and that plaintiff is the owner of the lands, if any, conveyed to its predecessor companies under and by virtue of the said acts of Congress; that the land described in the complaint lies within 200 feet of the center of the main track of the railroad, but outside of a line of 100 feet; that the railroad is part of the railroad constructed from the Missouri River at the mouth of the Kansas River westward to a connection with the main line of the Union Pacific, as authorized by the acts of Congress, and has been, since its construction, continuously operated as a railroad in connection with the main line of the Union Pacific at Cheyenne, Wyoming. That defendants withhold possession of the lands from plain-

tiff and that possession was demanded before the commencement of the action.

Judgment of nonsuit was moved on the grounds stated in the motion to dismiss; also judgment for defendants. Both motions were denied and plaintiff was adjudged owner in fee of the lands, and that defendants had no right, title or interest therein. Judgment was entered accordingly. The judgment was reversed by the Supreme Court of the State. 133 Pac. Rep. 1037.

The Supreme Court decided that the Kansas Pacific became vested by the acts of July 1, 1862, and July 2, 1864, c. 216, 13 Stat. 356, with title to a right of way 400 feet wide through the land and that the Union Pacific, its successor in title, is the owner of the right of way. The court rested this conclusion on *Stuart* v. *Union Pacific Railroad Co.*, 227 U. S. 342. It hence decided that "the determination of the court of the facts found upon the issue raised by the first defense was . . . in conformity with the decision of the Supreme Court of the United States." And the Supreme Court also decided that the District Court, in sustaining the demurrer to the second defense which pleaded the statute of limitations, followed the decision of this court, and cited *Kindred* v. *Union Pacific Railroad Co.*, 168 Fed. Rep. 648, 653; *S. C.*, affirmed 225 U. S. 582; *Northern Pacific Railroad Co.* v. *Smith*, 171 U. S. 260, 267; *Northern Pacific Railway Co.* v. *Ely*, 197 U. S. 1; *Northern Pacific Railway Co.* v. *Townsend*, 190 U. S. 267, to the effect that individuals could not for private purposes acquire by adverse possession under state statutes any portion of a right of way granted by the United States to a railroad company. "So," the court said, "it is plain that prior to June 24, 1912, an individual could not acquire title to any portion of the 400 feet right of way by the statute of limitations or adverse possession, and the judgment of the lower court on this issue was correct." But it was remarked that the act of June 24,

though passed while the case was pending on appeal, nevertheless applied to the case, on the authority of certain cases which were cited.

The cited cases express the principle that a judgment, though not erroneous when rendered, may become so by a subsequent law. Or if an event occurs after an appeal which makes it impossible for the appellate court to enforce its decision, the case will be dismissed. *United States* v. *The Peggy*, 1 Cr. 103; *Board* v. *Glover*, 160 U. S. 170; *S. C.*, 161 U. S. 101; *Dinsmore* v. *Express Co.*, 183 U. S. 115. Two of the members of the court dissented and expressed the view that as the judgment of the lower court was "in strict conformity with the decisions of the Supreme Court of the United States, and therefore when rendered was not erroneous," it was the duty of the court to affirm it.

In deciding that the act of June 24 was controlling, the Supreme Court of Colorado necessarily gave retrospective operation to the act. This was error. *Union Pacific Railroad* v. *Laramie Stock Yards Co.*, decided this day, *ante*, p. 190.

It was contended in that case that the grant of the right of way was only a grant of the right to use and that whenever and if not so used or for any reason became forfeited, it would revert to the grantor. It was recognized that to enforce the forfeiture and convey the right which had reverted, some act of the United States was necessary. This condition, it was contended, was satisfied by the act of June 24, 1912, c. 181, 37 Stat. 138, enacted, it was further contended, under the power reserved to Congress by the acts of 1862 and 1864 to alter or amend the charters of the companies. We rejected the contention and we said, besides, that even if the act be so regarded, its effect was to be determined by the time it was intended to operate, whether retrospectively or prospectively. What we said is applicable here. It is contended here that the

right of way was derived through the act of July 1, 1862, and that the title granted to the companies "was a fee upon limitation, and that the estate continued *so long as*, or while, the railroad companies continued to use the land granted for railroad purposes, and terminated *ipso facto* by the cessation of such use." And it is further contended that no act was necessary upon the part of the United States to work the forfeiture or reinvest the United States with complete title to the land granted.

The bearing of the first contention we shall presently consider; the other has no foundation in the granting acts nor in the decisions interpreting them, some of which are cited above. It is opposed by the act of June 24, which leaves the right of way as originally granted and to the extent granted in the railroad companies, except where they had *theretofore* conveyed parts of the same and where parts of it shall be held by adverse possession.

It is, however, contended that if some act of the United States was necessary to effect a forfeiture of the right of way, the act of June 24, 1912, was sufficient for that purpose. If this be conceded, *arguendo*, and if it be also conceded that the grant of the right of way was of a limited fee, we are brought to a consideration of the effect of the act, whether it applies to a past or a future possession; and we have decided that it applies to the latter. *Union Pacific Railroad Co.* v. *Laramie Stock Yards Co.*, *ante*, p. 190.

This conclusion is, of course, contested by defendants in an argument which it is, however, unnecessary to answer in detail. It is asserted that the act "operates *in præsenti* in so far as it conveys the reversionary interest of the United States to the persons entitled to the benefit of the act, or confirms their preëxisting titles." Special emphasis is put upon the words "is claimed" of the act as necessarily intended to apply to titles claimed at the time of the passage of the act by adverse possession. "Such

titles," it is said, "must have been initiated prior to the enactment of the act." For that reason, it is further said, "the act cannot be said to be retrospective, because the language used simply designates the classes of persons to whom confirmatory grants are made." But these considerations are simply the result of dwelling upon the literal terms of the act. But this is obnoxious to the rule of the cases. Courts will not, as we have seen, enforce a literal interpretation when by doing so antecedent rights are affected or human conduct given a consequence it did not intend. Such a purpose the courts refuse to assign to the legislature unless compelled by language explicit and imperative. And we have pointed out that we are repelled from so doing by grave doubts of its legality as well as of its justice. These considerations need not be further expanded. Their strength has been pointed out and their sufficiency to prevail over a literal interpretation of a statute.

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

MR. JUSTICE HUGHES dissents.

MR. JUSTICE HOLMES and MR. JUSTICE PITNEY took no part in the decision.

UNION PACIFIC RAILROAD COMPANY *v.* SIDES.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 683. Submitted October 14, 1913.—Decided December 1, 1913.

Decided on the authority of *Union Pacific Railroad Co.* v. *Snow, ante*, p. 204.

133 Pac. Rep. 1040, reversed.

THE facts are stated in the opinion.

Mr. N. H. Loomis, Mr. C. C. Dorsey and *Mr. E. I. Thayer* for plaintiff in error.

Mr. Milton Smith, Mr. Charles R. Brock and *Mr. W. H. Ferguson* for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action in ejectment, brought by plaintiff in error, called here plaintiff, against defendants in error, here called defendants, in the District Court of Arapahoe County, State of Colorado.

Except as to the description of the land the complaint is substantially the same as that in No. 682 and presents the same legal rights and titles. Defendant Sides demurred to the complaint; Scherrer denied being in possession of the land and disclaimed any claim to it. The demurrer was overruled and Scherrer answered, setting up defenses which are in substance the same as in No. 682. To the defenses plaintiff filed demurrers, which were sustained. Sides elected to plead no further and the case coming on for trial and certain facts being agreed upon as testified to, objection to the materiality of which was made, motions to dismiss and for judgment were also made and overruled. Judgment was entered for plaintiff. It was reversed by the Supreme Court of the State, for the reasons stated in its opinion in *Snow* v. *Union Pacific Railroad Co.*, that is, No. 682, *ante*, p. 204, 133 Pac. Rep. 1040.

This case was submitted with No. 682, involves the same questions and is determined by its decision.

Judgment reversed and cause remanded for further proceedings not inconsistent herewith.

MR. JUSTICE HUGHES dissents.

MR. JUSTICE HOLMES and MR. JUSTICE PITNEY took no part in the decision.

KENER, ADMINISTRATOR OF KENER, v. LA GRANGE MILLS.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 63. Argued November 13, 1913. Decided December 1, 1913.

A state constitution cannot exempt property from existing liens nor can Congress give such constitution greater effect; and so *held* that under the Bankruptcy Act of 1867 as amended by the act of March 3, 1873, c. 235, 17 Stat. 577, a homestead in Georgia was not exempted from liens which had attached prior to the bankruptcy, notwithstanding provisions in the Georgia Constitution to that effect. *Gunn* v. *Barry*, 15 Wall. 610.

135 Georgia, 730, affirmed.

THE facts, which involve the construction of the Bankruptcy Act of 1867 as amended by the act of 1873, are stated in the opinion.

Mr. Daniel W. Rountree, Mr. Clifford L. Anderson and *Mr. W. H. Terrell*, for plaintiff in error, submitted:

The bankrupt homestead was set aside by the assignee in bankruptcy, and what has been done by the assignee is equivalent to compliance with the State's statutes in assigning homestead or claiming exemption. *Ross* v. *Worsham*, 65 Georgia, 622.

Under the constitution and laws of Georgia, a sale of a homestead exemption pending the homestead estate, that is to say, during the life of the widow or minority of the children, is void. *Dozier* v. *McWhorter*, 113 Georgia, 584; *Evans* v. *Piedmont Assn.*, 118 Georgia, 882; *Williford* v. *Denby*, 127 Georgia, 786; *Timothy* v. *Chambers*, 85 Georgia, 267; *Hart* v. *Evans*, 80 Georgia, 330; *Pinkerton* v. *Tumlin*, 22 Georgia, 165.

Under the act of 1868, a debt was released by a discharge whether scheduled or not. *Heard* v. *Arnold*, 56 Georgia, 576; *Beck* v. *Crumb*, Ibid. 95.

An exemption in bankruptcy made under the constitution of 1868, is not subject to a judgment founded on a debt contracted prior to the adoption of such constitution, under the Bankruptcy Act of 1867 as amended in 1872 and again in 1873.

This act has been declared unconstitutional and void in this and other cases such as *In re Deckert*, 2 Hughes, 183; *In re Duerson*, 7 Fed. Cas. No. 4117; *In re Dillard*, 7 Fed. Cas. No. 3912; *In re Shipman*, 14 N. B. R. 570; *S. C.*, 21 Fed. Cas. No. 12791.

The same act was held to be valid in—*In re Smith*, 2 Woods, 458; *In re Jordan*, 13 Fed. Cas. No. 7515; *In re Beckerford*, 1 Dill. 45; *In re Jordan*, 8 N. B. R. 180; *In re Kean*, 2 Hughes, 322; *In re Smith*, 22 Fed. Cas. No. 12986; *Windley* v. *Tankard*, 88 N. Car. 223; *Lamb* v. *Chamness*, 84 N. Car. 379; *Simpson* v. *Houston*, 97 N. C. 344; *Darling* v. *Berry*, 13 Fed. Rep. 659.

The impairment clause is only a restriction upon the States. No provision of the Constitution prohibits Congress from passing laws impairing the obligation of contracts. On the contrary the power to enact bankrupt laws plainly authorizes it to annul or impair the obligations of contracts. *Satterlee* v. *Mathewson*, 2 Pet. 380, 416; *Hepburn* v. *Griswold*, 8 Wall. 603; *Legal Tender Cases*, 12 Wall. 457, 550, and 110 U. S. 421, 449; *Mitchell* v. *Clark*, 110 U. S. 633.

Nor was the act inconsistent with a uniform system of bankruptcy. As against debts contracted before the adoption of the laws authorizing it, the exemption was valid and this was true in every State and therefore uniform. See cases decided under act of 1898. *Hanover Nat. Bank* v. *Moyses*, 186 U. S. 181; *Holden* v. *Stratton*, 198 U. S. 202, 214; *Thomas* v. *Woods*, 173 Fed. Rep. 585, 591;

In re Rouse, Hazard & Co., 91 Fed. Rep. 96, 99. *Bush* v. *Lester*, 55 Georgia, 579, was erroneously decided.

Mr. Louis Marshall for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit to recover an interest in land sold on execution against Godfred Kener and held by the defendant in error under that sale. The plaintiff is the representative of one of Kener's heirs. The facts are these. A judgment was recovered upon a bill of exchange against Godfred Kener in 1858 and execution issued in 1873; in 1878 he was adjudged a bankrupt and returned the holders of the judgment among his creditors, but they did not prove their claim. In the same year this land was set aside in due form to Kener as his homestead exempted by the state constitution of 1868 and the Bankruptcy Act then in force. Rev. Sts., § 5045. In June, 1879, he died and in December, 1879, the execution was levied and this land was sold. The sale was valid unless the Bankruptcy Act interfered. The trial court entered judgment for the defendant and the judgment was affirmed by the Supreme Court of the State. 135 Georgia, 730.

The Bankruptcy Act of 1867 as amended by the act of March 3, 1873, c. 235, 17 Stat. 577, Rev. Stat., § 5045, preserved, within a limit, exemptions under state laws and provided that such exemptions should be valid against debts contracted before those laws and against liens by judgment of any state court. The plaintiff bases his claim upon this act. But in *Gunn* v. *Barry*, 15 Wall. 610, argued and decided (March 31, 1873) just after the amendment of March 3, it was held that the Georgia constitution could not exempt property from existing liens, and that Congress could not give that constitution greater effect. See also *In re Deckert*, 2 Hughes, 183. *In re*

Rahrer, 140 U. S. 545, 560. In *In re Shipman*, 2 Hughes, 227, it seems to have been supposed that the act of 1873, wrongly called of 1874, was passed to meet *Gunn* v. *Barry*, in the teeth of the declaration that such an attempt would be invalid. But that was a mistake.

Of course if the constitution of 1868 and statutes based upon it should be construed as not attempting to disturb then existing liens, the act of Congress hardly would be read as purporting to give a greater scope to the state laws. The Georgia decisions since *Gunn* v. *Barry* agree that in cases like the present the lien remained. *Bush* v. *Lester*, 55 Georgia, 579. Whether the result be reached by construction of the state laws, by construction of the former Bankruptcy Act, or on constitutional grounds, it comes to the same thing, and the judgment below was right.

Judgment affirmed.

UNITED STATES EX REL. GOLDBERG *v.* DANIELS, SECRETARY OF THE NAVY.

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

No. 79. Argued November 14, 1913.—Decided December 1, 1913.

The United States, as the owner in possession of property, cannot be interfered with behind its back; nor can the courts compel the officer having the custody of such property to surrender it in a proceeding to which the United States is not, and cannot be made, a party.

Mandamus will not lie at the instance of one who in response to advertisement has made the highest bid for a vessel to compel the Secretary of the Navy to deliver the vessel.

The discretion of the Secretary of the Navy is not ended by receipt and opening of bids for a condemned naval vessel even though they

satisfy the conditions prescribed. Mandamus will not lie to compel him to accept the highest bid.
37 App. D. C. 282, affirmed.

THE facts, which involve the jurisdiction of the court to issue a writ of mandamus directing the Secretary of the Navy to carry out the terms of a bid in response to advertisements for sale of a naval vessel, are stated in the opinion.

Mr. Albert N. Eastman and *Mr. Charles Poe* for plaintiff in error:

There was a binding contract for the sale of the cruiser to the relator.

The relator had carried out and performed everything which was to be done by him. He had paid the full purchase price. The minute the bids were opened and his proposal or bid was ascertained to be the highest and the money was paid, the statute required that the net proceeds of the sale should be covered into the Treasury, and the vessel be delivered to the purchaser, who could not have withdrawn his bid or retracted his offer after the sealed bids had been opened. As he was bound, under no principle of law, was the Secretary of the Navy released?

The case cannot be likened to a sale at public auction. *Blossom* v. *Railroad Co.*, 3 Wall. 196, 206, does not apply.

This court has determined that no government property can be sold under statutes similar to the one in question except in the way prescribed by law. *Steele* v. *United States*, 113 U. S. 128.

Instead of likening this transaction to an auction sale, it should be likened to a sale by correspondence. *Taylor* v. *Insurance Co.*, 9 How. 390; Benjamin on Sales, 7th ed., Bennett's Notes, p. 54, § 44; also p. 68, § 64; see also the American note on p. 76 of the same work.

No right to reject bids was reserved, and under the statute no right to reject bids could have been reserved.

Integrity of the Government demands it deliver this cruiser. If the Government does not make delivery, can it ever expect honest bids when it thus advertises? If the Government can thus refuse, equally so can the individual when the sealed bids are opened and he finds he has been foolish in bidding too much, or for other personal reasons of his own he desires to change his mind.

As the Secretary could only sell in this manner, the relator had a perfect right to rely on his rights under the statute and the Secretary cannot take advantage of a concealed purpose.

This is not such a contract as cannot be enforced for failure to comply with § 3744, Rev. Stat., as that section does not apply, and even if applicable before performance, as the contract has been performed § 3744 would not apply. *St. Louis Hay & Grain Co.* v. *United States*, 191 U. S. 159; *Garfield* v. *United States*, 93 U. S. 242.

The statute of frauds cannot be pleaded to an executed contract. *Cleveland, C., C. & St. L. Ry. Co.* v. *Wood*, 189 Illinois, 352, 355.

Section 3744 was passed in 1862 as a general act. Section 5 in 1883 as a special act to govern the sale of vessels, and, therefore, as the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one. 36 Cyc. 1151. See also 1 Fed. Stat. Ann.

Mandamus is the appropriate remedy to compel its performance. No discretion was left to the Secretary of the Navy under § 5.

In *Knight* v. *Lane*, 228 U. S. 6, the writ was refused because the court held that the Secretary of the Interior had a discretion in the matter involved in that proceeding. In *Parish* v. *MacVeagh*, 214 U. S. 124, the court granted the writ against the Secretary of the Treasury because it held

that there was simply a ministerial function to be performed. See also *Garfield* v. *Goldsby*, 211 U. S. 249.

Mr. Morgan H. Beach, with whom *Mr. Solicitor General Davis* was on the brief, for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is a petition for a mandamus directing the Secretary of the Navy to deliver the United States Cruiser Boston to the petitioner. The petition alleges that after survey, condemnation and appraisal the Cruiser was stricken from the Naval Register under the act of August 5, 1882, c. 391, § 2, 22 Stat. 284, 296; that thereafter the Secretary of the Navy advertised for proposals of purchase under the act of March 3, 1883, c. 141, 22 Stat. 582, 599; that the petitioner bid more than the appraised value, sending a certified check for the whole sum bid; that when the bids were opened on the day fixed the petitioner's was the highest, but that the Secretary refused to deliver the vessel and sent back the check, which the petitioner holds subject to the Secretary's order. The answer admits the facts, but sets up that the bid is not an acceptance of an offer, but is itself only an offer, subject to be accepted or not at the discretion of the Secretary and that the Secretary never accepted the petitioner's bid, the Government having decided to lend the Cruiser to the Governor of Oregon for use by the Naval Militia of that State. The petitioner demurred, but the petition was dismissed on the ground that the discretion of the Secretary was not ended by the receipt and opening of the bids, even though they satisfied all the conditions prescribed. 37 App. D. C. 282; *Sub nom. United States* v. *Meyer*.

We see no sufficient reason for throwing doubt upon this premise for the decision, but there is another that comes earlier in point of logic. The United States is the

owner in possession of the vessel. It cannot be interfered with behind its back and, as it cannot be made a party, this suit must fail. *Belknap* v. *Schild*, 161 U. S. 10. *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, 606. *Oregon* v. *Hitchcock*, 202 U. S. 60, 69. *Naganab* v. *Hitchcock*, 202 U. S. 473, 476.

Judgment affirmed.

STRAUS AND STRAUS, COMPOSING THE FIRM OF R. H. MACY & COMPANY, *v.* AMERICAN PUBLISHERS' ASSOCIATION.

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

No. 19. Argued March 7, 1913.—Decided December 1, 1913.

One who sets up a Federal statute as giving immunity from a judgment against him, may bring the case here under § 709, Rev. Stat., now § 237 of the Judicial Code, if his claim is denied by the decision of the state court.

No more than the patent statute was the copyright act intended to authorize agreements in unlawful restraint of trade and tending to monopoly in violation of the Sherman Act.

The Sherman Act is broadly designed to reach all combinations in unlawful restraint of trade and tending because of the agreements or combinations entered into to build up and perpetuate monopolies. The act is a limitation of rights which may be pushed to evil consequences and may, therefore, be restrained. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20.

As the agreement involved in this case went beyond any fair and legal means to protect trade and prices, practically prohibited the parties thereto from selling to those it condemned, affected commerce between the States, it was manifestly illegal under the Sherman Act, and was not justified as to copyrighted books under any protection afforded by the copyright act.

Where the state court dismissed the bill solely on the ground that defendant's acts were not within the denunciation of the Federal statute on which plaintiff relied, the judgment will be reversed on

that ground and it is unnecessary for this court to decide other Federal questions involved.

Quære, and not now discussed or decided, whether an original action can be maintained in the state courts for injunction and damages under the Sherman Act.

Judgment based on 199 N. Y. 548, reversed.

THE facts, which involve the construction of the Sherman Anti-trust Act and its application to agreements regarding the sale of copyrighted books, are stated in the opinion.

Mr. Wallace Macfarlane, with whom *Mr. Edmond E. Wise* was on the brief, for plaintiffs in error:

This court has jurisdiction to review the judgment of the state court, because that judgment decided against the plaintiffs in error a Federal right specifically set up and asserted by them in the state courts, which if decided in their favor would have required a contrary judgment.

The state court erred in holding that the agreements, resolutions or combinations set forth in the complaint which were entered into by the defendants were not unlawful, illegal and contrary to the statutes of the United States, and more particularly of the statute passed on July 2, 1890, known as "An Act to protect trade and commerce against unlawful restraints and monopolies," in so far as concerns copyrighted books.

The agreements obviously restrain trade. They have been entered into by seventy-five per cent. of the publishers of the United States and by a large majority of the booksellers of the United States. They affect interstate commerce as well as intrastate trade and operate to restrain trade or commerce among the several States. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *Swift & Co.* v. *United States*, 196 U. S. 375.

The Court of Appeals (177 N. Y. 473) in fact held that so far as uncopyrighted books were concerned, the com-

bination was in restraint of trade, and it requires little reasoning to show that it contains every element of illegality as to effect, intent, and method of execution condemned by this court in the latest, as well as many of the previous decisions. *American Tobacco Co.* v. *United States*, 221 U. S. 106; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *Montague* v. *Lowry*, 193 U. S. 38; *Swift & Co.* v. *United States*, 196 U. S. 375; *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20; *Dr. Miles Medical Co.* v. *John D. Parks & Sons*, 220 U. S. 373; *United States* v. *Joint Traffic Asso.*, 171 U. S. 505; *United States* v. *Freight Asso.*, 166 U. S. 290; *Addyston P. & S. Co.* v. *United States*, 175 U. S. 211; *Northern Securities Co.* v. *United States*, 193 U. S. 197.

For cases in which combinations similar to this have been condemned by the courts, see *Cohen* v. *Berlin & Jones*, 166 N. Y. 392; *Cummings* v. *Union Bluestone Co.*, 164 N. Y. 401; *People* v. *Milk Exchange*, 145 N. Y. 267; *Judd* v. *Harrington*, 139 N. Y. 105; *People* v. *Sheldon*, 139 N. Y. 251; *Arnot* v. *Pittston & Elmira Coal Co.*, 68 N. Y. 558; *In re Jacobs*, 98 N. Y. 98; *People* v. *Gilson*, 109 N. Y. 389; *Brown* v. *Jacob Pharmacy*, 41 S. E. Rep. 553 (Georgia); *Moore* v. *Bennett* (Ill., 1892), 15 L. R. A. 361; *People* v. *Chicago Live Stock Assn.*, 170 Illinois, 556; *Richardson* v. *Guhl*, 77 Michigan, 632; *State* v. *Nebraska Distillery Co.*, 29 Nebraska, 200; *Howardson* v. *Y. & L. Co.*, 111 Wisconsin, 445; *Morris Run Coal Co.* v. *Bartley Coal Co.*, 61 Pa. St. 173; *Bower* v. *Trade Council*, 53 N. J. Eq. 301; *Jackson* v. *Stanfield*, 137 Indiana, 592.

Mr. Stephen H. Olin and *Mr. John G. Milburn* for defendants in error:

This court has no jurisdiction to review the decision of the state courts giving effect to the copyright statute.

The plaintiffs in error did not specially set up or claim

any right, privilege or immunity under the Federal Anti-trust Act, as to which there was a decision adverse to the right or privilege claimed.

The complaint complained that the agreement therein recited was unlawful under the state laws and the Federal statute. The decision was that the agreement was unlawful under the state statute. Hence, the decision was not against the right claimed, although the court did not rest it upon the Federal statute.

Furthermore, the right claimed under the Federal statute was not specially set up or claimed, since in the claim as made was involved a non-Federal claim made under the public policy and statutes of New York. *Pierce* v. *Somerset Ry.*, 171 U. S. 641; *Allen* v. *Arguimbau*, 198 U. S. 149; *Dibble* v. *Bellingham Bay Land Co.*, 163 U. S. 63; *Klinger* v. *Missouri*, 13 Wall. 257; *Eustis* v. *Bolles*, 150 U. S. 361, 366; *Johnson* v. *Risk*, 137 U. S. 300.

No right under the Federal Anti-trust Act in relation to copyrighted books was specially set up or claimed by the plaintiffs at any time before the filing of the assignments of error.

As the record shows that no Federal question was at any time specially presented to the appellate courts by the plaintiffs, so the opinions show that no such question as is raised by the assignments of error was in fact considered or decided on either of the appeals. 177 N. Y. 473; 193 N. Y. 496; 194 N. Y. 538; 199 N. Y. 548.

This court has therefore no jurisdiction to examine the alleged errors assigned. *Klinger* v. *Missouri*, 13 Wall. 257; *De Saussure* v. *Gaillard*, 127 U. S. 216; *Johnson* v. *Risk*, 137 U. S. 300; *Bachtel* v. *Wilson*, 204 U. S. 36, 41; *Ark. So. R. R.* v. *German Bank*, 207 U. S. 271; *Leathe* v. *Thomas*, 207 U. S. 93; *Rogers* v. *Jones*, 214 U. S. 196; *Sauer* v. *New York*, 206 U. S. 536, 546; *Murdock* v. *Memphis*, 20 Wall. 590; *Hale* v. *Akers*, 132 U. S. 554; *Eustis* v. *Bolles*, 150 U. S. 361; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S.

112; *Pierce* v. *Somerset Railway*, 171 U. S. 641; *Appleby* v. *Buffalo*, 221 U. S. 524.

No inference of the denial of the Federal question raised in the assignments of error can be based upon the decision itself, because it might have rested upon any of several other grounds each of which is broad enough to sustain it.

The Sherman Act is not applicable in such an action as this when brought in the state court.

Agreements creating a monoply in restraint of trade and against public policy, though invalid and unenforcible, are not illegal in the sense of giving a right of action to third persons for an injury sustained, nor as affording ground for an injunction against threatened injury. *National Fireproofing Co.* v. *Mason Builders' Assn.*, 169 Fed. Rep. 259; *Penn. R. R. Co.* v. *Hughes*, 191 U. S. 477; *Locker* v. *American Tobacco Co.*, 121 App. Div. 443, 449, affd. 195 N. Y. 565; *Missouri* v. *Associated Press*, 51 L. R. A. 170.

No case has been found in which a state court has allowed a recovery based upon the Sherman Act or on account of its violation.

In a suit for an injunction not brought by the Attorney General, there can be no recovery on the ground that a combination is illegal under the Federal Anti-trust Act. *Nat. Fireproofing Co.* v. *Mason Builders' Assn.*, 169 Fed. Rep. 259, 263; *Pidcock* v. *Harrington*, 64 Fed. Rep. 821; *Greer, Mills & Co.* v. *Stoller*, 77 Fed. Rep. 1.

The plaintiffs have not come into a court of equity with clean hands, nor does it appear that the plaintiffs have suffered any actionable damage whatever from the acts complained of.

Notwithstanding the Federal Anti-trust Act it is lawful for a publisher when selling, at wholesale, books copyrighted by him, to fix, by agreement with the purchasing bookseller, the retail price at which such copyrighted books shall be sold during a period of one year. Such is the rule

in patent cases. *Bement* v. *Nat. Harrow Co.*, 186 U. S. 70, 91, 92, 93; *Henry* v. *Dick Co.*, 224 U. S. 1, 31, 39, 43, 44, 45, 46, 47; *Victor Talking Mach. Co.* v. *The Fair*, 123 Fed. Rep. 424; *Nat. Phonograph Co.* v. *Schlegel*, 128 Fed. Rep. 733, 735; Robinson on Patents, § 824; *Edison Phonograph Co.* v. *Kaufmann*, 105 Fed. Rep. 960; *Park & Sons* v. *Hartmann*, 153 Fed. Rep. 24; *Edison Phonograph Co.* v. *Pike*, 116 Fed. Rep. 863.

This rule applies also in copyright cases.

Certain uses of the copyrighted book or article by a purchaser have been held to be lawful; but all other uses are within the absolute and exclusive control of the owner of the copyright. Drone on Copyright, 387–399, 433, 467.

The same rule should be applied to a copyright as to a patent for a machine. *Story* v. *Holcombe*, 4 McLean, 306.

The courts have followed the patent cases whenever applicable. Macgillivray on Copyright, 281, 282; *Callaghan* v. *Myers*, 128 U. S. 617; *Reed* v. *Holliday*, 19 Fed. Rep. 325; *List Pub. Co.* v. *Keller*, 30 Fed. Rep. 772; *Gilmore* v. *Anderson*, 38 Fed. Rep. 846; *Harper Bros.* v. *Donohue*, 144 Fed. Rep. 491, 492; *West Pub. Co.* v. *Lawyers' Co-op. Pub. Co.*, 64 Fed. Rep. 360; *Harper* v. *Ranous*, 67 Fed. Rep. 904; *Daly* v. *Webster*, 56 Fed. Rep. 483, 488; *Ogilvie* v. *Merriam Co.*, 149 Fed. Rep. 858, 862; *Doan* v. *Am. Book Co.*, 105 Fed. Rep. 772, 776.

The owner of the copyright may make a valid contract with his publishers as to the selling price of copies of the copyrighted article. Drone on Copyright, 365; *Murphy* v. *Christian Press Assn.*, 38 App. Div. 426, 430; *Parton* v. *Prang*, 3 Cliff. 537; *Hudson* v. *Patten*, 1 Root (Conn.), 133; *Aronson* v. *Baker*, 43 N. J. Eq. 365, 369; *Park* v. *Natl. Wholesale Druggists' Assn.*, 175 N. Y. 1, 19.

An owner of copyright is not, on the sale of a copyrighted article, necessarily divested of all his statutory

rights in regard to it, but only of such rights as he conveys. *Cooper* v. *Stephens* (1895), 1 Ch. 567; *Marshall & Co., Ltd.*, v. *Bull, Ltd.*, 85 Law Times Rep. 77, 82; *Patterson* v. *Ogilvie*, 119 Fed. Rep. 453; *Stevens* v. *Gladding*, 17 How. 447.

The views of defendant in error are sustained in *Dr. Miles Medical Co.* v. *Park Sons & Co.*, 220 U. S. 373, 404; *Henry* v. *Dick Co.*, 224 U. S. 1, 43–47.

The agreement involved was not in violation of the Sherman Act.

While it may be that all publishers could not lawfully agree to fix a price upon all copyrighted books, *Murphy* v. *Christian Press Assn.*, 38 App. Div. 426, or enter into a combination to restrict the output and destroy competition, *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, on the other hand any or all of them might make rules for regulating the conduct of their business among themselves and with the public, and providing for just and fair dealings among them, provided the regulations were made for the legitimate purpose of reasonably forwarding personal interest and developing trade, without intent to wrong the general public or limit the right of individuals, or restrain the free flow of commerce, or bring about the evils, such as enhancement of prices, which are considered to be against public policy. *Anderson* v. *United States*, 171 U. S. 604; *Hopkins* v. *United States*, 171 U. S. 578; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 58; *Straus* v. *American Publishers' Assn.*, 177 N. Y. 473, 477, 488, 489, 490, 491; *Park & Sons Co.* v. *Nat. Druggists Assn.*, 175 N. Y. 1.

Regulating trade is not restraining trade. There is a well recognized difference. *United States* v. *Reardon*, 191 Fed. Rep. 454, 458; *Fonotipia, Ltd.*, v. *Bradley*, 171 Fed. Rep. 951, 959; *Heim* v. *N. Y. Exchange*, 64 Misc. Rep. 529, 531; *Am. Live Stock Com. Co.* v. *Chicago Live Stock Exchange*, 143 Illinois, 210.

MR. JUSTICE DAY delivered the opinion of the court.

This is a writ of error to review a judgment of the Supreme Court of the State of New York, rendered on remittitur from the Court of Appeals, refusing to grant to the plaintiffs in error an injunction restraining any interference with their purchase and sale of copyrighted books and damages, the defendants acting under an agreement alleged to be violative of the laws of New York and the Sherman Anti-trust Act (act of July 2, 1890, 26 Stat. 209, c. 647).

The suit originated in a bill filed in the Supreme Court of the State of New York for New York County, in which the plaintiffs in error alleged that they conducted a department store in New York City, a large department of which was devoted to books, magazines and pamphlets; that, because of their methods of business, they had been able to undersell other retail book stores; that the defendants in error, through the American Publishers' Association and the American Booksellers' Association, and by means of resolutions and agreements, with the cooperation of the Associations and their members and by the use of various practices and methods, to the end that books should be sold to the booksellers only who would maintain the retail price upon copyrighted books, agreed by them to be published at net prices, for one year and who would not sell books to anyone who would cut such prices, had restrained and prevented competition in the State of New York and throughout all of the United States in the supply and price of books, and that the business of the plaintiffs in error had been seriously affected, and they prayed that the combination and agreements be declared unlawful and that defendants be enjoined from acting thereunder or accomplishing the purposes thereof, and for damages. A demurrer having been interposed to the complaint and sustained by the court at Special Term and the

interlocutory judgment there entered having been reversed upon appeal to the Appellate Division of the First Department, the Court of Appeals, permission having been granted to appeal and the question certified, affirmed the decision and held that, so far as the bill related to copyrighted books, the demurrer was good, but that as to uncopyrighted books the complaint stated facts sufficient to constitute a cause of action. 177 N. Y. 473.

Amended answers having been filed, upon trial to the court without a jury, the court made findings of fact from which it appears that the material allegations of the complaint are true, as above set forth, and further that about April 1, 1904, and after the decision of the Court of Appeals reported in 177 N. Y. the Associations amended their resolutions and agreements so as to restrict the application and operation thereof to copyrighted books only; that about January 19, 1907, the Publishers' Association revoked all its former resolutions and adopted a new resolution, but that the Associations had continued the same course as to copyrighted books as was followed before the passage of such resolution. The court concluded that the resolutions and agreements, so far as they related to uncopyrighted books, were unlawful and contrary to the laws of New York, and to that extent granted relief by way of injunction and damages, but held that as to copyrighted books the agreements, resolutions and acts of the defendants were not unlawful, and entered an interlocutory judgment accordingly; and in its opinion the court stated that the former decision of the Court of Appeals in the case (177 N. Y. 473) was controlling. Plaintiffs in error excepted to the conclusions of law made by the court restricting the illegality of the combinations to uncopyrighted books and requested that certain conclusions be made and excepted to the refusal to find the conclusions submitted by them.

From that part of the interlocutory judgment denying

relief as to copyrighted books the plaintiffs in error appealed to the Appellate Division, which, also upon the authority of 177 N. Y. 473, affirmed the interlocutory judgment, and judgment of affirmance was entered in the Supreme Court; and, with permission, an appeal was taken to the Court of Appeals which answered in the negative the question certified by the Appellate Division as to whether plaintiffs in error, in so far as copyrighted books were concerned, were entitled to relief, adhering to its previous decision (177 N. Y. 473). 193 N. Y. 496. Judgment was so entered on remittitur to the Supreme Court. The report of the referee appointed to ascertain the amount of the damages sustained by the plaintiffs in error in the sale of uncopyrighted books having been filed and approved, final judgment was entered in the Supreme Court granting an injunction and damages as to uncopyrighted books only, and upon appeal to the Court of Appeals that court affirmed the final judgment (199 N. Y. 548) and remitted the case to the Supreme Court. Judgment on remittitur was accordingly entered, and this writ of error sued out to review that judgment.

In this court a motion was made to dismiss the writ of error upon the ground that it presents no Federal question so saved and brought here as to permit a review of such question. When the case was before the Court of Appeals, upon demurrer to the complaint (177 N. Y. 473), that court held that the agreement, as to copyrighted books, was not illegal, because of the monopoly granted to the holder of a copyright under the statutes of the United States. The court held that the agreement, as to uncopyrighted books, was, however, in violation of the so-called anti-trust law of New York, chapter 690, Laws of 1899, making contracts, agreements, etc., creating monopoly or restraining or preventing competition in the supply or price of articles or commodities void as against public policy. Subsequently the agreement was modified so as

to apply to copyrighted books only and findings of fact were specifically made upon which the case again went to the Court of Appeals of New York upon the certified question: "Are the plaintiffs, under the findings of fact contained in the decision in this case, entitled, in so far as copyrighted books are concerned, to the relief demanded in the complaint, or to any relief as against the defendants in this case?" Upon the record the Court of Appeals by a majority adhered to its former decision, notwithstanding the decision of *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, which had in the meantime been decided by this court, and held that, as the object of the copyright and patent statutes was to give monopolies, contracts made by the owners of copyrights to secure the fullest protection in the enjoyment of their monopolies would not be condemned by the courts as being in unlawful restraint of trade, at least not until the Supreme Court of the United States had pronounced differently (193 N. Y. 496). Three of the justices dissented upon the ground that the agreement was clearly one in restraint of trade, as they had theretofore held, and that the decision of this court in *Bobbs-Merrill Co.* v. *Straus*, *supra*, had so construed the copyright act as to limit the right of a copyright holder to the sale of copyrighted works and did not have the effect to protect such monopolistic agreements as were shown in the present case. As to uncopyrighted books the views theretofore expressed were maintained by the court and upon remittitur judgment was entered granting injunction and damages as to such books.

An inspection of the record shows that before the case went before the Court of Appeals for decision the second time upon the facts found in the lower court the following conclusions of law were specifically requested covering the effect of the Sherman Anti-trust Act as to copyrighted books dealt with in interstate commerce, as was found to be established by the facts in the present case:

"VII. That such resolutions and agreements purporting to restrict the effect of the combination, arrangement or contracts to copyrighted books likewise affect an article of interstate commerce and was unlawful and contrary to the aforementioned statute [the Sherman Anti-trust Act] of the United States as being in restraint of interstate commerce and tending to create a monopoly.

"IX. That the owners of several separate copyrights are not empowered to enter into any contract or agreement or combination between themselves concerning the supply and price of books published under their separate copyrights which would be unlawful and contrary to the statutes of the United States against combinations in restraint of trade or for the purpose of creating a monopoly, if entered into with reference to the supply or price of uncopyrighted books."

It is thus apparent that, when the defendants below set up the copyright statute of the United States as an authority for the agreement of the character here in question, the plaintiffs contended that such agreement was not only beyond the authority conferred in the copyright act but was in violation of the terms of the Sherman Anti-trust Law, making illegal combinations in restraint of trade and tending to monopoly. This contention was in terms denied by the lower court and the decision upon the facts went to the Court of Appeals with the result which we have stated. The contention thus made as to the effect of the Sherman Anti-trust Act when read in connection with the copyright act of the United States presented a question of a Federal character to the state courts, which claim of Federal right was necessarily denied in the decision of the Court of Appeals, affirming the judgment of the court below. One who sets up a Federal statute as giving immunity from a judgment against him, which claim is denied by the decision of a state court, may bring the case here for review under § 709 of the Revised Stat-

utes, now § 237 of the Judicial Code. *Nutt* v. *Knut*, 200 U. S. 12; *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281; *St. Louis & Iron Mountain Ry.* v. *McWhirter*, 229 U. S. 265. The motion to dismiss for want of jurisdiction must therefore be overruled.

This court, in the case of *Bobbs-Merrill Co.* v. *Straus*, *supra*, held that the copyright act did not grant the right to fix a limitation upon prices of books at subsequent sales to purchasers from retailers by notice of price limitation inscribed upon the book, and, construing the copyright act, held that in conferring the right to vend a book it did not intend to confer upon the holder of the copyright any further right after he had exercised the right to vend secured to him by the act.

In the case of *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, this court had under consideration the effect of the patent statute upon agreements found to be unlawful under the Sherman Law, and the agreements condemned were held not to be protected as within the patent monopoly conferred by the statute. Replying to the contention as to the protection which the patent law gave to enter into such agreements, this court said (p. 49):

"Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation of rights—rights which may be pushed to evil consequences and therefore restrained."

So, in the present case, it cannot be successfully contended that the monopoly of a copyright is in this respect any more extensive than that secured under the patent law. No more than the patent statute was the copyright act intended to authorize agreements in unlawful restraint of trade and tending to monopoly, in violation of the specific terms of the Sherman Law, which is broadly de-

signed to reach all combinations in unlawful restraint of trade and tending because of the agreements or combinations entered into to build up and perpetuate monopolies.

From the finding of facts upon which the court certified the question decided to the Court of Appeals, after the attempted reformation in view of the first decision of that court it appears that the Publishers' Association was composed of probably seventy-five per cent. of the publishers of copyrighted and uncopyrighted books in the United States and that the Booksellers' Association included a majority of the booksellers throughout the United States; that the Associations adopted resolutions and made agreements obligating their members to sell copyrighted books only to those who would maintain the retail price on net copyrighted books, and, to that end, that the Associations combined and coöperated with the effect that competition in copyrighted books at retail was almost completely destroyed. The findings further show that the Associations employed various methods of ascertaining whether prices of net copyrighted books were cut and whether there was competition in the sale thereof at retail, and issued cut-off lists, so-called, directing the discontinuance of the sale of copyrighted books to offenders, and that the plaintiffs in error, who had failed to maintain net prices upon copyrighted books, had been put upon the cut-off lists and were unable to secure a supply of such books in the ordinary course of business. It further appears that in some instances dealers who had supplied the plaintiffs in error were wholly ruined and driven out of business; that the Booksellers' Association widely circulated the names of such dealers and warned others to avoid their fate, and that various circulars were issued to the trade at large by both Associations warning all persons against dealing with the plaintiffs in error or other so-called price-cutters; that after the reformation of the resolutions and agreements in 1904 the Associations and

their members continued the same methods as to ascertaining the supply of copyrighted books of the plaintiffs in error, as to cut-off lists and circulars to the trade, and that, although in 1907 the resolution of the Publishers' Association was modified so that the "agreement" became a "recommendation," the cut-off lists were still issued, with plaintiff's name thereon and that the dealers still refused to supply plaintiffs in error with books of any kind. And it also appears from the finding of facts that the members of the Associations resided in and carried on the business of selling books in many different States and purchased books from persons in many States other than the one in which they resided and did business; and that the rules, regulations and agreements of the Associations were enforced against all publishers and dealers in books throughout the United States, whether they were members of either Association or not and whether they purchased books in one State for transportation and delivery in another or for delivery in the State where purchased.

We agree with the Court of Appeals in its characterization of the agreement involved in this case, about which there seems to have been no difference of opinion, except as to the supposed protection of the copyright act. It manifestly went beyond any fair and legal agreement to protect prices and trade as among the parties thereto and prevented, as the Court of Appeals said, when dealing with uncopyrighted books, the sale of books of any kind, at any price, to those who were condemned by the terms of the agreement and with whom dealings were practically prohibited. We conclude, therefore, that the Court of Appeals erred in holding that the agreement was justified by the copyright act, and was not within the denunciation of the Sherman Act, and in denying, for that reason alone, the right of the plaintiffs in error to recover under the state act as to copyrighted books.

This view of the case renders it unnecessary to decide whether an original action can be maintained in the state courts seeking an injunction and to recover damages under the Sherman Law.

As the Federal question, made in the manner which we have stated, was in our view wrongly decided and such decision was the basis of the judgment in the state court, the judgment of that court must be reversed. *Murdock* v. *City of Memphis*, 20 Wall. 590, 634.

Judgment reversed and case remanded to the state court whence it came for further proceedings not inconsistent with this opinion.

UNITED STATES FIDELITY AND GUARANTY COMPANY *v.* UNITED STATES FOR THE BENEFIT OF BARTLETT.

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

No. 50. Argued November 6, 7, 1913.—Decided December 1, 1913.

A bond given pursuant to the act of August 13, 1894, c. 280, 28 Stat. 278, for a contract for building a stone breakwater, under the terms of this contract, covers claims for labor on work at the quarry and for hauling and delivering the stone.

Under the circumstances of this case *held* that the claims of laborers for wages had been properly assigned to the claimant and clothed him with legal right to maintain an action upon the bond given under the act of August 13, 1894.

A claim against the surety on the bond of a government contractor will not be rejected as fraudulently excessive where it is shown that claimant's books have been destroyed but he offers to allow credits properly shown on the contractor's books and the records do not

disclose an attempt to recover more than the amount actually due.

A claimant will not be charged with laches when the record does not disclose any delay which affected the relations of the parties or such that should relieve a surety from liability on the contractor's bond.

189 Fed. Rep. 339, affirmed.

THE United States, for the benefit of Frank P. Bartlett, brought suit in the Circuit Court of the United States for the Southern District of New York against the plaintiff in error as surety upon a bond given pursuant to the provisions of an act of Congress (August 13, 1894, c. 280, 28 Stat. 278) to the effect that any person or persons contracting with the Government for the prosecution of public work should be required to furnish a bond conditioned that the contractor or contractors would "promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract." Upon trial a verdict was rendered in his favor, and judgment entered accordingly. The Circuit Court of Appeals for the Second Circuit affirmed the judgment (189 Fed. Rep. 339), and this writ of error is brought to review its judgment.

The record shows: The United States Government contracted with one Donovan on February 18, 1903, for the construction of a breakwater off Point Judith, Rhode Island, it being provided in the contract that he should be "responsible for and pay all liabilities incurred in the prosecution of the work for labor and material." Donovan executed a bond containing the obligation required by the act, with the plaintiff in error as surety. Donovan was associated with Hughes Brothers & Bangs and it was agreed that they should perform the contract and that he would turn over the Government's estimates to them, this fact being known to the plaintiff in error.

An arrangement was made between Hughes Brothers &

Bangs and Bartlett that he should engage the labor, open the quarry of the former, located at Sachems Head, Connecticut, about fifty miles from the breakwater, and superintend the furnishing of stone for the construction of the breakwater. Bartlett was also to maintain a commissary at the quarry from which the men might be supplied with provisions and merchandise, an account to be kept of the articles purchased, and, after approval by the men, forwarded to the office of Hughes Brothers & Bangs, who would deduct the amount from the wages of the laborers, this practice being with their consent, and credit Bartlett's account.

The quarry was operated, labor being employed in various ways from clearing the surface preparatory to blasting to loading the stone on scows, and the stone was transported to the breakwater and there deposited according to the direction of a Government inspector. All, save the inspector and a few of the more skilled workmen, were provided for at the commissary, and, under the arrangement described, the amount of their purchases was deducted from their wages by Hughes Brothers & Bangs. Separate account was kept of the men who were actually employed at the breakwater, for the reason that Bartlett had to wait for them to come back to procure their approval of his charges, before he could send in his statement to Hughes Brothers & Bangs.

The contract was completed November 8, 1903, and on December 22, 1903, the last retained percentage of $8,956.44 was paid by the United States. Hughes Brothers & Bangs became insolvent in 1907 or 1908. Suit on the bond was begun June 4, 1909.

Mr. E. J. Myers, with whom *Mr. Leonidas Dennis* and *Mr. Gordon S. P. Kleeberg* were on the brief, for plaintiff in error:

Neither the act of Congress nor the terms of the bond

warrant a recovery for preparation for the performance of the contract. *City Trust Co.* v. *United States*, 147 Fed. Rep. 155; *United States* v. *Hyatt*, 92 Fed. Rep. 442; *United States* v. *Morgan*, 111 Fed. Rep. 474; *United States* v. *Kimpland*, 93 Fed. Rep. 403.

Instrumentalities and plant (i. e., cost of) capable of general use by the contractor cannot be recovered in this action.

Transportation and carriage of the material at points distant from the place whereat the work is done is also excluded. *United States* v. *Fidelity & Deposit Co.*, 86 App. Div. (N. Y.) 475; *Kennedy* v. *Commonwealth*, 182 Massachusetts, 480; *Philadelphia* v. *Malone*, 214 Pa. St. 90, 95.

As to the strictness of the rule that mechanics' liens can be sustained only for materials that actually go into the work and labor performed at the place, see *City Trust Co.* v. *United States*, 147 Fed. Rep. 155; *Schaghticoke Powder Co.* v. *Greenwich Ry. Co.*, 183 N. Y. 306; *Troy Public Works Co.* v. *Yonkers*, 207 N. Y. 81; *Haynes* v. *Holland*, 48 S. W. Rep. 400.

No assignment of the wages to be thereafter earned was proven sufficient to sustain a recovery in an action at law, but the transaction at most only constituted an equitable assignment, enforcible only in equity, and cognizable at law only after it had been legally completed or established.

An equitable title is insufficient in the Federal courts to sustain an averment of legal title alleged in an action at law, and required to sustain judgment therein. *Ridings* v. *Johnson*, 128 U. S. 212, 217; *Pacific Mut. Ins. Co.* v. *Webb*, 157 Fed. Rep. 155; *Levi* v. *Mathews*, 145 Fed. Rep. 152.

An assignment at law must be of a perfect and choate cause of action and not predicated upon that which is to be earned *in futuro* and to accrue upon the performance of acts subsequent to the promise to assign. *Matter of Black*, 138 App. Div. (N. Y.) 562.

The transaction constituted, at the most, only an equitable assignment of the laborers' wages which was only capable of being enforced in equity. *Hovey* v. *Elliott*, 118 N. Y. 124; *Union Trust Co.* v. *Bulkeley*, 150 Fed. Rep. 510, 544.

The claim against the surety was a fraud in law because the demand upon the surety was for a willfully exaggerated and unconscionable amount which the creditor knew was not due when he made the demand.

The demand was inextricably confounded with items constituting the largest part thereof, not recoverable under the surety's undertaking. *Title G. & T. Co.* v. *Puget Sound Engine Works*, 163 Fed. Rep. 168, 174; *Title G. & T. Co.* v. *Crane Co.*, 219 U. S. 34; *United States* v. *Ansonia Brass Co.*, 218 U. S. 452, 471; *United States* v. *Fidelity & Deposit Co.*, 86 App. Div. (N. Y.) 475, 479; *Kennedy* v. *Commonwealth*, 182 Massachusetts, 480.

A claim of lien for a willfully exaggerated and unconscionable amount cannot be enforced against the owner even for the actual amount that may be due.

It is a fraud in law and vitiates the entire lien. *Lane* v. *Jones*, 79 Alabama, 156, 163. *Camden Iron Works* v. *Camden*, 60 N. J. Eq. 211, 214; *Uthoff* v. *Gerhard*, 42 Mo. App. 256.

The claim made against the surety is so gross, so exorbitant and so unconscionable as to defeat any and all right of recovery.

Regardless of statute and without the necessity of contractual engagement, the law incorporates good faith in every undertaking and refuses to enforce any liability that violates this principle. *Industrial Trust, Ltd.*, v. *Tod*, 180 N. Y. 215, 225; *Aeschlimann* v. *Presbyterian Hospital*, 165 N. Y. 296, 302.

In this case demand and suit was brought against the surety for three-fold more than the creditor was entitled to without any notice nearly seven years after the occur-

rence. *Equitable Savings Assn.* v. *Hewitt*, 55 Oregon, 329, 338.

Where the items for which a lien can be claimed are inextricably blended and intermingled with items for which no right of lien can be urged, the action cannot be maintained. *United States* v. *Conkling*, 135 Fed. Rep. 508, 512; *Schulenburg* v. *Strimple*, 33 Mo. App. 154.

The creditor was guilty of such gross laches and delay in presenting his claim against the surety that his action, followed as it was by the withdrawal of retained percentages and the insolvency of the principal, bars recovery. *United States F. & G. Co.* v. *United States*, 191 U. S. 416, 426; *United States* v. *American Bonding Co.*, 89 Fed. Rep. 921.

The admissions and declarations of Hughes Brothers & Bangs, who were subcontractors of the principal in the bond, were inadmissible and incompetent as against the surety. 1 Greenleaf Evidence, § 187 (16th ed., note 1); *Hatch* v. *Elkins*, 65 N. Y. 489, 496; *Rae* v. *Beach*, 76 N. Y. 164, 168; *Wheeler* v. *State*, 56 Tennessee, 393; *White* v. *Bank*, 56 Tennessee, 475; *Bocard* v. *State*, 79 Indiana, 270; *Knott* v. *Peterson*, 125 Iowa, 404, 407; *Lee* v. *Brown*, 21 Kansas, 458; *Howe* v. *Farrington*, 16 Hun (N. Y.), 591; *Ayer* v. *Getty*, 46 Hun (N. Y.), 287, 288.

Mr. Edward W. Norris and *Mr. Horace L. Cheyney*, with whom *Mr. Henry B. Hammond* was on the brief, for defendant in error.

After making the foregoing statement, Mr. Justice Day delivered the memorandum opinion of the court.

The nature of liability upon bonds given in pursuance of the act of Congress has been the subject of frequent consideration in this court, and the former discussions and conclusions need not be repeated here. *Guaranty Co.* v.

Pressed Brick Co., 191 U. S. 416, 427; *Hill* v. *American Surety Co.*, 200 U. S. 197; *Mankin* v. *Ludowici-Celadon Co.*, 215 U. S. 533.

The first contention of the plaintiff in error is that the work done at the quarry and the hauling and delivering of stone at the breakwater, or, at least, certain parts of such work, are not within the terms of the contract and bond, as work done or material furnished in the prosecution of the work provided for in the contract. This contention was rejected by the court below and we think properly. The object of the contract was to put the stone in place, much of it being merely dropped into the water, with a view to the construction of the breakwater. To accomplish this purpose it was of course necessary to have the material taken from the quarry, using tools and labor for that purpose, and transported to the location of the breakwater and there deposited. This material could not be had immediately at the breakwater, and bids were required to show samples of stone and names and locations of quarries to be used as the source of supply. The work involved in the claim here made was all necessary to the performance of the contract, and in our view comes clearly within the class of labor accounts the satisfaction of which it was the purpose of the act of Congress to secure by a proper bond.

It is next contended that the laborers had not assigned their claims to Bartlett in such way as to give him any more than an equitable right thereto and had not clothed him with the legal right to maintain an action at law upon the bond. But we think that the testimony discloses that so much of the laborers' wages as were necessary to satisfy Bartlett's advances were assigned to him with their consent and deductions to that extent made from such wages with their approval in such wise as to consummate the assignment.

It is next urged that in making the claim for an excessive

amount there was such gross fraud that no recovery can be had in the case. It is sought to bring this contention within that class of cases which have held that mechanics' liens when willfully and intentionally made for an amount in excess of that fairly due cannot be enforced for any sum. We do not think the record displays a case of that character. It appears that some of the books of Bartlett left in a building at the quarry had been destroyed and that efforts were made to obtain the amount of payments from other sources. At the trial it appeared that the credits to be made upon the account were contained upon certain cards which were in the possession of counsel for the plaintiff in error. Upon production at the trial they were admitted and accepted as containing proper credits to be made upon the account, and the judge charged the jury that the credits shown on the cards should be made the basis of calculations by the jury, if they found under the facts shown that any statement of the account was required, and the verdict was rendered accordingly.

As to the contention that the suit of defendant in error, in view of the delay in bringing it and want of previous demand or notice to the surety, shows gross laches, we agree with the Circuit Court of Appeals that the record does not disclose any such laches or change of relation affecting the rights of the surety as would relieve it of liability. Nor do we think there was such confusion of accounts or error in the admission of testimony as to require a reversal.

It therefore follows that the judgment of the Circuit Court of Appeals, affirming the judgment of the Circuit Court, must be

Affirmed.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY *v.* BREWER.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 62. Argued November 12, 13, 1913.—Decided December 1, 1913.

Dushane v. *Beall*, 161 U. S. 513, followed, to effect that the two year limitation provided by § 5057, Rev. Stat., applies only to suits growing out of disputes in respect of property and of rights of property of the bankrupt which came to the hands of the assignee to which adverse claims existed while in the hands of the bankrupt and before assignment. *Hammond* v. *Whittredge*, 204 U. S. 538.

When a cause of action accrues is a question of state law; and where the judgment below determining who was in possession of the land at a given time rests wholly on state law and is sufficiently broad to support the judgment without involving any Federal right asserted by plaintiff in error this court has no jurisdiction.

Writ of error to review 128 Louisiana, 544, dismissed.

THE facts, which involve the jurisdiction of this court to review judgments of the state court resting on other than Federal grounds and the construction and application of § 5057, Rev. Stat., are stated in the opinion.

Mr. Benjamin Ory, with whom *Mr. Hunter C. Leake*, *Mr. Gustave Lemle*, *Mr. Charles N. Burch* and *Mr. H. D. Minor* were on the brief, for plaintiffs in error.

Mr. M. M. Lemann, with whom *Mr. J. Blanc Monroe* was on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

This is a suit by Mrs. Annie E. Brewer as plaintiff, now defendant in error, brought in the Civil District Court for the Parish of Orleans in the State of Louisiana against

the Yazoo and Mississippi Valley Railroad Company, one of the plaintiffs in error, to establish title to a certain portion of the square of ground known as square No. 150 in the city of New Orleans. The District Court decided the case in favor of Mrs. Brewer and the judgment was affirmed upon appeal to the Supreme Court of Louisiana (*Brewer* v. *Yazoo & M. V. R. Co.*, 128 Louisiana, 544) and the case is brought here.

Both parties claim title under one Henry Parish, who, in 1848, appears to have been the owner of the land. He died in New York, and on December 17, 1857, his will was there admitted to probate. By the will, the square in controversy passed to Peter Conrey in trust for the benefit of one Henry Parish Conrey, with directions that it should be conveyed to him. In December, 1859, Henry Parish Conrey died and his succession was opened in the Second District Court for the Parish of Orleans. Inventory was taken, including the property now in question, and on June 9, 1860, James Grimshaw, as administrator, executed a notarial act conveying the property to George Brewer. On December 28, 1875, George Brewer was adjudged a bankrupt and on January 15, 1876, his estate, real and personal, was conveyed to Charles H. Reed, as assignee, who on November 23, 1876, by order of court conveyed the property to Mrs. Annie E. Brewer, plaintiff below. This is the title upon which Mrs. Brewer relied.

The defendants claimed title from the fact that Daniel Parish on April 11, 1868, appearing as a resident of the State of New York, presented a petition to the Second District Court of the Parish of Orleans, alleging that the will of Henry Parish had been admitted to probate in that State and that he had qualified as one of the executors, and submitted an exemplified copy of the will and of the proceedings and prayed that the will be executed, which was accordingly done. The executor under an order of sale

on April 25, 1871, conveyed the property in question to H. C. Boucher. On January 15, 1872, Boucher sold to George W. Babcock, and on September 8, 1896, the widow and heirs of Babcock sold to Benjamin Recurt, and on March 31, 1897, Recurt sold to William Laferriere, Etienne Gele and Jean Marie Gele, and these last named on November 22, 1898, sold a portion of square 150 to the Railroad Company.

For reasons dependent upon the law of the State, which we need not now recite, the Supreme Court of Louisiana held that the property had vested in Henry Parish Conrey and that subsequently by the various means stated had passed to the present defendant in error, plaintiff below. It also held that the title of the Railroad Company was fatally defective for reasons resting upon state law, which are set forth in the opinion.

It is contended by the plaintiff in error that the record presents a question decided in the Supreme Court of the State in such manner as to deny rights asserted in that court under a statute of the United States. This contention rests upon the prescription claimed by Laferriere and the Geles, warrantors of the Railroad Company (the various warrantors in title having been made parties to the suit), which is said to arise under § 5057 of the Revised Statutes of the United States which reads as follows:

"No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed."

The plaintiff in error insists that under this statute the alleged right of action of Mrs. Brewer was barred, and

that this defense should have been available when invoked in the state court.

The object of the statute is manifest and its purposes are kindred to other statutory provisions looking to a speedy settlement of estates in bankruptcy. The section was before this court in *Dushane* v. *Beall*, 161 U. S. 513, and it was there held that it applied "only to suits growing out of disputes in respect of property and of rights of property of the bankrupt which came to the hands of the assignee, to which adverse claims existed while in the hands of the bankrupt and before assignment." This construction of the act was adhered to in *Hammond* v. *Whittredge*, 204 U. S. 538, 550. It therefore follows that in order to have barred the cause of action asserted by Mrs. Brewer in the present case an adverse claim in favor of the plaintiffs in error must have existed while the property was in the hands of the bankrupt and before assignment. It is the contention of the plaintiffs in error that the claim existed as against George Brewer, the bankrupt, and as against the assignee as soon as he was appointed, growing out of the adverse title recorded by Boucher and Babcock in 1871 and 1872. But this view was rejected by the Supreme Court of Louisiana, and, dealing with the prescription claimed for the warrantors because of § 5057, that court said (128 Louisiana, p. 557):

"The provision of law thus invoked applies, in terms, to causes of action which have accrued 'for, or against such assignee,' but not to causes of action which arise between persons who purchase property from an assignee and other persons, long after such purchases, and long after the assignee has become *functus officio;* and it does not apply to this case, because, in January, 1876, when Reed was appointed assignee in bankruptcy of Brewer, the cause of action here sued on did not exist, since neither the defendant nor any of its authors pretended at that time to be in possession of the land here claimed, or had ever done any-

thing to interfere with the constructive possession following the authentic act by which Brewer acquired his title."

Citing other decisions of the Supreme Court of Louisiana the learned counsel for the plaintiffs in error contends that the law is otherwise, a contention which is resisted with vigor by the learned counsel for the defendant in error. The decision of the Supreme Court of Louisiana in this case upon a question of Louisiana law is conclusive upon this court. The Supreme Court of Louisiana held that no cause of action existed when Reed was appointed assignee in bankruptcy, and that neither the defendant nor any of its authors had made any pretense of possession of the land in controversy nor had they done anything to interfere with the constructive possession following the act by which Brewer acquired title. When the cause of action accrued to recover the land, was a question of state law, not depending upon the Federal statute. In deciding that no cause of action had accrued to Brewer available to the assignee, because the plaintiffs in error or those under whom they claimed were not in possession of the land, the court rested its decision wholly upon state law. The disposition of this question by the state court in the manner we have stated controlled the decision of the case and was sufficiently broad to support the judgment without involving the denial of any Federal right asserted by the plaintiff in error. *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 112, 116.

It follows that the writ of error must be

Dismissed.

MARSHALL, GOVERNOR OF THE STATE OF INDIANA, *v.* DYE.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 401. Argued October 23, 1913.—Decided December 1, 1913.

Where a board of public officials is a continuing body, notwithstanding its change of personnel, as is the case with the State Board of Elections of Indiana, the suit will be continued against the successors in office of those who ceased to be members of the board. *Murphy* v. *Utter*, 186 U. S. 95.

The enforcement of the provision in Article IV, § 4 of the Constitution, that the United States shall guarantee to every State in the Union a republican form of government, depends upon political and governmental action through the powers conferred on the Congress and not those conferred on the courts. *Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118.

The claim that a judgment of the state court enjoining state officers from acting under a state statute declared to be unconstitutional denies to the State a republican form of government on account of the interference of the judicial department with the legislative and executive departments, does not present a justiciable controversy concerning which the decision is reviewable by this court.

The right of this court to review judgments of the state courts is circumscribed within the limits of § 709, Rev. Stat., now § 237, Judicial Code. *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86.

Only those having a personal, as distinguished from an official, interest can bring to this court for review the judgment of a state court on the ground that a Federal right has been denied. *Smith* v. *Indiana*, 191 U. S. 138.

Whether the State Board of Elections shall submit a new state constitution to the electors of a State in accordance with a state statute, concerns the members of the board in their official capacity only, and a judgment of the state court that they refrain from so doing concerns their official and not their personal rights and this court will not review such judgment.

Writ of error to review 99 N. E. Rep. 1, dismissed.

THE facts, which involve the jurisdiction of this court to review a judgment of the state court at the instance of

a public official who has no personal interest in the litigation, are stated in the opinion.

Mr. Frank S. Roby and *Mr. Dan W. Simms*, with whom *Mr. Thomas M. Honan*, Attorney General of the State of Indiana, *Mr. James E. McCullough*, *Mr. Ward H. Watson*, *Mr. W. V. Stuart*, *Mr. E. P. Hammond*, *Mr. Sol H. Esarey* and *Mr. Elias D. Salsbury* were on the brief, for plaintiffs in error:

Under Art. 3, § 1, constitution of Indiana of 1851, the judicial department of the government is without power to direct, coerce, or restrain the executive (in which is included the administrative) department of the government; nor may the former exercise any of the functions of the latter. *State* v. *Noble*, 118 Indiana, 350; *Butler* v. *State*, 97 Indiana, 373, 376; *Frost* v. *Thomas*, 26 Colorado, 222; *Woods* v. *Sheldon, Governor*, 69 N. W. Rep. 602; *Sutherland* v. *Governor*, 29 Michigan, 320; *State* v. *Governor*, 25 N. J. Law, 331, 349; *State* v. *Lord*, 28 Oregon, 498; *Mississippi* v. *Johnson*, 4 Wall. 475; *Georgia* v. *Stanton*, 6 Wall. 50; *Decatur* v. *Paulding*, 14 Pet. 497; *Ex parte Ayres*, 123 U. S. 443; *Elliott* v. *Wiltz*, 107 U. S. 711; *Bates* v. *Taylor*, 3 L. R. A. 316; *Jonesboro* v. *Brown*, 8 Baxt. 490; *Vicksburg* v. *Lowry*, 61 Mississippi, 102; *In re Dennett*, 32 Maine, 508; 2 High on Injunction, § 1323; 1 Blackstone, * 243; The Federalist, No. 43.

A judicial question cognizable by this court is involved in this case. For the distinction between judicial authority over justiciable controversies and legislative power as to purely political questions, see *Pacific States Co.* v. *Oregon*, 223 U. S. 118.

This court has jurisdiction of cases involving § 4, Art. IV of the Constitution. *Minor* v. *Happersett*, 21 Wall. 162; *Mississippi* v. *Johnson*, 4 Wall. 475.

Courts of the State have no power or jurisdiction over the Governor of the State to enjoin official action in any

case. *Rice* v. *The Governor*, 207 Massachusetts, 577, 579; *People* v. *Bissell*, 19 Illinois, 229; *The Governor and Supreme Court*, 243 Illinois, 9, 35; *People* v. *Hatch*, 33 Illinois, 9, 148; *People* v. *Cullum*, 100 Illinois, 472; *State* v. *Stone*, 120 Missouri, 428, 433; *Vicksburg R. Co.* v. *Lowry*, 61 Mississippi, 102, 103; *Hawkins* v. *The Governor*, 1 Arkansas, 570, 572, 575; *State* v. *Bisbee*, 17 Florida, 67, 78–83; *State* v. *Warmoth*, 22 La. Ann. 1; *State* v. *Warmoth*, 24 La. Ann. 351, 352; *Rice* v. *Austin*, 19 Minnesota, 103, 105; *Secombe* v. *Kittleson*, 29 Minnesota, 555, 561; *Mauran* v. *Smith*, 8 R. I. 192, 216; *In re Dennett*, 32 Maine, 508; *State* v. *Inspectors*, 114 Tennessee, 516; *Bates* v. *Taylor*, 87 Tennessee, 319, 325; *Turnpike Co.* v. *Brown*, 8 Baxt. (Tenn.) 490; *Hovey* v. *State*, 127 Indiana, 588; *Beal* v. *Ray*, 17 Indiana, 554, 558; *State* v. *Huston*, 27 Oklahoma, 606, 611. See also *In re Opinion of Justices*, 208 Massachusetts, 610; Blackstone's Comm. *243; *State* v. *Towns*, 8 Georgia, 360; *Sutherland* v. *Governor*, 29 Michigan, 320; *Chamberlain* v. *Silby*, 4 Minnesota, 309; *State* v. *Governor*, 25 N. J. Law, 331; *Hartranft's Appeal*, 85 Pa. St. 433.

The court had no power to interfere with the exercise of legislative discretion and its judgment is void. *Beauchamp* v. *State*, 6 Blackf. 299, 301; *Fry* v. *State*, 63 Indiana, 552, 559; *Levey* v. *State*, 161 Indiana, 251, 255; *LaFayette Co.* v. *Geiger*, 34 Indiana, 185, 198; *State* v. *McClelland*, 138 Indiana, 321, 335, 340; *Hedderich* v. *State*, 101 Indiana, 564, 567.

A power which is not distinctly either legislative, executive, or judicial, and is not by the constitution distinctly confided to a designated department of the government, must necessarily be under the control of the legislature. Cooley, Const. Law, p. 44; § 375, Jamieson's Const. Conventions (4th ed.), J. 362. See also *People* v. *Hill*, 36 L. R. A. 634, 636; *State* v. *Henley*, 39 L. R. A. 126, 132.

If the courts can add to the reserved rights of the people they can take them away. If they can mend, they can

mar. If they can remove the landmarks which they find established, they can obliterate them. *Sharpless* v. *Mayor*, 21 Pa. St. 147; *State* v. *Menaugh*, 151 Indiana, 260, 267; Cooley, Const. Lim. (6th ed.), p. 200; *Burrows* v. *Delta Transp. Co.*, 106 Michigan, 582.

The judicial department of the government is without power to direct, coerce, or restrain the legislative department of the government; nor can the judicial department exercise any of the functions, or discharge, or prevent the discharge, of any of the functions of the latter. Cases *supra* and see § 1, Art. 3, Const. Indiana; *Smith* v. *Myers*, 109 Indiana, 1; *Langenberg* v. *Decker*, 131 Indiana, 471; *Wright* v. *Defrees*, 8 Indiana, 298, 303; *Ex parte Griffiths*, 118 Indiana, 83; *Carr* v. *The State*, 127 Indiana, 204, 208; *Hovey* v. *Noble*, 118 Indiana, 350; *Ex parte France*, 176 Indiana, 72; *Hanly* v. *Sims*, 175 Indiana, 345; *State* v. *Haworth*, 122 Indiana, 462; *McComas* v. *Krug*, 81 Indiana, 327; *Wilson* v. *Jenkines*, 72 N. Car. 5; *Goddin* v. *Crump*, 8 Leigh, 154; *Burch* v. *Earhart*, 7 Oregon, 58; *Franklin* v. *State Board*, 23 California, 177; *People* v. *Pecheco*, 27 California, 175; *Georgia* v. *Stanton*, 6 Wall. 50; *Decatur* v. *Paulding*, 14 Pet. 497; *Alpers* v. *San Francisco*, 32 Fed. Rep. 503; *New Orleans Water Co.* v. *City of New Orleans*, 164 U. S. 471; *State* v. *Lord*, 28 Oregon, 498; *McChord* v. *Louisville &c. R. Co.*, 183 U. S. 483.

Under this decision a circuit court can confer more authority upon its bailiff than the Constitution has conferred upon both legislative and executive departments.

As to what constitutes a republican form of government, see The Federalist, No. 43; *Texas* v. *White*, 7 Wall. 700; 1 Wilson's Works, p. 366.

The executive could have disregarded the mandate of the Supreme Court in this case, but he could not adequately repel the attack made upon the republican government of Indiana under form of judicial decision. See *Smith* v. *Myers*, 109 Indiana, 1, 9.

Plaintiffs in error are citizens of the United States as well as citizens and officers of the State of Indiana. They are here representing the citizenship of the State of Indiana by virtue of authority conferred upon them to do so in a conventional and regular manner. Privileges and immunities of these citizens of the United States are abridged by the decision of the state court. *Slaughter House Cases*, 16 Wall. 36; *Crandall* v. *Nevada*, 6 Wall. 36.

It is the right of the people in a government, republican in form, to peaceably alter or abolish it and to institute a new government. Art. 1, § 1, Const. Indiana.

That decision prevents the performance of an act of extraordinary legislation by those alone who can perform it, upon the possible ground that the method followed is not in accordance with the procedure which the court regards as regular, although the course to be followed is a matter for the legislative body alone. This court has not failed at any time to protect delegated rights and to secure the benefit of such rights to those who are entitled thereto.

Mr. Addison C. Harris, with whom *Mr. Ralph K. Kane* was on the brief, for defendant in error.

Mr. Justice Day delivered the opinion of the court.

The case originated in a complaint filed in the Circuit Court of Marion County, Indiana, by John T. Dye, in which he alleged that he brought the suit for himself and other electors and tax-payers of the State of Indiana, the object of the suit being to enjoin the defendants, Thomas R. Marshall, Governor, Muter M. Bachelder and Charles O. Roemler, jointly composing the State Board of Election Commissioners, and Lew G. Ellingham, Secretary of State, from taking the steps required by statute to certify and transmit to the clerks of the several counties in the

State a new constitution proposed by the legislature of the State and from printing and publishing a statement to be printed upon the ballots in such manner that the electors might indicate their choice as to such new constitution. Upon trial in the Circuit Court an injunction was granted. Upon appeal to the Supreme Court of the State of Indiana the judgment of the Circuit Court was affirmed. 99 N. E. Rep. 1. The case was then brought here by writ of error.

A motion was filed in this court on September 24, 1913, accompanied by an affidavit, stating the death of John T. Dye, defendant in error, and the appointment of Hugh Dougherty as his executor and his qualification as such in compliance with the laws of the State of Indiana and asking that he be permitted to appear and defend as such executor, which motion is granted.

There was also submitted on October 14, 1913, a motion to substitute Samuel M. Ralston, Governor, and Will H. Thompson and John E. Hollett, members of the State Board of Election Commissioners, of the State of Indiana, as plaintiffs in error. As the judgment in this case was against the defendants Thomas R. Marshall, Muter M. Bachelder and Charles O. Roemler, composing the State Board of Election Commissioners, and their successors in office, and as such Board is a continuing board (§ 6897, 2 Burns Annotated Indiana Statutes, 1908), notwithstanding its change of personnel, this motion is within the principle laid down in *Murphy* v. *Utter*, 186 U. S. 95, and is granted. See also *Richardson* v. *McChesney*, 218 U. S. 487, 492, 493. Lew G. Ellingham, Secretary of State, is one of the plaintiffs in error and the judgment sought to be reviewed ran against him as such Secretary of State, and he still occupies that office.

The statute (Acts of 1911, p. 205) under which it was proposed to submit the new constitution of the State, provided for its submission at the general election in

November, 1912, and required the election officials and other officers to perform like duties to those required at general elections, with a view to the submission of such questions. The Supreme Court sustained the contention that the act was void under the state constitution, holding in substance that the act of 1911 was unconstitutional for want of authority in the legislature to submit an entire constitution to the electors of the State for adoption or rejection, and that, if the instrument could be construed to be a series of amendments, it could not be submitted as such for the reason that Article 16 of the constitution of the State requires that all amendments to the state constitution shall, before being submitted to the electors, receive the approval of two general assemblies, which was not the case here, and that Article 16 further provides that while an amendment or amendments to the constitution which have been agreed upon by one general assembly are awaiting the action of a succeeding general assembly or of the electors, no additional amendment or amendments shall be proposed, and that as a matter of fact another amendment was still awaiting the action of the electors.

The contention mainly urged by the plaintiffs in error of the denial of Federal rights is that the judgment below is in contravention of Article IV, § 4, of the Constitution of the United States, which provides that the United States shall guarantee to every State in the Union a republican form of government. In *Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118, this court had to consider the nature and character of that section, and held that it depended for enforcement upon political and governmental action through powers conferred upon the Congress of the United States. The full treatment of the subject in that case renders further consideration of that question unnecessary, and the contention in this behalf presents no justiciable controversy concerning which the decision is

reviewable in this court upon writ of error to the state court. *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 314. And as to all questions said to be of a Federal character, although the judgment of the Supreme Court was rested solely upon its interpretation of the state constitution, the rulings are assailed because of alleged wrongs done to the plaintiffs in error in their official capacity only.

We have had frequent occasion to declare that the right of this court to review the judgment of the highest court of a State is circumscribed within the limits of § 709 of the Revised Statutes, now § 237 of the Judicial Code. See *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, and cases there cited. Among the limitations upon this right is the principle which requires those who seek to bring in review in this court the judgment of a state court to have a personal as distinguished from an official interest in the relief sought and in the Federal right alleged to be denied by the judgment of the state court. This principle was laid down in *Smith* v. *Indiana*, 191 U. S. 138, in which it was held that the auditor of a county of the State of Indiana could not upon writ of error to this court have the judgment of the Supreme Court of Indiana declaring an exemption law of that State valid and the performance of its provisions obligatory upon him reviewed upon the ground that the act was repugnant to the Federal Constitution. The court, Mr. Justice Brown delivering the opinion, said (p. 149):

"It is evident that the auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. The performance of those duties was of no personal benefit to him. Their non-performance was equally so. He neither gained nor lost anything by invoking the advice of the Supreme Court as to the proper action he should take. He was testing the constitutionality of the law purely in the interest of third persons, viz.,

the taxpayers, and in this particular the case is analogous to that of *Caffery* v. *Oklahoma*, 177 U. S. 346. We think the interest of an appellant in this court should be a personal and not an official interest, and that the defendant, having sought the advice of the courts of his own State in his official capacity, should be content to abide by their decision."

In *Braxton County Court* v. *West Virginia*, 208 U. S. 192, it was held that, where the Supreme Court of West Virginia had compelled a county court by mandamus to lower its assessment so that it would be within the limit designated by a certain statute, this court would not entertain a writ of error to review the judgment of the state court, although the plaintiff in error had set up that the assessment contended for would not provide a sufficient amount to pay the expenses of the county, part of which it was alleged had by contract attached before the statute in question was passed. Speaking for the court, Mr. Justice Brewer said, (p. 197):

"That the act of the State is charged to be in violation of the National Constitution, and that the charge is not frivolous, does not always give this court jurisdiction to review the judgment of a state court. The party raising the question of constitutionality and invoking our jurisdiction must be interested in and affected adversely by the decision of the state court sustaining the act, and the interest must be of a personal and not of an official nature. *Clark* v. *Kansas City*, 176 U. S. 114, 118; *Lampasas* v. *Bell*, 180 U. S. 276, 283; *Smith* v. *Indiana*, 191 U. S. 138, 148."

In the present case the Supreme Court of the State has enjoined the plaintiffs in error as officers of the State from taking steps to submit the proposed constitution to the electors of the State, because in its judgment the act of the legislature of the State requiring such submission was in violation of the state constitution. Whether this duty

shall or shall not be performed concerns the plaintiffs in error in their official capacity only. The requirement that they refrain from taking such steps concerns their official and not their personal rights. Applying the rule established by the previous decisions of this court, it follows the judgment of the state Supreme Court is not reviewable here, as it is not alleged to violate rights of a personal nature, secured by the Federal Constitution or laws.

It therefore follows that this writ of error must be

Dismissed.

MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG *v.* HENSON, RECEIVER OF THE VICKSBURG WATER WORKS COMPANY.

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

No. 546. Argued October 28, 1913.—Decided December 1, 1913.

A decree of the District Court to the effect that a contemplated issue of bonds, the issuance of which the bill sought to enjoin as wholly illegal, was illegal at that time, leaving open the question of whether it might be legal at a subsequent time, *held*, under the circumstances of this case, to be a final decree from which an appeal could be taken to the Circuit Court of Appeals.

Although the original bill depended solely upon diverse citizenship, independent grounds of deprivation of Federal rights which existed prior to the filing of the bill may be brought into the case by amended bill, and if so, the jurisdiction of the District Court does not rest solely on diverse citizenship and the judgment of the Circuit Court of Appeals is not final but an appeal may be taken to this court. *Macfadden* v. *United States*, 213 U. S. 288.

While the enforcement of the rule of *res judicata* is essential to secure the peace and repose of society, it is equally true that to enforce the rule upon unsubstantial grounds would work injustice.

A decree is to be construed with reference to the issues it was meant to decide; its nature and extent is not to be determined by isolated portions thereof, but upon the issue made and what it was intended to accomplish.

A decree in a former action between a municipal water company and the municipality that the former had an exclusive contract for a specified period and that the latter could not issue bonds for the purpose of establishing a municipal water supply to be forthwith put into operation, rendered while the franchise had a long period to run, *held* in this case not to be *res judicata* as to the right of the municipality to issue bonds within a short time prior to the expiration of the franchise for the purpose of erecting water works which were not to be put into operation until after the expiration of the existing franchise.

203 Fed. Rep. 1023, reversed.

THE facts, which involve the jurisdiction of this court of appeals from judgments of the Circuit Court of Appeals and the extent to which a former judgment is *res judicata* of the right of a municipality to issue bonds for establishing a water supply in view of existing contracts with a water works company, are stated in the opinion.

Mr. T. C. Catchings, Mr. O. W. Catchings, Mr. George Anderson and *Mr. John Brunini* for appellants, submitted.

Mr. Edgar H. Farrar, with whom *Mr. J. C. Bryson, Mr. Joseph Hirsh* and *Mr. Richard F. Goldsborough* were on the brief, for appellees.

MR. JUSTICE DAY delivered the opinion of the court.

This suit originated in the District Court of the United States for the Southern District of Mississippi, where an injunction restraining the appellants from constructing a water works system during the term of a certain franchise previously granted by the city of Vicksburg was allowed upon the complaint of W. A. Henson, Receiver of the

Vicksburg Water Works Company, one of the appellees herein (whom we will hereafter call "the receiver"), and the decree upon appeal was affirmed by the Circuit Court of Appeals for the Fifth Circuit (203 Fed. Rep. 1023), from which affirmance this appeal is taken.

The case, as made out in the District Court and shown by the record, appears to be:

The receiver alleged that in 1886 the city, under authority of an act of the legislature, by ordinance granted to Samuel R. Bullock & Company a franchise to furnish the city with water for a term of thirty years; that he had succeeded to the rights and interests of Bullock & Company; that he was paying taxes upon the property of the Vicksburg Water Works Company and was entitled to the rights and privileges of a taxpayer; that in 1900 the city of Vicksburg attempted to abandon the contract and to build and operate a water works system of its own, and that in a suit instituted in the Circuit Court of the United States for the Southern District of Mississippi, such action had been enjoined; that by the final decree therein it was, among other things, ordered "that the defendant refrain from constructing water works of its own until the expiration" of the franchise, and that, upon appeal to this court, such decree was affirmed. The pleadings, final decree and opinion of this court in the former case and the franchise of 1886, were introduced into the record in this case as exhibits, and, to save repetition, reference is made to the franchise as quoted in 185 U. S. 65, to the opinion in 202 U. S. 453, and to the outline of the pleadings in that case as set forth in those reports.

The receiver alleged further that the city had since made efforts to free itself from the franchise, and specified various suits and negotiations to that end; that early in 1912 the appellants by resolution and election undertook to authorize the sale of bonds for the construction of a water works plant, which was not to be operated until

after the expiration of the franchise; that he would be compelled to pay taxes upon such bonds and that the issuance and sale of the bonds and the construction of the plant would depreciate the value of the Water Works Company's property; that the city was commencing the construction of a plant too long before the expiration of the franchise; that the purpose of the city was really to depreciate the value of the Water Works Company's plant so that the city might buy it at a price materially less than its actual value; and that the bond election, for several reasons, which the receiver stated, under the statutes and constitution of Mississippi and because of fraud was of no effect, and the receiver offered to sell the plant at any time upon appraisement. The receiver prayed that the appellants be enjoined from issuing bonds for the construction of a water works system and from taking any further steps toward the building of such plant during the term of the franchise, for the reason that the matter of construction of the plant during such time was *res judicata* and that such construction would violate the franchise, and further that the bond election was void. The receiver also prayed for an injunction restraining the appellants from letting contracts for the laying of certain water mains, in violation of the franchise and of the decree in the former suit.

The appellants denied that the decree in the former case precluded the question raised here, and that the construction by the city of its own water works system would violate the terms of the franchise; that the receiver was, or was entitled to the rights and privileges of, a taxpayer, and alleged that the statement by the receiver of the dealings and negotiations between the city and the Water Works Company was irrelevant and false. They also denied that the receiver or the Water Works Company, as a taxpayer, would be affected by the bond issue; and alleged that, if the issuance of the bonds and construc-

tion of the plant should depreciate the property of the Water Works Company, it would be something for which it would not be responsible. They further denied that the steps taken by the city were premature, in view of the long time that must elapse before the expiration of the franchise, and that the city did not intend to build a plant; and alleged that the purpose of the Water Works Company was to compel the city to buy its plant at an exorbitant price; and they denied that the bond election was void. The appellants further alleged that if the decree should be construed as contended for by the receiver, the court below, as a court of equity, would not at that time give the decree that effect, for the reason that the situation of the parties was so changed as to make it inequitable to prohibit the appellants from taking the action sought to be enjoined; that the receiver by permitting the city to lay certain mains had conceded the appellants' right to construct a water works plant and was estopped from contesting such right; that the receiver and the Water Works Company actively participated in the election, conceding appellants' right to build its own water works system, and therefore were estopped from asserting the contrary; that the receiver, by conceding appellants' right to construct its plant, itself construed the decree as only enjoining competition and that the court should give effect to the decree as construed by the parties, and that the decree did not attempt to enjoin the sale of bonds and that that is all that is sought to be restrained by this suit. The appellants also denied that the letting of contracts for laying mains would violate either the decree or the franchise.

Upon petition, Lelia Boykin, a taxpayer of the city of Vicksburg, the other appellee herein, was, upon order, admitted as a party to the suit, and by proper pleadings issues were made with reference to her as such taxpayer.

Upon final decree the court held that the receiver was

entitled to the relief prayed for and ordered that the appellants be enjoined from constructing a system of water works and from disposing of the bonds covered by the suit during the term of the franchise, and in its opinion the court based its decision upon the decree made by it and its affirmance in 202 U. S. and decided that the matter was *res judicata*. Upon appeal to the Circuit Court of Appeals the decree of the District Court was affirmed upon the ground that the decree and affirmance in the case in 202 U. S. constituted an estoppel. The case was thereupon brought here upon appeal, the assignments of error asserting that the Circuit Court of Appeals erred in affirming the decree of the District Court, in holding that the decree affirmed in 202 U. S. was an estoppel and that the appellants had no right to build a water works system before the expiration of the franchise and in not deciding that the receiver was estopped to assert that appellants did not have such right.

A motion was made to dismiss the appeal, first, upon the ground that the decree was not final in the District Court, and hence was not appealable to the Circuit Court of Appeals, because it left undisposed of one of the substantial issues in the case. That contention arises from this alleged situation: The pleadings of the receiver, as well as the petition filed by the intervenor, Lelia Boykin, attacked the right to issue the bonds in question upon a ground independent of the former adjudication, namely, because the election at which the bonds were authorized to be issued was illegal for the reason that the city failed to make the statutory publication of the election and that the curative act was unconstitutional, for the reason that the city had exceeded the limit of indebtedness allowed under chapter 142 of the laws of Mississippi for 1910, the exception in such act being unconstitutional, and for the reason that the bond election was held under an ordinance purporting to amend the charter of the city which ordi-

nance was itself void, and for fraudulent and corrupt practices and for unlawful registration. This ground of attack, the appellees say, went to the right to issue the bonds to build a water works system at any time and rendered them invalid whether undertaken to be issued before or after the expiration of the Bullock franchise, and that such is the case is said to appear from reference to the final decree which was entered in the suit. The decree enjoined the appellants from building or constructing a system of water works or any part thereof within the city until after the eighteenth day of November, 1916, the date of the termination of the Bullock franchise, and it further provided:

"It is further ordered and decreed that the defendant, the Mayor and Aldermen of the City of Vicksburg, be and is hereby enjoined from disposing of the issue of four hundred thousand dollars ($400,000.00) of bonds mentioned and described in the pleadings with a view of constructing a water works system, or any part thereof, in said city during the life of the said franchise, that is, between now and the 18th day of November, 1916."

So much of the decree as relates to the bonds, it is contended, leaves open the right of the city to issue them after the expiration of the Bullock franchise, although they were attacked as being wholly illegal and the city wanting authority to issue them at any time.

It is true that the original bill contained allegations which went to the validity of the issue of bonds, if the same were proposed to be issued after the expiration of the Bullock franchise, as well as before the expiration of that time, and the prayer of the original bill among other things asked for an injunction restraining the defendant city from issuing the bonds or taking any action to that end by virtue of the election. In the amended and supplemental bill filed in the case, however, not only allegations by way of amendment were made, but the case was restated at great length and the prayer of the bill asked upon

final hearing for "a decree against the said defendant holding the said bond election void and without effect, and the said defendant without power to issue and float said bonds for the purpose of building a water works plant during the life of the Bullock franchise, and for an injunction against the said defendant restraining it from issuing bonds under the said election and from taking any further steps looking to the building of a water works plant during the life of the said Bullock franchise," and for general relief. When Lelia Boykin intervened, she filed a petition averring that she was the owner of real estate in and a taxpayer of the city of Vicksburg, and a citizen and resident of Georgia, adopting the allegations of the original bill and amended and supplemental bill, except so much thereof as set up the former adjudication in favor of the Water Works Company, and joining in the original complainant's prayer for relief and also asking for general relief.

It may be true that there were allegations in the pleadings which permitted or required a consideration of the law under which the bonds were to be issued for the purpose of erecting a water works system and which were independent of the alleged claim of *res judicata,* but the record and proceedings make it evident that the court and the parties concerned treated the bill as an attack upon the right of the city to proceed to build a water works system before the expiration of the Bullock franchise, although to be operated thereafter. The opinion of the court and the decree shows that the court so regarded it, and no objection to this disposition of the case was made by any of the parties, and when the case reached the Circuit Court of Appeals a motion was made to dismiss upon the ground that the proceeding was merely ancillary to the decree of the court, affirmed in this court (202 U. S. 453), enjoining the city from constructing and operating a plant of its own during the term of the fran-

chise. The decree was final as to the city's right to do what it was then proposing to do, to issue bonds and erect a system of water works to be used after the expiration of the Bullock franchise. The decree as rendered prevented the city from doing this. There was no reservation of the right to a further decree as to the legality of the bonds, and no retention of jurisdiction after the decree for any purpose. Neither in the Circuit Court of Appeals nor in the District Court was there any attempt to require the court to consider the case in its further aspect, but as we have said both courts and all parties treated the case as presenting a controversy concerning the right of the city to proceed, as it was about to do, to sell the bonds and build a plant before the expiration of the franchise in question. The record thus considered, we think there was a final decree in the District Court from which an appeal could be taken to the Circuit Court of Appeals.

The further contention is made that the jurisdiction of the Circuit Court of Appeals was final because the jurisdiction of the District Court as originally invoked depended solely upon diverse citizenship. But it appears that when the amended and supplemental bill was filed there were added to the ground of original jurisdiction allegations concerning the proper construction of the contract rights of the receiver, which attacked the proposed action of the city on the ground that it would be destructive of constitutional rights. We think those allegations brought into the case a ground of jurisdiction independent of diversity of citizenship. They were grounds which existed before the suit was begun, which might have been averred in the original bill and which were brought into the case by the amendment. We think therefore that the jurisdiction of the District Court did not rest solely upon diversity of citizenship, but upon the additional ground of deprivation of Federal right. In this view the decision of the Circuit Court of Appeals is not final, and an appeal may

be taken to this court. *Macfadden* v. *United States*, 213 U. S. 288.

Coming to the question whether the former decree disposed of the rights of the parties, as was held in the court below, which judgment was affirmed by the Circuit Court of Appeals, it is undoubtedly true that a right, question or fact put in issue and decided by a court of competent jurisdiction must be taken as settling the rights of the parties in respect to such controversy and while it remains undisturbed is conclusive between them. The enforcement of this rule has been repeatedly said to be essential to secure the peace and repose of society and in order that an end may be made of controversies between parties who have once invoked and have had the determination by a competent judicial tribunal of the matters in dispute between them. It is no less true that to hold upon any unsubstantial ground that a controversy has been thus concluded is to do an injustice to litigants. We must therefore be careful to see, when the contention of former adjudication is made, that the matter was actually presented and decided and the rights of the contending parties thereby concluded. We think that an examination of the record in the former case, put in evidence in this case, does not support the contention that the matter here in issue was then adjudicated and determined. It is true there is some broad language in the decree. It provided:

"Fourth. That the said defendant refrain from in any manner accepting the benefits of or proceeding under the act of the Legislature of the State of Mississippi, approved March 9th, 1900, and from issuing bonds under and by virtue of said act or any other act, or ordinance for the purpose of erecting water works of its own during the period prescribed in said ordinance contract and franchise.

"Fifth. That the said defendant refrain from constructing water works of its own until the expiration of the

period prescribed in the said ordinance contract and franchise dated 18th day of November, 1886."

The fifth paragraph read alone without regard to the pleadings in the case would broadly enjoin the city from constructing a water works system of its own until the expiration of the period named in the franchise held by the complainant. The fourth paragraph used language in enjoining the issuance of bonds which concluded with an injunction "from issuing bonds under and by virtue of said act or any other act, or ordinance for the purpose of erecting water works of its own during the period prescribed in said ordinance contract and franchise." It is also true that the court in concluding its opinion in 202 U. S. said that it found "no error in the decree of the Circuit Court enforcing the contract rights of the complainant and enjoining the city from erecting its own works during the term of the contract."

It is well settled, however, that a decree is to be construed with reference to the issues it was meant to decide. *Graham* v. *Railroad Company*, 3 Wall. 704, 710; *Reynolds* v. *Stockton*, 140 U. S. 254; *Vicksburg* v. *Vicksburg Water Works Co.*, 206 U. S. 496, 507; *Haskell* v. *Kansas Natural Gas Co.*, 224 U. S. 217, 223. In *Barnes* v. *Chicago, M. & St. P. Ry. Co.*, 122 U. S. 1, this court, speaking by Mr. Chief Justice Waite, said (p. 14):

"Every decree in a suit in equity must be considered in connection with the pleadings, and, if its language is broader than is required, it will be limited by construction so that its effect shall be such, and such only, as is needed for the purposes of the case that has been made and the issues that have been decided. *Graham* v. *Railroad Company*, 3 Wall. 704. Here the suit was by and for creditors to set aside the mortgage to Barnes and the foreclosure thereunder, because made and had to hinder and delay them in the collection of their debts. The decree, therefore, although broader in its terms, must be held to mean

no more than that the foreclosure was void as to these creditors, whose claims were inferior in right to that of the mortgage, and that the Minnesota Company was restrained and enjoined from asserting title as against them."

What was the situation which confronted the parties at the time of the institution of the original suit, and what rights were the Water Works Company striving to protect? The Company contended that it had a franchise good for thirty years and that this franchise was exclusive, at least in so far as it would prevent the city from building a water works system of its own and operating it in competition with the plaintiff company and in destruction of its rights yet to be enjoyed under its unexpired franchise. At that time the franchise had over half its term yet to run. There was no indication on the part of the city that it intended to build a water works system of its own and then await the expiration of the franchise before it operated such system. The city contended for and maintained the right to erect its own system and operate it at that time and in competition with the Water Works Company. This competition it was contended would be destructive of the rights and property of the complainant and virtually destroy the exclusive privilege which the city had granted to it for the period of thirty years. It was only after the conclusion of the litigation that the city undertook to construct a water works system, withholding operation thereof until the expiration of the franchise belonging to the Water Works Company. It was driven to that position by the decree against it in the former case. The building of such water works system, and not the one that it originally intended, was only proposed by the city after it had lost the original controversy, in which it contended for the right to erect a competing plant to be operated during the term of the franchise. Reference to the original bill filed in the former case confirms this view, where the following appears:

"By reason of said ordinance and contract [the franchise] said city has no right within the period of thirty years to engage in the business of supplying water to the inhabitants of said city in competition with said Bullock & Company, or their assigns, notwithstanding which, said act [under which the city was then proceeding to erect a plant] authorizes and permits said city to construct and maintain water works for said purpose;" and the prayer, in part, asked that the defendant might be "decreed from constructing or acquiring and operating a system of water works in competition with your orator's water works." The amended and supplemental bill read, in part, as follows:

"Therefore said city by its contract and ordinance with S. R. Bullock & Company and assigns are precluded from issuing and selling bonds to build, construct, maintain and operate a water works of its own, as provided by said legislative act and said resolution and said election of 1900, in competition with your orator against its own contract.

"The premises considered, your orator prays that this Honorable Court will enjoin the defendant from issuing and selling said bonds for the purpose of building and constructing water works of its own in competition with your orator."

In considering the rights of the parties and the position taken by them, this court in 202 U. S. 453 *et seq.* said (p. 458):

The rights of the Water Works Company under its exclusive contract, it alleged, "would be practically destroyed if subjected to the competition of a system of water works to be erected by the city itself." "We think it would be a palpable injustice to the stockholders to permit the competition of the city by new works of its own; which, whether operated profitably for the municipality or not, might be destructive of all successful opera-

tion in furnishing water to consumers by the private company." Stating the question of the power of the city to grant an exclusive contract: "Whether it can, in exercising this legislative power, exclude itself from constructing and operating water works for the period of years covered by the contract." (p. 469) "And unless the city has excluded itself in plain and explicit terms from competition with the Water Works Company during the period of this contract it cannot be held to have done so by mere implication." (p. 470) "These are the words of the contract and the question upon this branch of the case is, conceding the power of the city to exclude itself from competition with the grantee of these privileges during the period named, has it done so by the express terms used? It has contracted with the company in language which is unmistakable, that the rights and privileges named and granted shall be *exclusive*. Consistently with this grant, can the city submit the grantee to what may be the ruinous competition of a system of water works to be owned and managed by the city, to supply the needs, public and private, covered in the grant of privileges to the grantee? It needs no argument to demonstrate, as was pointed out in the *Walla Walla Case*, that the competition of the city may be far more destructive than that of a private company. The city may conduct the business without regard to the profit to be gained, as it may resort to public taxation to make up for losses. A private company would be compelled to meet the grantee upon different terms and would not likely conduct the business unless it could be made profitable. We cannot conceive how the right can be exclusive, and the city have the right at the same time to erect and maintain a system of water works, which may and probably would practically destroy the value of rights and privileges conferred in its grant." (p. 471) "We think it was distinctly agreed that for the term named the right of furnishing water to

the inhabitants of Vicksburg under the terms of the ordinance was vested solely in the grantee, so far at least as the city's right to compete is concerned."

And in 206 U. S. 496, where it was contended that the former adjudication was a bar to the rights contended for in regulating rates, this court in construing its former decision in 202 U. S. said (206 U. S. 506): that the former case "was regarded as settling the right of the Water Works Company under the contract, to carry on its business without the competition of works to be built by the city itself, as the city had lawfully excluded itself from the right of competition."

It is said that upon the argument in this court of the case in 202 U. S. the too broad character of the decree was brought to our attention. An examination of the briefs then filed shows that this objection rested upon the allegation that the decree would prevent the city from putting in hydrants and other facilities not covered by the contract. There was no suggestion that the city would be prevented from putting in its own water works for use after the expiration of the franchise.

The nature and extent of the former decree is not to be determined by seizing upon isolated parts of it or passages in the opinion considering the rights of the parties, but upon an examination of the issues made and intended to be submitted and what the decree was really designed to accomplish. We cannot agree with the court below or with the majority of the Circuit Court of Appeals that the effect of the former adjudication was to preclude the rights of the parties in the present controversy.

Upon the merits, irrespective of the effect of the former decree, we think the object and purpose of the franchise granted to Bullock & Company, and their successors, was to permit and protect the operation of a system of water works to the end of the franchise term. After that time the city was to be free to supply its inhabitants itself,

if it saw fit, or make other contracts with those who could supply the wants of the city in that respect. We see no reason why the city might not, if it so determined, make preparation for water supply to its own citizens which would be available upon the expiration of the contract, the contract accomplishing that purpose until by its terms it had expired. To appropriately accomplish this required time and we think the city was within its rights, not being obligated by any contract to purchase the works of the Water Works Company, the company having been content to accept the franchise without this requirement, and was free to make other adequate provision to meet this essential requirement of the inhabitants of the city.

The views we have expressed require a reversal of the judgment of the Circuit Court of Appeals, affirming the decree of the District Court. It is therefore ordered that the judgment be

Reversed and the case remanded to the District Court of the United States for the Southern District of Mississippi, for further proceedings not inconsistent with this opinion.

UNITED STATES *v.* BALTIMORE & OHIO RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

No. 385. Argued January 16, 17, 1913.—Decided December 1, 1913.

Premises occupied and used by a common carrier as a depot or freight station may become such through contract with the owners and not necessarily by lease or purchase.

The fact that the carrier leases a terminal from a shipper near that shipper's establishments does not, in the absence of any fraudulent intent, import a discrimination in favor of that shipper where the

station is actually used for the benefit alike of all shippers in that neighborhood.

A carrier may compensate a shipper for services rendered and instrumentalities furnished in connection with its own shipments; and if the amount is reasonable it is not a prohibited rebate or discrimination, even if the carrier does not allow other shippers to render and furnish similar services and instrumentalities and compensate them therefor.

Because a contract for terminal facilities contemplates and provides for the publication of joint tariffs does not make the owners of the terminal common carriers if no joint tariffs are ever filed or published.

Where the Interstate Commerce Commission held payments for shippers' services rendered and facilities furnished to be discriminatory only in so far as similar payments for similar services are not paid to other shippers, other questions as to the legality of such payments which were not passed on by the Commission or the Commerce Court are not properly before this court and will not be passed on.

Quære, and not now discussed or decided, whether a shipper furnishing lighterage service within lighterage limits for a part of the rate becomes a common carrier and debarred from transporting his own goods under the commodity clause of the Act to Regulate Commerce.

A shipper may be under disadvantages in regard to his shipments by a common carrier by reason of his disadvantageous location.

200 Fed. Rep. 779, affirmed.

THE facts, which involve the legality of an order made by the Interstate Commerce Commission regarding certain allowances made by railroad carriers to shippers and determination of whether such allowances constituted illegal preferences or discriminations in violation of the Act to Regulate Commerce, are stated in the opinion.

Mr. Solicitor General Bullitt for the United States:

Arbuckle Brothers in operating the Jay Street Terminal and in transporting freight by floats, etc., between Brooklyn and Jersey City are an integral part of the through trunk line systems operating into and out of greater New York, and as such are common carriers by railroad, and are subject to the Interstate Commerce Act. *United*

States v. *Union Stock Yard*, 226 U. S. 286, 302, 304, 306; *United States* v. *Del. & Hud. Co.*, 213 U. S. 366.

The Hepburn Act does not authorize the railroads to make the arrangement in question with Arbuckle Bros. and to pay them for their services in transporting freight between Brooklyn and Jersey City. *Int. Comm. Comm.* v. *Diffenbaugh*, 222 U. S. 42; *Un. Pac. R. R.* v. *Updike Grain Co.*, 222 U. S. 215.

Mr. P. J. Farrell for the Interstate Commerce Commission:

The Commission correctly treated as one and the same concern the firm of Arbuckle Brothers and the firm styled Jay Street Terminal.

The fact that a large part of Arbuckle Brothers' sugar is sold f. o. b. Brooklyn is a matter of no importance.

The allowances are paid to Arbuckle Brothers in accordance with tariffs published and contracts entered into by the carriers. The fact that the allowances cover use of the Jay Street Terminal and all services performed there in connection with the transportation of the shipments does not change the character of the discrimination.

By confusing allowances paid to Arbuckle Brothers on their shipments of sugar with allowances paid to them on other shipments the carriers cannot make lawful a discrimination which would otherwise be unlawful.

The fact that bills of lading issued by the carriers show that their responsibility for the Federal Sugar Refining Company shipments begins at the Jersey shore is not, as between such shipments and those of Arbuckle Brothers, a matter of importance.

The right of the carriers to discriminate between Arbuckle Brothers and the Federal Sugar Refining Company does not depend upon the question of whether the latter changed its method of shipping to avoid such discrimination.

The carriers' offer to lighter the Federal Sugar Refining Company shipments from Pier 24 to the Jersey shore free of expense to that company does not change the character of the discrimination which forms the basis of the Commission's order.

The lawfulness of the discrimination does not depend upon the question of whether the allowances paid to Arbuckle Brothers are more than reasonable compensation for the services performed by them in delivering their shipments of sugar on the Jersey shore.

The court erred in stamping with the seal of good faith the contracts made with the Jay Street Terminal for the purpose of giving Arbuckle Brothers an advantage over the Federal Sugar Refining Company and denouncing as a subterfuge the change in shipping arrangements made by the latter company to remove the discrimination thus brought about.

In support of these contentions see *Gulf, Col. &c. Ry. Co.* v. *Texas*, 204 U. S. 403; *Int. Com. Com.* v. *Balt. & Ohio R. R. Co.*, 145 U. S. 263; *Un. Pac. Ry. Co.* v. *Goodridge*, 149 U. S. 680; *Cin., N. O. & Texas Pac. Ry. Co.* v. *Int. Com. Com.*, 162 U. S. 184; *Tex. Pac. Ry. Co.* v. *Int. Com. Com.*, 162 U. S. 197; *Int. Com. Com.* v. *Cin., N. O. & Tex. Pac. Ry. Co.*, 167 U. S. 479; *Wight* v. *United States*, 167 U. S. 512; *Int. Com. Com.* v. *Alabama Midland Ry. Co.*, 168 U. S. 144; *East Tenn., V. & G. Ry. Co.* v. *Int. Com. Com.*, 181 U. S. 1; *New Haven R. R. Co.* v. *Int. Com. Com.*, 200 U. S. 361; *Tex. & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Int. Com. Com.* v. *Ch. G. West. Ry. Co.*, 209 U. S. 108; *Int. Com. Com.* v. *Ill. Cent. R. R. Co.*, 215 U. S. 452; *Int. Com. Com.* v. *Del., Lack. & West. R. R. Co.*, 220 U. S. 235; *Un. Pac. R. R. Co.* v. *Updike Grain Co.*, 222 U. S. 215.

Mr. Ernest A. Bigelow for the Federal Sugar Refining Company:

The present arrangement between the carriers and Arbuckle and Jamison is a fraud upon the spirit and the intent and the letter of the acts to regulate commerce. The arrangement had its origin in a flagrantly unlawful preference of these great shippers and was devised to perpetuate such preference.

The form is the form of an innocent contract between a carrier and a dock and lighterage concern; the substance is that of an unlawful and unjust preference of one group of shippers as against their competitor.

Underlying the arrangement with these favored shippers is the fundamental purpose to handicap the independent company and prevent it from entering the markets on equal terms, *i. e.*, to defeat the intention of Congress as manifested in the Act to Regulate Commerce. The lighterage limits could be expanded at will, in all directions, north, east and south, but never to Yonkers, for there was located the Federal's refinery.

The Commission's findings of fact, supported as they are by the evidence, will not be reviewed by this court, and its conclusions of law were correctly drawn.

So far as the conclusions embody findings of fact they appear not to be reviewable by the courts. A finding that there is unjust discrimination is a conclusion of fact. *Int. Com. Com.* v. *D., L. & W. R. R. Co.*, 220 U. S. 235.

The transportation referred to in § 2 of the act does not begin until the lighters are made fast to their float-bridges on the New Jersey shore, that being the point of time at which the carriers accept the goods and assume responsibility therefor. *Mo. Pac. Ry.* v. *McFadden*, 154 U. S. 155; *L. & L. Fire Ins. Co.* v. *R. W. & O. R.*, 144 N. Y. 200; *Coe* v. *Errol*, 116 U. S. 517, 528.

The single fact that Arbuckle and Jamison issue to themselves bills of lading in the name of the carriers does not suffice to overcome the legal conclusion arising from the fact that the sugar remains in their own possession and

at their own expense and risk until the lighters have made fast at the rail terminals.

On the first proposition, therefore, it is submitted the Commission has correctly disposed of the question of law, and that its finding that the arrangement between Arbuckle and Jamison and the carriers creates an unlawful discrimination, being a finding of fact which is supported by the evidence and as such not reviewable by the courts, should be accepted by this tribunal.

The Commission was right in finding that both shippers perform precisely the same service in lightering their respective shipments from points within the lighterage limits and delivering them to the appellee carriers at their rail terminals. If, therefore, the service performed by Arbuckle and Jamison be a part of the transportation, within the scope of § 15, so also must be the service performed by the Federal Company and to pay to Arbuckle and Jamison an allowance for their services and to refuse to pay the Federal Company for its precisely similar services is to discriminate unlawfully. *Int. Com. Com.* v. *Diffenbaugh*, 222 U. S. 42; *Union Pac. Ry.* v. *Updike Grain Co.*, 222 U. S. 215.

The Federal Company initiates the interstate transportation of its sugar, so far as these carriers are concerned, at pier 24, a point within the lighterage limits. This is true even if Federal sugar is not discharged from the lighters at pier 24 and there is, therefore, no physical delivery. *Gulf, C. & S. F. Ry.* v. *Texas*, 204 U. S. 403.

The Federal Sugar Refining Company has no apologies to offer for adopting the expedient of rebilling at pier 24, an expedient which has received the sanction of this court in *Gulf, C. & S. F. Ry.* v. *Texas*, 204 U. S. 403.

As to the propriety of motives, a shipper is entitled to accommodate its conduct to settled principles of law, even though it be impelled thereto by an enlightened self-interest.

The so-called admission by counsel for the Federal Sugar Refining Company did not admit, at least in the sense ascribed to it by the dissenting Commissioners; and, in any event, is quite immaterial, as the Commission has power in the public interests to consider the whole subject, disembarrassed by any supposed admissions, even if contained in the statement of complaint. *C. H. & D. Ry.* v. *Int. Com. Com.*, 206 U. S. 142, 149.

Mr. George F. Brownell, with whom *Mr. H. A. Taylor* was on the brief, for the Railroad Companies, appellees.

Mr. H. B. Closson for the Brooklyn Eastern District Terminal, appellee.

Mr. William N. Dykman for the Jay Street Terminal and Arbuckle Brothers, appellees.

Mr. Justice Lurton delivered the opinion of the court.

This appeal involves the legality of an order made by the Interstate Commerce Commission holding that certain allowances made by the appellees to Arbuckle Brothers on sugar shipped by them over one or another of the railroad companies' lines constitute an illegal preference or discrimination in violation of the Act to Regulate Commerce. The order of the Commission required the railroad companies to cease and desist from paying such allowances, "while at the same time paying no such allowances to the Federal Sugar Refining Co.," on its sugar brought by it on lighters to the carriers at the same rail terminals. 20 I. C. C. Rep. 200. The carriers affected filed a bill in the Commerce Court alleging the invalidity and illegality of the order, and sought an injunction *pendente lite* and a permanent injunction against its enforcement. An injunction until the cause could be finally heard was granted

by the Commerce Court. This was appealed from by the United States and the injunction sustained as within the sound discretion of the court below. 225 U. S. 306. Thereupon the cause was finally heard upon motion of the appellants to dismiss the bill for want of equity, all answers and pleas theretofore filed having been withdrawn. The Commerce Court denied this motion and sustained the equity of the bill. The appellants declining to further defend, the temporary injunction was made permanent. From that decree this appeal is prosecuted.

The situation out of which the questions for decision arise, shortly stated, is this:

The railroad companies held by the Interstate Commerce Commission to have discriminated in favor of Arbuckle Brothers and against the Federal Sugar Refining Company, are interstate trunk lines whose freight rail terminals are at the New Jersey shore of the harbor of New York. Transportation of freights into and out of the City of New York is practicable only by means of car floats, barges and steam lighters, operating between the city and the New Jersey shore.

To meet this condition the appellee railroads have long held themselves out as extending transportation of freights bound east to a defined area along the river front of the city and as beginning such transportation westbound when freight is delivered at designated points within the same area. The necessary lighterage service is performed without additional cost or charge, the flat rate into or out from such points being identical with that applicable at the New Jersey rail terminals. The limits within which such lighterage service is performed as a part of the transportation assumed have long been defined and published in the several filed rate sheets of the carriers. The district embraces substantially the commercial and manufacturing river front of Greater New York, and within it the railroads hold themselves out as undertaking

to receive or deliver freight at any public dock, or at any accessible private dock where the shipper shall arrange for the use of the dock. Within this lighterage zone each of the appellees has established and long maintained public freight terminal stations, at which it will deliver eastbound freights and receive freights bound west. Some of these stations are owned or managed solely by one of the railroads and some are union stations operated for the joint use of two or all of the railroads. Some of them are operated by third persons, who manage and operate them under contracts as agents for one or more of the railroads. But whether operated under contract or directly by the company or companies using them they are represented to be public delivery and receiving stations, and are so set out in the filed tariff sheets of the companies interested.

The "allowance" to Arbuckle Brothers referred to in the order of the Commission is the consideration paid by the railroad companies to them for instrumentalities and facilities furnished and services performed in the maintenance of one of these public stations, known as the Jay Street Terminal, and for the lighterage of all freight between that station and the railroad terminals on the New Jersey shore. Arbuckle Brothers, a co-partnership, are large refiners of sugar and dealers in coffee. Much of their product of sugar finds a market in the west at points upon the lines of the railroads here involved. Their refinery is upon the water front of Brooklyn. They also own a contiguous property fronting upon East River some 1,200 feet. Upon this property they have erected a dock, piers and large warehouses for the receipt of freight intended for transportation to the railroad terminals on the New Jersey shore, or received from such terminals for consignees nearby. They also own steam lighters, car floats, barges, etc., constructed for the transfer of cars, loaded or unloaded, between this dock and the New Jersey terminals. The premises were peculiarly adapted for use

as a public union freight station, and for the purpose of extending transportation by their several lines to this portion of the commercial and manufacturing water front of Greater New York, the appellee railroad companies, in 1906, entered into separate, but identical, contracts with Arbuckle Brothers, the latter contracting under the business name and style of "The Terminal Company." The contracts are too lengthy to be set out. Their essential points may be thus summarized:

1. The Terminal Company agrees to maintain the permises in good order and condition for the receipt of freight and to provide all necessary boats, car floats, docks and piers, adequate at all times to receive, discharge, transfer and deliver freights, loaded and unloaded, adequate to accommodate the business contemplated.

2. The Terminal Company will receive at the New Jersey terminals all freights, in or out of cars, intended for delivery at the aforesaid freight station and safely convey the same to the premises and there make delivery to the consignees. It will also receive and load into cars all freights which may be delivered to it at its said premises for transportation over the lines of any of said railroad companies and carry and deliver the same to said railroad company's New Jersey rail terminals.

3. For the facilities supplied and the services performed each of the railroad companies agrees to pay on freight in and out of the station, a compensation measured by the tonnage handled for each such railroad of four and one-fifth cents per hundred pounds on freight originating at or destined to points west of what is called "trunk line territory," and on freight originating at or destined to points east thereof, three cents per hundred pounds.

Under these contracts, consignments to or by Arbuckle Brothers are handled in the same manner as the shipments of the general public, and comprise a part of the tonnage

in and out of that station by which the compensation paid to the Terminal Company is measured. This fact was the basis of the complaint made by the Federal Sugar Refining Company, whose sugar seeks the same market, and who claimed that as it lightered its sugar from its own shipping dock to the terminals at the New Jersey shore the so-called "allowance" made in respect to the sugar of Arbuckle Brothers handled under the contracts referred to above, was an unjust and an illegal discrimination unless a like allowance was made to it.

The order of the Commission does not forbid the allowance to Arbuckle Brothers as in itself illegal or unreasonable, but forbids it only as a discrimination unless a like allowance is made to the Federal Sugar Refining Company. That there is no undue discrimination against the Federal Sugar Refining Company in refusing to make a like allowance to it will appear when the conceded circumstances and conditions are considered. This latter company is a competitor of Arbuckle Brothers in the sale and shipment of sugar to the same markets. Its refinery is located at Yonkers on the Hudson River, a point some ten miles beyond the limits of the free lighterage district. It owns its docks and piers upon the river, but has never enjoyed the free lighterage privilege accorded to all shippers from docks and piers inside the free zone under the tariff sheets of the carriers. It has therefore been compelled to furnish its own means for lightering shipments from its docks to the New Jersey shore. This is an undoubted disadvantage in competing with Arbuckle Brothers, as well as with all other refiners and shippers of sugar within the lighterage district. For many years it had an arrangement with the Ben Franklin Transportation Company, an independent transportation company, by which the latter transported its sugar directly from its Yonkers dock to the railway terminals on the New Jersey shore. There it was delivered to one of the appellees and a bill of lading

signed. The freight rates under such bills were identical with the flat rate from stations and piers within the free lighterage district. This disadvantage arising from its location was made the subject of a prior complaint before the Commission, wherein it sought to have the free lighterage district extended so as to include its Yonkers docks, or to have an allowance made to it for the transportation of its sugar from its dock to the New Jersey terminals. Such relief would have removed the disadvantage under which it had long labored. But this relief was denied and its petition dismissed without prejudice. In that proceeding it was ruled by the Commission that the free lighterage arrangements theretofore made by the carriers were the only available means by which they could extend their lines to New York and were not forbidden by the Commerce Act, and that by such extension the carriers had come under no obligation to extend the district to Yonkers. It was also ruled that the service rendered by Arbuckle Brothers in the lighterage of their own sugar from the Jay Street Terminal to the New Jersey shore was a service in aid of transportation and that for the instrumentalities and services, under the very contracts here involved, they did not receive an unreasonable consideration. 17 I. C. C. Rep. 40.

After the promulgation of that opinion the methods adopted for delivering sugar from the Yonkers dock to the New Jersey terminals were changed. The manager of the company's city office at 138 Front Street, would notify the manager of the refinery at Yonkers every morning of the sugar necessary to fill accepted orders. This necessary sugar was then loaded at the Yonkers dock upon the lighter Ben Johnson just as before. For this sugar the master of the lighter gave a receipt and was handed a document showing the Federal Sugar Refining Company to be the consignor and the consignee its city office, 138 Front Street. This document also gave the

number, weight and description of the packages. The Ben Johnson would then go down the river to pier No. 24, within the free lighterage district, where the boat tied up, and the city office was notified, "thereupon," say the Commission, "the complainant issues shipping instructions to the transportation company and hands to its representative bills of lading for execution by the carrier upon delivery at the New Jersey shore." The lighter then proceeds to the Jersey shore where the sugar is delivered to the carrier and the blank bills of lading are signed and returned to the lighter's captain. For the service of the lighter in taking the sugar to pier 24 and then across the river to the railroad terminals, it is paid three cents per hundred pounds. The claim upon these facts was and is that unless an allowance is made to it identical with that made to Arbuckle Brothers for their service in respect to their own shipments of sugar, a discrimination unlawful in character will result. And this was the conclusion of the Commission.

The Commerce Court was of opinion that the circumstances and conditions were so dissimilar as not to make the same rule applicable and that the result reached by the Commission was based upon manifest errors of law.

That pier 24 is within the free lighterage district and that the defendant carriers held themselves out as ready to take freight at any public or accessible private dock within that zone and lighter it across the river without any other charge than that published in their tariff sheets applicable alike to freight delivered to them at such dock or pier or at the New Jersey shore, is conceded. But the carriers have not established any public station at pier 24 and the Federal Company did not notify them, nor make any tender to them at that pier of their sugar for transportation. If such sugar had been tendered to them there and they had refused to receive it and lighter it at their own cost across the river, a very different ques-

tion would have arisen. That such tender was not made was obviously due to the fact that the sugar when loaded on the Ben Johnson at their Yonkers dock was destined for the railroad terminals at the New Jersey shore and thence by rail to the real consignee, the purchaser of the sugar at western points on the carriers' lines. The sugar had been sold before it was loaded at Yonkers and the stopping at this pier and the receipt of unsigned bills of lading showing the consignees and destinations was, as the Commerce Court held, not a break in the continuity of the transportation, but a plain subterfuge to give the transaction the appearance of a shipment from pier 24. We agree with the Commerce Court and the minority of the Commission in thinking that the change in method after the failure to obtain relief in the first case did not change the substance of the transaction in point of law or fact. The claim by the Federal Company is a claim for an allowance on account of lightering done for their own convenience, a lighterage service which under the facts of the case the carriers were under no obligation to do as a duty of transportation. It was, therefore, a demand for a purely accessorial service, as much so as if they had claimed for carting their shipments to a depot or station.

Assuming then, that the lighterage service performed by the Federal Sugar Refining Company was a service by it for its own convenience for which the railroads were under no obligation to make compensation, we come to the question whether the facilities employed and the service performed by Arbuckle Brothers in respect to their own sugar after delivery at the Jay Street Terminal are accessorial, or services in aid of railroad transportation for which they may be paid a reasonable compensation without discriminating unduly against the Federal Sugar Refining Company.

That the plain purpose of the contracts between the

several railroad companies and the Terminal Company was to constitute the dock and warehouses of that company a public freight station is too clear for extended discussion. That the premises became such a depot through contract with the owners and not by virtue of a fee simple title or a lease is of no legal significance. *Railroad Commission of Kentucky* v. *L. & N. Railroad*, 10 I. C. C. Rep. 173, 175; *Cattle Association* v. *C., B. & Q. Railway*, 11 I. C. C. Rep. 277. Nor is there the slightest substantial evidence that in the selection of the premises of Arbuckle Brothers there was any purpose to give them as large nearby shippers any preference or to unduly discriminate against competing sugar refineries. The premises were ideally adapted to meet the necessities of the great manufacturing and commercial business interests along the river front of Brooklyn and constituted the only property reasonably obtainable by the railroads for the extension of their lines of transportation to the Brooklyn side of East River. That through instrumentalities furnished by the Terminal Company and the service by it performed transportation by the railroads begins and ends at this station, is most obvious. This continuity of transportation is not questioned by the brief for the United States in this case. Thus, after referring to the instrumentalities furnished and the services performed by the Terminal Company, it is said, "in connection with the further fact that all of the railroad companies make through rates from Brooklyn and New York to western points covering (1) the service performed by Arbuckle Bros., and (2) the transportation by rail from Jersey City westward, show such a continuity of transportation as to render argument unnecessary that the transportation from Brooklyn to western points is by one continuous transportation by railroad. The mere fact that the physical rails stop at Jersey City does not mean that the railroad transportation there ends. It continues over to

Brooklyn by means of car floats, upon which further rails are laid and on which empty and loaded freight cars stand and are transported, so that the rails upon the car floats are brought into contact with the rail ends at Jersey City and the continuation thereof at Brooklyn, and in this way the transportation by railroad is carried on without interruption from the western points directly to Brooklyn."

It is true that this clear admission by the Solicitor General is made for the purpose of establishing a contention he makes, namely, that Arbuckle Brothers under the name of the Terminal Company are in law and fact common carriers by railroad who violate the commodity clause of the Hepburn Act by transporting their own products, a view to which we later refer. The concession as to the continuity of common carrier transportation by railroad from and to this station under the published freight tariffs which include the services performed by the Terminal Company is not inconsistent with the view of the Commission, so far as transportation to and from that station is confined to the shipments made to or by one of the general public. Thus the Commission say: "So far as the general public is concerned the Arbuckle dock may doubtless be regarded as a public receiving station of the defendant." It is said further: "Arbuckle Bros., not only operate their station for the defendants as a railway facility, but they also perform the lighterage service between the dock and the regular station of the defendants on the west shore."

The order of the Commission is made to rest upon an erroneous assumption that the services performed by Arbuckle Brothers in respect of their own westbound shipments of sugar after the delivery of such sugar at this station is a shipper's service done for their convenience, with their own facilities, and, therefore, an accessorial service for which they cannot be allowed compensa-

tion unless a similar compensation is allowed to the Federal Sugar Refining Company for the lighterage of its sugar to the west shore railroad terminals.

That certain advantages enured to Arbuckle Brothers from the fact that their refinery was so near this public station that their product might be trucked or carted to the station at slight cost, is obvious. That this was a consideration which operated as an inducement to make these contracts, may be true. But this mere advantage of nearness was one which they shared in common with every other shipper who chanced to be near a shipping station. That they were large shippers was also more or less an inducement to the railroads to place their depot in a locality which would tend to secure their shipments as against rival carriers, may also be conceded. But these were business considerations which are far from showing any purpose to give them any illegal preference or to discriminate against other shippers. That the station constituted a great public utility by which the shipping public was served is too plain for argument. Although nearly one-third of all westbound shipments through that station were made by Arbuckle Brothers, the remaining two-thirds of the tonnage was furnished by the general public. Thus, the uncontradicted averment of the bill is that during the first six months of 1907 the shipments of general merchandise through that station numbered 92,622 of which more than 85,000 were by shippers other than Arbuckle Brothers, though the tonnage of the latter aggregated nearly one-third of the total. Thus it is demonstrated that while Arbuckle Brothers are by far the largest shippers, yet the advantages of the station are availed of by thousands of the general public.

Upon all of the conceded facts of the case, we must conclude that the contracts by virtue of which the premises owned by Arbuckle Brothers were converted into a public freight station under their management as agents for the

several carrier lines were contracts made in good faith and not as a cover for any fraudulent scheme to give rebates or any other illegal advantage. The case must turn here, as it did before the Commission and in the Commerce Court, upon the question whether the allowance to Arbuckle Brothers of compensation upon their own shipments was for instrumentalities and services accessorial in character. Thus the Commission say (20 I. C. C. 209):

"The complainant contends that in lightering their sugar to the Jersey shore and there delivering it to the defendants, Arbuckle Brothers perform what the complainant refers to as a purely accessorial service. We incline to think this a sound view of the matter upon the facts shown of record. Neither the actual possession of their sugar nor their relation to it is in any respect changed until it is delivered into the physical possession of the defendants at Jersey City. This fact is clearly developed upon the record. Arbuckle Brothers handle their sugar out of their own refinery to their own dock and themselves deliver it to the defendants west of the river, using in the process only property and facilities that are owned by them and employés that are paid by them. Moreover, under the terms of the contracts between them and the defendant carriers none of the duties, obligations, responsibilities, or liabilities of common carriers attaches to the defendants, with respect to the sugar of Arbuckle Brothers, until the defendants have actually received it at their regular freight stations west of the river. Yet it is here contended that, through some sort of alchemy in their provisions, these contracts transmute Arbuckle Brothers from shippers into carriers' agents while they are in the act of delivering their own sugar to themselves at their own dock. We are not necessarily controlled, however, by the face of these documents or by the merely superficial relation that they purport to establish between these shippers and the defendant carriers, if, as seems to

be abundantly clear upon a reading of their provisions, the real and actual relation of Arbuckle Brothers to the defendants, so far as their own sugar is concerned, is that of shippers, up to the moment of time when they physically deliver their sugar to the defendants on the Jersey shore. The contracts expressly provide that until that moment the sugar is to be handled by Arbuckle Brothers at their own risk, and only from that moment does the carrier's risk begin. It is only when the defendants actually accept and physically take possession of the sugar at their receiving stations west of the river that they agree to, and do in fact, assume the liabilities of common carriers with respect to the sugar of Arbuckle Brothers."

We must now recur to the distinction drawn by the Commission between the compensation paid by the railroad companies to Arbuckle Brothers for the instrumentalities furnished and the service performed by them in respect of their own westbound shipments of sugar, and the compensation paid to them in respect to the freight handled by them through their station for the general public. The Commission find no fault with reference to the compensation paid for the latter but do find that the compensation paid for the former is an undue discrimination unless a like compensation is made to the Federal Sugar Refining Company for the lighterage of its sugar.

We have before noticed that the order of the Commission is in the alternative. The obvious inference is that the Commission found nothing unlawful *per se*, in the compensation paid to Arbuckle Brothers under the contract, although they are compensated upon a gross tonnage which includes their own sugar, for it sanctions its continuance upon condition that a like allowance shall be paid upon the sugar lightered by the Federal Sugar Refining Company. *Penn. Refining Co.* v. *Railroad*, 208 U. S. 208, 218.

But, as has already been shown the railroads were

under no obligation to lighter the sugar of the Federal Sugar Refining Company. Upon the other hand, if the lighterage of the Arbuckle sugar was included in the through rate from the Jay Street station, and a part of the transportation which the railroads were under obligation to perform, and that lighterage was done by Arbuckle Brothers at the instance and procurement of the carriers, they, as owners of the freight thus transported, were entitled to demand a compensation reasonably commensurate with the facilities furnished and the services performed. *Wight* v. *United States*, 167 U. S. 512; *General Electric Company* v. *New York Central Railroad*, 14 I. C. C. Rep. 237; *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46. In the case last cited, it is said:

"... the act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is taken for granted in § 15; the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or now, upon its own motion. Act of June 18, 1910, c. 309, § 12, 36 Stat. 539, 551). As the carrier is required to furnish this part of the transportation upon request he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it."

This principle is not controverted, but the Commission failed to give it application, because, as shown in the excerpt from its report set out above, it construed this relation of Arbuckle Brothers, under the terms of the contract, in respect of their own shipments of sugar, "as that of shipper up to the moment of time when they physically deliver their sugar to the defendants at the Jersey shore." Again the Commission say, that, "the

contracts expressly provide that until that moment the sugar is to be handled by Arbuckle Brothers at their own risk and only until that moment does the carrier's risk begin," etc. Of course, if this was the case, their services up to the time of delivery at the New Jersey shore, were shipper's services, purely accessorial, and not connected with or in aid of transportation by the railroad, and, therefore, a discrimination would result unless a like allowance was made to the Federal Sugar Refining Company. But this construction of the contract has no other basis than appears in the clause defining the responsibility of the Terminal Company to the contracting carriers while the freights remain in the Terminal Company's physical possession. That clause (3d) reads thus:

"The responsibility of said Terminal Company for eastwardly bound cars and the freights therein shall begin when the cars are placed upon its floats at the said float bridges at the aforesaid station of said Railroad Company, and shall continue as respects the cars until they have been returned by it, loaded or empty; and as respects the freights contained in eastwardly bound cars, its responsibility shall continue until the actual delivery thereof to and acceptance by the consignees at Brooklyn. As respects the freights to be transported westbound, said Terminal Company's responsibility shall commence at the time the same is received from the consignor at its aforesaid premises, and shall continue until said freights, loaded into cars, have been brought to the float bridge of said Railroad Company at its aforesaid freight station and until the floats have been attached to the float bridge and the cars are in complete readiness for removal from the car floats by said Railroad Company."

That clause deals both with east and westbound freight and covers both the freight and the cars of the railroad company. It is too plain for argument that its only purpose is to fix the responsibility upon the contracting com-

pany for both the cars of the carrier and the freight of all shippers while in its physical possession. The liability imposed is between agent and principal and is substantially that imposed by general principles of law. It is plainly not intended to affect the responsibility of the carriers to all shippers after the receipt of freight for transportation, a responsibility which they hold themselves out as assuming by their published tariff sheets.

The contracts between the carriers and the Terminal Company make no distinction whatever between the duty and obligation of the latter company in respect to the shipments of Arbuckle Brothers as sugar refiners, and those made through their station by the general public. Nor was there any distinction recognized by the undisputed course of business under the contracts. When the shipments of Arbuckle Brothers were delivered at the station, carriers' bills of lading were then signed and delivered just as in the case of freight delivered by the general public. If carrier responsibility began at that station for the shipments of the public, it also began as to the freight there received from Arbuckle Brothers. The physical possession of the Arbuckle sugar, as stated by the Commission, remained with them until actually placed in the possession of the carrier on the New Jersey shore. But that is equally true as to the shipments of the general public. In both cases, however, the possession after such delivery and until delivered at the New Jersey shore was, under the contract, that of Arbuckle Brothers, under the business name of the Terminal Company, as agents of the carrier over whose lines the freight was routed and whose bill of lading had been duly issued. The Commission, while seeming to recognize this relation of agency, in effect deny it as to the freight received and receipted for at the station if it constituted a shipment by Arbuckle Brothers. But neither the words, nor the purpose of the contract, nor the actual method of conducting

the business, furnish the slightest reason for any such distinction as that drawn by the Commission. All freight, both in and out of the station, was handled in the same way.

The suggestion in the brief of the Solicitor General for the United States that "joint published tariffs are issued by the railroads and Arbuckle Bros.," has no other foundation of fact than that found in the seventh paragraph of the contract between the Erie Railroad and the Terminal Company, where it is said, that the Terminal Company, "shall not be required to receive or carry any freight which may from time to time be classed as prohibited freights in the joint published tariffs of itself and the railroad company." But there is not a scintilla of evidence that any such joint published tariffs have ever been filed or published, nor that the Terminal Company has ever published or been required to file any tariff sheets whatever. The filed tariff sheets showing the services performed by Arbuckle Brothers, and the facilities provided for extending transportation between the New Jersey terminals and this station, are those published and filed by the railroad companies, who thereby hold themselves out as common carriers to and from this station. That it might originally have been expected that the Terminal Company might join in such published tariffs is possible. That it never did, is plain.

To say that the "allowance" made to Arbuckle Brothers is an allowance for lightering their own sugar across the river is to only half state the case. This so-called allowance is not only for such lighterage service, but is also compensation for the use of all of the terminal properties, docks, warehouses, tracks, steam lighters, car floats and every instrumentality used under the contract. It includes the services and responsibility of Arbuckle Brothers, as agents for the several lessees using the station, and their staff of employés engaged in receiving, delivering,

loading and unloading freights thus received, both incoming and outgoing. As the measure of compensation is the tonnage in and out of the station and as this compensation is paid by the several railroads maintaining the station in proportion to the tonnage which they severally handle, there is a sense in which it is in part an allowance to Arbuckle Brothers upon their own shipments. But they receive the same compensation upon the tonnage of every other shipper through that station, and it is the aggregate of the compensation which must determine the reasonableness of the allowance when we come to deal with it as an allowance to them for services or instrumentalities furnished, under § 15 of the Act to Regulate Commerce.

That the compensation of three and four and one-fifth cents per hundred pounds upon the total tonnage in and out of this station is not unreasonable was and is not challenged, and therefore we pass that subject by.

The contention to which we have hitherto referred that the arrangement made by the Terminal Company violates the commodity clause of the Act to Regulate Commerce is not necessary to be considered. There is nothing in the record showing that such a contention was pressed upon the Commission, considered by that body, or that the order rendered was in any respect based upon the commodity clause. Indeed, the order permitted the continuance of the Jay Street Terminal and the business there conducted, providing only that like rights and allowances were made to the Federal Sugar Refining Company. The order, therefore, cannot be assumed to have contemplated that the Jay Street Terminal business was a violation of the commodity clause, since under that hypothesis the conclusion would be inevitable that the Commission by its order gave sanction to and permitted the continuance of the wrong which its powers were exerted to suppress. As we do not consider the conten-

tions concerning the commodity clause as properly arising for decision and hence do not pass on them, they are not foreclosed, and hence our action in this case will be without prejudice to the right to assert them in the future if those having the right to do so are so advised.

Viewing the whole case in a broad light, it is apparent that the disadvantage under which the Federal Sugar Refining Company labors is one which arises out of its disadvantageous location. That disadvantage would still remain if the title to the Jay Street station was in the railroad companies, and its business in charge of a third person.

We fail to find any error in the decree of the Commerce Court holding the order of the Commission void, and its decree is accordingly approved.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* GARRETT ET AL., CONSTITUTING THE RAILROAD COMMISSION OF KENTUCKY.[1]

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

No. 23. Argued April 4, 1912.—Decided December 1, 1913.

The same rule by which the Federal court has jurisdiction to determine all the questions, local as well as Federal, when a Federal question is raised by the bill, governs the application for preliminary injunction under the act of June 18, 1910, c. 309, 36 Stat. 539, 557.

Unless the case imperatively demands such a decision, this court is reluctant to adjudge a state statute to be in conflict with the state constitution before that question has been considered by the state

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[1] Original docket title Louisville & Nashville Railroad Company *v.* Siler et al., constituting the Railroad Commission of Kentucky.

tribunals to which the question properly belongs. *Michigan Central R. R. Co.* v. *Powers*, 201 U. S. 245.

Prescribing rates for the future is a legislative and not a judicial act.

In prescribing intrastate rates the legislature of a State may act directly or, in the absence of constitutional restriction, it may commit the authority to do so to a subordinate body; and *held* that the legislature of Kentucky by the act of March 10, 1900, properly authorized the Railroad Commission of that State under certain conditions to fix reasonable intrastate rates for railroad transportation in conformity with the provisions of the constitution of the State.

The legislature may determine what are reasonable rates either directly or through a subordinate body and use methods like those of judicial tribunals to elicit facts without invading the province of the judiciary. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210.

In this case it does not appear that the State Railroad Commission acted in an arbitrary manner in fixing intrastate railroad rates; nor was it necessary to give legality to its order as to particular rates established to require a reduction in other rates.

Failure in a state statute establishing a railroad commission and giving it authority to fix reasonable rates to provide for an appeal from orders of the commission does not deny the carrier right of access to the courts to review an order that fixes rates so unreasonably low as to be confiscatory and is not an unconstitutional denial of due process of law under the Fourteenth Amendment.

Presumably the State, as well as the Federal, courts are open to a carrier to test the constitutionality of an order made by a railroad commission and to obtain protection by bill in equity against its enforcement if unconstitutional. *Home Telephone Co.* v. *Los Angeles*, 211 U. S. 265.

Penalties which are so unreasonable and severe as to be an unconstitutional denial of due process of law will not render a rate statute unconstitutional if they are separable, as in this case.

The right of the carrier to make its own intrastate rates is subject to the constitutionally enacted law of the State; in the absence of a legislative rate courts apply the common law in passing upon the reasonableness of the rates, but after legislative rates have been established the courts apply those rates unless there are constitutional objections.

So long as the legislature acts within its proper sphere, courts cannot substitute their judgment with respect to reasonableness of the established rates.

While a State may permit appeals to the courts from the rate making

orders of its railroad commission, *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, failure to provide for such an appeal does not deny the carrier due process of law as guaranteed by the Fourteenth Amendment.

Loss in revenue generally follows reductions in rates but that does not necessarily prove that the reduced rates are confiscatory; there must be further proof that they do not allow a fair return for service rendered.

An order of the Railroad Commission of Kentucky made under the act of March 10, 1900, is a legislative act under delegated power and has the same force as if made by the legislature and is for this reason a law passed by the State within the meaning of the contract clause of the Federal Constitution.

A charter provision is not violated under the contract clause by a subsequent state law otherwise legal, if, prior to the enactment of the latter, the chartered corporation has subjected itself to the operation of an amendment to the state constitution reserving the power to alter, amend and repeal charters and franchises.

Minnesota Rate Cases, 230 U. S. 352, followed to the effect that the establishment of railroad rates wholly intrastate by a State Railroad Commission is not an unwarrantable interference with, or a regulation of, interstate commerce.

In an equity suit by a carrier against the members of a State Railroad Commission to restrain enforcement of a rate order under a statute which provided for awards of reparation for failure to comply with the order, the court should not pass upon the validity of any of such awards made to parties not before the court.

186 Fed. Rep. 176, affirmed.

THE facts, which involve the constitutionality under the constitution of Kentucky and also under the Constitution of the United States of the State Railroad Commission Statute of Kentucky and the legality of orders made by the Commission, are stated in the opinion.

Mr. Henry L. Stone and *Mr. Albert S. Brandeis*, with whom *Mr. William G. Dearing* and *Mr. William A. Colston* were on the brief, for appellant.

Mr. Edward W. Hines and *Mr. James Garnett*, Attorney General of the State of Kentucky, with whom *Mr. Charles*

C. McChord, Mr. J. Van Norman, Mr. James Breathitt, former Attorney General of the State of Kentucky, and *Mr. John F. Lockett* were on the brief, for appellees.

Mr. Justice Hughes delivered the opinion of the court.

This is an appeal from an order denying a motion for an interlocutory injunction. *Louisville and Nashville Railroad Co.* v. *Siler,* 186 Fed. Rep. 176. The motion was heard by three judges, and the appeal is taken under § 17 of the act of June 18, 1910, c. 309, 36 Stat. 539, 557.

The suit was brought by the Louisville and Nashville Railroad Company, a corporation organized under the laws of Kentucky, to enjoin the enforcement of two orders made by the Railroad Commission of that State on August 10, 1910. One of these orders prescribed maximum freight rates for certain intrastate traffic, that is, for the transportation of corn, rye, barley, malt, empty barrels, boxes, etc., from three points of origin, Louisville, Covington and Newport, to sixteen points of destination in Kentucky. The second order awarded specified amounts in reparation for payments previously made to the carrier for such transportation in excess of the rates found to be reasonable.

For many years the Railroad Company had given special rates to the owners of distilleries along its lines in Kentucky for the transportation of the commodities above mentioned, which constituted their raw materials and supplies. These rates were withdrawn on March 25, 1910, and what are described as the standard rates of the company, that is, those which had theretofore been charged to others than distillers, were substituted. Thereupon, numerous distillery companies complained to the Railroad Commission of the State, insisting that the new rates were exorbitant and that the former rates were just

and reasonable. After hearing, the Commission sustained the contention of the petitioners and fixed the maximum rates in question. These rates were the same as the special rates which, prior to March 25, 1910, the Railroad Company had given to the distillery companies; but, by the Commission's order, the rates as fixed were made applicable to the transportation between the points stated, of the described commodities without distinction as to persons or as to the use to be made of the commodities by the consignees.

The statute under which the Commission acted, in establishing these rates, is that of March 10, 1900, known as the McChord Act (Kentucky Statutes, § 820a, Carroll's edition, 1909).[1] It provides in substance that when complaint shall be made to the Railroad Commission, accusing any railroad company of charging extortionate rates, or when the Commission shall receive information or have reason to believe that such rates are being charged, it shall be its duty "to hear and determine the matter as speedily as possible." The Commissioners are to give the company complained of not less than ten days' notice, stating the time and place of hearing and the nature of the complaint or matter to be investigated. They "shall hear such statements, argument or evidence offered by the parties as the Commission may deem relevant, and should the Commission determine that the company or corporation is, or has been, guilty of extortion, said Commission shall make and fix a just and reasonable rate, toll or compensation, which said railroad company or corporation may charge, collect or receive for like services thereafter rendered." The rate so fixed is to be entered as an order on the record book of the Commission; a copy thereof is to be mailed to a representative of the railroad company

[1] This statute is set forth in full in *McChord* v. *L. & N. R. R. Co.*, 183 U. S. 483, 484, 485; and in *Siler* v. *L. & N. R. R. Co.*, 213 U. S. 175, 178–180.

affected, and it is to be "in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record." If the railroad company, or any officer, agent or employé thereof charges a greater rate for like services thereafter, "said company . . . and said officer, agent or employé, shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offence in any sum not less than five hundred dollars, nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for a third and succeeding conviction in any sum not less than two thousand dollars nor more than five thousand dollars." The Circuit Court, in the appropriate counties as prescribed by the statute, is to have jurisdiction of such prosecutions, which are to be by indictment.

The bill attacked the statute, and the action of the Commission, as violative of the rights secured to the complainant by the Federal Constitution. Objections were also made under the constitution and statutes of the State. Demurrers were filed but upon these no decision was made. The motion for preliminary injunction was heard upon bill and affidavits. In denying the motion, the court did not pass upon the validity of the second order as it was of the opinion that those in whose favor the award of reparation had been made were "necessary parties in interest;" these had not been brought in. 186 Fed. Rep. 176, 203.

First. The order fixing rates.

Because of the Federal questions raised by the bill the Circuit Court had jurisdiction and was authorized to determine all the questions in the case, local as well as Federal. *Siler* v. *Louisville & Nashville R. R.*, 213 U. S. 175, 191. A similar rule must be deemed to govern the application for preliminary injunction under the statute which requires a hearing before three judges, and authorizes an

appeal to this court. 36 Stat. 557. This statute applies to cases in which the preliminary injunction is sought in order to restrain the enforcement of a state enactment upon the ground of its "unconstitutionality." The reference, undoubtedly, is to an asserted conflict with the Federal Constitution, and the question of unconstitutionality, in this sense, must be a substantial one. But, where such a question is presented, the application is within the provision, and this being so, it cannot be supposed that it was the intention of Congress to compel the exclusion of other grounds and thus to require a separate motion for preliminary injunction, and a separate hearing and appeal, with respect to the local questions which are involved in the case and would properly be the subject of consideration in determining the propriety of granting an injunction pending suit. The local questions arising under the state constitution and statutes were therefore before the Circuit Court and the appeal brings them here. They may be first considered.

1. It is objected that the act of March 10, 1900, violates §§ 27, 28, 109 and 135 of the state constitution [1] by under-

[1] The provisions referred to are as follows:

"SECTION 27. The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

"SECTION 28. No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

"SECTION 109. The judicial power of the Commonwealth, both as to matters of law and equity, shall be vested in the Senate when sitting as a court of impeachment, and one Supreme Court (to be styled the Court of Appeals) and the courts established by this Constitution.

"SECTION 135. No Courts save those provided for in this Constitution, shall be established."

taking to confer judicial powers upon the Commission. By these sections, provision is explicitly made for three distinct departments of government; the judicial power of the Commonwealth is vested in the courts established by the constitution, and no judicial power can be exercised by any other officer except those thus named unless authorized by some other provision of that instrument. *Roberts* v. *Hackney*, 109 Kentucky, 265, 268; *Pratt* v. *Breckinridge*, 112 Kentucky, 1.

So far as we are advised, the Court of Appeals of Kentucky has not passed upon the validity of the act in question; and this court has often expressed its reluctance to adjudge a state statute to be in conflict with the constitution of the State before that question has been considered by the state tribunals—to which it properly belongs—unless the case imperatively demands such a decision. *Pelton* v. *National Bank*, 101 U. S. 143, 144; *Michigan Central R. R. Co.* v. *Powers*, 201 U. S. 245, 291. Here, the argument against the statute is not of that compelling character.

It has frequently been pointed out that prescribing rates for the future is an act legislative, and not judicial, in kind. *Interstate Commerce Commission* v. *C., N. O. & T. P. Ry. Co.*, 167 U. S. 479, 499; *McChord* v. *Louisville & Nashville R. R. Co.*, 183 U. S. 483, 495; *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226; *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 8. It pertains, broadly speaking, to the legislative power. The legislature may act directly, or, in the absence of constitutional restriction, it may commit the authority to fix rates to a subordinate body. *Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S. 307, 336; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 393, 394; *Atlantic Coast Line* v. *North Carolina Corporation Commission*, 206 U. S. 1, 19; *Honolulu Rapid Transit & Land Co.* v. *Hawaii*, 211 U. S. 282, 291; *Grand Trunk Rwy. Co.* v. *Railroad Commission of Indiana*, 221

U. S. 400, 403. The Railroad Commission of Kentucky was established by § 209 of the Constitution (adopted in the year 1891) which provided that "the powers and duties of the Railroad Commissioners shall be regulated by law" and that "until otherwise provided by law, the Commission so created shall have the same powers and jurisdiction, perform the same duties, be subject to the same regulations, and receive the same compensation, as now conferred, prescribed and allowed by law to the existing Railroad Commissioners;" and by § 218 of the same instrument (the long and short haul provision) the Commission was authorized "in special cases, after investigation" to permit a less charge for longer than for shorter distances and to "prescribe the extent" to which the common carrier might be "relieved from the operations" of the section. *Louisville & Nashville R. R. Co.* v. *Commonwealth*, 106 Kentucky, 633; 183 U. S. 503. It is unnecessary to review the statutes defining the powers of the then existing Commission, to which § 209 refers (General Statutes of Kentucky, ed. 1888, pp. 1021 *et seq.;* Act of March 7, 1890; I Acts, 1889–90, p. 25). For, while the former Commission had not been authorized to fix rates, it can hardly be doubted that the constitution, in providing that the powers and duties of the new Commission should be regulated by law, contemplated that it should be available as an appropriate instrument in the supervision and regulation of railroads and left the legislature free to adopt, if it saw fit, a practice already familiar (*Interstate Commerce Commission* v. *C., N. O. & T. P. Ry. Co.*, 167 U. S. 479, 495, 496) and to call this agency to its aid in prescribing reasonable intrastate rates. This authority the legislature granted by the act of March 10, 1900, empowering the Commission where, as in this case, particular rates were found to be exorbitant, to fix the reasonable rates thereafter to be charged. (*Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175, 197.)

The contention is that, before the Commission makes such an order, it is required to exercise judicial functions. It is first to determine whether the carrier has been exacting more than is just and reasonable; it is to give notice and a hearing; it is to "hear such statements, arguments or evidence offered by the parties" as it may deem relevant; and, it is in case it determines that the carrier is "guilty of extortion" that it is to prescribe the just and reasonable rate. Still, the hearing and determination, viewed as prerequisite to the fixing of rates, are merely preliminary to the legislative act. To this act, the entire proceeding led; and it was this consequence which gave to the proceeding its distinctive character. Very properly, and it might be said, necessarily—even without the express command of the statute—would the Commission ascertain whether the former, or existing, rate, was unreasonable before it fixed a different rate. And in such an inquiry, for the purpose of prescribing a rule for the future, there would be no invasion of the province of the judicial department. Even where it is essential to maintain strictly the distinction between the judicial and other branches of the government, it must still be recognized that the ascertainment of facts, or the reaching of conclusions upon evidence taken in the course of a hearing of parties interested, may be entirely proper in the exercise of executive or legislative, as distinguished from judicial, powers. The legislature, had it seen fit, might have conducted similar inquiries through committees of its members, or specially constituted bodies, upon whose report as to the reasonableness of existing rates it would decide whether or not they were extortionate and whether other rates should be established, and it might have used methods like those of judicial tribunals in the endeavor to elicit the facts. It is "the nature of the final act" that determines "the nature of the previous inquiry." *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 227.

It is also urged in support of the objection that the order of the Commission is to be "in full force and effect" at the expiration of ten days after notice, and that this is the equivalent of a declaration that the order shall be final and conclusive, but the finality of the act did not change its essential character. So far as it was final, unless revoked or modified by the Commission, it was final as a legislative act within the Commission's authority.

2. It is contended that the Commission acted arbitrarily. We are referred to the allegations of the bill that there was "no testimony" before the Commission "that did establish or that tended to establish" the unjust or unreasonable nature of any of the rates maintained by the appellant; that there was "no evidence" introduced in the investigation or considered by the Commission "showing or tending to show" that the appellant's rates were "in and of themselves unjust, unreasonable or extortionate"; that the evidence "had no proper relation" to the reasonableness of rates for transporting the commodities in question when they were to be used for distillery purposes; and that "no evidence whatsoever was adduced at the hearing and investigation aforesaid, which showed or tended to show in the slightest degree what was or might be a just or reasonable rate to be charged" for the transportation described in the Commission's order.

But it appears that upon receiving the complaint of the distillers with respect to the rates which the appellant had put into effect, the Commission set the matter for hearing; that the parties were heard; that each party produced a number of witnesses; and that the appellant, represented by counsel, was permitted to cross-examine the witnesses of the complainants. The rates as fixed by the Commission were the same as those which for many years had been maintained by the appellant for the distillers' supplies. The evidence taken by the Commission was not before the court below; and the general allegations of

the bill, which in substance stated the judgment of the pleader as to what such evidence did not "establish" or "tend to establish," and the statements contained in the affidavits submitted upon the application for injunction, were utterly insufficient to justify the court in enjoining the rates upon the ground that the Commission either had denied the hearing which the statute contemplated or by its arbitrary action had been guilty of an abuse of power.

It is also charged, invoking a doctrine analogous to that declared in *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, that the Commission assumed a power which it did not possess by proceeding upon the theory of a supposed equitable estoppel in favor of the distillers because they had been induced to erect and extend their plants upon the faith of the former rates. This contention finds no support in the record. The Commission purported to act under its statutory authority, and, finding the rates charged by the carrier to be extortionate, fixed other rates which they declared to be reasonable.

Again, it is further said that the enforcement of the rate order should have been enjoined in order to prevent unjust discriminations and undue preferences in contravention of §§ 817 and 818 of the Kentucky statutes. Section 817 prohibits unjust discrimination in charges, as between persons, for like and contemporaneous service in transportation. Section 818 makes it unlawful to give any undue or unreasonable preference or advantage to one person or locality as compared with another. Section 819 prescribes penalties for violation, the prosecution to be by indictment. The point of this objection is that obedience to the Commission's order with respect to the traffic from the three places of origin to the sixteen places of destination therein mentioned will bring about discrimination in intrastate rates, contrary to these statutes, as against thirty-two other distillery stations on the lines

of the appellant, the distillers at which, so far as appears, have not complained of the appellant's rates.

In view of the decision in *Commonwealth* v. *Louisville & Nashville R. R. Co.*, 20 Ky. Law Rep. 491, to the effect that the provisions of § 818 are too uncertain to support a criminal proceeding under § 819, it is not contended by the appellant that it would be subject to the prescribed penalties so far as § 818 is concerned. And it is urged by the Attorney General of the State, on behalf of the appellees, that § 817 does not apply to discrimination as between localities.

But, aside from these considerations, we find the objection to be without merit. The Commission dealt with the question before it, and, on complaint as to the rates to the sixteen points of destination, ordered what it found to be reasonable rates for that transportation. In so doing, it acted in conformity with the statute. To give legality to its order as to the particular rates in question, it was not necessary for the Commission to require a reduction in other rates. Certainly, the fact that the other rates described, which had not yet been passed upon by the Commission, might likewise be open to the objection of unreasonableness and that their maintenance by the appellant might lead to unjust discrimination, would furnish no basis for restraining the enforcement of the Commission's order if that order were otherwise valid.

3. The order is further attacked upon the ground that the statute under which it was made operates to deprive the carrier of its property without due process of law and to deny to it the equal protection of the laws contrary to the Fourteenth Amendment.

It is insisted that the failure to provide for an appeal to any court from the final order of the Commission, or for a judicial review of the reasonableness of the prescribed rates before they become effective, makes the statute

void. But the statute does not deny to the carrier the right of access to the courts for the purpose of determining any matter which would be the appropriate subject of judicial inquiry. We have not been referred to any decision of the state court holding that the statute should be so construed (*Chicago &c. Railway Co.* v. *Minnesota*, 134 U. S. 418, 456). If the Commission establishes rates that are so unreasonably low as to be confiscatory, an appropriate mode of obtaining relief is by bill in equity to restrain the enforcement of the order. *Chicago &c. Railway Co.* v. *Minnesota*, 134 U. S. 418, 459, 460; *St. Louis & San Francisco Ry. Co.* v. *Gill*, 156 U. S. 649, 659, 666; *Ex parte Young*, 209 U. S. 123, 166. Presumably, the courts of the State, as well as the Federal courts, would be open to the carrier for this purpose (*Home Telephone Co.* v. *Los Angeles*, 211 U. S. 265, 278) without express statutory provision to that effect. In answer to the present objection, it is sufficient to say that there is no showing here of an attempt to preclude such resort to the courts, or to deny to the carrier the assertion of its rights, unless it can be found in the severity of the penalties attached to disobedience of the order. And, if it were assumed that these would be open to objection as operating to deprive the carrier of a fair opportunity to contest the validity of the Commission's action, still, the penal provisions would be separable, and the force of the remaining portion of the statute would not be impaired. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 395; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53, 54; *Granada Lumber Co.* v. *Mississippi*, 217 U. S. 433, 443; *Western Union Telegraph Co.* v. *Richmond*, 224 U. S. 160, 172; *The Minnesota Rate Cases*, 230 U. S. 352, 380; *Southern Pacific Co.* v. *Campbell*, 230 U. S. 537, 553.

4. The appellant, however, submits a broader contention which concerns the scope of the review to which it is entitled in this suit and the nature of the judicial function

where rates fixed by the legislature, or under its direction, are assailed as unreasonable.

It is urged that so long as a carrier's existing rates are just and reasonable for the services it performs, it is within its constitutional and statutory rights; that what constitutes a just and reasonable rate for the services it has performed is a question of fact upon which the carrier is entitled to a judicial hearing; that even more clearly is it entitled to such a hearing, if, as a consequence of a decision by the Commission that it has exceeded the limits of just and reasonable compensation for past services, it "must forfeit in favor of such statutory body its rate-making power and be deprived of that property right with respect to 'like services thereafter rendered' as provided in the McChord Act." It is said, further, that under the statute the finding from the evidence that the carrier has charged more than a reasonable compensation is "the essential jurisdictional fact" which must exist before the Commission can fix rates, and it is insisted that, if upon a judicial investigation and the evidence adduced by the parties, it turns out that this jurisdictional fact did not exist, then the Commission's entire action must be regarded as null and void, without regard to the question whether the new rates prescribed by it, in such circumstances, are reasonable or unreasonable, compensatory or confiscatory. It is therefore contended that the appellant is now entitled to a judicial hearing upon the questions of fact as to the reasonableness of the particular rates existing at the time the order was made as well as of those fixed by the Commission; and that in this view the injunction asked for should have been granted.

These arguments are elaborated and earnestly pressed, but the questions presented have been so frequently dealt with by this court that an extended discussion is unnecessary. The right of the carrier to make its own intrastate rates is subject to the law of the State con-

stitutionally enacted. In the absence of a legislative rate, it is the province of the courts in deciding cases that arise between shippers and carriers to pass upon the reasonableness of the compensation which the carrier has demanded for its services. In so doing, the courts apply the common law. But it is the province of the legislature to make the law; and when the legislature, or the body acting under its authority, establishes the rate to be thereafter charged by the carrier, it is the duty of the courts to enforce the rule of law so made unless the constitutional limits of the rate-making power have been trangressed. The rate-making power necessarily implies a range of legislative discretion; and, so long as the legislative action is within its proper sphere, the courts are not entitled to interpose and upon their own investigation of traffic conditions and transportation problems to substitute their judgment with respect to the reasonableness of rates for that of the legislature or of the railroad commission exercising its delegated power. It may be assumed that the statute of Kentucky forbade arbitrary action; it required a hearing, the consideration of the relevant statements, evidence and arguments submitted, and a determination by the Commission whether the existing rates were excessive. But, on these conditions being fulfilled, the questions of fact which might arise as to the reasonableness of the existing rates in the consideration preliminary to legislative action would not become, as such, judicial questions to be reëxamined by the courts. The appropriate questions for the courts would be whether the Commission acted within the authority duly conferred by the legislature, and also, so far as the amount of compensation permitted by the prescribed rates is concerned, whether the Commission went beyond the domain of the State's legislative power and violated the constitutional rights of property by imposing confiscatory requirements. *Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S. 307, 331;

Reagan v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 397–399; *Smyth* v. *Ames*, 169 U. S. 466, 526; *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 754; *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 446; *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 8, 17; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 41; *The Minnesota Rate Cases*, 230 U. S. 352, 433, 434. Undoubtedly, a State may permit appeals to its courts from the rate-making orders of its railroad commission and, upon the review of such orders, it may expressly authorize its judicial tribunals to investigate and decide questions which otherwise would not belong to them, or even to act legislatively (*Prentis* v. *Atlantic Coast Line*, *supra*). But the guaranties of the Fourteenth Amendment do not entitle the carrier to the exercise by the courts of such extra-judicial authority.

5. With respect to the question of confiscation, the Circuit Court ruled that the bill did not "clearly tender an issue that could be said to involve confiscatory rates." The court also referred in its opinion to the statement in the brief of complainant's counsel that the complainant was not bound in this case "to allege or prove that the new rates were confiscatory" and also to an oral disclaimer of a purpose to rely upon any such contention. "This concession," the court said, "we think, was but natural, in view of the history of the rates which the railroad company voluntarily maintained for years prior to March 25, 1910, as before pointed out. No averment is made touching the proportions in volume of distillers' traffic and of non-distillers' traffic, and it could not be assumed that the company had been carrying distillers' supplies and products at confiscatory rates, nor that the extension of those rates to all similar traffic on the lines in question would amount to the confiscation of property." 186 Fed. Rep. 176, 191.

It is explained by the appellant that what was conceded

below was that the bill as amended did not aver that the rates fixed by the Commission would result in the confiscation of appellant's property on its entire intrastate business, but that it is insisted, and was insisted below, that the rates would not yield a fair or reasonable compensation for the services performed, and would deprive the company of the fair and reasonable return which it is entitled to earn upon the property devoted to such services, with respect to the described traffic.

Without passing upon the general propositions advanced in argument, it suffices to say that we are of the opinion that the bill as amended wholly failed to make a case entitling the appellant to the relief sought. Apart from the merely general averments, it is alleged that the rates fixed by the order would cause an annual loss in revenue on intrastate freight of at least $15,600, and also that, in consequence of the effect on interstate rates, there would be an additional annual loss of not less than $3,000; further, that if the carrier were compelled to put in similar rates to the thirty-two other distillery stations, there would be a loss of $54,000 a year on shipments to those places; and that there would be other losses to an amount not specified, on shipments to consignees other than distillers.

But it may be supposed that, other conditions being the same, a reduction in rates found to be excessive will cause a loss in revenue; and the question is not simply as to the amount of reduction but whether the rates as fixed would allow a fair return. The bill does not show the value of the property employed, the expenses of operation, or the return which would be permitted under the rates prescribed.

6. It is further objected that the rate-making order impairs the obligation of the contract contained in the company's charter in violation of § 10, Article I of the Federal Constitution. It is alleged in the amended bill that by its charter granted by the act approved March 5,

1850, and the amendments thereto, the appellant was authorized to charge specified maximum rates for transportation over its lines, and that the rates fixed by the Commission's order are less than those which it was thus empowered to maintain.

It is provided by section three of the Bill of Rights contained in the state constitution adopted in 1891, that "every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment." Section 190 of this constitution is as follows: "No corporation in existence at the time of the adoption of this Constitution shall have the benefit of future legislation without first filing in the office of the Secretary of State an acceptance of the provisions of this Constitution."

It is set forth in the amended bill that, by resolution of the board of directors of the appellant, adopted July 11, 1902, it "duly accepted the provisions of the present Constitution of the Commonwealth of Kentucky, ordained September 28, 1891, and the provisions of Chapter 32 of the Kentucky Statutes, being the Act adopted April 5, 1893, with the amendments thereto," and that a copy of this resolution was filed with the Secretary of the State of Kentucky. Chapter 32 of the general statutes is the chapter upon private corporations. One of its provisions, contained in § 573, is that the "provisions of all charters and articles of incorporation, whether granted by special act of the General Assembly or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, and all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897. . . . After the twenty-eighth day of September, 1897, the provisions of this chapter shall apply to all corporations created or organized under the laws of this State, if said provisions

would be applicable to them if organized under this chapter." By another provision of this chapter, in the article relating to railroads (§ 816), a railroad corporation charging more than a just and reasonable rate of compensation is guilty of extortion; the penalty was a fine provided for in § 819. In *Louisville & Nashville R. R. Co.* v. *Commonwealth*, 99 Kentucky, 132, the Court of Appeals, holding that § 816 was too indefinite, to be sustained as a penal statute, concluded its opinion by saying: "It may be observed further, however, that it would seem singular if such a statute, even in all respects valid, could be enforced against a carrier whose rates, as fixed in its charter, are in excess of the rates alleged to be excessive in the indictment. And this, not because such rates are secured by an irrepealable contract, a matter not now considered, but simply because they at least remain the legal rates until changed by law."

It was after the decision in this case that the act of March 10, 1900, was passed, empowering the Railroad Commission to fix rates.

The amended bill states that, upon the filing of the resolution accepting the provisions of the Constitution, and the provisions of chapter 32 of the general statutes, "thereby and thereafter the said contract (with respect to the maximum freight and passenger rates it is entitled to charge and collect on its said lines of railroad) between complainant and the Commonwealth of Kentucky became and is now no longer irrevocable or irrepealable"; but, it is averred that "nevertheless, said contract remains intact and has never been revoked or repealed by any act of the Legislature," and that its obligation was in full force and effect at the time the rate order was made (August 10, 1910). That is, it is insisted that § 573 of the statutes, above quoted, is not applicable for the reason that on April 5, 1893, when the statute, of which this provision was a part, was approved, and also on Septem-

ber 28, 1897, when the repeal provided for in that statute was to take effect, the appellant's charter was not subject to repeal or amendment and that it did not become so subject until 1902. It is also contended that the act authorizing the Commission to fix rates does not apply because that was passed two years before the appellant filed its resolution; in other words, that its contract contained in its charter is still in force because the legislature has not enacted a repealing or amending provision since the resolution was filed.

We do not find it necessary to review all the questions that are suggested. Apart from other considerations, it is manifest that the statute of March 10, 1900, was a continuing authority to the Railroad Commission. The order of the Railroad Commission in fixing rates was a legislative act, under its delegated power. It had "the same force as if made by the legislature." *Grand Trunk Ry. Co.* v. *Indiana Railroad Commission*, 221 U. S. 400, 403. It is for this reason that it is a "law" passed by the State, within the meaning of the contract clause. *New Orleans Water Works Co.* v. *Louisiana Sugar Co.*, 125 U. S. 18, 31; *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 148; *Northern Pacific Ry. Co.* v. *Duluth*, 208 U. S. 583, 590; *Grand Trunk Ry. Co.* v. *Indiana Railroad Commission, supra; Ross* v. *Oregon*, 227 U. S. 150, 163. As it had full legislative effect, the appellant could not assert against its operation the provision of a contract which had previously become subject to legislative alteration. (*Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262, 274, 275.) Upon the filing of the resolution, the charter provision as to the maximum rates therein specified ceased to be an obstacle, if it had been such before, to the exercise by the State of its rate-making power.

7. The remaining questions require only a brief mention. The penalty provisions of the statute in question are challenged upon the ground that they violate the

provisions of the Fourteenth Amendment. But, as already stated, these provisions are separable. It is also objected that the order of the Commission constitutes an unwarrantable interference with, and a regulation of, interstate commerce. The questions thus raised cannot be distinguished from those which were considered and decided in *The Minnesota Rate Cases*, 230 U. S. 352.

Second. The order for reparation.

This order was not made under the statute of March 10, 1900, authorizing the Commission to fix rates. It is conceded on behalf of the appellees that if the Commission was not authorized by § 821 or 829 of the Kentucky statutes to award reparation, it had no authority whatever for that purpose. Section 821 provides that it shall be the duty of the Railroad Commissioners to see that the laws relating to railroads are faithfully executed and to exercise a general supervision over the railroads of the State. Section 829 authorizes the Commission to "hear and determine complaints" under §§ 816, 817 and 818, to the provisions of which we have already referred. It provides that such complaints shall be in writing, that the company complained of shall have notice of hearing, that the Commission shall hear and reduce to writing all the evidence adduced and that it shall render such award as may be proper. If the award be not satisfied within ten days, the chairman of the Commission is to file a copy of it and the evidence heard, in the office of the clerk of the proper circuit court, whereupon it is to be docketed for trial and summons is to be issued, as in other cases, requiring the party against whom the award has been made to show cause why it should not be satisfied. If the party fails to appear, judgment is to be rendered by default, and, if a trial is demanded, the case is to be tried as other ordinary cases, except that no evidence is to be introduced by either party save that heard before the Commission, unless the court shall be satisfied by sworn testimony that

it could not have been produced before the Commission by the exercise of reasonable diligence.

It thus appears that the two proceedings, though they were conducted at the same time, were distinct in their nature. The one resulted in a legislative rule for the future; in the other, there was an award of specific sums of money to particular persons upon the basis of past transactions and this award, according to the provisions of the statute, on being filed could be enforced by proceedings in the courts of the State. The persons in whose favor the award was made were not parties to the suit, and we think that the court was right in declining to determine its validity.

The order denying the application for injunction is

Affirmed.

STURGES & BURN MANUFACTURING COMPANY *v.* BEAUCHAMP.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 54. Submitted November 3, 1913.—Decided December 1, 1913.

A State is entitled to prohibit the employment of persons of tender years in dangerous occupations; and in order to make the prohibition effective it may compel employers at their peril to ascertain whether their employés are in fact below the age specified.

Absolute requirements as to ascertaining age of employés of tender years are a proper exercise of the protective power of government; and if the legislation has reasonable relation to the purpose which the State is entitled to effect it is not an unconstitutional deprivation of liberty or property without due process of law.

A classification in employment of labor of persons below sixteen years of age is reasonable and does not deny equal protection of the laws.

The provisions of the Child Labor Act of Illinois of 1903 involved in this case are not unconstitutional as denying due process of law, as

depriving the employer of liberty of contract, or of his property by requiring him at his peril to ascertain the age of the person employed, or as denying him the equal protection of the law.
250 Illinois, 303, affirmed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of the Illinois Child Labor Act of 1903, are stated in the opinion.

Mr. A. W. Bulkley and *Mr. C. E. More* for plaintiff in error:

The common-law rule of contributory negligence applies to minors. 7 Am. & Eng. Ency. of Law, 2d ed., p. 409; *Heiman* v. *Kinare*, 190 Illinois, 156.

The common-law rule of contributory negligence has not been abolished by child labor statutes. *Berdos* v. *Tremont Mills*, 209 Massachusetts, 489–498; *Beghold* v. *Auto Body Co.*, 149 Michigan, 14; *Bromberg* v. *Evans Laundry Co.*, 134 Iowa, 38, 46; *Braasch* v. *Michigan Stove Co.*, 118 N. W. Rep. 366; *Burke* v. *Big Sandy Coal Co.*, 68 W. Va. 421; *Darsam* v. *Kohlmann*, 123 Louisiana, 164, 171, 172; *Dalm* v. *Bryant Paper Co.*, 157 Michigan, 550; *Evans* v. *American Iron Co.*, 42 Fed. Rep. 519; *Gaines Leathers* v. *Blackwell Tobacco Co.*, 144 N. Car. 330; *Iron & Wire Co.* v. *Green*, 108 Tennessee, 161, 165; *Jacobson* v. *Merrill Mill Co.*, 107 Minnesota, 74; *Kirkham* v. *Wheeler-Osgood Co.*, 39 Washington, 415; *Nairn* v. *National Biscuit Co.*, 120 Mo. App. 144, 147; *Nickey* v. *Steuder*, 164 Indiana, 189, 196; *Norman* v. *Virginia-Pocahontas Co.*, 68 W. Va. 405; *Perry* v. *Tozer*, 90 Minnesota, 431; *Peters* v. *Gille Mfg. Co.*, 133 Mo. App. 412, 419; *Queen* v. *Dayton Coal Co.*, 95 Tennessee, 458, 465; *Rolin* v. *Tobacco Co.*, 141 N. Car. 300; *Roberts* v. *Taylor*, 31 Ontario, 10; *Sharon* v. *Winnebago Mfg. Co.*, 141 Wisconsin, 185, 189; *Smith* v. *National Coal Co.*, 135 Kentucky, 671; *Sterling* v. *Union Carbide Co.*, 142 Michigan, 284; *Syneszewski* v. *Schmidt*, 153 Michigan, 438.

Corporations are persons within the Fourteenth Amendment. *Duncan* v. *Missouri*, 152 U. S. 377; *Gulf, Col. &c. Railway* v. *Ellis*, 165 U. S. 154; *Hayes* v. *Missouri*, 120 U. S. 68; *Lowe* v. *Kansas*, 163 U. S. 88; *Minneapolis Railroad Co.* v. *Beckwith*, 129 U. S. 29; *Santa Clara County* v. *Southern Pac. Ry.*, 118 U. S. 394.

Courts will interfere to correct errors of state tribunals if law is administered so as to violate the Fourteenth Amendment. *Chy Lung* v. *Freeman*, 92 U. S. 275–279; *Henderson* v. *New York*, 92 U. S. 259–273; *Neal* v. *Delaware*, 103 U. S. 370; *Soon Hing* v. *Crowley*, 113 U. S. 703, 710; *Williams* v. *Mississippi*, 170 U. S. 213; *Yick Wo* v. *Hopkins*, 118 U. S. 356–373.

Defendant in error Beauchamp was an adult and not a child. *Allen* v. *State*, 7 Tex. App. 298; 16 Am. & Eng. Ency., 2d ed., p. 263; 51 Am. Reports, 293; *Bell* v. *State*, 18 Tex. App. 53; Black's Law Dict.; Century Dict.; Hurd's Illinois Stat. 1912, c. 38, Par. 282, p. 818, and § 7, Pars. 279, 280, 281 and 282; Id., c. 3, § 18, p. 11; Id., c. 4, § 4, p. 36; Id., c. 64, §§ 1, 3, p. 1261; *McGregor* v. *State*, 4 Tex. App. 599; *Quattlebaum* v. *Triplett*, 69 Arkansas, 91.

For distinction between contributory negligence and assumption of risk, see *Berdos* v. *Tremont Mills*, 209 Massachusetts, 489–497; *Cleveland & St. L. Ry. Co.* v. *Baker*, 33 C. C. A. 468; 91 Fed. Rep. 224; *Narramore* v. *Cleveland & St. L. Ry. Co.*, 96 Fed. Rep. 298–304; *Un. Pac. Ry. Co.* v. *O'Brien*, 161 U. S. 451.

The judgment of the Illinois courts deprives plaintiff in error of equal protection of the laws. *Chicago &c. R. R.* v. *Westby*, 178 Fed. Rep. 619; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Cotting* v. *Kansas Stockyards Co.*, 183 U. S. 79; Cooley on Const. Lim., 3d ed., p. 391; *Gulf, Col. &c. Ry. Co.* v. *Ellis*, 165 U. S. 150; *Mo. Pac. Ry. Co.* v. *Tucker*, 230 U. S. 340; *Southern Ry. Co.* v. *Greene*, 216 U. S. 400.

The legislature has no power to give civil remedy to one

guilty of fraud and deceit. Black on Const. Law, 2d ed., p. 373; *Mugler* v. *Kansas*, 123 U. S. 623; Story on Const., 5th ed., § 1945; *Wilkinson* v. *Leland*, 2 Pet. 627, 657; *Windsor* v. *McVeigh*, 93 U. S. 274.

Reading into the statute a civil remedy and abolishing common-law defenses are legislative and not judicial acts and transcends power of court. 26 Amer. & Eng. Ency., 2d ed., p. 597; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1; *Chicago, B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226; *Doe* v. *Considine*, 6 Wall. 458; *Home Telephone Co.* v. *Los Angeles*, 227 U. S. 278; *Scott* v. *McNeal*, 154 U. S. 34–45; *St. Paul &c. Ry. Co.* v. *Phelps*, 137 U. S. 528; *Sturges* v. *Crowninshield*, 4 Wheat. 202; *United States* v. *St. Anthony R. R. Co.*, 192 U. S. 524; *United States* v. *Fisher*, 2 Cr. 358; *United States* v. *Wiltberger*, 5 Wheat. 95; *Windsor* v. *McVeigh*, 93 U. S. 274, 282.

The statute as held and enforced is not within the police power. *Chicago* v. *Gunning System*, 213 Illinois, 628; *Collins* v. *New Hampshire*, 171 U. S. 30; *In re Jacobs*, 98 N. Y. 98; *Lawton* v. *Steele*, 152 U. S. 133; *Minnesota* v. *Barber*, 136 U. S. 313, 320; *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Ruhstrat* v. *The People*, 185 Illinois, 133; *State* v. *Caspare*, 80 Atl. Rep. 606. 613 (Md.); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370.

The maxim "No one acquires a right of action from his own wrong" applies to minors. 16 Amer. & Eng. Ency., 2d ed., p. 311; *Barham* v. *Turbeville*, 1 Swan. 437; Bigelow on Estoppel (5th ed.), p. 606; *Commander* v. *Brazil*, 41 So. Rep. 497 (Miss.); *Coleman* v. *Himmelberger Land Co.*, 79 S. W. Rep. 981; 22 Cyc., Title Infants, p. 512; *Ex parte Banking Asso.*, 3 DeG. & J. 63; *Edgar* v. *Gertison*, 112 S. W. Rep. 831; *Ferguson* v. *Bobo*, 54 Mississippi, 121; *Hall* v. *Timmons*, 2 Rich. (S. C.) 120; 57 L. R. A. 673, n.; *Matthews* v. *Cowan*, 59 Illinois, 341; *Munden* v. *Harris*, 134 S. W. Rep. 1076–1080; *Pace* v. *Cawood*, 110 S. W. Rep. 414 (Ky.); *Parker* v. *Elder*, 11 Humph. 546; *Rice* v.

Boyer, 108 Indiana, 472; *Sanger* v. *Hibbard*, 53 S. W. Rep. 330; *Vasse* v. *Smith*, 6 Cranch, 226; *Vinton* v. *State*, 52 S. E. Rep. 79; *Wright* v. *Snowe*, 2 DeG. & Sm. 321; *Williamson* v. *Jones*, 27 S. E. Rep. 418; *Whittington* v. *Wright*, 9 Georgia, 29.

The statute in question is a penal statute to be strictly construed. *Bandefield* v. *Bandfield*, 75 N. W. Rep. 287; *Field* v. *United States*, 137 Fed. Rep. 6; *Huntington* v. *Attrill*, 146 U. S. 657; *Sarlls* v. *United States*, 152 U. S. 570, 575; *The Ben R.*, 134 Fed. Rep. 784; *United States* v. *Harris*, 177 U. S. 305, 310; *United States* v. *Wiltberger*, 5 Wheat. 96; see also *Am. Car Co.* v. *Armentraut*, 214 Illinois, 509; *Illinois Central R. R. Co.* v. *O'Connor*, 189 Illinois, 564; *Strafford* v. *Republic Iron Co.*, 238 Illinois, 371.

Mr. George E. Gorman and *Mr. John M. Pollock* for defendant in error.

Mr. Justice Hughes delivered the opinion of the court.

The Sturges and Burn Manufacturing Company is a corporation engaged in manufacturing tinware and other metal products. It employed Arthur Beauchamp, the defendant in error, who was under sixteen years of age, as a press hand to operate a punch press used in stamping sheet metal. Beauchamp was injured in operating the press and brought an action through his next friend, in the Superior Court of Cook County, to recover the damages sustained, counting on the statute of Illinois passed in 1903 (Laws of 1903, p. 187, Hurd's Statutes, 1909, p. 1082) which, by § 11, prohibited the employment of children under the age of sixteen years in various hazardous occupations including that in which the injury occurred. The trial court, refusing to direct a verdict for the defendant, instructed the jury that if the plaintiff was in fact less than sixteen years old and when injured

was employed by the defendant upon a stamping machine, the defendant was guilty of a violation of the statute and the plaintiff was entitled to recover. A verdict was rendered for the plaintiff and judgment thereon was affirmed by the Supreme Court of the State. 250 Illinois, 303. The case comes here on error.

The plaintiff in error complains of the ruling that a violation of the statute gives a right of action to the employé in case of his injury, but this is a question of state law with which we are not concerned.

The Federal question presented is whether the statute as construed by the state court contravenes the Fourteenth Amendment. It cannot be doubted that the State was entitled to prohibit the employment of persons of tender years in dangerous occupations. *Holden* v. *Hardy*, 169 U. S. 366, 392, 395; *Jacobson* v. *Massachusetts*, 197 U. S. 11, 31; *Muller* v. *Oregon*, 208 U. S. 412, 421; *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549, 568, 569. It is urged that the plaintiff in error was not permitted to defend upon the ground that it acted in good faith relying upon the representation made by Beauchamp that he was over sixteen. It is said that, being over fourteen, he at least had attained the age at which he should have been treated as responsible for his statements. But, as it was competent for the State in securing the safety of the young to prohibit such employment altogether, it could select means appropriate to make its prohibition effective and could compel employers, at their peril, to ascertain whether those they employed were in fact under the age specified. The imposition of absolute requirements of this sort is a familiar exercise of the protective power of government. *Reg.* v. *Prince*, L. R. 2 C. C. 154; *People* v. *Werner*, 174 N. Y. 132; *State* v. *Kinkead*, 57 Connecticut, 173; *Ulrich* v. *Commonwealth*, 69 Kentucky, 400; *State* v. *Heck*, 23 Minneapolis, 549; *State* v. *Hartfiel*, 24 Wisconsin, 60; *State* v. *Tomasi*, 67

Vermont, 312; *Commonwealth* v. *Green*, 163 Massachusetts, 103; 3 Greenleaf on Evidence, § 21; 30 Am. Rep. (*note*) 617–620. And where, as here, such legislation has reasonable relation to a purpose which the State was entitled to effect, it is not open to constitutional objection as a deprivation of liberty or property without due process of law. *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U. S. 57, 70.

It is also contended that the statute denied to the plaintiff in error the equal protection of the laws, but the classification it established was clearly within the legislative power. *Heath & Milligan Co.* v. *Worst*, 207 U. S. 338, 354; *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36, 54; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78; *Mutual Loan Co.* v. *Martell*, 222 U. S. 225, 236.

The judgment is

Affirmed.

EASTERN EXTENSION, AUSTRALASIA AND CHINA TELEGRAPH COMPANY, LIMITED, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 419. Argued October 22, 1913.—Decided December 1, 1913.

While the act of March 3, 1887, c. 359, 24 Stat. 505, broadened the general jurisdiction of the Court of Claims, it was not repugnant to, or inconsistent with, the limitations of § 1066, Rev. Stat., expressly excluding from such jurisdiction all claims growing out of treaty stipulations, and it did not, therefore, repeal that section.

Claims based on treaty stipulations within § 1066, Rev. Stat., include those which arise solely as the result of cession of territory to the United States.

The policy and spirit of a statute should be considered in construing it as well as the letter.

Although the Court of Claims has not jurisdiction of claims against the United States based on treaty stipulations, it has jurisdiction of claims based on contracts originally made with the former sovereign of ceded territory and assumed by the United States after the cession either expressly or by implication.

Where the court below declined to take jurisdiction and the appeal is solely on that question, this court will not express any opinion on the merits as they are not before it.

48 Ct. Cl. 33, reversed.

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

Mr. Louis Marshall for appellant.

Mr. Assistant Attorney General Thompson, with whom *Mr. William F. Norris* was on the brief, for the United States.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is an appeal from a judgment of the Court of Claims which dismissed, upon demurrer, the petition of the claimant for the want of jurisdiction. 48 C. Cls. 33.

The petition averred that the claimant, a British corporation, secured from the Government of Spain, in the year 1879, a concession for the construction and operation of a submarine telegraph cable between the island of Luzon and Hong Kong, with an exclusive privilege for forty years, under which it maintained a cable from Hong Kong to Bolinao; and that in 1897, the Government of Spain granted a further concession for three submarine telegraph cables to provide communication between the Islands of Luzon, Panay, Negros and Zebu, in the Philippine archipelago. Among the conditions of the last-mentioned grant, a copy of which is annexed to the petition and made a part of it, are the following:

"Article 9. The Concessionaire undertakes to work, at his own expense and risk, the Cables of this Concession for a period of twenty years, the said term to begin from the date of the taking over of the Cables and their adjuncts in perfect working order.

"Article 10. The Concessionaire shall enjoy an annual subsidy of £4,500 (four thousand five hundred pounds sterling), payable monthly in twelve instalments, during the whole term of the working of the Cables, the said payments being made at Manila by the Chief Treasury Office of those Islands.

"Article 16. The Company holding the Concession shall pay the State the ten per cent. which tax in its application to cablegrams is fixed after first deducting the amount of the expenses for the maintenance of the Stations, calculated at £6,000 (six thousand pounds sterling) per annum, the said expenses not to exceed the amount specified.

"Article 17. It shall be obligatory to transmit official despatches, which shall enjoy precedence, at half the rates charged for those of a private character. . . ."

In March, 1898, the claimant obtained an additional concession from the Government of Spain for a submarine telegraph cable between Hong Kong and Manila which was completed in the following month.

It was further alleged that the claimant had "actually fulfilled" and continued "to fulfill" all of the conditions of the concessions and "to perform all of the duties imposed upon it" by their terms. After setting forth the making of the Treaty of Paris, and the cession thereby to the United States of the Philippine Islands, the petition continued:

"Thereupon the United States of America entered into the occupancy of said Philippine Islands, and proceeded to exercise sovereignty over said Islands and of the inhabitants thereof, and to assume jurisdiction and control

over all property and property rights in and upon said Philippine Islands, including the several lines of submarine cable and telegraph land lines established, constructed and operated by the Claimant, and availed itself of all of the benefits and advantages thereof, using the said lines of cable and telegraph for its governmental and other purposes, which it has continued to do ever since and still continues to do, and it has become in all respects the successor of the Government of Spain to all rights, privileges and advantages conferred upon and secured and reserved to the Government of Spain under the terms of the aforesaid concessions. . . .

"By reason of the premises the United States of America assumed all of the obligations and the performance of all of the conditions accepted by the Government of Spain and agreed to by it according to the terms of the aforesaid concessions . . . and of each of them, and agreed with the Claimant to perform the covenants and agreements, and to fulfill the conditions, set forth in said several concessions and accepted and agreed to by the Government of Spain.

"The United States of America has failed to perform said agreements and to fulfill the said conditions, in that it has failed and refused to pay to the Claimant the annual subsidy of £4,500 sterling as required by the terms of Article 10 of the aforesaid concession . . . for the years 1905, 1906, 1907, 1908 and 1909, and for each of said years, and by reason of such failure and refusal to pay it has become indebted to the Claimant in the sum of £4,500 sterling for each of said years, with interest on each of said annual instalments at the rate of six per cent per annum from the 31st day of December of the year in which the same became payable."

And judgment was demanded accordingly for the sum of $109,462.50, with interest as stated.

The Government demurred to the petition asserting

(1) that it did not set forth facts sufficient to constitute a cause of action against the United States and (2) that it did not disclose a cause of action within the jurisdiction of the court.

Upon hearing, the court held that it was without jurisdiction and it was upon this ground that the petition was dismissed. 48 C. Cls. 33.

The act of February 24, 1855, c. 122 (10 Stat. 612), creating the Court of Claims, provided that it should hear and determine all claims "founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States," and also all claims which might be "referred to said court by either house of Congress." It required the court to report to Congress the cases upon which it had finally acted, stating the material facts found with its opinion, and to prepare such bills as would be appropriate, if enacted, to carry its decisions into effect. Important amendments were made by the act of March 3, 1863, c. 92, 12 Stat. 765, which gave jurisdiction of set-offs and counter-claims, authorized appeals to the Supreme Court and provided for payment of final judgments out of any general appropriation made by law for the satisfaction of private claims.[1] But at the same time Congress was careful to exclude from the jurisdiction of the court such claims as arose out of treaty stipulations. (*id.* § 9; 12 Stat. 767). As was said in *Ex parte Atocha*, 17 Wall. 439, 444: "All the cases of which the court could subsequently take cognizance, by either the original or amendatory act, were cases arising out of contracts or transactions between the government or its officers and claimants; . . . Those acts have since then applied only to claims made directly against

[1] Cf. Act of March 17, 1866, c. 19, 14 Stat. 9; *United States* v. *Alire*, 6 Wall. 573, 576.

the United States, and for the payment of which they were primarily liable, if liable at all, and not to claims against other governments, the payment of which the United States had assumed or might assume by treaty."

The provisions of the act of 1855, as amended, relating to jurisdiction were placed in § 1059 of the Revised Statutes; and § 9 of the act of 1863 became § 1066 of the revision, as follows:

"SEC. 1066. The jurisdiction of the said court shall not extend to any claim against the Government not pending therein on December one, eighteen hundred and sixty-two, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes."

By the act of March 3, 1887, c. 359 (24 Stat. 505), the general jurisdiction of the court theretofore defined by § 1059 was broadened, and it was thus provided:

"That the Court of Claims shall have jurisdiction to hear and determine the following matters:

"First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however*, That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims,' or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, Department, or commission authorized to hear and determine the same.

"Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court."

The statute of 1887 repealed all inconsistent enactments. The question whether § 1066 was thus repealed has been raised but not decided. *United States* v. *Weld*, 127 U. S. 51, 57; *Juragua Iron Company, Limited*, v. *United States*, 212 U. S. 297, 310. Both the provisions above quoted and those of § 1066 are incorporated in the Judicial Code (§§ 145, 153). It is argued that the act of 1887 was intended to provide a complete scheme for the bestowal of jurisdiction over all claims against the Government, save those therein expressly excepted, and that, hence, it must be regarded as a substitute for the provisions of the Revised Statutes including § 1066 which should therefore be deemed to be repealed (*United States* v. *Tynen*, 11 Wall. 88, 92; *The Paquete Habana*, 175 U. S. 677, 684, 685). We cannot accede to this view. The question is one of legislative intent (*United States* v. *Claflin*, 97 U. S. 546, 551). The section dealt with a special class of cases. There is no essential repugnancy between the broadening of the general provisions as to jurisdiction and the maintenance of the limitation as to claims based upon treaties, and, in considering the scope and manifest purpose of the later act in relation to claims arising out of transactions between the Government, or its officers, and claimants, we find no warrant for concluding that in enlarging the jurisdiction previously conferred by § 1059 it was the intention of Congress to effect such a complete substitution as would destroy the established exception set forth in § 1066. So far, then, as the petition may be viewed as one seeking to assert a claim growing out of the treaty with Spain, we are of the opinion that it was not within the jurisdiction of the Court of Claims.

It is insisted, however, that the claim should not be treated as one dependent upon a treaty stipulation (*United States* v. *Weld*, 127 U. S. 51, 57), that the treaty merely serves to confer upon the United States the title to the Philippine Islands (December 10, 1898, 30 Stat. 1754; November 7, 1900, 31 Stat. 1942); and that the claim is based upon considerations of international law. It is pointed out that it was stated in the protocol that an article proposed for the assumption of contracts which had been entered into by the Spanish Government was rejected by the American Commissioners, while it was also set forth that it might be assumed that the United States would deal justly and equitably in respect of contracts that were binding under the principles of international law (Sen. Doc. No. 62, 55th Cong. 3d Sess., pp. 240, 241). But, if the claim of the appellant were deemed to rest exclusively upon the transfer of sovereignty, upon the theory that thereby under the principles of international law an obligation in its favor was imposed upon the United States, the claim would still, in our judgment, be excluded by the statute from the consideration of the court below. The words "treaty stipulation" should not be so narrowly interpreted as to permit the exercise of jurisdiction where the claim arises solely out of the treaty cession. Whether the liability asserted is said to result from an express provision of assumption contained in a treaty, or is sought to be enforced as a necessary consequence of the cession made by a treaty, it is equally within the policy and spirit of the statute; and the letter of the statute should not be otherwise construed. It is its evident purpose that the obligations of the United States directly resulting from a treaty should not be determined by the Court of Claims.

But the petition has another aspect. The grant to the appellant, as already stated, provided in Article 16 for a payment of a tax of ten per cent. and, under Article 17, for precedence and half rates in the transmission of official

despatches. It is argued by the appellant that the fact that the United States "has received and is receiving the special tax" and "the precedence and half rates specified" must be regarded as admitted; and it is urged that under the general principles of jurisprudence the facts set forth in the petition import an obligation on the part of the United States to the appellant to pay the subsidy provided for in the concession so long as the United States shall continue to avail itself of the rights and privileges which have accrued to it under the terms of the concession.

If the petition can be fairly said to present the claim that the United States, not simply by virtue of succession to sovereignty under the treaty of cession, but through its subsequent transactions with the appellant, and by contract to be implied from such transactions, has become indebted to the appellant, we think that the claim, as thus limited, would be within the jurisdiction of the court below under the act of 1887. It is true that the averments of the petition lack definiteness. It is not specifically alleged that the United States has received the tax or enjoyed the benefit of the half rates, nor is it precisely stated what transactions have been had between the Government and the appellant. But the petition alleges that the United States, since it entered into the occupancy of the Islands, has "availed itself of all the benefits and advantages" of the submarine cable and telegraph lines established by the appellant, "using the said lines of cable and telegraph for its governmental and other purposes, which it has continued to do ever since and still continues to do," and that "it has become in all respects the successor of the Government of Spain to all rights, privileges and advantages conferred upon and secured and reserved to the Government of Spain under the terms of the aforesaid concession." These general allegations are not altogether inapposite with respect to a claim based upon an implied contract outside of the treaty itself,

and the claimant should not be denied the right to have its claim, thus considered, adjudicated. In this view, the petition would be susceptible of amendment and its sufficiency, in law and fact, could be heard and determined.

We express no opinion upon the merits of the claim, in this aspect, as they are not before us, the court below having declined to take jurisdiction. But as we think there was jurisdiction to pass upon the claim under the limitations above stated, the judgment will be reversed and the cause remanded with instructions to the court below to take further proceedings in conformity with this opinion.

It is so ordered.

LITTLE *v.* WILLIAMS.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 8. Submitted October 30, 1913.—Decided December 1, 1913.

In this case, *held* that the interpretation by the State Court of a stipulation of counsel was not open to review in this court as not raising any Federal question although there were Federal questions involved in the case.

The Swamp-Land Act of September 28, 1850, c. 84, 9 Stat. 919, did not in itself operate to invest the States with swamp and overflowed lands. While the act was a grant *in præsenti* and gave an inchoate title, identification and patent were necessary to vest fee simple title in the State.

A duly legalized agreement between a State and the United States that the former accepts lands theretofore patented to it under the Swamp-Land Act as its full measure of land due thereunder extinguishes whatever inchoate title it or any of its political subdivisions may have in any swamp lands not already patented to it.

A levee district is a mere political subdivision of the State creating it and is bound by the action of the State; and so *held* that a relinquishment by the State of Arkansas of all lands in which it had merely an inchoate title under the Swamp-Land Act operated also to relinquish

the title thereto of the levee districts to which the State had previously conveyed such lands. *Rogers Locomotive Works* v. *Emigrant Company*, 164 U. S. 559.

88 Arkansas, 37, affirmed.

THE facts, which involve the construction of the Swamp-Land Act of 1850 and the title to certain lands in Arkansas, are stated in the opinion.

Mr. Henry Craft for plaintiff in error.

No counsel appeared for defendants in error.

Mr. Solicitor General Davis for the United States as *amicus curiæ*.

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

This was a suit to quiet the title to about 1,200 acres of land in Mississippi County, in the State of Arkansas, lying within the meander line of what was represented on the plats of the United States survey as Walker's lake. The plaintiff claimed title through (a) the act of Congress of September 28, 1850, 9 Stat. 519, c. 84, granting swamp and overflowed lands to the State, (b) an act of the state legislature in 1893 (Laws Ark. 1893, p. 172) granting to the St. Francis Levee District "all the lands of this State" lying within that district, and (c) a deed of March 11, 1903, from the levee district to the plaintiff. The defendants, in addition to denying the plaintiff's title, asserted title in themselves in virtue of their ownership, under swamp-land patents from the United States to the State and from the State to their grantors, of fractional sections abutting on the meander line of the lake. After a trial, the chancery court of the county entered a decree dismissing the complaint on the merits, and the decree was affirmed by the Supreme Court of the State. 88 Arkansas, 37.

The material facts, due regard being had for the findings of the Supreme Court, are these: The lands in the vicinity of Walker's lake were surveyed, in 1847, into two fractional townships, made so by meandering and excluding what the surveyor designated as the lake; but the meander line, instead of approximately following the margin of the actual lake, a small non-navigable body of water, was run about a mile distant therefrom, along a slash or slough which the surveyor probably mistook for the outer portion of the lake. The land in controversy, although then wet and swampy, as were also the lands outside the meander line, was not part of the bed of the lake, but lay between its bank, which was well defined, and the meander line. After the enactment of the Swamp-Land Act, the surveyed lands in the two townships were listed by the Secretary of the Interior as swamp lands and were patented to the State under that act, and the fractional sections abutting on the meander line and opposite the land in controversy were then patented by the State to the defendants' grantors. The unsurveyed land within the meander line was never selected by the State, or listed by the Secretary of the Interior, as swamp or overflowed land; nor was it ever patented to the State.

As part of a compromise and settlement between the State and the United States, negotiated in 1895 and approved by the state legislature in 1897 and by Congress in 1898, the State, subject to certain exceptions not here material, accepted the lands theretofore patented, approved or confirmed to it under the Swamp-Land Act as the full measure of lands due to it thereunder, and relinquished to the United States all other claims or demands, adjusted or unadjusted, growing out of that act. Senate Report No. 76, 54th Cong., 1st Sess.; Laws Ark., 1897, p. 88; 30 Stat. 367, c. 229.

In disposing of the case the Supreme Court of the State, after observing that the plaintiff must recover, if

at all, upon the strength of her own title, and not upon the weakness of that of her adversaries, held (a) that, as the land in controversy had not been selected, listed or patented as swamp or overflowed land under the Swamp-Land Act, the title thereto remained in the United States, unless it had passed to the State as a riparian owner in virtue of the patents for the adjoining fractional sections; (b) that if the title had so passed to the State it in like manner had passed thence with those sections to the defendants' grantors prior to the grant of 1893 to the levee district; and (c) that in view of the State's relinquishment under the compromise and settlement of 1895, the plaintiff, as a subsequent vendee of the district, was not in a position to question the riparian rights asserted by the defendants.

In the chancery court it was stipulated by counsel, for the purpose of avoiding the production of other evidence upon the subject, that "the townships including Walker's lake, as meandered on the map," were listed by the Secretary of the Interior as swamp lands and patented to the State under the Swamp-Land Act, and one of the controverted questions in the Supreme Court was whether this stipulation, rightly interpreted, meant that the listing and patenting embraced all the lands which would have been within the two townships if the township and subdivisional lines had been extended over the area represented on the plat as the lake, or only the surveyed lands, that is, those lying without the meander line. The court, having recourse to the plats of the survey as produced in evidence (which represented the townships as fractional by reason of the exclusion of the meandered area from the survey), as also to the Government's well known practice of patenting lands according to the legal subdivisions shown upon the plats, held that the stipulation should be taken as referring to the fractional townships, and not to the unsurveyed lands within the meander line; and in

that connection it was said: "It is evident that the parties meant only the surveyed lands appearing on the plat, leaving all questions as to the character of the unsurveyed territory and title thereto open to further proof and adjudication." This is assigned as error, but as no Federal question was involved, but only the proper interpretation of a stipulation of counsel, the ruling is not open to review by this court. It is not as if the patents had been in evidence and the question had been one of their interpretation or legal import. See *French-Glenn Live Stock Co.* v. *Springer*, 185 U. S. 47, 54.

In view of the finding that the land in controversy was never patented to the State, it will be perceived that a pivotal question in the case is, whether the Swamp-Land Act of 1850 in itself operated to invest the State with the title in any such sense as to be of present avail to the plaintiff. The state court answered the question in the negative, and the correctness of that ruling is now to be passed upon.

Although the terms of the first section of the act denote a present grant to the State of the "swamp and overflowed lands, made unfit thereby for cultivation," the second section lays upon the Secretary of the Interior the duty of identifying and listing the lands coming within the terms of the grant and of causing patents therefor to be issued to the State "at the request of" its Governor, and then declares: "and on that patent the fee simple to said lands shall vest in the said State," subject to the disposal of its legislature. It became necessary, in *Rogers Locomotive Works* v. *Emigrant Company*, 164 U. S. 559, to determine the meaning and effect of the act in the light of these provisions and of prior decisions, and it was there said (p. 570): "While, therefore, as held in many cases, the act of 1850 was *in præsenti*, and gave an inchoate title, the lands needed to be identified as lands that passed under the act; which being done, and not before, the title

became perfect as of the date of the granting act." And again (p. 574): "It belonged to him [the Secretary of the Interior], primarily, to identify all lands that were to go to the State under the act of 1850. When he made such identification, then, and not before, the State was entitled to a patent, and 'on such patent' the fee simple title vested in the State. The State's title was at the outset an inchoate one, and did not become perfect, as of the date of the act, until a patent was issued." What was there said has since been regarded as the settled law upon the subject. *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 592; *Brown* v. *Hitchcock*, 173 U. S. 473, 476; *Niles* v. *Cedar Point Club*, 175 U. S. 300, 308; *Ogden* v. *Buckley*, 116 Iowa, 352; *Birch* v. *Gillis*, 67 Missouri, 102; *Carr* v. *Moore*, 119 Iowa, 152, 159.

As this land was never so identified, and, so far as appears, its identification was never even requested by the State, it follows that, even if at the date of the act the land was in fact swamp or overflowed, the State never acquired more than an inchoate title to it, a claim which was imperfect both at law and in equity.

We have seen that by the compromise and settlement of 1895, which was approved by the state legislature and by Congress, the State accepted the lands theretofore patented, approved or confirmed to it under the Swamp-Land Act as the full measure of lands due to it thereunder, and relinquished to the United States all other claims or demands, adjusted or unadjusted, growing out of that act. Without any doubt this extinguished the State's inchoate title and estopped the State from thereafter asserting that title or demanding a patent.

Assuming that the inchoate title had then passed to the levee district under the act of 1893, was the district in any better situation than the State? The answer turns upon the relation of the one to the other. The district was a mere political subdivision of the State, created by the

latter, and invested with authority to construct and maintain levees to protect lands within its limits from overflow by the waters of the Mississippi River, and to levy and collect taxes and take other measures to that end. Laws Ark., 1893, pp. 24, 119. It was essentially a subordinate agency of the State, was exercising a power of the State for its convenience, could have no will contrary to the will of the State, held its property and revenue for public purposes, and was in all respects subject to the State's paramount authority. In view of this relation, we are quite clear that the State's action was binding upon the district, and that the latter could not by its subsequent deed to the plaintiff invest her with a title which it no longer possessed. In this respect the case is not distinguishable from *Rogers Locomotive Works* v. *Emigrant Company*, 164 U. S. 559, 576, 577.

We conclude, therefore, that the plaintiff was without title and could not maintain the suit. This renders it unnecessary to consider whether, in point of Federal law, the riparian rights asserted by the defendants are ill or well founded.

Decree affirmed.

MONSON *v.* SIMONSON.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

No. 14. Submitted October 30, 1913.—Decided December 1, 1913.

Restrictions on alienation imposed by § 5 of the act of February 8, 1887, 24 Stat. 388, c. 119, on an allotment to a Sisseton and Wahpeton Indian remained until the actual issuing of patent carrying full and unrestricted title, and were not removed instantly on its passage by an act of Congress permitting the Secretary of the Interior to issue such a patent.

An act of Congress authorizing and empowering the Secretary of the Interior to shorten the period of alienation of an Indian allotment construed in this case as being permissive only and not effecting the removal of the restrictions prior to the actual issuing of the patent by the Secretary.

A deed by an Indian of an allotment subject to restrictions on alienation is absolutely void if made before final patent, even if made after passage of an act of Congress permitting the Secretary of the Interior to issue such patent; nor does the unrestricted title subsequently acquired by the allottee under the patent inure to the benefit of the grantee. *Starr* v. *Long Jim*, 227 U. S. 613.

A state statute cannot make a deed the basis of subsequently acquired title to Indian allotment lands when the Federal statute has pronounced such a deed entirely void.

22 So. Dak. 238, reversed.

THE facts, which involve the title to land allotted to an Indian of the Sisseton and Wahpeton tribe under the act of February 8, 1887, and the effect of subsequent action by Congress in regard thereto on the restrictions against alienation, are stated in the opinion.

Mr. M. D. Munn and *Mr. Chester L. Caldwell* for plaintiff in error.

No appearance for defendant in error.

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

This is a suit to determine conflicting claims to the title to 160 acres of land in Roberts County, South Dakota. Both parties claim through Henry A. Quinn, an Indian of the Sisseton and Wahpeton tribe, to whom the land was allotted under the act of Congress of February 8, 1887, 24 Stat. 388, c. 119, the fifth section of which, omitting portions not here material, reads as follows:

"That upon the approval of the allotments provided

for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void."

In 1889, following the approval of the allotment, a trust patent or allotment certificate, conforming to this statute, was duly issued to the allottee; and on March 3, 1905, nine years before the expiration of the trust period, Congress incorporated in the Indian appropriation act of that date (33 Stat. 1048, 1067, c. 1479) the following provision:

"That the Secretary of the Interior is hereby authorized and empowered to issue a patent to Henry A. Quinn for the east half of the northwest quarter, the northeast quarter of the southwest quarter, and the northwest quarter of the southeast quarter of section thirty-two, township one hundred and twenty-five north, range fifty west of the fifth principal meridian, South Dakota."

The land so described is that covered by the allotment, and a patent therefor, passing the full and unrestricted title, was issued to the allottee by the Secretary of the

Interior, June 29, 1905, in the exercise of the authority and power given by this provision.

Upon the trial it appeared that the plaintiff claimed under two warranty deeds from the allottee, one made and acknowledged May 31, 1905, and recorded June 2, following, and the other purporting to have been made May 30, and acknowledged July 3, 1905, but not recorded. The defendant claimed under a deed from the allottee executed and delivered July 10, 1905, and recorded the same day. The matters in controversy were, (1) whether the plaintiff's deed of May 31 was void because made and delivered before the unrestricted patent was issued, (2) the real date of the acknowledgment and delivery of the plaintiff's unrecorded deed and whether it was void for the like reason, and (3) whether the defendant purchased with notice of the plaintiff's claim under the latter deed. That deed was admitted in evidence over the objection of the defendant, and the ruling was made the subject of a special exception.

The trial court found the issues for the plaintiff, and while the finding made no mention of his deed of May 31, it did recite that his unrecorded deed was executed and delivered July 3, 1905; that he was in actual and open possession from that date until after the date of the deed to the defendant; and that the latter purchased with notice of the plaintiff's claim. Upon this finding a judgment was entered quieting the title in the plaintiff, and shortly thereafter a motion to vacate the judgment and for a new trial was interposed by the defendant, supported by divers affidavits purporting to set forth newly discovered evidence tending to discredit the plaintiff's unrecorded deed and the claim that it was acknowledged and delivered July 3, 1905. The motion was denied, and the defendant appealed to the Supreme Court of the State, which affirmed both the judgment and the order denying the motion. 22 So. Dak. 238. The affirmance was put upon

the ground that the plaintiff's deed of May 31 was valid, and, being a warranty deed purporting to convey the land in fee simple, the title subsequently acquired through the unrestricted patent inured to the plaintiff by operation of a statute of the State. Rev. Civil Code, § 947, subd. 4. Reaching that conclusion, the court deemed it unnecessary to consider or decide the questions presented respecting the plaintiff's unrecorded deed and the effect to be given to it.

The Federal question presented for decision by us is, whether the restrictions upon alienation imposed upon the allottee by § 5 of the act of 1887 were instantly removed by the act of March 3, 1905, or remained in force until the issuing of the patent carrying the full and unrestricted title. The defendant sought to maintain the latter view, but the state court sustained the other.

The act of 1887 was adopted as part of the Government's policy of dissolving the tribal relations of the Indians, distributing their lands in severalty, and conducting the individuals from a state of dependent wardship to one of full emancipation with its attendant privileges and burdens. Realizing that so great a change would require years for its accomplishment and that in the meantime the Indians should be safeguarded against their own improvidence, Congress, in prescribing by the act of 1887 a system for allotting the lands in severalty whereby the Indians would be established in individual homes, was careful to avoid investing the allottee with the title in the first instance, and directed that there should be issued to him what is inaptly termed a patent (*United States* v. *Rickert*, 188 U. S. 432, 436), but is in reality an allotment certificate, declaring that for a period of twenty-five years, or such enlarged period as the President should direct, the United States would hold the allotted land in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and at the expiration of that period would

convey to him by patent the fee, discharged of the trust and free of any charge or incumbrance; and, as a safeguard against improvident conveyances or contracts made in anticipation of the ultimate or real patent, it was expressly provided that any conveyance of the land, or any contract touching the same, made before the expiration of the trust period should be absolutely null and void. It is thus made plain that it was the intention of Congress that the title should remain in the United States during the entire trust period, and that, when conveyed to the allottee or his heirs by the ultimate patent at the expiration of that period, it should be unaffected by any prior conveyance or contract touching the land.

It also is plain that, in the absence of further and permissive legislation, the Secretary of the Interior was without authority to shorten the trust period and at once invest the allottee with the title in fee. Recognizing that this was so, and for reasons deemed sufficient, Congress, by the provision in the act of March 3, 1905, clothed the Secretary with such authority with respect to this allotment. That provision says: "The Secretary of the Interior is hereby authorized and empowered to issue a patent" to the allottee. By "patent" is meant, of course, the ultimate patent passing the fee, for the trust patent or allotment certificate had issued sixteen years before. The language of the provision is permissive, not mandatory, and evidently was designed to enable the Secretary to shorten the trust period, by issuing the final patent, if in his judgment it seemed wise, but not to require him to do so. And it is significant that the provision contains no words directly or presently removing the existing restrictions upon alienation, while other kindred provisions in the same act, relating to other allotments, contain the words "and all restrictions as to sale, incumbrance, or taxation of said lands are *hereby* removed." It hardly can be said that the absence of those words in this instance

and their presence in others is not indicative of a difference in meaning and purpose. We conclude that the restrictions upon alienation contained in the act of 1887 were not instantly removed by the act of 1905, but remained in force as to this allotment until the Secretary of the Interior, in the exercise of the authority conferred by the latter act, terminated the trust period by issuing the final patent passing the fee.

As that patent was issued June 29, 1905, and as the deed from the allottee upon which alone the judgment of affirmance was rested was made and delivered May 31, preceding, it follows that this deed was, in the language of the statute, absolutely null and void, and that the title subsequently acquired by the allottee through the final patent could not inure to the plaintiff in virtue of his being the grantee in that deed. See *Starr* v. *Long Jim*, 227 U. S. 613, 624. A state statute could not make it the basis of passing subsequently acquired title when the Federal statute pronounces it entirely void. See *Bagnell* v. *Broderick*, 13 Pet. 436, 450; *Gibson* v. *Chouteau*, 13 Wall. 92, 99.

The judgment is accordingly reversed and the cause remanded, but without prejudice to the power of the Supreme Court of the State to proceed to a determination of the questions which were left open by its opinion. See *Murdock* v. *Memphis*, 20 Wall. 590, 635–636.

Judgment reversed.

STREET & SMITH, A COPARTNERSHIP, *v.* ATLAS MANUFACTURING COMPANY.

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

No 618. Submitted November 10, 1913.—Decided December 1, 1913.

Judgments and decrees of the Circuit Courts of Appeals arising under the Trade-Mark Act of February 20, 1905, are reviewable by this court only on certiorari and not on appeal or writ of error; appeals in such cases are not allowed under § 128 of the Judicial Code.

The Judicial Code does not purport to embody all the law upon the subjects to which it relates. Sections 292, 294 and 297 expressly bear upon the extent to which the Code affects or repeals prior laws and to which such prior laws remain in force.

The intent of Congress, as indicated in the provisions of the Judicial Code relating to the jurisdiction of this court, was to extend rather than contract the finality of decisions of the Circuit Court of Appeals. By the act of February 20, 1905, Congress placed trade-mark cases arising under that statute upon the same footing as cases arising under the patent laws as respects the remedy by certiorari under the Circuit Court of Appeals Act.

While the Judicial Code supersedes the Circuit Court of Appeals Act, references in other statutes to the latter act now relate to the corresponding sections of the Judicial Code, as is expressly provided by § 292 of the Code.

Section 297 of the Judicial Code did not repeal § 18 of the Trade-Mark Act of February 20, 1905.

Appeal from 204 Fed. Rep. 398, dismissed.

THE facts, which involve the construction of the provisions of the Judicial Code affecting the jurisdiction of this court of appeals from judgments of the Circuit Court of Appeals in cases relating to trade-marks, are stated in the opinion.

Mr. Hugh K. Wagner and *Mr. Leonard J. Langbein*, for appellants, in support of petition for certiorari and in opposition to appellees' motion to dismiss or affirm:

The omission in the Judicial Code to make cases arising under the trade-mark registration statute final in the United States Circuit Courts of Appeals was not accidental, but intentional, as is shown by the fact that the foregoing clause of the act of March 3, 1891, is reënacted in the Judicial Code in the identical language of the 1891 statute with the exception of the insertion therein of the additional class of cases, viz., those arising "under the copyright laws."

Even if this were not so, where a provision is left out of a statute either by design or mistake of the legislature, the courts have no power to supply it, as to do so would be to legislate and not to construe. *Hobbs* v. *McLean*, 117 U. S. 567; *United States* v. *Goldenberg*, 168 U. S. 95, 102.

No mere omission or failure to provide for contingencies will justify judicial addition to a statute. *Glover* v. *United States*, 164 U. S. 295; *McKee* v. *United States*, 164 U. S. 287; *Beechwood* v. *Joplin-Pittsburgh Railway Co.*, 158 S. W. Rep. 868, 871.

Mr. James Love Hopkins and *Mr. Nelson Thomas* for appellees in opposition to petition for certiorari and in support of motion to dismiss or affirm.

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

This is an appeal from a decree of a Circuit Court of Appeals directing the dismissal of a suit to enjoin infringement of a registered trade-mark and unfair trade. 204 Fed. Rep. 398. The decree was rendered and the appeal allowed after the Judicial Code, adopted March 3, 1911, 36 Stat. 1087, c. 231, became effective. Our jurisdiction is challenged by a motion to dismiss, and if we have jurisdiction it is solely because the case was in part one arising under the act of February 20, 1905, *infra*, under

which the trade-mark was registered. Whether in a case so arising the judgment or decree of a Circuit Court of Appeals may be reviewed by this court upon an appeal or writ of error, or only upon a writ of certiorari, is the question for decision.

Section 128 of the Judicial Code declares that, except as provided in §§ 239 and 240, "the judgments and decrees of the Circuit Courts of Appeals shall be final . . . in all cases arising under the patent laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases." Section 239 permits the certification to this court of questions of law by a Circuit Court of Appeals concerning which it desires instruction for the proper decision of a case within its appellate jurisdiction, and is not important here. Section 240 reserves to this court the discretionary power to require, by certiorari, upon the petition of a party, that any case in which the decision of a Circuit Court of Appeals is made final by the Code be certified here for review and determination, with the same power and authority in the case as if brought here by appeal or writ of error. Section 241 declares that any case in which the decision of a Circuit Court of Appeals is not made final by the Code may be brought here, as of right, by appeal or writ of error, if the matter in controversy exceeds $1,000, besides costs.

These provisions, it is said by counsel for the appellants, enabled them to appeal, as of right, the statutory amount being involved, and did not remit them to the discretionary writ of certiorari; the argument being that § 128 enumerates the cases in which the decisions of the Circuit Courts of Appeals shall be final and does not include among them cases arising under the trade-mark laws, and that § 241 gives an appeal or writ of error, as of right, in any case in which the decision of the Circuit Court of Appeals is not thus made final, if, as here, the requisite amount is in controversy. If the question turned entirely

upon the code provisions relied upon, the argument probably would be convincing. But there are other statutory provisions which must be considered, some within and others without the Code.

The Code does not purport to embody all the law upon the subjects to which it relates. It contains some new provisions and some that are modifications of old ones, but much of it is merely a reënactment of prior laws with appropriate regard to their proper classification and orderly arrangement. Among others, it contains the following provisions bearing upon the extent to which it was intended to affect or repeal prior laws:

"SEC. 292. Wherever, in any law not contained within this Act, a reference is made to any law revised or embraced herein, such reference, upon the taking effect hereof, shall be construed to refer to the section of this Act into which has been carried or revised the provision of law to which reference is so made.

"SEC. 294. The provisions of this Act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest.

"SEC. 297. The following sections of the Revised Statutes and Acts and parts of Acts are hereby repealed: . . . [many sections, acts, and parts of acts are here enumerated] . . . Also all other Acts and parts of Acts, in so far as they are embraced within and superseded by this Act, are hereby repealed; the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this Act had not been passed."

Sections 128, 239, 240, and 241 of the Code, as before described, substantially, almost literally, repeat the provisions of § 6 of the Circuit Courts of Appeals Act of March 3,

1891, 26 Stat. 826, c. 517. There is but a single change deserving mention here, and it is that cases arising under the copyright laws are in § 128 added to the enumeration of cases in which the decisions of the Circuit Courts of Appeals are declared final. But this has no bearing upon cases arising under the trade-mark laws, save as it indicates that Congress was extending, rather than contracting, the list of cases in which finality attaches to the decisions of the Circuit Courts of Appeals. Passing this consideration, there is nothing in the Code denoting a purpose to change the existing appellate jurisdiction in trade-mark cases: it is left as it was before.

The Trade-Mark Act of February 20, 1905, 33 Stat. 724, c. 592, dealt with the subject we are considering. By § 17 it invested the Circuit Courts of Appeals with appellate jurisdiction of cases arising under that act, and by § 18 declared that writs of certiorari might be granted by this court for the review of decisions of those courts in such cases "in the same manner as provided for patent cases" by the Circuit Courts of Appeals Act. In placing such trade-mark cases upon the same footing as cases arising under the patent laws, as respects the remedy by certiorari, Congress undoubtedly intended that this remedy should have the same attributes in the one class of cases as in the other. We already have seen that the Circuit Courts of Appeals act, in § 6, made it exclusive in cases arising under the patent laws. Before the adoption of the Code, this court said in *Hutchinson, Pierce & Co.* v. *Loewy*, 217 U. S. 457, 460, a case like this: "We are of opinion that this appeal will not lie, and that the remedy by certiorari is exclusive. . . . We think that the language of § 18 places suits brought under the trade-mark act [February 20, 1905] plainly within the scope of the act establishing the Court of Appeals [March 3, 1891], and that a final decision of that court can be reviewed in this court only upon certiorari."

Of course, that case and this are not to be confused with others arising under earlier trade-mark laws not containing any provisions respecting appellate jurisdiction such as are embodied in the act of 1905.

The provisions of that act upon this subject are not among those enumerated in § 297 of the Code as thereby repealed, and neither do they appear to have been embraced within and superseded by the Code. And while the Circuit Courts of Appeals Act, to which § 18 of the act of 1905 makes reference, has been superseded by being incorporated into the Code, that section has not thereby lost any of its original effect, for § 292 of the Code requires the reference to be construed as if naming the very sections of the Code into which the Circuit Courts of Appeals act has been carried.

It follows that the motion to dismiss the appeal must be sustained, as was done in *Hutchinson, Pierce & Co.* v. *Loewy, supra.*

Appeal dismissed.

DOWNMAN *v.* STATE OF TEXAS.

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

No. 43. Submitted November 3, 1913.—Decided December 1, 1913.

While real estate is generally taxed as a unit, separate estates therein may be taxed to the separate owners of such estates, where the title has been severed.

One who has purchased the mineral rights in land with the present right to enter and work the same is not denied equal protection of the law because in his case the mineral rights are taxed to him and the surface estate is taxed to the owner of the fee.

If his mineral rights are not over-assessed it is no defense that the surface estate may be over-assessed.
134 S. W. Rep. 787, affirmed.

THE facts, which involve the validity of an assessment for taxation of mineral rights on lands in Texas which had already been assessed for taxation to the owner of the fee, are stated in the opinion.

Mr. Robert L. Batts and *Mr. V. L. Brooks* for plaintiff in error.

Mr. B. F. Looney, Attorney General of the State of Texas, *Mr. G. B. Smedley* and *Mr. Knight Stith* for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

The State of Texas brought suit against Downman to collect taxes on "mineral rights" owned by him in 50,000 acres of land in Llano County. In his answer he contended that he was not liable because the mineral rights were not real estate but mere licenses to work and develop mines in the future; that if real estate they had already been returned by the owners of the surface and, as the latter had already paid taxes on the land, no additional sum could be collected from him. Further, he claimed that the assessments were void as being an unlawful discrimination against the class of persons who, like himself, owned mineral rights separate from the surface estate.

On the trial it appeared that there was no mining in the county, but in many sections there were signs indicating the existence of ore. Prior to 1907 there had been no assessment of mineral either to the owner of the surface or to persons to whom the mineral right had been separately conveyed. In that year the tax-books were made up

as usual, grazing and agricultural lands being assessed at from $2 to $3 per acre. The tax-books were then forwarded to the County Commissioners for equalization of values. Acting in pursuance of instructions from the Comptroller, the Commissioners made order directing the County Taxing Officer to assess mineral rights where they were owned by persons other than the owners of the surface estate. He thereupon examined the public records and secured the names of the grantees in all deeds which conveyed such rights. Without further investigation as to the existence or value of ore, he assessed the owner on the basis of 50 cents per acre, entering the tax in the column headed "Mineral Rights Only." No deduction was made from the amount already entered against the owner of the land proper. The books, with both classes of assessments appearing thereon, were then finally approved and, in due course, the surface owners paid the taxes assessed against them on the land. Downman, for the reasons already stated, refused to pay the sum demanded of him as taxes on mineral rights in the 50,000 acres. His defense was sustained by the District Judge, who held that when the surface owners returned real estate that included every interest connected with the land and consequently Downman could not be held for an additional tax on property or value which had already been assessed to the owner of the surface. The Court of Civil Appeals recognized that if the owner of the land in paying his taxes had, in fact, paid on the mineral rights also, Downman could not be held liable in the present suit. But the judgment of the District Court was reversed for the reason that in approving the books having two assessments—one against land and one against mineral rights in the same tract—the Commissioner had recognized the existence of two separate interests in the same property belonging to two different owners. The Supreme Court of the State declined to interfere and the case was brought here by

writ of error in which Downman renews his attack on the validity of the assessment. He contends that mineral rights when belonging to the owner of the surface were not included in the assessment, but were taxed as soon as they were sold; that such "a tax was discriminatory against owners who, like appellant, own mineral rights in lands, the surface estate of which was owned by others," and that such discriminatory assessment imposes upon the latter an unlawful burden of taxation and takes his and their property without due process of law.

The Texas court recognized that if a mineral right was not an estate, but a mere license to enter and work in the future it was not taxable. It held, however, that the deeds conveying ore, stone and minerals were grants of property and conveyed to Downman title to the mineral with the right to work the same. This title and right was held to be real estate and taxable as such. On this writ of error from the state court we are not concerned with that construction of the statute, nor with the regularity of the method by which the taxes were assessed, nor with the fairness of the valuation. The only Federal question arises out of the contention that there was a discrimination against Downman in taxing him on mineral rights when the same were not taxed if they belonged to the owner of the surface estate. In effect he claims that taxability of mineral rights was made to depend not on value, but on ownership, being taxable after they had been conveyed but not taxable as long as they remained the property of the holder of the surface. The record, however, does not support this position, for it does not appear that the landowner was consciously relieved of taxation on mineral rights known to exist. If the mineral actually added to the value, the law required that it should be represented in the assessment of the land. But if the owner and the Assessor did not know of the existence of ore, there was no injustice nor known discrimination

in assessing it merely as grazing land. When however, an actual sale of the mineral rights in a particular tract was made, and the deed recorded, a new value was brought to light. There was then no reason why the taxing officers should not accept the action of the buyer in paying therefor $1.50 per acre as evidence that the mineral right had a separate value. This right being real estate was taxable, but if assessed against the owner of the surface, the result would have been that he would have had to pay on an interest in the land with which he had absolutely parted. Usually real estate is taxed as a unit; but as different elements of the land are capable of being severed and separately owned, the statute may authorize a separate assessment against the owners of the severed parts. Accordingly if the title has been severed land may be taxed to one, timber to another, or land to one and coal to another. The state court held that such was the law of Texas, in view of the general language of the statute defining real estate as including not only the land itself but the buildings on the land and the minerals under the land. There was, therefore, nothing discriminatory in assessing Downman as owner of the mineral right which had been sold to him and separately assessing the owner of the surface with what remained. That the two owners were thus separately assessed, each on his own property, appears from the fact that both values were separately entered upon the tax-books—Downman's mineral rights, for which he paid $1.50 an acre, being assessed at 50 cents an acre and the surface estate at from $2 to $3 per acre. If the latter was over-assessed it affords Downman no defense. The record discloses no violation of a Federal right and the judgment is

Affirmed.

UNITED STATES *v.* TWENTY-FIVE PACKAGES OF PANAMA HATS.

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

No. 257. Argued October 30, 1913.—Decided December 1, 1913.

The expression—to attempt to introduce into the commerce of the United States—includes more than to attempt to enter merchandise, and as used in the act of August 5, 1909, c. 6, 36 Stat. 11, 97, it covers fraudulent invoices made by consignors in foreign countries.

As statutes have no extraterritorial operation, a consignor making a fraudulent invoice in a foreign country cannot be punished therefor, but the goods being within the protection and subject to the commercial regulations of this country can be subjected to forfeiture for the fraudulent attempt to introduce them.

While punishment for crime and forfeiture of goods affected by the crime are often coincident, they are not necessarily so, and inability to reach the criminal is a reason for subjecting the goods to forfeiture.

A foreign consignor is charged with knowledge of the regulations of the United States in regard to importation of goods and their disposition in case they are not called for after removal from the vessel.

When goods are unloaded and placed in General Order they are actually introduced into the commerce of the United States within the meaning of the statute intending to prevent fraud on the customs.

195 Fed. Rep. 438, reversed.

THE facts, which involve the construction of the tariff laws of the United States in regard to attempted introduction into the commerce of the United States of goods fraudulently undervalued, are stated in the opinion.

Mr. Assistant Attorney General Adkins for the United States.

Mr. Albert H. Washburn for the respondent.

MR. JUSTICE LAMAR delivered the opinion of the court.

This was a proceeding to forfeit, for fraud of foreign consignors, goods not technically entered at the New York Customs House, but unloaded from the ship and stored in General Order. The libel charges that Castillo & Co. were engaged in buying and selling Panama hats shipped to them by merchants from foreign ports. These consignors, as required by law, (June 10, 1890, c. 407; 26 Stat. 131), delivered to the American Consular Agent, at the point of shipment, three sets of invoices showing the value of the property intended for importation into the United States. One of these invoices was retained by that officer, one was sent to the Collector of the Port at New York, and the third was delivered to the consignor and by him forwarded to the consignee, Castillo & Co. All the provisions of the law were complied with, except that the consignors falsely and fraudulently undervalued the merchandise. The goods arrived in New York during April, May and June, 1910, but were not called for by the consignee. They were accordingly put in General Order by virtue of Customs Regulations (§§ 1087, 1088; 1902, Rev. Stat. 2954, 2989) whereby the Collector takes possession of goods unloaded but unclaimed. They are then stored in a General Order warehouse, the consignee having the right at any time within 12 months to withdraw them and make due entry therefor. If not so entered within the year, the merchandise must be sold at public auction.

The libelled goods not having been called for, the Collector, in May, 1911, caused proceedings to be instituted to have them forfeited under the provisions of § 9 of the Tariff Act of August 5, 1909, c. 6, 36 Stat. 11, 97, which declares "That if any consignor, seller, owner, importer, consignee, agent, or other person or persons, shall enter or introduce, or attempt to enter or introduce, into the commerce of the United States any imported

merchandise by means of any fraudulent or false invoice, . . . or shall be guilty of any willful act or omission by means whereof the United States shall or may be deprived of the lawful duties, . . . such merchandise, or the value thereof, to be recovered from such person or persons, shall be forfeited, . . . and such person or persons shall, upon conviction, be fined—or imprisoned—or both, in the discretion of the court."

Maximo Castillo, as claimant, filed exceptions to the libel on the ground that the merchandise was not subject to forfeiture because there had been no entry of the goods, contending that placing them in General Order was not even an attempt to introduce them into the commerce of the United States, inasmuch as the owner might, during the year, direct them to be forwarded to a foreign country without payment of a duty here. This contention was sustained by the District Judge. That judgment was affirmed by the Circuit Court of Appeals (195 Fed. Rep. 438) and the case is here on writ of certiorari.

The prior Tariff Act (26 Stat. 131) provided for the forfeiture of the goods "if any owner, importer, consignee, agent or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice." In several cases arising under that act it was held that the language used did not cover the case of fraud by the consignor, nor could the goods be forfeited for the wrongful conduct of any person if the act preceded the making of the documents or taking any of the steps necessary to enter the goods. *United States* v. *646 Half Boxes of Figs*, 164 Fed. Rep. 778 (1908); *United States* v. *One Trunk*, 171 Fed. Rep. 772 (July, 1909). Under the statute, as thus construed, there was no penalty for the grossest fraud on the part of the consignor, notwithstanding the fact that his invoice valuation was of great importance in determining true value, as a basis for collecting the duty. And even if the consignor was

also consignee it had been held that there was a *locus pœnitentiæ* so that he might, before entry, substitute a true for a false invoice and thus escape a forfeiture.

In order to close these loopholes and to make the act more effective Congress, on August 5, 1909 (36 Stat. 11, 97), changed the law so as to increase the number of persons whose fraud should be punished. It also enlarged the scope of conduct for which the goods should be forfeited. Instead of punishing only for the fraud of the "owner, importer, consignee and other persons," as under the act of 1890, provision was made for forfeiture for fraud, of the "consignor or seller." Instead of punishing only for entering or attempting to enter on a fraudulent invoice, it punished an attempt by such means "to introduce any imported merchandise into the commerce of the United States" This latter phrase necessarily included more than an attempt to enter, otherwise the amendment was inoperative against the consignor against whom it was specially aimed, for he does not, as such, make the declaration, sign the documents, or take any steps in entering or attempting to enter the goods. When he makes the false invoice in a foreign country there is no extraterritorial operation of the statute whereby he can be criminally punished for his fraud. But when the consignor made the fraudulent undervaluation in the foreign country and on such false invoice the goods were shipped and arrived consigned to a merchant in New York, the merchandise was within the protection and subject to the penalties of the commercial regulations of this country even though the consignor was beyond the seas and outside the court's jurisdiction.

It was argued that the goods could only be forfeited for the same acts that would support an indictment, and inasmuch as the consignor could not be prosecuted here for making a false invoice in a foreign country, neither could the goods be forfeited for the same conduct in the

same place. But while punishment for the crime and forfeiture of the goods will often be coincident penalties, they are not necessarily so, nor is there any inconsistency in proceeding against the *res* if the wrongdoer is beyond the jurisdiction of the court. The very fact that the criminal provision of the statute does not operate extra-territorially against the consignor, would be a reason why the goods themselves should be subjected to forfeiture on arrival here. Cf. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356; *United States* v. *Nord Deutscher Lloyd*, 223 U. S. 512. The consignor's absence would not relieve the goods from the liability to be forfeited. He must be treated as having made the shipment with a knowledge that they could not remain in the vessel (Rev. Stat. § 2880), and that if, after being unloaded, they were not called for, they would be stored in General Order, there to remain, free from the burden of any state legislation and within the protection of the commerce clause of the Constitution. The foreign consignor is charged with knowledge that if goods stored in such warehouse were not called for within the year they were to be sold at public outcry; or if, during that period, they were taken out for shipment to a foreign port, they would start from a place of storage within the territory of the United States and move thence in a channel of its commerce. So that in the present case when the goods, fraudulently undervalued and consigned to a person in New York, arrived at the port of entry there was an attempt to introduce them into the commerce of the United States. When they were unloaded and placed in General Order they were actually introduced into that commerce, within the meaning of the statute intended to prevent frauds on the customs. The judgment dismissing the libel is

Reversed and the cause remanded for further proceedings in conformity with this opinion.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

No. 275. Argued October 17, 1913.—Decided December 1, 1913.

The commodity clause of the Hepburn Act applies not only to the carrier's goods from point of production to the market but also to goods from market to that point.

While the power to regulate interstate commerce is subject to the provisions of the Fifth Amendment, an enactment, such as the commodity clause, which does not take property or arbitrarily deprive the carrier of a property right, does not violate that Amendment.

In dealing with interstate carriers, the fact that some of them are also engaged in private business does not compel Congress to legislate concerning them as carriers in such manner as not to interfere with such private business.

The commodity clause is general and applies to all shipments, even if innocent in themselves, which come within its scope; its operation is not confined to particular instances in which the carriers might use its power to the prejudice of shippers. Supplies, purchased for use in operating a carrier's mines, 75% of the product of which is intended for sale and only 25% intended for the carrier's own use, are not necessary for the conduct of its business as a carrier and fall within the prohibition of the commodity clause of the Hepburn Act.

Although the purchaser may have the right to rescind for a condition subsequent, title may pass on delivery; and so *held* in this case that title to hay purchased by, and delivered to, a railroad company, passed to it although payment was postponed until after inspection and acceptance.

THE facts, which involve the construction of the Commodities Clause of the Hepburn Act of June 29, 1906, are stated in the opinion.

Mr. W. S. Jenney for plaintiff in error:

The hay in question was not owned by the Railroad

Company during the transportation thereof from Black Rock to Scranton. The title to said hay did not pass to the Railroad Company until it accepted the hay after an inspection thereof at the mines.

The acceptance of goods by a buyer is necessary to completely transfer the title. 35 Cyc. 306; *Hershiser* v. *Delone*, 24 Nebraska, 380; *Stephens* v. *Santee*, 49 N. Y. 35; *Kein* v. *Tupper*, 52 N. Y. 550; *Cooke* v. *Millard*, 65 N. Y. 352; *Nichols* v. *Paulson*, 6 N. Dak. 400; *Hathaway* v. *O'Gorman*, 26 R. I. 476; *Smith* v. *Wisconsin Co.*, 114 Wisconsin, 151.

Where there is a contract to sell unascertained goods, no property in the goods is transferred to the buyer until the goods are ascertained (except in the case of a contract to sell an undivided share of goods). See § 17 of the Sales Act; Williston on Sales, § 258.

In every case the appropriation must have the assent of both parties, to transfer the property in the goods. See Williston on Sales, §§ 274, 277, 278; Mechem on Sales, §§ 721, 724, 726, 729, 730; Blackburn on Sales, p. 129; Benjamin on Sales, 5th ed., pp. 241, 346,

When the seller is required by the contract to deliver the goods to the buyer at some particular place, the presumption is, unless a contrary intention appears, that the property in the goods does not pass until the goods are delivered to the buyer at that place, and accepted by him. See § 19, Rule 5, of the Uniform Sales Act. See also Williston on Sales, § 280; Mechem on Sales, §§ 733, 736; Benjamin on Sales, 5th ed., p. 355; *Braddock Glass Co.* v. *Irwin*, 153 Pa. St. 440; *Dannemiller* v. *Kirkpatrick*, 201 Pa. St. 218; *McNeal* v. *Braun*, 53 N. J. L. 617; *Neimeyer Lumber Co.* v. *Burlington R. R. Co.*, 74 N. W. Rep. (Neb.) 670; *United States* v. *Andrews*, 207 U. S. 229.

Upon principle as well as upon the authority of the cases cited, the title to the hay did not pass to the Railroad Company until it accepted the hay after inspection at the

mines. *Cornell* v. *Clark*, 104 N. Y. 451; *Ballantyne* v. *Appleton*, 82 Maine, 570; *Potter* v. *Holmes*, 92 N. W. Rep. (Minn.) 411; *Cefalu* v. *Fitzsimmons*, 67 N. W. Rep. (Minn.) 1018; *Perkins* v. *Bell*, 1 Q. B. 193, 62 L. J. Q. B. 91.

Assuming, however, that the Railroad Company owned the hay in question during the transportation thereof over its railroad from Black Rock to Scranton, the Commodities Clause, in its application to such transportation, was unconstitutional because it deprived the Railroad Company of its liberty and property without due process of law, in violation of the Fifth Amendment.

The question here presented has not been passed upon by this court and was not covered by *Commodities Cases*, 213 U. S. 366.

The power to regulate commerce among the States is limited by the Fifth Amendment. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 336; *McCray* v. *United States*, 195 U. S. 27; *Adair* v. *United States*, 208 U. S. 161.

The limitations imposed by the Fifth Amendment upon the exercise by Congress of the power to regulate commerce are the same as those imposed by the Fourteenth Amendment upon the exercise of the police power by the state legislatures. Freund, Police Power, §§ 65, 66; *Twining* v. *New Jersey*, 211 U. S. 78, 101; *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 410.

The Fifth Amendment forbids Congress, in the exercise of the power to regulate commerce, to arbitrarily, unreasonably or unnecessarily interfere with individual rights of liberty and property. The Commodities Clause is an arbitrary, unreasonable and unnecessary interference with such rights, and has no reasonable relation to the accomplishment of any legitimate public object. *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Lochner* v. *New York*, 198 U. S. 45; *Martin* v. *District of Columbia*, 205 U. S. 135, 139; *Atlantic Coast Line* v. *North Carolina*

Commission, 206 U. S. 1, 20; *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349.

The Commodities Clause, in its application to the facts of this case, is arbitrary, unreasonable and unnecessary, in that it has no reasonable relation to the accomplishment of any legitimate public object. For the legislative history of the act, see *Haddock* v. *D., L. & W. R. R. Co.*, 4 I. C. C. 296, and *Coxe* v. *Lehigh Valley R. R. Co.*, 4 I. C. C. 535.

The Commodities Clause, in its application to the facts of this case, deprived the Railroad Company not only of its liberty but also of property. *Allgeyer* v. *Louisiana*, 165 U. S. 589; *New Haven R. R. Co.* v. *Int. Comm. Comm.*, 200 U. S. 361.

The last case cited undoubtedly pointed the way to Congress in the enactment of the Commodities Clause. Cong. Rec., Vol. 40, pp. 6618–23, 6680–86, 6693, 6757 and 6758.

The history of the act shows that the discrimination which it was the purpose of Congress in enacting the Commodities Clause to stamp out was that which a railroad company could cover up and conceal by the commingled accounts of the two kinds of business, commercial and transportation, and not the transportation by a railroad company of materials lawfully purchased and owned by it, not for sale, but for use in the operation of property owned by it.

That kind of discrimination is entirely absent from such transportation. It cannot exist in connection therewith, because the Railroad Company does not deal commercially in the commodities so transported.

In this case the transportation by a railroad company of its own commodities to its mines for use in the operation thereof, is free from any evil that might justify the absolute prohibition of such transportation in the public interest.

In fact, it is a matter of complete indifference to the public, and every individual shipper, and every one of its competitors in the coal business whether or not the Railroad Company does or does not engage in such transportation, so long as it continues lawfully to own and operate its mines, and the Commodities Clause in prohibiting such transportation has no reasonable relation to the accomplishment of any legitimate public object, but is arbitrary, unreasonable and unnecessary and violates the Fifth Amendment.

Mr. Assistant to the Attorney General Todd for the United States:

The defendant was the owner of the hay while transporting it from Black Rock to Scranton. *Alden* v. *Hart,* 161 Massachusetts, 576; *Allen Bethune & Co.* v. *Maury,* 66 Alabama, 10; *Ballantyne* v. *Appleton,* 82 Maine, 570; *Boothby* v. *Plaisted,* 51 N. H. 436; *Burrows* v. *Whitaker,* 71 N. Y. 291; *Cefalu* v. *Fitzsimmons,* 67 N. W. Rep. 1018; *Chi., I. & L. R. Co.* v. *United States,* 219 U. S. 486; *Cornell* v. *Clark,* 104 N. Y. 451; *Crofoot* v. *Bennett,* 2 N. Y. 258; *Fogle* v. *Brubaker,* 122 Pa. St. 7; *Fromme* v. *O'Donnell,* 124 Wisconsin, 529; *Gass* v. *Astoria Veneer Mills,* 121 App. Div. (N. Y.) 182; *Graff* v. *Fitch,* 58 Illinois, 375; *Grimoldby* v. *Wells,* L. R. 10 C. P. 391; *Hatch* v. *Standard Oil Co.,* 100 U. S. 124; *Holmes* v. *Gregg,* 66 N. H. 621; *In re Company Material,* 22 I. C. C. 439; *Kelsea* v. *Haines,* 41 N. H. 246; *Kuppenheimer* v. *Wertheimer,* 107 Michigan, 77; *Leonard* v. *Davis,* 1 Black (U. S.), 476; *Lingham* v. *Eggleston,* 27 Michigan, 324; *Louis. & Nash. R. Co.* v. *Mottley,* 219 U. S. 467; *Macomber* v. *Parker,* 13 Pick. (Mass.) 175; *McCarty* v. *Gordon,* 16 Kansas, 35; *McCulloch* v. *Maryland,* 4 Wheat. 316; *McNeal* v. *Braun,* 53 N. J. L. 617; *Murphy* v. *Sagola Lumber Co.,* 125 Wisconsin, 363; *Perkins* v. *Bell,* 1 Q. B. (1893) 193; *Pierson* v. *Crook,* 115 N. Y. 539; *Pope* v. *Allis,* 115 U. S. 363; *Potter*

v. *Holmes*, 92 N. W. Rep. 411; *Riddle* v. *Varnum*, 20 Pick. (Mass.) 280; *Star Brewing Co.*, v. *Horst*, 120 Fed. Rep. 246; *United States* v. *Andrews*, 207 U. S. 229; *United States* v. *Sunday Creek Coal Co.*, 194 Fed. Rep. 252; *Wadhams* v. *Balfour*, 32 Oregon, 313; *Weil* v. *Stone*, 69 N. E. Rep. (Ind.) 698; *Young* v. *Winkler*, 14 Colo. App. 204.

The Commodities Clause is constitutional as applied to the transportation by a railroad, also engaged in production, of articles owned by it and intended for use in its operations as a producer. Hence, it is constitutional as applied to the transportation by defendant of the hay in question. *Booth* v. *Illinois*, 184 U. S. 425; *Cedar Hill Co.* v. *Atchison &c. Ry.*, 15 I. C. C. 75; *Commonwealth* v. *Gilbert*, 160 Massachusetts, 157; Encyc. Sup. Court, vol. 11, p. 111, n. 23; *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13; *Lemieux* v. *Young*, 211 U. S. 489; *New Haven R. Co.* v. *I. C. C.*, 200 U. S. 361; *Opinion of the Justices*, 163 Massachusetts, 589; *Otis & Gassman* v. *Parker*, 187 U. S. 606; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Public Clearing House* v. *Coyne*, 194 U. S. 497; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *Scott* v. *Reid*, 10 Pet. 524; *Silz* v. *Hesterberg*, 211 U. S. 31; *Slaughter House Cases*, 16 Wall. 36; *St. Paul Ry. Co.* v. *Phelps*, 137 U. S. 528; *Swift* v. *United States*, 196 U. S. 375; *United States* v. *Del. & Hud. Co.*, 213 U. S. 366; *United States* v. *Goldenberg*, 168 U. S. 95; *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257.

Mr. Justice Lamar delivered the opinion of the court.

The Delaware, Lackawanna & Western Railroad Company was indicted for hauling, over its lines, between Buffalo, New York, and Scranton, Pennsylvania, twenty carloads of hay, belonging to the Company, but not necessary for its use as a common carrier. This transportation

was charged to be in violation of the Commodities Clause of the Hepburn Act, June 29, 1906, c. 3591, 34 Stat. 585, which makes it unlawful "for any railroad company to transport in interstate commerce any article . . . it may own . . . or in which it may have any interest . . . except such . . . as may be necessary . . . for its use in the conduct of its business as a common carrier."

On the trial it appeared that the defendant was not only chartered as a Railroad, but had also been authorized to operate coal mines. The hay, referred to in the indictment, had been purchased for the use of animals employed in and about the mines at Scranton—all the coal taken therefrom being sold for use by the public, except the steam coal which was used as fuel for the Company's locomotives.

The defendant was found guilty and sentenced on each of the twenty counts. It brought the case here, insisting that the Commodities Clause violated the Fifth Amendment; deprived the Company of a right to contract, and prevented it from carrying its own property needed in a legitimate intrastate business, conducted under authority of a charter granted by the State of Pennsylvania, many years before the adoption of the Hepburn Bill.

1. This contention must be overruled on the authority of *United States* v. *Delaware &c. Co.*, 213 U. S. 366, 416. It is true that the decision in that case related to shipments of coal from mine to market, while here the merchandise was transported from market to mine. But the statute relates to "all commodities, except lumber, owned by the Company" and includes inbound as well as outbound shipments. Both classes of transportation are within the purview of the evil to be corrected and, therefore, subject to the power of Congress to regulate interstate commerce. The exercise of that power is, of course, limited by the provisions of the Fifth Amendment.

(*Monongahela Co.* v. *United States*, 148 U. S. 312, 336; *McCray* v. *United States*, 195 U. S. 27; *Union Bridge Co.* v. *United States*, 204 U. S. 364), but the Commodities Clause does not take property nor does it arbitrarily deprive the Company of a right of property. The statute deals with railroad companies as public carriers, and the fact that they may also be engaged in a private business does not compel Congress to legislate concerning them as carriers so as not to interfere with them as miners or merchants. If such carrier hauls for the public and also for its own private purposes, there is an opportunity to discriminate in favor of itself against other shippers in the rate charged, the facility furnished or the quality of the service rendered. The Commodities Clause was not an unreasonable and arbitrary prohibition against a railroad company transporting its own useful property, but a constitutional exercise of a governmental power intended to cure or prevent the evils that might result if, in hauling goods in or out, the Company occupied the dual and inconsistent position of public carrier and private shipper.

It was suggested that the case is not within the statute because, as the Company could buy, in Scranton, hay that had already been transported over its line, no possible harm could come to anyone if it brought the same hay at Buffalo and then hauled it to Scranton for use at the mine, but not for sale in competition with other dealers in stock food. But the courts are not concerned with the question as to whether, in a particular case, there had been any discrimination against shippers or harm to other dealers. The statute is general and applies not only to those particular instances in which the carrier did use its power to the prejudice of the shipper, but to all shipments which, however innocent in themselves, come within the scope and probability of the evil to be prevented.

2. In this case the hay was purchased for use in operat-

ing mines where 75 per cent. of the coal produced was "assorted sizes" intended to be sold for domestic purposes. The remaining 25 per cent. was steam coal—all of which was used as fuel on the Company's locomotives. This steam coal was in the nature of a by-product from a mine operated primarily for the purpose of obtaining coal for sale. Hay purchased for use in such mining cannot be said to have been necessary for the use of the Company in the conduct of its business as a common carrier.

3. Lastly, it was contended that the hay did not belong to the Railroad Company at the time of the transportation and, therefore, the conviction should be set aside since the statute only prohibits the hauling of commodities owned by the carrier.

This contention is based upon the terms of the contract, by which the Vassar Company, of Millington, Michigan, agreed to sell to the Railroad Company 3,000 tons, No. 1, timothy hay, at $15.40 per ton, f. o. b. Buffalo, payment to be made as follows: Upon the delivery of the hay to the purchaser, at Buffalo, same will be transported by the purchaser to various points on its line of railroad to be determined by the purchaser, at which places the purchaser shall have the right to inspect such hay before acceptance, and if upon such inspection said hay shall prove to be of the kind specified, the purchaser shall accept such hay and pay for the same within 30 days after such acceptance. Each of the twenty carloads of hay mentioned in the indictment was received by the Company at Buffalo. Each was then reconsigned to itself at Scranton. The waybills were marked "Freight free—Co. use." After arrival at Scranton it was inspected, accepted and used.

On these facts the defendant insists that the title did not pass until after acceptance, and many authorities are cited to support the proposition that, in a contract for the sale of personal property not only delivery by the

seller, but acceptance by the buyer, is necessary for the transfer of title. But there are two kinds of acceptance—one of quality and the other of title. They are not necessarily contemporaneous. There may be an acceptance of quality before delivery, as where goods are selected by the purchaser—delivery and transfer of title being postponed until a later time. Or, there may be an acceptance of title without an acceptance of quality; so that in many cases, after the title has passed, the purchaser may recover damages if the goods, upon inspection, prove to be of a quality inferior to that ordered. *Day* v. *Pool*, 52 N. Y. 416; *Zabriskie* v. *Central R. R.*, 131 N. Y. 72; *Bagley* v. *Cleveland Co.*, 21 Fed. Rep. 159 (3), 164; *Miller* v. *Moore*, 83 Georgia, 684. Again, though there may be such an acceptance as will transfer the title, the purchaser may, under the contract, have the right to rescind, as for a condition subsequent, if the goods do not correspond with the specifications. Such was the case here. When the hay was received by the purchaser at Buffalo there was such an acceptance as to transfer title to the Railroad, which accordingly took possession and exercised control in fixing when and to what point on its line the hay should be shipped. Title *prima facie* passes when delivery is made and if such possession followed by acts of ownership did not transfer the title to the Railroad Company, it left the risk of unknown dangers, at unknown points, for an indefinite time, upon the seller. So hard and unusual an incident is not, under facts like these, necessarily to be implied from the use of the ambiguous phrase, "pay after inspection and acceptance," and no such construction should be given unless demanded by the explicit terms of the contract. The parties, by their conduct, showed that they did not understand that the hay remained the property of the seller after it had been delivered to the buyer, for the hay after being received was consigned by the Company to itself and went

forward from Buffalo to Scranton on waybills containing the entry "Freight free—Company use." If the hay did, in fact, then belong to the Vassar Company, such a shipment on such a waybill would have been a departure from the published tariff, contrary to the provisions of the Act to Regulate Commerce. No such offense however was committed, for the contract, both by its terms and in the light of the conduct of the parties, meant that the title should pass when delivery was accepted by the defendant at Buffalo, but that the Railroad Company might rescind if, on later inspection, the quality was found to be different from what had been described in the contract of sale. But after such delivery and before such rescission, the title was in the Railroad Company. *Allen* v. *Maury*, 66 Alabama, 10; *Burrows* v. *Whitaker*, 71 N. Y. 291; *Kuppenheimer* v. *Wertheimer*, 107 Michigan, 77. As the hay belonged to the defendant and was intended for use in its private business of mining, the transportation over its lines, in interstate commerce, was a violation of the Commodity Clause.

Judgment affirmed.

AMOSKEAG SAVINGS BANK *v.* PURDY.

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

No. 6. Argued December 4, 5, 1912.—Decided December 1, 1913.

The provisions in the tax law of New York, chap. 62, Laws of 1909, imposing a flat rate on shares of all banks, both state and national, without the right of exemption in case of indebtedness of the owners, does not discriminate against national banks and is not invalid under § 5219, Rev. Stat. *People* v. *Weaver*, 100 U. S. 539, distinguished.

Mercantile Bank v. *New York*, 121 U. S. 138, followed as to what constitutes moneyed capital within the meaning of § 5219, Rev. Stat.

The State is not obliged to apply the same system to the taxation of national banks that it uses in the taxation of other property, provided no injustice, inequality or unfriendly discrimination is inflicted upon them. *Bridgeport Savings Bank.* v. *Feitner*, 191 N. Y. 88, approved.

The Federal courts will not overthrow a system of state taxation as discriminatory against national banks under § 5219, Rev. Stat., unless such discrimination is affirmatively shown.

Section 5219, Rev. Stat., deals with shareholders of national banks as a class and not as individuals, and a scheme of taxation that is fair to the class will not be held invalid because of a particular case arising from circumstances personal to the individual affected.

198 N. Y. 503, affirmed.

THE facts, which involve the validity of certain taxes imposed by the taxing officers of New York City upon shares of stock in national banks located in that city and which shares were owned by non-residents of New York, are stated in the opinion.

Mr. Maxwell Evarts, with whom *Mr. George Richards* was on the brief, for plaintiff in error:

No state tax can be assessed against the owners of shares in a national bank which is at a greater rate than the tax imposed upon other moneyed capital in the hands of individual citizens. *Boyer* v. *Boyer*, 113 U. S. 689; *Cornell S. S. Co.* v. *Dietrich*, 161 N. Y. 195; *Covington* v. *First National Bank*, 198 U. S. 100; *Evansville Bank* v. *Britton*, 105 U. S. 322, 324; *Hills* v. *Exchange Bank*, 105 U. S. 319; *Mercantile Bank* v. *New York*, 121 U. S. 138; *National Bank of Wellington* v. *Chapman*, 173 U. S. 205, 220; *Newark Banking Co.* v. *Newark*, 121 U. S. 163; *Palmer* v. *McMahon*, 133 U. S. 660; *Pelton* v. *National Bank*, 101 U. S. 143, 145; *Bridgeport Savings Bank* v. *Feitner*, 191 N. Y. 88; *People* v. *Dolan*, 36 N. Y. 59; *People* v. *Weaver*, 100 U. S. 539; *People's National Bank* v. *Marye*, 191 U. S. 272; *Supervisors* v. *Stanley*, 105 U. S. 305, 311; *Whitbeck* v. *Mercantile Bank*, 127 U. S. 193.

Mr. William Herbert King and *Mr. Lawson Purdy*, with whom *Mr. Archibald R. Watson* was on the brief, for defendants in error:

The system of taxation established by the tax law of New York does not discriminate against shares of national bank stock, but, on the contrary, is favorable to capital so invested; it was desired by the banks, and it is successful and fair in its operation.

The plaintiff has failed to show that the taxes imposed upon national bank shares in New York are at a greater rate than taxes imposed upon other moneyed capital in the State.

In the absence of any material, unfriendly or substantial discrimination against capital invested in national banks compared with capital of a similar and competing character, no case is presented requiring the court to interpose for the protection of shareholders in national banks, and to determine that the system of taxation is in conflict with the act of Congress.

In support of these contentions see *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440; *Bank of Commerce* v. *Seattle*, 166 U. S. 463; *Boyer* v. *Boyer*, 113 U. S. 689; *Commercial Bank* v. *Chambers*, 182 U. S. 556; *Covington* v. *First National Bank*, 198 U. S. 100; *Evansville Bank* v. *Britton*, 105 U. S. 322; *First National Bank of Garnett* v. *Ayers*, 160 U. S. 660; *Hepburn* v. *The School Directors*, 23 Wall. 480; *Lander* v. *Mercantile Bank*, 186 U. S. 458; *Mercantile Bank* v. *New York*, 121 U. S. 138; *National Bank of Wellington* v. *Chapman*, 173 U. S. 205; *Palmer* v. *McMahon*, 133 U. S. 660; *Pelton* v. *National Bank*, 101 U. S. 143; *Bridgeport Savings Bank* v. *Feitner*, 120 App. Div. (N. Y.) 838; 191 N. Y. 88; *Dunlap's Express Co.* v. *Raymond*, 54 Misc. (N. Y.) 330; *People* v. *Weaver*, 100 U. S. 539; *People's National Bank* v. *Marye*, 191 U. S. 272; *Whitbeck* v. *Mercantile Bank*, 127 U. S. 193.

MR. JUSTICE PITNEY delivered the opinion of the court.

The question presented is the validity of certain taxes imposed in the year 1908 by the taxing officers of New York City upon some shares of stock in certain national banking associations located in that city, which shares were owned by the relator, a New Hampshire corporation doing business in its home State. The taxable value of the shares was ascertained by the Commissioners of Taxes and Assessments, in accordance with the provisions of the law of the State of New York, by adding together the capital, surplus and undivided profits of each bank and dividing the amount by the number of outstanding shares. It is admitted that at the time of the making of this assessment the relator owed just debts exceeding the value of its gross personal estate, including its bank shares, after deducting therefrom the value of its property taxable elsewhere and the value of its property not taxable anywhere; that no portion of such debts had been deducted from the assessment of any of its personal property, other than the bank shares; and that no portion of the indebtedness was contracted in the purchase of non-taxable property or securities or for the purpose of evading taxation. Relator made application to the Commissioners of Taxes and Assessments for the cancellation of the assessment, upon the ground that it was entitled to have its indebtedness deducted from the assessed valuation of the bank shares. This application was denied, a proceeding by *certiorari* taken to review the determination of the Commissioners was dismissed at the special term of the Supreme Court of New York; the Appellate Division affirmed the dismissal (134 App. Div. 966), upon the authority of *People ex rel. Bridgeport Savings Bank* v. *Feitner*, 191 N. Y. 88; and the Court of Appeals affirmed the order of the Appellate Division, upon the same authority, 198 N. Y. 503. The case comes here by writ of error under § 709, Rev.

Stat. (Judicial Code, § 237), upon the ground that the taxation imposed is in violation of the rights of the relator under § 5219, Rev. Stat.[1]

The contention of the plaintiff in error, made in the state tribunals and reiterated here, is that the taxes are invalid because made without allowing any deduction for relator's debts, as alleged to be allowed by the laws of New York in the case of other moneyed capital in the hands of individual citizens of that State; it being insisted that inasmuch as the debts of relator exceeded the valuation of the bank shares, the assessment should be wholly canceled.

The taxing laws in force at the time the assessment was made were in the following year consolidated and reenacted as the "Tax Law." (L., 1909, c. 62; in effect February 17, 1909; Cons. Laws, c. 60.) Those sections that are deemed in anywise pertinent to the matter in issue are set forth in full in the margin.[2]

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[1] SEC. 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed.

[2] EXTRACTS FROM NEW YORK TAX LAW.

SECTION 7:

"§ 7. *When Property of Nonresidents Is Taxable.* Subdivision 1. Nonresidents of the state doing business in the state, either as principals or partners, shall be taxed on the capital invested in such busi-

Section 21 provides for the preparation of the assessment roll, and requires that it shall contain separate columns, in which the assessing officers shall set down the pertinent items, and, among others, "4. In the fourth column the full value of all the taxable personal property owned by

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ness, as personal property, at the place where such business is carried on, to the same extent as if they were residents of the state."

SECTIONS 14 and 25:

"§ 14. *Place of Taxation of Individual Bank Capital.*—Every individual banker shall be taxable upon the amount of capital invested in his banking business in the tax district where the place of such business is located and shall, for that purpose, be deemed a resident of such tax district."

"§ 25. *Individual banker, how assessed.*—Every individual banker doing business under the laws of this state must report before the fifteenth day of June under oath to the assessors of the tax district in which any of the capital invested in such banking business is taxable, the amount of capital invested in such banking business in such tax district on the first day of June preceding. Such capital shall be assessed as personal property to the banker in whose name such business is carried on."

SECTION 21:

"§ 21. *Preparation of Assessment-Roll.*—They shall prepare an assessment-roll containing nine separate columns and shall, according to the best information in their power, set down:

1. In the first column the names of all the taxable persons in the tax district.

2. In the second column the quantity of real property taxable to each person with a statement thereof in such form as the commissioners of taxes shall prescribe.

3. In the third column the full value of such real property.

4. In the fourth column the full value of all the taxable personal property owned by each person respectively after deducting the just debts owing by him. . . ."

SECTION 13:

"§ 13. *Stockholders of bank taxable on shares.*—The stockholders of every bank or banking association organized under the authority of this state, or of the United States, shall be assessed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholders in the assessment

each person respectively after deducting the just debts owing by him." This provision is held to apply equally to corporations and individuals (*People ex rel. Cornell Steamboat Co.* v. *Dederick,* 161 N. Y. 195), and has the effect of allowing a deduction of the amount of the debts of the

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of taxes in the tax district where such bank or banking association is located, and not elsewhere, whether the said stockholders reside in said tax district or not."

SECTION 23:

"§ 23. *Banks to Make Report.*—The chief fiscal officer of every bank or banking association organized under the authority of this state, or of the United States, shall, on or before the first day of July, in each year, furnish the assessors of the tax district in which its principal office is located a statement under oath of the condition of such bank or banking association on the first day of June next preceding, stating the amount of its authorized capital stock, the number of shares and the par value of the shares thereof, the amount of stock paid in, the amount of its surplus and of its undivided profits, if any, a complete list of the names and residences of its stockholders and the number of shares held by each. . . . The list of stockholders furnished by such bank or banking association shall be deemed to contain the names of the owners of such shares as are set opposite them, respectively, for the purpose of assessment and taxation."

SECTION 24:

"§ 24. *Bank shares, how assessed.*—In assessing the shares of stock of banks or banking associations organized under the authority of this state or the United States, the assessment and taxation shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this state. The value of each share of stock of each bank and banking association, except such as are in liquidation, shall be ascertained and fixed by adding together the amount of the capital stock, surplus and undivided profits of such bank or banking association and by dividing the result by the number of outstanding shares of such bank or banking association. The value of each share of stock in each bank or banking association in liquidation shall be ascertained and fixed by dividing the actual assets of such bank or banking association by the number of outstanding shares of such bank or banking association. The rate of tax upon the shares of stock of banks and banking associations shall be one per centum upon the value thereof, as ascertained and fixed in the manner hereinbefore pro-

taxpayer from the valuation of his general personal estate, not however including bank shares, which are dealt with in other sections. Section 23 requires the chief fiscal officer of every bank or banking association organized under the laws of the State or of the United States to furnish an-

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vided, and the owners of the stock of banks and banking associations shall be entitled to no deduction from the taxable value of their shares because of the personal indebtedness of such owners, or for any other reason whatsoever. Complaints in relation to the assessments of the shares of stock of banks and banking associations made under the provisions of this article shall be heard and determined as provided in section thirty-seven of this chapter. The said tax shall be in lieu of all other taxes whatsoever for state, county or local purposes upon the said shares of stock, and mortgages, judgments and other choses in action and personal property held or owned by banks or banking associations the value of which enters into the value of said shares of stock shall also be exempt from all other state, county or local taxation. The tax herein imposed shall be levied in the following manner: The board of supervisors of the several counties shall, on or before the fifteenth day of December in each year, ascertain from an inspection of the assessment-rolls in their respective counties, the number of shares of stock of banks and banking associations in each town, city, village, school and other tax district, in their several counties, respectively, in which such shares of stock are taxable, the names of the banks issuing the same, respectively, and the assessed value of such shares, as ascertained in the manner provided in this article and entered upon the said assessment-rolls, and shall forthwith mail to the president or cashier of each of said banks or banking associations a statement setting forth the amount of its capital stock, surplus and undivided profits, the number of outstanding shares thereof, the value of each share of stock taxable in said county, as ascertained in the manner herein provided, and the aggregate amount of tax to be collected and paid by such bank and banking association, under the provisions of this article. A certified copy of each of said statements shall be sent to the county treasurer. It shall be the duty of every bank or banking association to collect the tax due upon its shares of stock from the several owners of such shares, and to pay the same to the treasurer of the county wherein said bank or banking association is located, and in the city of New York to the receiver of taxes thereof on or before the thirty-first day of December in said year; and any bank or banking association failing to pay the

nually, on or before July 1st, to the assessors of the tax district in which its principal office is located, a sworn statement of the condition of the bank on the first day of June next preceding, stating the amount of its capital stock, surplus and undivided profits, the number of shares,

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said tax as herein provided shall be liable by way of penalty for the gross amount of the taxes due from all the owners of the shares of stock, and for an additional amount of one hundred dollars for every day of delay in the payment of said tax. Every bank or banking association so paying the taxes due upon the shares of its stock shall have a lien on the shares of stock, and on all property of the several share owners in its hands, or which may at any time come into its hands, for reimbursement of the taxes so paid on account of the several shareholders, with legal interest; and such lien may be enforced in any appropriate manner. The tax hereby imposed shall be distributed in the following manner: The board of supervisors of the several counties shall ascertain the tax rate of each of the several town, city, village, school and other tax districts in their counties, respectively, in which the shares of stock of banks and banking associations shall be taxable, which tax rates shall include the proportion of state and county taxes levied in such districts, respectively, for the year for which the tax is imposed, and the proportion of the tax on bank stock to which each of said districts shall be respectively entitled shall be ascertained by taking such proportion of the tax upon the shares of stock of banks and banking associations, taxable in such districts, respectively, under the provisions of this chapter as the tax rate of such tax district shall bear to the aggregate tax rates of all the tax districts in which said shares of stock shall be taxable. The clerks of the several cities, villages and school districts to which any portion of the tax on shares of stock of banks and banking associations is to be distributed under this section shall, in writing and under oath, annually report to the board of supervisors of their respective counties, during the first week of the annual session of such board, the tax rate of such city, village and school district for the year prior to the meeting of each such board. The said board of supervisors shall issue their warrant or order to the county treasurer on or before the fifteenth day of December in each year, setting forth the number of shares of bank stock taxable in each town, city, village, school and other tax district in said county, in which said shares of stock shall be taxable, the tax rate of each of said tax districts for said year, the proportion of the tax imposed by this chapter to which each of said tax

and the names and residences of the stockholders, with the number of shares held by each. Sections 13 and 24 relate to the taxation of these shares, stockholders in state and in national banks being treated alike. Section 13 takes the place of § 13 of the Tax Law of 1896 (L. 1896, c. 908, p. 802). Section 24 of the latter act was amended by L. 1901, c. 550; L. 1902, c. 126; L. 1903, c. 267; L. 1907,

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districts is entitled, under the provisions hereof, and commanding him to collect same, and to pay to the proper officer in each of such districts the proportion of such tax to which it is entitled under the provisions of this chapter. The said county treasurer shall have the same powers to enforce the collection and payment of said tax as are possessed by the officers now charged by law with the collection of taxes, and the said county treasurer shall be entitled to a commission of one per centum for collecting and paying out said moneys, which commission shall be deducted from the gross amount of said tax before the same is distributed. In issuing their warrants to the collectors of taxes, the board of supervisors shall omit therefrom assessments of and taxes upon the shares of stock of banks and banking associations. *Provided, that*, in the city of New York the statement of the bank assessment and tax herein provided for shall be made by the board of tax commissioners of said city, on or before the fifteenth day of December in each year, and by them forthwith mailed to the respective banks and banking associations located in said city, and a certified copy thereof sent to the receiver of taxes of said city. The tax shall be paid by the respective banks in said city to the said receiver of taxes on or before the thirty-first day of December in said year, and said tax shall be collected by the said receiver of taxes and shall be by him paid into the treasury of said city to the credit of the general fund thereof. This section is not to be construed as an exemption of the real estate of banks or banking associations from taxation. No shares of stock of such banks and banking associations, by whomsoever held, shall be exempt from the tax hereby imposed."

SECTION 188:

"§ 188. *Franchise Tax on Trust Companies.*—Every trust company incorporated, organized or formed under, by or pursuant to a law of this state, and any company authorized to do a trust company's business solely or in connection with any other business, under a general or special law of this state, shall pay to the state annually for the privilege of exercising its corporate franchise or carrying on its business in such

c. 739; and in its final form became § 24 of the Tax Law of 1909. In this form § 24 is evidently a more recent enactment than § 13, and, so far as inconsistent, impliedly repeals it. The provision of § 13 for taxing bank shares in the district where the bank is located remains in force. It will be observed that § 24 declares (in obedience to

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corporate or organized capacity, an annual tax which shall be equal to one per centum on the amount of its capital stock, surplus, and undivided profits."

SECTION 189:

"§ 189. *Franchise Tax on Savings Banks.*—Every savings bank incorporated, organized or formed under, by or pursuant to a law of this state, shall pay to the state annually for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity, an annual tax which shall be equal to one per centum on the par value of its surplus and undivided earnings."

SECTION 191:

"§ 191. *Tax upon Foreign Bankers.*—Every foreign banker doing business in this state, shall annually pay to the treasurer a tax of five per centum on the amount of interest or compensation of any kind earned and collected by him on money loaned, used or employed in this state by such banker. The term, 'doing a banking business,' as used in this section, means doing such business as a corporation may be created to do under article three of the banking law, or doing any business which a corporation is authorized by such article to do. The term 'foreign banker doing a banking business in this state,' as used in this section, includes:

"1. Every foreign corporation doing a banking business in this state, except a national bank.

"2. Every unincorporated company, partnership or association of two or more individuals, organized under or pursuant to the laws of another state or country, doing a banking business in this state.

"3. Every other unincorporated company, partnership, or association, of two or more individuals, doing a banking business in this state, if the members thereof, owning more than a majority interest therein, or entitled to more than one-half of the profits thereof, or who would, if it were dissolved, be entitled to more than one-half of the net assets thereof, are not residents of this state.

"4. Every nonresident of this state, doing a banking business in this state, in his own name and right only."

§ 5219, Rev. Stat.) that "the assessment and taxation shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this State;" that the valuation of the shares of going concerns is to be ascertained by dividing the amount of capital stock, surplus, and undivided profits by the number of shares; the valuation, in the case of banks in liquidation, to be fixed by dividing the actual assets by the number of shares; that a fixed rate of tax equal to one per centum upon the value thus ascertained is imposed without deduction because of the personal indebtedness of the owners, or for any other reason; that the tax is in lieu of all other state taxation upon the choses in action and personal property held by the bank whose value enters into the valuation of its shares of stock; that this section is not to be construed as an exemption of the real estate of the banks from taxation; and that no share of stock of such banks, by whomsoever held, is to be exempt from the tax imposed. In construing § 24 the Court of Appeals of New York has held (*People ex rel. Bridgeport Savings Bank* v. *Feitner*, 191 N. Y. 88, 96) that the effect of introducing into the section the limitation prescribed by § 5219, Rev. Stat., is such that if any bank is located in a tax district where the rate is less than one per centum, its stockholders are entitled to a reduction to conform to the local rate.

Respecting other moneyed capital, trust companies, by § 188, are subjected to an annual franchise tax "equal to one per centum on the amount of its capital stock, surplus, and undivided profits." The practical burden of such a tax (which of course falls eventually upon the stockholder) is presumably not materially different from the burden of a tax at the same rate imposed upon the individual stockholder on a valuation of his shares arrived at by taking into consideration the same elements of capital stock, surplus, and undivided profits. And of course the stock-

holder has no relief from such a franchise tax because of his individual debts. By § 189 savings banks are subjected to a franchise tax of one per centum on the par value of the surplus and undivided earnings. These institutions are thus apparently taxed upon the basis of what they possess over and above what they owe to their depositors. The individual banker, by §§ 14 and 25, is taxed at the place where his business is located upon the "amount of capital invested in his banking business."

It is not insisted that this tax law discriminates against national banks or the stockholders thereof as compared particularly with individual bankers, trust companies, or savings banks. The ground of complaint is that § 24, in providing that owners of bank stock (state or national) shall not be entitled to deduction from the taxable value of their shares because of their personal indebtedness, is contrary to the restriction contained in § 5219, Rev. Stat., that the shares of national banks shall not be taxed "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State," because under § 21 of the Tax Law all persons are permitted to deduct their debts from their other taxable personal property in general, including, as is claimed, other moneyed capital.

Plaintiff in error relies chiefly upon the decision of this court in *People* v. *Weaver*, 100 U. S. 539. That case was in effect a review of the decision of the Court of Appeals of New York in *People* v. *Dolan*, 36 N. Y. 59. The question was as to the validity of an assessment and taxation of national bank shares in the City of Albany under the state law of April 23, 1866 (N. Y. Laws 1866, p. 1647), without deduction because of the indebtedness of the taxpayer, in view of the fact that under other laws the owners of other kinds of personal property were entitled to have the amount of their debts deducted from the valuation for the purposes of taxation. The state court in the *Dolan*

Case had justified the method adopted in taxing the bank shares, upon reasoning that assumed "that while Congress limited the state authorities in reference to the ratio or percentage levied on the value of its shares, which could not be greater than on other moneyed capital invested in the State, it left the matter of the relative valuation of the shares and of other moneyed capital wholly to the control of state regulation." This court held that the clause in § 5219,—"that the taxation shall not be at a greater rate than is assessed upon other moneyed capital," etc., meant that the taxation upon shares should not be greater than on other moneyed capital, taking into consideration both the rate of assessment and the valuation. In other words, that the restriction contained in the act of Congress had to do with the actual incidence and practical burden of the tax upon the taxpayer.

This decision was followed by several others to the same effect. In *Supervisors* v. *Stanley*, 105 U. S. 305, it was pointed out that the decision in the *Weaver Case* had not the effect of declaring the New York Act of 1866 void, but only of deciding that the tax there in question was void because the taxpayer had been refused the same deduction for his debts that was allowed to other taxpayers having moneyed capital otherwise invested. *Hills* v. *Exchange Bank*, 105 U. S. 319, and *Evansville Bank* v. *Britton*, 105 U. S. 322, applied the same principle.

But the pertinent statutes in the *Weaver Case* differed from those now before us, and the authority of that decision is not controlling. The act of 1866 is quoted in full in the report, 100 U. S. at p. 540. And in that case, as the opinion shows (pp. 542, 543), it was not disputed—"that the effect of the state law is to permit a citizen of New York, who has money capital invested otherwise than in banks, to deduct from that capital the sum of all his debts, leaving the remainder alone subject to taxation, while he whose money is invested in shares of bank stocks can make

no such deduction. Nor, inasmuch as nearly all the banks in that State and in all others are national banks, can it be denied that the owner of such shares who owes debts is subjected to a heavier tax on account of those shares than the owner of moneyed capital otherwise invested, who also is in debt, because the latter can diminish the amount of his tax by the amount of his indebtedness, while the former cannot. That this works a discrimination against the national bank shares as subjects of taxation, unfavorable to the owners of such shares, is also free from doubt."

The Tax Law of New York now in question is materially different. As already shown, moneyed capital is dealt with for the purposes of taxation upon lines different from those upon which the taxation of other personal property proceeds. By §§ 13 and 24 state bank shares and national bank shares are both dealt with, and they are treated alike, being assessed not upon the basis of market values, but upon a valuation determined by a consideration of the capital stock, surplus, and undivided profits (yielding what is commonly known as "book value"), and leaving out of consideration other elements, such as good will and the like, which enter into the determination of the actual market value of such shares. On the other hand, personal property in general is by § 21 to be assessed at its full value, which presumably means market value. Section 24, instead of subjecting the owners of bank shares to taxation at the rate locally obtaining for other personal property, imposes a "flat rate" of one per centum upon the valuation, with the proviso, as held in the *Feitner Case, supra,* that if the local rate be less than one per centum, the owners of shares in the bank have the benefit of it.

Enough has been said to show that the decision in the *Weaver Case,* which had to do with a tax assessed upon bank stock on the basis of the same method of valuation and the same rate of assessment as personal property in

general, including other moneyed capital, but without allowance for the indebtedness of the taxpayer, although such allowance was made to the owners of personal property in general, including other moneyed capital, is not to be deemed conclusive upon the present controversy, in view of the differences in the taxing laws.

The *Weaver Case*, however, and others that followed it, did establish that the question whether an owner of national bank shares has been subjected to a state tax in excess of the limitation imposed by § 5219, Rev. Stat., is a practical question, to be determined by considering whether he is actually discriminated against in favor of other moneyed capital in the hands of individual citizens of the State. And the meaning of the term "other moneyed capital" has been elucidated by several decisions, of which the leading one is *Mercantile Bank* v. *New York*, 121 U. S. 138. This was a suit brought by a national bank to restrain the collection of taxes assessed upon its stockholders under New York Laws 1882, c. 409, § 312, an enactment that followed the general lines of the act of 1866, dealt with in the *Weaver Case* and quoted in the opinion of the court therein, except that in obedience to that decision the act of 1882 required that—"in the assessment of said shares, each stockholder shall be allowed all the deductions and exceptions allowed by law in assessing the value of other taxable personal property owned by individual citizens of this State." The contention was that the State had not complied with the condition contained in § 5219 of the Revised Statutes, because it had by its legislation expressly exempted from all taxes in the hands of individual citizens numerous species of moneyed capital, while subjecting national bank shares and state bank shares in the hands of individual holders to taxation upon their full actual value, less only a proportionate amount of the real estate owned by the bank. The court (speaking by Mr. Justice Matthews) in examining and

disposing of this contention, after reviewing the previous decisions of this court bearing upon the subject, proceeded to expound the true intent and meaning of § 5219 of the Revised Statutes as follows (p. 153):

"It follows, as a deduction from these decisions, that 'moneyed capital in the hands of individual citizens' does not necessarily embrace shares of stock held by them in all corporations whose capital is employed, according to their respective corporate powers and privileges, in business carried on for the pecuniary profit of shareholders, although shares in some corporations, according to the nature of their business, may be such moneyed capital. . . . The key to the proper interpretation of the act of Congress is its policy and purpose. The object of the law was to establish a system of national banking institutions, in order to provide a uniform and secure currency for the people, and to facilitate the operations of the Treasury of the United States. The capital of each of the banks in this system was to be furnished entirely by private individuals; but, for the protection of the government and the people, it was required that this capital, so far as it was the security for its circulating notes, should be invested in the bonds of the United States. These bonds were not subjects of taxation; and neither the banks themselves, nor their capital, however invested, nor the shares of stock therein held by individuals, could be taxed by the States in which they were located without the consent of Congress, being exempted from the power of the States in this respect, because these banks were means and agencies established by Congress in execution of the powers of the government of the United States. It was deemed consistent, however, with these national uses, and otherwise expedient, to grant to the States the authority to tax them within the limits of a rule prescribed by the law. In fixing those limits it became necessary to prohibit the States from imposing such a burden as would prevent

the capital of individuals from freely seeking investment in institutions which it was the express object of the law to establish and promote. The business of banking, including all the operations which distinguish it, might be carried on under state laws, either by corporations or private persons, and capital in the form of money might be invested and employed by individual citizens in many single and separate operations forming substantial parts of the business of banking. A tax upon the money of individuals, invested in the form of shares of stock in national banks, would diminish their value as an investment and drive the capital so invested from this employment, if at the same time similar investments and similar employments under the authority of state laws were exempt from an equal burden. The main purpose, therefore, of Congress, in fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy."

And again (p. 157): "The terms of the act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale

or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property. Accordingly, it was said in *Evansville Bank* v. *Britton*, 105 U. S. 322: 'The act of Congress does not make the tax on personal property the measure of the tax on the bank shares in the State, but the tax on moneyed capital in the hands of the individual citizens. Credits, money loaned at interest, and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly there may be said to be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. But the rights, credits, demands, and money at interest mentioned in the Indiana statute, from which *bona fide* debts may be deducted, all mean moneyed capital invested in that way.' This definition of moneyed capital in the hands of individuals seems to us to be the idea of the law, and ample enough to embrace and secure its whole purpose and policy."

The rule of construction thus laid down has been since consistently adhered to by this court; *Palmer* v. *McMahon*, 133 U. S. 660, 667; *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440, 454; *National Bank of Wellington* v. *Chapman*, 173 U. S. 205, 214; *Commercial Bank* v. *Chambers*, 182 U. S. 556, 560; *Jenkins* v. *Neff*, 186 U. S. 230.

According to this practical test, it seems to us that the scheme adopted by the State of New York for taxing shares in national banks cannot upon this record be denounced as violative of the limitations prescribed by § 5219, Rev. Stat. The holders of shares in state banks are subjected to precisely the same taxation, and with respect to other competitive institutions, such as trust companies, the franchise taxes imposed upon them apparently result in a substantially similar burden upon the

shareholder. Nor is there any discrimination in favor of savings banks. With respect to individual bankers, there is a difference, they being apparently subject to the local rate of taxation and entitled to the privilege of deduction for personal debts; but as they are taxable upon the amount of the capital invested in the banking business, which is normally only such as remains after the deduction of debts, it is not plain that they possess any valuable privilege of reducing the tax assessment by deducting debts. Foreign bankers are separately treated, for reasons sufficiently obvious; but no criticism is made of this. If there be other forms of "moneyed capital in the hands of individual citizens" of the State employed in a banking or quasi-banking business in competition with the national banks, and which are subjected to a more favorable rule of taxation, our attention is not called to them. Moreover, we agree with what was said by the Court of Appeals of New York in the *Feitner Case*, 191 N. Y. 88, 96, that "The State is not obliged to apply the same system to the taxation of national banks that it uses in the taxation of other property, provided no injustice, inequality or unfriendly discrimination is inflicted upon them." The court there took note of the fact that the flat rate of one per centum assessed upon national bank shares was more favorable to the relator than the general tax rate for the same year in the Borough of Manhattan, where the banks were located. That local rate (for the year 1901), was 2.31733 per centum. In the present case it is stipulated that the general tax rate locally applicable for the year 1908 to personal property, not including bank shares, was 1.61407 per centum. There are other considerations to be weighed in determining the actual burden of the tax, one of which is the mode of valuing bank shares—by adopting "book values"— which may be more or less favorable than the method adopted in valuing other kinds of personal property. As against the owner of bank shares

who, by alleging discrimination, assumes the burden of proving it, and who fails to show that the method of valuation is unfavorable to him, it may be assumed to be advantageous.

Plaintiff in error contends that the statement of the New York court that "When all things are considered, the rate, even without the privilege of deducting debts, is not greater than that applied to other moneyed capital in the hands of individual citizens of the state," is based upon no facts of experience or investigation, and amounts to a pure surmise. We do not think it is to be so lightly treated; but, if it were, it still remains to be said that it was incumbent upon plaintiff in error to show affirmatively that the New York taxation system discriminates in fact against the holders of shares in the national banks, before calling upon the courts to overthrow it; and no such showing has been made.

Nor can we say that the taxing scheme contravenes the limits prescribed by § 5219, Rev. Stat., merely because in individual cases it may result that an owner of shares of national bank stock, who is indebted, may sustain a heavier tax than another, likewise indebted, who has invested his money otherwise. Such is, in effect, the objection urged by plaintiff in error to the position taken by the Court of Appeals of New York. In other words, it is insisted that § 5219 deals with the burden of the tax upon the individual shareholder, rather than upon shareholders as a class. We think this argument is sufficiently answered by reference to the language of § 5219. The declaration is that "the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State." And this restriction is imposed upon a grant of authority to tax "all the shares of National banking associations located within the State." The language clearly prohibits discrimination against shareholders in national banks and in favor of the share-

holders of competing institutions, but it does not require that the scheme of taxation shall be so arranged that the burden shall fall upon each and every shareholder alike, without distinction arising from circumstances personal to the individual.

Judgment affirmed.

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE *v.* COMMONWEALTH OF KENTUCKY.

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

No. 26. Argued April 21, 1913.—Decided December 1, 1913.

A State may lay an excise or privilege tax on conducting commercial agencies unless it has the effect of directly violating a Federal right such as burdening interstate commerce.

Courts will not interfere with the exercise of the taxing power of a State on the ground that it violates the commerce clause of the Federal Constitution unless it appears that the burden is direct and substantial.

The license tax imposed by § 4224, Kentucky Statutes, 1909, on persons or corporations having representatives in the State engaged in the business of inquiring into and reporting upon the credit and standing of persons engaged in business in the State, is not unconstitutional as a burden on interstate commerce as applied to a non-resident engaged in publishing and distributing a selected list of guaranteed attorneys throughout the United States and having a representative in that State.

In this case *held*, that the service rendered in furnishing a list of guaranteed attorneys did not, except incidentally and fortuitously, affect interstate commerce and that it was within the power of the State to subject the business to a license tax. *Ficklen* v. *Shelby County*,

145 U. S. 1 followed. *International Textbook Co.* v. *Pigg*, 217 U. S. 91, distinguished.
139 Kentucky, 27, affirmed.

THE facts, which involve the constitutionality under the commerce clause of the Federal Constitution of a license tax imposed by § 4224 of the Kentucky statutes on commercial agencies, as applied to non-resident agencies, are stated in the opinion.

Mr. Allan D. Cole, with whom *Mr. W. T. Cole* was on the brief, for plaintiff in error.

Mr. James Garnett, Attorney General of the State of Kentucky, with whom *Mr. D. O. Myatt* was on the brief, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

Section 4224 of the Kentucky statutes (Carroll's ed. 1909) provides as follows:

"Before engaging in any occupation or selling any article named in this subdivision of article 12 of this act, the person desiring to do so shall procure license and pay the tax thereon as follows: . . . Commercial Agencies. Each and every person, partnership or corporation having representatives in this State, who engage in the business of inquiring into and reporting upon the credit and standing of persons engaged in business in this State, shall pay a license tax of one hundred dollars."

Plaintiff in error was indicted for failing to pay the license tax required by this provision, and, upon trial, was convicted and fined. The trial court, and, on appeal, the Court of Appeals of Kentucky (139 Kentucky 27, 39), overruled the contention that the business done by plaintiff in error was interstate commerce, within the meaning

of § 8 of Article I of the Federal Constitution, and for that reason not subject to the taxing power of the State.

The indictment was based upon the employment by plaintiff in error of a firm of attorneys at Maysville, Kentucky, as its representatives for inquiring into and reporting upon the credit and standing of persons engaged in business in that State. Plaintiff in error is a corporation of the State of Maryland, and is engaged in the publication and distribution of a list of selected attorneys in the United States. With the several attorneys upon the list plaintiff in error has an arrangement by which, in consideration of a fee paid by them to it, their names are inserted, and plaintiff in error guarantees to merchants and other persons sending claims to the attorneys that they will promptly and faithfully pay over all moneys collected. It furnishes the list of attorneys to business men and merchants throughout the United States. It provides the attorneys, and also the subscribers to or purchasers of the book, with blank forms upon which information respecting the business and financial standing of persons with whom a subscribing merchant desires to deal, may be furnished, and the attorneys, upon request, make replies to inquiries of this character when received from subscribing members. The attorneys do not make reports to the plaintiff in error, but send them direct to the person or firm making the inquiry. The attorneys are not the agents for either buyer or seller, in the sense that any goods are bought or sold through their instrumentality. Such was the business that was done by the Maysville attorneys, as representatives of the plaintiff in error. They did not sell or offer to sell any goods, nor deliver or offer to deliver any, and had nothing to do with buying, selling, transporting, delivering, or handling any merchandise. If any commercial transaction took place between the merchant whose standing was reported and the merchant to whom the report was sent, it was due entirely to ne-

gotiations between them, with which the reporting attorney had nothing to do. Correspondence in which the Maysville attorneys furnished non-resident dealers with information was only desultory and occasional, and was not followed by the making of any contract or the transportation of any goods between the parties to the correspondence.

The contention of plaintiff in error is that the Maysville attorneys and its other representatives of the same kind are, through the means of the system employed, acting in fact as agents of merchants engaged in interstate commerce to furnish them with information through the mails or by telephone or telegraph, as a result of which merchandise may be transported in interstate commerce, or withheld from such transportation, according to the character of the information reported; and that the service thus rendered is so connected with interstate commerce as to preclude the State of Kentucky from enacting a statute imposing a license tax whose tendency is or may be to prevent plaintiff in error from operating in that State.

The tax in question is an excise or privilege tax, and undoubtedly within the power of the State, unless it has the effect of directly burdening interstate commerce. It is only one of a great number of license taxes dealt with in a single section of the statute, and including a great variety of occupations. In the case of commercial agencies, the thing that is laid hold of as the subject of the excise is a business carried on within the State. If it have consequences extending beyond the borders of the State, and affecting interstate commerce, these are only incidental and fortuitous. The case is, we think, easily to be distinguished from *McCall* v. *California*, 136 U. S. 104, and *International Textbook Co.* v. *Pigg*, 217 U. S. 91, relied upon by plaintiff in error. In the *McCall Case* the local instrumentality that was held to be exempt from

interference by state taxation was an agent whose business was the direct solicitation of passengers for interstate journeys by rail. This was clearly within the reasoning and authority of *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, and other cases of that class. In the case of the International Textbook Company, there was a systematic and continuous interstate traffic in instruction papers, textbooks, and illustrative apparatus for courses of study pursued by means of correspondence, and this was held to be in its essential characteristics commerce among the States within the meaning of the Federal Constitution, and entitled thereunder to exemption from any direct burden imposed by state legislation.

In the present case it appears that there is not even systematic or continuous correspondence, much less interstate commerce resulting therefrom. There is no direct or necessary connection between the service performed by plaintiff in error through its representatives and the making or fulfillment of commercial contracts. The most that can be said is that inquiries received by those representatives in Kentucky with respect to the credit and standing of persons engaged in business in that State may be received from merchants without the State in anticipation of commercial transactions between them in the future. But, on the other hand, similar inquiries may be received from merchants in Kentucky and may have reference alone to intrastate and not to interstate transactions. Or, the information may be desired as an aid in extending or refusing to extend credit for past transactions, as well as to lay the basis for future dealings. The circumstance that in a substantial number of cases—even if in the greater number—there is correspondence, by letter or otherwise, from State to State, which may perhaps have an effect upon the conduct of other parties about entering or not entering into transactions of interstate commerce, is not controlling.

The present case has no close parallel in former decisions, but in some of its aspects it bears a resemblance to the case of a tax imposed upon a resident citizen engaged in a general business that happens to include a considerable share of interstate business; *Ficklen* v. *Shelby County*, 145 U. S. 1. Or the business of the live stock exchange that was under consideration in *Hopkins* v. *United States*, 171 U. S. 578, 592. Or the business of a cotton broker dealing in futures or options. *Ware* v. *Mobile County*, 209 U. S. 405.

To warrant interference with the exercise of the taxing power of a State on the ground that it obstructs or hampers interstate commerce, it must appear that the burden is direct and substantial. We do not think the present is such a case.

Judgment affirmed.

STRATTON'S INDEPENDENCE, LIMITED, *v.* HOWBERT, COLLECTOR OF INTERNAL REVENUE.

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

No. 457. Argued October 21, 1913.—Decided December 1, 1913.

The Corporation Tax Law of August 5, 1909, c. 6, 36 Stat. 11, 112, applies to mining corporations.

Income, within the meaning of the Corporation Tax Law of 1909, includes the proceeds of ores mined by a corporation from its own premises.

A corporation mining ores from its own premises is not entitled to deduct from the proceeds of the ores mined, by way of depreciation under the Corporation Tax Law of 1909, the difference between the gross proceeds of the sales of ores during the year and the moneys expended in extracting, mining, and marketing the ores.

The Corporation Tax Law of 1909, having been enacted before the ratification of the Sixteenth Amendment, was not in any proper sense an income tax law; but was an excise tax upon the conduct of business in a corporate capacity, measured by the income, with certain qualifications prescribed by the act itself.

The process of mining ores is, in a sense, equivalent in its results to a manufacturing process, and is "business" within the Corporation Tax Law of 1909.

Income may be defined as the gain derived from capital, from labor, or from both combined.

In fixing the income by which the excise on conducting business should be measured, Congress has power to fix the gross income even though such income involved a wasting of the capital as in mining ores.

The Corporation Tax Law deals with corporations engaged in actual business transactions and presumably conducted according to business principles.

Whatever may be the proper method of computing depreciation under the Corporation Tax Law by reason of taking ore from the premises of a mining corporation, the rules applicable to liability of trespassers for taking ore have only a modified application thereto.

Where the case is here under § 239, Judicial Code, and the whole record has not been sent up, this court, under Rule 37, deals with the facts as certified and not otherwise; under such circumstances it answers only the questions of law certified and does not go into questions of fact or of mixed law and fact.

THE facts, which involve the construction of the Corporation Tax Act of August 5, 1909, c. 6, 36 Stat. 11, 112, and its application to mining corporations are stated in the opinion.

Mr. William V. Hodges, with whom *Mr. A. A. Hoehling, Jr.*, and *Mr. John R. Van Derlip* were on the brief, for Stratton's Independence, Limited:

Mining corporations are not included in general classifications of corporations, as such classifications are used in legislation. The fact that the natural enjoyment of a mining estate results in the waste of the estate, and the fact that the true value thereof is impossible of determination, have caused such properties to be considered as anomalous, and to be so treated in the general incorpora-

tion laws of the mining States, and the decisions of the courts relating thereto, in the laws establishing systems of taxation in the mining States, and by the decisions under the Federal Bankruptcy Act of 1898.

Special provision for the taxation of mining claims has been made in the following instances: Colorado Rev. Stat., 1908, §§ 5617–5627, as amended, Laws 1913, pp. 565–567; Montana Rev. Pol. Code, 1907, §§ 2500, 2563–2571; Nevada Rev. Laws, 1912, §§ 3687–3709; Idaho Rev. Codes, §§ 1863–1872; Utah Comp. Laws, 1907, §§ 2504, 2566–2573; Washington Laws, 1897, p. 155; New Mexico Comp. Laws, 1897, §§ 1560, 1756; Wyoming Comp. Stat. 1910, §§ 2449–2454; Oklahoma Laws, 1907–1908, c. 71, Art. 2; Laws 1909, c. 38; Art. 2, Comp. Laws, §§ 7702, 7703, 7706.

The courts recognize the same necessity for special treatment of this class of properties. *Taxation of Mining Claims*, 9 Colorado, 635; *Pilgrim Mining Co.* v. *Teller County*, 32 Colorado, 334; *Iron Silver Co.* v. *Henderson*, 12 Colorado, 369; *Foster* v. *Hart Mining Co.*, 52 Colorado, 459.

In a number of mining States the statutes make express exceptions, applicable to mining corporations, in relation to the conveyance of mining properties in exchange for capital stock, regardless of the true value thereof, and for disposition of the same on liquidation. Colorado Rev. Stat., 1908, §§ 975–983; Montana Rev. Civ. Code, 1907, §§ 3824, 3860, 3896, 4403–4412; North Dakota Rev. Code, 1899, §§ 3154–3161; Nevada Rev. Laws, 1912, §§ 1200–1202, 1216–1218, 1330–1340; Kerr's California Civ. Code, §§ 586–590; Lord's Oregon Laws, §§ 6713–6715; Washington, Ballinger's Ann. Code, 1897, §§ 4280–4284; and see decisions demonstrating the necessity of special treatment of mining premises. *Leschen Rope Co.* v. *Allen*, 187 Fed. Rep. 977; *In re South Mountain Mining Co.*, 14 Fed. Rep. 347; *Ross* v. *Mining Co.*, 36 Minnesota,

38; *In re Elk Park Mining Co.*, 101 Fed. Rep. 422; *In re Rollins Mining Co.*, 102 Fed. Rep. 982; *In re Keystone Coal Co.*, 109 Fed. Rep. 872; *In re Woodside Coal Co.*, 105 Fed. Rep. 56.

In the administration of the Corporation Tax Law the Commissioner of Internal Revenue at first recognized that the provisions thereof do not fit the conditions of a mining corporation, and attempted to make over the act of Congress by administrative legislation. T. D. 1742, December 15, 1911.

Mining corporations are not engaged in carrying on business within the meaning of the act. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107.

Merely existing as a corporation and exercising corporate franchises does not necessarily amount to the "carrying on of business," within the intent of the act. *McCoach* v. *Minehill Ry. Co.*, 228 U. S. 295; *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187; see also *Clark* v. *Sidway*, 142 U. S. 682; *Farrand* v. *Gleason*, 56 Vermont, 633; *Jordan* v. *Soule*, 79 Maine, 590; *Harris* v. *de Raismes*, 38 Atl. Rep. (N. J.) 637; *Nash* v. *Mitchell*, 71 N. Y. 199; *Childers* v. *Neely*, 47 W. Va. 70; *Judge* v. *Braswell*, 13 Bush (Ky.), 67.

The application of the act to mining corporations results in a tax upon the capital itself, while, as applied to corporations having an income, as distinguished from capital, it does not result in a tax upon capital. This inequality of operation is inherently unjust. Laying aside all questions of constitutional limitations, the act should not be so construed as to accomplish this unjust result, if there be a fair and reasonable construction to be given the act which would avoid such an unjust result. *Washington &c. R. R. Co.* v. *Coeur d'Alene Ry. Co.*, 160 U. S. 77, 101; *Bate Refrigerator Co.* v. *Sulzberger*, 157 U. S. 1.

The proceeds of mining operations do not represent values created by, or incident to, the business activities

of such a corporation, and cannot be a bona fide measure of a tax leveled at such corporate business activities.

The measurement of the tax by the excess of the receipts for ore marketed over the cost of mining, extracting and marketing the same is equivalent to a tax upon the usual and ordinary incidents of ownership of such property—such a direct tax as is prohibited by the Constitution—and, further, is such a tax as Congress, by the provisions for the deduction of depreciation provided in the act, expressly intended to avoid. *Knowlton* v. *Moore*, 178 U. S. 41, 81–82.

The proceeds of mining operations result from a conversion of the capital represented by real estate into capital represented by cash, and are in no true sense income. The act cannot apply to a corporation which has no income.

The act ought not to be construed to include mining corporations unless it clearly appears that Congress intended to include them. Duties are never imposed on the citizen upon vague or doubtful interpretations. *Hartranft* v. *Wiegemann*, 121 U. S. 609, 616; *Pennsylvania Steel Co.* v. *New York City Rys. Co.*, 198 Fed. Rep. 774; *Taylor* v. *Treat*, 153 Fed. Rep. 656; *Parkview Building Assn.* v. *Herold*, 203 Fed. Rep. 876, 880.

The fact that mining corporations come within the letter of the act, if true, does not conclude the argument; for, if mining corporations be not within the spirit of the act, it is not applicable to them. *Brewer* v. *Blougher*, 14 Pet. 178; *United States* v. *Kirby*, 7 Wall. 482; *Heydenfeldt* v. *Daney Mining Co.*, 93 U. S. 634, 638; *Holy Trinity Church* v. *United States*, 143 U. S. 457.

The proceeds of ores mined by a corporation from its own premises are not income within the meaning of the aforementioned act of Congress. T. D. 1742.

For a correct definition of income, see *Cornell University* v. *Davenport*, 30 Hun, 177, 180; *Thorne* v. *de Breteuil*, 86 App. Div. 405, 416; *Wilcox* v. *County Commissioners*,

103 Massachusetts, 544; *Sargent Land Co.* v. *Von Baumbach*, in the District Court of the United States, for the District of Minnesota, decided in August, 1913; *Gray* v. *Darlington*, 15 Wall. 63; *Spooner* v. *Phillips*, 62 Connecticut, 62, 68; *Foster* v. *Hart Mining Co.*, 52 Colorado, 459, 467; *Smith* v. *Hooper*, 95 Maryland, 16, 26; *Vinton's Appeal*, 99 Pa. St. 434; *In re Mount Alto Iron Co.*, 174 Pa. St. 430; *Mercer* v. *Buchanan*, 132 Fed. Rep. 501, 507; *In re Armitage* (1893), 3 Ch. Div. 337, 347.

If the proceeds from ore sales are to be treated as income, a mining corporation is entitled to deduct the value of such ore in place and before it is mined as depreciation within the meaning of the Corporation Tax Law. *Leschen Rope Co.* v. *Allen*, 187 Fed. Rep. 977; *In re South Mountain Mining Co.*, 14 Fed. Rep. 327; *United States* v. *Nipissing Mines Co.*, 202 Fed. Rep. 803.

Mr. Assistant Attorney General Graham for Howbert, Collector:

The Corporation Tax Act applies to mining corporations and the proceeds of ore mined by a corporation on its own premises are income within the meaning of the act. *Gay* v. *Baltic Mining Co.*, 220 U. S. 107; *Mitchell* v. *Clark Iron Co.*, 220 U. S. 107.

This result also follows from the nature of capital and income in relation to mining companies. When capital is by labor changed from a fund into a flow, it necessarily changes its character from capital to income. In the case of a mine the mineral as it lies in the ground is capital, but when it is extracted, converted into ore, and sold the result is a flow, and income has accrued.

The rule that corporations whose capital is intended to provide a permanent means of carrying on business must first charge off depletion in plant or stock has no application to a corporation whose sole purpose is to invest its capital in a specific piece of property like a mine, and

afterwards to consume the property or extract its value at a profit. Morawetz, Corp., 2d ed., § 442.

All the judicial authority is to the same effect. *Clegg* v. *Rowland*, L. R. 3 Eq. 368; *Daly* v. *Beckett*, 24 Beav. 114; *Eley's Appeal*, 103 Pa. St. 300; *McClintock* v. *Dana*, 106 Pa. St. 386; *Raynolds* v. *Hanna*, 55 Fed. Rep. 783; *Shoemaker's Appeal*, 106 Pa. St. 392.

The payment of dividends by a mining company out of the proceeds of ore sold is not a payment out of capital. *Excelsior Water Co.* v. *Pierce*, 90 California, 131; *Lee* v. *Neuchatel Asphalte Co.*, 41 Ch. Div. 1.

The fact that the operation of a mine may decrease its valuation by exhaustion does not prevent the profits of the business of a mining corporation not devoted to dividends from being properly denominated surplus.

It has been expressly held by the Supreme Court of Pennsylvania that oil companies and mining companies have income within the meaning of an income-tax act. *Commonwealth* v. *The Ocean Oil Co.*, 59 Pa. St. 61; *Commonwealth* v. *Penn. Gas Coal Co.*, 62 Pa. St. 241.

A mining company is not entitled to deduct the value in place of ore mined during the year as depreciation within the meaning of the Corporation Tax Act. *Alianza Co.* v. *Bell* (1904), 2 K. B. 666; 1905, 1 K. B. 184; (1906) A. C. 18; *Coltness Iron Co.* v. *Black*, 6 App. Cas. 315.

Depreciation to be allowed as a deduction under the Corporation Tax Act must be actually paid, and not merely estimated.

For other authorities in support of these contentions see *London County Council* v. *The Attorney General*, 1901, A. C. 26; *People* v. *Roberts*, 156 N. Y. 585; *State* v. *Evans*, 99 Minnesota, 220; *Stevens* v. *Hudson's Bay Co.*, 101 Law Times, 96; *Waring* v. *Mayor &c. of Savannah*, 60 Georgia, 93.

By leave of court *Mr. William D. Guthrie* filed a brief as *amicus curiæ*.

By leave of court *Mr. Charles S. Thomas, Mr. W. H. Bryant, Mr. George L. Nye, Mr. William P. Malburn, Mr. William Story* and *Mr. William Story, Jr.*, also filed a brief as *amici curiæ*.

MR. JUSTICE PITNEY delivered the opinion of the court.

This action was brought in the District Court of the United States by Stratton's Independence, Limited, a British corporation carrying on mining operations in the State of Colorado upon mining lands owned by itself, to recover certain moneys paid under protest for taxes assessed and levied for the years 1909 and 1910 under the provisions of the Corporation Tax Act, being § 38 of the act of August 5, 1909 (36 Stat. 11, 112, c. 6). The case was tried upon an agreed statement of facts, from which it appears, as to the year 1909, that the company extracted from its lands during the year certain ores bearing gold and other precious metals, which were sold by it for sums largely in excess of the cost of mining, extracting, and marketing the same, that the gross sales amounted to $284,682.85, the cost of extracting, mining, and marketing amounted to $190,939.42, and "the value of said ores so extracted in the year 1909, when in place in said mine and before extraction thereof, was $93,743.43." With respect to the operations of the company for the year 1910, the agreed facts were practically the same, except as to dates and amounts. It does not appear that the so-called "value of the ore in place," or any other sum, was actually charged off upon the books of the company as depreciation. Upon this state of facts each party moved the court for a directed verdict, at the same time presenting for consideration certain questions of law, and among them the following:

"1. Is the value of the ore in place that was extracted

from the mining property of the plaintiff during the years in question properly allowable as depreciation in estimating the net income of the plaintiff subject to taxation under the Act of Congress of August 5, 1909 (36 Stat., ch. 6, p. 11)?

"2. Is the right to such credit affected by the fact that the plaintiff does not carry such items on its books in a depreciation account."

The court directed a verdict in favor of the plaintiff with respect to certain amounts that were undisputed and concerning which no question is now raised; but directed a verdict in favor of the defendant with respect to so much of the taxes paid as represented the value in place of the ore that was extracted during the years in question, overruling the contention that such value was properly allowable as depreciation in estimating the net income of the plaintiff. To this ruling proper exceptions were taken. The resulting judgment having been removed by writ of error to the Circuit Court of Appeals, that court certifies that the following questions of law are presented to it, the decision of which is indispensable to a determination of the cause, and upon which it therefore desires the instruction of this court:

"I. Does Section 38 of the Act of Congress, entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909 (36 Stat., p. 11), apply to mining corporations?

"II. Are the proceeds of ores mined by a corporation from its own premises income within the meaning of the aforementioned Act of Congress?

"III. If the proceeds from ore sales are to be treated as income, is such a corporation entitled to deduct the value of such ore in place and before it is mined as depreciation within the meaning of Section 38 of said Act of Congress?"

The provisions of § 38 are set forth in the margin.[1]

The principal grounds upon which it is contended that the questions ought to receive answers favorable to the company are expressed in various forms, viz., that mining corporations are *sui generis*, because the

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[1] SEC. 38. That *every corporation*, joint stock company or association, *organized for profit and having a capital stock represented by shares*, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter *organized under the laws of any foreign country and engaged in business in any State or Territory of the United States* or in Alaska or in the District of Columbia, *shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation*, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; or *if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States*, and its Territories, Alaska, and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; *provided, however*, that nothing in this section contained shall apply to labor, agricultural or horticultural organizations, or to fraternal beneficiary societies, orders, or associations operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders or associations, and dependents of such members, nor to domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual.

Second. *Such net income shall be ascertained by deducting from the gross amount of the income of such corporation*, joint stock company or association, or insurance company, *received within the year from all*

natural enjoyment of mining lands necessarily results in the waste of the estate; that the true value thereof is impossible of accurate determination, and hence mining corporations are not included in general classifications of corporations as such classifications are employed in other legislation; that the provisions of § 38 do not fit

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sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; (second) *all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any,* and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof, or imposed by the government of any foreign country as a condition to carrying on business therein; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; *provided,* that *in the case of a corporation,* joint stock company or association, or insurance company, *organized under the laws of a foreign country, such net income shall be ascertained by deducting from the gross amount of its income received within the year from business transacted and capital invested within the United States* and any of its Territories, Alaska, and the District of Columbia, (first) *all the ordinary and necessary expenses actually paid within the year out of earnings* in the maintenance and operation of its business and property within the United States and its Territories, Alaska, and the District of Columbia, including all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property; (second) *all losses actually sustained within the year in business conducted by it within the*

the conditions of a mining corporation; that such corporations are not in truth engaged in "carrying on business" within the meaning of the Act; that the application of the Act to them results in a tax upon the capital, while as applied to other corporations it does not result in such a tax, the result being an inequality of operation that is

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United States or its Territories, Alaska, or the District of Columbia not compensated by insurance or otherwise, *including a reasonable allowance for depreciation of property, if any*, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness, not exceeding the proportion of its paid-up capital stock outstanding at the close of the year which the gross amount of its income for the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia bears to the gross amount of its income derived from all sources within and without the United States; (fourth) the sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, and insurance companies, subject to the tax hereby imposed. In the case of assessment insurance companies the actual deposit of sums with state or territorial officers, pursuant to law, as additions to guaranty or reserve funds shall be treated as being payments required by law to reserve funds.

Third. There shall be deducted from the amount of the net income of each of such corporations, joint stock companies or associations, or insurance companies, ascertained as provided in the foregoing paragraphs of this section, the sum of five thousand dollars, and said tax shall be computed upon the remainder of said net income of such corporation, joint stock company or association, or insurance company, for the year ending December 31, 1909, and for each calendar year thereafter; and *on or before the first day of March, 1910, and the first day of March in each year thereafter, a true and accurate return under oath or affirmation of its president, vice-president, or other principal officer, and its treasurer or assistant treasurer, shall be made by each of the corporations,* joint stock companies or associations, and insurance companies, *subject*

inherently unjust; that the proceeds of mining operations do not represent values created by or incident to the business activities of such a corporation, and therefore cannot be a *bona fide* measure of a tax leveled at such corporate business activities; that the proceeds of mining

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to the tax imposed by this section, to the collector of internal revenue for the district in which such corporation, joint stock company or association, or insurance company, has its principal place of business, or, *in the case of a corporation*, joint stock company or association, or insurance company, *organized under the laws of a foreign country, in the place where its principal business is carried on within the United States*, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth, (first) the total amount of the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year; (second) the total amount of the bonded and other indebtedness of such corporation, joint stock company or association, or insurance company at the close of the year; (*third*) *the gross amount of the income of such corporation*, joint stock company or association, or insurance company, received during such year *from all sources, and if organized under the laws of a foreign country the gross amount of its income received within the year from business transacted and capital invested within the United States* and any of its Territories, Alaska, and the District of Columbia; also the amount received by such corporation, joint stock company or association, or insurance company, within the year by way of dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed by this section; (fourth) the total amount of all the ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of the business and properties of such corporation, joint stock company or association, or insurance company, within the year, stating separately all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property, and if organized under the laws of a foreign country the amount so paid in the maintenance and operation of its business within the United States and its Territories, Alaska, and the District of Columbia; (*fifth*) *the total amount of all losses actually sustained during the year* and not compensated by insurance or otherwise, *stating separately any amounts allowed for depreciation of property*, and in the case of insurance companies the sums other than

operations result from a conversion of the capital represented by real estate into capital represented by cash, and are in no true sense income; and that to measure the tax by the excess of receipts for ore marketed over the cost of mining, extracting and marketing the same, is

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dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; *and in the case of a corporation,* joint stock company or association, or insurance company, *organized under the laws of a foreign country, all losses actually sustained by it during the year in business conducted by it within the United States* or its Territories, Alaska, and the District of Columbia, not compensated by insurance or otherwise, *stating separately any amounts allowed for depreciation of property,* and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve fund; (sixth) the amount of interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, stating separately all interest paid by it within the year on deposits; or in case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, interest so paid on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the proportion of its paid-up capital stock outstanding at the close of the year, which the gross amount of its income for the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia, bears to the gross amount of its income derived from all sources within and without the United States; (seventh) the amount paid by it within the year for taxes imposed under the authority of the United States or any State or Territory thereof, and separately the amount so paid by it for taxes imposed by the government of any foreign country as a condition to carrying on business therein; (eighth) the net income of such corporation, joint stock company or association, or insurance company, after making the deductions in this section authorized. All such returns shall as received be transmitted forthwith by the collector to the Commissioner of Internal Revenue.

equivalent to a direct tax upon the property, and hence unconstitutional. Next, assuming the proceeds of ore are to be treated as income within the meaning of the Act, it is yet insisted that such proceeds result solely from the depletion of capital, and are therefore deductible as depreciation under the provisions of the Act.

We do not think it necessary to follow the argument through all its refinements. The pith of it is that mining corporations engaged solely in mining upon their own premises have but one kind of assets, and that in the ordinary use of them the enjoyment of the assets and the wasting thereof are in direct proportion, and proceed *pari passu;* and hence that a mining corporation is not engaged in business, properly speaking, but is merely occupied in converting its capital assets from one form into another, and that a tax upon the doing of such a business, where the tax is measured by the value of the property owned by the corporation, would be in excess of the constitutional limitations that existed at the time of the passage of the act of 1909, as laid down in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; *S. C.*, 158 U. S. 601.

The peculiar character of mining property is sufficiently obvious. Prior to development it may present to the naked eye a mere tract of land with barren surface, and of no practical value except for what may be found beneath. Then follow excavation, discovery, development, extraction of ores, resulting eventually, if the process be thorough, in the complete exhaustion of the mineral contents so far as they are worth removing. Theoretically, and according to the argument, the entire value of the mine, as ultimately developed, existed from the beginning. Practically, however, and from the commercial standpoint, the value—that is, the exchangeable or market value—depends upon different considerations. Beginning from little, when the existence, character and extent of

the ore deposits are problematical, it may increase steadily or rapidly so long as discovery and development outrun depletion, and the wiping out of the value by the practical exhaustion of the mine may be deferred for a long term of years. While not ignoring the importance of such considerations, we do not think they afford the sole test for determining the legislative intent.

As has been repeatedly remarked, the Corporation Tax Act of 1909 was not intended to be and is not in any proper sense an income tax law. This court had decided in the *Pollock Case* that the income tax law of 1894 amounted in effect to a direct tax upon property, and was invalid because not apportioned according to population as prescribed by the Constitution. The act of 1909 avoided this difficulty by imposing not an income tax, but an excise tax upon the conduct of business in a corporate capacity, measuring, however, the amount of tax by the income of the corporation, with certain qualifications prescribed by the Act itself. *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107; *McCoach* v. *Minehill Co.*, 228 U. S. 295; *United States* v. *Whitridge*, (decided at this term, *ante*, p. 144).

For this and other obvious reasons we are little aided by a discussion of theoretical distinctions between capital and income. Such refinements can hardly be deemed to have entered into the legislative purpose. Of course, if it were demonstrable that to read the Act according to its letter would render it unconstitutional, or glaringly unequal, or palpably unjust, a reasonable ground would exist for construing it according to its spirit rather than its letter. But in our opinion the Act is not fairly open to this criticism. It is not correct, from either the theoretical or the practical standpoint, to say that a mining corporation is not engaged in business, but is merely occupied in converting its capital assets from one form into another. The sale outright of a mining property might be fairly described as a mere conversion of the capital from land

into money. But when a company is digging pits, sinking shafts, tunneling, drifting, stoping, drilling, blasting, and hoisting ores, it is employing capital and labor in transmuting a part of the realty into personalty, and putting it into marketable form. The very process of mining is, in a sense, equivalent in its results to a manufacturing process. And, however the operation shall be described, the transaction is indubitably "business" within the fair meaning of the act of 1909; and the gains derived from it are properly and strictly the income from that business; for "income" may be defined as the gain derived from capital, from labor, or from both combined, and here we have combined operations of capital and labor. As to the alleged inequality of operation between mining corporations and others, it is of course true that the revenues derived from the working of mines result to some extent in the exhaustion of the capital. But the same is true of the earnings of the human brain and hand when unaided by capital, yet such earnings are commonly dealt with in legislation as income. So it may be said of many manufacturing corporations that are clearly subject to the act of 1909, especially of those that have to do with the production of patented articles; although it may be foretold from the beginning that the manufacture will be profitable only for a limited time, at the end of which the capital value of the plant must be subject to material depletion, the annual gains of such corporations are certainly to be taken as income for the purpose of measuring the amount of the tax.

It seems to us that the first two questions certified must be answered in the affirmative principally for two reasons. First, because mining corporations are within the general description of § 38, which comprises "*every corporation*, joint stock company or association *organized for profit and having a capital stock represented by shares*, . . . and *engaged in business* in any state or territory of the United

States;" and, secondly, because the Act *specifies those classes of corporations that are to be exempt* from its operation, and mining corporations are not among them. Those exempted are labor, agricultural or horticultural organizations, fraternal beneficiary societies, orders or associations operating under the lodge system, domestic building and loan associations, corporations and associations organized and operated for religious, charitable, or educational purposes, etc. Moreover, the section imposes "a special excise tax with respect to the carrying on or doing business by such corporation," etc. That mining companies are doing business, within the fair intent and meaning of this clause, seems to us entirely plain, for reasons already given. The conduct of such business results in profit, for it cannot be seriously contended that the ores are not worth more at the mine mouth than they were worth in the ground, *plus* the cost of mining. Corporations engaged in such business share in the benefits of the Federal Government, and ought as reasonably to contribute to the support of that Government as corporations that conduct other kinds of profitable business.

As to what should be deemed "income" within the meaning of § 38, it of course need not be such an income as would have been taxable as such, for at that time (the Sixteenth Amendment not having been as yet ratified), income was not taxable as such by Congress without apportionment according to population, and this tax was not so apportioned. Evidently Congress adopted the income as the measure of the tax to be imposed with respect to the doing of business in corporate form because it desired that the excise should be imposed, approximately at least, with regard to the amount of benefit presumably derived by such corporations from the current operations of the Government. In *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 165, it was held that Congress in exercising the right to tax a legitimate subject of taxation as a franchise

or privilege, was not debarred by the Constitution from measuring the taxation by the total income, although derived in part from property which, considered by itself, was not taxable. It was reasonable that Congress should fix upon gross income, without distinction as to source, as a convenient and sufficiently accurate index of the importance of the business transacted. And from this point of view, it makes little difference that the income may arise from a business that theoretically or practically involves a wasting of capital.

Moreover, Congress evidently intended to adopt a measure of the tax that should be easy of ascertainment and simply and readily applied in practice. The Act prescribed that the tax should be "equivalent to one per centum upon the entire net income over and above $5,000 received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations," etc., or, with respect to foreign corporations, "upon the amount of net income over and above $5,000 received by it from business transacted and capital invested within the United States," etc. And the net income was to be ascertained by taking, first, the "gross amount of the income of such corporation . . . received within the year from all sources," or, in the case of foreign corporations, "from business transacted and capital invested within," etc., and deducting therefrom losses sustained, interest paid, etc. And the return was to be made under oath by the president and treasurer, or other officers having like duties, indicating in the clearest manner that it was to set forth *data* that with proper accounting would appear upon the books of the corporation. We have no difficulty, therefore, in concluding that the proceeds of ores mined by a corporation from its own premises are to be taken as a part of the gross income of such corporation. Congress no doubt contemplated that such corporations, amongst others, were doing business

with a wasting capital, and for such wastage they made due provision in declaring that from the gross income there should be deducted (*inter alia*) "all losses actually sustained within the year," including "a reasonable allowance for depreciation of property, if any," etc.

This brings us to the third question, which is whether such a mining corporation is entitled to deduct the value of ore in place and before it is mined, as depreciation within the meaning of § 38. This question, however, is to be read in the light of the issue that is presented to the Circuit Court of Appeals for determination, as recited in the certificate. From that certificate it appears that the case was submitted to the trial court and a verdict directed upon an agreed statement of facts, and in that statement the gross proceeds of the sale of the ores during the year were diminished by the moneys expended in extracting, mining, and marketing the ores, and the precise difference was taken to be the value of the ores when in place in the mine.

That we do not misconstrue the certificate, and that, on the contrary, the parties advisedly adopted this definition of "value of the ore in place," is apparent not only from the form of the agreed statement of facts, but from the arguments presented here in behalf of the plaintiff. The contention is that if the proceeds of ore sales are to be treated as income, the value of the ore in place and before it is mined is to be deducted as depreciation, and that such value is to be arrived at by the process indicated. Briefs submitted in behalf of *amici curiæ* have suggested other modes for determining depreciation; but plaintiff stands squarely upon the ground indicated by the certificate, as the following excerpts from the brief will show: "Assuming, then, that the proceeds of ore are to be treated as income within the meaning of the Act, we submit that *such proceeds result solely from depletion of capital*, and are therefore deductible as depreciation under the

provisions [of the Act] set out above. . . . And we contend that if a part of the capital assets are removed and sold, the property, as it originally stood, is actually depreciated in value to the exact extent of such removal. As an actual matter of experience, the original cost of the property must, from its very nature, be highly speculative. The values in the property are invisible, and impossible of determination. They may be worth many times the cost, or they may be worth nothing. . . . The value of the ore in sight does represent a part of the capital, but there is no warrant for limiting it to this amount, nor is there any warrant for limiting the value of ore bodies thereafter discovered in any case to a standard fixed before their discovery, and therefore, of necessity, purely conjectural. . . . The true capital of a mining corporation is the true value of the minerals within the limits of its properties, irrespective of developed ore bodies or those known to exist at any one moment. Investigation or development may demonstrate the existence of values theretofore unknown, but this results in no addition to the actual capital. It remains the same as it was before. . . ." And again, "With every dollar's worth removed, the land from which it is taken contains that much less of value; the corporation owns precisely that much less real property than it possessed before; for every dollar of cash received it relinquishes an equivalent amount of ore in place, and makes no gain or profit by the exchange."

Reading these extracts in connection with what is contended respecting the first and second questions—to the effect that mining corporations are not "doing business," but are merely converting their capital assets from one form into another—it is clear that a definition of the "value of the ore in place" has been intentionally adopted that excludes all allowance of profit upon the process of mining, and attributes the entire profit upon the mining

operations to the mine itself. In short, the parties propose to estimate the depreciation of a mining property attributable to the extraction of ores according to principles that would be applicable if the ores had been removed by a trespasser.

It is at the same time obvious that any method of stating the account that excludes all element of gain from the process of mining must, through one process or another, exempt mining companies from liability to tax under the act of 1909 with respect to their mining operations. And so, an affirmative answer to the third question as propounded would be the same in effect as an affirmative answer to the first or the second. For it is a matter of little or no moment whether it is to be said (a) that mining corporations are not "engaged in business" at all, or (b) that they are engaged in business but the proceeds of ore mined are not income, or (c) that such proceeds are income, but that there must be allowed as depreciation all that part of the proceeds which remains after paying the bare outlays of the business. In either case mining corporations would be exempt from the tax.

In our opinion, there are at least two insuperable obstacles in the way of returning an affirmative answer to the third question as certified.

In the first place, it is fallacious to say that, whatever may have been the original cost of a mining property or the cost of developing it, if in fact it afterwards yield ores aggregating many times its original cost or market value, this result merely proves and at the same time measures the intrinsic value that existed from the beginning. We are here seeking the correct interpretation and construction of an act of legislation that was, at least, designed to furnish a practicable mode of raising revenue for the support of the Government, and to do this in part by imposing annual taxes upon corporations organized for profit and by measuring the amount of the contribution

to be required from each corporation according to its annual income. The Act deals with corporations engaged in actual business transactions and presumably conducted according to ordinary business principles. It was of course contemplated that the income might be derived from the employment of property in business, and that this property might become more or less exhausted in the process; and because of this, a reasonable allowance was to be made for depreciation of it, if any. But plainly, we think, the valuation of the property and the amount of the depreciation were to be determined not upon the basis of latent and occult intrinsic values, but upon considerations that affect market value and have their influence upon men of affairs charged with the management of the business and accounting of corporations that are organized for profit and are engaged in business for purposes of profit.

And, secondly, assuming the depletion of the mineral stock is an element to be considered in determining the reasonable depreciation that is to be treated as a loss in the ascertainment of the net income of a mining company under the Act, we deem it quite inadmissible to estimate such depletion as if it had been done by a trespasser, to whom all profit is denied.

With respect to the proper measure of damages where ore has been unlawfully mined by one person upon the land of another, there is much conflict of authority. Different modes of determining the damages have been resorted to, dependent sometimes upon the form of the action, whether trespass or trover; sometimes upon whether the case arose at law or in equity; and often upon whether the trespass was willful or inadvertent. See *Wooden-ware Co.* v. *United States*, 106 U. S. 432, and cases cited; *Benson Mining Co.* v. *Alta Mining Co.*, 145 U. S. 428, 434; *Pine River Logging Co.* v. *United States*, 186 U. S. 279, 293; *United States* v. *St. Anthony R. Co.*, 192 U. S. 524, 542; *Martin* v. *Porter* (1839), 5 M. & W. 351,

352; *Jegon* v. *Vivian* (1871), L. R. 6 Ch. 742, 760; 40 L. J. Ch. 389; 19 W. R. 365; *Livingstone* v. *Rawyards Coal Co.* (1880), 5 App. Cas. 25, 34; 42 L. T., N. S., 334; *Coal Creek M. & M. Co.* v. *Moses*, 15 Lea (Tenn.), 300; 54 Am. Rep. 415; *Winchester* v. *Craig*, 33 Michigan, 205. See also English and American Notes to *Martin* v. *Porter*, and *Jegon* v. *Vivian*, 17 Eng. Rul. Cas. 873, 876, etc. We are not at this time concerned with this vexed question, beyond saying that the rules applicable to trespassers can have only a modified application to the case of a mine owner conducting mining operations upon its own lands, where the question is,—What is the income derived from the business?—and the incidental question,—What is the reasonable depreciation, if any, of the mining property?

What has been said necessitates a negative answer to the third question as certified. And we shall not go further into the question of depreciation. The case comes here under § 239, Judicial Code (derived from § 6 of the Evarts Act, March 3, 1891, 26 Stat. 826, 828, c. 517). It is established that in the exercise of this jurisdiction this court, unless it see occasion to require the whole record to be sent up for consideration, is to make answer respecting the several propositions of law that are certified, and is not to go into questions of fact, or of mixed law and fact. Our Rule 37 requires that the certificate shall contain a proper statement of the facts upon which the questions of law arise, and we deal with the facts as thus certified, and not otherwise. *Graver* v. *Faurot*, 162 U. S. 435, 437; *Cross* v. *Evans*, 167 U. S. 60, 63; *United States* v. *Union Pacific Railway*, 168 U. S. 505, 512; *Emsheimer* v. *New Orleans*, 186 U. S. 33; *Cincinnati, Hamilton Railroad* v. *McKeen*, 149 U. S. 259.

It would therefore be improper for us at this time to enter into the question whether the clause, "a reasonable allowance for depreciation of property, if any" calls for an allowance on that account in making up the tax, where

no depreciation is charged in practical bookkeeping; or the question whether depreciation, when allowable, may properly be based upon the depletion of the ore supply estimated otherwise than in the mode shown by the agreed statement of facts herein; for to do this would be to attribute a different meaning to the term "value of the ore in place" than the parties have put upon it, and to instruct the Circuit Court of Appeals respecting a question about which instruction has not been requested, and concerning which it does not even appear that any issue is depending before that court.

The first and second questions certified will be answered in the affirmative; and the third question will be answered in the negative.

MR. CHIEF JUSTICE WHITE, MR. JUSTICE MCKENNA, and MR. JUSTICE HOLMES dissent with respect to the answer made to the third question.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

No. 571. Argued October 29, 30, 1913.—Decided December 1, 1913.

The constitutional validity of the provisions in § 20 of the Act to Regulate Commerce of February 4, 1887, c. 104, 24 Stat. 379, as amended by the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, giving the Interstate Commerce Commission authority to prescribe the methods by which interstate carriers shall keep accounts, has already been sustained by this court. *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194.

The authority conferred upon the Commerce Court by the act of June 18, 1910, c. 309, 36 Stat. 539 (Judicial Code, § 207), with respect to enjoining or setting aside the order of the Interstate Commerce Commission, like the authority previously exercised by the Federal Circuit Courts, was confined to determining whether there had been violations of the Constitution, or of the power conferred by statute, or an exercise of power so arbitrary as virtually to transcend the authority conferred.

In enacting the Hepburn Act amending § 20 of the Act to Regulate Commerce, Congress recognized the essential distinctions between property accounts and operating accounts, and between capital and earnings, and that while prior to that time the practice of different carriers varied, uniformity in regard to the keeping of accounts was essential in the future for proper supervision and regulation.

Interstate Commerce Commission v. *Goodrich Transit Co.*, 224 U. S. 194, followed to the effect that there is no unconstitutional delegation of legislative power by Congress to the Commission in giving it authority to establish methods of accounts by the provisions of the Hepburn Act amending § 20 of the Act to Regulate Commerce in that respect.

The classification of accounts adopted by the Interstate Commerce Commission in regard to additions and betterments and to property and operating accounts are not so arbitrary or so entirely at odds with fundamental principles of correct accounting as to amount to an unconstitutional abuse of power.

In this case the carrier was not deprived of any of its property without due process of law because under the Commission's system of accounting it was permitted to carry into its property account only the excess of the full cost of improvements made off the line after deducting the estimated replacement cost of the abandoned portions of the track or because it was required to charge to operating expenses the estimated cost of replacing the abandoned sections.

Where, as in this case, all classes of stockholders of a carrier, whose dividends are affected by the method of charging betterments and repairs, are not before the court, their rights cannot be determined in a suit between the carrier and the Commission in regard to such methods of accounts.

Semble, that requiring stockholders to forego dividends for a period so that the amount not divided be spent in bettering the condition of the property, thus giving them greater security for dividends in the future, does not amount to an unlawful taking of property within the meaning of the Fifth Amendment.

A carrier is not relieved from complying with regulations properly

made by the Interstate Commerce Commission because of agreements previously entered into; whatever had been done was subject to being displaced by the Commission under the powers conferred upon it by Congress.

The power given to the Commission by § 20 of the Act to Regulate Commerce, as amended by the Hepburn Act, to require the carrier to keep accounts as prescribed by the Commission, does not impose obligations upon the carrier as to the use of the proceeds of bonds but simply prevents such proceeds from being used in any manner without the fact appearing in the accounts.

Although the contention of the carrier that abandonments ought to be charged to profit and loss rather than to operating expenses may have weight, this court will not reverse the order of the Commission requiring them to be otherwise charged on the ground that it was an abuse of power.

Where it appears that the Commission has acted fairly within the grant of power constitutionally conferred upon it by Congress its orders are not open to judicial review.

204 Fed. Rep. 641, affirmed.

THIS is an appeal from a decree of the Commerce Court dismissing appellant's petition in an action brought to have certain regulations of the Interstate Commerce Commission relative to the method of keeping the accounts of carriers declared invalid and to enjoin the enforcement thereof. 204 Fed. Rep. 641. The regulations are contained in the "Classification of Expenditures for Additions and Betterments of Steam Roads," effective July 1st, 1909, and the First Revised Issue thereof, effective July 1, 1910.

The facts as set forth in appellant's brief may be summarized as follows:

Appellant is engaged in interstate commerce. Its main line is about 786 miles in length and extends from Kansas City to Port Arthur, on the Gulf of Mexico, traversing the States of Missouri, Kansas, Oklahoma, Arkansas, Louisiana and Texas. The road was built years ago, when the country was heavily timbered and sparsely settled, and the traffic was correspondingly small. The traffic would not

then support, nor could capital be obtained for, an expensively constructed road; and in consonance with the general practice in the development of the country, the road was built with rather heavy ruling grades. But it was not defectively or improperly constructed or located; it had substantially the same grades as other roads then constructed in the west; and it was adequate to serve the then existing needs of the country. A railroad with heavy grades is, of course, more cheaply constructed than a road of low grades. And a road of heavy grades is generally adequate in a new country, where the volume of traffic offered is small, the train-loads light, and the trains few.

The ruling maximum grade of appellant's line as originally constructed was 1 per cent.; and in the mountain district as high as 1.35 per cent. The evidence is undisputed that it was properly located, well constructed, and ample for the needs of the country. In the course of time, with the development of the country, and the resultant increase in traffic, whereby the limit of the road's capacity was being approached, the conditions warranted and rendered desirable such additions or improvements as would enlarge the road's capacity, and permit traffic to be moved more rapidly and economically.

Two methods of increasing the capacity of the road were presented: one by double-tracking, the other by lowering the grades and thus permitting traffic to be moved more rapidly. The road was in active competition with powerful rivals operating in the same general territory; among them, the Southern Pacific, the Missouri, Kansas and Texas, the Missouri Pacific, the St. Louis Southwestern, the Texas and Pacific, the St. Louis and San Francisco, the Atchison, Topeka and Sante Fe, and the Rock Island. The character of the road as a trunk line, having a long average haul and the prevalence of low class traffic,—timber, coal, oil and like commodities—necessarily entailed a low average freight rate; its average rates per ton

per mile being lower than those of any of its competitors above named.

Under these conditions the management found that the most desirable plan was to lower the grades of the road, and thus to increase its capacity, procure economy in operation and render better service to the public. Two methods of reducing the grades at various points along the line were presented: one by raising or lowering the roadbed on the existing right of way; the other by the construction of short sections of new road in substitution for portions of the road, in instances where the same result could be thus obtained at less cost. The program of improvement contemplated, therefore, not only many changes on the original right of way, but also a number of changes by the substitution of short sections of road on new ground, where that method was more economical.

The first six sections of the road where new locations were utilized are covered by the petition herein. Other similar changes are being made as the work proceeds, which will cover several years and is estimated to cost $3,000,000. The road at these six points was in no way worn out, was fully maintained, and was capable of performing for an indefinite term the function for which it was originally constructed. All of these changes are being made for the purpose of increasing the capacity of the line, of securing economy in operation, and of rendering improved service to the public.

At the six sections of the road in question it was found by the estimates of the engineers that the cost of securing the required gradient upon the original roadbed would be $1,230,318.99; but that the same result could be obtained by means of re-locations upon adjacent land for a net expenditure of $629,399.74.

The actual expenditure on these six new locations, as ascertained on completion of the work (after the filing of the petition) was $763,798; and the testimony shows

that had the work been done on the original roadbed the cost would have been increased over the estimates in an equal or greater proportion; the variation being due to increase in the cost of labor, materials, etc. For present purposes, the figures set forth in the petition are adopted.

The grade revisions at the six sections of line involved herein having been completed by removing the tracks to adjacent parcels of ground, which were procured and substituted for the original parcels, the use of the latter parcels was, of course, discontinued.

The expenditure required to improve the property by bringing it to the desired grade of five-tenths of one per cent. being deemed a capital expenditure, appellant's directors determined to finance the work by applying to it the proceeds of a bond issue. It is claimed to have been necessary to finance the improvements in this way if they were to be made at all, because the appellant did not have current earnings available for these improvements, and could not have financed its program, involving the revision of about forty-one per cent. of the entire line and an ultimate expenditure of several million dollars, in any other way than by raising capital for that purpose through the issuance of bonds.

Appellant, in order to raise funds for this and certain other purposes, made an issue of bonds secured by a second mortgage on its property. This was duly authorized by the directors and stockholders in the month of June, 1909; a portion of the bonds was sold and an initial sum of $1,250,000 thus obtained became applicable to the improvements referred to in the petition and other improvements in the grade. Additional bonds have since been issued as the work has proceeded.

In 1907, appellant began the payment of dividends at the rate of 4% per annum upon its preferred stock, the total amount of which was $21,000,000, and has continued to pay such dividends each year until the present time.

These dividends are non-cumulative and are payable only out of the earnings of the current year. The fact that appellant had paid its dividends for several years was a factor in its credit. Preferred dividends having been established, it is claimed that their discontinuance would have affected the credit of the road so seriously that it would have been unable except on prohibitive terms to dispose of additional bonds as further money was required from time to time during the progress of the work. It is further claimed that appellant was able to finance its improvements only out of the proceeds of a bond issue; and that it could not have financed them at all except by adopting the economical method of making a considerable part of the grade reductions by means of changes off the line of the right of way.

Appellant having paid the cost of the six improvements out of its issue of bonds, was confronted with the regulations of the Commission bearing on the method of recording the transaction in its books of account. Except for those regulations, it is said that the full cost of the improvements would have been charged to the account of "Additions and Betterments"—a subdivision of the property accounts—and credited to the proceeds of the bonds, because that sum had been expended for additions and betterments, and because the bonds had supplied the funds. In the balance sheet the "Assets" would have shown an increment of approximately $629,399 under the subdivision of Additions and Betterments, and, *per contra*, the "Liabilities" would have shown a corresponding increase under the subdivision of Bonds.

Under the regulations in question, it was found that if the improvements had been made on the original right of way, the entries would have been made as above indicated. But, with respect to improvements made off the right of way, different treatment was prescribed. Here the appellant was not permitted to carry into its property

accounts the full cost of the improvement, but was required first to deduct from the cost thereof the estimated replacement cost of the portions of track no longer used, the difference only being carried into the property accounts, and a sum equal to the estimated cost of replacing the old sections of track being charged to the operating expenses of that year.

The text of the Classification of Additions and Betterments relative to revisions made on the original line is as follows: "Grade Revisions.—(Reduction of grades by cutting down summits and raising sags without materially changing the alinement). The amount to be charged to this account is the cost of additional grading done, including as a portion of such cost the rent and cost of operation of steam shovels and work trains; building temporary tracks for steam shovels and grading outfits; tools, etc., used in the work; raising or lowering existing bridges; increasing the length of culverts and replacing riprap at culvert ends; changing grade crossings for farm or country roads, highways, and streets, including crossing gates, highway crossing alarms, and watch houses."

Relative to changes off the original line the regulation is as follows: "Changes of Line.—(Construction of new lines for the purpose of improving grade or alinement). The amount to be charged to this account is the difference between the cost of the new line and the cost of replacing in kind the line abandoned, exclusive of right of way."

The General Instructions contained in the Classification supplement these rules and prescribe charges to Operating Expenses as follows:

"5. In case it becomes necessary directly in connection with betterment or improvement work to abandon any property, the cost of replacing the abandoned property in kind, plus the cost of removal but less the value of salvage, should be charged to the appropriate accounts under Operating Expenses. In case, however, the amount so

chargeable is large, and its inclusion in a carrier's operating expenses for a single year would unduly burden the operating expense accounts for that year, the carrier may, if so authorized upon application to the Interstate Commerce Commission, charge such cost to the Property Abandoned account provided in the Form of General Balance Sheet Statement, or to the reserve account mentioned in paragraph 6.

"6. When property is abandoned and not replaced, the original cost (estimated, if not known) should be credited to the appropriate additions and betterments accounts and charged, less salvage, to Profit and Loss Account, to which should also be charged all incidental expenses directly connected with the abandonment. If so authorized upon application to the Interstate Commerce Commission, however, a carrier may set up depreciation accounts under 'Maintenance of Way and Structures' for the purpose of creating a reserve to which (instead of Profit and Loss) should be charged the original cost, less salvage, of the property (other than land or equipment) abandoned, and all incidental expenses directly connected with the abandonment."

These are the regulations as they appeared in the Classification of 1909. In the First Revised Issue (1910) there were some slight changes, but none now important.

To restrain the enforcement of the regulations so far as they required or tended to require appellant to charge against its earnings the estimated replacement value (less salvage) of the six parcels of railroad line that were abandoned as an incident to grade reduction as above set forth, was the principal object of the suit.

The petition sets forth the following as a second ground of complaint. As a part of its program of improvements, appellant is engaged in erecting a new and enlarged shop and terminal plant at Shreveport, upon a different location from that of the existing shop and terminal plant,

which latter are incidentally to be abandoned. It is claimed that the present shop and equipment are not worn out or obsolete, but are in good condition, and capable, with ordinary running repairs, of performing for an indefinite time the functions for which they were originally constructed. Appellant desires to charge the estimated value of the abandoned shop and terminal plant, amounting approximately to $100,000, against its accumulated surplus as represented in its profit and loss account. The regulations of the Interstate Commerce Commission relative to accounting, however, prohibit this charge, and require that the estimated replacement cost (less salvage) of the existing shop and terminal plant shall be charged to the Operating Expense Account. An injunction against the enforcement of the regulations in this regard also was prayed.

Mr. Samuel Untermyer, with whom *Mr. Walter C. Noyes*, *Mr. Arthur M. Wickwire* and *Mr. Irwin Untermyer* were on the brief, for appellant:

The power delegated to the Commission to prescribe the "form" of accounts cannot be extended so as to authorize the exercise of substantial powers of railway management not otherwise within its authority.

The regulations will curtail and may absolutely prevent the payment of dividends on the petitioner's preferred stock, which is non-cumulative and payable only out of the net earnings of each year.

The lawful determination of the petitioner to finance this improvement, costing $600,000, out of the proceeds of a bond issue is vetoed to the amount of $400,000 by the regulation which compels the petitioner to pay $400,000 of the expense out of operating revenue and to restore that amount to the bond account and return it to the trustee of the mortgage.

Property abandoned as an incident to permanent improvements is not an operating expense.

Petitioner contends that since the original locations were necessary in the development of the line, and were abandoned only as an incident to the improvement and development of the property, the cost thereof being a part of the cost of progress should remain in the property account as a part of the stockholders' investment.

The original investment was necessary in order that the second investment might be made.

The theory of depreciation advanced in support of the regulations has no application to the facts of this case.

Even the theory on which the respondents attempt to support the regulations, does not, when analyzed, justify a charge to operating expenses, but at most, a charge to profit and loss.

Since the Act to Regulate Commerce penalizes the keeping of any other accounts, records or memoranda than those prescribed by the Commission, and since the act requires that the annual reports shall show in detail (1) the cost and value of the carrier's property; (2) the amounts expended for improvements each year; (3) the operating and other expenses and (4) the balance of profit and loss, the Commission cannot promulgate rules which would leave the carrier without a true record of the facts to be included in the annual reports.

If, under any circumstances, Congress had power to determine that accounts should be so kept as to include in operating expenses an item which is not an operating expense, and to interfere with the internal management of common carriers and to deprive stockholders of their dividends, the determination of such a public policy involves the exercise of discretionary legislative functions incapable of delegation to the Interstate Commerce Commission.

Since the regulations in question compel the petitioner to make false entries in its accounts and thereby deprive the preferred stockholders of dividends to which they are

lawfully entitled, the regulations are in violation of the Fifth Amendment to the Constitution of the United States.

In support of petitioner's contentions see *Charlotte, C. & A. R. R. Co.* v. *Gibbes*, 142 U. S. 386; *Fordyce* v. *Omaha, Kansas City & E. R. R.*, 145 Fed. Rep. 544; *Goodrich Transit Co.* v. *Int. Comm. Com.*, 224 U. S. 194; *Int. Comm. Com.* v. *Louis. & Nash. R. R. Co.*, 73 Fed. Rep. 409; *Int. Comm. Com.* v. *Chicago G. W. R.*, 209 U. S. 108; *Ill. Cent. R. R. Co.* v. *Int. Comm. Com.*, 206 U. S. 441; *Ill. T. & S. Bank* v. *Doud*, 105 Fed. Rep. 123; *Lackawanna Coal Co.* v. *Farmers' L. & T. Co.*, 176 U. S. 298; *N. Y., N. H. & H. R. R.* v. *Int. Comm. Com.*, 200 U. S. 361; *Pennoyer* v. *Connoughby*, 140 U. S. 1; *Railroad Tax Cases*, 13 Fed. Rep. 722; *S. C.*, 116 U. S. 138; *Southern Pac. Co.* v. *Int. Comm. Com.*, 219 U. S. 433; *Smyth* v. *Ames*, 169 U. S. 466; *Santa Clara County* v. *Southern Pac. R. R. Co.*, 18 Fed. Rep. 385; *S. C.*, 118 U. S. 394; *Tex. & Pac. Ry. Co.* v. *Int. Comm. Com.*, 162 U. S. 197; *United States* v. *Verdi Copper Co.*, 196 U. S. 207; *United States* v. *Folk*, 204 U. S. 143; *Wisconsin &c. R. R.* v. *Jacobson*, 179 U. S. 287; *Un. Pac. R. R. Co.* v. *United States*, 99 U. S. 402; *Wood* v. *Guarantee Co.*, 128 U. S. 416.

Mr. Assistant Attorney General Denison, with whom *Mr. Thurlow M. Gordon*, Special Assistant to the Attorney General, was on the brief, for the United States:

In requiring that abandoned property (over and above salvage) should not be continued as an asset, the Commission does not act arbitrarily or injuriously. *Int. Comm. Com.* v. *Goodrich Transit Co.*, 224 U. S. 194; *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1; *Minnesota Rate Cases*, 230 U. S. 352; Physical Valuation Act, 37 Stat. 701.

Nor did the Commission act arbitrarily and injuriously in requiring that property abandoned in connection with improvements should be charged off through operating expense instead of through surplus.

The policy of the Commission is to allow an indulgence to the railroads by permitting them to maintain a basis for higher rates until the abandoned property has been paid for.

Obsolescence is depreciation and a proper and authoritatively recognized part of the definition of "operating expense." *Cumberland Tel. Co.* v. *Louisville*, 187 Fed. Rep. 637; *Columbus Light Co.* v. *Columbus* (Whitten, Valuation of Pub. Ser. Corp., § 450); *Eastern Case, Re Advances in Rates*, 20 I. C. C. 243; *Int. Comm. Com.* v. *Goodrich Transit Co.*, 224 U. S. 212; *Holyoke, Massachusetts, Purchase Case* (Whitten, § 454); *Knoxville* v. *Water Co.*, 212 U. S. 1; Montgomery on Auditing (ed. 1912), p. 319; *Brooklyn Heights R. R. Co.* v. *Tax Commissioners*, 69 Misc. (N. Y.) 646; *Queens County Water Co.* v. *Woodbury*, 67 Misc. (N. Y.) 490; *Queens Borough Gas Co.*, 18 N. Y. (reported in Whitten, § 487); *San Joaquin Co.* v. *Stanislaus County*, 191 Fed. Rep. 875; *Spokane &c. R. R.* (Whitten, § 457); *State Journal Printing Co.* v. *Madison Gas Co.*, 4 W. R. C. R. 501; (Whitten, § 486); *Third Avenue Reorganization*, 2 P. S. C. N. Y. July 29, 1910; (Whitten, § 463); also Whitten, §§ 450, 451, 452, 453, 458, 481.

Even if dividends should be lost owing to the abandonment of property, such loss is no reason for invalidating this order. *Motley's Case*, 219 U. S. 467.

But there is no reason to assume that the Commission will refuse to spread the charge so as to avoid such a result.

The required system of accounting does not "veto" the terms of the mortgage.

For other cases in support of contention of the United States see *Buttfield* v. *Stranahan*, 192 U. S. 470; *Columbus Ry. & Light Co.* v. *City of Columbus* (Whitten, § 450); *Cumberland Tel. & Tel. Co.* v. *City of Louisville*, 187 Fed. Rep. 637; *Eastern Case, Re Advances on Rates*, 20 I. C. C. 243; *Holyoke, Mass., Purchase Case* (Whitten, § 454);

Illinois Central Case, 215 U. S. 452; *Int. Comm Com.* v. *Goodrich Transit Co.*, 224 U. S. 194; *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1; *Minnesota Rate Cases*, 230 U. S. 352; Montgomery on Auditing, Theory, and Practice; *Motley's Case*, 219 U. S. 467; *People ex rel. Brooklyn Heights R. R. Co.* v. *Tax Commissioners*, 69 Misc. (N. Y.) 646; *People ex rel. Queens County Water Co.* v. *Woodbury*, 67 Misc. (N. Y.) 490; *Queens Borough Gas & Elec. Co.*, 2 P. S. C. 18 N. Y. (Whitten, § 487); *San Joaquin Co.* v. *Stanislaus Co.*, 191 Fed. Rep. 875; *Spokane & Inland Empire Elec. R. R.* (Whitten, § 457); *State Journal Printing Co.* v. *Madison Gas & Elec. Co.*, 4 W. R. C. R. 501 (Whitten, § 486); *Third Avenue Reorganization* (Whitten, § 463); *Union Pacific Case*, 222 U. S. 541; *United States* v. *Grimaud*, 220 U. S. 506; (Whitten, Valuation of Public Service Corporations, §§ 450, 451, 452, 453, 458, and 481).

Mr. Charles W. Needham for the Interstate Commerce Commission:

The power of Congress over interstate commerce includes regulating the forms of accounts and reports which have a substantial relation to the regulation of commerce.

Public records are exclusively under public control and Congress has power to vest Commission with authority to determine classification of accounts of common carriers.

The Commission's order is an extension of congressional action and in prescribing the classification of accounts, etc., the Commission was acting in purely a legislative capacity, nor did it act arbitrarily in requiring such classification.

By the Commission's system of classification there was no destruction of property nor was the administration of the funds affected.

Constitutional rights were not violated by the orders involved.

Depreciation is an operating expense.

Congress has spoken directly on this subject and made these regulations the law and there is no violation of the Fifth Amendment.

In support of these contentions see *Adair* v. *United States*, 208 U. S. 178; *Butte City Water Co.* v. *Baker*, 196 U. S. 126; *Buttfield* v. *Stranahan*, 192 U. S. 470; *Employers' Liability Cases*, 207 U. S. 497; *Second Employers' Liability Cases*, 223 U. S. 1; *Field* v. *Clark*, 143 U. S. 649; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Hippolite Egg Co.* v. *United States*, 220 U. S. 45; *Hoke* v. *United States*, 227 U. S. 308; *Ill. Cent. R. R. Co.* v. *Int. Comm. Com.*, 206 U. S. 441; *Int. Comm. Com.* v. *Goodrich Transit Co.*, 225 U. S. 194; *Light* v. *United States*, 220 U. S. 523; *Lottery Case*, 188 U. S. 353; *Prentiss* v. *Atlantic Coast Line*, 211 U. S. 210; *Smyth* v. *Ames*, 169 U. S. 466; *The Daniel Ball Case*, 10 Wall. 557; *Union Bridge Co.* v. *United States*, 204 U. S. 384; *Union Pacific R. R. Co.* v. *United States*, 99 U. S. 402; *United States* v. *Grimaud*, 220 U. S. 566; *Wayman* v. *Southard*, 10 Wheat. 142; Montgomery on Auditing, Theory and Practice (1912).

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

The contention of appellant in the Commerce Court and in this court is, that the regulations of the Interstate Commerce Commission relative to the method of keeping the accounts of common carriers, so far as they are here questioned, are unreasonable, beyond the power or authority of either Congress or the Commission, and violative of the Fifth Article of Amendments to the Constitution of the United States, as being a deprivation of property without due process of law. It is claimed that the effect of enforcing the regulations under the circumstances of the case is to reduce the amount of net earnings applicable to dividends, and thereby cause an irreparable loss to the

preferred stockholders, whose dividends are non-cumulative and payable only out of the income of the current year; that the property accounts become inaccurate, because while appellant has actually expended something more than $600,000 in the improvement of its property, and its bonded indebtedness has been in fact increased by the like amount, the accounts will declare that for this expenditure the company has obtained a net accretion to its property of only a little over $200,000 ($629,399.74 less $386,484, or $234,747.74); that the Operating Expense Accounts will be improperly swollen by the inclusion therein of the sum of $386,484, to the deception of the stockholders and the investing public, and the impairment of the financial credit of the company; and that under the requirements of the Commission this sum of $386,484 cannot be charged to and finally taken out of the proceeds of the bonds, but must be charged to operating expenses, and thus taken from operating revenue, because of which (as is claimed) this amount, which has already been paid out of the proceeds of bonds, must ultimately be restored in cash to the bond account, and returned to the trustee or otherwise accounted for to the bondholders. As to the Shreveport shop and terminal plant that are to be abandoned, it is contended that it is unreasonable to require the cost of abandonment to be charged to operating expenses, and that this is a proper charge against the accumulated surplus, as represented in the profit and loss account.

The authority of the Commission rests upon § 20 of the "Act to Regulate Commerce" (February 4, 1887, 24 Stat. 379, c. 104, as amended by the Hepburn Act of June 29, 1906, 34 Stat. 584, cc. 3591).[1] The constitu-

[1] "SEC. 20. That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act, to prescribe the manner in which

tional validity of this legislation was sustained in *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 211, 214.

The authority conferred by Congress upon the Commerce Court (act of June 18, 1910; 36 Stat. 539, c. 309;

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such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; . . . the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

* * * * * * * * *

The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees."

Judicial Code, § 207) with respect to enjoining or setting aside the orders of the Commission, like the authority previously exercised by the Federal Circuit Courts, was confined to determining whether there had been violations of the Constitution, or of the power conferred by statute, or an exercise of power so arbitrary as virtually to transcend the authority conferred. *Interstate Com. Com.* v. *Illinois Central R. Co.*, 215 U. S. 452, 470; *Interstate Com. Com.* v. *Union Pacific R. Co.*, 222 U. S. 541, 547; *Procter & Gamble* v. *United States*, 225 U. S. 282, 297; *Interstate Com. Com.* v. *Balt. & Ohio R. Co.*, 225 U. S. 326, 340.

As to the intent and meaning of § 20, it is first insisted that the power conferred upon the Commission to prescribe the forms of accounts, records, and memoranda to be kept by the carriers, recognizes a distinction between the form and the substance; and that while the Commission, in order to obtain full and accurate information concerning the affairs of each corporation, must have power to require any reports, schedules, and accounts necessary to show the true financial condition of each carrier; yet that the grant must by fair interpretation, and in order not to amount to an unconstitutional delegation of legislative power, stop short of the point where the regulation in its essence goes not to the form but to the substance and involves interference with the internal affairs of the corporation. We do not, however, think that any such distinction between the form and the substance is admissible with respect to the declared object of standardizing railroad accounts and obtaining therefrom full and accurate information concerning the affairs of the respective corporations. The very object of a system of accounts is to display the pertinent financial operations of the company, and throw light upon its present condition. If they are to truly do this, the form must correspond with the substance. In order that accounts may be standard-

ized, it is necessary that the accounts of the several carriers shall be arranged under like headings or titles; and it is obviously essential that charges and credits shall be allocated under the proper headings—the same with one carrier as with another. Unless "Additions and Betterments," on the one hand, and "Operating Expenses," on the other, are to indicate the same class of entries upon the books of one carrier that they indicate upon the books of other carriers, there is no possibility of standardization. So far as such uniformity requirements control or tend to control the conduct of the carrier in its capacity as a public servant engaged in interstate commerce, they are within the authority constitutionally conferred by Congress upon the Commission. There is no direct interference with the internal affairs of the corporation; and if any such interference indirectly results, it is only such as is incidental to the lawful control of the carrier by the Federal authority and to this the rights of stockholders and bondholders alike are necessarily subject.

It is said, however, that the meaning of the term "operating expenses" was well defined at the time of the passage of the act of 1887, and that during the period intervening between the beginning of the work of the Commission thereunder and the passage of the Hepburn Act in 1906, the term had never been construed to include any charge for property abandoned in the course of improvements; and that this settled construction, upon familiar principles, must be deemed to have entered into the purpose of Congress when it reënacted the language of § 20 in the latter year, and added to it authority to the Commission to prescribe in its discretion the forms of accounts and a prohibition against keeping any others than those prescribed or approved by the Commission. But it will be observed that § 20, as originally enacted, authorized the Commission "in its discretion for the purpose of enabling it the better to carry out the purposes of this act,

[to] prescribe a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept." Congress, when it enacted the Hepburn Act in 1906, must have known that the Commission had not as yet found occasion to enforce this provision; and at the same time may be deemed to have contemplated that the authority then for the first time conferred upon the Commission to determine and prescribe the maximum rates to be charged by the carriers for the services to be performed by them, furnished a new and more cogent reason for establishing a uniform system of accounts.

The contention that the term "operating expenses" had a well-understood and defined meaning either recognized at the time of the passage of the act of 1887 or established by the constant practice of the Commission from that time until the Hepburn Act, so that the use of the term in the latter act amounted to an express limitation upon the grant of power to prescribe the forms of the accounts, is not well founded. Congress, in authorizing the Commission to prescribe a uniform system of accounts, recognized that accounting systems were not then uniform; and in reiterating this authorization in 1906, and adding a prohibition against the keeping of other accounts than those prescribed, manifested a purpose to standardize and render uniform the accounts of the different carriers with respect to matters that entered into property and the improvements thereof, on the one hand, and the current operations of the company, on the other. By the very terms of § 20, Congress at least outlined the classification of the carriers' accounts, for it required the annual reports to show "the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same . . . the surplus fund, if any, . . . the funded and floating

debts, . . . the cost and value of the carrier's property, franchises and equipments; . . . the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet." By the same section the Commission was authorized to require these annual reports from all carriers subject to the Act, and to prescribe the manner in which the reports should be made, and for this and other purposes to require carriers to have "as near as may be, a uniform system of accounts, and [to prescribe] the manner in which such accounts shall be kept."

Plainly, the law-making body recognized the essential distinctions between property accounts and operating accounts, between capital and earnings; it recognized that the practice of different carriers varied in respect to these matters; and that no system of supervision and regulation would be complete without requiring the accounts of all the carriers to speak a common language.

There is here no unconstitutional delegation of legislative powers. The reasoning adopted in *Interstate Com. Com.* v. *Goodrich Transit Co.*, 224 U. S. 194, 210, etc., is controlling. And since, as just shown, uniformity in accounting is dependent upon the adoption and enforcement of precise classification, the authority to define the terms of the classification necessarily follows. It amounts, after all, to no more than laying down the general rules of action under which the Commission shall proceed, and leaving it to the Commission to apply those rules to particular situations and circumstances by the establishment and enforcement of administrative regulations.

It is contended that the regulations of the Commission, in respect to the matters now under consideration, are

so unreasonable and arbitrary as to constitute an abuse rather than an exercise of the powers conferred by § 20, and consequently that they ought to be set aside by judicial action. This is not on the ground that the Commission did not proceed with due deliberation and after proper inquiry. Respecting this, the record abundantly shows that in the year 1906, and shortly after the passage of the Hepburn Act, the Commission undertook, and for nearly three years prosecuted a most thorough investigation into the current practice of the principal railroad lines, procuring reports and recommendations from experts, and submitting tentative plans for the classification of accounts to the executives of the railroad lines and to a committee of accountants created by the Association of American Railway Accounting Officers, which association was made up of members representing practically every important railroad in the country.

The present attack upon the classification as adopted is, and must be, rested at bottom upon the contention that the regulations embodied in it are so entirely at odds with fundamental principles of correct accounting as intrinsically to manifest an abuse of power.

There is evidence in the record that substantially the same method of distributing charges for so-called "Additions and Betterments" between the Property Accounts and the Operating Accounts is and has long been pursued by important railroad carriers, and has received the sanction of at least one recent text-book writer,—Whitten, Valuations of Public Service Corporations, §§ 450, 451, 458, etc. Nevertheless, it is insisted with emphasis that property abandoned as an incident to permanent improvements is not an operating expense, and, in effect, that no matter what practice may be pursued by railroad accounting officers, it cannot properly be treated as such.

We are thus brought back to the fundamental distinction between (a) the property or capital accounts, designed

to represent the investment of the stockholders, and to show the cost of the property as originally acquired, with subsequent additions and improvements; these assets being balanced by the liabilities, including the amount of the capital stock and of bonded and other indebtedness, with net profits or surplus, whether carried under the head of "profit and loss" or otherwise; and (b) the operating accounts, designed to show, on the one side, gross receipts or gross earnings for the year, and on the other side, the expenditures involved in producing those gross earnings and in maintaining the property, the balance being the net earnings.

Since the regulation of the railroad carrier by the public authority, and especially the fixing of the rates to be charged, depend primarily upon two fundamental considerations, (a) the value of the property that is employed in the public service, and (b) the current cost of carrying on that service, it is clear that the maintenance of a proper line of distinction between property accounts and operating accounts is essential to the execution by the Interstate Commerce Commission of the supervisory and regulatory powers conferred upon it by Congress.

Appellant contends, *inter alia*, that since the original locations were necessary in the development of its railroad line, and were abandoned only as an incident to the improvement and development of the property, the cost thereof, being as it is termed a part of the "cost of progress," should remain in the property account, as representing a part of the stockholders' present investment.

Support for this contention is sought in previous decisions of this court. In *Union Pacific R. Co.* v. *United States*, 99 U. S. 402, a decision that turned upon the meaning and effect of an act of July 1, 1862 for aiding the construction of the railroad (12 Stat. 489, c. 120), it was said, at p. 420: "As a general proposition, net earnings are the excess of the gross earnings over the expenditures de-

frayed in producing them, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves. It may often be difficult to draw a precise line between expenditures for construction, and the ordinary expenses incident to operating and maintaining the road and works of a railroad company. Theoretically, the expenses chargeable to earnings include the general expenses of keeping up the organization of the company, and all expenses incurred in operating the works and keeping them in good condition and repair; whilst expenses chargeable to capital include those which are incurred in the original construction of the works, and in the subsequent enlargement and improvement thereof." In *Illinois Central R. R.* v. *Interstate Commerce Commission*, 206 U. S. 441, the Commission had held (206 U. S. 449; 10 I. C. C. 544) that while repairs were properly chargeable to current operating expenses, yet expenditures for improvements and equipment "should not be taxed as part of the current or operating expenses of a single year, but should be, so far as practicable, and so far as rates exacted from the public are concerned, projected proportionately over the future." And in this court it was said (p. 462): "It would seem as if expenditures for additions to construction and equipment, as expenditures for original construction and equipment, should be reimbursed by all of the traffic they accommodate during the period of their duration, and that improvements that will last many years should not be charged wholly against the revenue of a single year." And, after pointing out that the case of the Union Pacific Railway Company in 99 U. S. had to do not with rates of transportation or the like, but with the construction of the words "net earnings" in an act of Congress, the court, in pointing out the difference between the position of the Government in that case and the position of a shipper of commodities in the case *sub judice*, said, with respect to the latter (p. 463):

"His right is immediate. He may demand a service. He must pay a toll, but a toll measured by the reasonable value of the service. The elements of that value may be many and complex, not always determinable, as we have seen, with mathematical accuracy, but, we think, it is clear, that instrumentalities which are to be used for years should not be paid for by the revenues of a day or year; and this is the principle of returns upon capital which exists in durable shape."

The expressions quoted were properly employed with respect to the questions then presented for decision. As expressions of the general principle, we see no occasion now to qualify them. In both cases it was recognized that in so complicated a matter as the construction, maintenance, and operation of a railroad line, it is difficult to define and perhaps more difficult to consistently apply a precise distinction between capital and expense accounts; and while the propriety of distributing improvement costs over a series of years was recognized, the impossibility of scientific accuracy in that regard was acknowledged. The question now is, whether the regulations of the Commission under attack do violence to these general principles—rather, it is whether those regulations are so clearly contrary to these and other applicable principles that they should be set aside as being in excess of the powers conferred by Congress upon the Commission.

We are unable to see that there is substantial inconsistency with principle, much less gross violation thereof. The contention of the appellant that property, originally acquired because necessary in the construction of the road, and afterwards abandoned only because rendered unnecessary by the improvement and development of the property, should remain in the property account as a part of the stockholders' investment, will be found, upon analysis, to rest upon the unwarrantable assumption that all capital expenditures result in permanent accretions to the

property of the company. This in effect ignores depreciation—an inevitable fact which no system of accounts can properly ignore. A more complete depreciation than that which is represented by a part of the original plant that through destruction or obsolescence has actually perished as useful property, it would be difficult to imagine. The fact that the original investment was necessary in order that the second investment might be made is not a conclusive test. Reference is made to the cost of the scaffolding used in the erection of a house, and discarded when the house is completed; and to the cost of the paper that goes to the waste-basket, rather than to the printer, in the preparation of a literary composition; but these are fanciful analogies, and do not assist us here, where the real question is not how shall original cost be ascertained, but, how shall subsequent depreciation in value be reckoned and accounted for?

In *Knoxville* v. *Water Co.*, 212 U. S. 1, this court had to do with a similar element of depreciation, and, after pointing out that such a plant as was there in question begins to depreciate in value from the moment of its use, and that before coming to the question of profit at all, the company was entitled to earn a sufficient sum annually to provide not only for current repairs but for making good the depreciation and replacing the parts of the property when they should come to the end of their life, the court proceeded to say (p. 14): "If, however, a company fails to perform this plain duty and to exact sufficient returns to keep the investment unimpaired, whether this is the result of unwarranted dividends upon overissues of securities, or of omission to exact proper prices for the output, the fault is its own. When, therefore, a public regulation of its prices comes under question the true value of the property then employed for the purpose of earning a return cannot be enhanced by a consideration of the errors in management which have been committed in the past."

And since one of the manifest objects of Congress in authorizing the supervision and standardization of carriers' accounts, as is done in § 20 of the Interstate Commerce Act, was to enable the Commissioners to intelligently perform their duties respecting the regulation of carriers' rates for the services performed, and since it is settled that the property investment which is to be taken into consideration as one of the elements in fixing such rates is the property then in use (*Smyth* v. *Ames*, 169 U. S. 466, 546; *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 757; *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 442; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 41; *Minnesota Rate Cases*, 230 U. S. 352, 434, 454, 458), it is obvious that so far as the regulations of the Commission now under consideration discard the "cost of progress" theory, they need no further vindication.

It is insisted that if the appellant, having expended in round figures $600,000, secured by the sale of bonds for improvements, can be compelled to charge $400,000 of that amount to the operating expense of one year or to distribute it among the operating expenses of a series of years, and if it be forbidden to keep any other record representing the transaction, it will have in its possession no kind of record from which it can report accurately either the cost of its property or the cost of improvements or its operating expenses. This, we think, is a misapprehension of the effect of the regulations. They do not require appellant to falsify its books or to change in any way the evidential character of the original entries. The source of the money, and the disposition made of it as expended, may and should be correctly shown. The regulations do require that the contemporaneous abandonment of other property be likewise shown, and the replacement cost, less salvage, charged to the appropriate accounts under operating expenses. This, if observed, of course results

in enforcing a prescribed distinction between capital expense and operating expense. It does not require that the record of the expenditure be obliterated; but it does of course affect the results as they work out upon the balance-sheet. If this be fairly done, there is no transmutation of new property into operating expenses, but only an insistence upon the requirement that new property added shall not alone be the measure of the accretion to the property account, and that the depletion attributable to contemporaneous abandonment of other property shall likewise be reflected upon the books.

Stress is laid upon the fact that if the grade reductions in question had been made upon the line of the original right of way, even though made at double the expense, the cost would have gone into "additions and betterments," and would have stood as a permanent increment of assets in the property account; while with respect to similar improvements made off the line of the original right of way, appellant is not permitted to carry into the property account the full cost of the improvement, but must first deduct therefrom the estimated replacement cost (less salvage) of the portions of track no longer used, charging this to the account of operating expenses.

So far as the comparative expense of the different modes of improvement is concerned, little need be said. The accounting regulations do not seek to control railroad companies in the exercise of their discretion respecting what shall be done and how it shall be done, but only to systematize their accounts with respect to whatever is done. It is to be presumed that boards of directors will select that method of accomplishing a needed grade revision that shall be preferable from the engineering standpoint and suited to the financial condition and prospects of the company; not that they will adopt an inferior or more costly method of improvement because of the accounting requirements.

The distinction drawn between grade improvements "off the line" and those made "on the line" rests upon the view that the discarding of sections of the original line of road is a loss or depreciation that in correct accounting should be taken out of the property account. If this is to be done, its value must be charged, directly or indirectly, as an expense incident to the operation of the road. Whether it should be charged against the accumulated profits of previous years, as reflected in the profit and loss account, or against the profits of present and future years, may depend upon circumstances. The theory upon which the Commission has acted in formulating its regulations is fairly stated in its brief herein as follows: The abandonment of property incident to grade revision is "depreciation," and such depreciation is of two kinds,—(1) that which is not replaced in kind, and (2) that which is replaced by improved materials, track, or equipment. If a trunk line of road has a branch extending into a territory not served by its main line, and, finding the branch unprofitable, abandons it, taking up the track, without constructing any substitute to serve the same territory, the abandoned branch ceases to be an earning instrumentality; the stockholders can thereafter derive no profit from it; it has served its purpose, and only past operations have benefited from it. So far as the profits of past operations have not been distributed to the stockholders, they are represented in the profit and loss account, and therefore such an abandonment or depreciation is properly chargeable to that account unless a special depreciation account has been established in anticipation of such abandonments; and for such an account, provision is made in the regulations. The other kind of depreciation is the result of changes attributable to the inadequacy of the existing property to meet the demands of the future. The road or the structures have to be replaced with stronger or more efficient instrumentalities. Abandon-

ments occasioned by changes of this character are therefore chargeable to future earnings, for the reason that the improved condition of the road is not only designed to meet the demands of the future, but presumably will result in economies of operation, and so the resulting benefits will be reaped by those who hold the stock of the company in the present and in the future. The railroad company may, if it sees fit, anticipate general depreciations, and make provision for them by establishing a reserve for the purpose; but if no such provision has been made the abandonments should be taken care of by charging them to present or future operating expense. In case, however, the amount is so large that its inclusion in a carrier's operating expenses for a single year would unduly burden the operating expense account for that year, the carrier may, if so authorized by the Commission, distribute the cost throughout a series of years.

A statement of the theory is sufficient to show that the regulation is not arbitrary in the sense of being without reasonable basis. And there is evidence to show that the Commission was warranted in adopting it, as sustained by expert opinion and approved by experience.

One of the reasons for the distinction made in accounting between improvements made on, and those made off, the old right of way is that in the former case the improvements show themselves in the physical structures, and can be inventoried and appraised by witnesses; the deepening of cuts and increasing of fills, while involving some abandonments (and these under the regulations are to be taken out of the operating account), yet in the main are visible upon the ground, and capable of mensuration and appraisement. To the suggestion that cuts filled up and embankments reduced would not be thus manifest, it is sufficient to say that if such cases occur they must be most extraordinary. When a railroad is originally constructed, cuts and fills are made to overcome natural

inequalities of surface; if any undue grades are permitted to remain, it is usually because for reasons of economy cuts have been made less deep and fills less high than otherwise they would have been made. Therefore grade revisions upon the line of the original right of way are normally required for the purpose of removing summits in cuts and raising sags in fills; not *vice versa*.

It is said that the effect of the regulations, if complied with, is to deprive the preferred stockholders of a considerable part of the non-cumulative dividends from the net earnings of the company, to which they would otherwise be entitled. The preferred stockholders, as such, are not before the court, and this is not a proper occasion for determining their rights. Supposing, however, that the enforcement of the accounting system does require them to forego their current dividends, we do not concede that this amounts to an unlawful taking of their property. Assuming (as of course we must) that the management of the company has acted prudently in making these extensive improvements within a short time, instead of distributing them throughout a series of years, and without providing in advance any fund applicable to them, still it must be presumed that the improvements are necessary to the general welfare of the company, and will result in its increased prosperity, and therefore make better the assurance of dividends for the preferred stockholders in the future.

But, aside from that, the Interstate Commerce Act deals with the carrier in its capacity as a servant of the public, and as a distinct entity, amenable to the legitimate regulation of Congress and the Commission. If in this aspect the carrier is not unwarrantably injured or deprived of its property by the exercise of the regulatory powers, the operation of such regulations cannot be restrained on the ground of agreements made by the stockholders amongst themselves for apportioning profits to one or the

other class of stockholders. To admit this might materially hamper the Federal control over interstate carriers, and evidently would tend to render impracticable the standardization of methods of accounting.

Much stress is laid upon the situation that results from the circumstance that (as is claimed) these regulations were promulgated after appellant had mortgaged its property and issued bonds for financing the improvements in question. It is not contended that the regulations impair the rights of either party under the mortgage. The contention is that the company had the right to finance the full cost of the improvements out of the proceeds of a bond issue, and that the regulations amount in effect to a veto upon the action of the directors in this respect. Supposing this to be true, we are unable to perceive that the appellant is thereby relieved from compliance with the regulations. Whatever was done about authorizing the improvements and financing the cost from the bond issue was done subject to being displaced by the exercise of the powers conferred upon the Interstate Commerce Commission by the act of 1906. The regulations do not affect the administration of the borrowed money. It was borrowed *inter alia* specifically for use in "reducing grades to one-half of one per cent. on three full operating divisions, aggregating 41 per cent. of the total length of the line." And by the mortgage appellant covenanted to use the bonds and the proceeds thereof in calling in and redeeming an outstanding loan, "and for the general improvement of its property." In short, so far as appears, there is nothing in the regulations to prevent the appellant from devoting the money strictly to the purposes for which it was borrowed, although they do prevent the keeping of the accounts in such manner as to make it appear that the book value of the company's assets is enhanced to the full extent of the moneys disbursed in the improvements.

When it is said that the amount of $386,484, which under the requirements of the Commission must be charged to operating expenses, must for that reason be ultimately restored in cash to the bond account and returned to the trustee or otherwise accounted for to the bondholders, this does not mean that any obligation of that kind is imposed upon appellant by the classification. We are not referred to anything in the classification, in the provisions of the mortgage, or in the law, that imposes any such duty. What is meant (as we presume), is that if the operating expenses are increased and the operating revenue decreased by the amount mentioned, in accordance with the regulations, and the payment of dividends should nevertheless continue, the books would make it appear that the dividends were paid not from earnings but from the proceeds of the bonds. In other words, the regulations of the Commission prevent the proceeds of the bond issue from being used, in whole or in part, to maintain dividend payments *without that fact appearing upon the accounts;* and since it is improbable that appellant would be willing to have the accounts bear such an interpretation, it is probable that the proceeds of the bonds will not be employed for dividend purposes, and unless required for further improvements, may as well be returned to the trustee for the bondholders. Since one of the very purposes of establishing the accounting system is to deter the payment of dividends out of capital, the criticism, upon analysis, bears its own refutation.

The same may be said of the argument that enforcement of the regulations will impair the credit of appellant by diminishing apparent earnings, preventing continuance of dividends upon preferred stock and keeping down the aggregate value of "assets" upon the property accounts. Presumably the regulations have a tendency to place the accounting system upon a sound basis in these respects; and to accomplish this was one of the legitimate

objects at which Congress aimed in the enactment of § 20 of the Interstate Commerce Act.

It is further insisted that even the theory upon which the accounting regulations rest does not, when analyzed, justify a charge of abandoned property to operating expenses, but at most a charge to profit and loss. The suggestion apparently has force; but, upon consideration, we are unable to see that it furnishes ground for judicial interference with the course pursued by the Commission. Except for the contention (already disposed of) that the value of the abandoned parcels should be permanently carried in the property account as part of the cost of progress, it is and must be conceded that sooner or later it must be charged against the operating revenue, either past or future, if the integrity of the property accounts is to be maintained; and it becomes a question of policy whether it should be charged *in solido* to profit and loss (an account presumptively representative of past accumulations) or to the operating accounts of the present and future. If abandoned property is not charged off in one way or the other it remains as a permanent inflation of the property accounts, and tends to produce, directly or indirectly, a declaration of dividends out of capital. If it be charged off to the surplus account, it tends to prevent the declaration of dividends based upon a supposed accumulation of past earnings. If charged to operating expenses of the current and future years, it has a tendency to prevent the declaration of dividends from current earnings until the amount of the depreciation shall have been made up out of the earnings.

But, did we agree with appellant that the abandonments ought to be charged to surplus or to profit and loss, rather than to operating expenses, we still should not deem this a sufficient ground to declare that the Commission had abused its power. So long as it acts fairly and reasonably within the grant of power constitutionally con-

ferred by Congress, its orders are not open to judicial review.

What has been said respecting the enforced disposition of the charges for property abandoned in grade revision, applies as well to the abandonment of the present shop and terminal plant at Shreveport.

Decree affirmed.

GRAND TRUNK RAILWAY COMPANY *v.* MICHIGAN RAILROAD COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 382. Argued October 23, 24, 1913.—Decided December 8, 1913.

A State is competent to create a commission and give it power of regulating railroads and investigating conditions upon which regulation may be directed; and the judiciary will only interfere with such a commission when it appears that it has clearly transcended its powers.

Courts are reluctant to interfere with the laws of a State or with the tribunals constituted to enforce them; doubts will not be resolved against the law.

It cannot as yet be asserted that Congress has, to the exclusion of the States, taken over the whole subject of carriers' terminals, switchings and sidings; and *quære* where the accommodation between intrastate and interstate commerce shall be made.

The fact that a movement of freight begins and ends within the limits of a city does not take from it its character of an actual transportation between two termini; and so *held* in regard to transportation between junction points in Detroit, Michigan.

While a city may be in some senses a terminal unit, the State Railroad Commission may regulate traffic between different points therein as transportation, and to do so does not amount to an appropriation of the terminals of one road for the use and benefit of other roads.

Transportation is the business of railroads and when, and to what extent, that business may be regulated so depends upon circumstances that

no inflexible rule can be laid down. *Wisconsin &c. R. R. Co.* v. *Jacobson*, 179 U. S. 287.

If the provisions for penalties in a statute creating a railroad commission and providing for the enforcement of the orders made by it are separable, as in this case, their constitutionality can be determined when their enforcement is attempted, and the operation of the whole act will not be suspended before that event. *Louis. & Nash. R. R. Co.* v. *Garrett*, *ante*, p. 298.

Railroad companies are incorporated for purposes of transportation; and the fact that a company was not specifically incorporated to carry on intra-city transportation cannot prevail against the power of the State to regulate it in regard to legitimate elements of transportation within the city.

An order of the Michigan Railroad Commission requiring certain railroads doing an interstate business to use their tracks within the city limits of Detroit for the interchange of intrastate traffic, sustained as being within the regulating power of the commission; and also *held* that such order was not unconstitutional as interfering with interstate commerce or as depriving the carriers of their property without due process of law.

198 Fed. Rep. 1009, affirmed.

THE facts, which involve the validity of an order of the Michigan Railroad Commission relative to intrastate transportation and switch connections in the city of Detroit, are stated in the opinion.

Mr. George W. Kretzinger, Jr., with whom *Mr. G. W. Kretzinger* and *Mr. Aldis B. Browne* were on the brief, for appellants.

Mr. Hal H. Smith, with whom *Mr. Grant Fellows*, Attorney General of the State of Michigan, was on the brief, for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Appeal from a decree of the District Court, three judges sitting, denying a motion of appellants for interlocutory

injunction against an order of the Michigan Railroad Commission and the denial of a motion of appellants for the continuance of a restraining order theretofore entered in the case.

The Commission was constituted by the Public Acts of the State and invested with quite full and detailed powers of regulation of the railroads of the State. Act No. 300 of the Public Acts of Michigan of 1909, as amended by Act No. 139, 1911.

Section 7 as originally enacted and as amended is alone specially relevant to the discussion and is inserted in the margin, subdivision (d) being the amendment.[1]

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[1] (55) SEC. 7. (a) All railroads, subject to the provisions of this act, shall afford all reasonable and proper facilities by the establishment of switch connections between one another and the establishment of depots and otherwise for the interchange of traffic between their respective lines and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall transfer and deliver without unreasonable delay or discrimination any freight or cars or passengers destined to any point on its own line or on any connecting line, and shall not discriminate in their rates and charges between such connecting lines: *Provided*, precedence may be given to live stock and perishable property. Nothing in this act shall be construed as requiring any railroad to give the use of its tracks or terminal facilities to another railroad engaged in like business. Any person or any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier subject to the provisions of this act shall have the right and privilege of routing such shipments and of prescribing and directing over what connecting line property so shipped shall be transported, and it shall be the duty of the initial carrier to observe the direction of such person or such officer or agent of any corporation or company, and to cause such freight to be transported over such connecting line as may be directed and required by such shipper.

(57) (c) Every corporation owning a railroad in use shall, at reasonable times and for a reasonable compensation, draw over the same the merchandise and cars of any other corporation or individual having connecting tracks; *Provided*, such cars are of the proper gauge, are in good running order and equipped as required by law and otherwise

After the amendment took effect, and on July 29, 1911, the Grand Trunk System, which is constituted of a number of railroad lines, published a tariff of charges, to be effective September 1, 1911, which, among other things, set forth the rates for the designated services within the corporate limits of the City of Detroit and as to team track services as follows:

"In case team track deliveries are required for the unloading of shipments received from other carriers, or when

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safe for transportation and properly loaded; *Provided further*, if the corporations cannot agree upon the times at which the cars shall be drawn, or the compensation to be paid, the said commission shall, upon petition of either party and notice to the other, after hearing the parties interested, determine the rate of compensation and fix such other periods, having reference to the convenience and interests of the corporation or corporations and the public to be accommodated thereby, and the award of the commission shall be binding upon the respective corporations interested therein until the same shall have been revised.

(57a) (d) Every common carrier operating within this state shall receive and transport at reasonable rates any and all carload traffic offered for transportation under the usual conditions locally consigned between points in the same city or town and shall receive and transport at reasonable rates from any junction point or transfer point or intersection with another railroad in such city or town any and all such carload freight destined to team tracks or other sidings on any line operated by the delivering carrier, and shall deliver such car or cars upon such team tracks or sidings in the city or town where such car or cars are received from such connecting line when required so to do: *Provided*, that when delivery is requested which will involve the use of a private siding not owned or controlled by consignee, said consignee shall file with both receiving and delivering carriers written permission signed by the owner or lessee of such private siding authorizing the use of same. When the particular delivery desired cannot be accomplished owing to the congestion of cars upon such siding or team tracks, it shall be the duty of the delivering carrier to notify consignee of such conditions and it shall be the duty of such consignee upon receipt of such notice to advise upon what other siding delivery will be accepted or whether or not it is desired that such car or cars shall be held awaiting the opportunity for delivery upon the siding originally designated as the destination.

such team tracks are used for the loading of shipments for delivery to other carriers, three dollars per car in excess of the charge made for switching to or from industrial sidings will be assessed."

This tariff also provided a charge of $5.00 for switching to and from industrial sidings and a charge of $8.00 for team track delivery from junction points with other roads within the switching limits of Detroit.

A complaint was made by one John S. Haggerty to the Commission of this difference as discriminatory. Haggerty, it is said in one of the briefs, conducts a brick-making plant, having a siding on one of the railroads in Detroit, and to supply his trade ships carloads of freight over various railroad lines doing business in the city, among which are the lines of the Grand Trunk System.

An answer was filed to the complaint by the Grand Trunk Western Railway Company. After hearing, the Commission held that the difference in rates was discriminatory and the railway company was ordered to file a tariff removing the discrimination, that is, the discrimination between the charges for industrial switching and for switching between junction points and team tracks; and to publish and make effective "like charges for the movement of a carload shipment received from an industry within the City of Detroit, upon the said Grand Trunk Western Railway, consigned for delivery upon a team track or other siding of said road within the same city, and for a like shipment received by said Grand Trunk Western Railway from a connecting carrier at a junction point within the corporate limits of the city of Detroit, consigned to a team track or other siding upon said road within the same city."

Subsequently to the making of such order the Grand Trunk System published a new tariff to be effective March 16, 1912, naming a rate of $5.00 between industrial tracks and a like rate between junction points with con-

necting carriers, within the switching district of Detroit, and industrial tracks within the said limits; $8.00 between junction points with other railroad companies, within said limits, and team tracks within said limits; and $8.00 between team tracks on the railway's own lines. The tariff was duly filed with the Commission and with the Interstate Commerce Commission.

Haggerty filed a supplementary petition with the Commission complaining that the new rates were unreasonable and exorbitant, and, on March 15, 1912, the Commission ordered the postponement of the same until April 29 to give the Commission an opportunity for investigation into "the reasonableness of such proposed rate and the matter set forth in the complaint." Thereupon the Grand Trunk System issued a supplement to its tariff suspending the intrastate rates named in its tariff, and, on March 30, published a new tariff canceling all rates between industries having private sidings on the System and hold or team tracks on that System, and all rates between junction points with other carriers within the corporate limits of Detroit and the team tracks of the System. The effect of this tariff was to withdraw all intrastate and interstate switching movements, except as to the Detroit & Toledo Shore Line, with which the Grand Trunk was under contract for terminal switching.

On April 10 the Commission suspended this supplemental tariff in order to give it opportunity to investigate, and two days afterward the bill in this case was filed. On April 27 an amended bill was filed, and, on the same day, the Detroit, Grand Haven & Milwaukee Railway Company filed its bill.

We may observe that the order of the Commission of April 10 is the only one in controversy. The other orders of February 6 and March 15, 1912, were directed against the Grand Trunk Western Railway, and when it came to the knowledge of the Commission that

that road did not enter the city, the orders were canceled.

The bills prayed that the acts referred to and the order of the Commission be declared null and void as to complainants, that injunctions interlocutory and perpetual be granted restraining appellees from executing the order, and from taking any steps or proceedings to enforce any of the penalties or remedies of the statute.

Answers were filed to the bills, and supporting and attacking affidavits. The District Court upon hearing denied an injunction and vacated the restraining order, but suspended the formal entry of its orders. Subsequently the cases were consolidated for the purposes of an appeal, and an appeal allowed. The bond was fixed at $100,000 and the restraining orders continued in force pending the appeal.

The two suits may be treated as one, the material points being identical, except as to the territory through which the roads run and the diversity of citizenship which exists only in the first suit filed. The foundation of both suits is the same, that the order of the Commission and the acts of the State under which it was made, in so far as the order and the acts require of complainants or their property any of the services above set forth or so threatened to be required, constitute the taking of their property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States; and is also a violation of the commerce clause of that instrument. The specification under the latter is "that Congress has taken over the whole subject matter of terminals, team tracks, switching tracks, sidings, etc., of carriers engaged in interstate commerce, and has enacted that such carriers shall not be required to give the use of such terminal facilities to other carriers engaged in like business."

It is further objected against said order that the com-

panies were not incorporated for the purpose of local or intrastate switching or drayage business, but for the purpose of interstate and intrastate commerce; and, further, the penalties prescribed by the acts under which the Commission purported to have acted are so drastic that a resort to court to test the validity thereof is at the risk of imprisonment in the jails of the various counties where the lines of the companies run, and, therefore, the companies are denied the equal protection of the laws and their property is taken without due process of law.

The question in the case is whether, under the statutes of the State of Michigan, appellants can be compelled to use the tracks it owns and operates in the city of Detroit for the interchange of intrastate traffic; or, stating the question more specifically, whether the companies shall receive cars from another carrier at a junction point or physical connection with such carrier within the corporate limits of Detroit for transportation to the team tracks of the companies; and whether the companies shall allow the use of their team tracks for cars to be hauled from their team tracks to a junction point or physical connection with another carrier within such limits and be required to haul such cars in either of the above-named movements or between industrial sidings.

It is contended that the order is an interference with interstate commerce. The contention is premature, if not without foundation. Section 7, before its amendment, required all railroads subject to it to establish switching connections between one another and to establish depots, and otherwise, for the interchange of traffic between their respective lines and for the receiving, forwarding and delivering of property and passengers to and from their several lines and those connecting therewith, and also for the transfer and delivery of cars without unreasonable delay or discrimination to any point on their own lines or on any connecting line, and forbidding discrimina-

tion in rates and charges. And the respective companies were required to draw over their roads the merchandise and cars of any other corporation or individual having connecting tracks when the cars are of proper gauge, equipment, and properly loaded. Power was given to the Commission, if the compensation could not be agreed on by the roads, to fix such compensation. In other words, the duty of investigation was imposed on the Commission and the duty to render such judgment as was suitable to the situation and to award compensation to the carriers for any service required of them.

We have seen from the statement of facts that the first concern of the Grand Trunk was the right to charge what it pleased or discriminate between the services. Inconvenience to its interstate business seems to be an after thought. Besides, the fact of inconvenience is disputed. It is charged, it is true, in an affidavit filed by appellants; but there was a counter affidavit, and it was averred that the interchange of traffic required by the legislature of the State did not impede interstate business, but on the contrary facilitated it and intrastate commerce and relieved, not caused, congestion on the tracks of the various railroads in the city. And, as we have seen, the order of the Commission was suspensory only of the tariff of the appellants, not a final determination against it or of the conditions which might or might not justify it. It is too late in the day to question the competency of a State to create a commission and to give it the power of regulating railroads and necessarily of investigating the conditions upon which regulation may be directed. If a judicial interference is sought with the exercise of such power it must be clearly shown to have been transcended, not left as a conclusion from the balancing of conflicting affidavits, or even, it may be, as held by the District Court, on *ex parte* affidavits. Courts are reluctant to interfere with the laws of a State or with the tribunals constituted

to enforce them. Doubts will not be resolved against the law, nor the decision of its tribunals prevented or anticipated unless the necessity for either be demonstrated. Upon these principles the District Court acted, and rightly acted.

We will not dwell on the contention of appellants that Congress has taken over the whole subject of terminals, team tracks, switching tracks, sidings, etc. We need make no other comment than that it cannot be asserted as a matter of law that Congress has done so; and where the accommodation between intrastate and interstate commerce shall be made we are not called upon to say on this record.

Before proceeding to the more important contention of appellants, that is, movement between junction points and other points, it is well to observe that a distinction is alleged to exist between team tracks and industrial sidings or tracks. The allegation (which is neither admitted nor denied in the answer) is that the lands upon which the latter are located are held, owned, or were acquired for the purpose of accommodating the tracks without expense to appellants, either in the acquisition or maintenance of the lands or tracks. Appellants, it is urged further, are not responsible for cars placed on such tracks nor are appellants required to police them. Team tracks are laid upon the ground acquired by appellants and were constructed and are maintained by them. The latter, therefore, are distinctly accessories or facilities in the receipt and delivery of freight in transportation, both within and to and from points outside of the city. The industrial sidings have, it may be said, more special character. But upon this distinction no point is made in the argument and the District Court left it untouched in its decision, no doubt because in that court, as here, no emphasis was put upon the distinction. In other words, because it was considered that it falls under the prin-

ciples which related to the team tracks; and we may so regard it.

The proposition of appellants is, as said by the District Court, that such service and team track service "are not in a proper sense transportation, but are essentially distinguishable therefrom"; or, to put it another way—and one which expresses more specially the contention of appellants—they are mere conveniences at the destination or initial point of the transportation and hence are terminal facilities merely and their use is not required to be given to other railroads. The District Court did not regard them in the latter character. After stating the conditions which exist in Detroit and its extent, the court said of them: "Such tracks are necessary to prevent the congestion which would result from requiring all carload freight, both in and out, to be delivered at the freight depots of the respective roads, and in a very proper sense are shipping stations." The court concluded that the services were transportation and that the statute of the State validly empowered the Commission "to require local transportation by a railroad between its own shipping stations within a city, whether such plurality of shipping stations has been voluntarily established by the railroad, as here, or has been required by the Commission under its lawful powers, and provided such transportation is for such substantial distance and of such a character as reasonably to require a railroad haul, as distinguished from other means of carriage." The court further said: "It is clear that a statute validly may, and the statutes we are considering do, authorize the employment of such depots, side-tracks, and team tracks of a railroad for transporting carload freight to and from the junction of such road with another road as a substantial part of a continuous transportation routing, where such junction is outside the city limits." And it was remarked that the fact that the freight movement begins and ends within

the limits of a city does not take from it its character "of an actual transportation between two termini," the other conditions obtaining. We concur in the conclusion of the court.

The extent of Detroit is about 22 miles, and its population about 500,000. The effect of the order is simply that the companies shall accept freight at the designated points for shipment to the other designated points. This, except in an extreme sense, is not a use of the tracks and terminals; or, rather, it is only a proper use—the use for which the roads were constituted to afford. An area of 22 miles is attempted by appellants to be localized and made a destination point. A city may, in a sense, be such a terminal unit, but considering the extent of Detroit, it is competent, we think, for the State under the conditions which this record presents to consider points within it the beginning and destination of traffic. And to call the service necessary to such intrastate movement of freight a taking of terminals is misleading and puts out of view the full signification of the question which the record presents, which is, Is there a distinct and sufficient movement between places which the companies can be required to perform, or which, to put it another way, constitutes transportation and therefore such as the companies were created to perform? That cars may be delivered or received is but an incident. The statute therefore is a regulation of the business of appellants, not an appropriation of their terminal facilities for the use and benefit of other roads. It is therefore justified by the doctrine of *Wisconsin &c. Rd. Co.* v. *Jacobson*, 179 U. S. 287. See also *Minneapolis & St. Louis R. R. Co.* v. *Minnesota*, 186 U. S. 257. In the *Jacobson Case* an order of the Railroad Commission of the State of Minnesota was considered which required two railroads of the State to make track connections. The statute of the State provided that all common carriers subject to its provisions

should provide at all points of connection, crossing, or intersection at grade, where it was necessary for interstate commerce, ample facilities for transferring cars used in the regular business of their respective lines of road from other lines or tracks to those of any other carrier whose lines or tracks might connect with, cross or intersect their own, and should provide facilities for the interchange of cars, and for the receiving, forwarding and delivering of passengers, property and cars to and from their several lines and those of other carriers connecting therewith, without discrimination in rates and charges. And it was provided that one carrier should not be required to furnish its tracks, equipment or terminal facilities to another without reasonable compensation, the cost of connections to be proportionately divided between the carriers; and in case of disagreement, it was to be settled by the Commission. The roads were required to establish reasonable joint through rates at the demand of any person or of the Commission. And it was provided that carload lots should be transferred without unloading the cars unless it be done without cost to the shipper or receiver and without unreasonable delay.

Under this statute track connections were required to be made by the Wisconsin &c. R. R. Co., with an intersecting road. In its answer before the State Railroad Commission it alleged that to construct a connecting track would require it to go outside of its right of way and to condemn land for that purpose. In addition it urged that to compel such connection would violate the commerce clause of the Constitution and the Fourteenth Amendment. The Commission directed the connection to be made and its order was affirmed by the local state court to which an appeal was taken, as provided by the statute. This court affirmed the order, deciding that it was a proper exercise of the power of regulation of the business of the companies. The reasoning to sustain this

conclusion need not be reproduced. It rested upon the ultimate proposition that railroad companies "are organized for the public interests and to subserve primarily the public good and convenience." And deciding this to be the purpose of the creation of the roads and that government had power to secure it, it was held that where a provision for regulation is reasonable and appropriate, when considered with regard to the interests both of the company and of the public, the legislation is valid and will furnish ample authority for the courts to enforce it, even though eminent domain must be exercised or cost incurred. This principle, illustrated by the facts of the case, is apposite to the regulation under review. If the establishment of track connections by intersecting roads with its necessary accessories of sidings and switches be required and acceptance and delivery of loaded cars as a convenience of transportation, surely team tracks and sidings in Detroit and the delivery and acceptance of loaded cars are as much so.

This view is not opposed by *Louisville &c. R. R. Co.* v. *Stock Yards Co.*, 212 U. S. 132. There a provision of the constitution of the State of Kentucky which required a carrier to deliver its cars to a connecting carrier was held invalid because it did not provide adequate protection for their return or compensation for their use. It was hence held that it amounted to a taking of property without due process of law. But the court was careful to say that "in view of the well-known and necessary practice of connecting roads, we are far from saying that a valid law could not be passed to prevent the cost and loss of time entailed by needless transshipment or breaking bulk, in case of an unreasonable refusal by a carrier to interchange cars with another for through traffic." The point of the decision was that compensation should be provided, and by the law. As it is expressed in the opinion, "The law itself must save the parties' rights, and not leave them

to the discretion of the courts." This as a condition was explained, for it was said: "We do not mean, however, that the silence of the [State] constitution might not be remedied by an act of the legislature or a regulation by a duly authorized subordinate body if such legislation should be held consistent with the State constitution by the State court." These conditions exist in the case at bar.

There is another part of the *Louisville &c. R. R.* v. *Stock Yards Case* which is more applicable to the contentions of the parties hereto and determine, it is urged, against the statute under consideration and the order of the Commission. The judgment reviewed required the railroad company to receive at its connection with the Southern Railway Company and to switch, transport and deliver all live stock consigned from the Central Stock Yards (the stock depot of the Southern Railway) to any one at the Bourbon Stock Yards (the stock depot of the Louisville & Nashville Railroad). This part of the judgment was based also upon the constitution of the State. We said: "If the principle is sound, every road into Louisville, by making a physical connection with the Louisville & Nashville, can get the use of its costly terminals and make it do the switching necessary to that end, upon simply paying for the service of carriage. The duty of a carrier to accept goods tendered at its station does not extend to the acceptance of cars offered to it at an arbitrary point near its terminus by a competing road, for the purpose of reaching and using its terminal station. To require such an acceptance from a railroad is to take its property in a very effective sense, and cannot be justified, unless the railroad holds that property subject to greater liabilities than those incident to its calling alone."

It will be observed that the beginning of traffic was at the Central Stock Yards, the stock yards of the Southern, and was to be hauled by that road to its connection with the Louisville & Nashville, and by the latter from that

point to the Bourbon Stock Yards, the stock depot of the latter railroad. The yards were the terminals of the respective roads for live stock delivery, and the case turned upon the point that the roads were competitive, and that the point of delivery was an arbitrary one, and that thereby the terminal station of one company was required to be shared with the other company.

In the case at bar a shipper is contesting for the right, as a part of transportation. The order of the Commission was a recognition of the right and legally so. Considering the theater of the movements, the facilities for them are no more terminal or switching facilities than the depots, side tracks and main lines are terminal facilities in a less densely populated district. A precise distinction between facilities can neither be expressed nor enforced. Transportation is the business of railroads, and when that business may be regulated and to what extent regulated may depend upon circumstances. No inflexible principle of decision can be laid down. This was recognized in *Wisconsin &c. R. R. Co.* v. *Jacobson, supra.* There the court was careful not to say that under no circumstances could an order requiring track connections between intersecting roads be a violation of constitutional rights. "It would depend," it was said, "upon the facts surrounding the cases in regard to which judgment was given. . . . And in many cases questions of degree are the controlling ones by which to determine the validity, or the reverse, of legislative action." Indeed, no case could better illustrate the value of the principle than does this case, where the exceptional situation of Detroit as shown by the record, the relation of the tracks in controversy to that situation, their length and their functions, as respects the commerce of Detroit which in the nature of things they perform, not merely as instruments of terminal service and delivery, but of railway transportation in the completest sense, are essential and controlling factors in the determination of

the question presented. To which controlling conditions there must of course be added the fact that the railroad itself for a long period of time had recognized the situation and had applied the tracks to uses of transportation in the proper sense as distinguished from mere terminal service, a use which was only abandoned or sought to be abandoned when authority was exerted to prevent unreasonable and to secure reasonable charges for the services.

It is contended by appellants that the statute is void upon its face because the severity of the penalties preclude an appeal to the courts against its provisions except at such risks and costs that they should not be compelled to incur, and *Ex parte Young*, 209 U. S. 123, is adduced. But the provision for penalties is in a section by itself and when their enforcement is attempted their constitutionality can then be determined. *Minnesota Rate Cases*, 230 U. S. 352; *Louis. & Nash. R. R. Co.* v. *Garrett, ante*, page 298.

As we have determined that the tracks or terminal facilities of appellants are not taken by the order of the Commission, we need not consider a subdivision of § 7 which provides that nothing in the act shall be construed as requiring any railroad to give the use of its tracks or terminal facilities to another railroad engaged in like business.

The contention of appellants that they were not incorporated for the purpose of intra-city transportation is untenable. They were incorporated for the purpose of transportation, and geographical limitations under the circumstances which this record exhibits cannot prevail against the power of the State to regulate.

Decree affirmed.

GRAHAM AND THE TITLE GUARANTY AND SURETY COMPANY *v.* UNITED STATES OF AMERICA.

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

No. 76. Argued November 13, 14, 1913.—Decided December 8, 1913.

Where the contractor refuses to go on with the work there is no question of revision of judgment of an officer annulling the contract, and a right of action accrues to the Government without need of any useless ceremony of approval by the superior officer or board. *United States* v. *McMullen*, 222 U. S. 460, distinguished.

In this case, as the bond in terms contemplated an extension of time and the contract provided for modifications, the surety was not discharged by waiver of time limit or for modifications without its express consent.

Under a contract that the Government would furnish the contractor with granite blocks free on board cars at the quarry, he to transport them, *held* that the contractor was to furnish the cars and was responsible for delay in that respect.

In Federal courts the judge and jury are assumed to be competent to play their respective parts; and *held* that the charge to the jury in this case as to the meaning of the phrase "net dimension blocks" was adequate and fair.

This court will not upset a verdict upon the speculation that the jury did not do their duty and follow the instructions of the court; the fact that the attention of the jury was called by counsel for the Government to the statement on the letter-head of the surety company defendant that its capital was $1,000,000, *held* not to have been prejudicial.

An instruction that the Government was entitled to recover, in case of breach found, an amount, not exceeding the penalty of the bond, equal to the difference between the reasonable and necessary cost to it for transporting, cutting and delivering the granite mentioned in the case and the amount specified in the contract, *held* to have referred simply to the granite actually in controversy; and there

being evidence in the case to warrant the finding, and as the measure followed the contract, a verdict for the amount was correct.
188 Fed. Rep. 651; 110 C. C. A. 465, affirmed.

THE facts, which involve the validity of a judgment obtained by the United States against a contractor and surety for failure to perform, are stated in the opinion.

Mr. Charles F. Harley and *Mr. George R. Gaither*, with whom *Mr. John B. A. Wheltle* and *Mr. Burdette B. Webster* were on the brief, for plaintiffs in error.

The Solicitor General for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action upon a bond against a contractor and his surety, for breach of a contract made under the act of March 3, 1903, c. 1007, 32 Stat. 1083, 1102, with Green, Superintendent of Construction, acting under the direction of the Regents of the Smithsonian Institution for the United States, party of the first part, which the bond was given to secure. The contractor, Graham, agreed to "transport from the quarry, cut, box and deliver complete, all of the Bethel granite, to be furnished by the party of the first part free on board cars at the quarry at Bethel, Vermont, required for" a part of the National Museum in Washington described in the specifications, "and to do all other things needful to carry out all and singular the several requirements of the said specifications, the drawings therein referred to, and the instructions and general conditions," for a gross sum. In case of failure to prosecute the work diligently in the judgment of the Superintendent of Construction, Green or his successor was given power, 'with the sanction of the Regents of the Smithsonian Institution, to annul' the contract by notice in

writing, whereupon payments under the contract were to cease, &c., and the United States was given the right to recover from Graham any excess over the contract price expended for completing the contract, which it was authorized to proceed to do. There were provisions for an extension of time by the Superintendent, for written modifications of the contract as to the character or quantity of the labor or material, and for payment of ninety per cent. as the progress of the work might warrant. The bond was for the performance of the contract according to its true intent and during any period of extension granted by the United States.

On March 7, 1908, after the time fixed for the completion of the work, Graham discharged his workmen and stopped work, the contract not having been performed. On March 11, the Superintendent wrote to him saying that he had heard that Graham apparently had stopped work indefinitely, and asking for immediate correct information. On the 14th Graham's lawyer answered that Graham had stopped work; that the step was necessary for his financial welfare in view of the damage that he had sustained through the Government's conduct, and that "if this matter can be in any way amicably adjusted" he would be glad to do anything fair. On the 16th the Superintendent replied that if he received no immediate assurance that the work was to be resumed promptly he must proceed to annul the contract; and on the 18th notified Graham that the contract was annulled with the sanction of the Regents of the Smithsonian Institution. To this Graham's lawyer rejoined that they could not concede any default, that the Government alone was to blame, but that they were willing to do what was fair, and to let the Government use their plant if the damage sustained could be adjusted. The Superintendent had written on the 18th to the Secretary of the Board of Regents recommending the so-called annulment and notice

to the contractor and his surety, and had received his approval expressed to be on behalf of the Board of Regents. Afterwards the United States completed the work. There was a long trial which resulted in a verdict and judgment for the plaintiff for the penalty of the bond, $50,000, subject to exceptions. The judgment was affirmed by the Circuit Court of Appeals. 188 Fed. Rep. 651; 110 C. C. A. 465.

Before considering the excuses alleged by Graham we will dispose of a preliminary objection that the suit cannot be maintained because the Secretary of the Board of Regents did not consult the Board before undertaking to sanction the 'annulment' of the contract. It is unnecessary to pass upon the argument that under the statute the Board could have no voice, and that by custom and practice, as well as by necessity in view of the constitution of the Board, the Secretary represented it in matters like this. The provision as to annulment, construed in *United States* v. *McMullen*, 222 U. S. 460, 471 and cases cited, referred to cases where there was a failure to prosecute the work diligently in the judgment of the Secretary and allowed a revision of that judgment in cases of that sort, before the United States should decline to proceed further and complete the work by other means. But when Graham refused to go on, there was no question of judgment to be revised but a plain breach of the contract unless the refusal was justified, and a right of action accrued without the need of a ceremony that would have had no meaning or use. The letters from March 7 to March 18, 1908, appear to us to show a clear refusal by Graham to do any further work. The expressions as to adjustment suggest nothing but a compromise of mutual claims, to be followed by the Government's, not Graham's, use of Graham's plant.

Another objection not going to the merits of Graham's case is that the surety was discharged by a waiver of the

original time limit without its assent, and by Graham's being called on for some extra work, due to a slight enlargement of the diameter of the dome, for which he was paid. The bond in terms contemplated an extension of time as possible and the contract provided, as we have said, for a waiver of the time limit and for written modifications. The modifications were exhibited in letters, but perhaps it is unnecessary to consider how far a surety whose undertaking extends to modifications of the principal contract is concerned with the form in which they are made. The surety was not discharged. *United States* v. *McMullen,* 222 U. S. 460, 468, 469.

The only question of substance is whether Graham's refusal to finish the work was justified or excused by the conduct of the other party. The first and only serious matter of complaint on his part was delay in furnishing him granite. The undisputed testimony is that this delay was due to their being unable to get cars at the quarry to take the stone, and so under the instructions the jury must have found, so that the responsibility for it depends upon who was bound to furnish the cars. By the contract the Government was to furnish the granite free on board the cars at the quarry, and Graham agreed to transport it from that place. On such an undertaking, as Graham was to do the transporting and moreover was made responsible for safe delivery on the site of the Museum building, and as the railroad would be his bailee, he naturally would be held to furnish the cars. No different conclusion seems to us to follow from the language of the preliminary description and conditions. These recite that "The necessary Bethel granite stock, in net dimension blocks, is to be furnished to the Government by the present contractor, free on board cars at the quarry in Bethel, ready for the contractor for the cutting of the granite to transport it to his cutting yards for that purpose." They go on "Bidders for the Bethel granite work

will therefore bid on the basis and understanding that the granite, in net dimension blocks, one block for each separate pattern, will be furnished to them without unnecessary delay and without charge, free on board cars at the quarry at Bethel, Vermont." The first passage does not mean that because the quarry man was to furnish the granite free on board and ready for transportation the quarry man was to furnish the cars. It may mean that as between him and the Government the Government was bound to do it, but, by the same reasoning, the second passage means that bidders were invited to step into the Government's shoes and assume a like obligation towards it, as by the agreement when made Graham did. It follows that he cannot charge the United States with delay due to lack of cars. Furthermore, in a letter of February 10, 1908, when the delay had ceased, he wrote that the work was nearly finished and that he intended to devote his whole yard to it until it should be about completed. This is wholly irreconcilable with the defence that a month later he abandoned the work because of the delay.

The next excuse put forward is that the granite was not furnished in 'net dimension blocks.' There was contradictory evidence as to the meaning of the phrase, Graham contending, in the face of his contract to cut, that it meant perfect blocks. But he admitted that he did not have that understanding when he contracted and, although on February 14, 1907, he complained of the size, in the letter just mentioned of February 10, 1908, he wrote that the work 'has had to be cut and shipped, but it is now nearly finished and I intend to devote my entire yard to Museum work, until I see the job about completed.' The judge left it to the jury 'whether on a fair average the rough stone furnished complied with the stipulation that it should be furnished in net dimension blocks, as you find the meaning and intention of that stipulation was understood by the parties to the contract.'

He added, 'if you find that in the latter part of February and the early part of March the stone in point of its dimensions and roughness did not comply with the contract, . . . Graham could not be held to the further performance of his contract, and your verdict should be for the defendants.' The reference to February and March did not import a limitation of time, but simply a reference to the period as to which the judge understood that there was special complaint. No attention was called to the matter as it should have been if any misunderstanding was feared. The charge on the point was adequate and fair. It is objected that the judge called the jury's attention to Graham's testimony concerning his expectation when he contracted. The judge had a right to do more than that if he left the decision to them. Universal distrust creates universal incompetence. In the courts of the United States the judge and jury are assumed to be competent to play the parts that always have belonged to them in the country in which the modern jury trial had its birth. *Rucker* v. *Wheeler*, 127 U. S. 85.

The ground on which Graham testified that he stopped work was that he could not get any money, but there seems to be no evidence that the Government failed in its obligations as to payment and this point is not one of those most pressed. We have examined the places in the record referred to by the defendants and think it enough to say that we discover no error of which they can complain.

Much emphasis was laid in the argument on what seem to us meticulous objections to every detail in the conduct of the trial. One that was dwelt upon was that, in putting in a letter from the surety showing notice to it of Graham's default and the position taken by it, the counsel was allowed to read the letter head, which contained the words 'Capital and Surplus over $1,000,000,' as well as the letter itself (which last was not objected to), and that in argument the counsel for the Government said 'There is no

room for sympathy for the poor defendant in this case.' The document went in as a whole, properly enough, and the judge charged the jury that it was 'not a case for sentimental considerations of any kind' with more in the same direction. It would be absurd to upset a verdict upon a speculation that the jury did not do their duty and follow the instructions of the court. As to various remarks made by the judge in the course of the trial, it is enough to refer to what we have said already as to his power, and that we discover nothing that could have created a prejudice against the defendants or have been open to objection even if he had been more strictly tied down by law than he was.

We find no error on the question of damages. The judge instructed the jury that the plaintiff was entitled to recover, of course not exceeding the penalty of the bond, the difference between 'the reasonable and necessary cost to the plaintiff for transporting, cutting and delivering the granite mentioned in this case . . . and the amount specified in the contract' to be paid to Graham. There was some cavil at the phrase 'granite mentioned in this case,' but obviously it meant the granite in controversy. There was evidence warranting a finding, and the measure followed the contract and was correct. *United States* v. *McMullen*, 222 U. S. 460, 471. A superfluous number of prayers was submitted and exceptions were taken at every step. We deem it enough to say in regard to them all that the instructions to the jury were fair, the rulings on the questions in the case correct, and that nothing appears that would warrant us in ordering the case to be retried.

Judgment affirmed.

THE CHIEF JUSTICE took no part in the decision of this case.

CHAVEZ *v.* BERGERE.

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

No. 5. Submitted October 30, 1913.—Decided December 8, 1913.

Although containing some words adapted to a present transfer, if the instrument taken in its entirety shows that it was a mere contract to convey upon a specified contingency it will be construed as such and not as a conveyance. *Williams* v. *Paine*, 169 U. S. 55.

Where an alleged Mexican grant was rejected, one who was in possession under a contract to purchase the same if confirmed, and who thereafter acquired portions thereof under the public land laws, was not obliged to surrender such portions in order to recover what he had paid his vendor on account of the contract to purchase the entire tract.

Possession by the vendee under an uncompleted contract to purchase is not adverse to the vendor, nor does it become so until after unequivocal repudiation of the relation created by the contract.

Manifest intention of the parties must be given full effect; and so *held* that approval by the Surveyor General of a Mexican grant referred to the approval of the grant by the proper authority.

Where a contract to purchase under which the vendee is in possession is terminated by an event which renders it impossible for the vendee to complete, his continued possession thereafter is without right and if he sets up an adverse right in himself demand for surrender is not a prerequisite to maintenance of ejectment.

In ejectment, defendants who acquired possession as conditional vendees of the plaintiff are estopped from calling in question the title of the latter.

14 N. Mex. 352, affirmed.

THE facts, which involve the construction of a contract for sale of an unconfirmed Mexican grant, and the relative rights of the parties thereto, are stated in the opinion.

Mr. A. B. Renehan for appellants.

Mr. T. B. Catron and *Mr. R. C. Gortner* for appellees.

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

This was an action in ejectment to recover the possession of 317 acres of land in Santa Fe County, New Mexico. The defenses interposed were the general issue and that the cause of action did not accrue within ten years before the action was begun. A trial to the court without a jury resulted in a judgment for the plaintiffs, which was affirmed by the Supreme Court of the Territory, 14 N. Mex. 352, and the case was then brought here. A statement of the facts, in the nature of a special verdict, and of the rulings and exceptions upon the rejection of certain evidence was made and certified by the appellate court agreeably to the act of April 7, 1874, 18 Stat. 27, c. 80, § 2.

Briefly stated, the principal facts are as follows: On June 22, 1878, Manuel A. Otero and Jesus M. Sena y Baca entered into an agreement written in Spanish a translation of which is as follows:

"Know all men by these presents: That I, the undersigned, Manuel Antonio Otero, resident of the county of Valencia, in the territory of New Mexico, for consideration, have sold and transferred in favor of Jesus M. Sena y Baca and Agapita Ortiz, his wife, a ranch known as the Ranch of Galisteo, which is situated in the county of Santa Fe and Territory aforesaid, known as the ranch which was formerly of the deceased Don Miguel E. Pino; and that I will give and execute the documents of conveyance of said ranch in favor of Jesus M. Sena y Baca and Agapita Ortiz, as soon as there shall be adjudicated and approved by the Surveyor General the Grant of Bartolome Baca of a tract which was ceded him by the Governor Melgarez in the year 1819, and the which is situate in the county of Valencia in the Territory of New Mexico, aforesaid, and furthermore they will take possession of the aforesaid ranch and will have and enjoy all the products

of the same until meanwhile the proper documents may be executed, and in conformity with the above stated; and the said Jesus M. Sena y Baca so agrees and has signed here jointly with me.

"In Witness Whereof, we sign the present in La Constancia, County of Valencia, this 22nd day of June, A. D. 1878.

"MANUEL A. OTERO.
"JESUS M. SENA Y BACA."

At that time the Galisteo ranch and the Bartolome Baca tract were supposed or claimed to be unconfirmed Mexican grants, the former of 24,000 acres and the latter of a vastly greater area. Otero had some substantial right in the former, and Sena y Baca was asserting an undivided interest in the latter, as an heir of the original grantee. As part of the transaction between them, Otero was to receive, and a few days after the signing of the agreement did receive, from Sena y Baca a deed for the latter's asserted interest in the Bartolome Baca tract.

The alleged grant from Mexico of that tract was thereafter presented to the Surveyor General for New Mexico for examination and report under § 8 of the act of July 22, 1854, 10 Stat. 308, c. 103. That officer, on September 7, 1881, made a report recommending, upon the proofs then before him, that the grant be not confirmed but rejected, and this report was duly laid before Congress for such action thereon as it should deem just and proper. While the matter was awaiting action by Congress, the Court of Private Land Claims was created by the act of March 3, 1891, 26 Stat. 854, c. 539, and was invested with jurisdiction of proceedings looking to the confirmation or rejection of such grants. The Bartolome Baca grant was then appropriately brought before that court for consideration and adjudication, and was confirmed to the extent of 11 square leagues; but in 1897, on an appeal to this court

the judgment of confirmation was reversed and the grant rejected as invalid because resting upon a forged signature of the Governor. *United States* v. *Bergere*, 168 U. S. 66.

In the meantime the Galisteo grant was presented to the Court of Private Land Claims for consideration and adjudication, and was by that court confirmed as a valid grant for 317 acres, only, the confirmed area being the land here in controversy.

The plaintiffs are heirs at law of Otero, who died in 1882, and the defendants are the successors in interest of Sena y Baca and his wife under the agreement of 1878. The mesne conveyances through which the defendants became such successors were quit-claim deeds, and were accompanied by a delivery of the original agreement.

Sena y Baca and his wife went into possession of the land in controversy under and pursuant to that agreement, and they and their successors continued in possession, farmed the land, made such improvements thereon as were incidental merely to its use in that way, received the rents and profits, paid some but not all of the taxes, and exercised other possessory rights ordinarily incident to ownership, but all consistent with the rights conferred by the agreement of 1878.

In the proceeding in the Court of Private Land Claims relating to the Galisteo grant, the successors of Sena y Baca and his wife sought to secure a confirmation of the grant for the full 24,000 acres theretofore claimed, and in that connection traced their right through the agreement with Otero, thus recognizing his title.

The present action was begun April 3, 1901, without any prior demand for the possession. At that time the defendants were openly claiming full title in themselves, notwithstanding the prior adjudication of the invalidity of the Bartolome Baca grant and notwithstanding there had been no conveyance by Otero or his heirs of the Galisteo grant as contemplated by the agreement.

Other facts disclosed in the certified statement will be noticed in connection with particular questions upon the decision of which it is claimed they have a bearing.

The territorial courts held that the agreement of 1878 was not a conveyance, but an executory contract for a conveyance in the event, and only in the event, of the favorable adjudication and approval of the Bartolome Baca grant; that this event became an impossible one when, in 1897, this court rejected that grant as invalid; that the defendants' rights under the agreement were thereby terminated and extinguished; that the possession of Sena y Baca and his wife, which was continued by their successors, was acquired and held under the agreement and in recognition of Otero's title, and therefore was not adverse; and that upon all the facts the plaintiffs were entitled to recover.

While it does not appear to be claimed that the question of title as between these litigants was adjudicated by the Court of Private Land Claims in the Galisteo case, it is well to observe that the act creating that court and defining its jurisdiction declared in subdivision 5 of § 13: "No proceeding, decree, or act under this act shall conclude or affect the private rights of persons as between each other, all of which rights shall be reserved and saved to the same effect as if this act had not been passed; but the proceedings, decrees, and acts herein provided for shall be conclusive of all rights as between the United States and all persons claiming any interest or right in such lands." See *United States* v. *Conway*, 175 U. S. 60, 71.

1. It is urged here that the agreement of 1878 in itself transferred the title to the Galisteo grant from Otero to Sena y Baca and his wife, and that the conveyance which was to be executed upon the adjudication and approval of the other grant was to operate only by way of a further assurance. Like the territorial courts, we think other-

wise. Although containing some words adapted to a present transfer, the instrument, taken in its entirety, shows that it was a mere contract to convey upon the contingency specified, with a provision investing the prospective vendees with the right of possession in the meantime. Had a present conveyance been intended, the right to a further assurance hardly would have been conditioned upon a contingency in no wise bearing upon the adequacy of the original conveyance, and, equally, the provision respecting the possession in the interim would have been superfluous. Then, too, the informality of the instrument, the signing by both parties, and the absence of an acknowledgment make against the claim of a conveyance *in præsenti*. Bearing in mind that the question is one of intent, and judging of this by what appears upon the face of the instrument, we think it clearly was designed to be a contract to convey and not a conveyance. See *Williams* v. *Paine*, 169 U. S. 55, 76.

2. In 1898 and 1899, after the Bartolome Baca grant was adjudged invalid, the plaintiffs severally made application, under §§ 17 and 18 of the act of 1891, as amended February 21, 1893, 27 Stat. 470, c. 149, and June 27, 1898, 30 Stat. 495, c. 504, for small-holding claims of 160 acres each within the limits of the rejected grant; and upon the trial the defendants sought to make proof of the advantageous sale or disposal of those claims. The evidence was rejected, and this it is contended was prejudicial error because, first, what was done tended to show that the plaintiffs treated the agreement of 1878 as executed rather than executory, and, second, even if the agreement was executory, the plaintiffs could not recover in the action without first surrendering to the defendants the advantages obtained through those claims. The contention is untenable. The right to those claims did not arise out of the agreement of 1878 or out of the rejected Bartolome Baca grant, but arose, if at all, because the

plaintiffs were in possession and the United States permitted the acquisition of title to public land in New Mexico in that way. The alleged Bartolome Baca grant being out of the way, whether the plaintiffs secured title to the 160-acre tracts and what they did with them were matters which did not concern the defendants.

3. Another contention is that the facts certified demonstrate that the defendants and their predecessors had been in adverse possession for more than ten years when the action was begun, and therefore that the defense of the statute of limitations was well founded. In our opinion, the territorial courts rightly held otherwise. Sena y Baca and his wife went into possession in virtue of a right so to do which was expressly given by the agreement and was to continue until the happening of the event whereby their right to a conveyance was to be determined. Thus, their possession was not hostile or adverse, but in subordination to the Otero title, and the possession of their successors was plainly of the same character up to the time of the determinative event. There had been no unequivocal repudiation of the relation created by the agreement, for all that was done was consistent with a holding under it. Not until the conditional right to a conveyance was terminated did the possession cease to be a permissive one under the agreement, and that conditional right was not terminated until this court adjudged the Bartolome Baca grant invalid and rejected it. That was less than four years before the action was begun.

We do not overlook the reference in the agreement to the Surveyor General as the one whose decision was to be determinative, or his adverse report which preceded the action by more than ten years. While the agreement uses the words "shall be adjudicated and approved by the Surveyor General," the naming of that officer evidently resulted from a misconception of his power and duty. Under the act of 1854, in force at the time, he was

not entrusted with power to adjudicate and approve Mexican grants, but was required to examine into their status and report thereon as a convenient means of aiding Congress in determining what should be done. His action was merely advisory, the power to decide and to approve or reject being reserved to Congress. *United States* v. *Ortiz*, 176 U. S. 422, 427. But notwithstanding the mistake, the intention of the parties is manifest and full effect should be given to it. To them the important thing was the adjudication and approval of the Bartolome Baca grant, and the particular governmental agency from which such action should come was of secondary consideration. They could make their future acts and rights dependent upon the former, as was done, but were without power to designate the latter. Evidently they named the Surveyor General in the belief that the power to adjudicate and approve had been lodged in him, their meaning being the same as if they had said "shall be adjudicated and approved by the proper authority." This, in our opinion, is the true construction of the agreement. Of course, an authorized adjudication and approval was contemplated, not one that would be without authority and of no effect.

Being in the nature of a recommendation only, the adverse report of the Surveyor General was not final and bound no one. It did not even preclude him from making a further examination and basing a favorable report thereon. *United States* v. *Ortiz*, *supra*. Had Congress disapproved his adverse report and confirmed the grant, we entertain no doubt that the confirmation would have satisfied the condition of the agreement and have entitled Sena y Baca and his wife to the stipulated conveyance; and a like result would have ensued had the decision of this court been one of confirmation instead of rejection.

It follows that the relation created by the agreement was not terminated by the Surveyor General's report in 1881, but continued until the adverse decision of this

court in 1897, and that the possession in the interim, like that before, was in virtue of the agreement and not adverse.

4. After the agreement was terminated by the adverse decision upon the Bartolome Baca grant the continued possession of the defendants was without right, and when the action was begun, almost four years thereafter, they were asserting full title in themselves. Therefore, a demand that they surrender the possession was not a prerequisite to the maintenance of the action.

5. We are asked to say that the findings do not show title in the plaintiffs' ancestor, Manuel A. Otero, or, at least, are so conflicting upon that point as to afford no basis for the judgment. The findings to which attention is invited may be summarized as follows: (a) At the date of the agreement the title to the land in controversy was in Otero; (b) as confirmed, the Galisteo grant consists of the land in controversy, but prior to confirmation it was claimed to embrace a much larger area; (c) Otero's title to the grant was founded upon a conveyance in 1856 which excepted three designated parcels theretofore transferred to others; and (d) the plaintiffs' proofs did not disclose whether the land in controversy passed under that conveyance or was within the excepted parcels.

While recognizing that these findings are confusing, if not conflicting, we think the judgment is adequately sustained by other findings which show that the agreement of 1878 did not contain the exceptions shown in the conveyance of 1856; that Sena y Baca and his wife went into possession of the land in controversy under that agreement; and that the possession which passed from them to their successors, including the defendants, was likewise a possession in virtue of the agreement. In short, the defendants acquired possession as conditional vendees of Otero, and so are estopped from calling his title in question. As is said in Tyler on Ejectment (p. 543):

"There is a class of cases in which the defendant is not permitted to controvert the title of the claimants in an action of ejectment on the ground of *estoppel*. These are cases where a privity exists between the defendant and the plaintiff, or those from whom he derives title. If a privity in estate has subsisted between the parties, proof of title is ordinarily unnecessary on the part of the plaintiff, for the reason that a party is not permitted to dispute the title of him by whom he has been let into possession. In all these cases, therefore, the proof is directed to the question as to whether such a relation exists between the parties as to operate as an estoppel, and thereby supersede the necessity of introducing any evidence to establish the title of the claimant."

And again (p. 559): "Although strictly speaking, the relation of landlord and tenant is not created between vendor and vendee; yet the vendee, in ejectment by the owner against him, is absolutely estopped, from either showing title in himself, or setting up an outstanding title in another; and the same rule applies to one coming into possession under the vendee, either with his consent, or as an intruder."

Of like import are *Lucas* v. *Brooks*, 18 Wall. 436, 451; *Jackson* v. *Walker*, 7 Cow. 637, 642; *Towne* v. *Butterfield*, 97 Massachusetts, 105; *Lacy* v. *Johnson*, 58 Wisconsin, 414, 423.

As we find no error in the record, the judgment is

Affirmed.

UNITED STATES *v.* CARTER.

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

No. 722. Motion to dismiss submitted December 1, 1913.—Decided December 15, 1913.

Under the Criminal Appeals Act of March 2, 1907, this court has no power to revise the mere interpretation of an indictment by the court below, but is confined to ascertaining whether that court erroneously construed the statute on which the indictment rested.

In this case the writ of error is dismissed as the ruling of the court below that the counts which were quashed were bad in law did not reasonably involve a construction of the statute but may well have rested on the opinion of the court as to insufficiency of the indictment.

THE facts, which involve the jurisdiction of this court of appeals under the Criminal Appeals Act of March 2, 1907, are stated in the opinion.

Mr. Francis B. Carter and *Mr. W. A. Blount* for defendant in error in support of the motion.

The Solicitor General for the United States in opposition to the motion.

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

At the threshold we must consider a motion to dismiss. The case is a criminal one over which we have only the jurisdiction conferred by the Criminal Appeals Act, March 2, 1907, 34 Stat. 1246, c. 2564. There were two indictments containing, the one 54 and the

other 26 counts, purporting to charge alleged offenses against the National Banking Laws as embodied in Rev. Stat., § 5209. On demurrer the court quashed 43 of the counts because they were "bad in law." It is settled that under the Criminal Appeals Act we have no authority to revise the mere interpretation of an indictment and are confined to ascertaining whether the court in a case under review erroneously construed the statute: *United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Stevenson*, 215 U. S. 190, 196. Our power to review the action of the court then in this case can alone rest upon the theory that what was done amounts to a construction of the statute. But it is obvious that the ruling that the counts which were quashed were bad in law did not necessarily involve a construction of the statute, and may well have rested upon the opinion of the court as to the mere insufficiency of the indictment.

It is, however, insisted on behalf of the United States that by referring to the counts which were held good and comparing them with those which were quashed, by a process of exclusion and inclusion, it will be possible to ascertain that the action of the court was based upon a construction of the statute, and we are asked to review the case upon this theory. At best, this proposition amounts to the contention that in every case where there is doubt as to whether the court construed the statute or interpreted the indictment such doubt should be solved by an examination of the entire record. But the right to a review in a criminal case, being controlled by the general law, it follows that a case cannot be brought within the control of the special rule provided by the Criminal Appeals Act unless it clearly appears that the exceptional and not the general rule applies. Aside from this consideration, we cannot give our approval to the suggestion made by the Government since in effect it virtually calls upon us to analyze and construe the in-

dictment as a prerequisite basis for the exertion of the limited power to review the action of the court in interpreting the statute. Indeed, to follow the suggestion would be to frustrate the purposes which manifestly the jurisdictional act was enacted to accomplish; because the intent to expedite in criminal cases the decision of questions involving statutory construction which was plainly one of the ends for which the law was intended would be of little avail if the right to review be extended by implication so as to embrace cases not within the purview of the statute, thereby multiplying appeals and delaying the speedy decision of such cases. Besides, we think in consequence of the ambiguity of the ruling a case like this is not within the scope of the fundamental evil intended to be guarded against by the reviewing statute, that is, to afford a direct and immediate remedy to correct an erroneous construction of a statute before final judgment and thus to prevent the harm which otherwise might result by the application of the construction to other cases, if the power to review could only be exerted after final judgment.

To suggest that if the mere form in which a ruling is clothed be made the test of the power to review, it will result that the exertion of the authority may be rendered unavailing in every case is without foundation. It is not to be assumed that trial courts will not seek rightfully to discharge their duty. But, even if it were possible to indulge in such an assumption, to do so would disregard the power which exists as an incident to the exercise of appellate jurisdiction to compel, in a case which requires it, such action as will prevent a destruction of or render practically unavailing the reviewing power. There can be, however, no ground in this case for indulging the forebodings which we have just answered, because there is nothing in the record showing any request made to the trial court for an expression of opinion in such form as to manifest clearly whether its action proceeded upon a

construction of the statute or merely upon the meaning which was given to the indictment. In saying this we are not unmindful of the fact that it is stated in the brief for the United States that when a bill of exceptions was after the trial presented to the court for settlement, a request was made and refused for a more specific statement of the reasons which led to the quashing of the counts of the indictment. But, obviously, the refusal to grant a request made at the time and under the circumstances stated affords no reason for an exertion of a power to review which we do not possess.

Dismissed for want of jurisdiction.

NEW YORK LIFE INSURANCE COMPANY *v.* DEER LODGE COUNTY.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 56. Argued November 11, 1913.—Decided December 15, 1913.

The sanction of the rule of *stare decisis* urges this court against reversing a long series of decisions where state legislation has been enacted in reliance thereon, and the reversal would involve the promulgation of a new rule of constitutional inhibition on state legislation necessitating readjustment of policy and laws.

After reviewing *Paul* v. *Virginia*, 8 Wall. 168, decided by this court in 1868, and other cases in which that case was followed, this court adheres to the decisions in those cases to the effect that the issuing of an insurance policy is not commerce but a personal contract, and that the regulations of a State in regard to policies delivered in the State by non-resident insurance corporations and taxes imposed on said corporations, are not, if otherwise legal, unconstitutional as a burden upon interstate commerce. *The Lottery Cases*, 188 U. S. 321, and *International Textbook Co.* v. *Pigg*, 217 U. S. 91, distinguished.

The fact that there are great numbers of transactions therein does not give to a business any other character than magnitude; it cannot transform a business from one which is subject to state regulation to one beyond that regulation as interstate.

The fact that the mails are used in consummating contracts for insurance between a corporation in one State and the insured in another, does not give character to the negotiations or the contract nor does it make the latter interstate commerce.

The fact that after the insured receives his policy of insurance it becomes subject to sale and transfer, does not make the business of issuing it commerce.

The statute of Montana imposing a tax on insurance corporations doing business in the State measured by the excess of premiums received over losses and expenses incurred within the State, is not unconstitutional as a burden on, or interference with, interstate commerce.

43 Montana 243, affirmed.

THE facts, which involve the constitutionality of a statute of Montana imposing certain taxes on insurance corporations, are stated in the opinion.

Mr. James H. McIntosh and *Mr. Roscoe Pound*, with whom *Mr. Robert L. Clinton* was on the brief, for plaintiff in error:

In this case the issue differs from prior insurance cases such as *Church* v. *La Fayette &c. Co.*, 66 N. Y. 22; *Ducat* v. *Chicago*, 10 Wall. 410; *Hooper* v. *California*, 155 U. S. 648; *Liverpool Ins. Co.* v. *Massachusetts*, 10 Wall. 566; *New York Mutual* v. *Armstrong*, 117 U. S. 591; *New York Life* v. *Cravens*, 178 U. S. 389; *Noble* v. *Mitchell*, 164 U. S. 367; *Nutting* v. *Massachusetts*, 183 U. S. 552; *Paul* v. *Virginia*, 8 Wall. 168; *Phila. Fire Ass'n* v. *New York*, 119 U. S. 110; *Swift* v. *United States*, 196 U. S. 375.

The issue here also differs from those in cases involving labor or emigration agencies, bucket shops, and private banks. *Engle* v. *O'Malley*, 219 U. S. 128; *Ware* v. *Mobile Co.*, 209 U. S. 405; *Williams* v. *Fear*, 179 U. S. 270.

In this case the course of the company's business is within the very object of the commerce clause. Bancroft, History &c. of Constitution, chapter IV; Bryce, Studies in Hist. and Jurisprudence, 222; *City* v. *Royal Exchange &c.*, 5 Ala. App. 318; Farrand, Records of Federal Constitution, I, 243, 247, 275, 496, 501, 546; III, 666.

The course of business here is within *International Text Book Co.* v. *Pigg*, 217 U. S. 91, and the *Lottery Case*, 188 U. S. 321. See also *Hoke* v. *United States*, 227 U. S. 308; *Kidd* v. *Pearson*, 128 U. S. 1; *McCall* v. *California*, 136 U. S. 104; *Pensacola Tel. Co.* v. *West. Un. Tel. Co.*, 96 U. S. 1; *Richmond* v. *So. Bell Tel. Co.*, 174 U. S. 761; *Robbins* v. *Shelby Co.*, 120 U. S. 489; *West. Un. Tel. Co.* v. *Pendleton*, 122 U. S. 347.

If *Paul* v. *Virginia*, 8 Wall. 168, is decisive of this case, then it is also decisive against the court's decision in *International Text Book* and *Lottery Cases*, supra. *Hooper* v. *California*, 155 U. S. 684; *New York Life* v. *Babcock*, 104 Georgia, 67; *Xenos* v. *Wickham*, L. R. 2 H. L. 296.

The company's business as performed by it is interstate commerce within all the decisions of the court and not in conflict with any decision. Cases *supra* and see also *Adair* v. *United States*, 208 U. S. 176; *Addyston Pipe &c. Co.* v. *United States*, 175 U. S. 211; *Butler Bros.* v. *United States*, 156 Fed. Rep. 1; *Covington Bridge* v. *Kentucky*, 154 U. S. 204; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Hopkins* v. *United States*, 171 U. S. 278; *New York* v. *Miln*, 11 Pet. 102; *Railroad Co.* v. *Husen*, 95 U. S. 465; *Welton* v. *Missouri*, 91 U. S. 275.

The object and purpose of the commerce clause sustains plaintiff's claim. 1 Hamilton, Works, 179, 203; *Henderson* v. *Mayer*, 92 U. S. 259; *Howard* v. *Ill. Central*, 207 U. S. 463; 2 Madison, Papers, 859; *Ratterman* v. *Western Union*, 127 U. S. 411; Report of Com. on Ins., 29 Am. Bar Ass'n, 557; *South Carolina* v. *Georgia*, 93 U. S. 4; 1 Wilson, Works, 335.

Writers on constitutional law criticise the interpretation of *Paul* v. *Virginia*, *supra*, except as limited to the facts before the court in that case. Innes, Insurance in its Relation to Commerce &c., 39 Am. Law Rep. 717; Prentice & Egan, The Commerce Clause &c. 46; Report of Com. on Am. Bar Ass'n, 29 Am. Bar Ass'n, 538; 1 Watson, The Constitution, 520–521; 2 Willoughby, The Constitution, §§ 294, 296.

The tax is void. *Hall* v. *De Cuir*, 95 U. S. 485; *Inter. Text Book Co.* v. *Pigg*, 217 U. S. 91; *Robbins* v. *Shelby Taxing Dist.*, 120 U. S. 489.

The laws of Montana prescribe procedure which has been followed here. Section 2742, Revised Codes Mont.

Mr. D. M. Kelley, with whom *Mr. Albert J. Galen*, Attorney General of the State of Montana, and *Mr. W. H. Poorman* were on the brief, for defendant in error.

Mr. Justice McKenna delivered the opinion of the court.

Plaintiff in error, called herein plaintiff as it was such in the courts below, brought suit against the defendant in error, herein called defendant, to recover the sum of $209.79, with interest, the amount of taxes paid by plaintiff under protest to defendant.

The tax was levied under a law of the State requiring every insurance corporation or company transacting business in the State to be taxed upon the excess of premiums received over losses and ordinary expenses incurred within the State during the year previous to the year of listing in the county where the agent conducts the business, properly proportioned by the corporation or company at the same rate that all other personal property is taxed. It is provided that the agent shall render the list, and if he refuses, or to make affidavit that the same is correct to the best of his knowledge and belief, the amount may

be assessed to the best knowledge and discretion of the assessor. The corporations and companies are subject to no other tax under the laws of the State except on real estate, and the fees imposed by law.

It was alleged in the complaint that the "tax was and is illegal, unlawful and void for that, said defendant was without jurisdiction to levy or collect said tax, and the levy and collection thereof was and is a burden upon interstate commerce contrary to section 8 of Article I of the Constitution of the United States."

A summary of the allegations of the complaint, which is very long, is as follows:

The plaintiff is a New York corporation, with its home office in New York City, and has transacted and does transact the business of life insurance on a large scale in all of the States of the United States, and with persons residing in every country of the civilized world. It commenced to transact its business with residents of Montana in 1869, and its business has progressively increased until its total insurance in force in that State amounts to $10,023,445, calling for premiums amounting to $343,664.93. This total insurance is made up of policies averaging $2000 each and these are subject to sale, assignment and transfer and are used for collateral security and other commercial purposes and are valuable for such purpose and for other general purposes of trade and commerce.

The company transacts its business through agents, who solicit insurance, collect the first premium and deliver the policy, which is prepared and transmitted from the Home Office to him for such purpose. The company also employs an Agency Director by contract in writing directly with the Home Office through the mails, who supervises the work of soliciting agents and recommends those who desire to become such. The company also employs medical examiners, with specified duties, their employment being negotiated through the mails, and their

reports are made through the mails, and if further information is desired, the Home Office obtains it by correspondence through the mails. It has also a confidential employé called an inspector, whose employment is intended to be secret and who transmits information through the mails. In Butte, in the State of Montana, the company maintains a cashier, appointed from the Home Office, whose authority, however, is limited to making and supervising such records as the business of the office requires, receiving from the soliciting agents and medical examiners applications for new insurance solely for transmission to the Home Office, receiving the reports of the Home Office of its action on such applications, and receiving policies, and the premiums which are paid on the new policies and not transmitted directly to the Home Office, mailing premium notices made out at the Home Office, and sent to him for that purpose; receiving renewal premiums when specially authorized; depositing the amount thereof in bank at Butte to the credit of the company and to be drawn upon by it and not by him; keeping account of the insurance obtained by the soliciting agents and settling with such agents the commission. The company has never had any office or place of business except said office at Butte and one other at Helena, with like duties and authority.

Forms for the use of the several transactions are prepared at the Home Office and transmitted by mail to the company's employés. No agent is authorized to accept risks of any kind or make or modify contracts, nor have they ever done so. The officers of the company reside and have always resided in and near the City of New York and had and have their offices and places of business at the Home Office. All risks are accepted and contracts made, modified and discharged at the Home Office.

The manner of taking applications for insurance and the final issue of policies is alleged, which shows that the

ultimate judgment of their character and acceptance is reserved for the Home Office. The manner of paying premiums is alleged to be either directly to the Home Office through the mails, or to the cashier of the company at its office in Butte, and that the several policies provide for advances and that the company has outstanding advances or loans to its policy holders in the State aggregating the sum of $432,878. The loan is made by transmitting an application to the Home Office, where it is considered and acted upon, and, if accepted, a loan agreement is transmitted to the applicant, who, after executing it, returns it to the Home Office and the proceeds of the loan forwarded by mail to the policy-holder by the company's check on its bank account in New York. And the use of the mails is alleged in payment of premiums and proofs of death.

On account of this manner of doing business it is alleged, on information and belief, to be interstate commerce and within the meaning of the Commerce Clause of the Constitution of the United States.

The laws of the State by virtue of which the tax was imposed are set out. They finally became § 4073 of the Revised Codes, 1907.

The company did not have any property within Deer Lodge County at any time during the year 1910. It paid without protesting the tax imposed by § 4017 of the Revised Codes for the year 1909, amounting to $3,496.85. It also, during said year, paid to the State licenses and fees aggregating the sum of $234. In 1909 it received from policy-holders residing in the County, premiums aggregating the sum of $14,233.41. Its losses and expenses amounted to the sum of $8,888.41. The excess of premiums over losses for said year was the sum of $5,345, upon which there was imposed the sum sued for. The company paid the tax under protest.

A demurrer was sustained to the complaint and a

judgment entered dismissing the action. It was sustained by the Supreme Court of the State.

The same contention is made here as in the state courts, that is, that the tax is a burden on interstate commerce, and an elaborate argument is presented to distinguish this case from those in which this court has decided that insurance is not commerce. These cases are: *Paul* v. *Virginia*, 8 Wall. 168 (1868); *Ducat* v. *Chicago*, 10 Wall. 410; *Liverpool Ins. Co.* v. *Massachusetts*, 10 Wall. 566; *Philadelphia Fire Ass'n* v. *New York*, 119 U. S. 110; *Hooper* v. *California*, 155 U. S. 648; *Noble* v. *Mitchell*, 164 U. S. 367; *New York Life Ins. Co.* v. *Cravens*, 178 U. S. 389; and *Nutting* v. *Massachusetts*, 183 U. S. 553.

If we consider these cases numerically, the deliberation of their reasoning, and the time they cover, they constitute a formidable body of authority and strongly invoke the sanction of the rule of *stare decisis*. This we especially emphasize, for all of the cases concerned, as the case at bar does, the validity of state legislation, and under varying circumstances the same principle was applied in all of them. For over forty-five years they have been the legal justification for such legislation. To reverse the cases, therefore, would require us to promulgate a new rule of constitutional inhibition upon the States and which would compel a change of their policy and a readjustment of their laws. Such result necessarily urges against a change of decision. In deference, however, to the earnestness of counsel, we will consider more particularly (1) what the cases decide, and (2) whether they are wrong in principle.

Paul v. *Virginia* is the progenitor case. A law of Virginia precluded any insurance company not incorporated under the laws of the State doing business in the State without previously obtaining a license for that purpose, which could only be obtained by a deposit with the state treasury of bonds of a specified character to an amount varying from thirty to fifty thousand dollars. A

subsequent law required the agent of a foreign insurance company to take out a license.

Paul was appointed the agent of several fire insurance companies incorporated in the State of New York. He applied for a license, offering to comply with all the provisions of the law excepting the deposit of bonds. The license was refused and he, notwithstanding, undertook to act as agent for the companies, offered to issue policies in their behalf and in one instance did issue a policy in their name to a citizen of Virginia. For this violation of the statute he was indicted and convicted in one of the state courts and the judgment was affirmed by the Supreme Court of Appeals of the State. Error was prosecuted from this court based on, as one of its grounds, the alleged violation of the commerce clause of the Constitution of the United States.

Replying to the argument to sustain the contention, the court said, by Mr. Justice Field, that its defect lay in the character of the business done. "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do

not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

The doctrine announced, that insurance was not commerce but a personal contract, was emphasized by illustrations. *Nathan* v. *Louisiana*, 8 How. 73, was cited, where a tax on money and exchange brokers who dealt in the purchase and sale of foreign bills of exchange was sustained as not conflicting with the constitutional power of Congress to regulate commerce. The individual thus using his money, it was said (quoting the cited case), "is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the ship-builder, without whose labor foreign commerce could not be carried on." The doctrine was further illustrated by bills of exchange foreign and domestic, which it was said were subject to the regulating and taxing laws of the States. And it was pointed out that the Federal Government taxed not only foreign bills but domestic bills and promissory notes, whether issued by individuals or banks, a power the Government could not have, it was said, if bills and notes were commerce. It was finally said: "If foreign bills of exchange may thus be the subject of state regulation, much more so may contracts of insurance against loss by fire."

We have taken the trouble to make this long excerpt from the opinion because, as we have said, the case is the primary one and because its argument is really exhaustive of the general principle. We shall consider presently whether there is anything in the case at bar which takes it out of the principle.

In *Ducat* v. *Chicago*, a law of Illinois came up for review. It was a regulation of insurance companies not incorporated by the State, and required their agents to be licensed upon the performance of certain conditions.

Subsequently by the act incorporating Chicago the legislature imposed on all foreign insurance a tax of $2 upon the $100 and at that rate upon the amount of all premiums which should be received. It was made unlawful for any company to transact business until the payment was made. The State Supreme Court sustained the tax and this court affirmed its action, resting the decision on *Paul* v. *Virginia*, the reasoning of which, it was said, it was not necessary to repeat.

Liverpool Ins. Co. v. *Massachusetts*. The subject came up again for consideration in passing upon a statute of Massachusetts which levied a tax upon all premiums charged or received by any fire, marine and fire and marine insurance company not incorporated under the laws of the State. The law was sustained. It was said: "The case of *Paul* v. *Virginia* decided that the business of insurance, as ordinarily conducted, was not commerce, and that a corporation of one State, having an agency by which it conducted that business in another State, was not engaged in commerce between the States."

Philadelphia Fire Ass'n v. *New York*. A statute of New York imposing taxes and conditions upon insurance companies of other States was considered and sustained. *Paul* v. *Virginia* was cited for the view that "issuing a policy of insurance is not a transaction of commerce."

We may say here that *Paul* v. *Virginia* was also cited for the proposition that the right of a foreign corporation to do business in a State other than that of its creation depends wholly upon the will of such other State. This proposition, it was said, was sustained by previous cases and it has been sustained by many subsequent cases. Necessarily it could not be applied to foreign insurance companies if the business of insurance is commerce. In other words, that right exists and has only an exception, as was said in *Hooper* v. *California*, 155 U. S. 648, "where a corporation created by one State rests its right to enter

another and to engage in business therein upon the Federal nature of its business." And that was the contention in *Hooper* v. *California*, asserting the invalidity of the statute of the State making it a misdemeanor for any person in that State to procure insurance for a resident in the State from an insurance company not incorporated under its laws. The argument was that in as much as the contract involved was one for marine insurance, it was a matter of interstate commerce, and as such beyond the reach of state authority and included among the exceptions to the rule. It was replied by the court: "This proposition involves an erroneous conception of what constitutes interstate commerce. That the business of insurance does not generically appertain to such commerce has been settled since the case of *Paul* v. *Virginia*." To the attempt to distinguish between policies of marine insurance and policies of fire insurance, and thus take the former out of the rule of *Paul* v. *Virginia*, it was answered, "It ignores the real distinction upon which the general rule and its exceptions are based, and which consists in the difference between interstate commerce or an instrumentality thereof on the one side and the mere incidents which may attend the carrying on of such commerce on the other." And it was pointed out that if the power to regulate interstate commerce applied to all of the incidents of such commerce and "to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the States; and would exclude state control over many contracts purely domestic in their nature." And then, sweeping away the distinction between the different subject-matters of insurance contracts, and the different events indemnified against, and declaring the principle applicable to all and determinative of the regulating power of the States over all, it was said, "The business of insurance is not commerce.

The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.'"

This declaration was repeated and applied in *Noble* v. *Mitchell*, 164 U. S. 367, and in *New York Life Insurance Co.* v. *Cravens*, 178 U. S. 389. The latter case has special application, for the plaintiff in error here was the plaintiff in error there and the case concerned life insurance companies and their policies. In that case it was contended that a policy of mutual life insurance was an interstate contract and the parties might choose its "applicatory law." The contention was made in many ways and with great amplitude of argument and illustration. It was urged that on account of the mutual character of the company it was the administrator of a fund collected from its policy-holders in different States and countries for their benefit. And the extent of the business was displayed by a stipulation of the parties as follows: "That during the year 1886 and prior to the issuance of the policy sued upon, the amount of policies issued by defendant to citizens of Missouri was $1,617,985.00, and the amount of insurance in force on the lives of citizens of Missouri on December 31st, 1886, was $8,886,542.00, and the total amount of policies issued by defendant in said year 1886 was $85,178,294.00, and the total amount of policies in force on December 31st, 1886, issued by defendant was $304,373,540.00."

It was also urged that modern life insurance had taken on essentially a national and international character, and that when *Paul* v. *Virginia* was decided the business was "to a great extent, local, that is, conducted through the domestic contracts by stock companies. The great and commanding organizations of the present day had hardly begun the amazing development which has made them

the greatest associations of administrative trusts in the business world."

These contentions were earnestly made; the reply to them deliberately meditated and its extent fully appreciated. The ruling in *Paul* v. *Virginia* and other cases was applied. We omitted the reasoning by which they demonstrated, we said, the correctness of their conclusion. We, however, repeated that "the business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the 'perils of the sea,'" and, we added, "or against the uncertainty of man's mortality."

In *Nutting* v. *Massachusetts* a statute of the State was sustained which required a licensing of the agent of a foreign insurance company not admitted to do business in the State and made it a crime to solicit insurance of a resident in violation of the statute. The principle of the prior cases which we have referred to was affirmed.

This detail shows what the cases decided. Were they rightly decided? The reasoning of the cases anticipate and answer the question, and it would rack ingenuity to attempt to vary its expression or more aptly illustrate it. A policy of insurance, the cases declare, is a personal contract, a mere indemnity, for a consideration, against the happening of some contingent event, which may bring detriment to life or property, and its character is the same no matter what the event insured against, whether fire or hurricane, acts of man or acts of God, storms on land or storms on sea, death or lesser accident. The same event may involve both life and property, precipitating the obligation of the policies. Nor does the character of the contracts change by their numbers or the residence of the parties. The latter is made much of in this case. It

was made much of in the *Cravens Case*. The effort has been to give a special locality to the contracts and determine their applicatory law, and, indeed, to a centralization of control, to employ local agents but to limit their power and judgment. To accomplish the purpose there is necessarily a great and frequent use of the mails, and this is elaborately dwelt on by the insurance company in its pleading and argument, it being contended that this and the transmission of premiums and the amounts of the policies constitute a 'current of commerce among the States.' This use of the mails is necessary, it may be, to the centralization of the control and supervision of the details of the business; it is not essential to its character. And we may say, in passing, that such effort has led to regulating legislation, but that it cannot determine its validity, was decided in the *Cravens Case*. See also *Equitable Life Society* v. *Clements*, 140 U. S. 226.

This legislation is in effect attacked by the contention of the insurance company. We have already pointed out that if insurance is commerce and becomes interstate commerce whenever it is between citizens of different States, then all control over it is taken from the States and the legislative regulations which this court has heretofore sustained must be declared invalid.

The number of transactions do not give the business any other character than magnitude. If it did, the department store which deals with every article which covers or adorns the human body, or, it may be, nourishes it, would have one character while its neighbor, humble in the variety and extent of its stock, would have another. Nor, again, does the use of the mails determine anything. Certainly not that which takes place before and after the transaction between the plaintiff and its agents in secret or in regulation of their relations. But put agents to one side and suppose the insurance company and the applicant negotiating or consummating a contract. That they may

live in different States and hence use the mails for their communications does not give character to what they do; cannot make a personal contract the transportation of commodities from one State to another, to paraphrase *Paul* v. *Virginia*. Such might be incidents of a sale of real estate (certainly nothing can be more immobile). Its transfer may be negotiated through the mails and completed by the transmission of the consideration and the instrument of transfer also through the mails.

It is contended that the policies are subject to sale and transfer, may be used for collateral security and other commercial purposes. This may be, but this use of them is after their creation, a use by the insured, not by the insurer. The quality that is thus ascribed to them may be ascribed to any instrument evidencing a valuable right. The argument was anticipated in *Paul* v. *Virginia*, citing *Nathan* v. *Louisiana*, where, as we have seen, a tax on money and exchange brokers who dealt in the purchase and sale of foreign bills of exchange was sustained as not conflicting with the constitutional power of Congress to regulate commerce among the States or with foreign nations.

It is contended that *Paul* v. *Virginia* and the cases which follow it must be limited, as it is contended "the facts therein did limit them, to intrastate, not interstate, contracts," and that if they be not so limited the *Lottery Case*, 188 U. S. 321, and *International Textbook Co.* v. *Pigg*, 217 U. S. 91, cannot stand.

The basis of this contention necessarily is the insistence that the contracts in *Paul* v. *Virginia* and the succeeding cases were intrastate contracts while the contracts in the case at bar are interstate contracts. But this is a false characterization of the contracts. The decision of the cases is that contracts of insurance are not commerce at all, neither state nor interstate. This is the obstacle to the contention of the insurance company. The com-

pany realizes it to be an obstacle and has attempted to remove it by detailing the manner of conducting its business as demonstrating that its policies are interstate contracts. We have replied to the attempt and shown that its manner of business has no such effect. It follows necessarily, therefore, that neither the *Lottery Case* nor the *Pigg Case* impugns the authority or the application of the cited cases. They, the *Lottery Case* and the *Pigg Case*, were concerned with transactions which involved the transportation of property and were not mere personal contracts.

There are cognate cases to the cited cases, of contracts incident to commerce but not of themselves commerce. In *Williams* v. *Fears*, 179 U. S. 270, there was levied by the State of Georgia a tax upon each emigrant agent or employer or employé of such agent, doing business in the State. The law imposing the tax was attacked as a violation of the Commerce Clause of the Constitution of the United States. Commerce was defined, quoting Mr. Justice Field, in *Mobile County* v. *Kimball*, 102 U. S. 691, 702, to "consist in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." The court considered the definition comprehensive enough for the purpose of the case and, testing its application, said, by Mr. Chief Justice Fuller: "These agents were engaged in hiring laborers in Georgia to be employed beyond the limits of the State. Of course, transportation must eventually take place as the result of such contracts, but it does not follow that the emigrant agent was engaged in transportation." The conclusion was supported by cases, among others, *Paul* v. *Virginia* and *Hooper* v. *California*. On the authority of the same cases and *Life Insurance Co.* v. *Cravens*, in *Ware & Leland* v. *Mobile County*, 209 U. S. 405, it was held that contracts by brokers for the sale of

cotton for future delivery, where the transactions were closed by contracts completed and executed in one State although the orders were received from another State, were legally subject to a tax. Such contracts, it was said, were not "the subjects of interstate commerce, any more than in the insurance cases, where the policies are ordered and delivered in another State than that of the residence and office of the company."

In *Engel* v. *O'Malley*, 219 U. S. 128, a law of New York forbade individuals or partnerships to engage in the business of receiving deposits of money for safe keeping or for the purpose of transmission to another, or for any other purpose, without a license from the Comptroller. It was attacked as a violation of the Commerce Clause of the Constitution. The case was decided to be similar in principle to *Ware & Leland* v. *Mobile County* and *Williams* v. *Fears*, and the law was sustained.

Further discussion, we think, is unnecessary, and we have gone beyond the citing of the authoritative cases only in deference to the able and earnest argument of counsel.

Judgment affirmed.

MR. JUSTICE HUGHES and MR. JUSTICE VAN DEVANTER dissent.

GREEY, TRUSTEE IN BANKRUPTCY OF SCHWAB-KEPNER COMPANY, *v.* DOCKENDORFF.

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

No. 544. Argued December 2, 1913.—Decided December 15, 1913.

No sufficient reason being shown for departing from it, this court follows its rule of not disturbing findings made by the Master, the court of first instance and the Circuit Court of Appeals.

Where the goods never would have come into the bankrupt's hands, had he not promised to give a lien thereon to one making the advances necessary for obtaining them, there is no reason why the rights of general creditors without liens should intervene to defeat security given in good faith and before there was any knowledge of insolvency. *National City Bank* v. *Hotchkiss*, *ante*, p. 50, distinguished.

Secrecy of a lien on goods purchased by advances made by the lienor does not invalidate it where there was no active concealment or any attempt to mislead anyone interested to know the truth, nor does merely keeping silent in such case create an estoppel.

203 Fed. Rep. 475; 121 C. C. A. 597, affirmed.

THE facts, which involve the validity of liens claimed by a creditor on accounts receivable assigned to him by the bankrupt, are stated in the opinion.

Mr. Benjamin G. Paskus, with whom *Mr. Ralph Wolf*, *Mr. James N. Rosenberg* and *Mr. Garrard Glenn* were on the brief, for appellant.

Mr. Julius Henry Cohen, with whom *Mr. Gerard B. Townsend* and *Mr. Theodore B. Richter* were on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This was a petition by the appellee, Dockendorff, filed in the bankruptcy proceedings against the bankrupt, the

Schwab-Kepner Company, to have paid over to him the proceeds of accounts receivable alleged to have been assigned to him by the bankrupt. The defences set up were that the assignment was a preference and that it was made without present consideration with intent to defraud creditors of the bankrupt concern. The case was referred to a special master who found that it did not appear that either the petitioner or the bankrupt knew that the latter was insolvent at the time of the supposed preference or that there were any transfers with intent to defraud creditors, and found for the petitioner. His finding of facts and conclusion were concurred in by the District Court and Circuit Court of Appeals. 203 Fed. Rep. 475; 121 C. C. A. 597.

A part of the appellant's brief is devoted to the attempt to show that the findings below as to insolvency and the knowledge of the parties was wrong, and a distinction is urged between what are called the Master's inferences and the facts upon which those inferences were based. But no sufficient reason is shown for departing from our ordinary rule, where the Master, the court of first instance, and the Circuit Court of Appeals have agreed, and in the course of the hearing this was admitted. *Merillat* v. *Hensey*, 221 U. S. 333. On the other side it is argued that this is not a controversy arising in bankruptcy proceedings within § 24 of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, 553, and that therefore the appeal should not have been allowed. This contention if open, seems to be answered sufficiently by *Knapp* v. *Milwaukee Trust Co.*, 216 U. S. 545. But the appellant's main proposition is that the transactions with the appellee were fraudulent in law however unconscious of it the parties may have been, and so it is necessary to make a short statement of the facts.

The bankrupt, a New Jersey corporation, did business in New York as a cotton converter. It bought raw

material from the mills, ordered it sent to bleacheries designated by it, sold the goods when finished and had them shipped from the bleacheries to the buyers. Dockendorff, on favorable statements of the Company's condition, made successive agreements to procure loans not exceeding $175,000 at any one time, the bankrupt giving demand notes, assigning as security all its accounts receivable thereafter to be created, and paying certain commissions. In May, 1910, the agreement now in question was made. By this the bankrupt was to assign within seven days after shipment the accounts receivable of credit sales made by it; upon that security Dockendorff was himself to lend eighty per cent. of the net face value of such as he should approve, less commissions and discounts, up to $175,000; the bankrupt was to give its notes, deliver the shipping documents, furnish evidence of actual receipt of the merchandise when required, notify Dockendorff of any return of goods or counterclaims, deliver the proceeds of such accounts as were proper and permit him to examine its books and correspondence &c.; Dockendorff's lien was to be for all sums due, and to cover all accounts, but he was not bound to lend on accounts not approved by him. Further details do not need to be stated in view of the establishment of the parties' good faith. On November 29, 1910, an involuntary petition was filed, the bankrupt then owing Dockendorff $252,838.54 for advances under the agreement, and he having received assignments of accounts from the bankrupt as it received orders, that is, after the contract of sale was made, but before the delivery of the goods.

The trustee relies upon the general application of the lien under the agreement as constituting a fraud in law. Whatever effect it might have as evidence must be laid on one side in view of the findings below. The question here is whether successive assignments of accounts by way of security, in pursuance of a contract under which ad-

vances were made to enable the assignor to get the goods on the faith of the undertaking that the accounts should be assigned, were bad because the contract embraced all accounts, although neither party contemplated any fraud. The rule of the English statutes as to reputed ownership may extend to debts growing due to the bankrupt in the course of his business, but we have no such statute. The advances were the means by which the bankrupt got the ownership of the goods. The contract of itself would operate as a conveyance as soon as the rights to which it applied were acquired. *Field* v. *New York*, 6 N. Y. 179. We do not see why in the interval between the acquisition of the goods and the specific assignment of accounts, the right of general creditors without lien should intervene to defeat a security given in good faith, when, but for the promise of it, the property never would have come into the bankrupt's hands. There may have been a moment when the goods could have been attached, or when, if insolvency had been made known, as in *National City Bank* v. *Hotchkiss, ante*, p. 50, it would have been too late to make the promised lien good. But in this case, the lien was acquired before any knowledge of insolvency, and before any attachment intervened. See *Jaquith* v. *Alden*, 189 U. S. 78. *Coder* v. *Arts*, 213 U. S. 223. *Van Iderstine* v. *National Discount Co.*, 227 U. S. 575, 583. It is objected that this lien was secret. But notice to the debtors was not necessary to the validity of the assignment as against creditors, *Williams* v. *Ingersoll*, 89 N. Y. 508, 522, and merely keeping silence to the latter whether known or unknown, created no estoppel. *Wiser* v. *Lawler*, 189 U. S. 260, 270. *Ackerman* v. *True*, 175 N. Y. 353, 363. There was no active concealment and no attempt to mislead anyone interested to know the truth.

We content ourselves with this very general answer to an argument that dealt with many details that we have not mentioned, because those details were material only to a

reconsideration of the findings of fact. Probably a hope of securing such a reconsideration was one of the inducements toward bringing the case here.

A subordinate question was raised on the exclusion of some of the bankrupt's books, as to which it seems to us enough to say that it does not appear that any wrong has been done.

Decree affirmed.

KINDER [1] *v.* SCHARFF.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 99. Argued December 4, 5, 1913.—Decided December 15, 1913.

After the estate has been closed and the two year period prescribed by § 11d of the Bankruptcy Act has run, the proceeding cannot be reopened on *ex parte* statements to enable the trustee to attack on the ground of fraud a sale made by the bankrupt, where, as in this case, the trustee had the opportunity of commencing an action for that purpose before the expiration of the period.

The Bankruptcy Court cannot under § 2 (8) remove the bar of § 11d at its own will simply because the trustee may have changed his mind and wishes to institute a suit which he might have instituted prior to the operation of § 11d.

129 Louisiana, 218, affirmed.

THE facts, which involve the construction and application of the limitation prescribed by § 11d of the Bankruptcy Act of 1898, are stated in the opinion.

Mr. Hannis Taylor and *Mr. A. P. Pujo*, with whom *Mr. L. A. Goudeau* and *Mr. W. B. Williamson* were on the brief, for plaintiff in error:

[1] Original Docket title, Collins, Trustee, *v.* Scharff.

Section 11d of the Bankrupt Act, as amended, is a statute of limitation, and when pleaded as a bar to a suit to set aside an alleged fraudulent sale, must be construed and applied as other statutes of limitation. *Bailey* v. *Glover*, 21 Wall. 342, 350.

Where fraud is the foundation of the action, the limitation of two years, under the Bankrupt Act, does not begin to run, in the absence of negligence or laches of the plaintiff, until the discovery of the fraud. *Traer* v. *Clews*, 115 U. S. 528, 542.

In suits in equity, where relief is sought on the ground of fraud, and the party injured remained in ignorance of the fraud without fault or want of diligence on his part, limitation does not begin to run until the fraud is discovered, although there are no special circumstances, and no effort on the part of the party committing the fraud to conceal it. *Levee Com'rs* v. *Tensas Land Co.*, 204 Fed. Rep. 736.

In a suit in equity by a public board of levee commissioners, to cancel deeds to lands sold by such board for fraud, complainant is not chargeable with notice of the fraud by the fact that it consisted of bribery of persons who were then officers and members of the board and its agent, nor because it did not take active measures to discover it, where the transaction was fair on its face, and there was nothing to cause suspicion, until the facts were incidentally learned by a third person who communicated them to plaintiff. *Levee Com'rs* v. *Tensas Land Co.*, 204 Fed. Rep. 736.

A suit by a trustee to recover assets alleged to have been fraudulently transferred by the bankrupt within four months prior to the filing of petition, ought not to stand like a suit between private parties. *United States* v. *Minor*, 114 U. S. 233, 240.

Courts of the United States follow their own adjudications in the interpretation, administration, and enforce-

ment of Federal statutes, and not those of state courts. *Calhoun Mining Co.* v. *Ajax Mining Co.*, 182 U. S. 499, 510.

Mr. Charles A. McCoy, with whom *Mr. Leland H. Moss* and *Mr. Robert L. Knox* were on the brief, for defendant in error:

Section 11 of the Bankruptcy Act, like § 5057, Rev. Stat., is a statute of limitation. It is precisely like other statutes of limitation and applies to all judicial contests between the assignee and other persons touching the property or rights of property of the bankrupt transferable to or vested in the assignee, where the interests are adverse and have so existed for more than two years from the time when the cause of action accrued, for or against the assignee. *Bailey* v. *Glover*, 21 Wall. 342.

There must be reasonable diligence and a means of knowledge is the same thing in effect as knowledge itself. *Wood* v. *Carpenter*, 101 U. S. 135; *Johnson* v. *Standard Co.*, 148 U. S. 370; *Pearsal* v. *Smith*, 149 U. S. 236; *Kirby* v. *Lake Shore Ry.*, 120 U. S. 130; *Putnam* v. *New Albany &c. Ry.*, 16 Wall. 390; *Johnson* v. *Atlantic G. & W. I. T. Co.*, 156 U. S. 648; *Bates* v. *Peebles*, 151 U. S. 162; *Foster* v. *Mansfield*, 146 U. S. 88; *Norris* v. *Hagan*, 136 U. S. 329.

Whatever is notice enough to excite attention to a fact and put a party on his guard and call for an inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant with it. *Johnson* v. *Stanard M. Co.*, 148 U. S. 307; *Succession of Dauphin*, 112 Louisiana, 139; *Poirier* v. *Cypress Co.*, 54 So. Rep. 298; *Citizens Bank* v. *Jansonne*, 120 Louisiana, 399.

Concealment must be the result of positive acts, mere silence is insufficient. *Woods* v. *Carpenter*, 101 U. S. 135; *Felix* v. *Patrick*, 145 U. S. 317; *Pearsal* v. *Smith*, 149 U. S. 236; *Bailey* v. *Glover*, 21 Wall. 342.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action by a trustee in bankruptcy to recover land alleged to have been conveyed by the bankrupt in fraud of creditors. The defendant pleaded that the estate had been closed and that the action was barred by the lapse of two years, under § 11d of the Bankruptcy Act, July 1, 1898, c. 541, 30 Stat. 544, 549, and also that he purchased the land for its full value and in good faith. The estate had been closed and the two years had run, but after they had elapsed the former trustee petitioned to have the proceedings reopened on the ground that he had just discovered the facts and that the sale should be set aside. The petition was granted, this suit was brought and the judge of first instance ordered a reconveyance. The Supreme Court of Louisiana found, as it was compelled to by the testimony of the trustee himself, that during the pendency of the original proceeding the trustee suspected the alleged fraud, made some inquiries, but dropped the matter because he thought that it was not worth while, that is, that it would not pay to go farther. He 'voluntarily abstained from availing himself of the means put in his hand by the law itself for the ascertainment of a suspected fact,' by examining the bankrupt and otherwise. On this ground the court held that he could not remove the bar of the statute, reversed the judgment and dismissed the suit. 129 Louisiana, 218.

We are of opinion that the decision of the Supreme Court was right. It is not necessary to consider whether the running of the two years after the estate is first closed is a bar to all suits upon claims that might have been collected if they had been known, or to controvert the conclusion of *Bilafsky* v. *Abraham*, 183 Massachusetts, 401, that such suits are not barred. But it is obvious that there must be some limits if the promise of repose after two years in § 11d is not to be a mirage. The power to reopen

estates given in § 2 (8) 'whenever it appears that they were closed before being fully administered' cannot be taken to put it into the power of the court of bankruptcy to remove the bar of § 11 at its own will simply because a trustee may have changed his mind. It was argued that the court of first instance found fraud and that we could not review the findings of fact. *Waters-Pierce Oil Co.* v. *Texas* (No. 1), 212 U. S. 86, 97. But if so, we equally are barred from reviewing the findings of the Supreme Court, that the trustee was chargeable with knowledge of the fraud, if there was one. Therefore, apart from the difference between the statutes considered there and here, cases like *Bailey* v. *Glover*, 21 Wall. 342, and *Traer* v. *Clews*, 115 U. S. 528, where the cause of action for fraud was concealed, do not apply. The question is simply whether, when, after an estate is closed, and more than two years later a trustee comes to the conclusion that he undervalued a claim that he knew of and might have sued upon, or finds that the value has risen since, the Bankruptcy Court may reopen the estate for the sole purpose of getting rid of the statute, and allowing the trustee to sue. See *Wood* v. *Carpenter*, 101 U. S. 135. *Rosenthal* v. *Walker*, 111 U. S. 185, 196.

The judge had no power by an *ex parte* order reopening the estate to remove the bar that was completed, and that there was no ground for removing. Whether it be put on the construction of the Bankruptcy Act or on the ground that the estate was fully administered *quoad hoc*, or of laches on the part of the trustee, it comes to the same thing. The claim in controversy cannot be made the ground of a suit.

Judgment of the Supreme Court affirmed.

MR. JUSTICE PITNEY concurs in the result.

LUDVIGH, TRUSTEE IN BANKRUPTCY OF HOROWITZ, *v.* AMERICAN WOOLEN COMPANY OF NEW YORK.

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

No. 55. Argued November 7, 10, 1913.—Decided December 15, 1913.

A contract under which goods are delivered by one party to another to be sold by the latter and proceeds paid to the former less an agreed discount, the unsold goods to be returned to the consignor, is really a contract of bailment only, and the consignor can, in the absence of fraud, take them back in case of the consignee's bankruptcy. 188 Fed. Rep. 30, affirmed.

THE facts, which involve the construction of a contract for consignment of goods to a bankrupt and the rights of the consignor thereunder, are stated in the opinion.

Mr. Abram I. Elkus, with whom *Mr. Garrard Glenn* was on the brief, for appellant.

Mr. Daniel P. Hays, with whom *Mr. Edwin D. Hays* was on the brief, for appellees.

MR. JUSTICE DAY delivered the opinion of the court.

This was a suit in the District Court of the United States for the Southern District of New York by Ludvigh, as trustee in bankruptcy of the firm of Philip Horowitz & Son, to set aside as fraudulent certain transactions of the bankrupts with the American Woolen Company of New York (which we will call the "Woolen Company"), and to recover for goods taken from the bankrupts by the Woolen Company prior to the institution of proceedings

in bankruptcy. The District Court held in favor of the trustee and sustained his right to recover the value of the goods so taken (176 Fed. Rep. 145). Upon appeal to the Circuit Court of Appeals for the Second Circuit the judgment of the District Court was reversed (188 Fed. Rep. 30), and the case is here upon appeal.

The facts as found by both courts are very little in dispute. It appears that Horowitz & Son, the bankrupts, had had a contract in writing with the Woolen Company which expired on December 1, 1902, whereby goods were to be consigned to Horowitz & Son, the title to the merchandise or its proceeds to remain in the Woolen Company until fully accounted for, all bills of such consigned goods to be payable to the Woolen Company and accounts of sales to be rendered to that company at least once a month. The Horowitzes were also to give security to protect the Woolen Company from any failure to perform the contract; the profit of the Horowitz firm was to be the difference between the invoice prices and the selling prices of the goods; they were to have seven per cent. discount for payment within four months and any increase in profits by varying the terms of trade was to go to them, and they were to have a drawing account of $1,200 a month, provided the goods sold by them warranted such payment. In 1902, for reasons which do not distinctly appear in the record, the Woolen Company expressed its desire to have the Horowitz firm incorporated, and a corporation was formed under the name and style of The Niagara Woolen Company (which we will designate the "Niagara Company"), for the purpose of contracting and dealing with the Woolen Company and of dealing in fabrics received therefrom. One hundred and ninety-five of the two hundred shares of the Niagara Company were issued to Philip Horowitz, as fully paid up, in consideration of a mortgage by him on certain real estate for $19,500. A contract in writing was entered into by the

terms of which it was agreed that the Woolen Company would deliver such merchandise to the Niagara Company as it saw fit and that the Niagara Company would accept possession of the merchandise upon the following conditions: The Niagara Company should hold and care for the merchandise as the property of the Woolen Company, the title thereto or proceeds therefrom being vested in the latter company and the merchandise being at all times under its control. The title to the merchandise was to pass directly from the Woolen Company to the purchaser. The property was to be insured for the benefit and in the name of the Woolen Company. The Niagara Company was to be given the usual discounts allowed by the Woolen Company and was restricted to the city of Elmira, New York, and the State of Montana in doing a merchandise business other than as provided in the contract. The Niagara Company agreed to execute such other documents as the Woolen Company deemed advisable to carry out the agreement, and the Woolen Company had the option to terminate the agreement upon the breach of any condition by the Niagara Company. The agreement further provided:

"IV. Said party of the second part [the Niagara Company] agrees to sell such merchandise to such persons as they shall judge to be of good credit and business standing, and to collect for and in behalf of the party of the first part [the Woolen Company], all bills and accounts for the merchandise so sold, and to immediately pay over to the said party of the first part any amount collected as aforesaid immediately upon its collection, minus, however, the difference between the price at which said merchandise so collected for has been invoiced to the party of the second part and the price at which said merchandise has been sold as aforesaid by the party of the second part.

"V. Said party of the second part does hereby guarantee the payment of all bills and accounts for merchandise,

possession of which is delivered to it under this agreement, and it hereby agrees in case any merchandise delivered under the provisions of this agreement by the party of the first part to the party of the second part, is not accounted for to the party of the first part under the provisions of Clause IV, of this agreement, to pay to the party of the first part the invoice price of said merchandise, and thereupon title to said merchandise, or to the proceeds thereof, so paid for shall pass to the party of the second part, and shall then be exempted from the provisions of this agreement.

* * * * * * * *

"VIII. This agreement shall continue for one year. If, for any reason, this agreement terminates, all of the merchandise, possession of which is held by the party of the second part under this agreement, shall at said termination be immediately returned to the possession of the party of the first part."

At the same time an agreement was made by the Woolen Company and Horowitz & Company and one Jeremiah P. Murphy, whereby Horowitz & Company guaranteed the performance of the contract of the Niagara Company, and the Horowitzes, in accordance with the contract, transferred 197 shares of that company's stock to Murphy, who really represented the Woolen Company, in trust, the stock to be voted as the Woolen Company directed, except that so long as the Niagara Company and the Horowitzes performed their agreements the stock should be voted for whomsoever they designated for president of the Niagara Company and should be used in all meetings as though the Horowitzes had control of it, and they were to receive the dividends thereon. Upon breach the stock was to be transferred to the Woolen Company or whomsoever it designated. Horowitz was elected president of the Niagara Company and one of the Woolen Company's employés was made treasurer of the

company: the by-laws of the Niagara Company provided that checks on the funds of the company were to be signed by the president and treasurer jointly. The Niagara Company had an office in part of the premises of Horowitz & Company with a sign on the outside door under that of Horowitz & Company. Afterwards the Woolen Company put in a bookkeeper who kept an account of the goods billed to the Niagara Company and of sales and payments reported by the Horowitzes. The goods were sold in the name of the Niagara Company and until May, 1904, when Philip Horowitz began to embezzle the funds of the Niagara Company by indorsing checks payable to the company for sales made by it and depositing them in his personal account, such funds were deposited in the bank account of the Niagara Company. An amendment to this contract extending it for another year and changing it in respect to discounts, requiring the Niagara Company to make monthly accounts of sales, giving to it a discount of eight per cent. upon all invoices the amounts of which were turned over to the Woolen Company within sixty days after sale by the Niagara Company, and then a further discount of two per cent., but obliging the Niagara Company to pay six per cent. interest on invoices the amounts of which were not turned over to the Woolen Company within sixty days, was made on November 11, 1903; otherwise it continued in force.

On October 26, 1904, a suspicious fire occurred on the premises and Philip Horowitz immediately left the country and has not been heard of since. On or about that date the Woolen Company removed from the premises of Horowitz & Co. 760 pieces of goods which had been consigned to the Niagara Company and for the value of which this suit was brought by the trustee, bankruptcy proceedings having been instituted shortly thereafter.

Both courts found that, whatever the true character of the Niagara Company was, there was no actual fraud

in the transaction. It is quite probable that the Woolen Company desired the method of doing business through the medium of the Niagara Company because it was deemed to be a better legal form and because it wanted to more effectually check up the transactions of the Horowitzes. The opinion of the District Court, as well as the opinion of the Circuit Court of Appeals, shows that the case has been made to turn mainly upon the interpretation of sections four and five of the agreement with the Niagara Company, which, the District Court found, was only another name for the Woolen Company, and which, the Circuit Court of Appeals found, was a sort of cash box for the Woolen Company and a check upon the transactions of Horowitz & Company. We think an examination of sections four and five, when read in connection with section eight, shows most clearly that the Niagara Company was not obliged to pay for goods in its possession and unsold.

By the provisions of section four the party of the second part, the Niagara Company, was obliged to sell to persons adjudged to be of good credit and business standing and to collect for the party of the first part, the Woolen Company, accounts for merchandise sold and immediately pay over to it the amounts collected, less the difference between the price of the merchandise as invoiced to the Niagara Company and the price at which it was sold. In section five of the contract the Niagara Company guaranteed the payment of bills and accounts, and agreed, in case any merchandise delivered was not accounted for *under the provisions of clause four*, to pay to the Woolen Company its invoice price, whereupon title to the merchandise or proceeds thereof was to pass to the Niagara Company and they were to be exempt from the terms of the agreement. That part of section five relating to goods not accounted for refers specifically to the provisions of clause four of the agreement, which deals with goods sold

only. The entire contract must be read to ascertain the purpose of the parties, and we find in clause eight, limiting the agreement to one year, the provision that if for any reason the agreement terminated all of the merchandise, the possession of which was held by the Niagara Company under the agreement, should be immediately returned to the Woolen Company. The District Court held that this agreement, sections four and five, obligated the Niagara Company to pay for each and every piece of goods delivered under the contract with it, but for the reasons we have stated we cannot agree with this construction. We find that the agreement was really one of bailment for the purpose of sale, with the right to return the unsold goods. There is nothing illegal in such contracts when made in good faith. As this court held in *Sturm* v. *Boker*, 150 U. S. 312, 330, an agency to sell and return the proceeds or the specific goods stands upon the same footing as a bailment where the identical article is to be returned in the same or altered form and title to the property is not changed. It therefore follows that, if there are no other circumstances controlling the situation and establishing that this contract was a mere cover for a fraudulent or illegal purpose, there is nothing in its terms operating to transfer the title to the goods to the Niagara Company or to prevent the return of those unsold to the Woolen Company or their being retaken by that company upon the happening of the contingency shown in this case.

But it is insisted by the counsel for the appellant that the conduct of the parties shows that their real purpose and understanding were to make an effectual sale and that the writing, even if interpreted to withhold the title by its terms, was merely a convenient resort to fortify the right to take the goods in event of disaster overtaking the Horowitz concern. Some of the most cogent of the circumstances relied upon will be noticed. It is said that the Horowitzes selected the goods, whereas under the

contract the Woolen Company had the right to turn over any it saw fit; but this circumstance may be readily explained for the Horowitzes were familiar with and of course interested in their own trade and more likely than anyone else to make proper selections for it, and from the sale of the goods chosen they were to make their profits.

A letter in evidence written in December, 1903, by an agent of the Woolen Company in answer to a request to take back goods contained the statement that the Woolen Company could not at that late date consent to have fall goods made expressly for the Horowitzes and delivered in accordance with the terms of the agreement turned back in the stock. It is true that this circumstance is more consistent with the idea of sale than of bailment, but it had reference to goods which were delivered and evidenced the desire of the Woolen Company to have them sold under the consignment as the parties intended.

It is urged that the goods were not kept separately, but it appears that the tags of the Woolen Company were left upon the goods and it is not shown that any creditor relied upon mismarking or misbranding. And memoranda are in evidence showing the names of certain salesmen thereon, but on these same bills it is stated that the goods were furnished under the agreement already referred to.

Against these considerations are the positive terms of the agreement, found to be free from fraud and fairly entered into, which as we interpret them permitted goods unsold to be returned. There is the further undisputed fact that until Philip Horowitz began in the spring of 1904 to violate the agreement checks for sales were quite uniformly deposited to the credit of the Niagara Company and the proceeds turned over to the Woolen Company; that the Woolen Company had a bookkeeper in the Horowitz place, who kept account of the goods consigned and sold; that checks were required to be indorsed by Horowitz and

a representative of the Woolen Company, and that an agent of the Woolen Company frequently visited the concern inquiring into the sales and urging prompt collections. The Horowitzes and the Niagara Company were not permitted to keep the proceeds of the sales or to use them for their own benefit, and this was only done through the fraudulent conduct of Philip Horowitz in violation of the agreement and the purpose of the parties.

We are unable to find that this contract was either actually or constructively fraudulent, and hold, as was found in the Circuit Court of Appeals, that it was what it purported to be, a consignment arrangement with the net proceeds of sales to be accounted for to the consignor and with the right to return the unsold goods. Finding no error in the decree of the Circuit Court of Appeals, the same is

Affirmed.

PEABODY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 289. Argued February 27, 1913.—Decided December 15, 1913.

The subjection of land to the burden of governmental use by constantly discharging heavy guns from a battery over it in time of peace in such manner as to deprive the owner of its profitable use would constitute such a servitude as would amount to a taking of the property within the meaning of the Fifth Amendment and not merely a consequential damage.

In order, however, to maintain an action for such a taking it must appear that the servitude has actually been imposed on the property.

A suit against the Government must rest on contract as the Government has not consented to be sued for torts even though committed by its officers in discharge of their official duties.

A contract with the Government to take and pay for property cannot be implied unless the property has been actually appropriated.

The mere location of a battery is not an appropriation of property within the range of its guns.

Where it appears that the guns in a battery have not been fired for more than eight years, and the Government denies that it intends to fire the guns over adjacent property except possibly in time of war, this court will not say that the Government has taken that property for military purposes.

46 Ct. Cls. 39, affirmed.

THE facts, which involve the determination of whether the establishment of a battery in connection with its military fortifications by the United States in the vicinity of claimants' land amounted under the circumstances of this case to a taking of property under the Fifth Amendment, are stated in the opinion.

Mr. John Lowell, with whom *Mr. William Frye White* and *Mr. Chauncey Hackett* were on the brief, for appellants:

The court below erred in not finding that the property of the claimant has been taken without just compensation where guns of a permanent battery established by the United States have been fired over and across the same; and where the guns are so fixed as to make it possible to do so in the future.

It also erred in not holding that under the circumstances of this case the property or a property right in the same has not been taken within the meaning of the Fifth Amendment and that the United States is liable for the value thereof.

It is impossible to fire the guns with safety except over the claimants' land.

The United States intended to fire the guns over the claimants' land in time of peace.

Property includes the collection of rights attaching to

the things or land. Those rights include rights of use, exclusion and disposition. It is these rights which constitute property and it is the interference with these rights which, if carried so far as to impair materially their value, constitutes a taking. *Old Colony R. R. Co.* v. *Plymouth*, 14 Gray, 155, 161; Hare on American Constitutional Law, 357; 1 Bentham's Works (1843), 308; *Morrison* v. *Semple*, 6 Binn. 94, 98; *Jackson* v. *Honsel*, 17 Johns. 281; *Chicago &c. R. R. Co.* v. *Englewood R. R. Co.*, 115 Illinois, 375, 385; *Denver* v. *Beyer*, 7 Colorado, 113; *St. Louis* v. *Hill*, 116 Missouri, 527; *Sinking Fund Cases*, 99 U. S. 700, 738; 1 Lewis on Eminent Domain, 3d ed., 51; 2 Austin's Jur. 1051.

As to what constitutes a taking, see Sedgwick, Const. Law, 2d ed., 456; 1 Lewis on Eminent Domain, 56; *Stockdale* v. *Rio Grande Ry. Co.*, 28 Utah, 201, 211; *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; 1 Hare on Amer. Const. Law, 388; *United States* v. *Lynah*, 188 U. S. 445; *Chappell* v. *United States*, 34 Fed. Rep. 673; *S. C.*, 160 U. S. 499; *Eaton* v. *B. C. & M. R. R. Co.*, 51 N. H. 504, 511; *Grand Rapids Booming Co.* v. *Jarvis*, 30 Michigan, 308, 321; *Thompson* v. *Androscoggin Imp. Co.*, 54 N. H. 545.

When the United States acquires the fee of the land over which the right of way goes, that is a taking of the right of way. *United States* v. *Welch*, 217 U. S. 338.

Where a part only of claimant's land was flooded, besides the market value of the land flooded, just compensation includes damage to the remaining land resulting from such taking. *United States* v. *Grizzard*, 219 U. S. 180. Nor is *Sharp* v. *United States*, 191 U. S. 341, in conflict, for that case went off on the ground that the depreciation occurred to a distinct tract of land. Compare *United States* v. *Alexander*, 148 U. S. 186; *Sprague* v. *Dorr*, 185 Massachusetts, 10.

See also 15 Cyc. 660, note 41; and *Ib.*, pages 661–670, inclusive, and notes.

Claimants' property has been taken.

It cannot possibly be said that with this menace constantly threatening the claimants' land, materially and permanently impairing its value, their rights of use, exclusion and disposition, have not been so seriously interfered with as to constitute a taking.

The claimants' land extends in contemplation of law *usque ad cœlum.* Co. Litt. 4a; 2 Bla. Com. 18; 3 Kent Com. 401; Webb's Pollock on Torts, p. 423; *Lyman* v. *Hale,* 11 Connecticut, 546; *Wandsworth* v. *Tel. Co.,* 13 Q. B. Div. 912; *Humphries* v. *Brogden,* 12 Q. B. 739; *Haines* v. *Roberts,* 6 El. & Bl. 643; 7 El. & Bl. 625; Erskine's Inst. Laws Scotland, Book ii, title 9, § 11; 1 American Law Reg. (N. S.) 577; *Lemmon* v. *Webb,* 1 App. Cases (1895), 1; *Corbett* v. *Hill,* L. R. 9 Eq. 671.

The property of the claimants consisted of the rights of user, exclusion and disposition. So far as they are concerned, these rights have been greatly impaired, in fact have become valueless. The Court of Claims has found that this impairment of the value of the property will continue so long as the fort and artillery therein are maintained. The United States is in the enjoyment of the greater part of these rights. It is clear, therefore, that the United States has taken the claimants' property within the meaning of the Fifth Amendment.

The decision of the Court of Claims is wrong. *Emerson* v. *Taylor,* 9 Maine, 42, relied on below, does not apply, as the acts complained of in that case did not constitute a taking within the meaning of the Fifth Amendment.

Transportation Co. v. *Chicago,* 99 U. S. 635; *Gibson* v. *United States,* 166 U. S. 269; *Scranton* v. *Wheeler,* 179 U. S. 141; *Bedford* v. *United States,* 192 U. S. 217, relied on by the Government as holding that the acts complained of did not constitute a taking within the meaning of the

Fifth Amendment are also clearly distinguishable. See *United States* v. *Lynah*, 188 U. S. 445.

The claimants' property has been taken: the United States has taken title to the whole of the claimants' property commanded by the guns by acquiring the value thereof and assuming dominion thereof *in perpetuo*.

The findings show that the land was of little value except as a summer resort, and that it can no longer be used for such purpose.

This is not a case of loss of access, nor a case where the land was subject to a servitude in favor of the United States; nor a case where the damage was consequential.

It is a case where upon the firing of the guns the United States took the valuable use of the land and thereby virtually, though not formally, has appropriated the title as well.

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

Appellants, as record owners, are estopped from asserting that the property has been taken.

Appellants' fundamental proposition to establish the taking rests upon a false premise.

There has been no taking of appellants' property within rule established by decisions of this court.

The injury of which appellants complain is consequential, for which no right of compensation attaches.

In support of these contentions, see *Bedford* v. *United States*, 192 U. S. 224; *Benner* v. *Atlantic Dredging Co.*, 134 N. Y. 156; *Beseman* v. *R. R.*, 50 N. J. L. 235; *Booth* v. *R. R. Co.*, 140 N. Y. 262; *Carroll* v. *R. R. Co.*, 40 Minnesota, 168; *Chicago R. R. Co.* v. *Drainage Comrs.*, 200 U. S. 561; *Chappell* v. *United States*, 34 Fed. Rep. 673; *Dist of Col.* v. *Barnes*, 197 U. S. 146; *Eaton* v. *Boston R. R.*, 51 N. H. 504; *Emerson* v. *Taylor*, 9 Maine, 42; *Gibson* v. *United States*,

166 U. S. 269; *Hay* v. *Cohoes Co.*, 2 N. Y. 159; *Heyward* v. *United States*, 46 Ct. Cls. 484; *Hurdman* v. *R. R. Co.*, L. R. (3 C. P. Div.) 168; *Lansing* v. *Smith*, 8 Cowen, 146; *McClure* v. *United States*, 116 U. S. 145; *Manigault* v. *Springs*, 199 U. S. 473; *Monongahela Nav. Co.* v. *Coons*, 6 Watts & S. 101; *Peabody* v. *United States*, 43 Ct. Cls. 19; *Portsmouth Land Co.* v. *Swift*, 82 Atl. Rep. 524; *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *Radcliff* v. *Brooklyn*, 4 N. Y. 195; *Scranton* v. *Wheeler*, 179 U. S. 141; *Sisseton Indians* v. *United States*, 208 U. S. 566; *Sharp* v. *United States*, 191 U. S. 341; *St. Peter* v. *Dennison*, 58 N. Y. 416; *Stevens* v. *Paterson R. R.*, 34 N. J. L. 549; *Transportation Co.* v. *United States*, 99 U. S. 642; *Tremain* v. *Cohoes Co.*, 2 N. Y. 163; *Union Bridge Co.* v. *United States*, 204 U. S. 361; *United States* v. *Adams*, 6 Wall. 112; *United States* v. *Grizzard*, 219 U. S. 180; *United States* v. *Lynah*, 188 U. S. 445; *United States* v. *Sewell*, 217 U. S. 601; *United States* v. *Welch*, 217 U. S. 338.

Mr. Justice Hughes delivered the opinion of the court.

This is an appeal from a judgment of the Court of Claims dismissing petitions for compensation for land alleged to have been taken by the United States for public use. 46 Ct. Cls. 39. Separate suits were brought by Samuel Ellery Jennison, the owner at the time the taking is said to have occurred, by his mortgagees, Mary R. Peabody and the Saco and Biddeford Savings Institution, and by his grantee, the Portsmouth Harbor Land and Hotel Company. These suits were consolidated and the merits were heard. The following facts are shown by the findings:

The land in question, comprising about two hundred acres, forms the southern corner of Gerrish Island, the southernmost point on the coast of Maine. It lies about three miles from Portsmouth, bordering on the south and

east the Atlantic ocean and on the west the entrance to Portsmouth harbor. Its value consists almost entirely in its adaptability for use as a summer resort and it had been improved for this purpose by the erection of a hotel, cottages, outbuildings and pier, by the construction of roads, and by the provision of facilities for summer recreations.

In 1873, long before Jennison acquired title and improved the property, the United States began the construction of a twelve-gun battery upon a tract of seventy acres lying north and west of the land in suit and abutting upon it. This battery was to be one of the outer line of defenses of Portsmouth harbor, for which appropriation had been made by the act of February 21, 1873, c. 175, 17 Stat. 468. (See also act of April 3, 1874, c. 74, 18 Stat. 25.) By the year 1876, a large sum had been expended upon the work which had reached an advanced stage of construction. Operations were closed in September of that year, however, for want of funds and the fortification was not occupied by the United States thereafter until work was resumed in 1898. The Government then constructed on the same site a battery consisting of three ten-inch guns and two three-inch rapid fire guns. It was practically completed on June 30, 1901, and was transferred to the artillery on December 16, 1901, being named Fort Foster.

No part of the fort encroaches upon the land in suit; the fort is within two hundred feet of its northwestern corner and about one thousand feet from the hotel. The claimants' land lies between the fort and the open sea to the south and southeast; and the guns have a range of fire over all the sea-front of the property. As the government reservation on its western side borders the entrance to the harbor, the court found that there was an available portion of the shore belonging to the reservation which permitted the firing of the guns in a southwesterly direc-

tion "for practice and for all other necessary purposes in time of peace" without the projectiles passing over the land in question. This conclusion was reached by applying the local law governing the boundary lines of contiguous proprietors where there is a curvature of the shore. *Emerson* v. *Taylor*, 9 Maine, 42. It may be noticed here that the petitioners insist that the guns could not be fired over the narrow area thus found to be a part of the reservation without endangering life and property along the New Hampshire coast and they present in their brief a map to support their assertion. The Government urges that this map has not been identified and is wholly incompetent; and that, as the question is one of fact, the finding must be deemed conclusive. But while thus finding that there was a line of fire available to the Government over its own shore property, the court also found that the most suitable field of fire for practice and other purposes in time of peace would be over the claimants' land.

On or about June 22, 1902, two of the guns were fired for the purpose of testing them at a target off the coast, the missiles passing over the land in suit; and another gun was fired for the same purpose and to the same effect on September 25, 1902, the resulting damage to buildings and property amounting to $150.

None of the guns has been fired since, but they have been kept in good condition by a detail from Fort Constitution which is situated across the Piscataqua River. The court below further states in its findings that "it does not appear from the evidence that there is any intention on the part of the Government to fire any of its guns now installed, or which may hereafter be installed, at said fort in time of peace over and across the lands of the claimants so as to deprive them of the use of the same or any part thereof or to injure the same by concussion or otherwise, excepting as such intention can be drawn from the fact that the guns now installed in said fort are so fixed as to make it possible

so to do and the further fact that they were so fired upon the occasions as hereinbefore found."

In the years 1903 and 1904, the hotel which had previously been profitable was conducted at a loss; since 1904, it has been closed and the cottages have been rented only in part and at reduced rates. It is found that the erection of the fort and the installation of the guns have materially impaired the value of the property and that this impairment will continue so long as the fort and artillery are maintained. This is found to be due to the apprehension that the guns will be fired over the property.

The question is whether upon this showing the petitioners were entitled to recover.

It may be assumed that if the Government had installed its battery, not simply as a means of defense in war, but with the purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made. The subjection of the land to the burden of governmental use in this manner might well be considered to be a 'taking' within the principle of the decisions (*Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 177, 178; *United States* v. *Lynah*, 188 U. S. 445, 469; *United States* v. *Welch*, 217 U. S. 333, 339) and not merely a consequential damage incident to a public undertaking which must be borne without any right to compensation (*Transportation Co.* v. *Chicago*, 99 U. S. 635, 642; *Gibson* v. *United States*, 166 U. S. 269; *Scranton* v. *Wheeler*, 179 U. S. 141, 164; *Bedford* v. *United States*, 192 U. S. 217, 224; *Jackson* v. *United States*, 230 U. S. 1, 23).

But, in this view, the question remains whether it satis-

factorily appears that the servitude has been imposed; that is, whether enough is shown to establish an intention on the part of the Government to impose it. The suit must rest upon contract, as the Government has not consented to be sued for torts even though committed by its officers in the discharge of their official duties (*Gibbons* v. *United States*, 8 Wall. 269, 275; *Langford* v. *United States*, 101 U. S. 341, 343; *Schillinger* v. *United States*, 155 U. S. 163, 169; *Russell* v. *United States*, 182 U. S. 516, 530; *Harley* v. *United States*, 198 U. S. 229, 234); and a contract to pay, in the present case, cannot be implied unless there has been an actual appropriation of property (*United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 656, 657).

The contention of the petitioners, therefore, is plainly without merit so far as it rests upon the mere fact that there is a suitable, or the most suitable, field of fire over their property. Land, or an interest in land, cannot be deemed to be taken by the Government merely because it is suitable to be used in connection with an adjoining tract which the Government has acquired, or because of a depreciation in its value due to the apprehension of such use. The mere location of a battery certainly is not an appropriation of the property within the range of its guns.

The petitioners' argument assumes that the guns, for proper practice, must be fired over the land in suit and, hence, that this burden upon it was a necessary incident to the maintenance of the fort. The fact of the necessity of practice firing is said to be established by the finding with respect to the line of fire over the Government's portion of the shore in which it is said that this would be sufficient "for purposes of practice and for all other necessary purposes in time of peace." But, in the light of other findings, this is far from affording a sufficient foundation for the conclusion upon which the petitioners insist. On the contrary, that no such necessity as is now asserted can be assumed from the mere fact that the fort is main-

tained is demonstrated by the facts of this case. This suit was tried in the latter part of the year 1910 and it appeared that none of the guns had been fired for over eight years. When the suit was brought in 1905, nearly two years and a half had elapsed since the firing of a shot. The guns have been fired only upon two occasions, or three times in all, and this firing took place in 1902, shortly after the installation of the guns, for the purpose of testing them. It may be that practice in firing the guns would be highly desirable, but it is too much to say upon this record that the fort would be useless without it. Nor are we at liberty to conclude that the Government has taken property, which it denies that it has taken, by assuming a military necessity in the case of this fort which is absolutely contradicted by the facts proved.

Reduced to the last analysis, the claim of the petitioners rests upon the fact that the guns were fired upon the two occasions in 1902, as stated, and upon the apprehension that the firing will be repeated. That there is any intention to repeat it does not appear but rather is negatived. There is no showing that the guns will ever be fired unless in necessary defense in time of war. We deem the facts found to be too slender a basis for a decision that the property of the claimants has been actually appropriated and that the Government has thus impliedly agreed to pay for it.

The judgment is affirmed.

Affirmed.

SPRINGSTEAD *v.* CRAWFORDSVILLE STATE BANK.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 93. Submitted December 4, 1913.—Decided December 22, 1913.

In determining the amount in controversy for jurisdictional purposes the attorney's fee provided for in a promissory note in case of suit can be considered, as it is not a part of the costs.

Failure to allege the citizenship of the original payee of a note on which suit is brought by the assignee is a jurisdictional defect; but if diversity of citizenship between the plaintiff and defendant is alleged the defect is amendable.

Under § 299 of the Judicial Code, amendments to the pleadings are allowable if the jurisdictional amount existed when the suit was brought notwithstanding that since then the amount necessary to give jurisdiction has been increased.

THE facts, which involve the jurisdiction of the Circuit Court, are stated in the opinion.

Mr. J. C. Davant for plaintiffs in error.

Mr. Peter O. Knight and *Mr. C. Fred Thompson* for defendant in error.

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

This is a direct writ of error to determine a question of jurisdiction. The action arose prior to the adoption of the Judicial Code and was on two promissory notes, each for one thousand dollars and each providing for the payment of a reasonable attorney's fee if suit were brought. Could

such an attorney's fee be considered in determining whether the jurisdictional amount was involved? We think so. Clearly such fee was no part of the costs, nor was it interest. It may be that the agreement to pay an attorney's fee in the event of suit created only an accessory right (though under *Brown* v. *Webster*, 156 U. S. 328, this is doubtful), but nevertheless it gave a right to recover and created a legal obligation to pay. It is true its effectiveness was dependent upon suit being brought, yet the moment suit was brought the liability to pay the fee became a "matter in controversy" and as such to be computed in making up the requisite jurisdictional amount, *Brown* v. *Webster*, 156 U. S. 328, and this has been the rule since applied by lower Federal courts. *Rogers* v. *Riley*, 80 Fed. Rep. 759; *Casualty Company* v. *Spradlin*, 170 Fed. Rep. 322; *Howard* v. *Carroll*, 195 Fed. Rep. 646.

It is further urged that though the case is within the jurisdictional amount, nevertheless it was not within the competency of the court below because of a failure to allege the citizenship of the original payee of the notes. (Act of August 13, 1888, 25 Stat. p. 433, c. 866, § 1.) The contention is clearly well taken. *King Bridge Company* v. *Otoe County*, 120 U. S. 225; *Parker* v. *Ormsby*, 141 U. S. 81, 83. However, as between the plaintiff and the defendants the necessary diversity of citizenship was alleged, we are of opinion that the failure to allege the citizenship of the assignor of the paper does not compel the absolute dismissal of the case, as the error in that particular is susceptible to correction by amendment. *King Bridge Co.* v. *Otoe County*, 120 U. S. 225; *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449.

The argument that because subsequent to the institution of suit the jurisdictional amount was increased to allow the amendment at this time, would be giving the lower court jurisdiction of a case to which its authority does not now extend is without merit, in view of the saving

clause of § 299 of the Judicial Code, which was intended to cover such a case as this.

Reversed and remanded with direction to allow plaintiff to amend by alleging the citizenship of the original parties to the paper within such time as the court shall think proper and upon failure to do so, to dismiss for want of jurisdiction.

AETNA LIFE INSURANCE COMPANY *v.* MOORE, ADMINISTRATOR OF SALGUE.

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

No. 33. Argued November 3, 1913.—Decided December 22, 1913.

The character of the covenants of a contract for life insurance depends upon the law of the State where made. The Code of Georgia expressly provides that the application must be made in good faith and that the representations are covenanted by the applicant as true, and any variations changing the character of the risk will void the policy.

The law of Georgia as determined by its highest court, prior to the adoption of the Code, was that insurer and insured may make their own contract and determine what representations are material.

The highest court of Georgia has decided that mere immaterial matters, although declared to be warranties, do not void a policy even though the policy declares them to be such, and that under the Code the parties themselves could not contract to make immaterial matter material.

In order for an insurance company, defending on the ground of false statements in the application, to have a verdict directed, it must establish that the representations were material to the risk and were untrue.

A representation that the applicant for insurance has never been rejected by any company, association or agents is material to the risk and is not true if he has withdrawn an application at the suggestion

of the medical adviser, and with the knowledge that the company to whom the application was made was about to reject it.

Applicants for insurance are competent to make agreements in the policy that no person other than the executive officers of the company can vary its terms, and such an agreement is binding when made.

A decision of the highest court of a State on a principle of general jurisprudence is not controlling upon this court. *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349.

Where two cases are consolidated by the court below because it appears reasonable to do so under § 921, Rev. Stat., and this court doubts the reasonableness of the consolidation, it need not pass upon that subject definitely if, as in this case, a new trial is ordered on other grounds.

THE facts, which involve the validity of a verdict and judgment on a policy of life insurance, are stated in the opinion.

Mr. A. L. Miller, with whom *Mr. M. D. Jones*, *Mr. George S. Jones*, *Mr. Walter Defore*, *Mr. Wallace Miller* and *Mr. Charles H. Hall, Jr.*, were on the brief, for petitioner.

Mr. Jesse Harris and *Mr. Minter Wimberly*, with whom *Mr. Alexander Akerman* was on the brief, for respondent:

Consolidating the causes was a proper exercise of the discretion of the trial court under § 921, Rev. Stat. *Mutual Life Ins. Co.* v. *Hillman*, 145 U. S. 285.

There was no error in the failure and refusal of the court to direct a verdict in favor of the insurance company.

While the policy is a Georgia contract, and the law of Georgia will, therefore, be applied in construing and considering the contract, the construction of the Georgia law will be taken in connection with the law as construed by the courts of the United States relating to contracts of life insurance. For the statute law of Georgia applicable to the case, see 1 Code of Georgia of 1910, §§ 2479–2482, and § 2499.

The evidence for both the plaintiff and the defendant in the court below clearly establishes the fact that there was no fraudulent concealment of any material fact and no wilful concealment of any fact that would enhance the risk.

All material facts were made known to the agents of the defendant company. It cannot be said that there was any fraudulent concealment as to these questions by the insured. This being true, the policy will not be voided. *Ley* v. *Metropolitan Life Ins. Co.*, 120 Iowa, 203; *Patten* v. *U. S. Life Ins. Co.*, 141 N. Y. 589; Vol. 25, Cyc. of Law & Procedure, 796.

The refusal of the court to give the instructions requested by plaintiff in error was proper. *O'Connell* v. *Supreme Conclave*, 102 Georgia, 143; *Farrell* v. *Security Life Ins. Co.*, 125 Fed. Rep. 684.

The refusal of the court to so charge was not error because the representations and warranties made by the applicant that he did not have heart trouble were true, and this was a question of fact for the jury to decide.

The insurance company is estopped from alleging that this answer was not the truth, as the agents who solicited the insurance and the medical examiner for the company, who examined the deceased, acted as the agents of the insurance company and the insurance company is bound thereby. *Union Mut. Ins. Co.* v. *Wilkinson*, 13 Wall. 222; *American Life Ins. Co.* v. *Mahone*, 21 Wall. 152; *New Jersey Mut. Ins. Co.* v. *Baker*, 94 U. S. 610; *Clubb* v. *American Accident Co.*, 97 Georgia, 502; *German-American Ins. Co.* v. *Farley*, 102 Georgia, 735; *Continental Ins. Co.* v. *Chamberlain*, 132 U. S. 304; *Springfield Fire Ins. Co.* v. *Price*, 132 Georgia, 687; *Johnson* v. *Aetna Ins. Co.*, 123 Georgia, 404; *Mechanics Ins. Co.* v. *Mutual Bldg. Assn.*, 98 Georgia, 262; *Wood* v. *American Fire Ins. Co.*, 149 N. Y. 382.

The answer given by the applicant may have been in-

complete, but the agents of the company knew that he had consulted at least two other physicians, and they did not deem it necessary to insert this fact in the answer. Therefore, the action of the insurance company's agent, which led the applicant to believe that it was unnecessary to give the names of all the physicians whom he had consulted, was such action as to estop the company from insisting upon a forfeiture for the failure to so state. *Phœnix Mut. Ins. Co.* v. *Doster*, 106 U. S. 30; *Hartford Life Ins. Co.* v. *Unsell*, 144 U. S. 439; *N. Y. Life Ins. Co.* v. *Eggleston*, 96 U. S. 572.

If the answer was not complete, or imperfectly answered, the issuance of the policy without further inquiry, especially when the insurance company had been put on notice, as in the case at bar, amounts to a waiver of the objection, and makes the omission immaterial. *Phœnix Mut. Ins. Co.* v. *Raddin*, 120 U. S. 183.

It was not necessary for the applicant, in answer to the question, to state the names of physicians he consulted for merely slight or temporary indispositions. *McLain* v. *Provident Ins. Co.*, 110 Fed. Rep. 80; *Hubbard* v. *Mutual Reserve Fund*, 100 Fed. Rep. 719.

This particular question is not a warranty, but is a representation. *Minn. Mut. Ins. Co.* v. *Lee*, 230 Illinois, 273.

Whether or not the statements made in the application are material to the risk is a question for the jury and not a question of law for the court.

Misstatements by way or representations of warranty, which are made through fraud of the company's agent, cannot be relied on by it to defeat the policy, and especially is this so where the insured is misled by the agent into making the false statements. *Standard Life Ins. Co.* v. *Frazier*, 76 Fed. Rep. 705; 25 Ency. of Law and Procedure, 803; *Globe Mut. Ins. Co.* v. *Myer*, 118 Ill. App. 155.

Whether or not the alleged falsities of the answers of

the insured would void the policy, should be submitted as a question of fact for the jury, in order to determine whether or not the answers were made *bona fide* by the applicant. *Moulor* v. *Am. Life Ins. Co.*, 111 U. S. 335; *Fidelity Mut. Life Assn.* v. *Jeffords*, 107 Fed. Rep. 402.

All policies of insurance and applications must be construed against the insurer and in favor of the insured, and all statements in the application will be construed as representations rather than warranties. *Havan* v. *Scottish Union Ins. Co.*, 186 U. S. 423; *Phœnix Mut. Life Ins. Co.* v. *Raddin*, 120 U. S. 183; *Home Life Ins. Co.* v. *Fisher*, 188 U. S. 726; *First Natl. Bank* v. *Hartford Ins. Co.*, 195 U. S. 673; *Franklin Fire Ins. Co.* v. *Vaughn*, 92 U. S. 516; *Mutual Benefit Life Ins. Co.* v. *Higginbotham*, 95 U. S. 380; *Knickerbocker Life Ins. Co.* v. *Trefz*, 104 U. S. 197; 25 Cyc. 796, 815; *Penn. Mut. Life Ins. Co.* v. *Mechanics' Savings Bank*, 72 Fed. Rep. 413.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action on a life insurance policy for $6,000 issued upon the life of John A. Salgue, the intestate of respondent. It was tried to a jury, resulting in a verdict and judgment for respondent. The judgment was affirmed on writ of error to the Circuit Court of Appeals by a *per curiam* opinion. This certiorari was then granted.

The questions in the case are based on certain statements made by Salgue which, it is contended by petitioner (herein called the insurance company), became a part of the policy and constituted warranties.

The following are the material provisions of the policy and the application:

"This policy of insurance witnesseth: That the Aetna Life Insurance Company, in consideration of the statements, answers and warranties contained in or endorsed

upon the application for this policy, which application is copied hereon and made a part of this contract, and in further consideration of the annual premium . . . hereby insures the life of John A. Salgue. . . .

"This policy is issued and accepted subject to the conditions, provisions and benefits printed on the reverse of this page, which are hereby referred to and made a part hereof. . . .

"Conditions, provisions and benefits which are made a part of this policy:

"Section 1. This policy shall not take effect until the first premium hereon shall have been actually paid during the lifetime and good health of the insured. . . .

"Section 7. All agreements made by said company are signed by one of its executive officers. No agent or other person not an executive officer can alter or waive any of the conditions of this policy, or make any agreement binding upon said company."

Copy of the application:

"Being desirous of insuring my life with the Aetna Life Insurance Company, I do hereby declare and warrant that I am in good health, of sound body and mind, and that the following statements signed by me are full, correct and true; and that I have no knowledge or information of any disease, infirmity or circumstance not stated in this application which may render insurance on my life more hazardous than if such disease, infirmity or circumstance had never existed; and I do hereby agree that the declarations and warranties herein made, and the answers to the following questions, together with those signed by me on the second page of this application, shall be the basis and form part of the contract (or policy) between me and the said company, and that if the same be in any respect untrue, said policy shall be void; and I further agree that the insurance hereby applied for shall not be binding upon said company until a policy has been issued, nor until

the amount of premium as stated therein has been received by said company, or its authorized agent, during my lifetime and good health, and a receipt given therefor, signed by an executive officer of said company; and I further agree that no statement or declaration made to any agent, examiner or any other person, and not contained in this application, shall be taken or considered as having been made to or brought to the notice or knowledge of said company, or as charging it with any liability by reason thereof; and I understand that all policies and agreements made by the said Aetna Life Insurance Company are signed by one or more of its executive officers, and that no other person can grant insurance or make any agreement binding upon said Company."

The application also contained questions addressed to the insured by the examining physician and the answers by him, among others, as follows:

"14. What are the names and residences of all the physicians whom you have personally employed or consulted during the last five years?"

Answer: "Dr. James T. Ross, Macon, Ga."

"16. Has any proposal or application to insure your life been made to any company, association or agent on which a policy of insurance is now pending? Or has any such proposal or application ever been made for which insurance has not been granted, or on which a policy or certificate of insurance was not issued in full amount, and of the same kind as applied for? If so, state particulars and the names of all such companies, associations or agents."

Answer: "None."

"19. Has any physician expressed an unfavorable opinion upon your life with reference to life insurance?"

Answer: "No."

"21. Have you ever had any of the following diseases? Answer 'yes' or 'no' opposite each. If 'yes,' state the

date, duration and severity of illness. . . . Disease of the heart?" . . .

Answer: "No."

"23. Are you subject to dyspepsia, dysentery or diarrhœa?" Answer: "No."

"24. Have you had during the last seven years any disease or severe sickness? If so, state the particulars of each case and the names of the attending physicians."

Answer: "No."

There was discussion between Salgue and the examining physician in regard to the condition of Salgue's heart. His first statement was that he did not have heart disease, though he had been told he had. The physician explained to him the symptoms of the disease, and he replied that he did not have any of them and never had been treated for heart trouble. He had, he further said, consulted two doctors, Little and Winchester, and one of them told him he had heart disease "and scared him so." The other told him that he did not have any signs of it. And the recollection of the physician was that Salgue referred to Dr. Ross as having treated him for something several years previously. At the end of the discussion the physician put down the answer "No." He also reported that Salgue's respiration was "full, easy and free. O. K." and that "auscultation" did not "indicate enlargement or disease of the heart of any kind."

There was testimony to the effect that about June 15, 1905, and prior to the application to the Aetna, Salgue applied to the local agent of the Penn Mutual Insurance Company at Macon for a policy of $6,000. The company's medical examiner refused to pass him, telling him that he had heart disease and advising him to see his family physician, Dr. McAfee. Salgue consulted Dr. McAfee and was informed by him that he had heart disease.

The contentions of the insurance company are based (1) upon a request for the direction of a verdict in its

favor; (2) the denial of requests for special instructions. We may confine our consideration to the special requests.

There was controversy as to whether Salgue had heart disease. We have seen the various opinions of the examining physicians. Salgue was a strong man physically and his strength was illustrated by instances. At one of his examinations he easily picked up and removed a large box of melons without any effect on his heart action. An effort of strength on another occasion was immediately detrimental, causing an aneurism which progressively developed and produced a rupture of the blood vessel and his death. By the advice of his physician he had quit work and had gone to a resort called Indian Springs. He remained there about ten days and on his way home died suddenly on the cars.

It is not necessary to give at length the charges requested. They embrace the propositions (1) that the application and its statements, warranties and covenants became part of the contract of insurance, and that any variation from them whereby the nature, extent or character of the risk was changed, would affect the policy whether the statement was made by the applicant in good faith, not knowing they were untrue, or made wilfully or fraudulently. And so also as to the answers to the questions put to Salgue as to his health, freedom from heart disease, the physicians he had consulted, the applications for insurance which he had made which were rejected or not accepted. (2) Under the terms of the policy the application constituted part of it, the answers to the questions were covenanted and warranted and Salgue was bound thereby without regard to his good faith in making them; or that they were representations material to the risk by which he was bound without regard to his good faith, and that therefore the answers, if untrue, would make the policy void. (3) The provisions of the policy that no statement or declaration made to an agent, exam-

iner or any other person, and not contained in the application, shall be taken or construed as having been made to or brought to the knowledge of the company, or as charging it with any liability by reason thereof, was binding on Salgue. So also the limitations on the powers of the agents and of what may have been said to them or by them. And further that if the answers in the application were incorrect it was Salgue's duty to report them as incorrect to the company, and, failing to do so, he was presumed to have accepted his policy upon the faith of them. It was, therefore, immaterial what may have been said by or to the agent or to the medical examiner which was not reduced to writing and presented to the officers of the company at the home office.

The charge of the court was very long—too long even to attempt to condense. It was antithetical to the special requests made by the insurance company. Applying certain general principles which it expressed, the court said:

"To make them distinctly applicable to your duty, you are instructed that you must determine from all the facts, first, did Salgue make a misrepresentation or concealment of a fact of which he had knowledge. If he did not, the defense on this point must fail. Second, if he did, was such misrepresentation or concealment so material that it would have influenced one or both of the defendants not to issue the policy of insurance upon the respective applications. And third, in connection with this your inquiry will be, if such material misrepresentation or concealment as would have caused the defendants or either of them to withhold insurance was made, was it by Salgue wilfully or fraudulently done. In the absence of wilful or fraudulent misrepresentation or concealment of a material fact the policy stands good and the insurance company must pay what it promised to pay by its policy, when it accepted the premium of the applicant."

We may note here that Salgue declared in his applica-

tion that he was "in good health"; that the statements made by him were "full, correct and true"; and that he had no knowledge of "any disease, infirmity or circumstance" which might "render insurance on his life more hazardous than if such disease, infirmity or circumstance had never existed." He also agreed that "the declarations and warranties" therein made, and the answers to the questions "should be the basis and form part of the contract (or policy)" between him and the company, "and that if the same be in any respect untrue" the policy should be "void."

The policy is conceded to be a Georgia contract. The character of its covenants, therefore, depends upon the law of that State declared in § 2479 of its Code, as follows:

"Application, Good Faith. Every application for insurance must be made in the utmost good faith, and the representations contained in such application are considered as covenanted to be true by the applicant. Any variation by which the nature, or extent, or character of the risk is changed will void the policy." [1]

But who is to decide—the court or jury—whether a variation be of the quality described? We have seen

[1] SEC. 2480. Effect of misrepresentation. Any verbal or written representations of facts by the assured to induce the acceptance of the risk, if material, must be true, or the policy is void. If, however, the party has no knowledge, but states on the representation of others, *bona fide*, and so informs the insurer, the falsity of the information does not void the policy.

SEC. 2481. Concealment. A failure to state a material fact, if not done fraudulently, does not void; but the wilful concealment of such a fact, which would enhance the risk, will void the policy.

SEC. 2483. Wilful misrepresentation voids policy. Wilful misrepresentation by the assured, or his agent, as to the interest of the assured, or as to other insurance, or as to any other material inquiry made, will void the policy.

SEC. 2499. Law of fire insurance applicable. The principles before stated as to fire insurance, wherever applicable, are equally the law of life insurance.

how explicit the policy is, and this court in *Jeffries* v. *Economical Life Insurance Company*, 22 Wall. 47, and *Aetna Life Insurance Company* v. *France*, 91 U. S. 510, held that the parties to the contract may make the inquiries and answers material and that therefore their materiality is not open to be tried by a jury.

These cases recognize the right of the insurer and the insured to make their own contract and determine for themselves what representations shall be material.

How far has this simple rule and the right of the parties been changed by the Georgia Code? In *German-American Life Association* v. *Farley*, 102 Georgia, 720, 733, it was decided to be the established law of that State that mere immaterial matters, though incorporated in an application for insurance and declared to be warranties, do not avoid the policy, and that this was so imperatively the law of the State under the provisions of the Code that the parties could not contract to make immaterial matter material. The court, however, said: "Of course, what is in any degree material should be allowed its due effect; but the absolutely immaterial should count for nothing."

In *Supreme Conclave* v. *Wood*, 120 Georgia, 328, the Code again came up for construction and the statements of the insured were declared to be representations, not warranties, and that it was the purpose of the Code to get away from what the court denominated the "finer distinctions and strained constructions" of the cases. It was therefore held that under the Code of the State "a policy cannot now be avoided upon the ground of the falsity of a representation, though warranted, unless that representation be material and the variations from truth be such as to change the nature, extent, or character of the risk." But the court further held that if the representations have such variation, although the applicant may have made them in good faith, not knowing that they were untrue, if they were made the basis of the contract,

such contract is void. "It is therefore immaterial," the court declared, "whether the warrantor acted in good faith in making them."

The facts of the case were very much like those of the case at bar. The applicant represented himself, in answer to a question, as not having heart disease. Of this representation the court said that it "was certainly a material one, and doubtless the company acted upon it." And further: "It is scarcely conceivable that the company would have issued the policy if the applicant had answered that he was or had been afflicted with heart disease, or even if he had answered doubtfully. We think that if the answer made was untrue, the plaintiff below cannot recover."

The judgment in the case was reversed upon the ground, among others not necessary to be considered, of error in the instruction of the court "that if Wood had heart disease and did not know it, the failure on his part to disclose it could not avoid the policy." There was dispute as to the fact but the court did not pass upon it, remitting it as a question for the jury to decide at the next trial.

In *Southern Life Ins. Co.* v. *Wilkinson*, 53 Georgia, 535, 549, 550, after commenting on the difference the cases make between warranties and representations, the peremptory character of the former, their truth being the only question, the effect of the latter being determined by their materiality to the risk, the court said the Code of the State determined the character of the statements. The court quoted § 2479, which we have given, and § 2480, which provides that "any verbal or written representation of facts by the assured to induce the acceptance of the risk, if material, must be true or the policy is void," and said that "the proper construction is that if there be any variation in them from what is true, whereby the nature or extent or character of the risk is changed, the policy, if it makes them the basis of the contract of insurance,

will be void, and that this will be so whether they are or are not wilfully or fraudulently made.

It is, however, contended by respondent that the questions asked in the application were truthfully answered, or, at any rate, whether they were truthfully answered was a question for the jury. And it is insisted that the answers of Salgue in regard to other insurance and the action thereon by other companies were correct.

But granting that the truthfulness of the answers was a question for the jury, the testimony was conflicting, and, as the verdict was general, it is not possible to say what view the jury took of the conflict, or that it was necessary to resolve it in view of the charge of the court, or how they would have resolved it if instructions requested by the insurance company had been given.

We think there was error also in refusing other requests for instructions. We have seen questions were addressed to Salgue as to the names and residence of the physicians he had employed or consulted, and whether any physician had expressed an unfavorable opinion upon his life with reference to life insurance, and also whether any proposal or application to insure his life was pending in another company or, if made, had not been granted. To the first question he gave the name of only one physician. There was testimony that he had consulted others. To the second question he answered, "No." There was testimony that the answer was untruthful. To the third question he answered, "None." The truthfulness of the answer is asserted notwithstanding it appeared from the testimony that he had made application to the Penn Mutual Company, which application had not been granted. The evidence was that the medical examiner had refused to pass him because he was of opinion that he, Salgue, had heart disease and so reported to the agent of the company. The agent told Salgue if he, Salgue, would pay the doctor's fee to the company he, the agent, would withdraw the

application before it reached the company and that Salgue "could answer in the future that he had never been rejected by any company"; and the agent testified "that it is customary entirely with agents to stop examinations that way."

It is contended by respondent that this testimony shows that Salgue's application to the Penn Mutual was not rejected but was withdrawn; and, besides, whether it was rejected or withdrawn was a question for the jury. We are unable to concur with either contention. The question was a very broad one. It was whether any proposal or application had been made for which insurance had not been granted, and particulars were asked for, "and the names of all such companies, associations or *agents*." Regarding the sense of the question—indeed, if not its letter—the answer was untruthful. The question certainly called for something more than an absolute negative. Its purpose was to ascertain the conduct of Salgue with reference to life insurance in order to judge of him as a risk. If it had been answered according to the facts, the company would have received information of circumstance certainly material for it to consider.

This conclusion is supported, as we have seen, by the cited Georgia cases and is not opposed by *Moulor* v. *American Life Insurance Company*, 111 U. S. 335 or *Phœnix Mutual Life Insurance Co.* v. *Raddin*, 120 U. S. 183. In the *Moulor Case* it was held that the statements made by an applicant would be considered as representations rather than warranties, the policy leaving it in doubt which they were contracted to be, and that they could not be considered either by the company or the applicant as covering diseases which the latter was not conscious of having. It was said that what the company desired of the applicant was the utmost good faith toward it, "and make full, direct, and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation

or concealment of facts with which the company ought to be made acquainted; and that by so doing, and only by so doing, would he be deemed to have made 'fair and true answers.'"

In *Phœnix Life Insurance Company* v. *Raddin*, there is a clear definition of principles. Answers to questions propounded to an applicant, it was held, will be considered representations unless clearly intended by both parties to be warranties, as to which substantial truth in everything material to the risk is all that is required of the applicant. And it was decided "whether there is other insurance on the same subject, and whether such insurance has been applied for and refused, are material facts, at least when statements regarding them are required by the insurers as part of the basis of the contract. . . . Where an answer of the applicant to a direct question of the insurers purports to be a complete answer to the question, any substantial misstatement or omission in the answer avoids a policy issued on the faith of the application."

The medical examiner, as we have seen, put down the answer "No" to the question asked Salgue as to whether he had heart disease, after being informed by Salgue, that he, Salgue, had been told by physicians that his heart was affected. It appears from the evidence that the other answers of Salgue in his application were written down by the agent of the company; and there is testimony for and against the fact that Salgue informed the agent of the opinion entertained of him by his physicians, and that he also informed the agent of other applications for insurance. It is hence contended that the agent, not Salgue, is responsible for the positive character of the answers and that the insurance company is estopped by this action of the agent and by his knowledge of the actual conditions and circumstances. It is, therefore, further contended that the case comes within the principle of the cases which

establish that where the agent of the company prepares the application or makes representations to the insured as to the character and effect of the statements of the application he will be regarded in so doing as the agent of the company, and not the agent of the insured. Among the cases cited to sustain the principle are the following in this court: *Union Mutual Insurance Co.* v. *Wilkinson*, 13 Wall. 222; *American Life Insurance Co.* v. *Mahone*, 21 Wall. 152; *New Jersey Mutual Life Insurance Co.* v. *Baker*, 94 U. S. 610; *Continental Life Insurance Co.* v. *Chamberlain*, 132 U. S. 304. *German-American Life Association* v. *Farley, supra*, is also cited, and, being a Georgia case, its authority is especially urged.

There are, however, later cases which enforce the provisions of a policy, and we have seen that it was agreed in the policy under review "that no statement or declaration made to any agent, examiner or other person, and not contained in" the application, should "be taken or construed as having been made to or brought to the notice or knowledge of" the company, "or as charging it with any liability by reason thereof." And he, Salgue, expressed his understanding to be that the company or one or more of its executive officers, and no other person, could grant insurance or make any agreement binding upon the company.

The competency of applicants for insurance to make such agreements, and that they are binding when made, is decided by *Northern Assurance Co.* v. *Grand View Building Association*, 183 U. S. 308; *Northern Assurance Co.* v. *Grand View Building Association*, 203 U. S. 106; *Penman* v. *St. Paul Fire & Marine Insurance Co.*, 216 U. S. 311.

To the contention that *German-American Life Association* v. *Farley*, is determinative, we answer that the principle which it is cited to support is one of general jurisprudence, and therefore the case is not controlling. *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349.

This case was consolidated by the court, against the objection of the insurance company, with the trial of the case of the same plaintiff against the Prudential Insurance Company. This action of the court was based on § 921 of the Revised Statutes which provides that "causes of a like nature or relative to the same questions" may be consolidated "when it appears reasonable to do so." The action of the court is assigned as error. We doubt if it was reasonable to consolidate the cases. We need not, however, pass definitely on that point, as we direct a new trial on other grounds.

Judgment reversed and cause remanded to the District Court for a new trial.

MR. JUSTICE PITNEY dissents.

PRUDENTIAL INSURANCE COMPANY OF AMERICA *v.* MOORE, ADMINISTRATOR OF SALGUE.

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

No. 47. Argued November 6, 1913.—Decided December 22, 1913.

Aetna Insurance Co. v. *Moore, ante*, p. 543, followed to effect that it was error not to charge the jury that a statement made by an applicant for life insurance that he had never been rejected by any company, association or agent after he had withdrawn an application on the advice of the medical adviser with knowledge that the company for whom the examination was made would reject him, is material and untruthful.

Where the policy itself expressly provides that it cannot be varied by anyone except an officer of the company issuing it, the company is

not estopped to contest the policy on the ground of misrepresentations or concealment in the application because its agent has knowledge of actual conditions.

THE facts, which involve the validity of a verdict and judgment on a policy of life insurance, are stated in the opinion.

Mr. Eugene R. Black, with whom *Mr. Sanders McDaniel* and *Mr. Edward D. Duffield* were on the brief, for petitioner.

Mr. Minter Wimberly, with whom *Mr. Alexander Akerman* and *Mr. Jesse Harris* were on the brief, for respondent.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action upon a policy of insurance for $5,000 issued by petitioner, herein called the insurance company, upon the life of John Andrew Salgue. It was consolidated and tried with the case against the Aetna Company, and resulted in a verdict for the amount of the policy, upon which judgment was entered. It was affirmed by the Circuit Court of Appeals and the case was then brought here. Though consolidated in the District Court with the other case, it is here upon a separate record and submitted upon a separate argument. It, however, involves some of the same fundamental questions.

Salgue, in his application for insurance, declared and warranted that he was in good health and that all the statements and answers to the questions put to him were complete and true, and that the declaration should constitute a part of the contract of insurance applied for. He further agreed that the policy should not take effect

until the same should be issued and delivered by the company while his health was in the same condition as described in the application.

Certain provisions were made part of the policy, among others, that "no agent has power in behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to waive any forfeiture or to bind the company by making any promise, or making or receiving any presentation or information."

On the medical examination he declared as follows: "I hereby warrant that the answers to these questions are true and correct, and agree that they shall form a part of the contract of insurance applied for." The questions in the application and the answers thereto were as follows:

"Has any company or association ever declined to grant insurance on your life, or issue a policy of a different kind or for a sum less than that applied for?"

Answer: "No."

"If 'yes,' give name of company or companies and when."

(No answer was given to this question.)

"Is application for insurance on your life pending at this time in any other company; if so, give the name of the company."

Answer: "Yes; Provident Savings Life."

"When were you last attended by a physician?"

Answer: "Early spring of 1905."

"For what complaint?"

Answer: "Bilious fever, two days."

"Have you ever had any serious illness?"

Answer: "No."

"Are you in good health?"

Answer: "Yes."

There was testimony in the case tending to show that these answers were untrue; that he had chronic acid

gastritis and heart disease and that other applications for insurance were pending, and others not granted. And it is urged that, the answers to the questions above stated being in the negative, he omitted to answer other questions which were material to be answered in order to make his statement complete and truthful; that, therefore, his omission to answer amounted to a fraudulent concealment.

Error is assigned on the ruling of the court refusing to direct a verdict for the insurance company and refusing certain special instructions.

The policy is conceded to be a Georgia contract and it is contended that the warranties contained in the application were all material to the risk and that they were all broken (1) because the evidence showed that the answers to the questions were false, thereby avoiding the policy; (2) the policy was not delivered to Salgue while he was in good health, that being a condition precedent to its taking effect, and (3) the policy was void by reason of incomplete and untruthful answers. This, it is urged, is the effect of the Georgia law, which, while it modifies the imperative character of statements by an applicant for insurance as warranties, yet provides that any variation from the facts stated "by which the nature, or extent, or character of the risk is changed will void the policy." Section 2479, Code of Georgia.

The insurance company, therefore, to sustain its contention that a verdict should have been directed for it, must establish that the representations were material to the risk and that they were untrue. Whether they were untrue is a question of fact and as the proposition of law which the insurance company relies upon is exhibited by the special request we shall pass to the consideration of the latter. It presents the question of the materiality of Salgue's statements to the risk as one of law. The court submitted it to the jury as a question of fact and

made as elements of decision Salgue's motive, his good or bad faith, his mistake or fraud in making the representations. This, we think, is the sense conveyed by the charge of the court, as we said in *Aetna Life Ins. Co.* v. *Moore*, just decided, notwithstanding there are here and there qualifying words and a distinction made between misrepresentation of facts and the concealment of them. A few excerpts from the charge will illustrate this. After defining a warranty the court said: "On the other hand, representations are statements made to give information to the insurer, and otherwise induce it to enter into the insurance contract and unless *distinctly material and made with fraudulent purpose* (italics ours), do not void the policy. . . . Substantial integrity of conduct on the part of both insurer and insured is the prime object the law seeks to obtain. . . . The law of Georgia, while requiring that every application for insurance must be made in the utmost good faith, and that representations are considered as covenanted to be true, otherwise the policy will be voided, also provides that a failure to state a material fact, if not done fraudulently, does not void the policy. On the other hand, the wilful and fraudulent concealment of such a fact which would enhance the risk of the company will have the effect to void it. What is here stated to be true of wilful concealment is also true of wilful misrepresentation by the applicant to his agent as to any material inquiry made. It follows that under the law of Georgia, a misrepresentation in statement or a concealment of fact must first be material, or must be wilfully or fraudulently made in order to annul the insurance."

After further explanation, the court said:

"These are the general principles. To make them distinctly applicable to your duty, you are instructed that you must determine from all the facts, first, did Salgue make a misrepresentation or concealment of a fact of

which he had knowledge? If he did not, the defense on this point must fail. Second, if he did, was such misrepresentation or concealment so material that it would have influenced one or both of the defendants not to issue the policy of insurance upon the respective applications? And, third, in connection with this your inquiry will be, if such material misrepresentation or concealment as would have caused the defendants or either of them to withhold insurance was made, was it by Salgue wilfully or fraudulently done. In the absence of wilful or fraudulent misrepresentation or concealment of a material fact, the policy stands good and the insurance company must pay what it promised to pay by its policy, when it accepted the premium of the applicant."

This being the charge of the court, wherein did it militate against the special request which is as follows:

"The defendant, The Prudential Insurance Company of America, requests the court to charge as follows:

"Question 4–B of the application of said John A. Salgue to the said The Prudential Insurance Company of America is as follows: 'Has any company or association ever declined to grant insurance on your life or issued a policy of a different kind or for a sum less than that applied for? (Answer 'Yes' or 'No')'. The answer to this question is 'No.'

"The defendant insists that this answer is false and says that the said Salgue in the month of June, 1905, prior to the time of making this application, applied to the Penn Mutual Life Insurance Company for a policy, and was declined. If you believe from the evidence that the said Salgue made application to Anderson Clark, the agent for the Penn Mutual Life Insurance Company, for insurance and that this application was signed by the said Salgue, and that this application was handed by the said Anderson Clark, as agent for the Penn Mutual Insurance Company, to Dr. Little, Examiner for the said

Penn Mutual Company, for examination and that Dr. Little, as said Examiner, examined the said Salgue and stated to the said Salgue that he had heart trouble and that for this reason he could not pass him, then I charge you that this would amount to a declination by the Penn Mutual Life Insurance Company of the application for insurance made to it by the said Salgue, and if you believe from the evidence that such application was made and that such declination was made, then I charge you that the answer of Salgue to this question was false and that it was warranted to be true and that it was as to a material matter which would tend to change the nature, extent and character of the risk assumed and that in this event plaintiff could not recover."

It is contended that the instruction was "legal and pertinent" to the issue and was not incorporated in the charge of the court. The court, we have seen, did not incorporate the instruction in its charge, and that the instruction was legal and pertinent to the issue between the parties is shown by the opinion in the *Aetna Case*.

The instruction based on the facts stated was peremptory of the right of the insurance company to recover. But respondent contends that the requirement was either void or that the agent of the company wrote down and reported the answer, knowing the facts, and therefore the company is estopped to dispute the correctness of the answer or its completeness. There was testimony in the case upon which the contention could be based. But the case was not submitted to the jury in that view. This phase of the case, as its other phases, was made to turn upon the good faith of Salgue, not upon the materiality of the fact or the action of the agent of the insurance company. The court stated to the jury that the contention of the insurance company was that the transaction with the Penn Mutual showed a rejection of Salgue's application

by that company, "to be determined by the court as a matter of law." With the contention the court said it was unable to agree, "and leaves the question to the jury, it being a mixed question of law and fact."

The testimony in regard to the application to the Penn Mutual is the same as in the *Aetna Case*. We need not repeat it. It may be that it cannot be literally said that any company or association had rejected an application by Salgue. If that had been the question, and regarding sense, rather than form, it could be contended that the answer was untruthful. But the question asked Salgue was broader. He was asked "if any company or association ever declined to grant insurance" on his life, and the further question was put: "If so, give the name of the company or companies," to which he gave no answer. He was also asked, "Is application for life insurance on your life pending at this time in any other company; if so, give the name of the company?" To the latter question he answered: "Yes; Provident Savings Life." At that time he had an application pending with the Sun Life Insurance Company of Canada. The answers were, therefore, not true, and we think that they were material to the risk within the meaning of the Georgia Code. *The Aetna Insurance Company* v. *Moore, ante*, p. 543.

It is contended here, as in the *Aetna Case*, that the company is estopped by the knowledge of the agent, and the same cases are cited as were cited there. We answer here, as we answered there, that the terms of the policy constituted the contract of the parties and precluded a variation of them by the agent. We may, however, observe that Salgue did not inform the medical examiner in this case, as he did in the *Aetna Case*, that he was told he had heart disease. In other words, he made no communication to the examiner which modified in any way the positive character of his answers to the questions put to him. The testimony is conflicting as to the in-

formation he gave to the agent of the company, who, the evidence shows, prepared the application.

We think, therefore, that the court erred in refusing the special request.

It is also contended, as it was in the *Aetna Case*, that the District Court erred in consolidating the causes, and it must be admitted that petitioner here has more ground of complaint of the ruling than the Aetna Company. We are, however, not required to pass upon the contention, though, as we said in the other case, there are grounds for it.

Judgment reversed and cause remanded to the District Court for a new trial.

MR. JUSTICE PITNEY dissents.

SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY *v.* STATE OF WASHINGTON, EX REL. LINHOFF.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 107. Argued December 9, 1913.—Decided December 22, 1913.

This court does not sit to revise the construction of documents by the state courts, even if alleged to be contracts within the protection of the Federal Constitution. *Fisher* v. *New Orleans*, 218 U. S. 438.

It takes more than a misconstruction by the state court to make a case under the Fourteenth Amendment.

The state court, and not this court, is the judge of its own jurisdiction.

This court will not hold that the state court had no jurisdiction to determine rights under an ordinance because it had been superseded by a later ordinance when the latter does not appear in the record,

and the highest court of the State has held in another case that it does not affect the case at issue.

Writ of error to review 62 Washington, 544, dismissed.

THE facts, which involve the jurisdiction of this court to review judgments of the state courts, are stated in the opinion.

Mr. James A. Kerr for plaintiff in error, submitted.

Mr. Howard A. Hanson, with whom *Mr. William B. Allison*, *Mr. James E. Bradford* and *Mr. Ralph S. Pierce* were on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This writ of error seeks to reverse a judgment in mandamus requiring the plaintiff in error, a street railway, to issue and accept transfers to and from the Seattle Electric Company, another street railway, redeemable by payment of two cents and a half for the ordinary five cent fares and of one cent and a quarter for school childrens' tickets costing two cents and a half. 62 Washington, 544. The Seattle Electric Company was made a defendant but did not appeal from the judgment of the court of first instance, affirmed by the Supreme Court. The plaintiff in error contends that its property is taken without due process of law by the construction given to the ordinance under which it was operating its line when the suit was brought. That ordinance requires a division "on the basis of settlement that the transfer is to be redeemed at or for such a proportionate part of the fare paid as the run or local route of the car on which transfer is received, bears to the sum of the runs of the local route of the cars from which the transfer is issued and on which the transfer is received." The Supreme Court construed the words 'or local route' as meaning 'the entire distance the passenger may travel upon that system of railway as if he had paid the ordinary

fare, whether he changes cars upon that system or not.' 62 Washington, 549. Noting that the Electric Company had not appealed, it decided for an equal division of the fares. At every point of intersection between the two roads, the line of the Electric Company is longer than that of the plaintiff in error. In some cases a single car is routed over the entire length, in others the routes are divided, but a passenger is entitled to a transfer that will take him the whole length in the same general direction. Whether there shall be a continuous single route or a divided one is determined by each company for itself.

The possibility of a different construction and the grounds for the one adopted both are obvious, but this court does not sit to revise the construction of documents by state courts, even if alleged, as this ordinance is not alleged, to be contracts protected by the Constitution of the United States. *Fisher* v. *New Orleans*, 218 U. S. 438. There is no impairment of rights by later legislation, and it takes more than a possible misconstruction by a court to make a case under the Fourteenth Amendment. *Cross Lake Shooting & Fishing Club* v. *Louisiana*, 224 U. S. 632, 638; *Ross* v. *Oregon*, 227 U. S. 150, 162; *McGovern* v. *New York*, 229 U. S. 363, 370, 371.

The plaintiff in error put forward suggestions of want of jurisdiction of the Supreme Court, &c., on the ground that since this suit was begun the ordinance referred to has been superseded by another. The Supreme Court, not we, is the judge of its own jurisdiction, but the later ordinance does not appear in the record. It was held not to affect the case when brought up at an earlier stage. 62 Washington, 124. In short, while the Railway seems to have brought the case here under a strong conviction as to what were its rights and although it refers to the Constitution in its answer, it discloses no grievance for which it is entitled to any remedy in this court.

Writ of error dismissed.

THE PULLMAN COMPANY *v.* CROOM, COMPTROLLER OF THE STATE OF FLORIDA.

SAME *v.* SAME.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

Nos. 28, 158. Argued October 31, November 3, 1913.—Decided December 22, 1913.

A suit to enjoin a public officer from enforcing a statute is personal, and in the absence of statutory provision for continuing it against his successor, abates upon his death or retirement from office. *United States* v. *Boutwell*, 17 Wall. 604.

The only exceptions recognized to this rule are boards and bodies of quasi-corporate character having continuous existence. *Marshall* v. *Dye*, *ante*, p. 250.

The act of February 8, 1899, c. 121, 30 Stat. 822, providing for substituting the successors in office of public officers, applies only to Federal officials and not to state officials.

Where the only state official, as to whom an injunction against enforcing a state statute has been applied for under § 266 of the Judicial Code and denied, dies pending the appeal, the action abates and the appeal to this court will be dismissed.

In such a case an order based upon a stipulation continuing the case against the successor of the deceased defendant must and can be vacated, there having been no final judgment in the case.

The fact that other officials had been joined as defendants cannot give this court jurisdiction of an appeal from an order denying an injunction applied for under § 266 of the Judicial Code where the injunction had only been asked against an officer who has died pending the appeal.

THESE are appeals from orders of the Circuit Court of the United States for the Northern District of Florida.

The Pullman Company, appellant herein, in its complaint filed in the court below, in the first case (No. 28

of this term), alleged that it was an Illinois corporation, engaged in furnishing to railroad companies under contract parlor, dining and sleeping cars in Florida and other States and had complied with the laws of Florida requisite to engaging in that business; that the defendant, A. C. Croom, was the duly qualified Comptroller of the State of Florida, charged with the collection of all taxes due from such companies. It averred that chapter 5597 of the laws of Florida for the year 1907 provides for the payment of license taxes to the State, and that it had paid such taxes; that § 46 of chapter 5596 provides for the collection of an *ad valorem* tax upon the cars of sleeping and parlor car companies, and that it had satisfied such tax. The appellant further averred that by the provisions of an act approved June 1, 1895, which by sundry amendments had been reenacted and incorporated into chapter 5596, being § 47, sleeping and parlor car companies operating their cars in the State were required to annually report, under oath, the total amount of the gross receipts of business done between points in the State to the Comptroller of the State, and to pay into the State Treasury $1.50 upon each $100 of such gross receipts, and in event of failure to make the report and pay the tax the Comptroller was authorized to estimate the amount of such gross receipts from the information he might obtain and to add a penalty of ten per cent. of the tax, and to collect it, with costs and penalties, the same as other delinquent taxes.

The appellant stated that since the passage of the act in 1895 and up to 1907, no property tax had been levied upon it and that it had therefore taken the act of 1895 to impose a tax upon its property and had paid the amount required by it; but it asserted that the act of 1907, § 46 of chapter 5596, contained an *ad valorem* tax, and it stated that it had not made a report of its business on January 1, 1910, or January 1, 1911, as required by the act and had not paid the tax provided for, and that the defendant had demanded

by wire that the reports be sent in at once. It assailed the constitutionality of the law, and pleaded allegations to support its claim to jurisdiction of the case by the court in equity. It prayed that the defendant be restrained and enjoined from estimating the gross receipts of the company and adding the penalty and from issuing a warrant for the collection of the tax, as provided by § 47 of chapter 5596, and from taking any action to enforce the payment of such tax or penalty, and that the act be declared void.

A restraining order was granted, but upon application for an injunction *pendente lite*, the Circuit Judges for the Fifth Circuit held that § 47 of chapter 5596, taken in connection with chapter 5597, provides for a graded license tax on all sleeping and parlor car companies operating their cars in the State and is within the legislative power of the State, and that until the complainant had complied with the requirements of the act it had no standing in equity, and denied the application. Thereupon an appeal was sued out to this court.

Thereafter the defendant notified the complainant that unless it made report within a time stated he would proceed to estimate the amount of the gross receipts and take such further action as the statute warranted. The complainant then, under protest, filed its return for the years ending October 31, 1909, and October 31, 1910, but did not pay the tax required by the act. The defendant issued a warrant of the State to the sheriff of Duval County, who levied upon one of the complainant's cars, and the complainant paid the taxes for the years 1909 and 1910, with costs.

The complainant later filed its bill in the second case (No. 158 of this term), containing practically the same allegations as its former bill, with additional averments with reference to the return and tax for the year 1911, and statements concerning the payment of the taxes for 1909

and 1910. W. V. Knott, Treasurer of the State of Florida, was made a defendant and the complainant prayed that he be compelled to repay the taxes and costs collected by the sheriff and turned over to him. The Circuit Judges again denied the application for an injunction *pendente lite*, upon the ground that § 47, read in connection with chapter 5597, provides for a graded license tax and is legal. An appeal was likewise sued out to this court.

On April 21, 1913, by stipulation and order, W. V. Knott was substituted for the appellee, A. C. Croom, in both cases, Croom having died and Knott having succeeded him in the office of Comptroller; and J. C. Lunning was substituted for the appellee, W. V. Knott, in the second case, having succeeded him as Treasurer.

Mr. Frank B. Kellogg, with whom *Mr. Gustavus S. Fernald* was on the brief, for appellant.

Mr. T. F. West, Attorney General of the State of Florida, with whom *Mr. Park Trammell*, former Attorney General of the State of Florida, was on the brief, for appellee.

After making the foregoing statement, MR. JUSTICE DAY delivered the opinion of the court.

Section 266 of the Judicial Code, practically a reënactment of § 17 of the act of June 18, 1910 (c. 309, 36 Stat. 539, 557), regulates the granting of injunctions by Federal courts in cases depending upon the alleged repugnancy of state statutes to the Federal Constitution. The requirement is that applications for temporary injunction in such cases shall be heard before three judges, one of whom shall be a justice of this court or a circuit judge, and an appeal from an order granting or denying an interlocutory injunction in such cases may be prosecuted directly to this court. These appeals are brought under that

section. They are from the orders of the court below denying the application for an interlocutory injunction. In that aspect alone the cases are now before the court. In the second suit, it is true, the Treasurer was brought in, with a view to the recovery from him of the moneys wrongfully collected over the protest of the Pullman Company; but no injunction was asked against him, and his presence in the case does not concern the inquiry as to the right to the temporary injunction against the Comptroller, restraining him from levying and collecting the taxes.

The order of substitution was made upon the stipulation and was granted without discussion. In the brief of the Attorney General the matter is submitted to the decision of the court, with an expression of doubt as to whether such substitution of parties can be made in cases of this character, and the question is thus called to the court's attention. In this situation the cases are controlled by the repeated adjudications of this court governing the right of substitution where relief is sought against persons who are situated as was the Comptroller in this case.

The leading case upon substitution of parties in such cases is *United States* v. *Boutwell*, 17 Wall. 604, which involved the right to substitute in a suit for mandamus the successor of the Secretary of the Treasury for the one who held that office at the time the suit was commenced. Mr. Justice Strong, who delivered the opinion of the court, pointed out that the purpose of a writ of mandamus is to enforce the personal obligation of the individual, no matter how the duty arose, and that even if the party be an officer and the duty official, mandamus does not reach the office, but is directed solely to the person, who alone can be punished for failure to conform to the mandate, and the suit is therefore a personal action based upon the alleged fact that the defendant has failed to perform a personal duty. And the court concluded that, since the

personal duty of the defendant lasted only so long as he occupied the office, and as his successor was not his personal representative and could not be held responsible for his delinquencies, for the successor might have acted differently than the defendant, such action, in the absence of a statute to the contrary, must abate upon the death or retirement from office of the original defendant. This case has been uniformly followed, and applied to suits for injunction as well as for the writ of mandamus. *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28, 33.

And in *United States ex rel. Bernardin* v. *Butterworth*, 169 U. S. 600, it was held that the substitution could not be made, although consent was given by the successor in office. In that case it was suggested that in view of the present state of the law it seemed desirable that Congress should provide for the difficulty by enacting a statute which would permit the successors of heads of departments who had died or resigned to be brought into the case by appropriate method. Thereupon Congress passed the act of February 8, 1899 (c. 121, 30 Stat. 822), under the provisions of which, by proper steps, successors of officers of the United States may be substituted for them in suits commenced against the latter in their official capacity. Subsequently, in *Caledonian Coal Co.* v. *Baker*, 196 U. S. 432, 442, this court held, after noticing the cases of *United States* v. *Boutwell, supra*, and *United States ex rel. Bernardin* v. *Butterworth, supra*, and other cases, and the statute just referred to, that, in so far as the successor to a territorial district judge was concerned, the statute had authorized substitution.

The above cases establish the practice of this court, and until the statute of 1899 the practice was uniformly adhered to. That statute affects only Federal officials and leaves the doctrine of the prior cases undisturbed as to the substitution of state officials. The only exception recognized in the decisions of this court has been boards

and bodies of a quasi-corporate character, having a continuing existence. See *Marshall et al.* v. *Dye*, *ante*, p. 250.

In *Richardson* v. *McChesney*, 218 U. S. 487, this court held that the defendant, McChesney, although named as Secretary of the Commonwealth of Kentucky, was sued personally and concluded that (p. 493) "as his official authority has terminated, the case, so far as it seeks to accomplish the object of the bill, is at an end, there being no statute providing for the substitution of McChesney's successor in a suit of this character. The case is governed by *United States* v. *Boutwell*, 17 Wall. 604; *United States ex rel. Bernardin* v. *Butterworth*, 169 U. S. 600, and *Caledonian Coal Co.* v. *Baker*, 196 U. S. 432, 441."

It therefore follows that in the present aspect of these cases, upon appeal from orders denying an interlocutory injunction, the only party appellee involved in this inquiry, A. C. Croom, Comptroller, having died pending the proceedings and there being no statute concerning such cases, the order of substitution made at the former term must be vacated, the matter being still within the control of the court, there having been no final judgment in the case (*Iowa* v. *Illinois*, 151 U. S. 238).

It will therefore be ordered that these appeals be dismissed for want of a proper appellee to stand in judgment upon the only question brought to this court,

And it is so ordered.

PHOENIX RAILWAY COMPANY *v.* LANDIS, ADMINISTRATOR OF SANDERS.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 61. Argued November 12, 1913.—Decided December 22, 1913.

This court is disposed to accept the construction of local statutes by the territorial court, and, therefore, *held* that the action for death by negligence under Rev. Stats. Arizona 1901, pars. 2764–2766, was for the benefit of the estate and that it was not necessary to allege or prove the existence of beneficiaries or amount of damages sustained by them.

Where the case was tried throughout on the proper theory of the statute, the fact that the court in its charge may have used some terms that were technically inappropriate *held* not to be ground for reversal as the jury could not have been misled thereby.

This court in reviewing on error the judgment of the territorial court is limited to those questions that may be appropriately raised on writ of error, which excludes an objection that the verdict is against the weight of evidence or that the damages allowed are excessive.

An instruction that the jury might consider the income and earning capacity of deceased, his business capacity, experience, health conditions, energy and perseverance during his probable expectancy of life, will not be held to be too general in the absence of a suitable request of the defendant for an instruction with greater particularity.

An objection to the charge in regard to the subject of damages which was not presented to the court below comes too late when raised in this court for the first time.

This court will not, except in a clear case, hold that the appellate court in a Territory erred in following the established practice and construction of a local statute in regard to the record in cases on appeal.

13 Arizona, 80, 279, affirmed.

THE facts, which involve the validity of a verdict and judgment for damages for negligence causing the death of the judgment creditor's intestate, are stated in the opinion.

Mr. Charles Cowles Tucker, with whom *Mr. Louis H. Chalmers*, *Mr. Edward Kent*, *Mr. A. B. Browne*, *Mr.*

Alexander Britton and *Mr. Evans Browne* were on the brief, for plaintiff in error.

Mr. J. M. Jamison, with whom *Mr. John Mason Ross* was on the brief, for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

This action was brought by the administrator of the estate of George W. Sanders against the Phoenix Railway Company to recover damages for negligence causing the death of the intestate. Judgment in favor of the administrator was affirmed by the Supreme Court of the Territory. 13 Arizona, 80, 108 Pac. Rep. 247; 13 Arizona, 279, 112 Pac. Rep. 844.

The first assignment of error is to the effect that the court below misconstrued the statute under which the action was brought. Rev. St. Ariz. 1901, pars. 2764–2766. The ruling was upon the sufficiency of the complaint, and the court followed *Southern Pacific Company* v. *Wilson* (1906), 10 Arizona, 162, 85 Pac. Rep. 401, and *De Amado* v. *Friedman* (1907), 11 Arizona, 56, 89 Pac. Rep. 588, which held that the action was for the benefit of the estate and that it was not necessary for the plaintiff to allege or prove the existence of beneficiaries or the amount of damages suffered by them.

In the first case cited, the history of the legislation was reviewed and the conclusion was rested upon the terms of the statute of 1901 as compared with the earlier act. This court has frequently stated that it is disposed to accept the construction which the territorial court has placed upon a local statute. *Sweeney* v. *Lomme*, 22 Wall. 208, 213; *Fox* v. *Haarstick*, 156 U. S. 674, 679; *Northern Pacific R. R. Co.* v. *Hambly*, 154 U. S. 349, 361; *Copper Queen Mining Co.* v. *Arizona Board*, 206 U. S. 474, 479; *Lewis* v. *Herrera*, 208 U. S. 309, 314; *English* v. *Arizona*,

214 U. S. 359, 361; *Santa Fe County* v. *Coler*, 215 U. S. 296, 305; *Albright* v. *Sandoval*, 216 U. S. 331, 339; *Clason* v. *Matko*, 223 U. S. 646, 653. The applicable considerations gain in force where, as in this case, the construction of the statute, deliberately established and followed, has been reaffirmed upon the eve of statehood, and we are of the opinion that the ruling of the Supreme Court of the Territory of Arizona should not be disturbed.

The next contention is that the court below should have reversed the judgment of the trial court because of inconsistent instructions to the jury. After charging the jury that if they found for the plaintiff they should award such damages as should fairly compensate the estate of the deceased for the loss sustained by reason of his death, not exceeding the amount fixed by the statute, the trial court gave a further instruction that it was "not necessary on the part of the plaintiff to show the precise money value of the life of the deceased or the exact amount of damages suffered by the beneficiaries in order to sustain a recovery for substantial damages." It is urged that the latter instruction was inconsistent with the former and impliedly submitted a distinct basis of recovery, that is, the loss to beneficiaries. It appeared in evidence that the decedent left a wife and two adult children and that his wife, at least, had enjoyed the benefit of his support. The court below while conceding that the term 'beneficiaries,' in the light of its construction of the statute, was 'technically inappropriate' was of the opinion that the action was tried throughout upon the theory that the damages to be awarded were such as were suffered by the estate and that, on considering the course of the trial and the instructions given to the jury just prior to, and immediately following, the one in question, it could not be said that the language complained of might have confused or misled the jury. We concur in this view and find in this assignment of error no ground for reversal.

It is said further that the court erred in holding that the plaintiff was entitled to recover substantial damages for the benefit of the estate "without evidence showing or tending to show that deceased had ever saved or would have saved any portion of his earnings." We have not been referred to any ruling to this effect. No such instruction was given to the jury and the record does not disclose any request for an instruction which was refused by the trial court. The argument, in substance, is that the verdict was without sufficient basis in the evidence. It cannot be said, however, that there was no evidence to go to the jury and, as we are limited to those questions which may be appropriately raised on writ of error, an objection that the verdict is against the weight of evidence or that the damages allowed were excessive cannot be considered in this court. Act of April 7, 1874, c. 80, § 2, 18 Stat. 27; *Wilson* v. *Everett*, 139 U. S. 616; *Aetna Life Insurance Co.* v. *Ward*, 140 U. S. 76, 91; *Erie Railroad Co.* v. *Winter*, 143 U. S. 60, 75; *Herencia* v. *Guzman*, 219 U. S. 44, 45.

The trial court charged the jury that it might "take into consideration the income and earning capacity of the deceased, his business capacity, experience and habits, his health, physical condition, energy and perseverance during what would probably have been his lifetime if he had not received the injuries from which death ensued." The court below granted a rehearing upon the question whether there was error in giving this instruction because of a failure to specify particularly what habits the jury was authorized to consider. 13 Arizona, 279, 112 Pac. Rep. 844. It was concluded that if the appellant desired an instruction with greater particularity upon this point it should have made a suitable request and having failed to do so was not entitled to complain of the omission. This ruling is assigned as error. It is urged that the instruction as given by the trial court was wrong in itself in that it directed the jury, in effect, to find for the plain-

tiff the amount the deceased would have earned during the years of his life expectancy. But this is manifestly a misconstruction of the charge. It was not erroneous to instruct the jury, as did the court, with respect to what might be taken into consideration in determining the damages sustained by the estate and the court below was right in saying that, if the plaintiff in error desired explicit reference to particular habits, an instruction to that effect should have been requested. *Pennock* v. *Dialogue*, 2 Pet. 1, 15; *Spring Company* v. *Edgar*, 99 U. S. 645, 659; *Texas & Pacific Rwy. Co.* v. *Volk*, 151 U. S. 73, 78. A further objection to the charge of the trial court upon the subject of damages, with respect to the number of years which should be deemed to constitute the deceased's expectation of life, concededly was not presented to the court below and, being raised in this court for the first time, comes too late. *Clark* v. *Fredericks*, 105 U. S. 4; *Robinson & Co.* v. *Belt*, 187 U. S. 41, 50.

The remaining assignments of error involve a question of appellate practice in the Supreme Court of the Territory. That court held, with respect to the action of the trial court in permitting answers to certain hypothetical questions addressed to physicians, that the mere general objections disclosed by the abstract of record filed under its rules were unavailing and it declined to scrutinize the reporter's transcript for the purpose of discovering the objections said to have been actually made. In this course, the court but applied its rule that "abstracts of record, as filed, will be treated by the court as containing such portions of the record as the parties deem sufficient upon which to try the assignments of error." Rule I, sub. VI, 8 Arizona, iv, 71 Pac. Rep. vi. It is urged that the refusal to examine the reporter's transcript was in violation of the act of 1907 (Laws of Arizona, 1907, c. 74, p. 122). But the statute has not been thus construed, and we find no ground upon which we should be justified in holding

that the court committed error in following the established practice to which the court alludes in its opinion. 13 Arizona, 80, 84, 108 Pac. Rep. 247, 248; Laws of Arizona, 1907, c. 74, pp. 130, 131; *Liberty Mining & Smelting Co.* v. *Geddes*, 11 Arizona, 54, 90 Pac. Rep. 332; *Donohoe* v. *El Paso & S. W. R. R. Co.*, 11 Arizona, 293; *S. C.*, 94 Pac. Rep. 1091; *Title Guaranty & Surety Co.* v. *Nichols*, 12 Arizona, 405, 120 Pac. Rep. 825; *Sanford* v. *Ainsa*, 13 Arizona, 287, 114 Pac. Rep. 560; 228 U. S. 705, 706, 707.

The judgment is affirmed.

Affirmed.

JOHN, GUARDIAN, v. PAULLIN.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 105. Argued December 8, 9, 1913.—Decided December 22, 1913.

No Federal right is denied by an appellate court of a State in dismissing an appeal from a lower court, because its jurisdiction was not invoked in accordance with the laws of the State, and this court cannot review such a judgment under § 709, Rev. Stat., now Judicial Code, § 237.

It rests with each State to prescribe the jurisdiction of its appellate courts, and the mode of invoking it, and their rules are equally applicable when Federal, as when only local, rights are involved.

Section 12 of the act of March 3, 1905, 33 Stat. 1048, 1081, providing for the review of judgments of the courts temporarily established in the Indian Territory, related only to such judgments and has no application to judgments rendered by the state courts after Statehood.

The method of subjecting the judgments of a subordinate state court to review by appellate courts of the State is a matter of local concern and not within the control of Congress. *Coyle* v. *Smith*, 221 U. S. 559.

In this case, as nothing was decided but a preliminary question of the jurisdiction of a state appellate court which turned entirely upon a question of local law, the writ of error is dismissed.

Writ of error to review 24 Oklahoma, 636, dismissed.

THE facts, which involve the jurisdiction of this court under § 237 of the Judicial Code to review a judgment of the appellate court of a State dismissing an appeal from an inferior court, are stated in the opinion.

Mr. Edward F. Colladay, with whom *Mr. Napoleon B. Maxey* was on the brief, for plaintiff in error.

Mr. W. T. Sprowls, Mr. V. B. Hays and *Mr. Robert Crockett,* for defendants in error, submitted.

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

Our jurisdiction in this case is challenged by a motion to dismiss. The case was begun in the United States Court for the Central District of the Indian Territory, and was pending in that court when the Territory of Oklahoma and the Indian Territory were admitted into the Union as the State of Oklahoma. Under the combined operation of the Oklahoma Enabling Act (June 16, 1906, 34 Stat. 267, c. 3335; March 4, 1907, *Id.* 1286, c. 2911) and the state constitution (see *Benner* v. *Porter,* 9 How. 235, 246) the case was then transferred to the district court of Bryan County, where a trial resulted in a judgment determining the matters in controversy, which turned in part upon the validity, under the laws of the United States, of certain deeds and leases executed by an Indian allottee, since deceased. The guardian of two minor heirs of the allottee had intervened in the cause, had asserted the invalidity of all the deeds and leases, and

had set up a claim to the property in question as against the other parties; but this claim was rejected, and the guardian sought to have the judgment reviewed and reversed by the Supreme Court of the State. That court held that some of the parties below, whose presence in the appellate proceeding was essential, had not been brought into that proceeding, or voluntarily appeared therein, in accordance with the law of the State, and upon that ground dismissed the proceeding. 24 Oklahoma, 636. The guardian then sued out the present writ of error.

As the Supreme Court of the State did not pass upon the merits of the case or upon the correctness of any of the rulings below, but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the State, we do not perceive any theory upon which its judgment of dismissal may be reviewed by us consistently with the familiar limitations upon our authority. See Rev. Stat., § 709; Judicial Code, § 237. Certainly no Federal right was denied by that court, and if, as was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision.

Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. *Callan* v. *Bransford*, 139 U. S. 197; *Brown* v. *Massachusetts*, 144 U. S. 573; *Jacobi* v. *Alabama*, 187 U. S. 133; *Hulbert* v. *Chicago*, 202 U. S. 275, 281; *Newman* v. *Gates*, 204 U. S. 89; *Chesapeake & Ohio Railway Co.* v. *McDonald*, 214 U. S. 191, 195.

But it is said that the proceedings by which it was attempted to secure a review of the judgment of the trial court should have been tested by the act of Congress of

March 3, 1905, 33 Stat. 1048, 1081, c. 1479, § 12, and that the Supreme Court of the State erred in holding otherwise. We cannot accede to the contention. The act of 1905, § 12, related to the review of judgments rendered in the courts temporarily established by Congress in the Indian Territory, and had no application to judgments rendered after statehood in the courts of the State. Besides, the mode of subjecting the judgments of the State's subordinate courts to review in its Supreme Court was a matter of local concern only and not within the control of Congress. See *Coyle* v. *Smith*, 221 U. S. 559.

The state constitution provided (Art. 7, § 8) that the appellate jurisdiction of the Supreme Court should be invoked in the manner prescribed by the laws of the Territory of Oklahoma, until the state legislature should provide otherwise, and also (Art. 25, § 2) that the laws of the Territory of Oklahoma, not repugnant to the state constitution or locally inapplicable, should be extended over the new State, which embraced the Indian Territory as well as the Territory of Oklahoma. When the State was admitted into the Union the Territory of Oklahoma had a full complement of laws regulating appellate proceedings. Wilson's Rev. & Ann. Stat. 1903, §§ 4732 *et seq.* It was by these constitutional provisions and laws that the Supreme Court tested the appellate proceedings in this instance, with the result that they were adjudged inadequate because they had not brought before the court, within the time prescribed (Wilson's Stat., §§ 4736, 4748), parties whose presence was essential to enable it to review the judgment below.

Thus it appears that nothing was decided but the preliminary question of the court's jurisdiction to pass upon the controverted matters shown in the record, and that this question was resolved according to what the court deemed to be the true construction and effect of applicable provisions of the constitution and laws of the State. In

short, the judgment of dismissal turned entirely upon a question of local law.

As particularly apposite, we quote the following from the opinion in *Newman* v. *Gates*, *supra*, a case in which this court declined to review a like judgment of dismissal by a state court:

"Had the appeal been properly taken it would have been the duty of the Supreme Court of Indiana to pass upon the questions presented by the record before it, including, it may be, a Federal question, based upon the due faith and credit clause of the Constitution, which, on various occasions, was pressed upon the attention of the trial court. In legal effect, however, the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court. As the jurisdiction of this court to review the judgments or decrees of state courts when a Federal question is presented is limited to the review of a final judgment or decree, actually or constructively deciding such a question, when rendered by the highest court of a State in which a decision in the suit could be had, and as for the want of a proper appeal no final judgment or decree in such court has been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting."

Writ of error dismissed.

BAKER *v.* WARNER.

SAME *v.* SAME.

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

Nos. 41, 42. Argued November 5, 1913.—Decided December 22, 1913.

Motions in arrest of judgment are not favored.

In considering a motion in arrest the plaintiff will be given the benefit of every implication that can be drawn from the pleading liberally construed; and even if the allegations are defectively set forth or improperly arranged, if they show facts constituting a good cause of action the motion will be denied.

Where the defendant in a suit for libel is put on notice of extrinsic facts surrounding the publication, and does not demur but joins issue and goes to trial, a verdict against him cures the defects in the complaint and a motion to arrest should not be granted.

The strict rules announced in earlier decisions in this respect have been modified by modern and more liberal rules of pleading.

Where plaintiff in error in this court succeeded in the trial court and was reversed in the intermediate appellate court, this court is not limited to a consideration of the points presented but must enter the judgment which should have been rendered by the court below on the record before it.

Although this court reverses the order to arrest the judgment, it affirms the ruling of the intermediate appellate court that there should be a new trial on account of erroneous instructions on material matters.

Where the words are not libelous *per se* and can only be construed as such in the light of extrinsic facts, it is for the jury not only to determine whether the extrinsic facts exist but also whether the words have the defamatory meaning attributed to them.

36 App. D. C. 493, reversed.

THE plaintiff, Baker, United States District Attorney for the District of Columbia, sued the defendant, Warner, for libel. Briefly stated, the complaint charges that—

The Washington Jockey Club owned a race track in

the District where races were run and bets were made and in January, 1908, the plaintiff, as District Attorney, had obtained from the Grand Jury an indictment charging one Walters with betting at this race track, contrary to the statute against gaming in the District. A demurrer was filed which was sustained on March 11, 1908,—the court holding that the laying of bets on horse races, at this track, was not a violation of the act of Congress, which as appears by reference to the statute (March 3, 1901, c. 854, 31 Stat. 1189, 1331, § 869) only prohibited such betting and bookmaking within one mile of the boundaries of the cities of Washington and Georgetown. The plaintiff immediately took an appeal from this judgment in order that the Court of Appeals might determine whether such betting at such place was a violation of the gaming law of force in the District.

Shortly after the appeal, the Spring Meet of the Jockey Club began, being advertised to continue until April 14. On the opening days of the Meet there was book-making and betting; but the complaint alleges that the plaintiff "conforming himself, as it was his duty to do, to the law as judicially construed by the Supreme Court of the District, did not issue warrants for the arrest of or present to the Grand Jury any persons for betting on the horse races."

It is further alleged that, at this time, Warner was a candidate against Pearre for the nomination for Congress from Maryland, and, on March 28, Warner composed and published, of and concerning the plaintiff and of and concerning the office of the plaintiff, in a Washington newspaper, a certain false and defamatory libel. The article need not be set out at length, but the communication, after characterizing a speech by his opponent as undignified, proceeded to say that it was not wanting in dignity so much as for a Judge of the District, "who, with the United States District Attorney (meaning the

plaintiff) went to Rockville (meaning the town of Rockville, County of Montgomery, State of Maryland) last Saturday (meaning Saturday, the 21st day of March, A. D. 1908) to attend a conference of Mr. Warner's (meaning defendant's) enemies and determine what ammunition was needed to defeat him.

"The question now is, Where does the money come from in the contest against Mr. Warner? (meaning the defendant).

"How about the race track?

Lawyer."

"meaning thereby, . . . that the said plaintiff entered into a conference with others for the purpose of determining what funds were necessary, and how same should be raised, to be used in the campaign on behalf of Pearre, and meaning . . . that the plaintiff was and is corrupt, in not presenting to the Grand Jury and prosecuting before the courts of the District, persons laying bets upon the contests at the race track, in consideration of contributions of money in the contest against the defendant from some company or person interested in the race track or the contests carried on thereon."

The defendant filed a general denial, and, after a trial, there was a verdict in favor of the plaintiff. Motions for a new trial and in arrest of judgment were overruled and the case taken to the Court of Appeals, which held not only that reversible error had been committed, but that the judgment should have been arrested. In No. 41 the case is here on a writ to review that ruling. To avoid any question as to the finality of that judgment of the Court of Appeals plaintiff sued out another writ of error (No. 42) after the judgment had been arrested in the trial court.

Mr. Frank J. Hogan and *Mr. Henry E. Davis* for plaintiff in error.

Mr. W. C. Sullivan and *Mr. J. J. Darlington* for defendant in error.

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

The plaintiff, who was United States District Attorney for the District of Columbia, sued the defendant in an action for libel and recovered a verdict for $10,000. The Court of Appeals (36 App. D. C. 493) held that the judgment should have been arrested, for the reason that the publication was not libelous *per se* and was not shown to be defamatory by any averment of fact in the Inducement or in the Colloquium.

The publication was not libelous *per se*. The meaning of the article and person to whom it referred were so ambiguous that, in order to constitute a cause of action, it was necessary to set out extrinsic facts, which, when coupled with the words, would show that the writer charged the plaintiff with corruption in office. Accordingly, the plaintiff in the Inducement averred that he was District Attorney, charged with the duty of prosecuting violators of the law against gaming, and had procured an indictment against one for betting at the Washington Jockey Club, which indictment had been quashed and, pending the appeal and conforming to the ruling of the court, he had instituted no other prosecutions: That, under these circumstances, the defendant had published of and concerning the plaintiff, the article which is set out in the complaint.

There were general allegations that the article was written concerning the plaintiff in his office as District Attorney, together with general statements in the Innuendo that the defendant meant to charge him with corruption in office. There was, however, no distinct averment as to the meaning of those particular phrases in the publi-

cation on which the cause of action was really based. The Court of Appeals thereupon sustained the defendant's contention that the complaint was defective because of the failure specifically to allege what, as a fact, the words meant and to whom they referred. It further held that the absence of such specific averments was not supplied by the general statement in the Innuendo that the defendant meant to charge the plaintiff with a crime. This was based on the rule that it is not the office of the Innuendo to set out facts, but rather to explain what is ambiguous, or to state a conclusion which, to be effective, must be supported by averments, definitions, references or other facts alleged in traversible form in Inducement and Colloquium. It is, however, unnecessary to discuss the sufficiency of the complaint which, even if defective, was amendable. The defendant did not demur, but joined issue, the case was tried by a jury, a verdict for the plaintiff was rendered, judgment was entered and the defendant then moved in arrest.

Such motions are not favored. In considering them, courts liberally construe the pleadings, giving the plaintiff the benefit of every implication that can be drawn therefrom in his favor. Sentences and paragraphs may be transposed. The allegations in one part of the complaint may be aided by those in another and if taken together, they show the existence of facts constituting a good cause of action, defectively set forth or improperly arranged, the motion in arrest will be denied.

In the present case the defendant was put on notice of the extrinsic facts surrounding the publication. The statements in the Innuendo, even if misplaced, may after verdict, be treated as substantive allegations of fact given by transposition, their proper position in Inducement or Colloquium. The verdict cured the defects, if any, in the complaint and made it improper to arrest the judgment. *Stanley* v. *Brit*, 8 Tennessee, 222; *Mc-*

Caughry v. *Wetmore*, 6 Johns. 82; *Brittain* v. *Allen*, 13 N. Car. 120, 124; *Tuttle* v. *Bishop*, 30 Connecticut, 80; *Nestle* v. *Van Slyck*, 2 Hill, 282. In answer to these decisions the defendant cites *Ryan* v. *Madden*, 12 Vermont, 51, 55, and other cases, to support his contention that the motion in arrest should have been granted. But those decisions announce what, in *Bloss* v. *Toby*, 2 Pick. 320, was admitted to be a hard and technical rule—one which, we think, has been modified by modern and more liberal rules of pleading and practice in the Federal courts and in those of most of the States.

The plaintiff, Baker, had a judgment in the trial court. The defendant, Warner, took the case to the Court of Appeals on various grounds, most of which were sustained. The plaintiff then brought the case here, assigning error on some of those rulings but not on others. We are not limited, however, to a consideration of the points presented by the plaintiff, but, this being a writ of error from an intermediate appellate tribunal, must enter the judgment, which should have been rendered by the court below on the record then before it.

While we reverse the order to arrest the judgment, we affirm the ruling of the Court of Appeals that there was an erroneous instruction on a matter material to the case and harmful to the defendant. The trial judge, summarizing the facts, charged that if the jury found from the evidence that plaintiff was District Attorney; that in the District there was a race track where races were run and bets were made, which some claimed could have been prevented by prosecutions instituted by the plaintiff and that he did not, in fact, prosecute such persons; if Warner was a candidate for Congress and the plaintiff supported Pearre, his opponent, and the defendant, Warner, wrote and procured the publication of the article set out in the complaint, "then you are instructed, as matter of law, that the said article is libelous and your

verdict should be for the plaintiff, and the only question for your determination is what amount of damages the plaintiff is entitled to recover by reason of the publication of said article."

This was error, since it was for the jury and not for the court to determine the meaning of ambiguous language in the published article. Where words are libelous *per se* the Judge can so instruct the jury, leaving to them only the determination of the amount of damages. Where the words are not libelous *per se* and, in the light of the extrinsic facts averred could not possibly be construed to have a defamatory meaning, the Judge can dismiss the declaration on demurrer, or, during the trial, may withdraw the case from the jury. But there is a middle ground where though the words are not libelous *per se*, yet, in the light of the extrinsic facts averred, they are susceptible of being construed as having a defamatory meaning. Whether they have such import is a question of fact. In that class of cases the jury must not only determine the existence of the extrinsic circumstances, which it is alleged bring to light the concealed meaning, but they must also determine whether those facts when coupled with the words, make the publication libelous. *Van Vechten* v. *Hopkins*, 5 Johns. 219. The meaning of the words was in dispute, and as that issue of fact was not submitted to the triers of fact, a new trial must be ordered.

This conclusion makes it unnecessary to consider the other questions in the case.

The judgments of the Court of Appeals are reversed and the cases are remanded to that court with directions to reverse the judgments of the Supreme Court of the District of Columbia and to remand the case to that court with directions to grant a new trial and for further proceedings in conformity with this opinion.

WORK *v.* UNITED GLOBE MINES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 46. Argued November 6, 1913.—Decided January 5, 1914.

The settled rule of this court is to accept the construction placed by the territorial court upon a local statute, and not to disregard the same unless constrained so to do by clearest conviction of serious error. *Phœnix Railway Co.* v. *Landis*, *ante*, p. 578.

Where, as in this case, it does not appear that manifest error was committed in the construction and application of the statute of limitation or in determining the sufficiency of a deed to the premises, the title to which was involved, this court will not reverse the judgment of the territorial court.

In refusing to reverse because no manifest error appears, this court does not intimate any doubt as to the correctness of the ruling, but simply abstains from deciding a purely local question in the absence of conditions rendering it necessary to do so.

12 Arizona, 339, affirmed.

THE facts, which involve the validity of a judgment of the Supreme Court of the Territory of Arizona establishing title to property in that Territory, are stated in the opinion.

Mr. A. L. Pincoffs for appellant:

Defendant, being a foreign corporation, cannot set up the statute of limitations. *Larsen* v. *Aultmann*, 86 Wisconsin, 281; *Williams* v. *Metropolitan Co.*, 68 Kansas, 17; *State* v. *Nat. Assn.*, 79 N. W. Rep. 223; *Robinson* v. *Imperial Mining Co.*, 5 Nevada, 43; *State* v. *Cent. Pac. R. R. Co.*, 10 Nevada, 47; *Barstow* v. *Union Mining Co.*, 10 Nevada, 386; *Olcott* v. *Tioga R. R. Co.*, 20 N. Y. 210; *Clark* v. *Bank*, 10 Arkansas, 516; 52 Am. Dec. 248, with long monographic note at page 256.

The deed from its grantors is insufficient to enable the defendant to set up the five years' statute of limitations (§ 2937, Rev. Stat., Arizona, 1901), because it gives notice to the defendant that its grantor had no title to the premises and because it did not purport to convey the fee.

It is admitted that at the time the assessment was made, plaintiff in error was and had been for twenty-five years a *bona fide* resident of New York.

This mortgage was not taxable in Arizona because it was owned by a non-resident.

Mortgages are only taxable in State of the owner's residence. *Jack* v. *Walker*, 79 Fed. Rep. 142; *Holland* v. *Commissioners*, 39 Pac. Rep. 576; *Cleveland Co.* v. *Pennsylvania*, 15 Wall. 300.

A deed founded on a sale for taxes which on its face is absolutely void does not support adverse possession under a statute of limitations. *Redfield* v. *Parks*, 132 U. S. 239.

Under the laws of Arizona a mortgage of real property conveyed no title whatever to the mortgagee; he has merely a lien upon the property. A deed attempting to convey this alleged interest conveyed nothing.

While a deed, valid on its face, is sufficient for the purpose of the statute, even if it could be impeached by evidence *aliunde*, *Elder* v. *Wood*, 208 U. S. 226, it does not follow that the result is the same when the grantee has actual knowledge or notice that his grantor has absolutely no title to the premises he attempts to convey. See also *Bradshaw* v. *Ashley*, 180 U. S. 59; *Saxton* v. *Hunt*, 20 N. J. L. 487, 493.

In order successfully to invoke the statute, the defendant must claim under the deed, and no one can claim under a deed a greater interest or title than the deed conveys.

The ten years' statute of limitations (§ 2938, Rev. Stat.,

1901) does not apply, because its operation is restricted to the recovery of lands held without deed, and also because no such limitation was in existence when plaintiff's cause of action accrued and the statute must be given a prospective operation. *Redfield* v. *Parks*, 132 U. S. 239.

If the statute is intended to have a retrospective effect, it would be unconstitutional. *Gilbert* v. *Ackerman*, 159 N. Y. 118; *Price* v. *Hopkins*, 13 Michigan, 318.

Mrs. Sarah H. Sorin for appellee.

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

We confine our statement to so much of the case as is necessary to develop the matters for decision.

Work, the appellant, who was plaintiff in the trial court, sued the United Globe Mines, the appellee, to quiet his title to certain described mining property, averring that he had the fee simple title to the same and although defendant asserted some adverse right, it had no title or interest in the property. The defendant, averring itself to be a New York corporation having its principal place of business in Globe, Gila County, Arizona, in its answer besides traversing the averments of the complaint, alleged that it was entitled to the possession of the property sued for, and was the owner, because for more than five years before the commencement of the suit it had been "in the actual, continuous, uninterrupted, peaceable, exclusive, open, notorious, hostile and adverse possession of said premises, and has been cultivating, using, enjoying and working the same, paying taxes thereon, and holding and claiming the same and the title thereto adversely to plaintiff and all the world, under a deed from William E. Dodge and D. Willis James conveying said premises to

this defendant, which deed is dated January 31st, A. D., 1893, and which said deed was duly recorded on the seventeenth day of February, A. D., 1893, in the office of the County Recorder of Gila County, said Territory, in book 3 Deeds of Mines, at page 299;

"And defendant alleges that the cause of action, if any, stated in the complaint herein, did not accrue within five years next before the commencement of this action."

In addition, as a second ground, the ownership of the property was asserted to have been acquired by a period of ten years' limitation, the benefit of which was expressly pleaded. The prayer of the answer was not only that the claim of the plaintiff be rejected, but that there be affirmative relief adjudging the title of the property to be in the mining company.

The case was submitted to the trial court upon an agreed statement of facts and was decided in favor of the defendant and a judgment of affirmance followed in the Supreme Court of the State to which the case was taken, that judgment being the one to which this writ of error is directed. The court, for the purpose of its consideration of the case, adopted the statement of facts acted upon by the trial court.

Three principal questions were decided: *a*, That the United Globe Mines, although a foreign corporation, was entitled to avail itself of the statute of limitations; *b*, that the deed which the United Globe Mines asserted as the basis of its claim to a right of ownership resulting from the five years' limitation under § 2937 of the Revised Statutes of Arizona for 1901, was adequate and hence the United Globe Mines was the owner of the property by limitation; and *c*, besides that, the facts proven as the basis of the ten year limitation under § 2938 of the Revised Statutes of Arizona for 1901 were adequate to bring the United Globe Mines within the embrace of the statute and therefore to additionally sustain its claim of owner-

ship on such ground. For the purposes of this appeal a number of grounds of error were asserted, but we content ourselves with the mere statement that we think they are without merit because in the argument at bar for the appellant only the rulings of the court below concerning the three propositions to which we have referred are discussed and insisted upon as a basis for reversal. We come then briefly to consider those propositions.

At the outset it is to be observed that the questions are inherently and in the strictest sense local in character, depending as they do upon the right to have the benefit in the Territory of the statutes of limitation concerning real estate and the application of such statutes to the case as made by the defendant, the United Globe Mines. But as to questions of such character the settled rule is that this court "accepts the construction which the territorial court has placed upon a local statute"; in other words, will not disregard or reverse the same unless constrained to do so by the clearest conviction of serious error. (*Phœnix Railway Co.* v. *Landis, ante,* p. 578, where a full list of the applicable cases is collected, decided December 23 last.) With our duty thus defined the case is readily disposed of. As to the first question, the court below expressly found that during the whole of the statutory time the United Globe Mines, although a non-resident in the sense that it was a corporation of foreign organization, had complied with the laws of Arizona, was in possession of the property, paying taxes thereon and conducting business by means of its use, and was subject there to be sued, having under the law of the Territory, an agency for that purpose. It is manifest under these conditions, if there be any ground for a different conclusion, which we do not intimate, there is no possible room for holding that such serious error was committed as to constrain us to reverse. As to the second proposition,—the five years' statute—the only contention is that the court erred in holding that

a reference in the deed which was relied upon as to the origin of title did not operate to render the deed relied on, insufficient for the purposes of the statute, although it was in every other respect adequate. That is to say, the contention is that the sufficiency of the deed should have been tested not by its own adequacy but by the insufficiency of another deed, not involved in the case simply because such other deed by way of mere recital was referred to in the deed which was relied on and upon which deed the application of the bar of the statute solely depended. We do not test the accuracy of the reasoning upon which the contention must rest, nor comprehensively review the authorities—since in our opinion it cannot be said, either from the point of view of reason, or from a consideration of the decided cases [1] that there is ground for holding that there was such manifest error committed as to justify reversal. In saying this we intimate no doubt as to the correctness of the ruling below made—our sole purpose is to abstain from deciding a purely local question in the absence of those conditions which render it necessary for us to do so—that is the existence of plain error of so serious a nature as to require correction at our hands.

Affirmed.

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[1] *Bradstreet* v. *Huntington*, 5 Pet. 402, 447; *Clarke* v. *Courtney*, 5 Pet. 319, 354; *Pillow* v. *Roberts*, 13 How. 472; *Wright* v. *Mattison*, 18 How. 50; *Cameron* v. *United States*, 148 U. S. 301.

VAN SYCKEL *v.* ARSUAGA.

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

No. 69. Argued November 13, 1913.—Decided January 5, 1914.

Where appellant with ground challenges the adequacy of the findings of the court below to sustain the legal conclusions based on them, it is the duty of this court to consider and decide that question.

Under the local law of Porto Rico, if there is intrinsic ambiguity in a written instrument the right obtains to dispel such ambiguity by extraneous proof showing the circumstances under which the instrument was executed.

In this case there was such ambiguity in the contract involved as justified proof beyond the terms of the instrument to clear up the situation, and findings of the trial court based upon such proof are not void because of want of power to consider it.

The mere fact that parties seek in a lawful mode to protect legal rights by keeping alive an instrument under which possession to the property could be maintained in case of adverse decision in suits under another instrument does not indicate fraud in the transaction.

On the record in this case, *held*, that a partner who had kept alive a lease on property which his firm had acquired from him through another source of title so as to protect the interest of the firm against attacks from outside parties could not subsequently recover the property under the lease to the detriment of the other partners.

There is evident lack of merit in the contention of a partner to recover property which he sold to the partnership and was paid for, without returning the price.

THE facts, which involve the validity of a judgment liquidating and distributing the assets of a copartnership in Porto Rico, are stated in the opinion.

Mr. N. B. K. Pettingill, with whom *Mr. George H. Lamar* was on the brief, for appellants.

Mr. Charles F. Carusi for appellees.

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

When the court below delivered its opinion and made

a statement of facts it did not enter a final decree, but directed a re-statement of certain accounts to be made and ordered a survey and report as to the condition of certain real estate to the end that thereafter the case might be finally disposed of. Fixing their attention upon the controlling force of the reasons which the court had stated in its opinion and the decisive character of the findings embodied in the statement of facts, the parties who believed themselves aggrieved at once appealed, but their appeal was dismissed for want of a final judgment. 200 U. S. 624. The case is now here on an appeal from a final judgment and the contentions previously relied upon to secure a reversal are applicable and now require to be decided.

This suit was begun by the widow and heirs of Paul Van Syckel to liquidate and distribute the assets of two partnerships of which he was a member, viz., P. Van Syckel & Co. and the Santa Cruz Sugar Co. The defendants were the other members of the firms. From the petition and the documents annexed, from the answer, and a cross-petition filed by the defendants to construe and limit a document referred to as an agreement for "postponement of rights," as also from the issues taken on the cross-petition and from the opinion of the court and the statement of facts which it made it is beyond question that the only controversy between the partners arose from an assertion by the widow and heirs of Van Syckel that they were the holders of a subsisting lease covering an important piece of partnership real estate.

The solution of this controversy depended upon the answers proper to be made to the following questions: 1st, Did the lease which was owned by Van Syckel prior to the formation of the partnership of P. Van Syckel and Company pass to that firm as the result of its organization and the stipulations contained in the articles of partnership? 2nd, If the firm became the owner of the lease, was such lease extinguished by confusion (Civil Code, § 1192)

as the result of the purchase by the firm of the leased property under a foreclosure sale, and 3rd, even although as a general rule, the lease was extinguished under the conditions stated, could the surviving members of the firm be heard to deny the existence of the lease as against the widow and heirs of Van Syckel in view of the public record concerning the lease, of the stipulations of the agreement styled postponement of rights of the foreclosure proceedings, and of other declarations made in other notarial acts to which the partnership and the partners were parties?

Concluding that these questions required an affirmative answer the court below rejected the claim based upon the existence of the alleged lease. The reasons which led to this conclusion were stated in an elaborate opinion and the facts which were deemed controlling were enumerated in a statement of facts. While conceding that there is no power to review the facts, and while further conceding that if effect be given to the facts found, the judgment is clearly right, it is yet insisted by the appellants that there should be a reversal upon the following grounds: *a*, Because the ultimate findings made by the court as to the non-existence of the lease were on the face of the record manifestly alone based upon inferences drawn from parol proof conflicting with the declarations of the parties contained in notarial acts and which under the local law were not lawfully susceptible of being overthrown by parol proof; and, *b*, because moreover error is manifest on the face of the findings as well as in the legal conclusions based on the findings because it was impossible to conclude that the lease had no existence without permitting the defendants to repudiate their declarations made in notarial acts, to base a claim of right upon their deceit and fraud and to discharge themselves and their property from an obligation by giving efficacy to their wrongdoing. As these propositions in their final analysis challenge the adequacy of the findings made to sustain the legal conclusions

based on them, it is our duty to consider and to decide them. As a prelude to doing so, we make a statement of the case as established by the findings and as elucidated by the opinion of the court and the documents therein referred to.

In June, 1897, by notarial act, Paul Van Syckel leased from one Montilla, the Santa Cruz plantation except a small portion previously leased to some one else. The rent was payable monthly and the term was indeterminate; that is, was to last as long as Van Syckel chose to pay rent. The property when leased was encumbered by mortgage. Van Syckel used the leased property for the business of raising cattle and carrying on a dairy. The registration officer refusing to record the lease because of the uncertainty of the term, Van Syckel, in October, 1899, made a notarial statement, fixing a term of six years and reserving the right, at will, to fix future terms. The registering officer refusing to record this statement, Van Syckel sued to compel its registry, and was successful, the Supreme Court of Porto Rico (or the Chief Justice thereof) having affirmed an order directing the registry to be made. The holder of the mortgage on the leased property having commenced executory proceedings to foreclose, Van Syckel sued in the Provisional Court created by the American military authority to enjoin on the ground of an alleged fraudulent combination between the debtor and creditor by foreclosure of the paramount mortgage to wipe out the lease and impliedly, on the further ground that having an interest, as lessee, in paying the paramount mortgage debt, he was entitled to do so and take a creditor's legal subrogation. (Civil Code, §§ 1203, 1210 and 1211.) The foreclosure proceeding was perpetually enjoined. The mortgage creditor acquiescing in the result, in March, 1900, transferred the debt to Van Syckel. During these proceedings there was pending in the local courts, suits in one or another

form, brought by Montilla assailing the rights of Van Syckel. The exact character of these suits is not disclosed, but they are referred to in the findings and a statement on the subject is contained in *Montilla* v. *Van Syckel*, 8 Porto Rico, 153, 162.

In June, 1900, before a notary, Van Syckel and the firm of Sobrinos de Ezquiaga, an established and reputable commercial firm, formed a partnership styled P. Van Syckel & Company. The act recited that Van Syckel was the owner of enumerated property, viz: a small farm, a lot of cattle "as per inventory," a lot of personal property, constituting the plant of a dairy, such as cans, bottles, milk straining apparatus, carts, milk wagons, etc., and besides a mortgage paper secured on the Santa Cruz plantation, inventoried at about 11,000 pesos; and lastly a sum of money stated in the inventory as "value of working capital," amounting to 1111 pesos. These various items gave a total value of 30,000 pesos, and one-half, 15,000 pesos, was paid in cash by Sobrinos de Ezquiaga to Van Syckel as the purchase price of one-half the property which thus became jointly owned, and was by the joint owners, Van Syckel and Sobrinos de Ezquiaga, established as the capital of the new firm. The duration of the firm was two years and the purpose of its organization was declared to be the carrying on of a dairy business and the purchase of cattle. There were careful provisions as to the keeping and rendering of the accounts of the firm as to the equal power of management by the partners and an equal division between them of profits. There was a stipulation relating to the mortgage debt on Santa Cruz, providing that if the debtor, Montilla, paid the same the sum received should take the place of the debt as firm capital, and the firm should not be dissolved thereby, and the same result, it was expressly provided would follow in case Montilla should "recuperate the debt" and require an assignment of the same; that is, in case

Montilla by operation of legal subrogation compelled a transfer of the debt to another.

The year following, in July, 1901, the firm of P. Van Syckel & Company and P. Van Syckel individually were parties to a notarial act styled "postponement of right," by which the firm, after reciting its ownership of the mortgage claim on the Santa Cruz property and the paramount character of the mortgage as to a lease on the property, held by Van Syckel, waived the priority of the mortgage, gave precedence to the lease and expressly renounced all right of the mortgage creditor "to rescind the lease" as against Van Syckel and his "*causa habientes.*" This act was placed on the public records. In September, 1901, Van Syckel & Company commenced executory proceedings against Montilla to enforce their mortgage debt and in due course, in November, 1911, the property was adjudicated to them for two-thirds of its estimated value and as was customary under the local law, the state of the record was referred to and the priority of the recorded lease was recited.

In May, 1902, the firm of P. Van Syckel & Company was by notarial agreement extended for a period of four years to the first day of June, 1906. The articles of extension recited the original organization, the purchase from Van Syckel of the property which constituted the capital of the firm, including the debt secured by mortgage upon Santa Cruz. It then recited the foreclosure and the purchase of the property at less than the face value of the mortgage debt, and stipulated that the capital of the new firm should not be thereby diminished as the property took the place of the debt as a partnership asset. It would seem that after the foreclosure and probably after the extension of the firm, the suits brought by Montilla in the local courts, to which we have previously referred, were decided against him, but in December, 1902, a new suit in the Porto Rican courts was by him

commenced against Van Syckel individually and the firm of Van Syckel & Company and its members to rescind the lease and to vacate the foreclosure proceedings, and to recover the Santa Cruz property. Speaking generally, as to the lease, the ground of attack was that it was void for uncertainty, that the notarial declaration of Van Syckel as to the six year term was unilateral and created no obligation and that his reservation of future right to fix terms at his will was purely protestative and void for uncertainty. As to the mortgage debt, the assertion was that the transfer by which Van Syckel had acquired it, consequent on the decree of the Provisional Court, had extinguished the mortgage by payment, as no subrogation was expressed in the transfer or could by operation of law have resulted therefrom. In the meanwhile and before the extension of the partnership, Van Syckel removed from Porto Rico with his family to reside in Cuba, but left a power of attorney with his partners to carry on the business of the firm, he returning at intervals to Porto Rico to supervise and participate in the business. Subsequently in leasing a portion of the Santa Cruz property, the lease was made to conform to the state of the public records and therefore was so drawn as to pass not only the rights of the firm, but the right of Van Syckel under his apparently existing lease. In 1905, in conjunction with one English, the firm of Van Syckel & Company formed an agricultural partnership called the Santa Cruz Sugar Company, for the purpose of developing the sugar industry on the Santa Cruz property and in that contract also the parties so acted as to make their agreement conform to the public records; that is, so as to recognize the lease apparently existing in the name of Van Syckel, as also the rights of the partnership in and to the property.

During the interval, the suit last referred to, brought by Montilla was decided against him in the lower court, and on his appeal in March, 1905, the judgment of the lower

court was affirmed by the Supreme Court of Porto Rico, Montilla prosecuting an appeal to this court, but shortly thereafter the appeal was dismissed because of a compromise effected with Montilla by which the firm of Van Syckel & Company paid a small sum in cash, thus terminating the long controversy. Shortly prior, however, to this being done, Van Syckel died in Cuba and the partnership having terminated not only as the result of his death, but by lapse of time, a controversy concerning the lease supervened and this suit followed.

Dealing with the facts which we have recited and the other proof before it, the court found that the sale made by Van Syckel to the firm of Sobrinos de Ezquiaga consisted of one-half the plant and assets of a dairy establishment and cattle farm by him carried on in part at least on the leased property and that not only as the result of implications necessarily arising from the provisions of the articles of partnership, but from the proof as to the situation of the parties and the manner in which they gave effect to the articles of partnership, it clearly resulted that the lease passed to the firm as a part and parcel of the contract by which the firm became the holder of the assets and plant.

Thus the court said:

"It is our opinion that Mr. Van Syckel sold a full half interest in his dairy business and all that constituted it, which included every right he had to all property concerned for 15,000 pesos to respondents Sobrinos de Ezquiaga."

And again, speaking on the same subject:

"We fail to see the force of the claim that Van Syckel put in a mere credit or mortgage debt, as an asset of this firm, the business of which was to carry on a dairy, and it looks ridiculous to say that these respondents simply invested in half of an interest-bearing mortgage. Van Syckel himself had been using this ranch for some time

previous, for this same purpose as a dairy ranch and the firm continued to use it for the same purpose for some time thereafter. The firm could not ordinarily promote a dairy business by simply owning a mortgage which might be paid off any moment, so it seems to us to be plain that Van Syckel intended to include the possession which included the lease in the assets of the firm."

And this conclusion as to the ownership of the lease by the firm as the result of the formation of the partnership was reinforced by the following statements as to the conduct of the partners, their knowledge of the business, their participation therein, the accounts rendered concerning the same and the profits distributed. The court said:

"There is not a word of evidence in the case which shows that P. Van Syckel & Company ever paid any rent to Paul Van Syckel for this lease, or have ever given him any credit for any such rent or that Van Syckel ever asked the firm to so give him credit for any rent, although it is in evidence that Sobrinos de Ezquiaga sent Van Syckel numerous statements of their accounts of the firm's business while he was then living in Cuba."

And again:

"The overwhelming weight of the evidence in the case, shows that Paul Van Syckel was just as prominent and even a much more active party than Sobrinos de Ezquiaga was in all defense against, or attacks upon Montilla. A reading of the correspondence that is in evidence will convince any one of this."

Indeed, the conclusive effect of the comprehensive findings of the court concerning the ownership by the partnership of the alleged lease is fully illustrated by finding XIV, a portion of which we quote, and finding XVII.

"XIV.

"The said Paul Van Syckel during his lifetime agreed with Sobrinos de Ezquiaga by the terms of his partnership

in the firm of P. Van Syckel & Company and otherwise that said firm of P. Van Syckel & Company should be the sole and exclusive owners of the said farm 'Santa Cruz,' free and clear of any claims upon the part of said Paul Van Syckel by reason of said lease of June 23, 1897. . . ."

"XVII.

"The evidence in this case is clear, unequivocal and convincing that this lease of June 23, 1897, was to have no life or effect as between the parties in their accounting during or after the date of the partnership, but that the same was merged in the fee at the time of the adjudication thereof to said partnership of P. Van Syckel & Company, if not before."

Absolutely demonstrating, as these findings do, the want of merit in the contention that there was error in holding that the lease had no existence, if there was power to make and give effect to the finding, we come to consider those questions which at the outset we pointed out, are the only issues in the case.

Passing whether the face of the notarial acts to which we have referred do not in and of themselves fully establish the transfer of the lease by Van Syckel to the firm and its extinguishment by confusion as the result of the purchase at the foreclosure sale, but without intimating any opinion whatever to the contrary, let us consider the subject in a somewhat narrower aspect.

Undoubtedly, under the local law (Laws of Porto Rico, 1905, p. 70), if there was intrinsic ambiguity, the right to resort to extraneous proof to dispel it obtained; that is proof, to use the words of § 28 of the statute, showing "the circumstances under which it (the document or contract) was made, including the situation of the subject of the instrument, and of the parties to it . . . so that the judge be placed in the position of those whose language he is to interpret."

Was there then such ambiguity in the articles of partnership concerning the method of carrying on the business for which the partnership was organized as to justify the admission of explanatory proof?

The articles leave no doubt concerning what the business of the partnership was to be, that is, the carrying on of a dairy and the purchase of cattle; but there is nothing in the articles which expressly shows where and how the proposed business of the firm was to be conducted, and when light on this subject is sought from the implications of the text, to say the least, such a state of mental uncertainty is engendered as plainly justifies the resort to proof to clear up the ambiguity. We say this because in the first place the property, one-half of which was bought from Van Syckel by Sobrinos de Ezquiaga and the whole of which was then put by the joint owners into the firm as its sole capital in trade, on the face of the paper appeared to be an inventory of the assets and property of a pre-existing business, which, from the nature and character of a large part of the tangible property sold, was a dairy and cattle business. In the second place because included in the articles bought was a sum of money stated to be "value of working capital" which so persuasively suggests the present purpose to continue an existing business as beyond all doubt to justify proof as to the situation of the parties and of the subject-matter to which the contract related. The proof then being admissible and establishing that Van Syckel was engaged in a dairy and cattle business upon the Santa Cruz property and that the assets and capital, one-half of which he sold, constituted the plant and assets of such business, which the firm continued to conduct, the question is, Was there such ambiguity in the contract as to the transfer of the lease as to again justify proof beyond the terms of the instrument to clear up that situation? Of this also we think there can be no doubt, for the following reason: The inclusion among the

transferred assets of the debt secured by mortgage upon the Santa Cruz property and the dominancy of that debt as to the lease, in and of itself creates obscurity as to whether, by the transfer of the paramount right, it was not contemplated to also pass to the firm the subordinate lease right, and that ambiguity becomes more apparent when it is considered that the established business was carried on by means of the Santa Cruz property and that possession of that property was necessarily a prerequisite to the continued conduct of the business. Indeed, this ambiguity becomes all the more marked when it is borne in mind that the interdependence of the lease and the mortgage was so great that the judicial power had compelled a transfer to Van Syckel of the mortgage because he was the owner of the lease. Certainly, as the possession of the Santa Cruz property for the purpose of the business was essential and that possession could only be enjoyed by the firm as a consequence of the right to the lease or the rights to be possibly acquired as the result of the foreclosure of the mortgage, the inquiry as to whether one or both rights were intended to be embraced was essential to a comprehension of the contract, and its solution was made so ambiguous by particular provisions of the contract as to justify proof for its clarification. This arises from the provision requiring the transfer of the mortgage to a third person by legal subrogation in the event Montilla should so exact. The resulting ambiguity is apparent since in such event, unless the mortgage was subordinated by agreement or by operation of law to the lease, the destruction or impairment of the rights, which it was the obvious intention of the partnership to create, becomes self-evident. So also unless the firm owned the lease it would have no interest to subordinate the mortgage to the lease and in the event the right of legal subrogation was exercised and the mortgage, by operation of law, passed to a third person, such person, unless the partnership

owned the lease, would hold the mortgage as paramount to the lease and therefore have the power to destroy it. Indeed the duty to admit the proof, we think, would equally result if attention be not confined to the articles of partnership but be extended to those articles in conjunction with "the postponement agreement," the foreclosure sale, the extension of the partnership and the other notarial documents to which we have referred. But we do not deem it necessary to elaborate this view, as what we have said is adequate to demonstrate the want of merit in the contention that the controlling findings of fact made by the court below were as a matter of law void because of a want of power in the court to consider the proof upon which the findings were based.

This leaves only for consideration the contention that the action of the court was erroneous because it gave effect to fraud and deceit, and enabled the defendants to recover by alleging their own turpitude. Before we approach that subject, however, we dispose of another matter to which considerable attention was devoted in the argument at bar.

During the course of the trial Señor Vacuna, who had been the attorney of Sobrinos de Ezquiaga, of Van Syckel and of the partnership, was offered as a witness to prove that "the postponement agreement" was advised by him and was executed as a mere precautionary measure to protect the interest of the firm in the lease, that is, to preserve the lease in case, by an adverse decision in the Montilla suits, the foreclosure proceedings were annulled and the firm deprived of its resulting ownership of the property. In other words, that the purpose was to leave the lease in such a position upon the public records that if it should result from the Montilla suits that the title resting upon the foreclosure was destroyed the lease would not be treated as having been extinguished by confusion because on the records the ownership of the property and

the ownership of the lease had been in one and the same person. The court heard the witness over objection based upon the privileged character of the matter sought to be proved, and the form in which it was attempted to be elicited. But we do not think we need consider the subject because we are clearly of opinion, in view of the findings of the court concerning the sale of the lease to the partnership and its other findings of fact, that it is wholly immaterial to pass upon the objection because even if it be assumed for argument's sake to have been well taken, prejudicial error under the circumstances did not result. The weight of the contention as to deceit, fraud and wrong-doing is placed upon the postponement agreement, but in view of the ownership by the partnership of the lease and the fact that Van Syckel, although he had disposed of the lease, still remained upon the public records as its owner, we fail to perceive the slightest foundation for the contention as to fraud or wrong or deceit, resulting from the postponement agreement as applied to those who were parties to it. As the holder of both the lease and the mortgage, the firm had the right to seek to prevent the destruction of the one right by the enforcement of the other, a destruction which would have been threatened by a resort to foreclosure if the agreement to postpone the mortgage to the lease had not been put upon the records. This is obvious for this reason: If upon the records, the mortgage had continued to occupy a dominant position as to the lease, it would have resulted that the lease would have been extinguished by a sale to foreclose the mortgage and therefore if at such a sale, a third person had bought the mortgaged property, such purchaser would have taken the property free from the lease and the firm by the act of enforcing its mortgage would necessarily have extinguished its lease. Under these circumstances there is no ground for charging fraud and wrong-doing, simply because the parties sought in a lawful mode to protect their legal rights.

In its last analysis the whole argument rests upon the assumption that because the parties to the contracts did not change the public records so as to cause them to conform to their contracts, they lost the right as between themselves to enforce their contract obligations, a proposition which is refuted by its mere statement. Looking at all the transactions from first to last,—the silence of the articles of partnership as to the lease, the act of postponement, the foreclosure proceedings, the extension of the partnership and the subsequent dealings, we can discover no ground by which it can be justly said that the parties were guilty of wrongdoing. The existence of the Montilla suits assailing the title to the property as well as the validity of the lease suffices to explain the constant purpose to retain on the public records divergent ownership of the two—when in fact they were united in one person—lest the loss of one, the title, might carry with it by confusion the loss of the other, the lease, because both had been on the record in the name of the same person. Admitting that if the title had been vacated, the benignity of the law by the application of the principle of *restitutio in integrum* would have prevented the loss of the lease by confusion and therefore the fear of the partners was unnecessary, that fact does not justify treating them as wrongdoers or characterizing their acts as fraudulent.

Indeed, when it is considered that the controversy is between partners and concerns acts in which they all bore an equal part, and that the charge of fraud is advanced to sustain the asserted right of one partner to recover, to the detriment of the other partners, property which he sold to the partnership and for which he was paid without a return of the price, the want of merit in the contention becomes apparent.

Affirmed.

STATE OF WISCONSIN ON THE RELATION OF BOLENS *v.* FREAR, SECRETARY OF STATE OF THE STATE OF WISCONSIN.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 447. Motion to dismiss submitted December 15, 1913.—Decided January 5, 1914.

In this case this court follows the construction given by the highest court of the State to the provisions of the state constitution in regard to its jurisdiction of cases in which the State is a party or which are brought by the consent of the State on the relation of an individual.

Where the relator has no authority to sue except by consent of the State, and he is a mere agent for calling judicial authority into activity for protection of general public rights, and not for redress of individual wrongs, the State is the real party plaintiff and the relator has no power without its consent to prosecute error to this court.

Where, in such a case, the State does not consent that the relator prosecute error the writ will be dismissed; the case is not within Rev. Stat., § 709 (Judicial Code, § 237), and this court has not jurisdiction.

The fact that this court has authority under § 237, Judicial Code, to decide a legal question in a case where jurisdiction exists, does not give it power to decide that question in a case where jurisdiction does not exist.

Where jurisdiction does not exist this court will not pass upon the questions involved so that in future cases involving those questions the state court may be guided by the views expressed by this court thereon.

Writ of error to review 148 Wisconsin, 456, dismissed.

THE facts, which involve the jurisdiction of this court of a writ of error to review the judgment of a state court against a relator who is not the agent of the State, and who has without authority of the State sued out the writ of error, are stated in the opinion.

Mr. W. C. Owen, Attorney General of the State of Wisconsin, *Mr. George G. Greene* and *Mr. J. E. Dodge* for defendants in error in support of the motions.

Mr. Paul D. Carpenter for plaintiff in error in opposition to the motions.

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

The Attorney General of the State of Wisconsin by direction of the Governor of the State moves to dismiss on the ground that the State is the real party in interest, because Bolens, the relator, personally, was in the court below the mere agent of the State, devoid of all authority to prosecute this writ of error and thereby to implead the State in this court without its consent. Indeed, the motion to dismiss in a strict sense is a motion to quash the writ of error on the ground that no writ was ever sued out, and that in effect there is no judgment below to which the writ could be directed since the State, which was the party plaintiff and the officers of the State who were the defendants, both acquiesced in and have executed the judgment.

The decree to which the writ of error is directed was rendered on a demurrer to the petition filed in the Supreme Court of Wisconsin by Bolens, as relator, asking the court as a matter of original cognizance to enjoin the putting in force of a state law creating a new system of state taxation described as "progressive income taxation." 148 Wisconsin, 456. We accept a statement contained in the argument of the plaintiff in error concerning the nature of the original jurisdiction of the court below:

"The Constitution of the State of Wisconsin confers original jurisdiction upon the Supreme Court of the State to issue writs of injunction and other original and remedial writs and to hear and determine the same. (Art. VII,

Sec. 3.) This clause gives full jurisdiction to the state Supreme Court over any question *quod ad statum reipublicæ partinet*, affecting the 'sovereignty of the State, its franchises or prerogatives or the liberties of its people.' Such action is to be brought originally in the state Supreme Court and may be instituted by the Attorney General, acting on his own initiative or acting on the petition of a citizen; or if he refuses to act on the petition of a citizen, then the citizen may on notice apply to the Supreme Court for permission to bring the action for the State in the name of the Attorney General, and the Court may refuse or grant such permission."

Further, we adopt a statement in the argument for the plaintiff in error as to the grievances which it was deemed required judicial redress and the steps taken which were exacted by the state statute as prerequisite to obtain an exertion by the court of its original jurisdiction:

"Harry W. Bolens presented his petition to the then Attorney General of Wisconsin, setting up that the Wisconsin Income Tax Law, Chapter 658 of the Laws of Wisconsin for 1911, is wholly null, void and of none effect for that it violates numerous sections of both state and Federal Constitutions, most of these objections being set out in detail, followed by an omnibus allegation; and praying that for the wrongs complained of and for the protection of himself and all others similarly situated, and for the protection of all the taxpayers of the State against the threatened invasion of their rights and liberties, and forasmuch as all said persons are remediless in the premises without the interposition of the state Supreme Court, that the Attorney General move the Court for leave to bring the action designed 'so as fully to protect and secure the said rights and privileges guaranteed to the people of this State by the Constitution of the United States and the amendments thereto and the Constitution of the State of Wisconsin and the amendments thereto.'"

The Attorney General refusing to comply with the request, the Supreme Court, on motion of the relator, ordered the petition to be filed without prejudice to thereafter considering whether there was jurisdiction to entertain it. Subsequently the court overruled a demurrer challenging its original jurisdiction and moreover held on a demurrer addressed to the merits that the petition stated no ground for the relief which was prayed. The court in so doing defined the nature of the power possessed by it as a matter of original jurisdiction to hear and determine the case made by the petition.

It said, 148 Wisconsin, p. 500:

"This transcendent jurisdiction is a jurisdiction reserved for the use of the State itself when it appears to be necessary to vindicate or protect its prerogatives or franchises or the liberties of its people. The State uses it to punish or prevent wrongs to itself or to the whole people. The State is always the plaintiff, and the only plaintiff, whether the action be brought by the Attorney General, or, against his consent, on the relation of a private individual under the permission and direction of the court. It is never the private relator's suit. He is a mere incident. He brings the public injury to the attention of the court, and the court, by virtue of the power granted by the Constitution, commands that the suit be brought by and for the State. The private relator may have a private interest which may be extinguished (if it be severable from the public interest), yet still the State's action proceeds to vindicate the public right." Contrasting the authority thus possessed by virtue of its original jurisdiction with the ordinary processes for the redress of private wrongs the court said: "These propositions, if correct, and we believe they are, demonstrate very clearly that there can be no such thing as a tax payer's action (as that action is known in the circuit courts) brought in the Supreme Court within the original jurisdiction."

Referring to such a tax-payer's suit, the court observed (p. 501):

"The tax payer himself is the actual party to the litigation, and represents not the whole public, nor the State, nor even all the inhabitants of his municipality, but a comparatively limited class, namely, the citizens who pay taxes. In short, he sues for a class. No such thing is known in the exercise of the original jurisdiction of this court. In actions brought within that jurisdiction the State is the plaintiff and sues to vindicate the rights of the whole people."

Applying these doctrines, it was said (p. 501): "The *Bolens Case* (this case) cannot therefore be held to come within the original jurisdiction of this court, if it be a mere taxpayer's action."

After further pointing out the distinction between the right of an individual to sue in a trial court to enforce an individual right or redress a wrong and if aggrieved to prosecute error or appeal and the difference between the exertion on such error or appeal of authority to review and the extraordinary power exerted when original jurisdiction was invoked, the court came to consider the merits of the petition. In doing so it declared that because of the public nature of the controversy, it would confine attention solely to those matters which were addressed to the invalidity of the statute as a whole. In passing upon questions of that character propositions which asserted the statute to be repugnant to both the United States and state constitutions, were analyzed and held to be without merit. The petition was dismissed.

From this statement it is apparent that the motion of the State to dismiss is well-founded for the following reasons: (*a*) Because accepting the interpretation affixed by the court below to the state constitution and the resulting ruling as to the scope of its own original jurisdiction, it follows that the State was the only real plaintiff below,

since the relator had no authority to sue but by the consent of the State, and as its mere agent for the purpose of calling into activity judicial authority, not for the redress of individual wrong, but for the protection of general public rights; (*b*) because the suit, having been brought by the consent of the State in its behalf, the relator had no power, without the consent of the State, to prosecute error, and thus to implead the State without its consent; (*c*) because as the relator did not resort to the methods provided by law for the enforcement of his individual rights, if any, but elected solely to resort, by the consent of the State, to a jurisdiction given only for the redress of general public wrongs, he may not, by means of a writ of error, directed from this court, transform the nature of the proceedings and secure at the hands of this court, under the guise of an appellate proceeding, the exertion of authority to originally determine alleged grievances which were not passed upon by the court below and are not within the scope of Rev. Stat., § 709 (Judicial Code, § 237). The argument that if, asserting his individual grievances, the case had been brought in a trial court and had been carried to the Supreme Court of the State from an adverse decision upon a Federal question the judgment or decree of the Supreme Court would be here reviewable, hence the decision in this case, to save circuity of action, should be now reviewable, amounts but to saying that because there is authority to decide a legal question in a case where there is jurisdiction, there must also be power to pass upon the same question when it arises in a case over which there is no jurisdiction. Under the ruling below no individual right of the relator was denied and because it may be inferred that if in the future a case asserting individual rights in due course of procedure comes to the court below, that court will be controlled or persuaded by the opinions expressed in this case, furnishes no ground for the exertion by this court in the

present case of a jurisdiction which it does not possess. Indeed, whether the case be considered in the light of the absence of any assertion of individual right or grievance on behalf of the relator or be looked at from the point of view that the suit was one under the state law which could only be brought by the permission of the State and for the protection of its governmental authority, the State being therefore the real party plaintiff, or if it be tested by the want of authority on the part of the relator by means of a writ of error to implead the State under the circumstances disclosed without its consent in this court, the want of jurisdiction is so conclusively shown by previous decisions as to leave no room for controversy (*Smith* v. *Reeves*, 178 U. S. 436).

Dismissed for want of jurisdiction.

WYANDOTTE COUNTY GAS COMPANY *v.* STATE OF KANSAS, ON RELATION OF MARSHALL, ATTORNEY FOR THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 472. Argued December 2, 1913.—Decided January 5, 1914.

The fact that the determination of the question of power of the municipality to make the contract alleged to have been impaired involves consideration and construction of the laws of the State does not relieve this court from the duty of determining for itself the scope and character of such contract.

While this court, in determining whether there is a contract, is not bound by the construction of the state statutes by the state court, it will not lightly disregard such construction but will seek to uphold it

so far as it can consistently with the duty to independently determine the question.

In this case, this court reaches independently the same conclusion as the state court in determining that under the authority conferred by the statutes of Kansas the municipality cannot divest itself by contract of its duty to see that only reasonable rates are enforced under a public utility franchise.

A proviso in a public utility statute, in which manufactured gas, light and water were enumerated, stating that municipalities were not prohibited from granting franchises for supplying natural gas on terms and conditions agreed to by it and the franchisee, construed as bringing natural gas within the statute, and that the terms and conditions on which the franchise could be granted were subject to the same limitations contained in the statute as applicable to franchises for other utilities.

88 Kansas, 165, affirmed.

THE facts, which involve the power of a municipality in Kansas to regulate charges for natural gas, are stated in the opinion.

Mr. J. W. Dana, with whom *Mr. W. F. Douthirt* was on the brief, for plaintiff in error:

The construction of this court is controlling and it will determine for itself whether a contract exists within the meaning of the contract clause of the Constitution. *Louisville Gas Co.* v. *Citizens Light Co.*, 115 U. S. 683, 697; *McCullough* v. *Virginia*, 172 U. S. 102; *Crosslake Club* v. *Louisiana*, 224 U. S. 632; *Vicksburg* v. *Water Co.*, 185 U. S. 65.

Power to regulate rates by municipality may be suspended by contract. *Home Tel. Co.* v. *Los Angeles*, 211 U. S. 265; *Detroit* v. *Citizens Railway Co.*, 184 U. S. 368; *Vicksburg* v. *Waterworks Co.*, 206 U. S. 496.

Municipal corporations may be invested by statute with power to bind themselves by irrevocable contract not to regulate rates. *Water Co.* v. *Freeport*, 180 U. S. 587; *Los Angeles* v. *Water Co.*, 177 U. S. 558; *Water Co.* v. *Walla Walla*, 172 U. S. 1; *New Orleans Water Co.* v.

Rivers, 115 U. S. 674; *Louisville* v. *Cumberland Tel. Co.*, 224 U. S. 648; *Vicksburg* v. *Water Co.*, 185 U. S. 65; *Vicksburg* v. *Waterworks Co.*, 202 U. S. 453; *Street Railway Co.* v. *Minneapolis*, 215 U. S. 417.

The power to fix and regulate rates is governmental, inherent in the State, and cannot be exercised by a subordinate subdivision such as a municipality unless conferred by the State. *Home Tel. Co.* v. *Los Angeles*, 211 U. S. 265; *Water Co.* v. *Freeport*, 180 U. S. 587; *Stanislaus County* v. *San Joaquin Co.*, 192 U. S. 201.

The power to regulate rates by a municipality may be implied from the statute, and if implied is as authoritative as though expressly granted. *Home Tel. Co.* v. *Los Angeles*, 211 U. S. 265; *Street Railway Co.* v. *Minneapolis*, 215 U. S. 417; *Vicksburg* v. *Water Co.*, 206 U. S. 496.

This power is clearly implied in the Kansas statutes, and by § 51 of the act of 1903 municipalities were given power to prescribe and fix reasonable and just maximum rates for public utilities, and under § 170*a* the municipality was given power to agree on terms with companies supplying natural gas. Similar provisions in the other statutes involved in the cases cited *supra* have been construed as conferring power on municipalities to make binding contracts as to rates in future. See also *Water Co.* v. *Omaha*, 147 Fed. Rep. 1; *City Ry. Co.* v. *Citizens Ry. Co.*, 166 U. S. 557.

The decisions of the Kansas courts are a part of the contract in this case and estop the State from denying its validity. *Territory* v. *Rayburn*, 1 Kansas, 552; *Jones* v. *State*, 1 Kansas, 273; *Dudley* v. *Reynolds*, 1 Kansas, 285; *Leavenworth* v. *Rankin*, 2 Kansas, 357; *Leavenworth* v. *Laing*, 6 Kansas, 287; *Atchison Street Ry.* v. *Mo. Pac. Ry.*, 31 Kansas, 661; *Wood* v. *Water Co.*, 33 Kansas, 597; *Wyandotte* v. *Corrigan*, 35 Kansas, 24; *Winfield* v. *Gas Co.*, 37 Kansas, 24, and 51 Kansas, 70; *Water Co.* v. *Burlington*, 43 Kansas, 725; *Manly* v. *Emley*, 46 Kansas, 655; *Water*

Co. v. *Columbus*, 48 Kansas, 99; *Watkins* v. *Glenn*, 55 Kansas, 417; *Mills* v. *Osawatomie*, 59 Kansas, 463; *State* v. *Water Co.*, 61 Kansas, 561. See also § 59, c. 100, Laws of Kansas 1872, under which power to regulate is reserved and the power to contract is not modified. *Baxter Springs* v. *Light Co.*, 64 Kansas, 591; *Bank* v. *Arkansas City*, 76 Fed. Rep. 271, and cases cited.

The contract in this case has been sustained in *Wyandotte Gas Co.* v. *Commissioners*, 83 Kansas, 195.

The binding force of municipal franchise contracts has been so often sustained by the Kansas courts as not to be now open. Cases *supra*, and see also *Potwin Place* v. *Topeka Ry. Co.*, 51 Kansas, 609; *Street Ry. Co.* v. *Nave*, 38 Kansas, 744; *Kansas City* v. *Gas Co.*, 9 Kans. App. 325; *Water Co.* v. *Galena*, 74 Kansas, 644; *Brown* v. *Atchison*, 39 Kansas, 37.

Mr. Richard J. Higgins, with whom *Mr. Henderson S. Martin*, *Mr. A. E. Helm* and *Mr. John Marshall* were on the brief, for defendant in error.

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

The Supreme Court of the State of Kansas, with a modification to which it is not necessary to refer, affirmed a decree of the District Court of Wyandotte County, Kansas, enjoining the plaintiff in error, the Wyandotte County Gas Company, from charging domestic consumers in the cities of Kansas City, Kansas and Rosedale, Kansas, for natural gas furnished, any sum in excess of 25 cents per thousand cubic feet. To such decree this writ of error is directed, and the Federal ground relied upon for reversal, is the existence of contract rights in favor of the Gas Company, which it is insisted were impaired by the action of the court below.

The price which the court below sustained was lower than the rate charged by the Gas Company and was in effect a statutory rate since a state law fixed the rate and forbade the charging of a higher rate without the consent of the State Utilities Commission, which consent the Gas Company, under the theory that its contract relieved it from doing so had not sought to obtain.

The court below rested its conclusion upon the grounds, first, that the company had no contract rights fixing rates which were impaired by enforcing the lower rate fixed in the subsequent state law, and second, that if the city had agreed with the company to fix contract rates, the action of the city was void since the city possessed no authority to make a contract limiting its power to fix reasonable rates for the future. As the question of power, which the last proposition involves, lies at the foundation of the case, we come first to consider it, indulging, for the sake of argument in the hypothesis that the city contracted with the company for fixed rates during a stated period, which contract would be impaired if the subsequent legislation here complained of was enforced.

At the outset it is certain that the determination of the question of power involves a consideration and construction of the law of the State from which the city derived its authority. While, indeed, that fact does not relieve us from the duty of determining for ourselves the scope and character of the asserted contract, it is yet elementary doctrine that in the discharge of such duty it is incumbent upon us not to lightly disregard the construction put by the court below upon the statutes of the State, but to seek to uphold such construction as far as it can be done consistently with the obligation to independently determine whether a contract exists which in disregard of the Constitution has been impaired by subsequent legislation.

The alleged contract arises from the passage in 1904 by the city of ordinance 6051 and action taken thereunder.

The question of power is to be determined by a consideration of a comprehensive state law adopted in 1903 regulating cities of the first class, of which Kansas City was one. This law was incorporated in the general statutes of Kansas for 1905, and in referring to it we quote the section numbers as found in the act of 1905, putting in brackets the section numbers of the law of 1903 as originally adopted. Under the heading of "General Provisions" in the fourth paragraph of § 735 [3] cities of the first class were empowered "To make all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate or administrative powers."

Under the heading of "Legislative Department, Powers of the Mayor and Council" it was provided in § 784 [51]:

"Rates for Water, Light, etc. Sec. 51. To prescribe and fix maximum rates and charges, and regulate the collection of the same, for all water, electric light, heat, power, gas, telephone service or any other commodity or service furnished to such city or to any of the inhabitants thereof by any person or corporation now authorized by such city by virtue of a franchise ordinance, or that may hereafter be authorized by virtue of a franchise ordinance to furnish water, electric light, heat, power, gas or telephone service, or any other commodity or service, to such city or to its inhabitants. The rates and charges so prescribed shall at all times be reasonable and just; and if any city shall fix unreasonable and unjust rates and charges, the same may, at the instance of any producer or consumer, be reviewed and determined by the district court of the county in which such city is situated."

Under the heading of "Public Utilities," § 902 [167], authority was given for the securing of an adequate supply of water and the granting of franchises to that end, as well as of contracting for laying pipes, etc., etc. The section contained the following provision as to rates:

"Provided further, that . . . the mayor and council of any such city shall at all times during the existence of any such grant, contract or privilege have the right by ordinance to fix a reasonable schedule of maximum rates to be charged for water for public and private purposes by any such person, company or corporation: Provided, however, That said mayor and council shall at no time fix a rate which will prohibit such person, company or corporation from earning at least eight per cent. on its capital invested over and above its operating expenses and expenses for maintenance and taxes. In establishing and fixing such rates, the value of the plant and property of any such person, company or corporation shall be taken into consideration, but the value of such franchise, contract and privilege given and granted by the city to such person, company or corporation shall not be taken into consideration in ascertaining the reasonableness of the rates to be charged to the inhabitants of such city."

Moreover, the section, after directing that a contract should be reduced to writing, contained the following:

"and any attempt to evade, directly or indirectly, the requirements of this act as to such consideration, or the obligations and conditions of such contract, shall render such contract and franchise absolutely null and void and inoperative."

By § 904 [169] the same general power was given to make contracts and grant franchises, etc., concerning heat, light, power and street railway franchises, as was conferred, as above stated, for the purpose of obtaining a water supply; but as to the authority to fix rates by contract, the power was limited by a restriction in substance the same as that which was imposed upon the right to contract for rates for the purposes of a water supply, since by § 905 [170] the right of the city in that respect was expressly reserved to

"at all times during the existence of any such grant,

contract or privilege . . . to fix a reasonable schedule of maximum rates to be charged for public and private purposes, including street lighting by any such person, company, or corporation, to the inhabitants of any such city, for gas light, electric light, electric power, or heat, and the rates of fare on any street railway."

Section 906 [170a], contained regulations as to the period of the contract which might be made and other general regulations, and closed with the provision which is inserted in the margin. [1]

Considering these statutory provisions the court below (88 Kansas, 165) decided that they did not authorize the city to divest itself by contract of its duty to see that nothing but reasonable rates were enforced, however much the statute might have as to other subjects conferred upon the city an authority to contract in the complete sense. Looking comprehensively at the provisions in question, in the light of the duty resting on us to which at the outset we referred, not lightly to disregard the construction which the state court of last resort has given to the statutes of the State, we can see no ground for holding that the court erred in its conclusion. Conceding that there are forms of expression used in the statute which taken isolatedly might be considered as having conferred the power to fix a contract rate, such concession is not decisive, since we must consider the statute as a whole. And

[1] *Nothing in this act shall be construed as prohibiting any city governed and controlled by the provisions of this act from granting, and the mayor and council of any such city are hereby authorized to grant, to any person, company, or corporation, a franchise to construct, maintain and operate a natural-gas plant for the purposes of furnishing to said city and its inhabitants natural gas for lights, fuel, and all other purposes, with authority to lay and maintain all necessary mains and pipes in the streets, avenues, alleys and public grounds of said city, on such terms and conditions as may be agreed to by said mayor and council and such person, company, or corporation: Provided, That such franchise shall not continue for a longer period than twenty years.*

when we do so, we think, to divorce the expressions referred to, from the context would be, not to interpret and apply, but to distort the statute. Especially is this conclusion necessary when the broad scope of the provisos which we have quoted is taken into view, since they in effect forbid the making of contract rates as to both water and gas by commanding that the governmental power to see to it that only reasonable rates are exacted shall be perpetually preserved and exerted. In face of such a plain manifestation of the legislative will, it would be a departure from the obvious intent and purpose of the lawmaker to hold that the statute conferred the power to do that which the text makes it apparent there was a dominant and fixed purpose of the legislature to forbid. This conclusive view also applies to the special provision concerning natural gas. We say this because, as obviously the prior sections of the statute embraced only manufactured gas, the provision as to natural gas was rendered necessary in order to give the same power to deal with that subject as was conferred concerning manufactured gas. In other words, on its face, the purpose of the provision was to bring natural gas within the statute, subject to the regulations and limitations which the statute imposed and it could not therefore have been intended to cause dealings concerning natural gas to be for the purposes of power conferred within the statute and at the same time to exclude the conferred authority from the safeguards and regulations which the statute exacted. The bringing of natural gas within the power therefore caused it to be subject to the limitations which the statute imposed and which as we have seen rendered it impossible to contract away the governmental power to forbid unreasonable and secure reasonable rates.

Affirmed.

PENNINGTON *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 582. Submitted December 15, 1913.—Decided January 5, 1914.

The proviso in the back pay and bounty provision in the Sundry Civil Appropriation Act of March 4, 1907, c. 2918, 34 Stat. 1295, 1356, directing accounting officers to follow decisions of this court and of the Court of Claims without regard to former settlements, did not confer a new cause of action upon the holders of other claims against the United States which had been adversely ruled upon theretofore and remove the bar of the statute of limitations from such claims.

The back pay and bounty provision in the Sundry Civil Appropriation Act of 1907 related to certain enumerated claims and the proviso also related exclusively to those claims and is not to be regarded as independent legislation.

This court will not construe a provision in an appropriation act in regard to an enumerated class of claims as expressing the intent of Congress to unsettle past administrative action as to all claims against the Government; such a radical intent would not be expressed in an obscure and uncertain manner.

Even though it may have become a modern practice in Congress to adopt independent legislation by attaching "riders" to appropriation bills, the judiciary is not relieved from the old duty of correctly interpreting the statute when enacted.

A claim of an officer of the United States for extra *per diem* rations under the act of July 5, 1838, and which had been disallowed in 1890 by the accounting officers, was not reinstated by the proviso in the back pay and bounty provision of the Sundry Civil Appropriation Act of March 4, 1907.

48 Ct. Cl. 408, affirmed.

THE facts, which involve the construction of statutes regulating pay and allowances of officers of the army of the United States, are stated in the opinion.

Mr. George A. King, *Mr. William B. King* and *Mr. William E. Harvey* for appellant.

Mr. Assistant Attorney General Thompson for the United States.

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

By the judgment appealed from the court below dismissed the petition in which recovery was sought by the appellant, of a stated sum charged to be due him because of the extra *per diem* ration for each five years' service allowed by the act of July 5, 1838, § 15, 5 Stat. 256, 258, c. 162, and the ten per centum increase of yearly pay given for each term of five years' service by Rev. Stat., § 1262. To develop the questions to be decided, we chronologically arrange the facts alleged and somewhat abbreviate their statement, omitting nothing however relevant to the issues.

Stating the petitioner to be a Brigadier General on the retired list, the petition alleged the period of his military service from 1855, when he entered the Military Academy, up to and including 1899, when, as a Brigadier General, he was placed upon the retired list. The arms of the military establishment in which the services of the petitioner were rendered, during the period stated, as well as the various grades through which, by promotion, he passed, were enumerated, the whole period embracing service in the regular army except a brief time between the first of October, 1864, and the first day of August, 1865, when it was alleged he served as an officer of the volunteer service. It was charged that,

"During the entire period of his service as second lieutenant, first lieutenant and captain aforesaid, the practice of the War Department and of the accounting officers of the Treasury Department was not to count service as a cadet in the United States Military Academy in reckoning the term of five years of service for purposes of the additional ration provided by the act of July 5, 1838, or for longevity increase of pay under § 1262 of the Revised Statutes."

The following averments were then made:

"It was decided by the Supreme Court of the United States on the twenty-seventh day of October, 1884, in the case of United States v. Morton, 112th Volume of United States Reports, p. 3, and on the eleventh day of March, 1889, in the case of United States v. Watson, reported in the 130th Volume of United States Reports, p. 80, that officers of the United States Army were entitled, in computing their rations under said act of July 5, 1838, and in computing their longevity pay under Sec. 1262 of the Revised Statutes, to be credited with their service as cadets in the United States Military Academy.

"Notwithstanding said decisions of the Supreme Court of the United States, the Second Comptroller of the Treasury, on June 20, 1890, decided that he would not allow any claim for additional rations under Sec. 15 of the act of July 5, 1838, aforesaid, and for increase of longevity pay under Sec. 1262 of the Revised Statutes on account of any service not theretofore admitted as forming a proper subject of credit by the previous practice of the Treasury Department as aforesaid."

Although the date when the claim was presented was not stated, it was averred that "After the decisions of the Supreme Court aforesaid in the Morton and Watson cases, a claim was presented by this claimant to the Second Auditor of the Treasury for additional rations and longevity pay due under the acts aforesaid in accordance with the decisions of the Supreme Court aforesaid, and said claim was disallowed [on December 13, 1890,] by the Second Auditor in accordance with the decision of the Second Comptroller of the Treasury of June 20, 1890, as hereinbefore set forth, and no consideration was given by said Auditor to the interpretation of said statutes made by the Supreme Court in said cases."

It was alleged that on the fourth day of March 1907, "a provision of law was passed by Congress as a portion

of the Annual Sundry Civil Appropriation Act, 34 Stat. 1295, 1356," which provision was quoted in full in the petition. It was further alleged "that on the eighteenth day of May, 1908, the Comptroller of the Treasury decided" . . . "that in the future the decisions of the Supreme Court of the United States in the cases aforesaid would be followed by the accounting officers of the Treasury in claims for additional rations and longevity pay aforesaid based upon service as a cadet at the Military Academy of West Point, but it was decided by said Comptroller in various cases that" . . . "the accounting officers of the Treasury would not reopen any claim as aforesaid in which a settlement or adjudication had once been made by their predecessors.'

Following the enactment by Congress of the provision above referred to, it was averred:

"Your petitioner applied to the Auditor for the War Department in July, 1909, for all arrears of pay then due on account of his service aforesaid, particularly for additional rations and longevity pay on account of his service aforesaid as a cadet in the Military Academy. The Auditor for the War Department refused to consider said claim because of the settlement aforesaid dated December 13, 1890, by the Second Auditor then in office, disallowing said claim."

Referring to the provision in the Sundry Civil Appropriation Act of 1907, it was then alleged:

"Your petitioner respectfully represents that by said provision of statute, there was granted to your petitioner a right to be paid additional rations under said act of 1838, and additional longevity pay under said Sec. 1262 of the Revised Statutes for the reason that the decisions of the Supreme Court of the United States and of the Court of Claims of the United States aforesaid held that such rations and longevity pay were due in a similar case, and such decisions should have been followed by said

accounting officers notwithstanding the former settlement or adjudication by one of their predecessors as aforesaid. The refusal of the accounting officers of the Treasury aforesaid to state a balance in favor of your petitioner on account of the former settlement aforesaid, deprived your petitioner of a right granted under said act of Congress, for which there is no remedy except by action in this court."

Plainly, under this pleading the only ground upon which the right to a recovery was based was the provision in the Sundry Civil Appropriation Act which was counted upon as conferring a substantive new and independent right. The text of the proviso upon which the case depends is this (34 Stat. 1356):

"Back pay and bounty: For payment of amounts for arrears of pay of two and three-year volunteers, for bounty to volunteers and their widows and legal heirs, for bounty under the act of July twenty-eighth, eighteen hundred and sixty-six, and for amounts for commutation of rations to prisoners of war in rebel States, and to soldiers on furlough, that may be certified to be due by the accounting officers of the Treasury during the fiscal year nineteen hundred and eight, $200,000; *Provided*, That in all cases hereafter so certified the said accounting officers shall, in stating balances, follow the decisions of the United States Supreme Court or of the Court of Claims of the United States after the time for appeal has expired, if no appeal be taken, without regard to former settlements or adjudications by their predecessors."

The complaint that the court below held that this provision does not "include the claim of the appellant" is the single matter assigned as error and what is urged to be the correct meaning of the provision is thus stated in argument:

"1. That the above proviso in the act of March 4, 1907, is an acknowledgment of the indebtedness of the United States to all persons whose claims are therein de-

scribed and, as a new promise, takes their claims out of the operation of the statute of limitations.

"2. That upon the refusal of the accounting officers to allow a claim as directed by this proviso, an action may be maintained upon the claim in the Court of Claims because it is a claim 'founded upon . . . any law of Congress' (Judicial Code, Sec. 145, par. 1st)."

It is apparent that the construction which the proposition affixes to the proviso does not confine its operation to the character of claims here involved, but extends it so as to embrace all claims of every nature if hereafter it be asserted that a prior administrative determination against the validity of the claim was reached without following the decisions of this court or of the Court of Claims. The foundation principle contended for by which the result just stated is brought about is that by the effect of the proviso, a new cause of action is conferred upon the holder of every claim arising against the Government from its foundation, however remote may have been the time when an adverse ruling was made and however otherwise statutes of limitation would be applicable.

The arguments advanced to sustain the proposition make it clear that such is its scope. For instance, it is insisted that "Congress has by the proviso, enacted that in all cases" "the administrative rule of *res adjudicata* shall not prevail against a judicial decision," and that the purpose of the provision was to remove the bar of all statutes of limitations as to every case to which the enactment relates. The extreme result of the proposition is thus made apparent. That its assertion is not academic becomes obvious when it is observed that maintaining it is essential to meet the requirements of the case, since without the asserted doctrine of new promise and the contention as to the removal of the bar of statutes of limitation the claim sued on would not be justiciable, and could be barred by limitations.

Coming to test the proposition by the text of the provision it is seen that it consists simply of an item in a general appropriation act applying a designated sum to pay an enumerated class of cases, of which this is not one, accompanied with a proviso concerning the steps to be taken to ascertain and pay the claims appropriated for. This makes it clear that the sole ground upon which the proposition rests, is a disregard of all that portion of the provision which precedes the word "provided," thus treating the latter part of the whole clause as distinct and independent legislation.

In other words, the only avenue of approach for the proposition is through a gateway created by wrenching the provision asunder. We are of opinion that this may not be done. (*White* v. *United States*, 191 U. S. 545; *Georgia Banking Company* v. *Smith*, 128 U. S. 174, 181.) But it is insisted that the words following the word "provided" do not technically amount to a proviso and therefore the clause must be divided into two independent parts consisting the one of that portion which goes before the word "provided" and the other that portion which follows it. And when this is done the argument is that the word "all" in the latter portion renders it necessary to give to that portion the far-reaching significance claimed. Conceding for argument's sake that the latter part of the provision, that is, the portion which follows the word "provided," may not be technically a proviso, nevertheless the fact that the two provisions are united in enactment in one and the same clause giving no intrinsic manifestation of a legislative purpose to separate them, causes the concession to be without influence in determining the proper construction of the provision. It is however, urged that at the time of the enactment of the clause there were pending before Congress various bills concerning the action of the executive departments in failing to apply the rulings of this court

as to longevity pay and therefore the provision must have been intended to remedy the evil by the adoption of a general provision accomplishing the results here claimed. The premise, if conceded, serves to refute, instead of to sustain the proposition based on it, for if it be that the purpose of Congress was to unsettle the entire past administrative action as to all claims against the Government and to confuse the entire administration for the future, it cannot be conceived that such a radical intent would have been expressed in such an obscure and uncertain manner. And this leads us finally to examine the contention that as in modern practice it has become common to adopt independent legislation on appropriation bills by what is called a "rider," therefore the provision here involved should be treated as having that character and be accordingly independently interpreted as claimed. But whatever be the new habit, it can in no respect serve to relieve the judiciary, when called upon to consider a statute, of the old duty of correctly interpreting it. Indeed, the very suggestion of the practice of "riders" admonishes that things may not be so associated as one for the purpose of securing the enactment of legislation upon the theory that they are one and when enacted be disassociated for the purpose of judicial construction so as to cause them to be wholly independent one of the other.

Affirmed.

IN RE CITY OF LOUISVILLE, KENTUCKY, PETITIONER.

PETITION FOR WRIT OF MANDAMUS.

No. 11, Original. Argued November 10, 1913.—Decided January 5, 1914.

The mandate in the case of *Louisville* v. *Cumberland Telephone Co.*, 225 U. S. 430, in which this court decided that the rates established by municipal ordinance were not confiscatory and reversed the judgment holding that they were, without prejudice, and remanded the case to the lower court, permitted further proceedings; and the judge of the District Court acted within his discretion in continuing the case and appointing a Master to take proof and report as to the amount collected by the company during the injunction period and also after the new rates had been put into effect.

Mandamus to compel the District Court to vacate supplemental orders of reference made in a case reversed and remanded, refused, on the ground that the case was decided without prejudice and the District Court acted within its discretion in the conduct of the case and the interpretation of the mandate.

THE facts, which involve the proper exercise of discretion of the trial judge in interpreting the mandate of this court in a case remanded for further proceedings, are stated in the opinion.

Mr. Pendleton Beckley, with whom *Mr. J. W. S. Clements* and *Mr. Stuart Chevalier* were on the brief, for petitioner:

Where a decree of this court has been misunderstood or misconstrued by a lower court, the party complaining can have the error corrected either by an appeal to this court or by a motion for a writ of mandamus. *City National Bank* v. *Hunter*, 152 U. S. 512. See also *Whitaker* v. *Desfosse*, 7 Bosw. (N. Y.) 678; *Cram* v. *Bradford*, 4 Abb. Pr. R. 193; *St. Paul & Sioux City* v. *Gardner*, 19 Minnesota, 132, 136; 2 Cyc. 612, 613, and cases cited.

In any event a writ of mandamus is proper to bring before this court the question whether its opinion or mandate has been misconstrued by a lower court. *Perkins* v. *Fourniquet*, 14 How. 328; *Gaines* v. *Caldwell*, 148 U. S. 228; *Re Sanford Fork & Tool Co.*, 160 U. S. 247; *Re Potts & Co.*, 166 U. S. 263.

The city contends that the District Court should retain jurisdiction of this case for the purpose (but for the purpose only) of decreeing restitution to the patrons of the telephone company of the amount of overcharges accruing from the passage of the rate ordinance to the filing of the mandate of this court upholding that ordinance. *Brown* v. *Detroit Trust Co.*, 193 Fed. Rep. 626; *Northwestern Fuel Co.* v. *Brock*, 139 U. S. 216; *Southern Railway Co.* v. *Tift*, 206 U. S. 435, and see report of the subsequent hearing in *Tift* v. *Southern Railway Co.*, 159 Fed. Rep. 555.

Respondent in ordering another investigation of the rates and the supervision by a special Master of the operations of the telephone company, misconstrued or misunderstood the opinion of this court rendered on the former appeal.

The one issue made in the bill of complaint filed in this case in March, 1909, was whether the ordinance of March 6, 1909, was confiscatory as to the telephone company.

This court by its opinion reversed the decree of the lower court. In so reversing that decree this court adhered to the opinions in *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, and *Knoxville Water Company Case*, 212 U. S. 18, that the courts should not declare a rate ordinance confiscatory until the public service corporation had given it a fair trial.

The City of Louisville contends that by the opinions in each of these cases this court meant identically the same thing; that is to say, inasmuch as complainants had not shown by clear and unmistakable proof that the rates in question would be confiscatory, the court would not

affirm decrees enjoining the enforcement of such rates until the public service corporations had put the rate into effect, and given them a fair trial. In the meantime, it was clearly the purpose of this court in those cases that the decrees of the lower court should be reversed, and the cases dismissed in so far as the question of confiscation was concerned; but if any one of those three public service corporations saw fit in the future, and after testing the rates, to again try out the question of whether the ordinance was or was not confiscatory, its right to do so should not be prejudiced by anything contained in the opinions of this court or the decrees entered pursuant thereto.

See also *Northern Pacific Ry. Co.* v. *North Dakota*, 216 U. S. 579.

There is no possible ground on which a court can entertain jurisdiction of a cause in which a public service corporation alleged that it was ignorant of whether certain rates fixed by a legislative body were confiscatory as to it, that it had put the rates into effect and it now filed its bill of complaint for the purpose of having the court appoint a master to see if those rates were really in effect, to supervise the operations of the company, and to report to the court the gross earnings, gross expenses and net revenues of the company; and asked the court to determine from such a report whether the rates were or were not confiscatory.

Mr. Alexander P. Humphrey and *Mr. W. L. Granbery*, with whom *Mr. Hunt Chipley* was on the brief, for respondent.

Mr. Justice McKenna delivered the opinion of the court.

Petition for a rule on the Judge of the District Court of the United States for the Western District of Kentucky,

to show cause why a mandamus should not issue commanding him to vacate the supplemental order of reference entered on March 10, 1913, in the cause entitled *Cumberland Telephone & Telegraph Company* v. *City of Louisville*, pending in said District Court, and to desist from further trying in the cause the question whether the ordinance of March 6, 1909, in litigation in the cause, is confiscatory and void as to the company, and further commanding him to dismiss the bill of complaint, retaining the same on the docket, however, for the purpose of ascertaining the amounts collected by the company from its patrons in the City of Louisville in excess of the rates prescribed in the ordinance, and for the further purpose of distributing the same among the persons entitled thereto.

A rule was issued in accordance with the petition and return thereon duly made by the District Judge.

The suit referred to was brought by the Telephone & Telegraph Company against the city in the Circuit Court, the predecessor of the District Court, on the eighth of March, 1909, and sought an injunction enjoining the City of Louisville from enforcing the ordinance referred to on the ground that the rates prescribed by it were confiscatory. Upon the filing of the bill a temporary restraining order was granted. A motion was also made for an injunction *pendente lite* but was not passed upon till final hearing on the twenty-fifth of April, 1911, when a permanent injunction was decreed, the court adjudging the rates fixed to be confiscatory.

On the fifteenth of June, 1909, the city moved for an order requiring the company to pay into court all sums collected in excess of those fixed in the ordinance. Thereupon the company agreed that if the court make no order in pursuance of the motion it would keep an accurate account of the sums collected in excess of the rates fixed in the ordinance and would, on the final hearing, pay the amounts into court for distribution among those entitled thereto,

provided the ordinance was not declared to be confiscatory. In pursuance of the agreement the court refrained from making the order prayed for and allowed the restraining order to remain in force.

An appeal to this court was taken by the city from the decree of perpetual injunction and the decree was reversed. 225 U. S. 430. This court reviewed the evidence upon which the Circuit Court decided that the rates were confiscatory, and said (p. 436):

"We express no opinion whether to cut this telephone company down to six per cent. by legislation would or would not be confiscatory. But when it is remembered what clear evidence the court requires before it declares legislation otherwise valid void on this ground, and when it is considered how speculative every figure is that we have set down with delusive exactness, we are of opinion that the result is too near the dividing line not to make actual experiment necessary. The Master thought that the probable net income for the year that would suffer the greatest decrease would be 8.60 per cent. on the values estimated by him. The Judge on assumptions to which we have stated our disagreement makes the present earnings 5–10.17 per cent. with a reduction by the ordinance to 3–6.17 per cent. The whole question is too much in the air for us to feel authorized to let the injunction stand.

"Decree reversed without prejudice."

A mandate was issued, the material parts of which are as follows:

"On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed with costs, without prejudice; and that the said defendant, City of Louisville, recover against the said complainant Three thousand nine hundred and forty-five dollars and sixty-five cents for its costs herein expended and have execution therefor.

"And it is further ordered that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of Kentucky for further proceedings not inconsistent with the opinion of this Court."

On the return of the case to the District Court, as successor of the Circuit Court, in obedience to the mandate, the original decree was set aside and the case restored to the docket. Subsequently on motion of the city, the court appointed a special master to take proof of and report the amount, with interest, collected by the company in excess of the rates fixed by the ordinance. Power was given to the master to subpœna witnesses and examine the books and records of the company. A motion of the city to require the company to pay the amount into the court was postponed. A motion of A. Englehard & Sons Company for leave to file a bill of intervention was set for hearing November 12, 1912. The master proceeded to the execution of his duties under the order, but had not completed them at the time the petition herein was filed. The sums in excess of the rate will aggregate more than $100,000.

On March 10, 1913, the District Court (it is alleged, without any motion being made or any further steps taken by any party to the cause), on its own initiative, entered a supplemental order of reference wherein the clerk of the court was appointed a special master to ascertain and report the gross earnings of the company after the rate ordinance went into effect, the gross expenses incurred in operating its property and the net income derived by the company from operating its plant since the ordinance was put into effect.

The court justified this order by its interpretation of the opinion and mandate of this court. The city protested against the entry of the order, denying that it was a proper interpretation of the opinion of this court and insisted

that the District Court, in response to the bill of complaint, should "adjudge that the ordinance in question was not confiscatory and that the complainant take nothing by its bill." And it is now alleged that the cause is at an end so far as the rights of the company to have the ordinance adjudged confiscatory and void are concerned and that the District Court has no further jurisdiction; that the trial of the issue cost the city $20,000, and a new trial will cost it the same sum, and that no appeal can be taken until such trial be had; and, having no adequate remedy but mandamus, the petitioner prays that one issue to require the Judge to vacate his order and to desist from further trying the issue.

It is alleged that the special master who was appointed to ascertain the amounts collected by the company is ready to make his report and will make it in a short time.

It is further alleged the amounts collected in excess of the ordinance are a trust fund held by it for the benefit of the patrons of the company as their rights may appear and that they are entitled to have restitution made to them by the District Court, and that therefore the litigation between the company and the city should not be dismissed absolutely, but should be retained on the docket for the purpose of having collected and distributed the excessive collections. And this relief is prayed in addition to the mandamus.

Due return to the rule was made. It is, in effect, that the court considered the opinion and decree of this court permitted a discretion to retain the case for an actual experiment of the rates, and, thus considering it, made the order of March 10, 1913.

We think the discretion was properly exercised. The terms of the mandate permitted further proceedings, and it is well to recall what had been done. The decree of this court was rendered June 7, 1912. The Telephone Company put the ordinance rates into effect July 1, 1912.

On motion of the City a special master was appointed to take proof and report the amount collected by the company between the latter date and March 8, 1909, and, subsequently after an interchange of views between court and counsel, the order of March 10, 1913, was made. It will be observed, therefore, that an actual experiment of the rates had been voluntarily undertaken and had been in effect for more than eight months before the order under review was entered, and the court conceived that observation of the experiment might secure greater accuracy and confidence in the result, and, besides, inform the court of matters as they progressed.

We repeat, we think the court did not exceed the discretion permitted, and the rule is

Discharged.

IN RE ENGELHARD & SONS COMPANY, PETITIONER.

PETITION FOR WRIT OF MANDAMUS AND RULE.

No. 12, Original. Argued November 10, 1913.—Decided January 5, 1914.

In a suit by a public utility corporation to enjoin enforcement of rates claimed to be confiscatory, the municipality is the proper party to be made defendant, and as such it can represent all parties interested.

The only mode of judicial relief against unreasonable rates is by suit against the governmental authority which established them or is charged with the duty of enforcing them.

It is not competent for each individual having dealings with a regulated public utility corporation to raise a contest in the courts over questions which can be settled in a general and conclusive manner. *Chicago, M. & St. P. Ry.* v. *Minnesota*, 134 U. S. 418.

Where a telephone company has sued the municipality to enjoin rates as confiscatory and an injunction has been granted upon the company paying into a fund the excess collected from the subscribers, the

municipality is the proper party to represent all the subscribers on a reference to determine the amount of refund to which each is entitled after the rates have been held not confiscatory and the injunction dissolved.

Under such conditions a single subscriber cannot represent all the subscribers as a class and the court is not compelled under Equity Rule 38 to allow him to intervene.

In this case, the court below having acted within its discretion in refusing a petition for leave to intervene, mandamus to compel it to grant the petition is refused.

THE facts, which involve the right and power of a municipality to represent the residents and citizens having contracts with a public utilities corporation in a suit brought by such corporation to enjoin as confiscatory, rates established by ordinance of the municipality, are stated in the opinion.

Mr. Clayton B. Blakey, with whom *Mr. Huston Quin* was on the brief, for petitioner.

Mr. Alexander P. Humphrey and *Mr. W. L. Granbery*, with whom *Mr. Hunt Chipley* was on the brief, for respondent.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This petition was argued and submitted with No. 11, Original and prays a mandamus issue commanding respondent to vacate the order made March 10, 1913, in the suit then and now pending, brought by the Cumberland Telephone & Telegraph Company against the City of Louisville, in so far as it denied to petitioner the right to sue for all subscribers of the Telephone & Telegraph Company similarly situated with petitioner, who paid the Telephone & Telegraph Company, during the pendency of the injunction against a certain rate ordinance enacted

by the city, sums in excess of the rates fixed in the ordinance, and commanding him to enter an order permitting petitioner to sue for and represent and act in behalf of such subscribers with respect to the restitution of the sums so collected.

If this cannot be done, then petitioner prays for a rule on said Judge to show cause why a mandamus shall not issue to grant petitioner an appeal prayed for from the order of March 10, 1913, and refused by him.

The petition recites the proceedings in the District Court substantially as they are recited in the petition in *In re City of Louisville*. It adds these details: That while the injunction was in force at least 8000 of the subscribers of the Telephone Company paid for its service sums in excess of the amounts fixed by the ordinance; that the amounts paid by them ranged from $5.00 to $100.00, the majority of the payments being less than $20.00. The total amount so paid will exceed $100,000. None of the subscribers were parties to the litigation, and petitioner, on September 28, 1912, presented and asked to have filed a bill of intervention in the cause and that it might be permitted to sue for and represent all of the subscribers who had so paid the Telephone Company. The petition was refused.

That on February 15, 1913, and after the new equity rules had been promulgated by this court, petitioner again moved for leave to file its bill of intervention and for leave to sue in behalf of all of such subscribers. The motion was denied.

A petition for an appeal was presented and denied on April 18, 1913.

That during the time the Telephone Company collected rates from its subscribers in excess of the new ordinance rates some of the subscribers had business telephones on a direct line, and some on a party line; some had residence telephones on a direct line and others on a party line. All

of the subscribers who paid the excess rates paid them under identically similar circumstances, and in the same situation with respect to their right to have the Telephone Company restore the excess. The petitioner had a telephone on a party line and more than 3000 of the subscribers of the company had the same kind of telephone.

That the effect of the order of the court is to deny the right of the subscribers to be represented in the cause upon the correctness of the master's report, which will be filed in the next thirty days, and their rights will be finally adjudicated without allowing them to appear or have their day in court. There are 8000 subscribers thus situated who have no adequate remedy against the action of the court, but mandamus.

A copy of the complaint in intervention is attached to the petition. It sets out the facts as in the petition, but more in detail, with additions in an attempt to show a common interest in all of the subscribers to the right of petitioner to appear for itself and for them. It prays that petitioner be made a party to the cause for itself and the other subscribers; that the Telephone Company, upon the coming in of the master's report, pay into the court the sums collected in excess of the ordinance rates, with interest at 6 per cent., to be distributed for the benefit of those concerned. The bill of intervention was permitted to be filed so far as to permit petitioner to assert its own claim, but so far as it prayed to be permitted to act or claim for any other but itself its prayer was denied, with the privilege, however, to renew the same upon making it appear to the court that it had authority from "other specifically named claimants" to act for them.

The basis of petitioner's contention is that it has a common interest with the other subscribers of the Telephone Company and may therefore intervene for itself

and for them. Equity Rule 38[1] is cited to sustain the contention. Petitioner is not seeking, however, as it says, "for itself or for any one the recovery of a specific portion of the fund." The alternative of this would seem to be the assertion of a right to intervene and become a party to all the controversies upon which the fund may depend, and this may mean either in conjunction with the city or independently of it, and, it may be, in exclusion of it. It is said that the city is acting only for the good of the public but that that is not "the criterion to determine whether the parties in interest have the representation to which they are entitled." It is further said that however earnest the city may be to obtain restitution to the subscribers of the Telephone Company, it might not appeal from an adverse ruling. Who is going to represent the subscribers, it is asked, upon the question of fees to the master and the costs, and the costs on appeal, and who raise the question of interest? This enumeration presents the purpose of the petition for intervention. In other words, the apprehension is expressed and made a basis of the petition for leave to intervene, that the city, which has so far conducted the litigation—and with success—may or will relax its attention and energy to the detriment of petitioner and the other subscribers of the company. This does not present a very strong plea against the discretion the court exercised, supposing the court had discretion to grant or refuse the petition.

It is contended, however, that the court had no discretion but to grant the petition and that Equity Rule 38 was peremptory of the right of petitioner. It recognizes the principle, it is said, "that the rights of persons should not be passed upon unless such persons are before the court or are represented by some one who is interested similarly

[1] See 226 U. S., Appendix, p. 11, for Equity Rule No. 38, at length.

with them." And cases are cited which, it is urged, also recognize and illustrate the principle.

We have given due consideration to the cited cases and the argument of counsel, and we are of opinion that the District Court did not exceed its discretion in making the order under review. The city was the proper party to make defendant in the suit as representative of all interested, and so throughout the whole proceedings. If we may suppose in a case like the present one there can be a distinction between the public interest and private interest, the subscribers of the company being the public, the representation of both interests was adequately fulfilled. It was in consequence of the motion of the city that the telephone company agreed to keep account of charges in excess of the ordinance rates, and, if they should finally be decided to be illegal, to pay into court the excess sums for distribution among its subscribers. It was the representative of all interests to provide for the creation of the fund; it is properly the representative of all interests to see to its proper distribution. This is a necessary deduction from the cases. It is the universal practice, sustained by authority, that the only mode of judicial relief against unreasonable rates is by suit against the governmental authority which established them or is charged with the duty of enforcing them. As was said by Mr. Justice Miller, in *Chicago, Mil. & St. P. Railway Co.* v. *Minnesota*, 134 U. S. 418, 460, it was not competent for each individual having dealings with the regulated company "to raise a contest in the courts over the questions which ought to be settled in this general and conclusive way." The rule has been repeated in subsequent cases.

Indeed, what issue is involved except that of the main suit—the character of the rates—that needs the intervention of petitioner? As to who are subscribers of the company, there can be no controversy, nor as to the amounts to be returned to them. Both names and amounts could be,

indeed had been, ascertained by the master, under an order made upon motion of the city. Petitioner, however, was not able to produce authority from any subscriber to appear for him, notwithstanding the order of respondent permitted petitioner to renew its motion whenever it should "be made to appear to the court in any appropriate way that other specifically named claimants" desired petitioner to act for them. And yet, against these facts, against, as counsel for respondent says, the possibility of a presumption that the other subscribers of the telephone company do not desire petitioner to represent them, it prays a mandamus to compel such representation.

We cannot yield to the prayer.

Rule discharged.

CITY OF LOUISVILLE *v.* CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY.

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

No. 538. Argued November 10, 1913.—Decided January 5, 1914.

Decided on authority of *In re Louisville, ante,* p. 639.

THE facts are stated in the opinion.

Mr. Pendleton Beckley, with whom *Mr. J. W. S. Clements* and *Mr. Stuart Chevalier* were on the brief, for appellant.

Mr. Alexander P. Humphrey and *Mr. W. L. Granbery,* with whom *Mr. Hunt Chipley* was on the brief, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Appeal from the order of March 10, 1913, referred to in Nos. 11 and 12, Original, and which order it was the object of the petition for mandamus passed on in No. 11 to command the Judge of the District Court to vacate. The appeal also includes certain other orders which preceded the making of that order. The question, which is fundamental of all, is whether the decision and decree of this court set out in No. 11, Original, and the mandate issued thereon permitted further proceedings in the suit or necessarily required its dismissal. This is the general basis of the assignments of error, and as included in it, special objection is made to the instructions given the master in the orders appealed from, to the refusal of the court to order the Telephone Company to pay into court for immediate distribution among those entitled thereto, whatever sums the company collected in excess of the ordinance rates, and deciding instead that a bond should be required of the company for the restitution of the amounts if the ordinance rates should ultimately be held not to be confiscatory. These objections are repeated in the usual way of assignments of error.

The discretion vested in the court, we considered in No. 11, Original, and repetition would serve no purpose. For the reasons there given the order of the District Court is

Affirmed.

UNITED STATES OF AMERICA *v.* ANTIKAMNIA CHEMICAL COMPANY.

ERROR TO AND APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 118. Argued December 9, 1913.—Decided January 5, 1914.

Where the validity of regulations made by officers to whom power to make them is delegated by the Food and Drugs Act of 1906 is denied, an authority exercised under the United States is drawn in question, and not merely the construction of the statute, and this court has jurisdiction to review the judgment of the Court of Appeals of the District of Columbia. *Steinmetz* v. *Allen*, 192 U. S. 543, followed, and *United States ex rel. Taylor* v. *Taft*, 203 U. S. 461, distinguished.

In this case the question of authority of the officers to whom the power to make regulations is delegated by the Food and Drugs Act is substantial and not frivolous. *United States* v. *Grimaud*, 220 U. S. 506 distinguished.

The purpose of the Food and Drugs Act of 1906 is to secure purity of food and drugs and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it.

The power given by § 3 of the Food and Drugs Act to the specified heads of departments to make regulations is an administrative power and not one to alter, or add to, the act, and the extent of the power must be determined by the purpose of the act and the difficulties its execution might encounter.

Regulation No. 28 for the enforcement of the Food and Drugs Act requiring labels to state not only what drugs contain but also what the contents are derivatives of, is within the delegated power of the act and does not enlarge or alter its provisions.

It is a violation of the Food and Drugs Act of 1906 and of Regulation No. 28 to label tablets as containing acetphenetidin without stating that acetphenetidin is a derivative of acetanilid.

The Food and Drugs Act itself requires that not only primary substances be labelled but also their derivatives, and no regulations are necessary to support this requirement.

The purpose of a statute is the ever insistent consideration in its interpretation, and this court will not attribute to a statute so

important as the Food and Drugs Act the defect of ineffectiveness as to its execution.

The fact that a statute has penal character does not mean that it should not be given its reasonable intendment.

37 App. D. C. 343, reversed.

THE facts, which involve the construction of provisions of the Food and Drugs Act of 1906 in regard to labelling drugs, are stated in the opinion.

The Solicitor General, with whom former *Solicitor General Lehmann* and *Mr. Karl W. Kirchwey* were on the brief, for the United States:

This court has jurisdiction. *Smoot* v. *Heyl,* 227 U. S. 518.

The regulation violated was within the power of the Secretaries to make uniform rules and regulations, and its violation constituted a misbranding within the meaning of the act.

Debates in Congress may be looked to in order to show the evil which Congress sought to remedy. *American Twine Co.* v. *Worthington,* 141 U. S. 468; *Binns* v. *United States,* 194 U. S. 486; *Blake* v. *National Banks,* 23 Wall. 307; *Holy Trinity Church* v. *United States,* 143 U. S. 457; *Jennison* v. *Kirk,* 98 U. S. 453.

This court will recognize well-known scientific facts upon which Congress acted. *Austin* v. *Tennessee,* 179 U. S. 343; *Muller* v. *Oregon,* 208 U. S. 412; *Schollenberger* v. *Pennsylvania,* 171 U. S. 1.

Permitting name of derivative alone to be stated on label would defeat purpose of act.

Reasonably construed, § 8 of the act requires a statement of the name of the parent substance; and the regulation to that effect was purely administrative.

The act is not penal for purposes of strict construction. *Cliquot's Champagne,* 3 Wall. 114; *443 Cans of Egg Product,* 226 U. S. 172; *Hipolite Egg Co.* v. *United States,* 220 U. S.

45; *N. Y., N. H. &c. R. R.* v. *Int. Com. Comm.*, 200 U. S. 361; *Smythe* v. *Fiske*, 23 Wall. 374; *Taylor* v. *United States*, 3 How. 197; *United States* v. *Five Boxes of Asafoetida*, 181 Fed. Rep. 561; *United States* v. *Hodson*, 10 Wall. 395; *United States* v. *Stowell*, 113 U. S. 1.

Even penal statutes should be construed to effectuate the legislative intent. *Northern Securities Co.* v. *United States*, 193 U. S. 197; *United States* v. *Harris*, 177 U. S. 305; *United States* v. *Lacher*, 134 U. S. 624.

The only alternative is that § 8 was left incomplete and the Secretaries were intended and authorized to fill in the outline. *Pickett* v. *United States*, 216 U. S. 456; *United States* v. *Hartwell*, 6 Wall. 385.

The power to make regulations having the force of law may be conferred by general language. *Bong* v. *Campbell Art. Co.*, 214 U. S. 236; *Buttfield* v. *Stranahan*, 192 U. S. 470; *Caha* v. *United States*, 152 U. S. 211; *Coopersville Creamery Co.* v. *Lemon*, 163 Fed. Rep. 145; *In re Kollock*, 165 U. S. 526; *Roughton* v. *Knight*, 219 U. S. 537; *United States* v. *Bailey*, 9 Pet. 238; *West* v. *Hitchcock*, 205 U. S. 80.

The power delegated to the Secretaries was constitutional. *Buttfield* v. *Stranahan, supra; Field* v. *Clark*, 143 U. S. 649; *In re Kollock*, 165 U. S. 526; *St. Louis & I. M. Ry.* v. *Taylor*, 210 U. S. 281; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *United States* v. *Breen*, 40 Fed. Rep. 402; *United States* v. *Grimaud*, 220 U. S. 506.

The statement on the label of each package that no acetanilid was contained therein was false and misleading.

A statement may be misleading under § 8, although literally true. *Brina* v. *United States*, 179 Fed. Rep. 373; *Frank* v. *United States*, 192 Fed. Rep. 864; *Schraubstadter* v. *United States*, 199 Fed. Rep. 568; *United States* v. *Morgan*, 181 Fed. Rep. 587; *United States* v. *100 Cases of Apples*, 179 Fed. Rep. 985; *United States* v. *Scanlon*, 180 Fed. Rep. 485; *United States* v. *75 Boxes of Pepper*, 198

Fed. Rep. 934; *United States* v. *Ten Barrels of Vinegar*, 186 Fed. Rep. 399.

The statement was calculated to suggest that no derivative of acetanilid was contained in the tablets.

Section 8 was intended to cover just such deceptions as to identity. *United States* v. *Johnson*, 221 U. S. 488.

Mr. D. W. Baker, with whom *Mr. Joseph C. Sheehy*, *Mr. Frank J. Hogan* and *Mr. Wilton J. Lambert* were on the brief, for defendant in error and appellee:

The libel fails to charge a misbranding of the article therein within the meaning of the act of June 30, 1906.

The act gives neither authority nor power to the several Secretaries to promulgate a regulation requiring the name of the parent substance to be added.

The statement that no acetanilid is contained in the drug is neither misleading nor false. In support of this contention, see *443 Cases of Egg Product* v. *United States*, 226 U. S. 172; *United States* v. *Antikamnia Co.*, 37 App. D. C. 343; *Hipolite Egg Co.* v. *United States*, 220 U. S. 45; *United States* v. *Johnson*, 177 Fed. Rep. 313; *Huntington* v. *Attrill*, 146 U. S. 667; *Chouteau* v. *United States*, 102 U. S. 603; *Boyd* v. *United States*, 116 U. S. 616; *Coffey* v. *United States*, 116 U. S. 436; *Lees* v. *United States*, 150 U. S. 476; *Hepner* v. *United States*, 213 U. S. 111; *United States* v. *Harris*, 177 U. S. 305; *United States* v. *Lacher*, 134 U. S. 629; *Northern Securities Co.* v. *United States*, 193 U. S. 358; *Todd* v. *United States*, 158 U. S. 282; *Fozer* v. *United States*, 52 Fed. Rep. 919; *United States* v. *Traction Co.*, 34 App. D. C. 597; *Morrill* v. *Jones*, 106 U. S. 566; *United States* v. *200 Barrels of Whiskey*, 95 U. S. 751; *United States* v. *Three Barrels of Whiskey*, 77 Fed. Rep. 965; *Taylor* v. *Kercheval*, 82 Fed. Rep. 504; *United States* v. *Symonds*, 120 U. S. 46; *Williamson* v. *United States*, 207 U. S. 425; *Payne* v. *Railway Publishing Co.*, 20 App. D. C. 581; *United States* v. *Eaton*, 144 U. S. 677; *United States* v.

Sandfuhr, 145 Fed. Rep. 49; *United States* v. *Grimaud*, 220 U. S. 506; *Standard Oil Co.* v. *United States*, 222 U. S. 77; *United States* v. *George*, 228 U. S. 14; *Brown* v. *Piper*, 91 U. S. 37; *Manufacturing Co.* v. *Adkins*, 36 Fed. Rep. 554; *Engraving Co.* v. *Hoke*, 30 Fed. Rep. 444; *Lagler* v. *Bye*, 42 Ind. App. 592; *Diversey* v. *Smith*, 103 Illinois, 390; *Commonwealth* v. *Crane*, 158 Massachusetts, 219; *State* v. *Mann*, 2 Oregon, 241; *Brown* v. *State*, 131 Wisconsin, 543.

See page 3, Pharmacopœia of the United States of America, defining Acetanilid and Acetphenetidin, and page 8, United States Dispensatory, giving uses and effects of Acetanilid and Acetphenetidin.

See also Report No. 301 of Senate Committee on Manufactures, 58th Cong., 2d Sess., Jan. 15, 1904, accompanying Senate Bill 198, relating to "Adulteration of Foods, etc.," and containing statements of Dr. Wiley, of Department of Agriculture, relative to phenacetine (Acetphenetidin) and Acetanilide and hearings before Senate Committee, January 20, 1903, on H. R. 3109, being the Pure Food and Drugs Act, containing statements relative to the use of Acetanilid as an adulteration of or substitution for Acetphenetidin (Phenacetine).

An examination of 2350 judgments filed by the Agricultural Department up to February 1, 1913, shows that in no case, except the instant case, does the libel, indictment, or information charge a violation of a rule or regulation of the Department.

In No. 438, *The Ice Cream Case, United States* v. *Bishof*, there was charged a violation of the law and not any regulation of the Department.

Regulations have been held valid not under the Pure Food Act, but under act of Congress, March 3, 1903.

In *Hurdle Brand Holland Gin*, No. 807, the libel charged a violation of the law and not of any regulation. The court held the label was sufficient under the law.

The act of June 3, 1903, has been before the court on

various occasions, some of the decisions holding the power given valid, others that it is void. See *United States* v. *Frank*, 189 Fed. Rep. 195; *United States* v. *St. Louis Coffee Mills*, 189 Fed. Rep. 191; *Coopersville Creamery Co.* v. *Lemon*, 163 Fed. Rep. 145.

See also *United States* v. *11,150 Pounds of Butter*, 195 Fed. Rep. 665, holding that the Secretary of the Treasury cannot, by his regulations, alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. *St. Louis Bridge Co.* v. *United States*, 188 Fed. Rep. 191.

The admission of the Solicitor General that there cannot be a prosecution without this regulation is an admission that there cannot be an offense without this regulation, and therefore the regulation adds something to the statute that is not there. *McDermott* v. *Wisconsin*, 228 U. S. 115, distinguished.

The regulations in no sense have the force of law; at most they form a rule of conduct, which if not followed will place a person in a position where the Secretary will order the District Attorney to proceed under the law to prosecute for a violation of the law.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Libel for the seizure and condemnation of certain drugs under the provisions of the act of Congress of June 30, 1906, commonly known as the Food and Drugs Act, c. 3915, 34 Stat. 768.

The libel alleges that the drugs are in the possession and custody of The Wholesale Drug Exchange, a body corporate, at a numbered place in the City of Washington.

The drugs, it is alleged, are intended to be used for the cure and mitigation and prevention of diseases of man. They are described as follows:

"Twenty packages, more or less, of said drug, labelled and branded as follows: 'Antikamnia Tablets, Contain 305 grains of acetphenetidin, U. S. P. per ounce, Guaranteed by the Antikamnia Chemical Company, under the Food and Drugs Act, June 30, 1906, U. S. Serial Number 10. The Antikamnia tablets in this original ounce package contain no acetanilid, antifebrin, antipyrin, morphine, opium, codein, heroin, cocaine, alpha or beta eucaine, arsenic, strychnine, chloroform, cannabis indica, or chloral hydrate, Antikamnia tablets five grains. One ounce Antikamnia Tablets. Manufactured in the United States of America by the Antikamnia Chemical Co., St. Louis, U. S. A.'

"Also seventy other packages, more or less, of said drug, labelled and branded as follows: 'Antikamnia and Codein Tablets. Contain 296 grains acetphenetidin, U. S. P. per ounce. Contain 18 grains sulp. codein per ounce. Guaranteed by the Antikamnia Chemical Company, under the Food and Drugs Act, June 30, 1906. U. S. Serial Number 10. The Antikamnia and Codein tablets in this original ounce package contain no acetanilid, antifebrin, antipyrin, morphine, opium, heroin, cocaine, alpha or beta eucaine, arsenic, strychnine, chloroform, cannabis indica, or chloral hydrate. One ounce Antikamnia and Codein Tablets. Manufactured in the United States of America by the Antikamnia Chemical Co., St. Louis, U. S. A.'

"Also ten other packages, more or less, of said drug, labelled and branded as follows: 'Antikamnia and Quinine Tablets. Contain 165 grains acetphenetidin, U. S. P. per ounce. Guaranteed by the Antikamnia Chemical Company under the Food and Drugs Act, June 30, 1906, U. S. Serial Number 10. The Antikamnia and Quinine Tablets in this original ounce package contain no acetanilid, antifebrin, antipyrin, morphine, opium, codein, heroin, cocaine, alpha or beta eucaine, arsenic, strychnine,

chloroform, cannabis indica, or chloral hydrate. One ounce Antikamnia and Quinine Tablets. Manufactured in the United States of America by the Antikamnia Chemical Co., St. Louis, U. S. A.'"

The ground of confiscation and condemnation alleged is that all of the packages of the drugs contain a large quantity and proportion of acetphenetidin, which, it is alleged, is a derivative of acetanilid, and that under the provisions of the act of Congress and of the regulations lawfully made thereunder it is provided and required that the label on each of the packages shall bear a statement that the acetphenetidin contained therein is a derivative of acetanilid; and yet, it is alleged that each and all of the packages fail to comply with such provisions.

It is also alleged that the packages are further misbranded, in that the labels thereon are false and misleading, for the reason that each and all of them bear the statement that no acetanilid is contained therein, and that the statement imports and signifies that there is no quantity of any derivative of acetanilid contained in the drug.

A warrant of arrest was issued upon which the marshal duly made return that he had arrested twenty packages of Antikamnia tablets, ten packages of Antikamnia quinine tablets and sixty-three packages labeled "Antikamnia and Codein Tablets," and otherwise duly executed the warrant.

The Antikamnia Chemical Company, appellee and defendant in error, alleging itself to be the owner of the drugs, petitioned to be made a defendant in the libel. The petition was granted, and the company thereupon filed the exceptions to the libel. The exceptions negative in detail the charges of the libel and assert conformity in the labelling of the packages to the act of Congress of June 30, 1906, 34 Stat. 768, p. 770, quoting its eighth section as follows: ". . . . or if the package fail to bear a statement on the label of the quantity or proportion of

any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilid, or any derivative or preparation of any such substances contained therein." And it is averred that the act does not provide that there should be added to any derivative of any of the substances contained therein the name of the parent substance, and the act cannot be added to or enlarged by requiring the company to add to the name of a known article, the fact that the article is a derivative of any of the substances mentioned in the act. It is averred, therefore, that the packages are not misbranded and that the statement on the labels that no acetanilid is contained therein is in no way false or misleading because the libel does not allege that there is acetanilid in the packages, and, therefore, the statement instead of being false and misleading is, according to the allegations of the libel, true.

The exceptions were sustained and the libel dismissed.

It was stipulated that Food Inspection Decision No. 112, issued January 27, 1910 by the United States Department of Agriculture was considered by the court upon the hearing of the cause and should be included in and be considered part of the record on appeal.

The decision quotes § 8 of the act, states that the Attorney General, in an opinion rendered January 15, 1909, held that a derivative is a substance so related to one of the specified substances "that it would be rightly regarded by recognized authorities in chemistry as obtained from the latter 'by actual or theoretical substitution,' and it is not indispensable that it should be actually produced therefrom as a matter of fact;" further that the labelling of derivatives, as prescribed by § 8, is a proper subject conferred upon the Department by § 3, and that a rule or regulation requiring the name of the specified substance to follow that of the derivative would be in harmony with the general purpose of the act, and an

appropriate method by which to give effect to its provisions.

In conformity to this opinion, Regulation 28 of the Rules and Regulations for the enforcement of the Food and Drugs Act was amended as follows: ". . . Acetanilide (antifebrine, phenylacetamide). Derivatives—Acetphenetidine, . . . (g) In declaring the quantity or proportion of any of the specified substances the names by which they are designated in the act shall be used, and in declaring the quantity or proportion of the derivatives of any of the specified substances, in addition to the trade name of the derivative, the name of the specified substance shall also be stated, so as to indicate clearly that the product is a derivative of the particular specified substance."

The decree of the Supreme Court of the District dismissing the libel was affirmed by the Court of Appeals.

The case is not in very broad compass, though the arguments of counsel are somewhat elaborate. The libel is prosecuted for the condemnation of one hundred packages of Antikamnia tablets as being misbranded in violation of the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768. The tablets contain acetphenetidin and the labels so state, and the proportion of the substance. It is a derivative of acetanilid, but the labels do not so state but do state that the tablets contain no acetanilid. And these omissions, it is contended by the Government, constitute a violation of the statute and of Regulation No. 28 as amended. The chemical company contends that the first statement is not required by the law and that the second statement is true, and therefore cannot be false or misleading.

Preceding the discussion of these contentions a question of jurisdiction is presented by the chemical company and a motion to dismiss is made on the ground that only the construction of the statute is involved in the decision of

the court below. The company also moves for an affirmance of the judgment on the ground that the appeal is frivolous. *Contra* the Government contends that the Court of Appeals held invalid the regulation requiring the name of the primary substance as well as that of the derivative to be stated on the label; and that there is not only drawn in question, but so far denied, an authority exercised under the United States. We concur in this view. The validity of the regulation was and is denied. Its validity may, indeed, rest on the statute, but so did the validity of the rule of the Patent Office passed on in *Steinmetz* v. *Allen*, 192 U. S. 543. We there said (p. 556) of a rule of practice established by the Commissioner of Patents under a section of the Revised Statutes, "It thereby became a rule of procedure and constituted, in part, the powers of the primary examiner and Commissioner. In other words, it became an authority to those officers, and, necessarily, an authority 'under the United States.' Its validity was and is assailed by the plaintiff in error. We think, therefore, we have jurisdiction, and the motion to dismiss is denied." *United States ex rel. Taylor* v. *Taft, Secretary of War*, 203 U. S. 461, is not in antagonism to this ruling. In that case the relator was dismissed from the public service by an order of the Secretary of War as representative of the President. She sought restoration by mandamus. It was denied and she brought the case to this court on the ground that the validity of an authority exercised under the United States was drawn in question. Dismissing the case, this court said that as she did not question the authority of the President or his representative to dismiss her but contended only that certain rules and regulations of the civil service had not been observed, the validity of an authority exercised under the United States was not drawn in question but only the construction and application of regulations of the exercise of such authority. On p. 465 it was said

Steinmetz v. *Allen* was not to be contrary, "for there the validity of a rule constituting the authority of certain officers in the Patent Office was drawn in question."

Motion to dismiss is denied.

Joined with the motion to dismiss, we have seen, was a motion to affirm on the ground that the question of the authority of the Secretaries to make the regulation is frivolous in view of the decisions in *United States* v. *Grimaud*, 220 U. S. 506; *Williamson* v. *United States*, 207 U. S. 425 and other cases. How far this contention is tenable will be developed as we proceed with the consideration of the act and the power of the Secretaries under it.

The purpose of the act is to secure the purity of food and drugs and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it.

Section 3, 34 Stat. 768, gives the Secretary of the Treasury, the Secretary of Agriculture and the Secretary of Commerce and Labor, power to "make uniform rules and regulations for carrying out the provisions" of the act and the power to collect specimens of foods and drugs offered in interstate and foreign commerce. It adopts the definitions of the United States Pharmacopoeia or National Formulary and provides (§ 8, 34 Stat., p. 770) that the term "misbranded" as used in the act "shall apply to all drugs . . . the package or label of which shall bear any statement, design or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular." And, further, in case of drugs, an article shall be deemed to be misbranded "if the package fail to bear a statement on the label of the quantity or proportion" of certain enumerated substances "or acetanilid, or any derivative or preparation of any such substances contained therein."

These are the applicatory provisions. How are they to be construed?

First, as to the power of the Secretaries. It is undoubtedly one of regulation only—an administrative power only—not a power to alter or add to the act. The extent of the power however, must be determined by the purpose of the act and the difficulties its execution might encounter. The fact that a council of three Secretaries of governmental departments was given power to make the rules and regulations for the execution of the law shows how complex the matters dealt with were considered to be, and the care that was necessary to be taken to guard against their defeat or perversion. The composition of drugs is a matter of technical skill, their denomination often by words of scholastic origin, conveying no meaning to the uninformed, their uses and abuses learned only by experience, beneficial or evil. It was this experience that the law sought to avail itself of and to avail itself against the ever increasing powers of the laboratory or the disguises of a technical nomenclature. Hence the provision of the law that the term "drug" as used in the act shall include all medicines and preparations recognized in the United States Pharmacopoeia or National Formulary for internal or external use, and hence also the provision that a drug or food product is misbranded in case it fails to bear a statement on the label of the quantity or proportion of certain enumerated substances, including acetanilid, "or any derivative or preparation of any such substance contained therein." Experience had demonstrated the quality of those substances, their effects had become common knowledge; their names, therefore, were all the warning it was necessary for the law to give. But derivatives of them might, probably would, be of their quality, so derivatives of them were to be guarded against, and the law hence further provided that the labels on them should state the "quantity or proportion" of "any derivative or preparation" of them. This much is clear—there is no obscurity in the words and purpose of the law. The

query then occurs, such being the words and purpose, if the quantity or proportion of the substances or any derivative or preparation of them must be stated, is it administrative of the law or additive to it to require by regulation that not only the name of the derivative or preparation be stated but from what substance derived or of what it is a preparation? It certainly cannot be said that the purpose of the law is not exactly fulfilled by the regulation. If it fulfills the purpose of the law it cannot be said to be an addition to the law, unless, indeed, it can be contended that the law provided a means for its defeat by the easy device of mysterious names. There is illustration in the present case. What information does the use of the word "acetphenetidin" convey to anybody of its good or evil origin? If it be said that the like question may be asked of any of the primary substances, we reply that they are the precautions of the law and adopted as such because they had demonstrated themselves, the value of their use, the detriment of their abuse, and it was believed that their names would carry no deception.

But let us turn from the power of the Secretaries to the law itself and inquire if it needs the assistance of a regulation. It is the contention of the Government that it does not, that its requirement that the primary substances should be labelled and that their derivatives should be labelled means, necessarily, that it should be stated of what they are the derivatives to make the warning of the labels complete. A great deal of what we have said in discussing the power of the Secretaries applies to this contention and supports it. The purpose of the law is the ever insistent consideration in its interpretation. The purpose is to prevent the surreptitious sale of certain noxious drugs or their derivatives, the latter supposedly partaking of the quality of parent article and as effective of evil consequences. This being the purpose, did the law leave it unexecuted? We cannot attribute to it such

defect, and a serious defect it might be. Nor can we consider as a case of omission that which involves so definitely the mischief which was intended to be redressed and which is fairly within the language of the law. And we say this without regard to the various illustrations contained in the Government's brief of the deceptions which can be practiced by using the name of the derivative alone, for the chemical company insists that we may not, in the absence of allegations and proof, look for knowledge in the encyclopedias, or medical lexicons or to trade practices for trade disguises, actual or possible. It is not necessary to enter upon the challenged ground. The law furnishes its own tests of what the labels should reveal, and we may grant, for the argument's sake, as contended, that it has penal character; but this does not mean that it should not be given its reasonable intendment. There is no hardship in this either to the manufacturer or the seller of drugs. They surely know what they make or vend—know whether it is primary or of what a derivative—and the law requires only that they put their knowledge on the labels for the information of purchasers. No serious burden is thereby imposed on honest business. Indeed, it makes the label on the packages an assurance as well as a warning and benefits all concerned, manufacturer, seller and purchaser. And this is the interest of the public health.

Decree reversed and cause remanded with direction to reverse the decree of the Supreme Court and remand the cause with direction to overrule the exceptions to the libel.

MULCREVY, AND FIDELITY AND DEPOSIT COMPANY *v.* CITY AND COUNTY OF SAN FRANCISCO.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 133. Argued December 12, 15, 1913.—Decided January 5, 1914.

An act of a State will not be construed in such a manner as to raise questions concerning relations of state officers to the State if such a construction can be avoided.

Quære, whether in this case the writ of error should not have run to the lower state court, the higher court having refused to transfer the cause for review; but the Chief Justice of the State having allowed the writ prior to the decision of this court in *Norfolk Turnpike Co.* v. *Virginia*, 225 U. S. 264, it will not be dismissed.

The construction given by the highest court of California to the provisions in the state statute regarding the compensation of county clerks, followed; and *held* that the portion of fees retained under the act of Congress of June 29, 1906, c. 3592, 34 Stat. 596, by a county clerk in naturalization proceedings should be accounted for by him to the county as public moneys.

The fact that a state or county official may also under an act of Congress be an agent of the National Government does not affect his relations with the county and relieve him from accounting for fees received from such Government if his contract requires him to account for all fees received by him even though, so far as the National Government is concerned, he is entitled to retain them in whole or in part for services rendered.

THE facts, which involve the right of a county clerk of San Francisco to retain a portion of the fees received by him for naturalization of aliens as citizens of the United States, are stated in the opinion.

Mr. James F. Tevlin, with whom *Mr. Samuel M. Shortridge* and *Mr. L. A. Redman* were on the brief, for plaintiffs in error.

Mr. J. F. English, with whom *Mr. Percy V. Long* was on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action brought in the Superior Court of the City and County of San Francisco against plaintiffs in error to recover from them the sum of $2,972, with interest from certain dates, received by plaintiff in error Mulcrevy in his official capacity as county clerk and *ex officio* clerk of the Superior Court of the City and County of San Francisco in certain naturalization proceedings. Judgment was rendered on the pleadings against plaintiffs in error. It was affirmed on appeal.

Mulcrevy was elected county clerk of the City and County of San Francisco at the November election, 1905, for the term of two years commencing on January 8, 1906. He duly filed his official bond with plaintiff in error, the Fidelity and Deposit Company of Maryland, his surety, which was conditioned that he should faithfully perform all official duties which were then or thereafter might be imposed upon him by law, ordinances, or the charter of the City and County. His salary was fixed by the charter at the sum of $4,000 and it was provided as follows: "The salaries provided in this charter shall be in full compensation for all services rendered, and every officer shall pay all moneys coming into his hands as such officer, no matter from what source derived or received, into the treasury of the City and County of San Francisco within twenty-four hours after the receipt of the same."

By his election Mulcrevy became *ex officio* the clerk of the Superior Court. After he had entered upon the discharge of his duties, on June 29, 1906, Congress passed an act, c. 3592, 34 Stat. 596, entitled "An Act to establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States." Jurisdiction in naturalization proceedings was conferred by the act on the Fed-

eral courts and certain state courts, and the duties of the clerks were set forth. Fees were prescribed, and it was provided that the clerks of the courts collecting them were authorized to retain one-half thereof, the other half to be accounted for in their quarterly accounts which they were required to make to the Bureau of Immigration and Naturalization. The amount retained by the clerk, however, it was provided should not exceed in any one fiscal year the sum of $3,000. If fees in excess of $6,000 be collected in any one year the clerk might be allowed by the Secretary of Commerce and Labor additional compensation for additional clerical assistance out of the moneys received by the United States.[1]

Under the provisions of the act as clerk of the Superior Court in naturalization proceedings, Mulcrevy collected

[1] "SEC. 13. . . . The clerk of any court collecting such fees is hereby authorized to retain one-half of the fees collected by him in such naturalization proceeding; the remaining one-half of the naturalization fees in each case collected by such clerks, respectively, shall be accounted for in their quarterly accounts, which they are hereby required to render the Bureau of Immigration and Naturalization, . . .

"Provided, That the clerks of courts exercising jurisdiction in naturalization proceedings shall be permitted to retain one-half of the fees in any fiscal year up to the sum of three thousand dollars, and that all fees received by such clerks in naturalization proceedings in excess of such amount shall be accounted for and paid over to said Bureau as in case of other fees to which the United States may be entitled under the provisions of this Act. The clerks of the various courts exercising jurisdiction in naturalization proceedings shall pay all additional clerical force that may be required in performing the duties imposed by this Act upon the clerks of courts from fees received by such clerks in naturalization proceedings. And in case the clerk of any court collects fees in excess of the sum of six thousand dollars in any one year, the Secretary of Commerce and Labor may allow to such clerk from the money which the United States shall receive additional compensation for the employment of additional clerical assistance, but for no other purpose, if in the opinion of the said Secretary the business of such clerk warrants such allowance." 34 Stat. 600.

$5,944 and accounted for one-half thereof as required by the act. The other half he kept for himself, his contention being that it was intended for himself by the act of Congress as pay for his extra work and clerical assistance, the fees not having been received by him in his official capacity but merely as an agent designated by the act of Congress to perform services in naturalization proceedings.

It appears from the opinion of the District Court of Appeal that the total salary list fixed and allowed to Mulcrevy's office amounts to $58,600.00. And it is provided by the charter that when an officer shall require additional deputies, clerks or employés the same may be allowed by supervisors if upon investigation the Mayor determines the same to be necessary.

A question of jurisdiction is raised. From the judgment of the Superior Court the case was taken by appeal to the Supreme Court of the State, and properly taken, the latter court having jurisdiction, the amount involved being over $2,000. The Supreme Court, exercising the power given to it by the constitution of the State, ordered the cause to be heard by the District Court of Appeal of the First Appellate District of the State. The record was accordingly transmitted to the latter court, three printed copies, however, being retained in the Supreme Court. Upon the rendition of the judgment of the District Court of Appeal affirming the judgment of the Superior Court, a petition was filed in the Supreme Court for transfer of the cause to it. The petition was denied as follows:

"By the Court: The petition to have the above entitled cause heard and determined by this Court after Judgment in the District Court of Appeal for the First Appellate District is denied.

"Beatty, C. J."

A petition for writ of error was then presented to the Chief Justice of the Supreme Court which recited that that court was the highest court of the State in which a

decision of the cause could be had. The writ was allowed by the Chief Justice. A question was raised at the time as to which court the writ should run and it seemed to be the opinion of the Chief Justice, as it was of counsel, that by the petition for transfer of the cause from the District Court of Appeal to the Supreme Court the order of the latter court made the judgment final in that court. Though both counsel concur in this view, its correctness may be doubted. However, as this writ of error was allowed before the October term, 1912, of this court, the case is brought within *Norfolk Turnpike Co.* v. *Virginia*, 225 U. S. 264. In that case, under like circumstances, we did not dismiss the writ on our own motion but entertained jurisdiction.

On the merits the case presents no difficulty. It involves only the construction of the act of Congress already referred to above. We accept the state court's construction of the charter of the City and County of San Francisco. Indeed, its clearness leaves no room for construction. The salary it provides is declared to be "in full compensation for all services rendered." And it is provided that "every officer shall pay all moneys coming into his hands as such officer, no matter from what source derived or received, into the treasury of the city and county." The provisions are complete and comprehensive and express Mulcrevy's contract with the city, the performance of which his office imposed upon him; and, of course, the fees received by him in naturalization proceedings, because he was clerk of the Superior Court, were in compensation for official acts, not personal acts.

But it is contended by plaintiffs in error that the fees having been received officially is not of importance, that nevertheless he acted as the representative of the United States in execution of the policies of the United States and being by the act of Congress invested with his powers he is entitled for himself to the compensation prescribed

by the act for their execution, without any liability to account for them to the city. The last proposition, however, does not follow from the others, and the others are but confusing. If it be granted that he was made an agent of the National Government, his relations to the city were not thereby changed. He was still its officer, receiving fees because he was—not earning them otherwise or receiving them otherwise, but under compact with the city to pay them into the city treasury within twenty-four hours after their receipt.

Under the contention of plaintiffs in error a rather curious situation is presented. Mulcrevy was elected to an office constituted by the municipality under the authority of the State. He was given a fixed salary of $4,000 with the express limitation that it should be his complete compensation. He agreed that all other moneys received by him officially should be paid into the treasury of the city. He was given office accommodations, clerks to assist him, and yet contends that notwithstanding such equipment and assistance, notwithstanding his compact, he may retain part of the revenues of his office as fees for his own personal use. We cannot yield to the contention. Nor do we think the act of Congress compels it. The act does not purport to deal with the relations of a state officer with the State. To so construe it might raise serious questions of power, and such questions are always to be avoided. We do not have to go to such lengths. The act is entirely satisfied without putting the officers of a State in antagonism to the laws of the State—the laws which give them their official status. It is easily construed and its purpose entirely accomplished by requiring an accounting of one-half of the fees to the United States, leaving the other half to whatever disposition may be provided by the state law. Counsel cite some state decisions which have construed the act of Congress as giving a special agency to the clerks of the state courts and as receiving

their powers and rights from the national enactment. The reports of the Department of Commerce and Labor are quoted from, which, it is contended, exhibit by their statistics and recommendations the necessity of national control. State decisions expressing a contrary view are frankly cited. This contrariety of opinion we need not further exhibit by a review of the cases. We have expressed our construction of the act, and it is entirely consonant with the purpose of the act and national control over naturalization.

Judgment affirmed.

PENNELL, ADMINISTRATRIX, *v.* PHILADELPHIA & READING RAILWAY COMPANY.

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

No. 469. Argued December 3, 1913.—Decided January 5, 1914.

Quære, and not decided on this record, whether the purpose of the Safety Appliance Act is to protect all employés of every class and the mere absence of an automatic coupler is enough for liability if accident and injury result to an employé.

Under the Safety Appliance Act of March 2, 1893, c. 196, 27 Stat. 531, as amended March 2, 1903, c. 976, 32 Stat. 943, automatic couplers are not required between the locomotive and the tender.

While a custom of railroads cannot justify a violation of a mandatory statute, a custom which has the sanction of the Interstate Commerce Commission is persuasive of the meaning of that statute.

203 Fed. Rep. 681, affirmed.

THE facts, which involve the construction of the Safety Appliance Acts and their application to tenders of locomotives, are stated in the opinion.

Mr. George Demming for plaintiff in error.

Mr. William Clarke Mason, with whom *Mr. Charles Heebner* was on the brief, for defendant in error.

Mr. Justice McKenna delivered the opinion of the court.

Action for $50,000 damages brought by plaintiff in error, herein called plaintiff, against defendant in error, the Philadelphia & Reading Railway Company, herein called defendant, in the District Court of the United States, Eastern District of Pennsylvania. It was tried to a jury which, under the direction of the court, rendered a verdict for defendant. Judgment was duly entered upon the verdict and it was affirmed by the Circuit Court of Appeals.

Defendant is a common carrier engaged in interstate commerce. The intestate of plaintiff was employed by it in the capacity of fireman on one of its locomotives, and, it is alleged, came to his death by the failure of defendant to comply with the requirements of the Safety Appliance Acts of Congress and the rules and directions of the Interstate Commerce Commission formulated and proclaimed thereunder, in that defendant failed to affix between the locomotive and its tender an automatic coupling device. The action is prosecuted under the act of April 22, 1908, c. 149, 35 Stat. 65, as amended April 5, 1910, c. 143, 36 Stat. 291, relating to the liability of common carriers by railroad engaged in interstate commerce to their employés while so engaged.

The train was composed of forty-four cars, some loaded and some empty, and the engine, tender and caboose. The coupling between the cars was automatic, that between the engine and the tender was a draw-bar and pin. The pin broke in consequence of the air hose breaking or parting between the first and second cars from the caboose, thereby setting the brakes on the whole train. By the

breaking of the coupling between the tender and the engine, Pennell, plaintiff's intestate, was thrown from the train upon the track and killed on December 31, 1911. The train at the time of the accident was going about fifteen miles an hour.

The act of Congress provides (27 Stat. 531, § 2): "It shall be unlawful for any such common carrier [railroad engaged in interstate commerce] to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

The first contention of plaintiff is that the primary object of the act is, quoting from its title, "to promote the safety of employés and travelers upon railroads," and that, therefore, the language of the act "should be so applied and construed in matters relating to the protection of railroad workmen as to specific railroad accidents." In other words, the purpose of the act, it is contended, is to protect all employés, of whatever class, and the mere absence of an automatic coupler, if accident and injury result to an employé, is enough for liability. But plaintiff does not quote all of the title. The complete title is (27 Stat. 531), "An Act to promote the safety of employés and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes." The provisions of the act correspond to the purpose declared in the title and may be applied distributively to the protection of employé or traveler or to employés according to their employment.

But even if the act has the broad purpose asserted, which we need not decide, we are brought to the question, Is the tender of a locomotive a car within the meaning of the statute?

Plaintiff asserts the affirmative of the question and cites *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, and a number of state decisions. The case does not so decide. It does decide that the locomotive is a car within the meaning of the act. No distinction was made between it and the tender; the latter was deemed integral with the locomotive. In other words, tender and engine were considered as constituting the locomotive. Necessarily a locomotive thus constituted was decided to be a "car" within the meaning of the act and necessarily had to be coupled with the cars, which constituted the train. And in this necessity the dangers to employés would occur which the act was intended to prevent. Any other construction would have left the act denuded of some of its value. In other words, there would have been only a partial enforcement of its protection in instances where protection was oftenest needed. To omit the locomotive, composed of engine and tender—and it was considered as so composed in the cited case—was to omit part of a train which was within all the mischiefs of the act and therefore covered by its remedies. No such conditions exist in the present case. Engine and tender are a single thing; separable, it may be, but never separated in their ordinary and essential use. The connection between them, that is, between the engine and tender, it was testified, was in the nature of a permanent coupling, and it was also testified that there was practically no opening between the engine and tender, and that attached to the engine was a draw-bar which fitted in the yoke of the tender, and the pin was dropped down to connect draw-bar and yoke. The necessary deduction from this is that no dangerous position was assumed by an employé in coupling the engine and tender for the reason that the pin was dropped through the bar from the tank of the tender. The case at bar, therefore, is not brought either within the mischief or the remedy of the act.

The evidence established that it is not the custom of railroads to use an automatic coupler between the engine and tender. Some roads, however, use two additional or supplemental draw-bars, called radial bars, one on each side of the main bar, while on other roads it is almost the standard practice, instead of the supplemental bars, to use chains secured to the back heads of the locomotive and hooked to the tender on each side of the center. The record does not disclose whether there were either such bars or chains connecting the engine and tender. But even if their absence may be inferred, it is not relied on as a ground of negligence.

It is further contended by plaintiff that the necessity of an automatic coupler between engine and tender is determined by the amendment of the act of March 2, 1893, c. 196, 27 Stat. 531, enacted March 2, 1903, c. 976, 32 Stat. 943. It may be necessary, it is said, under the statute of 1893, to "bring the word 'tender' within the definition of the word 'car,'" but that this "is totally unnecessary when we come to consider and apply the subsequent statutes, because here we find the word 'tender' specifically used, and used, too, in evident contradistinction to the words 'locomotives' and 'cars.'" The amendment repeats the title of the prior acts, provides that their provisions "shall apply in *all cases*, whether or not the couplers brought together are of the same kind, make or type," and that their provisions and requirements, including automatic couplers, "shall be held to apply to all trains, locomotives, *tenders*, cars, and similar vehicles used on any railroad engaged in interstate commerce." But this act does not destroy the integrity of the locomotive and tender. It is entirely satisfied by requiring the automatic coupler between the tender and the cars constituting the train, that is, to the rear end of the tender. And this requirement fulfills the purpose of the statute, which, we have seen, does not regard the

strength of the connections between the cars, even if it may be supposed that an automatic coupler is the stronger, but does regard safety in making and unmaking the connections. This being kept in mind, the construction of the statute is not difficult. And the construction of the statute is the main concern. If it is not mandatory, as we think it is not, of an automatic coupler between the engine and the tender, the contentions of plaintiff are without foundation. We need not refer to them with further detail except to say that the custom of the railroads could not, of course, justify a violation of the statute, but that custom, having the acquiescence of the Interstate Commerce Commission, is persuasive of the meaning of the statute.

Under the various safety appliance acts the Commission is charged with the duty of prosecuting violations of them which come to its knowledge, and by the Sundry Civil Appropriation Act of June 28, 1902, c. 1301, 32 Stat. 419, 444, the Commission was authorized to employ inspectors to execute and enforce the requirements of the acts. It is of special significance, therefore, that in its order under the act of April 14, 1910, c. 160, 36 Stat. 298, which was supplemental of the other acts, designating the number, dimensions, location and manner of application of certain appliances, it provided as follows: "Couplers: Locomotives shall be equipped with automatic couplers at rear of tender and front of locomotive." That is, couplers were required where danger might be incurred by the employés.

The state decisions cited by plaintiff to sustain her definition of a car, we do not think it is necessary to review. They are all cited in *Johnson* v. *Southern Pacific Co.*, *supra*. They applied the principle which we have applied and construed the statutes passed on according to the objects which the statutes were intended to secure.

Judgment affirmed.

TINKER *v.* MIDLAND VALLEY MERCANTILE COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 13. Submitted October 30, 1913.—Decided January 5, 1914.

Under the provision in the Indian Appropriation Act of June 21, 1906, c. 3504, 34 Stat. 325, 366, making it unlawful for traders on the Osage Indian Reservation to give credit to any individual Indian head of a family for any amount exceeding seventy-five per centum of his next quarterly annuity, the burden of proof is on the person taking and attempting to enforce a note to bring his claim within the permission of the statute.

The order of pleading does not always determine the burden of proof.

While generally the payee of a note need not allege consideration in declaring upon it, if there is conflicting evidence he has the burden of proof.

Quære, whether the fact that a note is very largely in excess of the amount permitted to be given by statute does not constitute a *prima facie* case against the holder even if the burden were not upon him.

25 Oklahoma, 160, reversed.

THE facts, which involve the construction and application of the act of June 21, 1906, making it unlawful for traders on the Osage Reservation to give credit beyond a certain amount to Indians, are stated in the opinion.

Mr. Charles H. Merillat for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action on a promissory note for $922.50 dated September 1, 1906, against an Osage Indian residing on

the Osage Reservation. By the Indian Appropriation Act of June 21, 1906, c. 3504, 34 Stat. 325, 366, it was made "unlawful hereafter for the traders upon the Osage Indian Reservation to give credit to any individual Indian, head of a family, to an amount greater than seventy-five per centum of the next quarterly annuity to which such Indian will be entitled." This amended the previous act of March 3, 1901, c. 832, 31 Stat. 1058, 1065, by which the limit was sixty per centum. The defendant demurred and the demurrer having been overruled answered that the note was given for a debt in excess of seventy-five per cent. of the next quarterly annuity due to him after the credit was extended and that the note exceeded that amount. It appeared in evidence that the plaintiff, the defendant in error, was a licensed trader with the Indians and the defendant testified that he received as his quarterly payment forty-six dollars for each of the seven members of his family, which would be $322—in any event much less than $922.50. It was not shown when the credits were given. The plaintiff demurred to the evidence and the demurrer was sustained by both courts below. 25 Oklahoma, 160.

The Supreme Court of the State put its decision on the burden of proof, following the analogy of illegal consideration. We hardly need consider whether proof that the note was so largely in excess of the percentage then allowable, especially when coupled with the improbability that the defendant ever had received in the past an annuity so much larger as to warrant such a credit, did not constitute at least a *prima facie* case. The court is of opinion that, in view of the policy of the statute, the relative position of the parties and the protection necessarily extended to Indians, the burden was on the plaintiff not only to bring his claim within the permission of the statute in fact, as he was warned by its letter that he must, but also to prove that he had done so, in case of dispute. He occu-

pied the position of advantage and that rather than formal logic determines the burden of proof. It may be that it lay on the defendant to plead the defense. That is a question of convenience. *Burnet* v. *Desmornes*, 226 U. S. 145, 147. But the order of pleading does not always determine the burden of proof. Generally it is not considered necessary for the payee of a promissory note to allege a consideration in declaring upon it, but if there is conflicting evidence he has the burden of proof. *Delano* v. *Bartlett*, 6 Cush. 364; *Burnham* v. *Allen*, 1 Gray, 496.

Judgment reversed.

TRIMBLE *v.* CITY OF SEATTLE.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 108. Argued December 9, 1913.—Decided January 5, 1914.

The state court having declared the policy of the State as excluding a constructive obligation to indemnify against the exercise of the sovereign power of taxation from leases given by the State, this court will not overthrow it.

In ordinary cases of leased property, whether the lessor or lessee shall bear the burden of taxation is not a matter of public concern, but an obligation not to tax property leased by the State is a restriction of public import not lightly to be imposed.

In this case *held*, that the imposing of assessments for benefits on property in Seattle leased by the State of Washington is not an unconstitutional impairment of an implied covenant in the lease that the lessor will pay assessments.

Whether landlords or tenants shall pay taxes and assessments on leased property is a matter of private arrangement, and compelling tenants of the State to pay them does not deny them equal protection of the law because there may be a practice the other way in private leases.

Quære, whether exemption from taxation would not create a favored class and thus deny equal protection to other property owners.

When an interest in land, whether freehold or for years, passes from the public domain into private hands, there is a natural implication that it goes with the ordinary incidents of private property and subject to be taxed. *New York ex rel. Metropolitan Street Ry.* v. *Tax Commissioners*, 199 U. S. 1.

64 Washington, 102, affirmed.

THE facts, which involve the validity of assessments on lands leased by the City of Seattle to the plaintiffs in error, are stated in the opinion.

Mr. C. W. Corliss and *Mr. George McKay* for plaintiffs in error, submitted:

In leases such as these the lessor is bound to pay all taxes, assessments and other charges on the leased land, and the State, the same as a private lessor, is bound by this rule, though in such a case as this the State's covenant takes this form: the State agrees not to impose charges on the leased land and compel the lessee to pay the same.

The lands of the State in the absence of the State's consent are not subject to special assessment for local improvements. Constitution of the State, Art. VII, § 2; Hamilton on Special Assessments, § 281; *St. Louis* v. *Brown*, 155 Missouri, 545; *State* v. *Hartford*, 50 Connecticut, 89.

At the time the leases involved in this action were made no consent had been given by the State to the levying of special assessments on its land; the making of the leases did not subject the land to special assessment. *Daugherty* v. *Thompson*, 71 Texas, 192; *Davis* v. *Burnett*, 77 Texas, 3.

Nor was there any provision of the written or the common law splitting assessments against leased land between lessor and lessee.

The rule of the common law is that, in the absence of a covenant or condition to the contrary, there is an implied covenant in every lease that the lessor, not the lessee shall

pay all taxes and assessments levied on the leased land during the term. Taylor's Landlord and Tenant (7th ed.), p. 289, par. 341, § VI, c. 8; Woods' Landlord and Tenant, pp. 683, 684, § 417; 18 Am. and Eng. Ency. (2d ed.) 650; 32 Am. Digest, Century ed., pp. 578–587, §§ 519 to 529.

There is difference in this respect between a lease and a grant. In a grant there are no implied covenants, but the State, as lessor, is bound by the general rule the same as a private person. See *West. & Atl. R. Co.* v. *Georgia*, 14 L. R. A. 438, 455.

Under such conditions the State is regarded, *pro hac vice*, as a private person itself. *Murray* v. *Charleston*, 96 U. S. 432; *Hall* v. *Wisconsin*, 103 U. S. 5; *Davis* v. *Gray*, 16 Wall. 203; *Daggett* v. *Bonewitz*, 107 Indiana, 279; *Lessieur* v. *Price*, 12 How. 59; *Gray* v. *Coghlen*, 72 Indiana, 567.

States which issue negotiable paper incur the same responsibilities which attach to individuals or corporations in like case. *Bond Debt Cases*, 12 N. Car. 200, 272; *Floyd Acceptances*, 7 Wall. 666, and cases *supra*.

The statutes under which these leases were executed show clearly that the leases were intended to be ordinary leases, and subject to the legal incidents of such leases. See Laws of 1897, pp. 229–242, and 253, § 50; Laws of 1899, pp. 138, 139.

The rule that the State as lessor is bound by the same obligations as a private lessor is not qualified or overthrown by the rule that a legislative grant is construed most strongly in favor of the State and against the grantee. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420. See also *Slidell* v. *Grandjean*, 111 U. S. 437; *Missionary Soc'y* v. *Dalles*, 107 U. S. 343; *Hancock* v. *McKinney*, 7 Texas, 445; *Dubuque &c. R. Co.* v. *Litchfield*, 23 How. 88; *Rice* v. *Minn. &c. R. R.*, 1 Black, 380.

The covenant of the State to pay all taxes and assess-

ments on the leased land during the term works a practical exemption of the leasehold from the payment of assessments on the leased land for the State cannot impose its burden by statute, on another, nor can the State pass a statute in direct violation of its contract. The lessor's covenant to pay the assessments takes the form, in this case, that the State will not impose burdens on the land and attempt to compel the lessee to discharge them. *Met. St. R. Co.* v. *Tax Comm.*, 199 U. S. 1; *Coast Line R. Co.* v. *Savannah*, 30 Fed. Rep. 646.

The statutes and ordinances authorizing these assessments impair the obligation of the State's lease, for the reason that by the statute and ordinances subsequent to the lease, the lessee is compelled, if these legislative acts are valid, to pay and discharge a burden imposed on the land, which burden is within the State's covenant with its lessee.

Nothing in the other provisions of the ordinance in any way qualifies this plain, clear legislative declaration that even the reassessment is against the land.

As matter of law and fact, special assessments are against the land. *Chicago &c. R. Co.* v. *Phillips*, 111 Iowa, 377; *Macon* v. *Patty*, 57 Mississippi, 378, 386; *New England M. S. Co.* v. *Vader*, 28 Fed. Rep. 265, 274.

The statutes authorizing the levy of special assessments against certain leases also deny to the lessees the equal protection of the laws.

The assessments take plaintiff's property without due process of law. *Coast Land Co.* v. *Seattle*, 52 Washington, 380, 383.

In *Coast Land Co.* v. *Seattle*, 52 Washington, 380, p. 383, and *Rabel* v. *Seattle*, 44 Washington, 482, there are *dicta* to the effect that a leasehold is subject to special assessment for a local improvement. As to future leases there is no objection to a statute which apportions between lessor and lessee the burden of taxes and assessments on

the leased land, but to make such a statute applicable to past leases is another thing.

Mr. Howard A. Hanson, with whom *Mr. William B. Allison* and *Mr. James E. Bradford* were on the brief, for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is an attempt to reverse a judgment confirming an assessment on certain leaseholds of tide lands. The leases were executed by the State in 1899. Subsequent statutes of 1905 and 1907 respectively, authorized the assessment of such leaseholds for local improvements specially benefiting them, and the inclusion of them within local improvement districts by cities of the first class. The City of Seattle made a plank roadway, created an improvement district, levied an assessment which failed, *Coast Land Co.* v. *Seattle*, 52 Washington, 380, and then in due form levied the reassessment that is in question here. The plaintiffs in error argue that the leases contained an implied covenant for quiet enjoyment and that the subsequent laws that authorized the assessment impair their constitutional rights. Art. I, § 10. Amendment XIV, § 1. The Supreme Court of Washington, admitting the general rule as to leases, held that so far as concerns taxation, it did not apply to leases made by the State. 64 Washington, 102. The concession of the court was that in private contracts "in the absence of a covenant or condition to the contrary, it is an implied covenant in every lease that the lessor shall pay all taxes and assessments levied on the leased land during the term." Stated in this form, the rule appears to be a rule of policy to which special considerations may set a limit. But it might be suggested that if the State should expressly covenant against such

assessments it could not impair the obligation of its contract by a subsequent law. The words used in these leases are 'lease, demise and let,' and from *Spencer's Case*, 5 Co. Rep. 16*a*, 17*a*, down to the present day these words have been said to imply a covenant. 1 Wms. Saund. 322, n. 2. *Mostyn* v. *West Mostyn Coal & Iron Co.*, 1 C. P. D. 145, 152. *Mershon* v. *Williams*, 63 N. J. L. 398, 406. Words express whatever meaning convention has attached to them, and so it may be argued that the State has covenanted against this tax in express terms.

Nevertheless it is obvious that the supposed meaning was not reached by simple interpretation. There is no suggestion of warranty in *dedi* or *demisi* by any usage of speech alone. The warranty was what Lord Coke called a warranty in law, Co. Litt. 384*a*, an institution, not depending upon an expression of intent, not arising because the words mean warrant, but imposed from without by the law. In Butler's note to this page the lessor's obligation is put as reciprocal to the tenant's obligation to pay rent, (compare 5 Co. Rep. 17*a*), just as the warranty in *dedi* in some cases was a consequence of tenure. One may wonder whether in fact the warranty incident to a sale in early law before the machinery of implied contracts was thought of (Glanv. VII, c. 2; X, c. 15; Lex. Sal. c. 47; 1 Löning, Vertragsbruch, 103; 2 Inst. 274, 275), was not given a scholastic turn, extended, limited and embodied in sacramental words—whether Glanville's *Donatores*, grantors, did not suggest the special effect of *dedi* in the Statute de Bigamis as interpreted by Lord Coke. (The Statute itself says that the feoffor is held *ratione doni proprii.* 4 Ed. I., c. 6.) But whatever may be the history, it is plain, as we have said, that the rule is not the result of interpretation but of doctrine; and hence it is that very commonly the rule is stated as expressing the general operation of a lease and not as depending upon the use of a particular word. 64 Washington, 102, 104. *J. W. Perry*

Co. v. *Norfolk*, 220 U. S. 472, 477. *Duncklee* v. *Webber*, 151 Massachusetts, 408, 411, and cases cited in 24 Cyc. 1057; 18 Am. & Eng. Encyc. of Law, 2d ed. 650. It has come back to what it started as being, a construction of the law; and since, notwithstanding its age, the special effect of *demisi* has not entered into speech so far as to reach popular understanding, the rule still may be construed as extending no further than reason dictates. Indeed warranties in law always have been dealt with on this principle. See e. g. *Brett* v. *Cumberland*, Cro. Jac. 521, 523. Therefore we may consider the question before us on the footing upon which it was discussed by the Supreme Court of the State.

The question is, then, whether our duty requires us to overthrow a decision that the policy of the state law excludes a constructive obligation to indemnify against the exercise of the sovereign power of taxation from leases by the State. Put in this form, it is not hard to answer. When the law creates an obligation outside of the expressed intent of the parties, it must consider all the circumstances, and the effect with reference to them. In ordinary cases the whole property is taxed and which party shall bear the burden is not a matter of public concern. But when the State makes the lease, the supposed obligation would be an obligation not to tax—a restriction of public import not lightly to be imposed. *Providence Bank* v. *Billings*, 4 Pet. 514, 561. *Wells* v. *Savannah*, 181 U. S. 531, 539, 540. *St. Louis* v. *United Railways Co.*, 210 U. S. 266, 273, 274. *J. W. Perry Co.* v. *Norfolk*, 220 U. S. 472, 480. It is urged that to deny the State's obligation discriminates unconstitutionally against this class of lessees, since all others are free from the burden. But that is not true. Whether landlord or tenant shall pay a tax is a matter of private arrangement, and the practice one way or the other has no bearing on the matter. The argument from inequality really works the other way. If these leaseholds are not

taxable, they are a favored class of property; for ordinarily leaseholds are taxed even if they are lumped and included in the value of the fee. When an interest in land, whether freehold or for years is severed from the public domain and put into private hands, the natural implication is that it goes there with the ordinary incidents of private property and therefore is subject to being taxed. See *New York ex rel. Metropolitan Street Ry. Co.* v. *New York State Board of Tax Commissioners*, 199 U. S. 1, 38.

The plaintiffs in error think that thus far there has been a failure to understand their contention that these assessments are against the land, and therefore are met by the supposed contract of the State, that the lessees should have the land free of all charges. The court below appears to us to have decided in direct response to that argument that the contract of the State did not go so far, and we are of opinion that we ought not to pronounce the decision wrong. There was some subsidiary discussion of the meaning and operation of the Statutes, but upon those matters we do not go behind the judgment of the Supreme Court of the State.

Judgment affirmed.

PIZA HERMANOS *v.* CALDENTEY.

APPEAL FROM THE SUPREME COURT OF PORTO RICO.

No. 134. Submitted December 15, 1913.—Decided January 5, 1914.

Where the principle on which the amount recovered is based is admitted, this court will not go behind well warranted findings of fact in regard to the question of amount.

Where it appears that there may have been an error in computing the

amount of the recovery, this court can affirm the judgment without prejudice to reopening the account for the single purpose of correcting such error if the lower court so permits.

THE facts, which involve the construction of a contract of employment, are stated in the opinion.

Mr. Frederic R. Coudert, Mr. Paul Fuller and *Mr. Charles B. Samuels* for appellants.

Mr. Charles F. Carusi and *Mr. A. Sarmiento* for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit by the appellee to recover the sum alleged by him to be due upon a correct account between the defendants and himself. The facts as found are that the appellee was employed by the defendants, copartners, at a monthly salary and ten per cent. of the net profits, to be credited in his private account; that after about seven years and a half he left the firm on March 11, 1910; that the points of difference as to accounting concern the valuation of an estate bought by the firm and of some unharvested and unsold crops. The firm credited the estate at cost, $20,584.67, but the courts below found that it was worth $80,000, charged the difference, $59,415.33, as profit, and credited the appellee with $5941.53. They likewise found that the profit on the crops was much greater than the appellee's estimate and therefore allowed him the $2000 claimed in his complaint.

It may be that we should adopt a different rule from that followed by the courts below if the question came here as a pure question of law. But it appears from the opinion of both courts that they found the appellants to have admitted the propriety of charging an increase in

the value of the estate as a profit, so that the question was narrowed to one of amount. The principle being settled in this way it was applied to the unsold crops. We do not go behind these well warranted findings of fact and really there is nothing else before us. The assignment of errors raised some other points, but these were the only matters that were pressed in the final argument or that could have been pressed with any hope of success. It is suggested that if otherwise right the judgment charged the appellants with some items twice over. We do not see it, but if there has been any oversight in this respect our affirmance of the judgment will be without prejudice to reopening the account for the single purpose of correcting errors of calculation if permitted upon application to the Supreme Court.

Judgment affirmed.

HOBBS *v.* HEAD AND DOWST COMPANY.

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

No. 148. Argued December 18, 19, 1913.—Decided January 5, 1914.

Even though contractors may not be entitled to a mechanics' lien under the statute unless the contract be completed, they may be entitled thereto if absolute completion is waived, and in this case this court will not go behind the finding of the master followed by the court below that there was a waiver and the contractor was justified in stopping work.

Where the state trial court had upheld a mechanics' lien before the petition and the trustee in bankruptcy seeks in the Federal court to prevent the enforcement of the lien, this court will not go behind the state judgment because exceptions thereto had not been passed upon owing to the action of those representing the estate.

In this case this court is satisfied that substantial justice has been

done in enforcing a lien for over $45,000 admittedly due to the contractor but contested because about $1,000 of work remained uncompleted on a contract of $187,000, the contractors having ceased work after the owner of the building had failed in its payments and was hopelessly insolvent.

175 Fed. Rep. 501, affirmed.

THE facts, which involve the validity of a lien for labor and materials on property of a bankrupt, and the necessity for completion of the contract in order to maintain the lien, are stated in the opinion.

Mr. Henry F. Hollis for appellant:

The alleged lien has no legal standing under the statute. See N. H. Pub. Stats., c. 141, §§ 10, 16, 17.

The lienors are not entitled to a mechanics' lien because: They deliberately, willfully, and without legal excuse, failed to complete their contract; nothing is due and payable under said contract; the contract is entire and no way is provided to apportion non-lienable items.

All the mechanics' lien cases which are reported in New Hampshire reports are as follows and sustain this contention: *Jacobs* v. *Knapp*, 50 N. H. 71; *Bryant* v. *Warren*, 51 N. H. 213; *Cheshire Prov. Ins.* v. *Stone*, 52 N. H. 365; *Cole* v. *Colby*, 57 N. H. 98; *Freeto* v. *Houghton*, 58 N. H. 100; *Hill* v. *Callahan*, 58 N. H. 497; *Hale* v. *Brown*, 59 N. H. 551; *Eastman* v. *Newman*, 59 N. H. 581; *Marston* v. *Stickney*, 60 N. H. 112; *Foote* v. *Scott*, 60 N. H. 469; *Pike* v. *Scott*, 60 N. H. 469; *Hodgdon* v. *Darling*, 61 N. H. 582; *Pitman* v. *Thompson*, 63 N. H. 73; *Thompson Mfg. Co.* v. *Smith*, 67 N. H. 409; *Kendall* v. *Pickard*, 67 N. H. 470; *Quimby* v. *Williams*, 67 N. H. 489; *Lawson* v. *Kimball*, 68 N. H. 549; *Wason* v. *Martel*, 68 N. H. 560; *Lavoie* v. *Burke*, 69 N. H. 144; *Grafton Co.* v. *Company*, 69 N. H. 177; *Perrault* v. *Shaw*, 69 N. H. 180; *Cudworth* v. *Bostwick*, 69 N. H. 536; *Bixby* v. *Whitcomb*, 69 N. H. 646; *Russell* v. *Howell*, 74 N. H. 551.

A mechanics' lien is a creature of the statute, and can only be obtained by a strict compliance with the letter of the law. *Marston* v. *Stickney*, 55 N. H. 383; *Jacobs* v. *Knapp*, 50 N. H. 71, 80; *Bicknell* v. *Trickey*, 34 Maine, 273, 281; *Trask* v. *Searle*, 121 Massachusetts, 229; *Gale* v. *Blaikie*, 129 Massachusetts, 206; *Wendell* v. *Abbott*, 43 N. H. 68, 73; *Ellis* v. *Lull*, 45 N. H. 419; *Pierce* v. *Cabot*, 159 Massachusetts, 202; *Street Lumber Co.* v. *Sullivan*, 87 N. E. Rep. (Mass.) 905; *General Fire Extinguisher Co.* v. *Chaplin*, 183 Massachusetts, 375; *Grainger & Co.* v. *Riley*, 201 Fed. Rep. 901, 903; *Street Lumber Co.* v. *Sullivan*, 201 Massachusetts, 484; *Whalen* v. *Collins*, 164 Massachusetts, 146, 150; 20 Am. & Eng. Ency. Law, 2d ed., 269, 277; 27 Cyc. 20.

The lien was not recognized at common law. *Van Stone* v. *Company*, 142 U. S. 128, 136.

Under the New Hampshire and similar statutes, the lien suit must be based upon an express contract with the owner, in existence when the service is performed. It cannot be based upon a *quantum meruit*, or implied assumpsit. *Copeland* v. *Kehoe*, 67 Alabama, 594; *Rowley* v. *James*, 31 Illinois, 298; *Parker* v. *Anthony*, 4 Gray, 289; *Sanderson* v. *Taft*, 6 Gray, 533; *Sly* v. *Pattee*, 58 N. H. 102; *Pike* v. *Scott*, 60 N. H. 469; *Marston* v. *Stickney*, 60 N. H. 112; *Jacobs* v. *Knapp*, 50 N. H. 71, 78; *Dressel* v. *French*, 7 How. Pr. (N. Y.) 350; *Ellenwood* v. *Burgess*, 144 Massachusetts, 534.

In case there is an express contract, there can be no lien unless the claimant show one of three things: That he has performed the contract: *Rochford* v. *Rochford*, 192 Massachusetts, 231; *General Fire Extinguisher Co.* v. *Chaplin*, 183 Massachusetts, 375; *Rome Hotel Co.* v. *Warlick*, 87 Georgia, 34; *Thomas* v. *University*, 71 Illinois, 310; *Bohem* v. *Seabury*, 141 Pa. St. 594; *Moritz* v. *Larsen*, 70 Wisconsin, 569; *Company* v. *Berghoefer*, 103 Wisconsin, 359; *Cahill* v. *Heuser*, 2 N. Y. App. Div. 292; *Paturzo* v.

Shuldiner, 110 N. Y. Supp. 137; *Gunther* v. *Bennett*, 72 Maryland, 384; *Brick Co.* v. *Spilman*, 76 Maryland, 337; *Derrickson* v. *Edwards*, 29 N. J. Law, 468; *McGraw* v. *Godfrey*, 16 Abb. Prac. (N. S.) 358. That he has been prevented from doing so by the other party: *Howes* v. *Reliance Wire Co.*, 46 Minnesota, 44; *Knight* v. *Norris*, 13 Minnesota, 473; *Dennistoun* v. *McAllister*, 4 E. D. Smith (N. Y.), 729; *Kenney* v. *Sherman*, 28 Illinois, 520; *Charnley* v. *Honig*, 74 Wisconsin, 163; *Hutchins* v. *Bautch*, 123 Wisconsin, 394; *Catlin* v. *Douglas*, 33 Fed. Rep. 569; *Sproessig* v. *Keutel*, 17 N. Y. Supp. 839. That performance has been waived: *Cahill* v. *Heuser*, 2 N. Y. App. Div. 292; *Floyd* v. *Rathledge*, 41 Ill. App. 370; *McCue* v. *Whitwell*, 156 Massachusetts, 205; *Stewart* v. *McQuaide*, 48 Pa. St. 191; 20 Am. & Eng. Ency. (2d ed.), 366.

See also to the same effect *Hains* v. *Graham*, 111 S. W. Rep. (Ark.) 984; *Pippy* v. *Winslow*, 125 Pac. Rep. (Or.) 298; *Klaub* v. *Vokonn*, 169 Ill. App. 434; *Evans* v. *Woodley*, 138 N. W. Rep. (Mich.) 275.

The lienor willfully failed to complete the shutters, at an estimated expense of $1,000 and damage to that amount accrued thereby.

The completion of the contract was not prevented although it was somewhat delayed by the owner; performance of the contract was not waived.

The only excuse for the failure to complete the contract was failure of the owner to make its payments under the contract.

Breach by one party is no excuse for failure to perform by the other party. *Geary* v. *Bangs*, 33 Ill. App. 582, 584, 585; *Palm and Robertson* v. *R. R. Co.*, 18 Illinois, 217; *Kenney* v. *Sherman*, 28 Illinois, 520, 523; *West* v. *Bechtel*, 125 Michigan, 144; *Winchester* v. *Newton*, 2 Allen (Mass.), 492; *Dox* v. *Dey*, 3 Wend. (N. Y.) 356, 361; *M'Grath* v. *Horgan*, 76 N. Y. Supp. 412; *Osgood* v. *Bauder*, 75 Iowa, 550, 558; *Myer* v. *Wheeler*, 65 Iowa, 390; *Hanson* v. *Heat-*

ing Co., 73 Iowa, 79; *Bianchi* v. *Hughes*, 124 California, 24, 27; 3 Page, Contracts, § 1490 (7); *Mersey Co.* v. *Naylor*, 9 App. Cas. (H. of L.) 434; *Cox* v. *McLaughlin*, 54 California, 605; *Campbell* v. *McLeod*, 24 Nova Scotia, 66; *Mill Dam Foundry* v. *Hovey*, 21 Pick. (Mass.) 417, 435; *Howe* v. *Howe & Owen Co.*, 154 Fed. Rep. 820, 826; *Kauffman* v. *Raeder*, 108 Fed. Rep. 171, 181; *Paturzo* v. *Shuldiner*, 110 N. Y. Supp. 137; *Boon* v. *Eygre*, 1 H. Bl. 273 (Lord Mansfield).

Insolvency of one party is no excuse for abandoning work by the other party. *Pardee* v. *Kanady*, 100 N. Y. 121; *Vandegrift* v. *Cowles Eng. Co.*, 161 N. Y. 435; *Phenix Nat. Bank* v. *Waterbury*, 197 N. Y. 161; *Ins. Com.* v. *Ins. Co.*, 68 N. H. 51; *Bank Comm'rs* v. *Trust Co.*, 69 N. H. 621.

In New York this point has been considered and maintained more often than anywhere else. *N. E. Iron Co.* v. *Gilbert E. R. R.*, 91 N. Y. 153; *Devlin* v. *Mayor*, 63 N. Y. 8; *Merchant* v. *Rawson*, 1 Clarke Ch. (N. Y.) 123; *Underhill* v. *North Am. Co.*, 31 How. Prac. (N. Y.) 34; *In re Carter*, 47 N. Y. Supp. 383. See also *Hobbs* v. *Columbia Co.*, 157 Massachusetts, 109; *Jewett Pub. Co.* v. *Butler*, 159 Massachusetts, 517; *Lumber Co.* v. *Co.*, 89 Mo. App. 141; *In re Edwards*, 8 Ch. App. (Eng.) 289, 293; *McConnell & Drummond* v. *Hewes*, 50 W. Va. 33; *Brassel* v. *Troxel*, 68 Ill. App. 131.

For additional authorities recognizing this principle, see *Boorman* v. *Nash*, 9 B. & C. (Eng.) 145; Wald's Pollock on Contracts (3d ed.), 355, n. 88; Page on Contracts, § 1449, p. 2243; Benjamin on Sales, p. 808; *Lumber Co.* v. *Glasgow Co.*, 101 Fed. Rep. 863.

The owner did not refuse to make its payments under the contract.

The finding that the architect's certificate for $25,000 was given September 29th, is based on incompetent evidence.

Nothing is due under the contract. Under the express

terms of the contract, payments become due only upon the performance of certain unperformed conditions.

Nothing can be recovered under a contract until the contract has been complied with. *Robinson* v. *Crowninshield,* 1 N. H. 76; *Currier* v. *Railroad,* 34 N. H. 398; *Danforth* v. *Freeman,* 69 N. H. 466; *Wadleigh* v. *Sutton,* 6 N. H. 15; *Dame* v. *Woods,* 73 N. H. 222.

Nothing being due under the contract, no recovery can be had in the lien suit. 20 Am. & Eng. Ency. (2d ed.) 520.

As the creditor can maintain no action against the debtor until his demand is due and payable, he cannot until that time secure his lien by attachment. The cause of action and the perfected enforceable lien accrue to him at the same moment. *Kendall* v. *Pickard,* 67 N. H. 470; *Kihlburg* v. *United States,* 97 U. S. 398; *Martinsburg Co.* v. *March,* 114 U. S. 549; *Palmer* v. *Clark,* 106 Massachusetts, 373; *Chicago &c. Co.* v. *Price,* 138 U. S. 185; *Harmon* v. *Ashmead,* 60 California, 439; *Pitt* v. *Acosta,* 18 Florida, 270; *Thomas* v. *Turner,* 16 Maryland, 105; *Lauer* v. *Dunn,* 115 N. Y. 405; *Kinney* v. *Hudnut,* 3 Illinois, 472; *Preusser* v. *Florence,* 4 Abb. N. C. (N. Y.) 136; *Schroth* v. *Black,* 50 Ill. App. 168.

While as a general rule if there has been an honest endeavor to complete the contract, and substantial compliance with its terms, a lien may be enforced, 20 Am. & Eng. Ency., 2d ed., 366–367; 27 Cyc. 85, a willful omission in the performance of the contract, unless trivial, will preclude the assertion of a lien. 20 Am. & Eng. Ency. (2d ed.) 367; 27 Cyc. 85, n. 27; *Van Clief* v. *Van Vechten,* 130 N. Y. 571, 579; *Elliott* v. *Caldwell,* 43 Minnesota, 357; *D'Arnato* v. *Gentile,* 173 N. Y. 596; *S. C.,* 54 App. Div. 625; *Weeks* v. *O'Brien,* 59 N. Y. Super. Ct. 28; *May* v. *Menton,* 18 Misc. (N. Y.) 737; *Kohl* v. *Fleming,* 21 Misc. 690; *Fox* v. *Davidson,* 36 N. Y. App. Div. 159; *Spence* v. *Ham,* 27 N. Y. App. Div. 379; *Anderson* v. *Todd,* 8 N. Dak. 158;

Federal Trust Co. v. *Guingues*, 74 Atl. Rep. (N. J.) 652, 654; *Braseth* v. *State Bank*, 12 No. Dak. 486; *Wade* v. *Haycock*, 25 Pa. St. 382; *Gillespie Co.* v. *Wilson*, 123 Pa. St. 19; *Sherry* v. *Madler*, 123 Wisconsin, 621; *Roane* v. *Murphy*, 96 S. W. Rep. (Tex.) 782; *Hahn* v. *Bonacum*, 76 Nebraska, 837; *Gillis* v. *Cobe*, 177 Massachusetts, 584; *Burke* v. *Coyne*, 188 Massachusetts, 401; *Schindler* v. *Green*, 82 Pac. Rep. (Cal. App.) 341; *Smith* v. *Ruggeriero*, 173 N. Y. 614; *King* v. *Moore*, 70 N. Y. Supp. 6.

The architect's certificate was essential. 20 Am. & Eng. Ency., 2d ed., 370; 30 Id. 1205, 1237; Addison on Contracts, § 394; 27 Cyc. 87, n. 38; *Hanley* v. *Walker*, 8 L. R. A. 207; *Packard* v. *Van Schoick*, 58 Illinois, 79; *Coey* v. *Lehman*, 79 Illinois, 173; *Barney* v. *Giles*, 120 Illinois, 154; *Arnold* v. *Bournique*, 144 Illinois, 132; *Kirtland* v. *Moore*, 40 N. J. Eq. 106; *Wolf* v. *Michaelis*, 27 Ill. App. 336; *Provost* v. *Shirk*, 223 Illinois, 468; *Boots* v. *Steinberg*, 100 Michigan, 134; *Boden* v. *Mayer*, 95 Wisconsin, 65; *Forster Lumber Co.* v. *Atkinson*, 94 Wisconsin, 578; *Nesbit* v. *Braker*, 93 N. Y. Supp. 856; *Federal Trust Co.* v. *Guingues*, 74 Atl. Rep. (N. J.) 652, 656.

Where a contractor engages to do different kinds of work under the same contract for a lump sum, upon part of which he is entitled to a lien and the other part not, no lien attaches in his favor. *Libbey* v. *Tidden*, 192 Massachusetts, 175, 177; *Morrison* v. *Minot*, 5 Allen, 403; *Brewster* v. *Wyman*, 5 Allen, 405; *Graves* v. *Bemis*, 8 Allen, 573; *Getty* v. *Ames*, 30 Oregon, 573; *Allen* v. *Elwert*, 29 Oregon, 444.

For cases recognizing this general doctrine, see *Driscoll* v. *Hill*, 11 Allen, 154; *Angier* v. *Distilling Co.*, 178 Massachusetts, 163; *General Fire Extinguisher Co.* v. *Chaplin*, 183 Massachusetts, 375; *Evans Marble Co.* v. *Trust Co.*, 101 Maryland, 210; *McLain* v. *Hutton*, 131 California, 132; *Peatman* v. *Light & Power Co.*, 105 Iowa, 1; *Adler* v. *Exposition Co.*, 126 Illinois, 373; *McMaster* v. *Merrick*,

41 Michigan, 505; *Edgar* v. *Salisbury*, 17 Missouri, 271; *Sweem* v. *Railroad Co.*, 85 Mo. App. 87, 95; *Baker* v. *Fessenden*, 71 Maine, 292; *Rinzel* v. *Stumpf*, 93 N. W. Rep. (Wis.) 36; *Thompson Mfg. Co.* v. *Smith*, 67 N. H. 409, 410; *Grafton &c. Co.* v. *Company*, 69 N. H. 177; *Meek* v. *Parker*, 63 Arkansas, 367; *Baum* v. *Covert*, 62 Mississippi, 113; *Tumer* v. *Wentworth*, 119 Massachusetts, 459; *Harrison* v. *Ass'n*, 134 Pa. St. 558.

Mr. George H. Warren and *Mr. Robert L. Manning* for appellees.

Mr. Justice Holmes delivered the opinion of the court.

This case arises upon a petition by a trustee in bankruptcy to prevent the enforcement of a lien for labor and materials in a state court. The proceedings in the state court were begun and had passed to a judgment in the Superior Court of New Hampshire, subject to exceptions, before the adjudication of bankruptcy. Afterwards the exceptions were overruled on technical grounds not touching the merits, the trustee in bankruptcy being heard at this stage. The action upon the matter in the courts of the United States will be seen in 169 Fed. Rep. 586, *S. C.*, 95 C. C. A. 84; 175 Fed. Rep. 501, and 184 Fed. Rep. 409, *S. C.*, 106 C. C. A. 519; a rehearing being denied upon the last decision in 185 Fed. Rep. 1006, *S. C.*, 107 C. C. A. 663, and an appeal to this court allowed in 191 Fed. Rep. 811, *S. C.*, 112 C. C. A. 325. The allowance of the appeal was correct. *Knapp* v. *Milwaukee Trust Co.*, 216 U. S. 545; *Greey* v. *Dockendorff*, *ante*, p. 513.

The Head and Dowst Company had agreed with the bankrupt to erect a grand stand, clubhouse, and other buildings and structures, for $187,644, and had completed the work, with the exception of shutters on the grand stand that would cost about $1000 to finish. At this point

it was told by the bankrupt of the hopeless insolvency of the latter and was informed that it must look to its lien to support its claim. Thereupon the company stopped work and began its lien suit. When the present attempt was made to reopen the matter, the case was sent to a Master who reported in great detail the facts just summed up and concluded that the Company was entitled to a lien for $45,995.02, exclusive of interest, that being the part of the contract price remaining unpaid, less $1000 for the shutters &c., and being also very nearly the same sum that was found due in the state court. The judge of the District Court thereupon dismissed the trustee's petition, and his decree was affirmed by the Circuit Court of Appeals. 175 Fed. Rep. 501, *sup.*

We shall consider such questions only as are sufficient to decide the case, omitting others that would have to be considered before the decree below could be reversed. The trustee argues that the failure to take the proper steps to get exceptions heard by the Supreme Court of the State on the merits constitutes an equitable ground for going behind the state judgment in order to defeat it by an objection of the most narrowly technical sort. The objection of course is that the contract was entire, and that whatever justification there may have been for stopping work, or ground for a *quantum meruit*, nothing short of complete performance would earn the contract price as such, or establish a lien for the same. It is argued in the same connection that the facts did not justify the Company in stopping work, but we shall not go behind the finding of the Master in this respect, followed as it has been, or say more than that, as we construe the facts and finding, it was quite right, and that putting on the last touches was waived.

We are of opinion that the decision was equally right. The case was tried upon its merits and decided in favor of the lien by the state court. The failure to get the

exceptions considered was due to no fault of the appellee, but solely to the conduct of those then representing the interests of the estate. It is a doubtful suggestion that an equity could be founded upon this. Certainly it is an inadequate ground for the intervention of equity to enforce forfeiture of a claim that could not be defeated, if at all, except by a most technical application of the law, and on the assumption that the state court did not know the law of the State. We shall not speculate upon that point, beyond saying that we see no reason to doubt that the state court was right, *Bergfors* v. *Caron*, 190 Massachusetts, 168, and cases in 27 Cyc. 85, 87, and 20 Am. & Eng. Encyc. of Law, 2d ed., 366–368, as we are satisfied that substantial justice has been done. Some subordinate matters of detail were argued but they do not seem to us to need mention; the whole strength of the case lay in the matter of which we have disposed.

Decree affirmed.

UNITED STATES *v.* MOIST.

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

No. 378. Submitted October 22, 1913.—Decided January 5, 1914.

Where it does not appear that the judgment sustaining a demurrer to the indictment turned upon any controverted construction of the statute, this court has not jurisdiction to review under the Criminal Appeals Act of March 2, 1907.

In this case as it does not appear upon what ground the court below acted in sustaining the demurrer the writ of error is dismissed.

THE facts are stated in the opinion.

Mr. Assistant Attorney General Denison for the United States.

Mr. Roy D. Keehn for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an indictment under § 215 of the Criminal Code of March 4, 1909, c. 321, 35 Stat. 1130, for placing a letter in the post-office for delivery by the post-office establishment for the purpose of executing a scheme to defraud. The scheme alleged was to send out puzzle pictures, advertising as a prize for the neatest correct answer a credit order for $350 on a certain piano, one for $300 for the next neatest, and others for $200 for correct answers. Persons answering were to be told that they were entitled, for instance, to an order for $200 on a piano sold the world over for $300, which would cost them $75 cash with the order. The credit was to be a pretense, as the piano to be delivered was to be one of a retail price not exceeding the cash received. It was not alleged that the piano was to be worth less than the cash paid, but, as is manifest, people were to be led into the dealing by the delusive apparatus of a promise known to be false when made, *Durland* v. *United States*, 161 U. S. 306, and false statements as to the value of the piano bought. The indictment was demurred to and the demurrer was sustained.

It will not be necessary to decide whether the facts alleged show a scheme to defraud, since it does not appear on what ground the court acted. As was said in *United States* v. *Carter*, *ante*, pp. 492, 494: "there is nothing in the record showing any request made to the trial court for an expression of opinion in such form as to manifest clearly whether its action proceeded upon a construction of the statute or merely upon the meaning which was given to the indictment." As it does not appear that the judgment

turned upon any controverted construction of the statute, the writ of error must be dismissed in this case as in that. It is unnecessary to consider whether every determination concerning the common law of fraud taken for granted by the act would be a decision based upon the construction of the statute, within the meaning of the act of March 2, 1907, c. 2564, 34 Stat. 1246.

Writ of error dismissed.

RAINEY v. W. R. GRACE & COMPANY.

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

No. 119. Submitted December 9, 1913.—Decided January 5, 1914.

A statute, the evident purpose of which is to save expense in litigation, will be construed in the light of this manifest purpose.

Repeals by implication are not favored and only in cases of clear inconsistency will a later act be held to repeal an earlier one on the same subject, but if there is clear inconsistency, as in this case, the earlier act cannot stand. *King* v. *Cornell*, 106 U. S. 395.

Even if it might be true that the earlier act prescribed the better rule, where Congress having full authority has acted it is the duty of the courts to enforce the legislation with a view of effecting the purpose for which it was enacted.

When the appellant in a cause in admiralty causes to be printed and presented to the Circuit Court of Appeals under the act of February 13, 1911, printed copies of the apostles on appeal, each of which contains a printed index of the contents thereof and is prepared and printed under a rule of the lower court adopted in pursuance of the said act, the Circuit Court of Appeals is authorized to hear and determine the cause on such copies and to dispense with the requirement of the payment of fees to its clerk by the appellant as prescribed by its rules and which are the same as those prescribed by this court under the act of February 19, 1897.

The first section of the act of February 13, 1911, sets aside by implica-

tion the provision of the fee bill prescribed by this court so far as it relates to the fee to the clerk of the Circuit Court of Appeals for indexing the record when the same has already been properly printed and indexed in pursuance of a rule of the lower court.

THE facts, which involve the construction of the acts and rules of court regulating fees of clerks of the Circuit Courts of Appeals for indexing records on appeal, are stated in the opinion.

Mr. W. H. Gorham for Rainey.

No appearance for Grace & Company.

MR. JUSTICE DAY delivered the opinion of the court.

This case is here on certificate from the Circuit Court of Appeals for the Ninth Circuit. The facts stated show that the appellant caused fifty or more copies of the apostles on appeal in an admiralty case to be printed under the first section of the act of Congress of February 13, 1911, c. 47, 36 Stat. 901. The appeal was taken from the District Court of the United States for the Western District of Washington, and the copies of the apostles were printed and indexed under a rule of that court adopted June 13, 1911, in pursuance of the act of February 13, 1911. In due time the appellant filed one of the printed copies, certified by the clerk and under the seal of the court below, in the Circuit Court of Appeals and moved that court to hear the case without the payment by the appellant of the fees of the clerk of the Circuit Court of Appeals for indexing the record, as prescribed by § 9 of rule 23 of that court, and without the payment by the appellant of the fees of the clerk for indexing the record and distributing copies as provided in that section. Section 9 provides:

"In all cases, including cases in which the record may have been printed under the Act of Congress approved

February 13, 1911, or otherwise, the fee of the clerk of this Court for performing the services herein required shall be twenty-five cents for each printed page of the record and index, as provided by law."

On this statement the Circuit Court of Appeals certifies to this court two questions, namely:

"1. When the appellant in a cause in admiralty causes to be printed and presented to this Court under said Act of February 13, 1911, printed copies of the apostles on appeal, each of which copies contains a printed index of the contents thereof and is prepared and printed under a rule of the lower Court adopted in pursuance of said Act, is this Court authorized to hear and determine the cause on such copies and to dispense with the requirement of the payment of fees to the Clerk of this Court by the appellant as prescribed by Section 9 of Rule 23 of this Court, which is the fee bill prescribed on February 28, 1898, by the Supreme Court under the Act of Congress of February 19, 1897, 29 Stat. 537 [536], which provides as a fee for 'Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index, twenty-five cents'?

"2. Does the first section of the Act of Congress of February 13, 1911, 36 Stat. 901, set aside by implication said fee bill so prescribed by the Supreme Court which is referred to in the first question herein certified?"

The answer to these questions requires a construction of the act of Congress of February 13, 1911, which is, in part, as follows (§ 1, 36 Stat. 901):

"That in any cause or proceeding wherein the final judgment or decree is sought to be reviewed on appeal to, or by writ of error from, a United States circuit court of appeals, the appellant or plaintiff in error shall cause to be printed under such rules as the lower court shall prescribe, and shall file in the office of the clerk of such circuit

court of appeals at least twenty days before the case is called for argument therein, at least twenty-five printed transcripts of the record of the lower court, and of such part or abstract of the proofs as the rules of such circuit court of appeals may require, and in such form as the Supreme Court of the United States shall by rule prescribe, one of which printed transcripts shall be certified under the hand of the clerk of the lower court and under the seal thereof, and shall furnish three copies of such printed transcript to the adverse party at least twenty days before such argument: *Provided*, That either the court below or the circuit court of appeals may order any original document or other evidence to be sent up in addition to the printed copies of the record or in lieu of printed copies of a part thereof; and no written or typewritten transcript of the record shall be required."

And a construction of the act requires a consideration of prior statutes on the subject. On February 19, 1897, c. 263, 29 Stat. 536, Congress passed an act amending the Circuit Court of Appeals Act of March 3, 1891, c. 517, 26 Stat. 826, providing:

"'The costs and fees in each circuit court of appeals shall be fixed and established by said court in a table of fees, to be adopted within three months after the passage of this Act: *Provided*, That the costs and fees so fixed by any court of appeals shall not, with respect to any item, exceed the costs and fees now charged in the Supreme Court.' Each circuit court of appeals shall, within three months after the fixing and establishing of costs and fees as aforesaid, transmit said table to the Chief Justice of the United States, and within one year thereof the Supreme Court of the United States shall revise said table, making the same, so far as may seem just and reasonable, uniform throughout the United States. The table of fees, when so revised, shall thereupon be in force for each circuit."

On February 28, 1898, this court by order (169 U. S. 740, 741) fixed a table of fees and costs in the Circuit Courts of Appeals, one paragraph providing:

> "Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index. . $0.25"

This is the charge provided for in rule 23 of the Circuit Court of Appeals referred to in the certificate.

Before the passage of the act of February 13, 1911, the clerks of the District and Circuit Courts charged for a transcript of the record in preparing the case for review in the Circuit Court of Appeals, which transcript was usually written or typewritten and not required to be printed, the fee for such service being fixed (§ 828, Rev. Stat.). The printing was done under the supervision of the clerk of the Circuit Court of Appeals after the allowance of appeal or writ of error under the regulations above set forth.

In this state of the law, Congress came to deal with the subject in the act of February 13, 1911, 36 Stat. 901. The act is entitled: "An Act To diminish the expense of proceedings on appeal and writ of error or of certiorari," and, especially when read in the light of the report of the Chairman of the Judiciary Committee in the House, which accompanied its introduction into that body, shows that its main purpose is to reduce the expense of records upon which cases may be taken to and considered in the Circuit Courts of Appeals and this court. This was to be accomplished by dispensing with a written or typewritten transcript of the record of the lower court and substituting therefor a certified copy of the printed record, other copies of which should be available for use in the further consideration of the case in the appellate courts. With these ends in view the act provides that the appellant or plaintiff in error shall cause to be printed under such rules as the lower court (the Circuit or District Court) shall pre-

scribe, and shall file in the office of the clerk of the Circuit Court of Appeals, twenty-five printed transcripts of the record. The form in which the transcript shall be printed, the act provides, shall be prescribed by this court, which on March 13, 1911, made the following order:

"It is ordered by the Court that the provisions of Rule 31 of the rules of this court shall apply to all records to be printed as provided in the act of Congress entitled 'An act to diminish the expense of proceedings on appeal and writ of error or of certiorari,' approved February 13, 1911."

Rule 31 prescribes, (222 U. S. appx., p. 36):

"*Form of printed Records and Briefs:* All records, arguments, and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume; and, as well as all quotations contained therein, and the covers thereof, must be printed in clear type (never smaller than small pica) and on unglazed paper."

Section 2 of the Act provides for the use of such printed transcripts of the record, should the case be taken from the Circuit Court of Appeals to this court. The evident purpose of the Act is therefore among other things, to save expenses incurred under the former system in printing records, the clerks' fees for supervising, etc.

In view of this history of the legislation and its manifest purposes we think that, when the court below by its rule had, as in the present case, provided for the printing and indexing of the record, which had been done, and the printed transcript had been filed under the statute with the clerk of the Circuit Court of Appeals, no fee for the like service can be charged by the clerk of the Circuit Court of Appeals. To permit this would be subversive of the purposes of the statute and a continuance of the system which the Act was designed to change.

It is true that there is no express repeal of the act of

February 19, 1897, granting authority to this court to fix the fees in the Circuit Courts of Appeals under which the rule referred to in the certificate was adopted and under which it is contended by the clerk of the Circuit Court of Appeals he is entitled to a fee for indexing, etc., and under which rule, if the clerk performs any of the services designated, he is entitled to the entire fee (*Bean* v. *Patterson*, 110 U. S. 401). It is equally true that repeals by implication are not favored and that it is only in cases of clear inconsistency that a later act will be held to repeal a former one on the same subject. We think that in the present case clear inconsistency exists and that the rule invoked in the certificate of the Circuit Court of Appeals cannot stand consistently with the act of Congress of February 13, 1911, on the same subject. See *King* v. *Cornell*, 106 U. S. 395.

It may also be true that the supervision by clerks of the Circuit Courts of Appeals will tend to uniformity of printing, better indexing and consequent greater facility in hearing cases upon appeal and writ of error. But Congress, with full authority, has regulated the matter, and it is the duty of the courts to enforce the legislation with a view to effecting the purposes for which it was enacted.

We are therefore of the opinion that the later act, that of February 13, 1911, repeals the table of fees as to the fees of the clerk of the Circuit Court of Appeals in the case mentioned under the facts certified. It follows that the first question certified by the Circuit Court of Appeals must be answered in the affirmative, and the second question also in the affirmative so far as the fee in question to the clerk of the Circuit Court of Appeals is involved.

It is so ordered.

CAMERON *v.* UNITED STATES.

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

No. 165. Argued October 21, 1913.—Decided January 5, 1914.

The estate of the bankrupt is in process of administration after the petition has been filed and a receiver appointed and an examination may be ordered at any time thereafter under § 21a of the Bankruptcy Act.

Section 7 of the Bankruptcy Act does not prevent a prosecution for perjury in the giving of testimony by the bankrupt; the immunity applies to past transactions concerning which the bankrupt is examined. *Glickstein* v. *United States*, 222 U. S. 139.

In the absence of clearly expressed legislative intent, retrospective operation will not be given to statutes; nor in absence of such intent will a statute be construed as impairing rights relied upon in past conduct when other legislation was in force. *Union Pacific R. R. Co.* v. *Laramie Stock Yards*, *ante*, p. 190.

Section 860, Rev. Stat., although repealed before testimony was used, if in force when the testimony was given, protected the giver thereof from having it used against him in a criminal proceeding.

The use of testimony given by the bankrupt in a hearing before a commissioner to contradict his testimony given before the referee, in a trial on an indictment for perjury in giving the latter testimony, violates the immunity guaranteed under § 860 Rev. Stat., and the use thereof is reversible error.

192 Fed. Rep. 548, reversed.

THE facts, which involve the immunity of one examined in a bankruptcy proceeding prior to the repeal of § 860, Rev. Stat., from having his testimony used against him, and the construction of §§ 7 and 21a of the Bankruptcy Act, are stated in the opinion.

Mr. Howard S. Gans for petitioner:

Under § 860, Rev. Stat., defendant was guaranteed against the reception in evidence against him of any part of the testimony given by him in either of the bankruptcy

proceedings, save that which in the indictment based upon that proceeding was assigned as perjurious.

Testimony given in the bankruptcy proceeding other than that assigned as perjurious was read in evidence to the defendant's prejudice.

Testimony given before the commissioner was used to prove the falsity of testimony given before the referee.

The prosecution was permitted to read testimony given before the referee which contradicted testimony given before the commissioner on a matter not assigned as perjurious in either indictment.

Testimony not assigned as perjurious was read as a basis for contradiction by the witness Smith, and thus the jury was permitted to consider further evidence that the defendant had sworn falsely in matters not assigned as perjury in either indictment.

The prosecution was permitted to read testimony not assigned as perjurious on the theory that it tended to establish his criminal intent.

The right to immunity from the use of this testimony was not affected by the subsequent repeal of § 860, Rev. Stat. *Lapham* v. *Marshall*, 51 Hun, 36, 41; *Sorenson* v. *United States*, 143 Fed. Rep. 820; *Bram* v. *United States*, 168 U. S. 532, 550; *Whitfield* v. *Aetna Life Ins. Co.*, 144 Fed. Rep. 356, 360; *United States* v. *Kirby*, 7 Wall. 482–486; *Chew Heong* v. *United States*, 112 U. S. 536–554; *Heydenfeldt* v. *Daney Mining Co.*, 93 U. S. 634, 638.

A construction which would involve for the Government the disgrace of a breach of good faith, will by every possible means be resisted. *United States* v. *Taylor*, 104 U. S. 216, 221; *Town of Red Rock* v. *Henry*, 106 U. S. 596, 604; *United States* v. *Central Pac. R. R. Co.*, 118 U. S. 235, 240; *United States* v. *Hosmer*, 9 Wall. 432.

A statute will not be given a retrospective operation, unless by its plain terms that result is rendered imperative. *White* v. *United States*, 191 U. S. 542, 552; *United States*

v. *Heath*, 3 Cranch, 399, 408; *Twenty per cent. Cases*, 20 Wall. 179, 187; *Reynolds* v. *McArthur*, 2 Pet. 434.

It will never be given such an effect so as to destroy vested rights. *United States* v. *Chew Heong*, 112 U. S. 536, 559; *Twenty per cent. Cases*, 20 Wall. 179, 187; *Davis* v. *Bohle*, 92 Fed. Rep. 325, 328.

All general terms in statutes should be limited in their application so as not to lead to injustice or oppression or any unconstitutional operation if that be possible. It will be presumed that exceptions were intended which would avoid results of that nature. *Carlisle* v. *United States*, 16 Wall. 147, 153; *Trinity Church* v. *United States*, 143 U. S. 457, 460; *United States* v. *Kirby*, 7 Wall. 482; *Kennedy* v. *Gibson*, 8 Wall. 498, 506; *Taylor* v. *United States*, 207 U. S. 120, 125; *Hawaii* v. *Mankichi*, 190 U. S. 197, 212.

The right of immunity when acquired is a vested right. *Society &c.* v. *New Haven*, 8 Wheat. 461, 494; *Twenty per cent. Cases*, 21 Wall. 179, 187; *Moore* v. *State*, 43 N. J. Law, 203, 227, 256; *Commonwealth* v. *Duffy*, 96 Pa. St. 506, 514; *State* v. *Sneed*, 25 Texas Rep. (Supp.) 66; *State* v. *Keith*, 63 N. Car. 140, 144.

Defendant was examined as one of the officers of the bankrupt company, and *pro hac vice* was the bankrupt, and entitled to the immunities guaranteed by the section. *In re Alpine Cotton Co.*, 131 Fed. Rep. 824; *In re Royce Dry Goods Co.*, 133 Fed. Rep. 100, 106.

The evidence was insufficient to justify the submission of any of the assignments of perjury, and it was error to deny the defendant's motion to take the case from the jury and for the direction of an acquittal.

Mr. Assistant Attorney General Denison, with whom *Mr. Francis H. McAdoo* was on the brief, for the United States:

Section 860, Rev. Stat., was repealed before the trial

and does not apply; but neither it nor § 7a–9 of the Bankruptcy Act gave any privilege against the use of the fact of self-contradiction as part of the proof of perjury.

Section 860 was repealed without a saving clause before petitioner's testimony was used against him, and therefore afforded no protection. *Balt. &c. R. R. Co.* v. *Grant*, 98 U. S. 398; *Ewell* v. *Daggs*, 108 U. S. 143, 150; *Hopt* v. *Utah*, 110 U. S. 574; *Kans. P. R. Co.* v. *Twombly*, 100 U. S. 78, 81; *McNulty* v. *Batty*, 10 How. 72; *Re Hall*, 167 U. S. 38; *South Carolina* v. *Gaillard*, 101 U. S. 433; *Wilkinson* v. *Nebraska*, 123 U. S. 286; Cf. *Legal Tender Cases*, 12 Wall. 457.

There is no such immunity.

The immunity granted by § 7a–9, of the Bankruptcy Act does not prevent the Government from using the bankrupt's testimony to prove other points of the charge than the mere text of the false statement itself. *Daniels* v. *United States*, 196 Fed. Rep. 459; *Edelstein* v. *United States*, 149 Fed. Rep. 636; *Glickstein* v. *United States*, 222 U. S. 139; *United States* v. *Brod*, 176 Fed. Rep. 165; Cf. *People* v. *Cahill*, 126 App. Div. (N. Y.) 391; *United States* v. *Smith*, 47 Fed. Rep. 501.

Nor does it prohibit the admission of testimony before the commissioner to sustain the charge before the referee, and *vice versa*, since both examinations were part of the same proceeding. *Powers* v. *United States*, 223 U. S. 303.

The evidence supported the verdict.

The examination by the commissioner as special examiner was duly authorized, and the false testimony there was perjury.

The decision of the Court of Appeals below is supported by the undisputed rulings under the acts of 1841 and 1867 and by the uniform practice under the present act until the contrary decision rendered in 1909, by the Court of Appeals for the Third Circuit, in *Skubinsky* v. *Bodek*, 172 Fed. Rep. 332, but see Judge Buffington's dissent, and see

also *Ex parte Bick*, 155 Fed. Rep. 908; *Ex parte Lee*, 15 Fed. Cas. 8,178; *In re Fixen*, 96 Fed. Rep. 749; *In re Fleischer*, 151 Fed. Rep. 81; *In re Salkey*, 21 Fed. Cas. 12, 252; *United States* v. *Wechsler*, 16 Am. B. R. 1; *United States* v. *Liberman*, 176 Fed. Rep. 161; 10 Columbia Law Rev. 70; 23 Harvard Law Rev. 221; Loveland, Bankruptcy (3d ed.), § 204.

Even under § 21a the examination was authorized, because the estate was in process of "administration" within the meaning of the section as soon as it came into the jurisdiction of the court by the filing of the petition, and certainly as soon as the receiver was appointed. *In re Fleischer*, 151 Fed. Rep. 81, *supra*.

Independently of § 21 (a), an examination of a bankrupt prior to adjudication is within the general equity powers of a bankruptcy court conferred by § 2 (15), and the concluding paragraph of the section. *Blake* v. *Francis-Valentine Co.*, 89 Fed. Rep. 691; *In re Cohen*, 136 Fed. Rep. 999; *In re Lacov*, 142 Fed. Rep. 960; *In re Levi and Klauber*, 142 Fed. Rep. 962; *In re Union Trust Co.*, 122 Fed. Rep. 937; *White* v. *Schloerb*, 178 U. S. 542.

This construction, being therefore possible, both under § 21 (a) and under the general equity power, should be accepted, because the other view leads to the result that no witnesses may be examined before adjudication, thus bringing to a standstill the powers of the bankruptcy courts and their representatives during the 20-day interval between the filing of the petition and the adjudication. See *Craddock-Terry Co.* v. *Kaufman*, 175 Fed. Rep. 303; *In re Fleischer*, 151 Fed. Rep. 81; *United States* v. *Liberman*, 176 Fed. Rep. 161. See also Sen. Rep. No. 502, 61st Cong., 2d Sess. on H. R. 16367 to repeal § 860, Rev. Stat.

MR. JUSTICE DAY delivered the opinion of the court.

This is a writ of certiorari to the Circuit Court of Appeals for the Second Circuit. The case concerns a prose-

cution commenced in the Circuit Court of the United States for the Southern District of New York by the finding of two indictments against the petitioner herein charging perjury in a bankruptcy proceeding. Upon trial the defendant, Cameron, was convicted and sentenced and upon writ of error the judgment of the Circuit Court was affirmed by the Circuit Court of Appeals. 192 Fed. Rep. 548.

The first indictment, after setting forth the proceedings in bankruptcy against the Knickerbocker Piano Company, of which the defendant was president and treasurer, alleged that he, upon inquiry under oath before a special examiner and commissioner, appointed under § 21a of the Bankruptcy Act, prior to adjudication, testified:

"First. That he, the said Albert B. Cameron, the aforesaid witness, shortly prior to the filing of the aforesaid petition in bankruptcy, against the said Knickerbocker Piano Company, had sold a number of pianos to William C. Smith, the petitioner in bankruptcy aforesaid.

"Second. That he, the said Albert B. Cameron, the witness aforesaid, had a conversation with the said William C. Smith, concerning the sale to him of pianos by him, the said Albert B. Cameron.

"Third. That he, the said Albert B. Cameron, the aforesaid witness, had sold to the said William C. Smith, eight pianos for the sum of six hundred and sixty-eight dollars."

And it alleged that the defendant thereby committed perjury.

By the second indictment the defendant is said to have committed perjury in a proceeding before the referee in testifying:

"First. That he, the said Albert B. Cameron, had not been able to obtain the address of the said William C. Smith and had never known the said address.

"Second. That he, the said Albert B. Cameron, had

had a conversation or conversations with the said William C. Smith in regard to his, the said William C. Smith's buying pianos of and from the said alleged bankrupt."

The two indictments were consolidated and, the defendant pleading not guilty, trial was had and a verdict of guilty returned upon which judgment was rendered.

The petitioner contends that the Bankruptcy Act does not authorize the proceeding before the commissioner prior to the adjudication. The record discloses that a receiver had been duly appointed of the assets and effects of the bankrupt and that he had applied to the court under § 21a of the Bankruptcy Act of 1898 for an order requiring the bankrupt, its officers and directors, to appear before a special examiner and commissioner to be examined concerning the property of the bankrupt and the acts and conduct of its officials. The court made the order requested and appointed the special examiner and commissioner, before whom Cameron appeared and testified, giving, in the course of his examination, the testimony charged in the first indictment to be false. This proceeding was prior to the adjudication in bankruptcy, which followed a few days later. Whether the examination of Cameron upon oath at that stage of the proceedings was authorized by the Bankruptcy Act depends upon a construction of clause *a*, § 21, of the act, which provides, in part, as follows:

"A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act."

The controversy is over the meaning of the phrase, "a bankrupt whose estate is in process of administration under this act." The construction of this provision dif-

fers in the Federal courts, some of them having held that there can be no such examination until after adjudication, as it is only then that the bankrupt can be subjected to such proceeding. Of this class are *Skubinsky* v. *Bodek*, 172 Fed. Rep. 332; *Podolin* v. *McGettigan*, 193 Fed. Rep. 1021; *In re Thompson*, 179 Fed. Rep. 874; *In re Davidson*, 158 Fed. Rep. 678; *In re Crenshaw*, 155 Fed. Rep. 271. To the opposite view are *In re Fixen*, 96 Fed. Rep. 748; *In re Fleischer*, 151 Fed. Rep. 81; *Ex parte Bick*, 155 Fed. Rep. 908; *Wechsler* v. *United States*, 158 Fed. Rep. 579; *United States* v. *Liberman*, 176 Fed. Rep. 161. We are of opinion that the estate was in process of administration at the time when the examination before the commissioner was ordered and the testimony of Cameron given. This court has decided that the filing of the petition in bankruptcy operates to place the property of the alleged bankrupt *in custodia legis* and prevents any creditor from attaching it; and, although by the terms of the act the estate does not vest in the trustee until the date of the adjudication, it is placed at the time of the filing of the petition under the control of the court with a view to its ultimate distribution among creditors. *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, 307; and see *Mueller* v. *Nugent*, 184 U. S. 1, 14; *Everett* v. *Judson*, 228 U. S. 474, 478, 479. And this is true, notwithstanding, as contended by the petitioner, that should the attempt to obtain an adjudication of bankruptcy fail upon the subsequent hearings, the receivership would necessarily be vacated and the property turned back to the alleged bankrupt.

In order to arrive at the true meaning of § 21a other provisions as well as the purpose of the act must be had in view. The object of the examination of the bankrupt and other witnesses to show the condition of the estate is to enable the court to discover its extent and whereabouts, and to come into possession of it, that the rights of creditors may be preserved. If such examination is postponed

until after adjudication, which may not take place for at least twenty days, within which the bankrupt in involuntary bankruptcy is given leave to appear and plead, the estate may be concealed and disposed of and the purpose of the act to hold it and to distribute it for the benefit of creditors defeated. The importance of such early examination of bankrupts was emphasized in *In re Fleischer, supra.* By subdivision 9 of § 7 of the act, it is provided that the bankrupt shall, "when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate." Here is found authority to examine the bankrupt at such other times than the first meeting of creditors as the court may direct. This section should be read with § 21a, and throws light upon its proper construction. In this case the petitioner had invoked the jurisdiction of the court, a receiver had been appointed to take possession of the property, the court was so far in possession of it as to prevent other courts from seizing it and thus defeating the bankruptcy jurisdiction. We are of opinion that the estate was then in process of administration and the examination ordered was within the jurisdiction of the court.

Other questions in the case relate to alleged violations of immunity afforded the defendant under statutes of the United States, which were invoked by him at the trial in the Circuit Court. Records were there offered in evidence showing the testimony given by Cameron before the examiner and before the referee. Cameron claimed that this testimony was incompetent for the purpose of establishing his guilt beyond showing that it was in fact given.

Counsel for petitioner relies upon the immunity clause of § 7 of the Bankruptcy Act, and upon § 860 of the Revised Statutes in force at the time the testimony was given but repealed by the act of May 7, 1910, c. 216, 36 Stat. 352. Section 7, subdivision 9, of the Bankruptcy Act, cited above, concludes, "but no testimony given by him shall be offered in evidence against him in any criminal proceeding." This section was before this court, so far as the immunity provided is concerned, in *Glickstein* v. *United States*, 222 U. S. 139, where it was held not to prevent a prosecution for perjury in the giving of testimony by a bankrupt, and the immunity was held to apply to past transactions concerning which the bankrupt might be examined. In the opinion in that case *Edelstein* v. *United States*, Circuit Court of Appeals for the Eighth Circuit, 149 Fed. Rep. 636, which had held that the words "any criminal proceeding" in which immunity is provided are limited to such criminal proceedings as arise out of the conduct of the bankrupt's business or the disposition of his property, etc., concerning which he may be examined, was cited with approval. In *Ensign* v. *Pennsylvania*, 227 U. S. 592, 600, it was held that full effect could be given to the immunity provision by confining it to the testimony given under subdivision 9, to which it was immediately subjoined. As the present prosecution was based upon alleged false swearing in the course of the bankruptcy proceedings, § 7 of the Bankruptcy Act can have no application.

Petitioner also invokes the protection of § 860 of the Revised Statutes, which reads:

"No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any Court of the United States, in any criminal proceeding, or for the enforcement of any

penalty or forfeiture: *Provided,* That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

The Government contends that the subsequent repeal of this section deprives the petitioner of the immunity afforded. We cannot agree with this contention. It would be subversive of principles of right and justice to give such effect to a statute upon the protection of which the petitioner had the right to rely at the time when called upon to testify in the bankruptcy court and in consequence of which he may be presumed to have given his testimony. A retrospective operation of statutes is not to be given except in clear cases unequivocally evidencing the legislative intent to that effect. *Union Pacific R. R. Co.* v. *Laramie Stock Yards Co.*, 231 U. S. 190, 199, and previous cases in this court cited in the opinion in that case. *Summers* v. *United States*, 231 U. S. 92. In the absence of a clearly expressed legislative intent to the contrary the court will presume that the law-making power is acting for the future and does not intend to impair obligations incurred or rights relied upon in the past conduct of men when other legislation was in force. *White* v. *United States*, 191 U. S. 545, 552.

The Circuit Court of Appeals in the instant case was of opinion that the petitioner was entitled to the immunity afforded in § 860 of the Revised Statutes, but failed to find in the record any instance of its violation. Section 860 by its express terms does not exempt a party from prosecution for perjury committed in testifying in the instances named. It was held in *Glickstein* v. *United States, supra,* of § 7 of the Bankruptcy Act, that this immunity was not intended to put a premium upon perjury by giving protection against the use of the testimony in prosecutions for that crime; and we cannot agree with petitioner's contention that the use of such testimony is limited to proving that

it was in fact given. In prosecutions for perjury the statute saved the right to use such testimony for any legitimate purpose in establishing the charge made. While this is true, the statute by its terms protects the party from the use of such testimony in any court of the United States in any criminal proceeding.

The subsequent prosecution of Cameron for perjury in the two bankruptcy proceedings was a criminal proceeding in a court of the United States and the testimony given in the one bankruptcy proceeding, not tending to establish perjury in that proceeding, should not have been received to establish the crime charged in the other proceeding. In this case it will be noted from the statement already made, that the indictment based upon the testimony before the referee charged that Cameron falsely swore that he had not been able to obtain and had never known the address of William C. Smith, the man with whom it was charged the fraudulent transactions regarding the pianos were had. In the first indictment based upon the testimony before the commissioner, there is no such charge. The Government having put in evidence the proceedings before the referee showing that Cameron there testified that he did not know Smith's address and that he was not acquainted with his friends and that he did not know any one who knew him, the record of Cameron's testimony before the commissioner was offered in evidence, and, over specific objections calling attention to the lack of such charge in the first indictment based on the proceedings before the commissioner, the Government was permitted to read:

"'Q. Did you shortly prior to the filing of the petition sell some pianos and realize cash on them?

"'A. Yes, I did.

"'Q. To whom were they sold?

"'A. They were sold to W. C. Smith.

"'Q. Where is his place of business?

"'A. He is not in business.

"'Q. Who is he?

"'A. Why, an acquaintance of mine.

"'Q. Where does he live?

"'A. On St. Nicholas Avenue, I don't recall the address.

"'Q. What number?

"'A. I don't remember.

"'Q. Between what streets?

"'A. Above 125th.

"'Q. Is it an apartment or a private house?

"'A. Why, I think just a furnished room, or rooms.'

"Mr. McManus: I object to this as immaterial and not within the issues. There is no allegation in the indictment, or the assignment of perjury, as to the alleged address of William C. Smith, and in the proceedings before the Commissioner—

"Mr. Smith: I am reading so the jury will get some sort of a comprehensive idea as to what the man testified to. This is the beginning of this alleged transaction with William C. Smith.

"The Court: Cut it down closer.

"Mr. Smith: I have cut it down to about two pages.

"Objection overruled. Exception by defendant.

"Mr. Smith (reading):

"'Q. How long have you known him?

"'A. Oh, three or four years.

"'Q. Do you know whether he is employed by anybody?

"'A. Yes, sir, but I don't know where.

"'Q. You haven't any idea in what capacity he is employed?

"'A. No.

"'Q. How often do you meet him?

"'A. Not very often.

"'Q. How often did you meet him before this last transaction?

"'A. Oh, two or three times.

"'Q. How long do you know him?
"'A. Three or four years, I think.'
"Mr. McMANUS: This is another line, subject to the last exception.
"'Q. Where did you first meet him?
"'A. New York.
"'Q. Where?
"'A. I don't recall that.
"'Q. Do you know anybody else other than yourself who knows Mr. Smith?
"'A. He has a number of friends.
"'Q. Do you know of anybody?
"'A. My brothers.
"'Q. Outside of your family?
"'A. No.
"'Q. Is he related to you?
"'A. No.
"'Q. Is he related to any member of your family?
"'A. No.
"'Q. Do you know how he can be located?
"'A. Why, yes, I could get hold of him.
"'Q. How could you get hold of him to-day?
"'A. I'd go and ask my brother.
"'Q. You think he could give you the address?
"'A. Yes, sir, I think so.
"'Q. Did you send to Mr. Smith to come to the place and buy some pianos?
"'A. I had to sell some pianos to get some money.
"'Q. Where did you send to get him?
"'A. I got him through my brother.'"

The effect of this testimony was to distinctly contradict the testimony which Cameron had given before the referee and which was the subject-matter of the indictment based on the proceedings before that officer. It did not tend to establish the charge growing out of his testimony before

the commissioner, which related solely to the sale of pianos and conversations between Cameron and Smith concerning the sales. The district attorney contended that this testimony was competent in order that the jury might get some sort of comprehensive idea as to what the man testified to, and, in view of that statement and the expressed view of the court that anything that threw light on the event was admissible, the testimony was admitted. It is contended that it was competent as showing the relations of Cameron to Smith and to identify Smith, but there was no question in the case as to who Smith was. He was a witness called to establish the charge of perjury and he was the person with whom it was charged the fraudulent dealings in pianos was had by the bankrupt. The testimony offered as to what Cameron swore to before the examiner, while not tending to establish the charge of perjury based upon testimony in that instance, did contradict the testimony which he had given before the referee, and directly tended to establish the charge under that indictment. We think to permit the use of the testimony for that purpose was to permit the testimony given in the one instance to be used in a criminal proceeding based upon testimony given in the other instance, and therefore to violate the immunity given in § 860 of the Revised Statutes, then in force.

Other errors are alleged, and it is contended that there was no adequate proof of the charges made, but these questions were submitted to the jury and cannot be reexamined here. We are of the opinion that error was committed in the use given to the testimony taken before the commissioner in the manner we have stated and for that reason the judgment of the Circuit Court of Appeals affirming the conviction of Cameron in the court below should be reversed.

Reversed and remanded to the District Court of the United States for the Southern District of New York.

RADFORD *v.* MYERS.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 251. Submitted December 3, 1913.—Decided January 5, 1914.

Whether due effect was given by the state court to a judgment rendered in the Circuit Court of the United States presents a Federal question which gives this court jurisdiction to review the judgment of the state court, and to determine the question this court will examine the judgment in the Federal court, the pleadings and the issues and, if necessary, the opinion rendered.

Where the suit in which the former judgment is set up is not upon the identical cause of action the estoppel operates only as to matters in issue or points controverted and actually decided in the former suit.

Judgments become estoppels because they affect matters upon which the parties have been heard, but are not conclusive upon matters not in question or immaterial. *Reynolds* v. *Stockton*, 140 U. S. 254.

In a suit in which two of the parties successfully unite in asking the court to award the fund to one of them against a third party claiming it under an assignment, the judgment is not, as between the two so uniting, *res judicata* so that the one to whom it is awarded is not obligated to account therefor to the other under an agreement so to do if the record does not show that such question was also at issue and determined.

167 Michigan, 135, affirmed.

THE facts, which involve the effect to be given by the state court to a former judgment in a suit between some of the parties rendered by the Circuit Court of the United States and the extent to which such judgment was *res judicata* of the matters in controversy, are stated in the opinion.

Mr. Thomas A. E. Weadock for plaintiff in error:

Whether a state court has given due effect to the decision of a United States court is a Federal question. *Dupasseur* v. *Rochereau*, 21 Wall. 130; *Embry* v. *Palmer*, 107

U. S. 3; *Pendleton* v. *Russell*, 144 U. S. 640; *Central Bank* v. *Stevens*, 169 U. S. 432; *Hancock Bank* v. *Farnum*, 176 U. S. 640; *Werlein* v. *New Orleans*, 177 U. S. 390; *National Foundry* v. *Oconto Supply Co.*, 183 U. S. 216.

Matters in issue and decided by the judgment of a court having jurisdiction of the parties and the subject-matter of the suit are conclusively settled, and cannot be litigated again between the parties to that suit or any of their privies. 23 Cyc. 1215; *Hopkins* v. *Lee*, 6 Wheat. 109; *Cromwell* v. *Sac County*, 94 U. S. 351; *Johnson Co.* v. *Wharton*, 152 U. S. 252; *Southern Pacific Co.* v. *United States*, 168 U. S. 1.

A right, question or fact once put in issue and decided is concluded in any future action between the same parties or their privies, whether the subsequent action is for the same or a different cause of action. *New Orleans* v. *Citizens' Bank*, 167 U. S. 371.

A judgment is a bar to any future action between the same parties or their privies upon the same cause of action. *Cromwell* v. *Sac County*, 94 U. S. 351; *Dowell* v. *Applegate*, 152 U. S. 327; *Werlein* v. *New Orleans*, 177 U. S. 390.

Or as this last rule has more recently been very aptly stated—a judgment is conclusive as to all the *media concludendi*. *United States* v. *California Land Co.*, 192 U. S. 358; *American Exp. Co.* v. *Mullins*, 212 U. S. 312; *United States* v. *Southern Pac. Co.*, 223 U. S. 565; *Troxell* v. *D., L. & W. R. Co.*, 227 U. S. 434; 2 Black., Judgm. (2d ed.), § 506.

Those are held to be parties who have a right to control the proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision. 2 Black., Judgm. (2d ed.), p. 808; 23 Cyc. 1240.

Matters which follow by necessary and inevitable inference from the judgment itself are equally covered by the estoppel as if they were specifically found in so

many words. 23 Cyc. 1306; *Nat. Foundry Co.* v. *Oconto Co.*, 183 U. S. 216; *Werlein* v. *New Orleans*, 177 U. S. 390; *Winona Land Co.* v. *Minnesota*, 159 U. S. 526; *Nalle* v. *Oyster*, 230 U. S. 165.

The estoppel covers matters which were actually determined, whether technically put in issue by the pleadings or not. 23 Cyc. 1304; 2 Black., Judgm. (2d ed.), § 614.

There need be no pleadings between co-parties in order that they may, as between themselves, be bound by the judgment, if they were essentially adversary parties, or their respective rights were in issue. *Baldwin* v. *Hanecy*, 204 Illinois, 281, affirming 104 Ill. App. 84; *Kohly* v. *Fernandez*, 133 App. Div. (N. Y.) 723; affirmed 201 N. Y. 561; *Corcoran* v. *Ches. & Ohio Canal Co.*, 94 U. S. 741; *Louis* v. *Brown Township*, 109 U. S. 163.

This is also the Michigan rule. *Waldo* v. *Waldo*, 52 Michigan, 91, 93; *Scripps* v. *Sweeney*, 160 Michigan, 148, 177.

The Federal decision is a bar to this litigation between the plaintiff in error and Col. Myers as to the half of the judgment paid by Luzerne County into the United States court.

No counsel appeared for defendant in error.

Mr. Justice Day delivered the opinion of the court.

Elijah E. Myers brought this suit in the Circuit Court of Wayne County, State of Michigan, against George W. Radford, the plaintiff in error herein, for an accounting and for a decree for the balance due him from a judgment in a suit of the former in which the latter acted as one of his attorneys and received the amount of the judgment. Myers having died during the pendency of the action, it was revived in the name of his executrix, the defendant in error. The decree of the Circuit Court in favor of the

defendant in error was affirmed by the Supreme Court of the State of Michigan (167 Michigan, 135), and the case comes here on error.

The record discloses that Myers had entered into a contract with the County of Luzerne, State of Pennsylvania, to furnish the plans and specifications for a court-house and had certain claims against the County arising therefrom. Counsel had been employed and suit commenced, but little progress made. Myers had assigned a one-half interest in the contract to his son, George W. Myers. In this state of affairs the elder Myers employed the plaintiff in error, who had theretofore been his attorney and to whom he was indebted, to prosecute the court-house claim. To secure his indebtedness to Radford, Myers assigned his remaining one-half interest in the claim to the plaintiff in error. Later, April 2, 1900, George W. Myers assigned his one-half interest to the plaintiff in error, the latter to account to him for the proceeds after deducting a $1,000 attorney's fee and one-half of the costs, to which assignment Elijah E. Myers gave his written assent; and shortly thereafter, April 11, 1900, George W. Myers, in consideration of $150, transferred his interest in his prior assignment and in the assignment from his father to him to the plaintiff in error.

The plaintiff in error engaged local counsel in Pennsylvania, who commenced suit in the United States Circuit Court for the Middle District of Pennsylvania, and prosecuted the court-house claim to a successful termination (*Myers* v. *Luzerne County*, 124 Fed. Rep. 436). Thereupon George W. Myers intervened in that suit, setting up his right to one-half of the judgment, claiming that his assignment to Radford had been fraudulently obtained; and one-half of the amount of the judgment was paid into court. Upon the petition of the plaintiff in error to remove the money, the jurat of which was signed by Elijah E. Myers, the court decreed that the

assignment was valid and awarded the fund to Radford, and dismissed George W. Myers' claim.

Elijah E. Myers thereafter brought this suit, alleging among other things that Radford, on April 11, 1900, acting on his behalf, purchased the one-half interest assigned by him to George W. Myers, and that at that time it was distinctly understood and agreed between the plaintiff in error and himself that the one-half interest so purchased, with the one-half interest assigned by him to Radford, should be held as security for the payment of all his indebtedness to Radford for loans and services and for the payment of the $150 given by Radford to George W. Myers and all costs in the litigation of the court-house claim, and that, after deducting such amounts from the judgment collected, the plaintiff in error should pay the balance to him. The plaintiff in error contended that the judgment in the United States Circuit Court was *res judicata* as to his right to the one-half interest in the court-house claim assigned to him by George W. Myers. He further alleged, however, that, notwithstanding his absolute ownership of the George W. Myers' one-half interest, he purchased it with the distinct intention that he would apply for the benefit of Elijah E. Myers the balance, if he succeeded in collecting the claim, after paying expenses and services and all Myers' indebtedness to him. But, he alleged, he did not intend to waive his right as absolute owner or allow Myers to dictate the amount of expenses, services or indebtedness. The Circuit Court entered a decree for the balance due Myers.

The Supreme Court held that the assignment of April 2, 1900, was merged in the assignment of April 11, 1900, and also held that the Federal decision in Pennsylvania had not determined that the trust relation between the plaintiff in error and Elijah E. Myers had terminated; as to which holdings the plaintiff in error assigns error, upon the failure of the Supreme Court to give due credit in those

respects to the judgment of the United States Circuit Court.

From the foregoing statement it is evident that the sole Federal question involved arises from the alleged denial in the judgment of the Supreme Court of Michigan of due effect to the judgment rendered in the United States Circuit Court in Pennsylvania, which is relied upon by the plaintiff in error as *res judicata* of the matters in controversy. Whether such effect was given as the former judgment required presents a Federal question for determination. *National Foundry & Pipe Works* v. *Oconto Water Supply Co.*, 183 U. S. 216, 233. To determine this issue we examine the judgment in the former case, the pleadings filed and the issues made, and, if necessary to elucidate the matters decided, the opinion of the court which rendered the judgment. *National Foundry & Pipe Works* v. *Oconto Water Supply Co.*, *supra*, 234, and previous cases in this court therein cited.

As the suit in the Michigan court was not upon the identical cause of action litigated in the United States Circuit Court the estoppel operates only as to matters in issue or points controverted and actually decided in that suit. *Cromwell* v. *Sac County*, 94 U. S. 351; *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1, 50; *Troxell* v. *Del., Lack. & West. R. R.*, 227 U. S. 434, 440.

Applying these familiar principles, how stands the present case? The elder Myers brought this suit upon the theory that the amount of the judgment which had been paid over to Radford on August 22, 1903, which the Supreme Court of Michigan found was $12,711.23, was held in trust and to be accounted for by Radford to him because of the agreement set up in the complaint in the state court, already referred to. The record of the proceedings in the United States Circuit Court shows that one-half of the money due upon the claim of Elijah E. Myers against Luzerne County had been paid into court in the original suit of Myers against Luzerne County.

Radford had filed a petition asking for the payment of the money to him as the owner of the judgment. George W. Myers, as respondent, filed an answer, claiming the amount in court and attacking his assignment to Radford. It was upon that petition and answer and testimony that the case was heard and the following order made:

"In the United States Circuit for the Middle District of Pennsylvania, February Term, 1903.

"No. 3.

"Elijah E. Myers

v.

"County of Luzerne.

"In the Matter of Petition of George W. Radford to Take Money Out of Court.

"At a Session of said Court Held at Scranton, in said District, on the 31st Day of July, One Thousand Nine Hundred and Three.

"Present: Honorable R. W. Archbald, District Judge.

"The above matter having heretofore been heard upon said petition, answers and proofs, and the same having been argued by counsel for Petitioner, as well as for the Respondent, respectively, and due consideration had thereon, it is now ordered, adjudged and decreed that the assignment from Respondent to Petitioner of the 11th day of April, one thousand nine hundred is valid, and an absolute assignment of all the interest of said Respondent in the said contract between Elijah E. Myers and the County Commissioners of Luzerne County of date Feb. 22, 1895, and that the fund in court be awarded to Petitioner, George W. Radford; and that the claim of George W. Myers, Respondent, be dismissed with costs to be taxed against said Respondent."

A reading of this order, which is said to embody the Federal judgment relied upon by the plaintiff in error as *res judicata* of the present controversy, shows that the only matter adjudged concerned the assignment from the

respondent (Radford) to the petitioner (George W. Myers), of date the eleventh day of April, 1900, the court holding that it was an absolute assignment of the interest of the respondent in the contract between Elijah E. Myers and the County of Luzerne, awarding the fund in court (which was one-half of that recovery) to the petitioner, and decreeing that the claim of the respondent be dismissed and that he pay all the costs. Certainly there is nothing in that judgment to conclude the present suit in the state court between Elijah E. Myers and Radford. The proceeding in the United States Circuit Court in Pennsylvania is specifically limited to the controversy between Radford and the respondent in that proceeding, George W. Myers. If there could be any doubt as to the effect of the order, the opinion of Judge Archbald found in the record shows how the matter was regarded by him. The opinion recites that, a verdict having been rendered in favor of Elijah E. Myers, because of a controversy with respect to one-half of it, leave of court had been given to pay one-half of the judgment into court, and that the petitioner, Radford, and George W. Myers, by each of whom ownership was asserted, by pleadings and proof had submitted the matter to that court, and that it had jurisdiction to determine to whom the fund belonged. After referring to the original contract and the various steps to collect the money from the County of Luzerne and the assignment of a one-half interest from the elder Myers to his son in 1896, Judge Archbald said (124 Fed. Rep. 438:)

"Col. Myers explained to Mr. Radford that one-half the contract had already been assigned to George, and it was recognized that if he held on to the assignment there would be little, if anything, coming to Col. Myers after he had settled with Radford. But it was stated by Col. Myers that the assignment was without consideration, and if he succeeded, as he hoped, in getting George to surrender it, then Radford was to account to him for that

interest also, after deducting for expenses and services. The trust relation so established still continues."

The opinion then goes on to consider elaborately the claim of George W. Myers to the one-half interest paid into court, as against Radford, and finds that the assignment of April 11, 1900, was a valid sale from George W. Myers to Radford and that the assignment was absolute in form and intended by George W. Myers as a complete disposition to Radford for $150 of the one-half interest derived from his father. The judge concludes his opinion by directing that an order be drawn awarding the fund to Radford, and dismissing the claim of George W. Myers with costs. Thereupon the order which we have already set forth was made.

The fact that the order was made in an intervention in the original suit of *Myers* v. *Luzerne County* and that Myers verified the petition filed by Radford asking to have the fund in court paid over to the latter, did not raise any issue between Elijah E. Myers and Radford as to the alleged agreement that Radford should account to Myers for the fund. And the fact that both Elijah E. Myers and Radford were parties in the same suit did not have the effect to submit the controversy made in the present litigation to the decision of the United States Circuit Court. Judgments become estoppels because they affect matters upon which the parties have been heard or have had an opportunity to be heard, but are not conclusive upon matters not in question or immaterial. *Reynolds* v. *Stockton*, 140 U. S. 254, 268, 269.

It seems very clear that there was nothing in this proceeding, in the issues made or the judgment rendered, that in any wise concluded the right of Elijah E. Myers to bring suit, which he subsequently prosecuted in the state court, calling upon Radford for an accounting concerning the proceeds of the judgment in his hands.

Judgment of the Supreme Court of Michigan affirmed.

OPINIONS PER CURIAM, ETC., FROM OCTOBER 13, 1913, TO JANUARY 5, 1914.

No. —. Original. *Ex parte:* IN THE MATTER OF ASSETS COLLECTING COMPANY, PETITIONER. Submitted October 14, 1913. Decided October 20, 1913. Motion for leave to file petition for writs of mandamus or certiorari denied. *Mr. Ferdinand E. M. Bullowa* and *Mr. Richard S. Harvey* for the petitioner.

No. —. Original. *Ex parte:* IN THE MATTER OF YOUNG, SMYTHE FIELD COMPANY, PETITIONER. Submitted October 14, 1913. Decided October 20, 1913. Motion for leave to file petition for a writ of mandamus denied. *Mr. Mortimer C. Rhone* and *Mr. A. R. Jackson* for the petitioners.

No. —. CHARLES ANDERSON, PETITIONER, *v.* WILLIAM H. MOYER, WARDEN OF THE UNITED STATES PENITENTIARY AT ATLANTA, GA. Submitted October 20, 1913. Decided October 27, 1913. Motion for leave to file petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit and to proceed *in forma pauperis* denied. *Mr. Lamar Hill* for the petitioner.

No. —. CARL OLIVER, PLAINTIFF IN ERROR, *v.* THE STATE OF TEXAS. Submitted October 21, 1913. Decided October 27, 1913. Motion for leave to docket cause and proceed *in forma pauperis* denied. *Mr. Cecil H. Smith* for the petitioner.

No. 575. The Glenwood Light & Water Company, Appellant, *v.* The Town of Glenwood Springs. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss or affirm submitted October 21, 1913. Decided October 27, 1913. *Per Curiam.* Appeal dismissed. *Press Pub. Co.* v. *Monroe,* 164 U. S. 105, 111–112; *Defiance Water Co.* v. *Defiance,* 191 U. S. 184, 191; *Shulthis* v. *McDougal,* 225 U. S. 561; *Joplin* v. *Southwest Missouri Light Co.,* 191 U. S. 150, 157; *Knoxville Water Co.* v. *Knoxville,* 200 U. S. 22; *Swope* v. *Leffingwell,* 105 U. S. 3–4. *Mr. W. P. Malburn, Mr. W. H. Bryant* and *Mr. George L. Nye* for the appellant. *Mr. John A. Rush* for the appellee.

No. 153. Chino Lee, Plaintiff in Error, *v.* The United States. In error to the Supreme Court of the Philippine Islands. Submitted October 22, 1913. Decided October 27, 1913. *Per Curiam.* Judgment affirmed. *Mugler* v. *Kansas,* 123 U. S. 623, 659–663; *Holden* v. *Hardy,* 169 U. S. 366; *Louisville & Nashville Railroad Co.* v. *F. W. Cook Brewing Co.,* 223 U. S. 70, 82; *Price* v. *United States,* 165 U. S. 311. *Mr. A. D. Gibbs* for the plaintiff in error. *The Attorney General* and *Mr. Assistant Attorney General Denison* for the defendant in error.

No. 584. Henry C. King, Appellant, *v.* U. B. Buskirk, Trustee, et al. Appeal from the United States Circuit Court of Appeals for the Fourth Circuit. Motion to dismiss or affirm submitted October 14, 1913. Decided October 27, 1913. *Per Curiam.* Dismissed for the want of jurisdiction. *Fay* v. *Crozer,* 217 U. S. 455, 456, and cases cited; *Farrell* v. *O'Brien,* 199 U. S. 100; *Waters-*

Pierce Oil Co. v. *Texas*, 212 U. S. 112, 117–118. *Mr. Maynard F. Stiles* for the appellant. *Mr. Frank Cox* and *Mr. W. R. Lilly* for the defendants in error.

No. 516. M. V. KIRKPATRICK, APPELLANT, *v.* WYATT A. HARNESBERGER, TRUSTEE, ETC. Appeal from the District Court of the United States for the Southern District of Georgia. Motion to dismiss submitted October 15, 1913. Decided November 3, 1913. *Per Curiam.* Dismissed for the want of jurisdiction. *Merritt* v. *Bowdoin College*, 169 U. S. 551, 556. *Mr. Samuel H. Myers* for the appellant. *Mr. Wm. H. Fleming* for the appellee.

No. 539. THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL., APPELLANTS, *v.* THE UNITED STATES ET AL. Appeal from the United States Commerce Court. Argued October 27 and 28, 1913. Decided November 3, 1913. *Per Curiam.* Decree affirmed on the authority of *Illinois Central Railroad Company* v. *Interstate Commerce Commission*, 206 U. S. 454, and cases cited; *Chicago, Rock Island & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 218 U. S. 88, 110; *Proctor & Gamble Co.* v. *United States*, 225 U. S. 282, 297–298; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91. *Mr. C. W. Durbrow, Mr. Robert Dunlap, Mr. H. A. Scandrett, Mr. T. J. Norton, Mr. Maxwell Evarts* and *Mr. James G. Wilson* for the appellants. *The Attorney General, The Solicitor General* and *Mr. Blackburn Esterline* for the United States. *Mr. P. J. Farrell* for The Interstate Commerce Commission. *Mr. Wm. E. Lamb, Mr. Geo. E. Farrand, Mr. Rush C. Butler* and *Mr. Stephen A. Foster* for intervenors.

No. 688. JOHN RONEY ET AL., PLAINTIFFS IN ERROR, *v.* H. J. VAN NESS. In error to the Supreme Court of the State of California. Motion to dismiss submitted October 27, 1913. Decided November 3, 1913. *Per Curiam.* Dismissed for the want of jurisdiction. Revised Statutes, § 1008; *Allen* v. *Southern Pacific R. R. Co.*, 173 U. S. 479, 484; *Aspen Min. & Smelting Co.* v. *Billings*, 150 U. S. 31, 36; *Scarborough* v. *Pargoud*, 108 U. S. 567. *Mr. A. E. Bolton* for the plaintiffs in error. *Mr. Theodore A. Bell* for the defendant in error.

No. 520. PACIFIC CREOSOTING COMPANY, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the United States Circuit Court of Appeals for the Ninth Circuit. Motion to dismiss submitted October 27, 1913. Decided November 3, 1913. *Per Curiam.* Dismissed for the want of jurisdiction. *Anglo-Californian Bank* v. *United States*, 175 U. S. 37; *Macfadden* v. *United States*, 213 U. S. 288, 294. *Mr. George E. de Steiguer* for the plaintiff in error. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Adkins* for the defendant in error.

No. 413. JOHN ZELLER, PLAINTIFF IN ERROR, *v.* THE STATE OF NEW JERSEY. In error to the Court of Errors and Appeals of the State of New Jersey. Motion to dismiss or affirm submitted October 27, 1913. Decided November 3, 1913. *Per Curiam.* Dismissed for the want of jurisdiction. *Hurtado* v. *California*, 110 U. S. 516; *Maxwell* v. *Dow*, 176 U. S. 581, 584; *Twining* v. *New Jersey*, 211 U. S. 78; *Farrell* v. *O'Brien*, 199 U. S. 89, 100. *Mr. Marshall Van Winkle* for the plaintiff in error. *Mr. Edmond Wilson, Mr. Robert H. McCarter* and *Mr. Pierre P. Garven* for the defendant in error.

No. 221. WILLIAM S. LOVELL, AS TRUSTEE IN BANKRUPTCY, ETC., PLAINTIFF IN ERROR, *v.* HENRY HENTZ & COMPANY ET AL. In error to the United States Circuit Court of Appeals for the Fifth Circuit. Motion to dismiss or affirm submitted October 27, 1913. Decided November 3, 1913. *Per Curiam.* Dismissed for the want of jurisdiction. *Lovell* v. *Newman*, 227 U. S. 412. *Mr. Walker Percy* and *Mr. H. Generes Dufour* for the plaintiff in error. *Mr. Phelan Beale* for the defendants in error.

No. 44. THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, PLAINTIFF IN ERROR, *v.* OLIVER LETOT. In error to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas. Submitted by plaintiff in error November 5, 1913. Decided November 10, 1913. *Per Curiam.* Dismissed for want of jurisdiction on the authority of *Missouri, Kansas & Texas Railway Company* v. *May*, 194 U. S. 267. *Mr. Joseph M. Bryson* for the plaintiff in error. No appearance for the defendant in error.

No. 436. C. F. EASTON, RECEIVER, ETC., PLAINTIFF IN ERROR, *v.* THE CHICAGO HOTEL COMPANY ET AL. In error to the District Court of the United States for the Western District of Washington. Motion to dismiss submitted November 10, 1913. Decided November 17, 1913. *Per Curiam.* Dismissed for want of jurisdiction on the authority of *United States* v. *Congress Construction Co.*, 222 U. S. 199; *Fore River Shipbuilding Co.* v. *Hogg*, 219 U. S. 195; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225; *Smith* v. *McKay*, 161 U. S. 355. *Mr. Stephen A. Keenan* for the

plaintiff in error. *Mr. Chas. W. Dorr, Mr. Aldis B. Browne, Mr. Alexander Britton* and *Mr. Evans Browne* for the defendants in error.

No. 8. Original. *Ex parte:* IN THE MATTER OF AMERICA CAPO, PETITIONER. On petition for writ of mandamus. Argued November 10, 11, 1913. Decided November 17, 1913. *Per Curiam.* The rule to show cause hitherto allowed is discharged and the petition for the allowance of the writ of mandamus is dismissed, and the prayer for the writ consequently denied. *Ex parte Harding*, 219 U. S. 363. *Mr. Frederic D. McKenney* and *Mr. F. H. Dexter* for the petitioner. *Mr. Malcolm Donald, Mr. Charles Hartzell* and *Mr. M. Rodriguez-Serra* for the respondent.

No. 9. NEW LOUISVILLE JOCKEY CLUB ET AL., PLAINTIFFS IN ERROR, *v.* THE CITY OF OAKDALE ET AL.; and

No. 10. LENNOX LAND COMPANY, PLAINTIFF IN ERROR, *v.* CITY OF OAKDALE ET AL. In error to the Court of Appeals of the State of Kentucky. Submitted October 30, 1913. Decided November 17, 1913. *Per Curiam.* Dismissed for the want of jurisdiction. *Mount Pleasant* v. *Beckwith*, 100 U. S. 531; *Kelly* v. *Pittsburgh*, 104 U. S. 80; *Castillo* v. *McConnico*, 168 U. S. 674. *Mr. Wm. H. Field* and *Mr. Bernard Flexner* for the plaintiffs in error. *Mr. J. M. Chilton* for the defendants in error.

No. 3. THE MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG, APPELLANTS, *v.* VICKSBURG WATER WORKS COMPANY. Appeal from the Circuit Court of the United

States for the Southern District of Mississippi. Submitted October 30, 1913. Decided December 1, 1913. *Per Curiam.* Dismissed for the want of jurisdiction, upon the authority of *Bayard* v. *Lombard,* 9 How. 530; *Payne* v. *Niles,* 26 How. 219; *Indiana* v. *Liverpool, London & G. Ins. Co.,* 109 U. S. 168, and cause remanded to the District Court of the United States for the Southern District of Mississippi. *Mr. T. C. Catchings, Mr. O. W. Catchings* and *Mr. George Anderson* for the appellants. *Mr. Joseph Hirsh* and *Mr. J. C. Bryson* for the appellee.

No. 332. JACOB GLOS ET AL., PLAINTIFFS IN ERROR, *v.* WILLIAM L. O'CONNELL, COUNTY TREASURER, ETC., ET AL. In error to the Supreme Court of the State of Illinois. Motion to dismiss submitted November 17, 1913. Decided December 1, 1913. *Per Curiam.* Dismissed for the want of jurisdiction, on the authority of *Jacob Glos* v. *The City of Chicago &c.,* 226 U. S. 599, and authorities there cited. Submitted by the plaintiffs in error, *pro se. Mr. George Gillette* for the defendants in error.

No. 48. WILLIAM RABB, PLAINTIFF IN ERROR, *v.* THE STATE OF LOUISIANA. In error to the Criminal District Court for the Parish of Orleans, State of Louisiana. Submitted November 6, 1913. Decided December 1, 1913. *Per Curiam.* Affirmed, with costs, upon the authority of *Foppiano* v. *Speed,* 199 U. S. 501. *Mr. Paul A. Sompayrac* for the plaintiff in error. *Mr. R. G. Pleasant* for the defendant in error.

No. —. Original. *Ex parte:* IN THE MATTER OF BANCO TERRITORIAL Y AGRICOLA DE PUERTA RICO AND

THE BANCO COMMERCIAL DE PUERTO RICO, TRUSTEES, PETITIONERS. Submitted November 17, 1913. Decided December 1, 1913. Motion for leave to file petition for writ of certiorari denied. *Mr. Frederic D. McKenney* and *Mr. Francis H. Dexter* for the petitioners.

No. 94. JOE DARSEY, PLAINTIFF IN ERROR, *v.* THE STATE OF GEORGIA. In error to the Supreme Court of the State of Georgia. Argued December 4, 1913. Decided December 8, 1913. *Per Curiam.* Dismissed for the want of jurisdiction. (*Heike* v. *United States*, 217 U. S. 423.) *Mr. John Randolph Cooper* for the plaintiff in error. *Mr. Thos. S. Felder* for the defendant in error.

No. 588. ATLANTIC COAST LINE RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* JAMES A. MILLER. In error to the Supreme Court of the State of South Carolina. Motion to affirm submitted December 1, 1913. Decided December 8, 1913. *Per Curiam.* Judgment affirmed with costs, on authority of *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 541. *Mr. P. A. Willcox* and *Mr. Frederic D. McKenney* for the plaintiff in error. *Mr. L. D. Jennings* for the defendant in error.

No. 558. LOUIS ELIE JOSEPH HENRY DE GALARD DE BRASSAC DE BEARN, ETC., PLAINTIFF IN ERROR, *v.* PIERRE DE BEARN;

No. 559. LOUIS ELIE JOSEPH HENRY DE GALARD DE BRASSAC DE BEARN, ETC., PLAINTIFF IN ERROR, *v.* FRANCOIS DE BEARN;

No. 560. LOUIS ELIE JOSEPH HENRY DE GALARD DE BRASSAC DE BEARN, ETC., PLAINTIFF IN ERROR, *v.* ODON DE BEARN; and

No. 561. LOUIS ELIE JOSEPH HENRY DE GALARD DE BRASSAC DE BEARN, ETC., PLAINTIFF IN ERROR, *v.* JEAN BAPTISTE CHAUMET. In error to the Court of Appeals of the State of Maryland. Motion to dismiss or affirm and for damages submitted November 17, 1913. Decided December 8, 1913. *Per Curiam.* Dismissed for the want of jurisdiction. (*Eustis* v. *Bolles*, 150 U. S. 361; *Wood* v. *Chesborough*, 228 U. S. 672; *Adams* v. *Russell*, 229 U. S. 358, and authorities there cited; *Hamblin* v. *Western Land Co.*, 147 U. S. 531; *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102; see *De Bearn* v. *De Bearn*, 225 U. S. 695.) *Mr. Maurice Leon* for the plaintiff in error. *Mr. J. Kemp Bartlett* and *Mr. Edgar Allan Poe* for the defendants in error.

No. 272. PARIS & GREAT NORTHERN RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* MRS. GEORGIA BOSTON ET AL. In error to the Court of Civil Appeals for the Sixth Supreme Judicial District of the State of Texas. Argued and submitted December 2, 1913. Decided December 15, 1913. Judgment affirmed with costs and interest by an equally divided court. *Mr. W. F. Evans* and *Mr. Edgar Wright* for the plaintiff in error. *Mr. Fred B. Rhodes* for the defendants in error.

No. 127. WASHINGTON DREDGING & IMPROVEMENT COMPANY, PLAINTIFF IN ERROR, *v.* THE STATE OF WASHINGTON, E. V. BUSSELL ET AL. In error to the Supreme Court of the State of Washington. Argued December 11, 12, 1913. Decided December 15, 1913. *Per Curiam.*

Dismissed for want of jurisdiction. 1. *Eustis* v. *Bolles*, 150 U. S. 361; *Preston* v. *Chicago*, 226 U. S. 447, 450; *Wood* v. *Chesborough*, 228 U. S. 672, 677. 2. *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102; *Standard Oil Company of Indiana* v. *Missouri*, 224 U. S. 271, 287. *Mr. W. F. Hays* and *Mr. Chas. E. Shepard* for the plaintiff in error. *Mr. Alfred Battle, Mr. George B. Cole, Mr. Richard A. Ballinger, Mr. George E. de Steiguer, Mr. Jas. A. Kerr, Mr. W. V. Tanner, Mr. Douglas C. Conover, Mr. Wm. M. Watson, Mr. Chas. W. Bunn, Mr. Ira Bronson, Mr. Jas. B. Murphy, Mr. Wm. B. Stratton* and *Mr. John C. Higgins* for the defendants in error.

No. 103. JOHN E. HEAVNER ET AL., PLAINTIFFS IN ERROR, *v.* THE CITY OF ELKINS. In error to the Supreme Court of Appeals of the State of West Virginia. Argued December 5, 8, 1913. Decided December 15, 1913. *Per Curiam.* Judgment affirmed with costs. *Schaefer* v. *Werling*, 188 U. S. 516; *Detroit* v. *Parker*, 181 U. S. 399, etc. *Mr. A. R. Stallings* and *Mr. Jas. A. Bent* for the plaintiffs in error. *Mr. R. H. Allen* for the defendant in error.

No. —. Original. *Ex parte:* IN THE MATTER OF ADOLPH GRIMSINGER, PETITIONER. Submitted December 8, 1913. Decided December 15, 1913. Motion for leave to file a petition for writ of *habeas corpus* denied. *Mr. Geo. F. Curtis* for the petitioner. *The Solicitor General* opposing.

No. —. Original. *Ex parte:* IN THE MATTER OF JONAS JONES, PETITIONER. Submitted December 15, 1913. De-

cided December 22, 1913. Motion for leave to file petition for writ of *habeas corpus* denied. *Mr. W. I. Cruce* and *Mr. A. C. Cruce* for the petitioner. *The Solicitor General* opposing.

No. 449. PARKER-WASHINGTON COMPANY, PLAINTIFF IN ERROR, *v.* HAROLD CRAMER, A MINOR, ETC. In error to the District Court of the United States for the Northern District of Illinois. Motion to dismiss or affirm, etc., submitted December 22, 1913. Decided January 5, 1914. *Per Curiam.* Dismissed for want of jurisdiction. *Union Trust Company of St. Louis* v. *Westhus*, 228 U. S. 519. *Mr. Henry R. Rathbone* and *Mr. Shepard Barclay* for the plaintiff in error. *Mr. Michael F. Gallagher* for the defendant in error.

No. —. Original. JAMES M. COCKINS, PETITIONER, *v.* ADELAIDE MILLER BLICK AND HORACE J. MILLER. Submitted December 22, 1913. Decided January 5, 1914. Petition for a writ of error denied. *Mr. Samuel S. Mehard* and *Mr. Harvey A. Miller* for the petitioner. *Mr. John S. Ferguson* and *Mr. Joseph N. Ulman* for the respondents.

Decisions on Petitions for Writs of Certiorari from October 13, 1913, to January 5, 1914.

No. 709. THE UNITED STATES, PETITIONER, *v.* NIPISSING MINES COMPANY. October 20, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *The Attorney*

General, The Solicitor General and *Mr. Assistant Attorney General Harr* for the petitioner. *Mr. George F. Hurd* for the respondent.

No. 711. JAMES SIM, PETITIONER, *v.* WILLIAM EDENBORN; and

No. 712. THOMAS P. ALDER, PETITIONER, *v.* WILLIAM EDENBORN. October 20, 1913. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Theron G. Strong* for the petitioners. *Mr. Martin W. Littleton* for the respondent.

No. 578. PETER W. REHERD, RECEIVER, ETC., PETITIONER, *v.* THE COAL & IRON RAILWAY COMPANY. October 20, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Fred O. Blue* for the petitioner. *Mr. B. M. Ambler* for the respondent.

No. 617. TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY, PETITIONER, *v.* ANNA PERENCHIO. October 20, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Clarence Brown* and *Mr. C. E. Pope* for the petitioner. *Mr. John L. Flannigen* for the respondent.

No. 636. CADILLAC MOTOR CAR CO., PETITIONER, *v.* GEORGE W. RAY, JUDGE, ETC. October 20, 1913. Peti-

tion for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Otto Kirchner* for the petitioner. *Mr. Andrew J. Nellis* for the respondent.

No. 694. ALLEN H. WALKER, PETITIONER, *v.* IOWA CENTRAL RAILWAY COMPANY ET AL. October 20, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Frank W. Hackett* for the petitioner. *Mr. W. H. Bremner* for the respondents.

No. 695. PACIFIC LIVE STOCK COMPANY, PETITIONER, *v.* SILVIES RIVER IRRIGATION COMPANY ET AL. October 20, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Edward F. Treadwell, Mr. Wirt Minor, Mr. Aldis B. Browne, Mr. Alexander Britton* and *Mr. Evans Browne* for the petitioner. No appearance for respondents.

No. 698. FRANCIS P. B. SANDS, PETITIONER, *v.* HENRIETTA S. ANDERSON. October 20, 1913. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Francis P. B. Sands* for the petitioner. *Mr. Frank J. Hogan* for the respondent.

No. 702. HENRY BAETZ, PETITIONER, *v.* SCHOENLAU-KUCKKUCK TRUNK TOP & VENEER COMPANY ET AL. October 20, 1913. Petition for a writ of certiorari to the

United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Emil Starek* for the petitioner. *Mr. Charles Howson* for the respondents.

No. 703. LIBERTY BELL GOLD MINING COMPANY, PETITIONER, *v.* THE SMUGGLER UNION MINING COMPANY. October 20, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Moorfield Storey* for the petitioner. *Mr. Joel F. Vaile* and *Mr. Henry McAllister, Jr.*, for the respondent.

No. 705. DAVID ALLEGAR, PETITIONER, *v.* AMERICAN CAR & FOUNDRY COMPANY. October 20, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Frank W. Hackett* and *Mr. Paul J. Sherwood* for the petitioner. *Mr. Fred Ikeler* and *Mr. C. E. Sprout* for the respondent.

No. 706. CHARLES A. DAVEY, PETITIONER, *v.* THE UNITED STATES. October 20, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Ward H. Watson* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 716. MILLARD F. FIELD, PETITIONER, *v.* HOWARD D. COLMAN. October 20, 1913. Petition for a writ of

certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Melville Church* for the petitioner. *Mr. Lincoln B. Smith* for the respondent.

No. 718. WILLIAM W. NILES, ADMINISTRATOR, ETC., PETITIONER, *v.* THE LUDLOW VALVE MANUFACTURING COMPANY. October 20, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Hartwell Cabell* and *Mr. William W. Niles* for the petitioner. *Mr. Samuel Untermyer, Mr. Louis Marshall* and *Mr. Abraham Benedict* for the respondent.

No. 719. RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION ET AL., PETITIONERS, *v.* FRED STEBLER. October 20, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. N. A. Acker* and *Mr. J. J. Scrivner* for the petitioners. *Mr. Frederick S. Lyon* and *Mr. William W. Dodge* for the respondent.

No. 734. CHEROKEE CANNING EXTRACT COMPANY ET AL., PETITIONERS, *v.* GEORGE H. LEONARD ET AL. October 20, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Thomas S. Rollins* and *Mr. J. H. Merrimon* for the petitioners. *Mr. Alfred S. Barnard* for the respondents.

No. 753. LUMBER UNDERWRITERS OF NEW YORK ET AL., PETITIONERS, *v.* O. C. RIFE ET AL. October 27, 1913.

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Dent Minor* and *Mr. R. Lee Bartels* for the petitioners. No appearance for respondents.

No. 761. D. J. McDonald et al., Petitioners, *v.* J. W. Pless et al. October 27, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted. *Mr. Julius C. Martin, Mr. George H. Wright* and *Mr. Thomas S. Rollins* for the petitioners. *Mr. E. J. Justice* for the respondents.

No. 497. St. Paul Fire & Marine Insurance Company, Petitioner, *v.* Hachiroyemon Mitsui et al. October 27, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William Denman* for the petitioner. *Mr. Howard S. Harrington* for the respondents.

No. 594. The City of St. Louis, Petitioner, *v.* The National Surety Company. October 27, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Wm. E. Baird* for the petitioner. *Mr. W. C. Marshall* for the respondent.

No. 602. Norfolk & Western Railway Company, Petitioner, *v.* Cora E. Hauser, Administratrix, etc.

October 27, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Theodore W. Reath* for the petitioner. *Mr. Lindsay Patterson* for the respondent.

No. 715. THE CITY OF ST. LOUIS, PETITIONER, *v.* THE CHICAGO HOUSE WRECKING COMPANY. October 27, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Wm. E. Baird* for the petitioner. No appearance for respondent.

No. 723. PHILADELPHIA, BALTIMORE & WASHINGTON RAILROAD COMPANY, PETITIONER, *v.* SOUTHERN TRANSPORTATION COMPANY. October 27, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Shirley Carter* for the petitioner. No appearance for respondent.

No. 724. THE PACIFIC COAST STEAMSHIP COMPANY, LTD., CLAIMANT, ETC., PETITIONER, *v.* M. ANDERSON; and

No. 725. THE PACIFIC COAST COMPANY, CLAIMANT, ETC., PETITIONER, *v.* N. JORDAN. October 27, 1913. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George W. Towle* for the petitioners. *Mr. Wm. Denman* for the respondents.

No. 748. J. S. HARRISON ET AL., PETITIONERS, *v.* ELIZABETH FOLEY. October 27, 1913. Petition for a

writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. W. S. Cowherd* and *Mr. Frederic D. McKenney* for the petitioner. *Mr. Wm. F. Guthrie* for the respondent.

No. 754. GRAND TRUNK WESTERN RAILWAY COMPANY, PETITIONER, *v.* GERTRUDE GILPIN, ADMINISTRATRIX. October 27, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. George W. Kretzinger* and *Mr. George W. Kretzinger, Jr.*, for the petitioner. *Mr. Jas. C. McShane* for the respondent.

No. 756. FIRST NATIONAL BANK OF DEXTER, NEW YORK, PETITIONER, *v.* EDMUND K. FOX. October 27, 1913. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. A. S. Worthington, Mr. Chas. L. Frailey* and *Mr. Henry F. Woodard* for the petitioner. *Mr. J. J. Darlington* for the respondent.

No. 757. BENJAMIN F. EDWARDS, PETITIONER, *v.* EDMUND K. FOX. October 27, 1913. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. W. W. Millan* for the petitioner. *Mr. J. J. Darlington* for the respondent.

No. 575. THE GLENWOOD LIGHT & WATER COMPANY, PETITIONER, *v.* THE TOWN OF GLENWOOD SPRINGS. Octo-

ber 27, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. W. P. Malburn*, *Mr. W. H. Bryant* and *Mr. George L. Nye* for the petitioner. *Mr. John A. Rush* for the respondent.

No. 764. Ellen Connolly, Administratrix, etc., Petitioner, *v.* Pennsylvania Railroad Company. November 3, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted. *Mr. Francis Rawle* for the petitioner. *Mr. J. Hampton Barnes* and *Mr. Frederic D. McKenney* for the respondent.

No. 766. John A. S. Brown et al., etc., Petitioners, *v.* Austin B. Fletcher, etc., et al. November 3, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Chas. H. Burr* for the petitioners. *Mr. Wm. P. S. Melvin* for the respondents.

No. 732. Emiel T. Palmenberg et al., Petitioners, *v.* W. S. Butler & Company; and

No. 733. Morris Blackstone et al., Petitioners, *v.* Everybody's Store, Incorporated, et al. November 3, 1913. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Harvey H. Pratt* for the petitioners. *Mr. Chas. F. Choate, Jr.*, *Mr. Frederick H. Nash* and *Mr. Boyd B. Jones* for the respondents.

No. 736. RUTH KRAMER, PETITIONER, *v.* E. W. KRAMER. November 3, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Augustus O. Bacon* for the petitioner. *Mr. Edgar Watkins* for the respondent.

No. 762. AMERICAN BELL TELEPHONE COMPANY, PETITIONER, *v.* WESTERN UNION TELEGRAPH COMPANY. November 10, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Chas. H. Swan, Mr. John C. Gray* and *Mr. Frederick P. Fish* for the petitioner. *Mr. J. H. Benton* and *Mr. Rush Taggart* for the respondent.

No. 585. BELVA A. LOCKWOOD, PETITIONER, *v.* FRANK M. RUCKER, ADMINISTRATOR, ETC. November 10, 1913. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Isaac R. Hitt* and *Mr. Richard P. Evans* for the petitioner. No appearance for the respondent.

No. 768. CITY WATER COMPANY OF CHILLICOTHE, PETITIONER, *v.* THE CITY OF CHILLICOTHE. November 10, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Jas. H. Harkless, Mr. Clifford Histed* and *Mr. Morgan M. Mann* for the petitioner. *Mr. Joseph J. Russell* for the respondent.

No. 769. ANNIE F. CRAIG, ADMINISTRATRIX, ETC., PETITIONER, *v.* EMILY E. PARISH, EXECUTRIX, ETC. November 10, 1913. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Frank W. Hackett* and *Mr. Chauncey Hackett* for the petitioner. *Mr. Holmes Conrad* and *Mr. Leigh Robinson* for the respondent.

No. 770. THE CARBORUNDUM COMPANY, PETITIONER, *v.* THE ELECTRIC SMELTING & ALUMINUM COMPANY. November 10, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Philander C. Knox* for the petitioner. *Mr. Francis C. McMillin* for the respondent.

No. 720. SAMUEL B. ARCHER ET AL., PETITIONERS, *v.* IMPERIAL MACHINE COMPANY. November 17, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel B. Archer, pro se. Mr. Ernest Wilkinson* for the respondent.

No. 779. THE ILLINOIS CENTRAL RAILROAD COMPANY, PETITIONER, *v.* THE UNION RAILWAY COMPANY. November 17, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Dent Minor, Mr. Chas. N. Burch* and *Mr. Blewett Lee* for the petitioner. No appearance for the respondent.

No. 618. STREET & SMITH, A COPARTNERSHIP, ETC., PETITIONERS, *v.* THE ATLAS MANUFACTURING COMPANY ET AL. November 17, 1913. Petition for a writ of certiorari herein denied. *Mr. Hugh K. Wagner* for the petitioners. *Mr. Jas. Love Hopkins* for the respondents.

No. 780. ELIZABETH S. RUTLAND, PETITIONER, *v.* ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY. December 8, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Caruthers Ewing* for the petitioner. No appearance for the respondent.

No. 783. SARA GYE, WIDOW OF JOHN GYE, PETITIONER, *v.* THE HAMBURG AMERICANISCHE PACKETSAHRT AKTIEM GESELSCHAFFT. December 8, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. H. Garland Dupre*, *Mr. Chas. F. Consaul* and *Miss I. M. Moyers* for the petitioner. No appearance for the respondent.

No. 784. JOHN BARTON MILLER, PETITIONER, *v.* THE UNITED STATES. December 8, 1913. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Henry E. Davis* and *Mr. John E. Laskey* for the petitioner. *The Attorney General*, *The Solicitor General* and *Mr. Clarence R. Wilson* for the respondent.

No. 808. HERMAN C. H. HEROLD, COLLECTOR, PETITIONER, *v.* THE MUTUAL BENEFIT LIFE INSURANCE COM-

PANY. December 15, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *The Attorney General* and *The Solicitor General* for the petitioner. *Mr. John O. H. Pitney* and *Mr. John R. Hardin* for the respondent.

No. 813. HAMILTON-BROWN SHOE COMPANY, PETITIONER, *v.* THE WOLF BROTHERS & COMPANY. December 22, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. H. S. Priest, Mr. Morton Jourdan, Mr. Luke E. Hart* and *Mr. Joseph W. Bailey* for the petitioner. *Mr. Lawrence Maxwell, Mr. Percy Werner* and *Mr. Simeon M. Johnson* for the respondent.

No. 740. HANOVER STAR MILLING COMPANY, PETITIONER, *v.* D. D. METCALF. January 5, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Henry Fitts* for the petitioner. *Mr. Edward Everett Longan* and *Mr. J. F. Gilster* for the respondent.

No. 807. THE CITY OF NEW YORK, PETITIONER, *v.* WILLIAM SAGE, JR. January 5, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Louis C. White* for the petitioner. *Mr. Edward A. Alexander* for the respondent.

No. 816. ANNIE MYERS, PETITIONER, *v.* PITTSBURGH COAL COMPANY. January 5, 1914. Petition for a writ of

certiorari to the United States Circuit Court of Appeals for the Third Circuit granted. *Mr. Edward C. Goodwin* for the petitioner. *Mr. Chas. Marshall Johnston* for the respondent.

No. 795. CHARLES S. INTERMELA, ETC., PETITIONER, *v.* DAVID PERKINS. January 5, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Walter S. Penfield* for the petitioner. *Mr. Chas. E. Shepard* for the respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM OCTOBER 13, 1913, TO JANUARY 5, 1914.

No. 145. UNION PACIFIC RAILROAD COMPANY, APPELLANT, *v.* THE CITY OF GREELEY ET AL. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. October 14, 1913. Dismissed with costs, on motion of *Mr. A. A. Hoehling, Jr.*, for the appellant. *Mr. Maxwell Evarts* and *Mr. A. A. Hoehling, Jr.*, for the appellant. *Mr. John M. Thurston, Mr. E. E. Whitted, Mr. W. S. Summers, Mr. Joseph C. Helm, Mr. W. H. Bryant* and *Mr. Joseph C Ewing* for the appellees.

No. 31. NORTHWESTERN PACIFIC RAILROAD COMPANY, PLAINTIFFS IN ERROR, *v.* THE UNITED STATES. In error to the District Court of the United States for the Northern District of California. October 14, 1913. Dismissed on motion of *Mr. Evans Browne*, in behalf of counsel for the

plaintiff in error. *Mr. Edward M. Cleary* for the plaintiff in error. *The Attorney General* for the defendant in error.

No. 331. Northern Pacific Railway Company, Appellant, *v.* King County, Washington, et al. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. October 14, 1913. Dismissed with costs, per stipulation of counsel, on motion of *Mr. Evans Browne* for the appellant. *Mr. C. W. Bunn* and *Mr. A. B. Browne* for the appellant. *Mr. Hugh M. Caldwell* for the appellees.

No. 125. The Title Guaranty & Surety Company, Plaintiff in Error, *v.* The United States to the Use of The General Electric Company. In error to the United States Circuit Court of Appeals for the Third Circuit. October 15, 1913. Dismissed per stipulation of counsel. *Mr. Russell H. Robbins* and *Mr. Jas. F. Campbell* for the plaintiff in error. *Mr. H. B. Gill* and *Mr. Louis Barcroft Runk* for the defendant in error.

No. 132. Adams Express Company, Plaintiff in Error, *v.* Kaskell Solomon et al. In error to the Superior Court of the State of Pennsylvania. October 15, 1913. Judgment reversed, with costs, per stipulation of counsel, and cause remanded for further proceedings. *Mr. Charles F. Patterson* for the plaintiff in error. *Mr. Harry J. Nesbit* for the defendants in error.

No. 428. John McKay, Plaintiff in Error, *v.* The United States of America. In error to the District

Court of the United States for the District of Minnesota. October 15, 1913. Dismissed per stipulation of counsel. *Mr. Albert R. Moore* for the plaintiff in error. *The Attorney General* for the defendant in error.

No. 429. ROSE MCKAY, PLAINTIFF IN ERROR, *v.* THE UNITED STATES OF AMERICA. In error to the District Court of the United States for the District of Minnesota. October 15, 1913. Dismissed per stipulation of counsel. *Mr. Albert R. Moore* for the plaintiff in error. *The Attorney General* for the defendant in error.

No. 637. LUCY GRACE MUSICA, PLAINTIFF IN ERROR, *v.* THE STATE OF LOUISIANA. In error to the First City Criminal Court of the Parish of Orleans, State of Louisiana. October 15, 1913. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Henry L. Lazarus* for the plaintiff in error. No appearance for the defendant in error.

No. 638. LOUISE MUSICA, PLAINTIFF IN ERROR, *v.* THE STATE OF LOUISIANA. In error to the First City Criminal Court of the Parish of Orleans, State of Louisiana. October 15, 1913. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Henry L. Lazarus* for the plaintiff in error. No appearance for the defendant in error.

No. 195. GEORGE H. BEDDOW, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the District Court of

the United States for the Western District of Michigan. October 15, 1913. Dismissed pursuant to the tenth rule. *Mr. M. M. Riley* for the plaintiff in error. *The Attorney General* for the defendant in error.

No. 70. GEORGE WELSCH, PLAINTIFF IN ERROR, *v.* CLEMENT L. RILEY, AS AUDITOR OF LICKING COUNTY, OHIO, ET AL. In error to the Supreme Court of the State of Ohio. October 20, 1913. Dismissed per stipulation, on motion of *Mr. Frank Davis, Jr.*, for the defendants in error. *Mr. R. W. McCoy, Mr. Roderic Jones* and *Mr. J. Howard Jones* for the plaintiff in error. *Mr. Timothy S. Hogan* and *Mr. Frank Davis, Jr.*, for the defendants in error.

No. 222. JOHN W. BROWN, PLAINTIFF IN ERROR, *v.* CLEMENT L. V. HOLTZ, AS COUNTY TREASURER, ETC., ET AL. In error to the Supreme Court of the State of Ohio. October 20, 1913. Dismissed per stipulation, on motion of *Mr. Frank Davis, Jr.*, for the defendants in error. *Mr. Fred C. Rector* for the plaintiff in error. *Mr. Timothy S. Hogan* and *Mr. Frank Davis, Jr.*, for the defendants in error.

No. 146. UNION PACIFIC RAILROAD COMPANY, APPELLANT, *v.* THE DENVER, LARAMIE & NORTHWESTERN RAILWAY COMPANY. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. October 24, 1913. Dismissed with costs, on motion of *Mr. A. A. Hoehling, Jr.*, for the appellant. *Mr. Maxwell Evarts* and *Mr. A. A. Hoehling, Jr.*, for the appellant. *Mr. W. H. Bryant* for the appellee.

No. 51. ST. LOUIS GUNNING & ADVERTISING COMPANY, PLAINTIFF IN ERROR, *v.* CITY OF ST. LOUIS ET AL. In error to the Supreme Court of the State of Missouri. October 24, 1913. Dismissed per stipulation. *Mr. Morton Jourdan* for the plaintiff in error. *Mr. William E. Baird* and *Mr. Lambert E. Walther* for the defendants in error.

No. 113. JAMES TALCOTT, APPELLANT, *v.* ALFRED E. OMMEN, AS TRUSTEE, ETC.; and

No. 114. ALFRED E. OMMEN, AS TRUSTEE, ETC., APPELLANT, *v.* JAMES TALCOTT. Appeals from the United States Circuit Court of Appeals for the Second Circuit. October 27, 1913. Dismissed without costs to either party, per stipulation of counsel. *Mr. Arthur C. Rounds* for Talcott and *Mr. Frederick M. Czaki* for Ommen, trustee.

No. 32. THE SINGER MANUFACTURING COMPANY, APPELLANT, *v.* WIRT ADAMS, STATE REVENUE AGENT OF MISSISSIPPI, ET AL. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. October 31, 1913. Dismissed with costs, on joint motion of counsel for both parties. *Mr. C. H. Alexander* and *Mr. J. M. Flowers* for the appellant. *Mr. Edward Mayes* for the appellees.

No. 49. HENRY C. LOEB, TRUSTEE IN BANKRUPTCY OF THE BLOCK MERCANTILE COMPANY, APPELLANT, *v.* GERMANIA SAVINGS BANK & TRUST COMPANY. Appeal from the United States Circuit Court of Appeals for the Sixth Circuit. November 4, 1913. Dismissed with costs,

pursuant to the tenth rule. *Mr. W. A. Percy* for the appellant. *Mr. J. Hirsh* for the appellee.

No. 53. ELVIRA FERNANDEZ BLANCO ET AL., APPELLANTS, *v.* JOSE ANTONIO FERNANDEZ Y PEREZ ET AL. Appeal from the District Court of the United States for Porto Rico. November 5, 1913. Dismissed with costs, pursuant to the tenth rule. *Mr. Francis H. Dexter* for the appellants. *Mr. Willis Sweet* for the appellees.

No. 387. LENA DUPUIS, APPELLANT, *v.* SAMUEL W. BACKUS, COMMISSIONER OF IMMIGRATION, ETC. Appeal from the District Court of the United States for the Northern District of California. November 6, 1913. Dismissed with costs on motion of counsel for the appellant. *Mr. Corry M. Stadden* for the appellant. *The Attorney General* for the appellee.

No. 81. WILLIAM S. TEVIS ET AL., PLAINTIFFS IN ERROR, *v.* JEPP RYAN ET AL. In error to the Supreme Court of the Territory of Arizona. November 10, 1913. Dismissed with costs, on motion of *Mr. Evans Browne*, in behalf of counsel for the plaintiffs in error, and cause remanded to the Supreme Court of the State of Arizona. *Mr. A. C. Baker* for the plaintiffs in error. No appearance for the defendants in error.

No. 123. THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* THE STARR GRAIN

& LUMBER COMPANY. In error to the Supreme Court of the State of Kansas. November 10, 1913. Dismissed with costs, on motion of *Mr. Evans Browne*, in behalf of counsel for the plaintiff in error. *Mr. Robert Dunlap* for the plaintiff in error. *Mr. Carr W. Taylor* for the defendant in error.

No. 264. BOOTH FISHERIES COMPANY, PLAINTIFF IN ERROR, *v.* THE PEOPLE OF THE STATE OF ILLINOIS; and

No. 265. BOOTH FISHERIES COMPANY, PLAINTIFF IN ERROR, *v.* THE PEOPLE OF THE STATE OF ILLINOIS. In error to the Supreme Court of the State of Illinois. November 10, 1913. Dismissed with costs on motion of counsel for the plaintiff in error. *Mr. John Barton Payne* and *Mr. Silas H. Strawn* for the plaintiff in error. No appearance for the defendant in error.

No. 80. THE WESTERN UNION TELEGRAPH COMPANY, APPELLANT, *v.* M. E. TRAPP, AS AUDITOR OF THE STATE OF OKLAHOMA, ET AL. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. November 12, 1913. Dismissed with costs per stipulation of counsel. *Mr. S. T. Bledsoe* for the appellant. *Mr. Charles West* for the appellees.

No. 143. THE UNITED STATES OF AMERICA EX RELATIONE GRAND RAPIDS TIMBER COMPANY, PLAINTIFF IN ERROR, *v.* WALTER L. FISHER, SECRETARY OF THE INTERIOR. In error to the Court of Appeals of the District of Columbia. November 13, 1913. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr.*

Duane E. Fox for the plaintiff in error. *The Attorney General* for the defendant in error.

No. 88. Creamery Package Manufacturing Company, Plaintiff in Error, *v.* The State of Minnesota. In error to the Supreme Court of the State of Minnesota. November 14, 1913. Dismissed with costs, pursuant to the tenth rule. *Mr. Geo. C. Frye* and *Mr. Emanuel Cohen* for the plaintiff in error. *Mr. Lyndon A. Smith* for the defendant in error.

No. 90. Fred J. Bliss, Petitioner, *v.* The Washoe Copper Company et al. On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. November 14, 1913. Dismissed with costs, pursuant to the tenth rule. *Mr. Robert Lee Clinton, Mr. Hannis Taylor* and *Mr. Caleb M. Sawyer* for the petitioner. *Mr. John A. Garver, Mr. Jas. M. Beck* and *Mr. L. O. Evans* for the respondents.

No. 91. A. Emerson Cross, Administrator, etc., et al., Plaintiffs in Error, *v.* Gray's Harbor Boom Company. In error to the Supreme Court of the State of Washington. November 14, 1913. Dismissed with costs, pursuant to the tenth rule. *Mr. Charles W. Needham* for the plaintiffs in error. No appearance for the defendant in error.

No. 764. Ellen Connelley, Administratrix, etc., Petitioner, *v.* The Pennsylvania Railroad Company.

On writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit. November 17, 1913. Judgment reversed with costs, upon confession of error, on motion of *Mr. Frederic D. McKenney* for the respondent. *Mr. Francis Rawle* for the petitioner. *Mr. J. Hampton Barnes* and *Mr. Frederic D. McKenney* for the respondent.

No. 493. YOSHIRO NAKAYAMA, APPELLANT, *v.* W. R. MANSFIELD, IMMIGRATION INSPECTOR, ETC. Appeal from the District Court of the United States for the District of Colorado. December 1, 1913. Dismissed with costs, pursuant to the tenth rule. *Mr. Samuel H. Crosby* for the appellant. *The Attorney General* for the appellee.

No. 95. MARY B. HERBERT, PLAINTIFF IN ERROR, *v.* S. R. WAGG ET AL. In error to the Supreme Court of the State of Oklahoma. December 3, 1913. Dismissed with costs, pursuant to the tenth rule. *Mr. I. N. Watson* for the plaintiff in error. *Mr. Edward Maher* for the defendants in error.

No. 96. JOHN H. JONES, PLAINTIFF IN ERROR, *v.* DAVID MOULD, JUDGE, ETC., ET AL. In error to the Supreme Court of the State of Iowa. December 3, 1913. Dismissed with costs, pursuant to the tenth rule. *Mr. Wilbur Owen* for the plaintiff in error. No appearance for the defendants in error.

No. 101. SELOVER, BATES & COMPANY, PLAINTIFF IN ERROR, *v.* OLE A. FINNES. In error to the Supreme Court

of the State of Minnesota. December 4, 1913. Judgment affirmed with costs per stipulation of counsel. *Mr. Rome G. Brown* and *Mr. Arthur W. Selover* for the plaintiff in error. *Mr. Otto N. Davies* for the defendant in error.

No. 106. Fred E. Earnhart, Plaintiff in Error, *v.* John B. Switzler. In error to the Supreme Court of the State of Oregon. December 5, 1913. Dismissed with costs, pursuant to the tenth rule. *Mr. Henry H. Gilfry* for the plaintiff in error. *Mr. R. J. Slater* and *Mr. Samuel Herrick* for the defendant in error.

No. 110. Quentin Garrett, by William C. Garrett, his next Friend, Plaintiff in Error, *v.* American Baptist Home Mission Society et al. In error to the Supreme Court of the State of Oklahoma. December 5, 1913. Dismissed with costs, pursuant to the tenth rule. *Mr. Joseph C. Stone* and *Mr. Benjamin Martin, Jr.*, for the plaintiff in error. No appearance for the defendants in error.

No. 117. Kapiolani Estate (Limited), Plaintiff in Error, *v.* The Territory of Hawaii, by Marston Campbell, Commissioner of Public Lands. In error to the Supreme Court of the Territory of Hawaii. December 8, 1913. Dismissed with costs, pursuant to the tenth rule. *Mr. David L. Withington* and *Mr. C. W. Ashford* for the plaintiff in error. *Mr. C. R. Hemenway* for the defendant in error.

No. 116. Isaac N. Boarts, Trustee, etc., Appellant, *v.* J. M. Selden & Company. Appeal from the United

States Circuit Court of Appeals for the Third Circuit. December 9, 1913. Dismissed with costs, pursuant to the tenth rule. *Mr. Harry H. Fisher* and *Mr. Joseph Hill Brinton* for the appellant. No appearance for the appellee.

No. 124. PETER J. O'REILLY, PLAINTIFF IN ERROR, *v.* DORA F. NOXON, AS ADMINISTRATRIX, ETC. In error to the Supreme Court of the State of Colorado. December 10, 1913. Dismissed with costs, pursuant to the tenth rule. *Mr. Henry B. O'Reilly* for the plaintiff in error. No appearance for the defendant in error.

No. 129. THEODORE SWENSEN, PLAINTIFF IN ERROR, *v.* THE PEOPLE OF THE STATE OF MICHIGAN. In error to the Supreme Court of the State of Michigan. December 10, 1913. Dismissed with costs, pursuant to the tenth rule. *Mr. Lawrence Maxwell* and *Mr. Joseph S. Graydon* for the plaintiff in error. *Mr. Franz C. Kuhn* and *Mr. Grant Fellows* for the defendant in error.

No. 131. LOUIS F. SWIFT ET AL., APPELLANTS, *v.* LUMAN T. HOY, UNITED STATES MARSHAL IN AND FOR THE NORTHERN DISTRICT OF ILLINOIS. Appeal from the Circuit Court of the United States for the Northern District of Illinois. December 11, 1913. Dismissed, without costs to either party, and cause remanded to the District Court of the United States for the Northern District of Illinois. *Mr. John S. Miller* and *Mr. Levy Mayer* for the appellants. *The Attorney General* for the appellee.

No. 139. JULIO O. ABRIL, PLAINTIFF IN ERROR, *v.* SUCRERIE CENTRALE COLOSO, A CORPORATION. In error to the District Court of the United States for Porto Rico. December 12, 1913. Dismissed with costs, pursuant to the tenth rule. *Mr. Willis Sweet* for the plaintiff in error. No appearance for the defendant in error.

No. 445. JAMES C. YANCEY, APPELLANT, *v.* THE UNITED STATES. Appeal from the District Court of the United States for the Southern District of California. December 15, 1913. Dismissed, on motion of counsel for the appellant. *Mr. Frank Fuller* for the appellant. *The Attorney General* for the appellee.

No. 261. GRAND LODGE KNIGHTS OF PYTHIAS, NORTH AMERICA, ETC., ET AL., PLAINTIFFS IN ERROR, *v.* SUPREME LODGE KNIGHTS OF PYTHIAS ET AL. In error to the Supreme Court of the State of Tennessee. December 15, 1913. Judgment reversed with costs, on confession of error by defendants in error, and cause remanded for further proceedings. *Mr. Samuel A. T. Watkins, Mr. Benjamin F. Booth* and *Mr. M. T. Bryan* for the plaintiffs in error. *Mr. John H. DeWitt* for the defendants in error.

No. 147. THE UNITED STATES TRUST COMPANY OF THE DISTRICT OF COLUMBIA, ANCILLARY ADMINISTRATOR, ETC., APPELLANT, *v.* THE NATIONAL SAVINGS & TRUST COMPANY OF THE DISTRICT OF COLUMBIA, ADMINISTRATOR, ETC. Appeal from the Court of Appeals of the District of Colum-

bia. December 15, 1913. Dismissed with costs, pursuant to the tenth rule. *Mr. J. H. Ralston* for the appellant. *Mr. J. J. Darlington* for the appellee.

No. 587. Thomas C. Perkins et al., Plaintiffs in Error, *v.* Arthur C. Coffin et al. In error to the Supreme Court of Errors of the State of Connecticut. January 5, 1914. Dismissed, per stipulation of counsel. *Mr. Lucius F. Robinson* for the plaintiffs in error. *Mr. John R. Buck* and *Mr. John H. Buck* for the defendants in error.

No. 778. W. A. Gaines & Company, Appellant, *v.* The Turner-Looker Company. Appeal from the United States Circuit Court of Appeals for the Sixth Circuit. January 5, 1914. Dismissed with costs, on motion of counsel for the appellant. *Mr. Jas. Love Hopkins* for the appellant. No appearance for the appellee.

CASE DISPOSED OF IN VACATION.

No. 25. The Richmond, Fredericksburg & Potomac Railroad Company, Plaintiff in Error, *v.* The Commonwealth of Virginia. In error to the Supreme Court of Appeals of the State of Virginia. July 15, 1913. Dismissed, pursuant to the 28th rule. *Mr. A. Caperton Braxton, Mr. John S. Eggleston, Mr. Alexander Pope Humphrey* and *Mr. William H. White* for the plaintiff in error. *Mr. Samuel W. Williams* for the defendant in error.

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CITIZENSHIP.

Definition of.

Citizenship is membership in a political society and implies the reciprocal obligations as compensation for each other of a duty of allegiance on the part of the member and a duty of protection on the part of the society. *Luria* v. *United States*, 9.

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NATURALIZATION, 2, 3.

CLAIMS AGAINST THE UNITED STATES.

1. *Limitations; effect of back pay and bounty provision of act of March 4, 1907, to confer new cause of action.*

The proviso in the back pay and bounty provision in the Sundry Civil Appropriation Act of March 4, 1907, c. 2918, 34 Stat. 1295, 1356, directing accounting officers to follow decisions of this court and of the Court of Claims without regard to former settlements, did not confer a new cause of action upon the holders of other claims against the United States which had been adversely ruled upon

CONSTRUCTION OF STATUTES.

CONTRACTS.

CONTROVERSIES BETWEEN STATES.

CONVEYANCES.

COPYRIGHTS.

Monopoly conferred by act; conflict with Sherman Act.

No more than the patent statute was the copyright act intended to authorize agreements in unlawful restraint of trade and tending to monopoly in violation of the Sherman Act. *Straus* v. *American Publishers' Ass'n*, 222.

CORPORATIONS.

CORPORATION TAX LAW.

CUSTOMS LAW.

1. *Attempt to introduce into commerce of the United States; scope of expression as used in act of 1909.*

The expression—to attempt to introduce into the commerce of the United States—includes more than to attempt to enter merchandise, and as used in the act of August 5, 1909, c. 6, 36 Stat. 11, 97, it covers fraudulent invoices made by consignors in foreign countries. *United States* v. *25 Packages of Panama Hats*, 358.

2. *Forfeiture of goods for attempt to fraudulently introduce into commerce of United States.*

As statutes have no extraterritorial operation, a consignor making a fraudulent invoice in a foreign country cannot be punished therefor, but the goods being within the protection and subject to the commercial regulations of this country can be subjected to forfeiture for the fraudulent attempt to introduce them. *Ib.*

3. *Knowledge imputed to foreign consignor.*

A foreign consignor is charged with knowledge of the regulations of the United States in regard to importation of goods and their disposition in case they are not called for after removal from the vessel. *Ib.*

4. *General Order; placing of goods in; effect of, as introduction into commerce.*

When goods are unloaded and placed in General Order they are actually introduced into the commerce of the United States within the meaning of the statute intending to prevent fraud on the customs. *Ib.*

DAMAGES.

See BONDS, 6;
EMINENT DOMAIN, 1;
NEGLIGENCE, 3.

DEATH OF PARTY.

See ACTIONS.

DEBTOR AND CREDITOR.

See BANKRUPTCY;
INDIANS, 6.

EMINENT DOMAIN.

1. *What constitutes taking within Fifth Amendment; effect of discharge over land of heavy guns.*

The subjection of land to the burden of governmental use by constantly discharging heavy guns from a battery over it in time of peace in such manner as to deprive the owner of its profitable use would constitute such a servitude as would amount to a taking of the property within the meaning of the Fifth Amendment and not merely a consequential damage. *Peabody* v. *United States*, 530.

2. *What amounts to taking; effect of location of battery.*

The mere location of a battery is not an appropriation of property within the range of its guns. *Ib.*

3. *What amounts to a taking for military purposes.*

Where it appears that the guns in a battery have not been fired for more than eight years, and the Government denies that it intends to fire the guns over adjacent property except possibly in time of war, this court will not say that the Government has taken that property for military purposes. *Ib.*

4. *Action to recover for taking; showing to support.*

In order, however, to maintain an action for such a taking it must appear that the servitude has actually been imposed on the property. *Ib.*

See CONTRACTS, 4.

EMPLOYER AND EMPLOYÉ.

See CONSTITUTIONAL LAW, 8, 9; SAFETY APPLIANCE ACT; HOURS OF SERVICE LAW; STATES, 7.

ENABLING ACTS.

See STATES, 3, 4.

EQUAL PROTECTION OF THE LAW.

See CONSTITUTIONAL LAW, 3, 8, 15; TAXES AND TAXATION, 2.

ESTATES.

See TAXES AND TAXATION, 1, 2.

ESTOPPEL.

See BANKRUPTCY, 6; INSURANCE, 1; EJECTMENT, 3; RES JUDICATA.

EVIDENCE.

1. *Burden of proof; order of pleading; effect of.*

The order of pleading does not always determine the burden of proof. *Tinker* v. *Midland Valley Co.*, 681.

2. *Immunity of witness under § 860, Rev. Stat.*

Section 860, Rev. Stat., although repealed before testimony was used, if in force when the testimony was given, protected the giver thereof from having it used against him in a criminal proceeding. *Cameron* v. *United States*, 710.

3. *Immunity of witness under § 860, Rev. Stat.; bankrupt within.*

The use of testimony given by the bankrupt in a hearing before a commissioner to contradict his testimony given before the referee, in a trial on an indictment for perjury in giving the latter testimony, violates the immunity guaranteed under § 860, Rev. Stat., and the use thereof is reversible error. *Ib.*

See Bankruptcy, 1, 2;
Bills and Notes;
Constitutional Law, 13, 14;
Contracts, 1;
Eminent Domain, 4;
Libel and Slander;
Local Law (Porto Rico);
Naturalization, 5, 6, 8;
Rate Regulation, 4, 5, 15, 16;
Trusts.

EXAMINATION OF BANKRUPT.

See Bankruptcy, 1, 2.

EXCISE TAXES.

See Constitutional Law, 3;
Corporation Tax Law, 4, 5;
States, 6, 8.

EXECUTIVE DEPARTMENTS.

See Pure Food and Drugs Act, 2.

EXEMPTIONS.

See Bankruptcy, 7;
Constitutional Law, 18.

FACTS.

See Practice and Procedure, 1, 2, 13.

FALSE REPRESENTATIONS.

See Insurance, 4, 5, 6.

FEDERAL QUESTION.

Frivolousness.

In this case the question of authority of the officers to whom the power to make regulations is delegated by the Food and Drugs Act is substantial and not frivolous. *United States* v. *Grimaud*, 220 U. S. 506, distinguished. *United States* v. *Antikamnia Co.*, 654.

FEE BILL.

See APPEAL AND ERROR, 6, 7.

FEES.

See NATURALIZATION, 10, 11.

FIFTH AMENDMENT.

See EMINENT DOMAIN, 1;
INTERSTATE COMMERCE, 5, 19.

FOOD AND DRUGS ACT.

See PURE FOOD AND DRUGS ACT.

FOREIGN CORPORATIONS.

See CONSTITUTIONAL LAW, 3;
STATES, 5, 6.

FORMS OF PROCEDURE.

See CONSTITUTIONAL LAW, 10.

FOURTEENTH AMENDMENT.

See CONSTITUTIONAL LAW;
JURISDICTION, A 17;
RATE REGULATION, 1, 2.

FRANCHISES.

See MUNICIPAL CORPORATIONS.

FRAUD.

Effect as, of seeking to keep alive instrument in order to protect legal rights in litigation.

The mere fact that parties seek in a lawful mode to protect legal rights by keeping alive an instrument under which possession to the property could be maintained in case of adverse decision in suits under

INDICTMENT AND INFORMATION.

See CRIMINAL LAW, 2; LOCAL LAW (Alaska);
JURISDICTION, A 4, 5, 6; PRACTICE AND PROCEDURE, 14.

INJUNCTION.

See ACTIONS, 4, 6;
JURISDICTION, C 4; F;
PARTIES, 1, 2, 3.

INSTRUCTIONS TO JURY.

1. *Error not prejudicial where jury not misled.*

Where the case was tried throughout on the proper theory of the statute, the fact that the court in its charge may have used some terms that were technically inappropriate *held* not to be ground for reversal as the jury could not have been misled thereby. *Phœnix Ry. Co.* v. *Landis*, 578.

2. *Adequacy and fairness in suit on bond.*

In Federal courts the judge and jury are assumed to be competent to play their respective parts; and *held* that the charge to the jury in this case as to the meaning of the phrase "net dimension blocks" was adequate and fair. *Graham* v. *United States*, 474.

See PRACTICE AND PROCEDURE, 31.

INSURANCE.

1. *Agent's knowledge; effect to estop principal.*

Where the policy itself expressly provides that it cannot be varied by anyone except an officer of the company issuing it, the company is not estopped to contest the policy on the ground of misrepresentations or concealment in the application because its agent has knowledge of actual conditions. *Prudential Ins. Co.* v. *Moore*, 560.

2. *Agreements in policy; right of applicant to make.*

Applicants for insurance are competent to make agreements in the policy that no person other than the executive officers of the company can vary its terms, and such an agreement is binding when made. *Aetna Life Ins. Co.* v. *Moore*, 543.

3. *Law governing contracts of; Georgia law.*

The character of the covenants of a contract for life insurance depends upon the law of the State where made. The Code of Georgia expressly provides that the application must be made in good faith and that the representations are covenanted by the applicant as true, and any variations changing the character of the risk will void the policy. *Ib.*

INTERSTATE COMMERCE.

13. *Disadvantage of shipper by reason of location.*

A shipper may be under disadvantages in regard to his shipments by a common carrier by reason of his disadvantageous location. *United States* v. *Baltimore & Ohio R. R. Co.*, 274.

14. *Discrimination between shippers; lease of terminal as.*

The fact that the carrier leases a terminal from a shipper near that shipper's establishments does not, in the absence of any fraudulent intent, import a discrimination in favor of that shipper where the station is actually used for the benefit alike of all shippers in that neighborhood. *Ib.*

15. *Discrimination between shippers; compensation of shipper for services as.*

A carrier may compensate a shipper for services rendered and instrumentalities furnished in connection with its own shipments; and if the amount is reasonable it is not a prohibited rebate or discrimination, even if the carrier does not allow other shippers to render and furnish similar services and instrumentalities and compensate them therefor. *Ib.*

16. *Federal assertion of power; scope of.*

It cannot as yet be asserted that Congress has, to the exclusion of the States, taken over the whole subject of carriers' terminals, switchings and sidings; and *quære* where the accommodation between intrastate and interstate commerce shall be made. *Grand Trunk Ry.* v. *Michigan R. R. Comm.*, 457.

17. *Power of Congress; effect of interference with private business of carrier.*

In dealing with interstate carriers, the fact that some of them are also engaged in private business does not compel Congress to legislate concerning them as carriers in such manner as not to interfere with such private business. *Delaware, L. & W. R. R. Co.* v. *United States*, 363.

18. *Hepburn Act; commodity clause; application of.*

The commodity clause of the Hepburn Act applies not only to the carrier's goods from point of production to the market but also to goods from market to that point. *Ib.*

19. *Hepburn Act; commodity clause; constitutional validity under Fifth Amendment.*

While the power to regulate interstate commerce is subject to the provisions of the Fifth Amendment, an enactment, such as the com-

sponding sections of the Judicial Code, as is expressly provided by § 292 of the Code. *Ib.*

3. *Repeals by; effect of § 297 on § 18 of Trade-Mark Act of 1905.*
Section 297 of the Judicial Code did not repeal § 18 of the Trade-Mark Act of February 20, 1905. *Ib.*

§ 128 (see Jurisdiction, A 2): *Street & Smith* v. *Atlas Mfg. Co.*, 348.
§ 237 (see Appeal and Error, 4): *Bolens* v. *Wisconsin*, 616 (see Jurisdiction, A 11–14): *Marshall* v. *Dye*, 250; *John* v. *Paullin*, 583; *Bolens* v. *Wisconsin*, 616; *Straus* v. *American Publishers' Assn.*, 222.
§ 239 (see Practice and Procedure, 1): *Stratton's Independence* v. *Howbert*, 399.
c. 299 (see Jurisdiction, C 2): *Springstead* v. *Crawfordsville Bank*, 541.

JURISDICTION.

A. Of This Court.

1. *Of appeal from Circuit Court of Appeals.*
Although the original bill depended solely upon diverse citizenship, independent grounds of deprivation of Federal rights which existed prior to the filing of the bill may be brought into the case by supplemental bill, and if so, the jurisdiction of the District Court does not rest solely on diverse citizenship and the judgment of the Circuit Court of Appeals is not final but an appeal may be taken to this court. (*Macfadden* v. *United States*, 213 U. S. 288.) *Vicksburg* v. *Henson*, 259.

2. *To review judgments and decrees of Circuit Court of Appeals under Trade-Mark Act of 1905; certiorari only mode.*
Judgments and decrees of the Circuit Courts of Appeals arising under the Trade-Mark Act of February 20, 1905, are reviewable by this court only on certiorari and not on appeal or writ of error; appeals in such cases are not allowed under § 128 of the Judicial Code. *Street & Smith* v. *Atlas Mfg. Co.*, 348.

3. *To review judgments and decrees of Circuit Court of Appeals under Trade-Mark Act of 1905 and Judicial Code.*
The intent of Congress, as indicated in the provisions of the Judicial Code relating to the jurisdiction of this court, was to extend rather than contract the finality of decisions of the Circuit Court of Appeals. By the act of February 20, 1905, Congress placed trade-mark cases arising under that statute upon the same footing as cases arising under the patent laws as respects the remedy by certiorari under the Circuit Court of Appeals Act. *Ib.*

MANDAMUS.

MANDATE.

MASTER AND SERVANT.

30. *Scope of review; reversal of appellate court for not deciding matters not within its authority.*

Where the appellate court is without authority to consider errors of the trial court, which were not there assigned, this court cannot reverse the appellate court for error in not deciding matters which it had no authority to pass on. *Torres* v. *Lothrop, Luce & Co.*, 171.

31. *Tardy objections; when too late.*

An objection to the charge in regard to the subject of damages which was not presented to the court below comes too late when raised in this court for the first time. *Phœnix Ry. Co.* v. *Landis*, 578.

32. *Tardy objections; when point raised too late.*

Where a point involving sufficiency of the complaint is not raised and defendant does not challenge the statement of the court that it supposes the point will not be raised, it is too late to raise it in this court. *Luria* v. *United States*, 9.

33. *Interpretation by lower court of stipulation of counsel not reviewable.*

In this case, *held* that the interpretation by the state court of a stipulation of counsel was not open to review in this court as not raising any Federal question although there were Federal questions involved in the case. *Little* v. *Williams*, 335.

34. *Limitation on right of one attacking constitutionality of statute.*

One attacking a statute on the ground that it is unconstitutional is limited to his own case as the statute has been applied therein; he cannot rely on a possible construction of the statute that might make it unconstitutional. (*Castillo* v. *McConnico*, 168 U. S. 674.) *Straus* v. *Foxworth*, 162.

35. *Determination of jurisdiction of state court.*

This court will not hold that the state court had no jurisdiction to determine rights under an ordinance because it had been superseded by a later ordinance when the latter does not appear in the record, and the highest court of the State has held in another case that it does not affect the case at issue. *Seattle & Renton Ry.* v. *Linhoff*, 568.

36. *Affirmance, without prejudice, in suit for accounting.*

Where it appears that there may have been an error in computing the amount of the recovery, this court can affirm the judgment without prejudice to reopening the account for the single purpose of correcting such error if the lower court so permits. *Hermanos* v. *Caldentey*, 690.

RAILROADS.

RATE REGULATION.

RESERVATIONS.

See INDIANS, 6.

RES JUDICATA.

1. *Application of rule.*

While the enforcement of the rule of *res judicata* is essential to secure the peace and repose of society, it is equally true that to enforce the rule upon unsubstantial grounds would work injustice. *Vicksburg* v. *Henson*, 259.

2. *Estoppel; operation of.*

Where the suit in which the former judgment is set up is not upon the identical cause of action the estoppel operates only as to matters in issue or points controverted and actually decided in the former suit. *Radford* v. *Myers*, 725.

3. *Estoppel; scope of.*

Judgments become estoppels because they affect matters upon which the parties have been heard, but are not conclusive upon matters not in question or immaterial. (*Reynolds* v. *Stockton*, 140 U. S. 254.) *Ib.*

4. *Questions concluded.*

In a suit in which two of the parties successfully unite in asking the court to award the fund to one of them against a third party claiming it under an assignment, the judgment is not, as between the two so uniting, *res judicata* so that the one to whom it is awarded is not obligated to account therefor to the other under an agreement so to do if the record does not show that such question was also at issue and determined. *Ib.*

5. *Decree construed and held not to be res judicata of right of municipality to issue bonds for erection of water works.*

A decree in a former action between a municipal water company and the municipality that the former had an exclusive contract for a specified period and that the latter could not issue bonds for the purpose of establishing a municipal water supply to be forthwith put into operation, rendered while the franchise had a long period to run, *held* in this case not to be *res judicata* as to the right of the municipality to issue bonds within a short time prior to the expiration of the franchise for the purpose of erecting water works which were not to be put into operation until after the expiration of the existing franchise. *Vicksburg* v. *Henson*, 259.

RESTRAINT OF TRADE.

1. *Anti-trust Act; combinations within.*

The Sherman Act is broadly designed to reach all combinations in unlawful restraint of trade and tending because of the agreements or combinations entered into to build up and perpetuate monopolies. The act is a limitation of rights which may be pushed to evil consequences and may, therefore, be restrained. (*Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20.) *Straus* v. *American Publishers' Ass'n*, 222.

2. *Anti-trust Act; combinations within; agreement as to sale of copyrighted books.*

As the agreement involved in this case went beyond any fair and legal means to protect trade and prices, practically prohibited the parties thereto from selling to those it condemned, affected commerce between the States, it was manifestly illegal under the Sherman Act, and was not justified as to copyrighted books under any protection afforded by the copyright act. *Ib.*

See COPYRIGHTS.

RETROSPECTIVE LAWS.

See CONSTITUTIONAL LAW, 11; RAILROADS, 1.
PUBLIC LANDS, 7; STATUTES, A 12, 13, 14.

RIDERS IN LEGISLATION.

See STATUTES, A 16.

SAFETY APPLIANCE ACT.

1. *Employés protected by; quære as to.*

Quære, and not decided on this record, whether the purpose of the Safety Appliance Act is to protect all employés of every class and the mere absence of an automatic coupler is enough for liability if accident and injury result to an employé. *Pennell* v. *Philadelphia & Reading Ry.*, 675.

2. *Automatic couplers not required between locomotive and tender.*

Under the Safety Appliance Act of March 2, 1893, c. 196, 27 Stat. 531, as amended March 2, 1903, c. 976, 32 Stat. 943, automatic couplers are not required between the locomotive and the tender. *Ib.*

3. *Custom of railroad; effect on construction of act.*

While a custom of railroads cannot justify a violation of a mandatory statute, a custom which has the sanction of the Interstate Commerce Commission is persuasive of the meaning of that statute. *Ib.*

STATUTES.

A. CONSTRUCTION OF.

1. *Amendments by one branch of legislature.*

A paragraph in a statute which is plain and unambiguous, must be accepted as it reads even though inserted as an amendment by one branch of the legislature. *Luria* v. *United States*, 9.

2. *Codes; duality of procedure not favored.*

The court will if possible avoid construing a code of procedure as establishing a dual instead of a single procedure in the prosecution of crimes committed within the same territorial jurisdiction. *Summers* v. *United States*, 92.

3. *Implications; validity of that which is contrary to.*

That which is contrary to the plain implication of a statute is unlawful, for what is clearly implied is as much a part of a law as that which is expressed. *Luria* v. *United States*, 9.

4. *Legality and justice favored in.*

Courts are repelled from giving such a construction to a statute as will raise grave doubts of its legality as well as of its justice. *Union Pacific R. R. Co.* v. *Snow*, 204.

5. *Literal interpretation; when not to be given.*

Courts will not enforce a literal interpretation of a statute if antecedent rights are affected or human conduct given a consequence the statute did not intend. *Ib.*

6. *Meaning of words "provisions of this section."*

The words "provisions of this section" used in a statute naturally mean every part of the section, one paragraph as much as another. *Luria* v. *United States*, 9.

TAX SALES.

TELEPHONE COMPANIES.

TRIAL BY JURY.

See NATURALIZATION, 9.

TRUSTS.

Establishment; sufficiency of showing.

A trust cannot be established in an aliquot share of a man's whole property, as distinguished from a particular fund, by showing that trust monies have gone into it. *National City Bank* v. *Hotchkiss*, 50.

ULTRA VIRES.

See NATIONAL BANKS, 5.

UNITED STATES.

Property rights; power of courts to compel surrender of property held by.

The United States, as the owner in possession of property, cannot be interfered with behind its back; nor can the courts compel the officer having the custody of such property to surrender it in a proceeding to which the United States is not, and cannot be made, a party. *Goldberg* v. *Daniels*, 218.

See ACTIONS, 9; CONTRACTS, 2; CONSTITUTIONAL LAW, 4; PUBLIC LANDS, 5.

VENDOR AND VENDEE.

Passing of title on delivery; effect of postponement of payment.

Although the purchaser may have the right to rescind for a condition subsequent, title may pass on delivery; and so *held* in this case that title to hay purchased by, and delivered to, a railroad company, passed to it although payment was postponed until after inspection and acceptance. *Delaware, L. & W. R. R. Co.* v. *United States*, 363.

See BANKRUPTCY.

VERDICT.

See PLEADING, 5, 6.

WAIVER.

See MECHANICS' LIENS, 1.

WITNESSES.

See BANKRUPTCY, 2;
EVIDENCE, 2, 3.

WORDS AND PHRASES.

WRIT AND PROCESS.

See TAXES AND TAXATION, 7.