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VOLUME 232

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,[2] 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.
JAMES D. MAHER, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

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

[2] Mr. Justice Lurton was absent from the bench on account of illness from December 3, 1913, until April 6, 1914, and took no part in the decisions of cases argued and submitted during that period.

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.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1913.

HAWLEY *v.* CITY OF MALDEN.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 18. Argued March 6, 7, 1913.—Decided January 5, 1914.

The property of shareholders in their respective shares is distinct from the corporate property, franchises and capital stock of the corporation itself and may be separately taxed.

Even if the constitutional validity of the taxation by a State of shares owned by its citizens of stock of foreign corporations having no property and doing no business therein has not been definitely raised and directly passed upon by this court, the existence of the authority of the State has invariably been assumed. *Darnell* v. *Indiana*, 226 U. S. 390.

In dealing with the intangible interest of a shareholder there is no question of physical situs, and the jurisdiction to tax such interest is not dependent upon the tangible property of the corporation.

A State has the undoubted right, in creating corporations, to provide for the taxation in that State of all their shares, whether owned by residents or non-residents. *Corry* v. *Baltimore*, 196 U. S. 496.

Quære, whether in case of corporations organized under state laws a provision by the State of incorporation fixing the situs of shares for the purpose of taxation, by whomsoever owned, would exclude taxation of those shares by other States in which the owners reside.

While it would be an advantage to the country and to individual States if non-conflicting principles of taxation could be agreed upon by the States so as to avoid the taxation of the same property in more than one jurisdiction, the Constitution of the United States does not go so far. *Kidd* v. *Alabama*, 188 U. S. 730.

204 Massachusetts, 138, affirmed.

THE facts, which involve the constitutionality under the due process clause of the Fourteenth Amendment of an assessment for taxation under authority of the State of shares of stock owned by residents of the State of foreign corporations which did no business and has no property within the State, are stated in the opinion.

Mr. Courtenay Crocker and *Mr. Nathan Matthews* for plaintiff in error:

Whether a tax by a State upon a resident thereof in respect of shares of stock owned by him in foreign corporations deprives him of his property without due process of law, in violation of the Fourteenth Amendment, because the property represented by the stock is not property within the State, has never been squarely presented to or decisively passed upon by this court. This point was not passed on in *Sturges* v. *Carter*, 114 U. S. 511; *Kidd* v. *Alabama*, 188 U. S. 730; *Wright* v. *L. & N. R. R.*, 195 U. S. 219; *Darnell* v. *Indiana*, 226 U. S. 390.

By analogy to the national bank decisions shares should only be taxed in the State where the company is organized and does business. See *People* v. *Commissioners*, 4 Wall. 244; *National Bank* v. *Commonwealth*, 9 Wall. 353; *National Bank* v. *Owensboro*, 173 U. S. 664, 668; *Third National Bank* v. *Stone*, 174 U. S. 432, 439; *Cleveland Trust Co.* v. *Lander*, 184 U. S. 111; *Van Allen* v. *Assessors*, 3 Wall. 573; *Bradley* v. *People*, 4 Wall. 459.

Independently of the Fourteenth Amendment, a state law which attempts to tax property situated in another State is void on general principles, as the State can have

no jurisdiction over such property. *Hayes* v. *Pacific Mail S. S. Co.*, 17 How. 596; *St. Louis* v. *Ferry Co.*, 11 Wall. 423; *State Tax on Foreign-Held Bonds*, 15 Wall. 300; *Morgan* v. *Parham*, 16 Wall. 471; *Louisville Ferry Co.* v. *Kentucky*, 188 U. S. 385; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 204; *Del., Lack. & W. R. R.* v. *Pennsylvania*, 198 U. S. 341; *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1; *So. Pacific Co.* v. *Kentucky*, 222 U. S. 63, 74.

Under the due process clause of the Fourteenth Amendment taxes cannot be levied on land belonging to a resident but situated in another State. *Louisville Ferry Co.* v. *Kentucky*, 188 U. S. 385; *Del., Lack. & W. R. R.* v. *Pennsylvania*, 198 U. S. 341, 360; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194.

Nor can taxes be levied on tangible personal property belonging to a resident but which has acquired a permanent location or situs in another State. Cases *supra*, and *Old Dominion S. S. Co.* v. *Virginia*, 198 U. S. 299; *Union Transit Co.* v. *Lynch*, 177 U. S. 149.

The correlative proposition is that such property may be taxed in the State where it is, although belonging to a non-resident. *Gromer &c.* v. *Standard Dredging Co.*, 224 U. S. 362; *Brown* v. *Houston*, 114 U. S. 622; *Pittsburg Coal Co.* v. *Bates*, 156 U. S. 577; *Coe* v. *Errol*, 116 U. S. 517; *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82; *Savings Society* v. *Multnomah Co.*, 169 U. S. 421; *Bristol* v. *Washington County*, 177 U. S. 133; *Carstairs* v. *Cochran*, 193 U. S. 10; *Thompson* v. *Kentucky*, 209 U. S. 340; *Hannis Distilling Co.* v. *Baltimore*, 216 U. S. 285; *Am. Steel & Wire Co.* v. *Speed*, 192 U. S. 500.

Property of the kind in question can only be taxed in the State where it is physically located. *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18, 22; *Buck* v. *Beach*, 206 U. S. 392, 400; *Marye* v. *B. & O. R. R.*, 127 U. S. 117, 123; *So. Pacific Co.* v. *Kentucky*, 222 U. S. 63, 74.

Taxes cannot be levied on corporate franchises belonging to a resident but granted by the United States, *California* v. *Pacific R. R.*, 127 U. S. 1, 40, or by another State, *Louisville Ferry Co.* v. *Kentucky*, 188 U. S. 385.

In holding that a State cannot tax property not within its limits, the court draws no distinction between tangible and intangible property. It is the situs that controls. *Buck* v. *Beach*, 206 U. S. 392, 401; *So. Pacific Co.* v. *Kentucky*, 222 U. S. 63, 68; *N. Y. C. & H. R. R. R.* v. *Miller*, 202 U. S. 584, 596, 597; *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Bonaparte* v. *Tax Court*, 104 U. S. 592.

The rule *mobilia sequuntur personam* is a legal fiction; it must always give way in matters of taxation to the facts of the case; it does not authorize taxation at the domicile of the owner of property which, whether tangible or intangible, is actually located and protected in some other State. For the history of the rule in its limited application to the law of taxation, see *Green* v. *Van Buskirk*, 7 Wall. 139, 150; *St. Louis* v. *Ferry Co.*, 11 Wall. 423, 430; *Pullman Co.* v. *Pennsylvania*, 141 U. S. 18, 22; *Adams Exp. Co.* v. *Ohio*, 166 U. S. 185, 224; *Eidman* v. *Martinez*, 184 U. S. 578, 581; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 208; *Buck* v. *Beach*, 206 U. S. 392, 400; *Liverpool Ins. Co.* v. *Assessors*, 221 U. S. 346, 354.

While some forms of indebtedness may be subject to taxation in two States, such as debts secured by mortgage on real estate, *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Savings Society* v. *Multnomah County*, 169 U. S. 421; *New Orleans* v. *Stempel*, 175 U. S. 309; *Bristol* v. *Washington County*, 177 U. S. 133, if the mortgage is a mere lien on the land, unsupported by any note, bond, or personal indebtedness, it could not be taxed at the domicile of the holder, if a resident of another State.

Deposits of money and certain forms of credit may be so localized as to be subject to taxation in the State where the deposits are made or the credits given, *New Orleans* v.

Stempel, 175 U. S. 309; *Blackstone* v. *Miller*, 188 U. S. 189; *Assessors* v. *Comptoir National*, 191 U. S. 388; *Metropolitan Ins. Co.* v. *New Orleans*, 205 U. S. 395, but whether such credits are also taxable as technical debts in the State of the creditor's domicile, is doubtful. *Liverpool Ins. Co.* v. *Assessors*, 221 U. S. 346.

A State cannot reach for taxation property which itself is not subject to taxation, by means of a tax upon the documents which represent the property. *Almy* v. *California*, 24 How. 169; *Fairbank* v. *United States*, 181 U. S. 283; *Selliger* v. *Kentucky*, 213 U. S. 200; *Buck* v. *Beach*, 206 U. S. 392.

If the property cannot be taxed specifically because outside the State, it cannot be reached indirectly, as by a general tax on the capital stock or property of a domestic corporation which would include the property outside the State.

In such cases the tax is void as to so much of the company's property as is situated outside the State. *Del., Lack. & West. Ry.* v. *Pennsylvania*, 198 U. S. 341; *Louisville Ferry Co.* v. *Kentucky*, 188 U. S. 385; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1.

As to the difference between the property, capital, or stock of a corporation and the shares of stock in the company held by individuals, see *National Bank* v. *Commonwealth*, 9 Wall. 353; *Delaware Railroad Tax*, 18 Wall. 206; *Tappan* v. *Merchants' Natl. Bank*, 19 Wall. 490, 503; *Farrington* v. *Tennessee*, 95 U. S. 679; *Dewing* v. *Perdicaries*, 96 U. S. 193; *Gibbons* v. *Mahon*, 136 U. S. 558; *Jellenik* v. *Huron Copper Co.*, 177 U. S. 1.

Property physically situated in one State is not taxable elsewhere, because taxation and protection are correlative incidents, and if protection can be furnished only in the State where the property is situated, taxation also must be confined to that State. *Tappan* v. *Merchants Bank*, 19 Wall. 490, 501; *Union Transit Co.* v. *Kentucky*,

199 U. S. 194, 204; *Liverpool Ins. Co.* v. *Assessors*, 221 U. S. 346, 356.

American economists agree that the attempt to tax shares of stock in foreign corporations upon their market value is unjust, unwise, and ineffective. See reports for 1907, 1908, 1909, 1910, 1911, and 1912 of the National and International Conferences on State and Local Taxation. Report of Wisconsin Tax Commission for 1910; Report in 1897 of Special Commission on Taxation in Massachusetts.

Mr. H. L. Boutwell for defendant in error:

The Massachusetts acts authorizing the levying of a tax by a municipal corporation upon shares of the stock of foreign corporations owned by its inhabitants domiciled therein are not contrary to the Fourteenth Amendment.

This form of taxation has existed under the laws of Massachusetts for more than seventy years. See the earlier enactment, in Rev. Stat., c. 7, § 4, the validity and constitutionality of which were sustained in *Great Barrington* v. *Commissioners*, 16 Pick. 572; *Dwight* v. *Boston*, 12 Allen, 316; *Frothingham* v. *Shaw*, 175 Massachusetts, 59, 61; *Hawley* v. *Malden*, 204 Massachusetts, 138.

A similar rule has been laid down in the decisions of the courts of many other States. *State* v. *Kidd*, 125 Alabama, 413; *Greenleaf* v. *Morgan County*, 184 Illinois, 226; *Seward* v. *Rising Sun*, 79 Indiana, 351; *Griffith* v. *Watson*, 19 Kansas, 23; *Appeal Tax Court* v. *Gill*, 50 Maryland, 377; *Bacon* v. *Commissioners*, 126 Michigan, 22; *Ogden* v. *St. Joseph*, 90 Missouri, 522; *State* v. *Branin*, 23 N. J. L. 484; *State* v. *Bentley*, 23 N. J. L. 532; *Worth* v. *Ashe County*, 82 N. Car. 420; *Worthington* v. *Sebastian*, 25 Oh. St. 1; *Bradley* v. *Bauder*, 36 Oh. St. 28; *Lander* v. *Burke*, 65 Oh. St. 532; *McKeen* v. *Northampton County*, 49 Pa. St. 519; *Whitesell* v. *Same*, *id.* 526; *Dyer* v. *Osborne*, 11 R. I. 321; *Union*

Bank v. *State*, 9 Yerg. (Tenn.) 490; *Nashville* v. *Thomas*, 5 Coldw. (Tenn.) 600.

This court has laid down the same rule, the constitutionality of the tax law, however, not being put in issue. *Sturges* v. *Carter*, 114 U. S. 511; *Kidd* v. *Alabama*, 188 U. S. 730; *Wright* v. *L. & N. R. R.*, 195 U. S. 219; *Darnell* v. *Indiana*, 226 U. S. 390.

Unless constrained by the most cogent reasons this court ought not to overturn a system of taxation which has been practiced for so many years and repeatedly upheld by the courts of so many different States. As to *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, see correct rule stated in *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63; and see also *Gromer* v. *Standard Dredging Co.*, 224 U. S. 362, 376; *Tappan* v. *Merchants' National Bank*, 19 Wall. 490.

For the purposes of taxation, personal property may be separated from the owner, and he may be taxed on its account at the place where it is actually located.

In order to obtain a taxable situs in a jurisdiction other than that of the domicile of its owner tangible personal property must have become commingled or intermingled with the property of the taxing authority or permanently located there or incorporated in the local property of such other jurisdiction. *Old Dominion S. S. Co.* v. *Virginia*, 198 U. S. 299; *Del., Lack. & West. R. R. Co.* v. *Pennsylvania*, 198 U. S. 341; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194; *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63.

For the foundation and general application of the rule *mobilia sequuntur personam*, see *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63; *St. Louis* v. *Ferry Co.*, 11 Wall. 423, 430.

The property taxed in the case at bar consists of shares of the capital stock of foreign corporations, as to which see *Tennessee* v. *Whitworth*, 117 U. S. 129; *New Orleans* v.

Houston, 119 U. S. 265, 277; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 205.

The tendency of modern authorities is to apply the maxim *mobilia sequuntur personam*, and to hold that the property may be taxed at the domicile of the owner as the real situs of the debt, and also, more particularly in the case of mortgages, in the State where the property is retained. *Tappan* v. *Merchants' National Bank*, 19 Wall. 490; *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Bonaparte* v. *Appeal Tax Court*, 104 U. S. 592; *Sturges* v. *Carter*, 114 U. S. 511; *Kidd* v. *Alabama*, 188 U. S. 730; *Blackstone* v. *Miller*, 188 U. S. 189.

Certificates of stock of a foreign corporation held by a citizen of a State are taxable in that State, though a tax is also imposed on the property of such corporation situated in the State. *Sturges* v. *Carter*, 114 U. S. 511; *Dyer* v. *Osborne*, 11 R. I. 321, 326, 327; *Bradley* v. *Bauder*, 36 Oh. St. 28, 35; *Farrington* v. *Tennessee*, 95 U. S. 679.

MR. JUSTICE HUGHES delivered the opinion of the court.

The plaintiff in error, a resident of the city of Malden, brought this action to recover the amount of certain taxes which he had paid under protest. The taxes were assessed upon shares which he held in foreign corporations most of which did no business and had no property within the State of Massachusetts. It was alleged that the levy and collection were in violation of the due process and equal protection clauses of the Fourteenth Amendment. Demurrer to the declaration was sustained by the Superior Court and the case was reported to the Supreme Judicial Court of the Commonwealth which directed judgment for the defendant. 204 Massachusetts, 138.

It is conceded that the objection that the statute authorizing the tax [Rev. Laws (Mass.), c. 12, §§ 2, 4, 23] denies to the plaintiff in error the equal protection of the

laws is not well taken; but it is contended that the shares were not within the jurisdiction of the State and hence that the enforcement of the tax constitutes an unconstitutional deprivation of property.

The power thus challenged, as the state court points out, has been continuously exercised by the State of Massachusetts for more than three-quarters of a century. Substantially the same statutory provision, derived from an earlier enactment, is found in Rev. Stats. (Mass.), c. 7, § 4, and its constitutionality has been sustained by repeated state decisions. *Great Barrington* v. *County Commissioners*, 16 Pick. 572; *Dwight* v. *Mayor & Aldermen of Boston*, 12 Allen, 316; *Frothingham* v. *Shaw*, 175 Massachusetts, 59, 61. And other States through a long period of years have asserted a similar authority. *Union Bank of Tennessee* v. *State*, 9 Yerg. (Tenn.) 490; *McKeen* v. *County of Northampton*, 49 Pa. St. 519; *Whitesell* v. *Same*, *id.* 526; *State* v. *Branin*, 23 N. J. Law, 484; *State* v. *Bentley*, *id.* 532; *Worthington* v. *Sebastian*, 25 Oh. St. 1; *Bradley* v. *Bauder*, 36 Ohio St. 28; *Dyer* v. *Osborne*, 11 R. I. 321; *Seward* v. *Rising Sun*, 79 Indiana, 351; *Ogden* v. *St. Joseph*, 19 Missouri, 522; *Worth* v. *Ashe County*, 90 N. Car. 409; *Jennings* v. *Commonwealth*, 98 Virginia, 80; *Appeal Tax Court* v. *Gill*, 50 Maryland, 377; *State* v. *Nelson*, 107 Minnesota, 319; *Bacon* v. *State Tax Commissioners*, 126 Michigan, 22; *State* v. *Kidd*, 125 Alabama, 413; *Commonwealth* v. *Lovell*, 125 Kentucky, 491; *Stanford* v. *San Francisco*, 131 California, 34; *Judy* v. *Beckwith*, 137 Iowa, 24; *Greenleaf* v. *Morgan County*, 184 Illinois, 226. It is well settled that the property of the shareholders in their respective shares is distinct from the corporate property, franchises and capital stock, and may be separately taxed (*Van Allen* v. *Assessors*, 3 Wall. 573, 584; *Farrington* v. *Tennessee*, 95 U. S. 679, 687; *Tennessee* v. *Whitworth*, 117 U. S. 129, 136, 137; *New Orleans* v. *Houston*, 119 U. S. 265, 277); and the rulings in the state cases which we have

cited proceed upon the view that shares are personal property and, having no situs elsewhere, are taxable by the State of the owner's domicile, whether the corporations be foreign or domestic.

It is said that the question of the constitutional validity of such taxation has not hitherto been raised definitely in this court and has not been directly passed upon. There is no doubt, however, that the existence of the state authority has invariably been assumed. In *Sturges* v. *Carter*, 114 U. S. 511, the action was brought to recover taxes imposed under the law of Ohio upon shares of stock owned by a resident of Ohio in the Western Union Telegraph Company, a New York corporation. The right of the State to tax the shares was not questioned and as it was found that a statutory exemption which was relied upon in defense did not apply, the recovery of the tax was sustained. Again, in *Kidd* v. *Alabama*, 188 U. S. 730, it was not disputed that the State was entitled to tax shares owned by its citizens in foreign corporations. The argument was that the statute in that case created an unconstitutional discrimination and, this point being found to be without merit, the tax was upheld. In *Wright* v. *Louisville & Nashville R. R. Co.*, 195 U. S. 219, the question was whether shares of stock in a railroad corporation of another State, which were owned by a Georgia corporation were taxable under the constitution and laws of Georgia. The State's power to tax the shares was not denied, so far as the Constitution of the United States was concerned, but it was contended that this power had not been exercised. The constitution of Georgia provided that all taxation should "be uniform upon the same class of subjects, and *ad valorem* on all property subject to be taxed within the territorial limits of the authority levying the tax," and should be levied and collected under general laws. The general tax act had authorized a tax on all of the taxable property of the State. It was clear that the

State had directed shares in foreign corporations to be taxed, provided these could be considered to be "property subject to be taxed within the territorial limits" of the taxing authority. And such shares when held by a resident being deemed to fall within this description, it was decided that the state officer was entitled to collect the tax. "Putting the case at the lowest," said the court (p. 222), "the above cited section of the constitution was adopted in the interest of the State as a tax collector, and authorizes, if it does not require, a tax on the stock." So also, in *Darnell* v. *Indiana*, 226 U. S. 390, the authority of the State to tax the shares of its citizens in foreign corporations was recognized, the tax being sustained against objections urged under the commerce clause, Art. I, § 8, and the equal protection clause of the Fourteenth Amendment.

To support the contention that this familiar state action, hitherto assumed to be valid, is fundamentally violative of the Federal Constitution, the plaintiff in error invokes the doctrine that a State has no right to tax the property of its citizens when it is permanently located in another jurisdiction. *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U. S. 385; *Del., Lack. & West. R. R. Co.* v. *Pennsylvania*, 198 U. S. 341; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194. But these decisions did not involve the question of the taxation of intangible personal property (*Union Transit Co.* v. *Kentucky*, 199 U. S. p. 211); nor do they apply to tangible personal property which, although physically outside the State of the owner's domicile, has not acquired an actual situs elsewhere. *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63, 68. When we are dealing with the intangible interest of the shareholder, there is manifestly no question of physical situs, so far as this distinct property right is concerned, and the jurisdiction to tax it is not dependent upon the location of the lands and chattels of the corporation.

The argument, necessarily, is that shares are to be deemed to be taxable solely in the State of incorporation. It is urged that these rights rest in franchise and that the principle of the decision in *Louisville &c. Ferry Co.* v. *Kentucky, supra,* holding that a ferry franchise granted by Indiana to a Kentucky corporation was not taxable in Kentucky is applicable to shares of stock. But that case went upon the ground that the franchise was an incorporeal hereditament and hence had its legal situs in Indiana, 188 U. S. p. 398. Shares fall within a different category. While the shareholder's rights are those of a member of the corporation entitled to have the corporate enterprise conducted in accordance with its charter, they are still in the nature of contract rights or *choses in action.* Morawetz on Corporations, § 225. As such, in the absence of legislation prescribing a different rule, they are appropriately related to the person of the owner, and, being held by him at his domicile, constitute property with respect to which he is under obligation to contribute to the support of the government whose protection he enjoys. *Kirtland* v. *Hotchkiss,* 100 U. S. 491; *Bonaparte* v. *Tax Court,* 104 U. S. 592; *Covington* v. *First National Bank,* 198 U. S. 100, 111, 112; *Southern Pacific Co.* v. *Kentucky, supra;* Cooley on Taxation (3d ed.), 26.

Undoubtedly, the State in which a corporation is organized may provide, in creating it, for the taxation in that State of all its shares whether owned by residents or non-residents. *Corry* v. *Baltimore,* 196 U. S. 466. This is by virtue of the authority of the creating State to determine the basis of organization and the liabilities of shareholders. *Id.,* 476, 477; *Hannis Distillery Co.* v. *Baltimore,* 216 U. S. 285, 293, 294. So, by reason of its dominant power to provide for the organization and conduct of national banks, Congress has fixed the places at which alone shares in those institutions may be taxed. Rev. Stat., § 5219. Whether, in the case of corporations or-

ganized under state laws, a provision by the State of incorporation fixing the situs of shares for the purpose of taxation, by whomever owned, would exclude the taxation of the shares by other States in which their owners reside is a question which does not arise upon this record and need not be decided. No such provision is here involved, and the present case must be determined by the application of the established principle which has been stated.

The real ground of complaint in this class of cases is not that the shares are taxed in one place rather than in another but that they are taxed at all, when presumably the property and franchises of the corporation which give to the shares their value are also taxed. As to this we may repeat what was said in *Kidd* v. *Alabama,* 188 U. S. 730, 732, "No doubt it would be a great advantage to the country and to the individual States if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far."

The judgment is affirmed.

Affirmed.

BARRETT, PRESIDENT OF ADAMS EXPRESS CO., *v.* CITY OF NEW YORK.

CITY OF NEW YORK *v.* BARRETT, PRESIDENT OF ADAMS EXPRESS CO.

APPEAL AND CROSS-APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 83, 84. Argued December 3, 4, 1913.—Decided January 5, 1914.

The practical construction of municipal ordinances by the local authorities prior to the controversy is persuasive, especially where, as in this case, a different construction would render the ordinances unconstitutional.

While the exertion of the police power essential for protection of the community may extend incidentally to operations of interstate commerce, the police power does not justify the imposition of direct burdens on that commerce nor its subjection to unreasonable demands.

A state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it. *Crutcher* v. *Kentucky*, 141 U. S. 47.

An ordinance requiring an express company to take out local licenses for transacting interstate business is an unconstitutional burden on interstate commerce.

Congress has exercised its authority over interstate express business and so removed that business from any action of the State directly burdening it.

A municipal license fee required for express wagons and drivers cannot be construed as a fee or tax for use of the streets or regulation of street traffic; and *quære* whether the ordinance in this case, if so construed, would not be invalid as discriminating against express companies.

While regulations to insure careful driving over city streets may be proper, they should, when interstate traffic is involved, be entirely reasonable. *Quære* whether a requirement that only citizens of the United States, or those who have declared their intention to become

such, can be licensed is not unnecessarily burdensome in a city such as New York.

Where a license tax is declared unconstitutional as to all classes covered by the action it is not necessary for this court to decide whether it has been superseded as to one of the classes by a later statute; *quære* whether the general automobile statute of New York State repealed and superseded the express license fee ordinance of the City of New York.

The ordinances of the City of New York requiring expressmen to be licensed and providing that only citizens of the United States or those who have declared their intention to become such can be licensed, as applied to interstate commerce, impose a direct burden thereon and, as so applied, are unconstitutional under the commerce clause of the Constitution of the United States.

Where a municipal ordinance is unconstitutional as applied to interstate commerce, the person or corporation whose business is impeded by the enforcement of such ordinance is entitled to an injunction restraining the municipal authorities from enforcing it in respect to its interstate business.

189 Fed. Rep. 268, reversed.

THE facts, which involve the constitutionality under the commerce clause of the Federal Constitution of certain ordinances of the City of New York as applied to the interstate business of express companies, are stated in the opinion.

Mr. William D. Guthrie for Adams Express Company:

The ordinance is unconstitutional and void as to the interstate express companies because it requires them to take out a license, pay license fees and give bonds for the privilege of carrying on interstate business. *Crutcher* v. *Kentucky*, 141 U. S. 47, 58.

See also *Brennan* v. *Titusville*, 153 U. S. 289, 302; *Adams Express Co.* v. *Ohio*, 166 U. S. 185, 218; *Fairbank* v. *United States*, 181 U. S. 283, 306; *Stockard* v. *Morgan*, 185 U. S. 27, 33; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Atlantic &c. Tel. Co.* v. *Philadelphia*, 190 U. S. 160, 162; *St. Clair County* v. *Interstate Sand & Transfer Co.*, 192 U. S. 454, 468; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1, 21; *In-*

ternational Textbook Co. v. *Pigg*, 217 U. S. 91, 108; *Buck Stove Co.* v. *Vickers*, 226 U. S. 205, 215; *Minnesota Rate Cases*, 230 U. S. 352, 401.

The service rendered by the drivers and wagons of the Adams Express Company in collecting and delivering packages in the City of New York is an inseparable part of interstate commerce. The local transportation of interstate packages is interstate commerce, and so within the exclusive jurisdiction of the Federal Government. *Louisiana R. R. Comm.* v. *Tex. & Pac. Ry. Co.*, 229 U. S. 336, 341; *St. L. & San Francisco Ry.* v. *Seale*, 229 U. S. 156, 161; *Texas & N. O. R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111; *United States* v. *Union Stock Yard*, 226 U. S. 286; *Ohio R. R. Comm.* v. *Worthington*, 225 U. S. 101; *So. Pac. Terminal Co.* v. *Int. Com. Comm.*, 219 U. S. 498, 526; *Galveston, H. &c. Ry. Co.* v. *Texas*, 210 U. S. 217; *Heyman* v. *Southern Railway Co.*, 203 U. S. 270, 274. See also *Jewel Tea Co.* v. *Lee's Summit*, 189 Fed. Rep. 280, *S. C.*, 198 Fed. Rep. 532.

The interstate commerce clause of the Constitution guarantees the right to ship merchandise from one State into another, and covers and protects the shipment from the time it commences its transit by whatever means, local or interstate, until the termination of the shipment by delivery at the place of consignment. *The Daniel Ball*, 10 Wall. 557, 565; *Vance* v. *Vandercook Co.*, 170 U. S. 438, 451; *Am. Exp. Co.* v. *Iowa*, 196 U. S. 133, 142; *Adams Exp. Co.* v. *Iowa*, 196 U. S. 147; *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543, 559; *Adams Exp. Co.* v. *Kentucky*, 206 U. S. 129; *Osborne* v. *Mobile*, 16 Wall. 479; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 647; and see *Crutcher* v. *Kentucky*, 141 U. S. 47.

The *Crutcher Case* has received the approval of this court in *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1, 19; *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 108; *Buck Stove Co.* v. *Vickers*, 226 U. S. 205, 215.

People ex rel. Pennsylvania R. R. Co. v. *Knight*, 171 N. Y. 354; aff'd 192 U. S. 21, distinguished.

The ordinance shows on its face that its intent and purpose were to regulate business and nothing else, and that it could not have been intended as a regulation of the use of the streets of the City of New York. *Detroit* v. *Little*, 163 Michigan, 444, 448.

Until a few years ago, not a single wagon or driver of the company was licensed, and never until then was any demand or intimation made by any city official that the company must procure licenses for them. This long continued administrative or executive construction of such an ordinance cannot be ignored. *Easton* v. *Pickersgill*, 55 N. Y. 310, 315; *Matter of Tiffany*, 179 N. Y. 455, 459; *New York* v. *City Ry. Co.*, 193 N. Y. 543; *Grimmer* v. *Tenement House Dept.*, 205 N. Y. 549; *Werner* v. *Prendergast*, 206 N. Y. 405, 411; *Fairbank* v. *United States*, 181 U. S. 283, 307; *Studebaker* v. *Perry*, 184 U. S. 258, 268; *United States* v. *Sweet*, 189 U. S. 471, 473; *McMichael* v. *Murphy*, 197 U. S. 304, 312; *Komada* v. *United States*, 215 U. S. 392, 396.

The Charter of the City by § 57 provides for an annual compilation of the ordinances by the board of aldermen. The reënactment, without change, of a statute which had previously received long continued executive construction, is an adoption of such construction. *United States* v. *Hermanos*, 209 U. S. 337; *Copper Mining Co.* v. *Arizona Board*, 206 U. S. 474, 479; *United States* v. *Falk*, 204 U. S. 143, 152; *New Haven R. R.* v. *Interstate Com. Comm.*, 200 U. S. 361, 401. The same principle applies to the adoption by a municipal legislature of the executive construction of an ordinance by repeatedly reënacting it substantially in the form in which it was construed. *Outwater* v. *Green*, 56 N. Y. 456, 475; *Pouch* v. *Prudential Ins. Co.*, 204 N. Y. 281, 288.

The court cannot remodel or reconstruct the ordinance

so as to make it read as if its operation were expressly limited to the wagons and drivers of the interstate carriers who are engaged in local business, and thus compel such carriers at prohibitive expense and inconvenience to separate the local from the interstate business. *Williams* v. *Talladega*, 226 U. S. 404, 419; *Ill. Cent. R. R.* v. *McKendree*, 203 U. S. 514, 529; *Allen* v. *Pullman Co.*, 191 U. S. 171, 179.

Congress has legislated upon the subject covered by the ordinance and its legislation is exclusive and supersedes all state regulations. *Nor. Pac. Ry.* v. *Washington*, 222 U. S. 370; *Southern Ry. Co.* v. *Reid*, 222 U. S. 424; *Southern Ry. Co.* v. *Reid & Beam*, 222 U. S. 444; *N. Y. Cent. R. R.* v. *Hudson County*, 227 U. S. 248; *St. Louis, Iron Mt. & S. Ry.* v. *Edwards*, 227 U. S. 265; *Louisville & N. R. Co.* v. *Hughes*, 201 Fed. Rep. 727.

The ordinance in question is not severable. *Trade-Mark Cases*, 100 U. S. 82, 99; *Allen* v. *Louisiana*, 103 U. S. 80, 83; *Poindexter* v. *Greenhow*, 114 U. S. 270, 304; *California* v. *Pacific R. R. Co.*, 127 U. S. 1, 29; *Baldwin* v. *Franks*, 120 U. S. 678, 685; *Pollock* v. *Farmers' L. & T. Co.*, 158 U. S. 601, 635; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 565; *United States* v. *Ju Toy*, 198 U. S. 253, 262; *Ill. Cent. R. R. Co.* v. *McKendree*, 203 U. S. 514, 529; *Hatch* v. *Reardon*, 204 U. S. 152, 160; *Employers' Liability Cases*, 207 U. S. 463, 501; *El Paso & N. E. Ry.* v. *Gutierrez*, 215 U. S. 87, 97; *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 113; *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S. 298, 302; *Butts* v. *Merchants Transpn. Co.*, 230 U. S. 126, 133.

If the ordinance in question had been expressly drawn as a regulation of the use of the streets of the City of New York under § 50 of the Greater New York Charter, it would nevertheless be invalid.

The board of aldermen could not exact a license fee for the use of the streets by any class of the public having

the right to use the same. *New York* v. *N. Y. City R. Co.*, 138 App. Div. 131, 136; aff'd 203 N. Y. 593; *Chicago* v. *Collins*, 175 Illinois, 445, 454; *Harder's Storage Co.* v. *Chicago*, 235 Illinois, 58, 84.

Aliens are entitled to the protection of equal laws. *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 417; *Gulf, Col. &c. Ry.* v. *Ellis*, 165 U. S. 150, 165.

Undoubtedly, under the police power and in the absence of action and regulation by Congress, the several States have ample power to enact reasonable police regulations and legal sanctions which indirectly affect interstate commerce. See *Smith* v. *Alabama*, 124 U. S. 465; *Nashville &c. R. Co.* v. *Alabama*, 128 U. S. 96; *West. Un. Tel. Co.* v. *James*, 162 U. S. 650; *Chicago &c. R. Co.* v. *Solan*, 169 U. S. 133; *Penn. R. R. Co.* v. *Hughes*, 191 U. S. 477; *Martin* v. *Pittsburg &c. R. R. Co.*, 203 U. S. 284; *Atlantic Coast Line* v. *Mazursky*, 216 U. S. 122; *West. Un. Tel. Co.* v. *Milling Co.*, 218 U. S. 406; *West. Un. Tel. Co.* v. *Crovo*, 220 U. S. 364.

In each of these cases, however, the provision in question related either to a subject not yet covered by any legislation of Congress, or created a sanction to secure the performance of the legal duties of common carriers. Many of these regulations belonged to that large class which are superseded as soon as Congress asserts its right to exercise exclusive power and to introduce uniform regulations. *Adams Exp. Co.* v. *Croninger*, 226 U. S. 491, 500; *Kansas City Southern Ry.* v. *Carl*, 227 U. S. 639, 649.

The right to relief in equity is plain. See *Osborn* v. *Bank*, 9 Wh. 738, 838; *Ex parte Young*, 209 U. S. 123, 161; *Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 146; *West. Un. Tel. Co.* v. *Andrews*, 216 U. S. 165; *United States Exp. Co.* v. *Hemmingway*, 39 Fed. Rep. 60; *Postal Tel. Co.* v. *Mobile*, 179 Fed. Rep. 955, 960; *Simpson-Crawford Co.* v. *Atlantic Highlands*, 158 Fed. Rep. 372; *Hutchinson* v. *Beckham*, 118 Fed. Rep. 399; *Jewel Tea Co.* v. *Lee's Summit*, 198

Fed. Rep. 532; *Southern Exp. Co.* v. *Ensley*, 116 Fed. Rep. 756, 761; *Gas Co.* v. *Kansas City*, 198 Fed. Rep. 500, 510; *Southern Ry. Co.* v. *Asheville*, 69 Fed. Rep. 359, 360, 361.

Mr. Walker D. Hines for the United States Express Company in Nos. 85 and 86, argued simultaneously herewith: [1]

There was no basis for separation because the various specific provisions upheld below cannot be regarded as regulations as to the use of the streets.

The various specific provisions upheld below, even if they could be regarded as regulations as to the use of the streets, are not separable from the remainder of the ordinance.

But the license provisions are an unreasonable burden upon interstate commerce even if relating to the use of the streets and capable of separation.

The reasonableness of the regulation is a question for the court and the inquiry is broader under the commerce clause than under the Fourteenth Amendment.

The relation to any local police necessity is so remote and fanciful, and the interference with interstate commerce so direct and burdensome, that the regulations are unreasonable as to interstate commerce.

The regulations apply to a very small part of the vehicles using the streets, and this, under the facts of this case, establishes unreasonableness as to interstate commerce.

The Mayor's power to revoke licenses creates under the peculiar circumstances here an unreasonable burden upon interstate commerce.

The requirement of a bond for prompt delivery of interstate shipments is an unconstitutional interference with interstate commerce.

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[1] See p. 35, *post*.

There is no basis for the view that the duties of interstate express companies to their patrons can be regulated by this ordinance as an "aid to interstate commerce."

In support of these contentions, see *Adams Exp. Co.* v. *Croninger*, 226 U. S. 491; *Atlantic Coast Line* v. *Mazursky*, 216 U. S. 122; *Chicago, R. I. & Pac. Ry.* v. *Hardwick Elevator Co.*, 226 U. S. 426; *Cleveland &c. Ry. Co.* v. *Illinois*, 177 U. S. 514; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Gladson* v. *Minnesota*, 166 U. S. 427; *Hampton* v. *St. L., Iron Mt. & So. Ry. Co.*, 227 U. S. 456; *Haskell* v. *Kansas Natural Gas Co.*, 224 U. S. 217; *Kansas City S. Ry. Co.* v. *Carl*, 227 U. S. 639; *Lake Shore Ry. Co.* v. *Ohio*, 173 U. S. 285; *M., K. & T. Ry. Co.* v. *Harriman*, 227 U. S. 657; *Nashville &c. R. R. Co.* v. *Alabama*, 128 U. S. 96; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Reagan* v. *Farmers L. & T. Co.*, 154 U. S. 362; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Smith* v. *Alabama*, 124 U. S. 465; *Southern Ry. Co.* v. *Reid*, 222 U. S. 242; *West. Un. Tel. Co.* v. *James*, 162 U. S. 650; *West. Un. Tel. Co.* v. *Crovo*, 220 U. S. 364; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *Yazoo & Miss. Valley R. R. Co.* v. *Greenwood Grocery Co.*, 227 U. S. 1.

Mr. Terence Farley, with whom *Mr. Archibald R. Watson* was on the brief, for the City of New York, in these cases and in Nos. 85 and 86, argued simultaneously herewith: [1]

The ordinances in question were enacted under the authority of the provisions of the Greater New York Charter, and as so enacted have the force of law within the corporate limits of the City of New York. Laws of 1901, c. 466, §§ 43, 44, 50, 51.

The ordinances in question were passed in pursuance of legislative authority, and have the force of law and are as obligatory as if enacted by the legislature itself.

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[1] See p. 35, *post*.

Buffalo v. *New York, L. E. & W. R. R. Co.*, 152 N. Y. 276, 280; *Kittinger* v. *Buffalo Traction Co.*, 160 N. Y. 377, 389.

The ordinances are a valid exercise of the police power of the municipality, which has been delegated to it by the State, and are reasonable and just.

While the power of Congress to regulate interstate commerce is exclusive and the State cannot legislate on that subject, *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204; *West. Un. Tel. Co.* v. *James*, 162 U. S. 650, whenever the subject of the regulation is of a local nature, and only incidentally affects interstate commerce, it is within the legislative power of the State, in the absence of conflicting national regulation of the same subject. *Robbins* v. *Shelby County Taxing Dist.*, 120 U. S. 489, 492; *West. Un. Tel. Co.* v. *James, supra; New York, N. H. & H. R. R. Co.* v. *New York*, 165 U. S. 628; *Lake Shore & M. S. R. Co.* v. *Ohio*, 173 U. S. 285; *Atl. & Pac. Tel. Co.* v. *Philadelphia*, 190 U. S. 160; *Missouri Pac. R. Co.* v. *Larabee Flour Mill Co.*, 211 U. S. 612: *Houston & Texas R. Co.* v. *Mayes*, 201 U. S. 321; *Atlantic Coast Line* v. *Wharton*, 207 U. S. 328, 334.

In the absence of legislation by Congress, the State may enact reasonable laws, under its police powers and in pursuance of acknowledged state authority, which indirectly affect interstate commerce. *Reid* v. *Colorado*, 187 U. S. 137; *Asbell* v. *Kansas*, 209 U. S. 251; *N. Y., N. H. & H. R. Co.* v. *New York*, 165 U. S. 628; *Smith* v. *Alabama*, 124 U. S. 465; *Nashville, Chat. & St. L. R. Co.* v. *Alabama*, 128 U. S. 96; *Lake Shore & M. S. R. Co.* v. *Ohio*, 173 U. S. 285. See, also, *Hemmington* v. *Georgia*, 163 U. S. 299; *Patapsco Guano Co.* v. *Bd. of Agriculture*, 171 U. S. 345; *Olsen* v. *Smith*, 195 U. S. 332; *New Mexico* v. *McLean*, 203 U. S. 38; *New York* v. *Hesterberg*, 211 U. S. 31; *The Minnesota Rate Cases*, 230 U. S. 352, 402, 410.

The ordinances are not a tax laid upon interstate com-

merce. See §§ 300, 379, c. 7, Code of Ordinances of the City of New York (Cosby's).

The license fees of $5 for each express wagon and of fifty cents for each driver thereof, therefore, are merely the necessary sums reasonably fixed to cover the ordinary and usual expenses of administration, supervision and inspection; and, as such, are sums collected in aid of the exercise of the police powers and are not an exercise of the taxing power. The distinction between licenses, and fees in connection therewith, exacted in the exercise of the police power, and license taxes, levied under the taxing power, has long been recognized. *West. Un. Tel. Co.* v. *New Hope*, 187 U. S. 419; *Atl. & Pac. Tel. Co.* v. *Philadelphia*, 190 U. S. 160; *Postal Tel. Co.* v. *New Hope*, 192 U. S. 55; *Postal Tel. Co.* v. *Borough of Taylor*, 192 U. S. 64; *Duluth Brew. Co.* v. *Superior*, 123 Fed. Rep. 353, 358; *Barrett* v. *New York*, 183 Fed. Rep. 796.

In this case there is no allegation that the license fees are excessive or unreasonable.

The ordinances are general, and not special, and make no unjust discriminations in violation of the Fourteenth Amendment. *Barrett* v. *New York*, 183 Fed. Rep. 801.

The classification is proper. *Magoun* v. *Ill. Trust Bank*, 170 U. S. 283; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557; *Railway Co.* v. *Mackay*, 127 U. S. 204, 208; *Railway Co.* v. *Beckwith*, 129 U. S. 26.

MR. JUSTICE HUGHES delivered the opinion of the court.

This suit was brought to restrain the enforcement against the Adams Express Company of a group of ordinances of the Board of Aldermen of the City of New York upon the ground that, as applied to that Company, these ordinances constitute an unconstitutional interference with interstate commerce and deny to it the equal protection of the laws. The ordinances are contained in

Chapter 7 of the Code of Ordinances adopted in the year 1906 as amended (Cosby's Edition, 1911), and the material sections together with portions of the context are set forth in the margin.[1]

The chapter relates to specified businesses in which no one is permitted to engage except under an annual license granted by the Mayor and revocable by him. Among these is the business of "expressmen" (§§ 305, 306).

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[1] CHAPTER 7.

TITLE I.—BUREAU OF LICENSES.

(§§ 300–304)

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TITLE II.—THE GRANTING AND REGULATION OF LICENSES.

Article I.—Business Requiring a License.

§ 305. The following businesses must be duly licensed as herein provided, namely, public cartmen, truckmen, hackmen, cabmen, expressmen, drivers, junk dealers, dealers in second-hand articles, hawkers, peddlers, venders, ticket speculators, coal scalpers, common shows, shooting galleries, bowling alleys, billiard tables, dirt carts, exterior hoists and stands within stoop-lines and under the stairs of the elevated railroad stations. (Ord. app. May 22, 1899, § 1.)

§ 306. No person shall engage in or carry on any such business without a license therefor under a penalty of not less than two dollars, nor more than twenty-five dollars for each offense, and for the purposes of this ordinance the term person shall include any human being or lawful association of such. (Id., § 2.)

Article II.—Licenses and License fees.

§ 307. All licenses shall be granted by authority of the Mayor and issued by the Bureau of Licenses for a term of one year from the date thereof, unless sooner suspended or revoked by the Mayor, and no person shall be licensed except a citizen of the United States or one who has regularly declared intention to become a citizen.

The Mayor shall have power to suspend or revoke any license or permit issued under the provisions of this ordinance. The Mayor shall also have power to impose a fine of not more than five dollars or less than one dollar for any violation of the regulations herein provided, and to suspend the license pending payment of such fine, which, when collected, shall be paid into the sinking fund for the redemption of the city debt. (Id., § 3.)

It is provided that no person is to be licensed "except a citizen of the United States or one who has regularly declared intention to become a citizen" (§ 307). The license fee is "for each express wagon," five dollars, and, "for each driver of any licensed vehicle," fifty cents,

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§ 308. The annual license fees shall be as below enumerated:

* * * * * * * *

For each express wagon..... $5.00

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For each driver of any licensed vehicle..... .50

(Id., § 4.)

§ 309. Any license, before its expiration or within thirty days thereafter, may be renewed for another term, upon payment of one-half the license fee above designated therefor.

All licenses in force when this ordinance takes effect for any business enumerated above may be renewed under the foregoing provisions regulating renewals of licenses hereunder issued. (Id., § 5.)

Article III.—Special Regulations and Rates.

I. Public Carts and Cartmen.

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II. Drivers of Licensed Vehicles.

§ 315. Every person driving a licensed hack, or express, shall be licensed as such driver, and every application for such license shall be indorsed, in writing, by two reputable residents of The City of New York testifying to the competence of the applicant. No owner of a licensed hack or express shall employ an unlicensed driver under a penalty of $10 for each and every offense. (Amend. app. June 29, 1909.)

III. Public Hacks and Hackmen.

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IV. Public Hack Stands.

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IVa. Public Porters.

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V. Expresses and Expressmen.

§ 330. Every vehicle of whatever construction kept or used for the conveyance of baggage, packages, parcels and other articles within or through The City of New York for pay, shall be deemed a public express, and the owner thereof shall be deemed a public expressman, and the term expressman shall be deemed to include any common carrier of

with provision for renewal at one-half these rates (§ 308). Every person driving a licensed "express" is to be "licensed as such driver, and every application for such license shall be indorsed, in writing, by two reputable

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baggage, packages, parcels or other articles within or through The City of New York. (Ord. app. May 22, 1899, § 18.)

§ 331. Every public express shall show on each outside thereof the word "Express," or the letters "Exp.," together with the figures of its official number. (Id., § 19.)

§ 332. Every owner of a public express shall give a bond to The City of New York for each and every vehicle licensed in a penal sum of $100, with sufficient surety, approved by the Mayor or Chief of the Bureau of Licenses, conditioned for the safe and prompt delivery of all baggage, packages, parcels and other articles or things entrusted to the owner or driver of any such licensed express. (Id., § 20)

§ 333. The legal rates for regular deliveries, unless otherwise mutually agreed, shall be as follows in the city:

Between points within any borough—	
Not more than five miles apart, each piece.....	$0 40
Not more than ten miles apart, each piece.....	55
Not more than fifteen miles apart, each piece.....	75
Between points in different boroughs: One-half the above rates in addition.	

Special deliveries at rates to be mutually agreed upon. (Id., § 21.)

[The succeeding provisions of Article III (subdivisions VI–XVI) and Article IV, relate to Junk Dealers, Dealers in Second-Hand Articles, Peddlers, etc., being the remaining businesses described in § 305.]

TITLE 3.—GENERAL REGULATIONS AND COMPLAINTS.

§ 373. All license fees received by the Bureau of Licenses shall be regularly paid over to the City Treasury, except the license fees received from hackmen, dealers in junk and second-hand articles, and for stands within stoop-lines, which shall be paid into the Sinking Funds for the Redemption of the City Debt. (Ord. app. May 22, 1899, § 56.)

§ 374. The Mayor shall have power to appoint inspectors in the Bureau of Licenses to see that the provisions of this ordinance are fully and properly complied with; and all licensed vehicles and places of business shall be regularly inspected, and the result of such inspection shall be indorsed on the official license therefor, together with the date of inspection and the signature of the inspector, and all inspections shall be regularly reported to the Bureau of Licenses. (Id., § 57.)

residents of The City of New York testifying to the competence of the applicant" (§ 315). Every vehicle "kept or used for the conveyance of baggage, packages, parcels and other articles within or through The City of New

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§ 375. Every licensee shall have the official license and exhibit the same upon the demand of any person; and shall report within three days to the Bureau of Licenses any change of residence or place of business; and shall at all times perform the public duties of the business licensed when called upon so to do, if not actually unable. (Id., § 58.)

§ 376. All words, letters and numbers hereinbefore prescribed for licensed vehicles shall be shown permanently and conspicuously on each outside thereof in colors contrasting strongly with background, and not less than two inches high, as directed and approved by the Mayor or Chief of the Bureau of Licenses, and shall be kept legible and plainly visible at all times during the term of the license; and shall be obliterated or erased upon change of ownership or expiration of the license; and no person shall have or use any vehicle with words, letters or numbers thereon like those herein prescribed for licensed vehicles without being duly licensed therefor. (Id., § 59.) . . .

§ 378. The Chief of the Bureau of Licenses, or Deputy Chief, shall have power to hear and determine complaints against licensees hereunder and impose a fine of not more than five dollars or less than one dollar for any violation of the regulations herein provided, subject to the approval of the Mayor, who shall have power to suspend the license pending payment of such fine. All such fines, when collected, shall be paid into the Sinking Fund for the Redemption of the City Debt. (Id., § 61.)

TITLE 4.—VIOLATIONS.

§ 379. Except as hereinbefore otherwise provided, no person shall violate any of the regulations of this ordinance under a penalty of ten dollars for each offense. No such violation shall be continued under a penalty of one dollar for each day so continued. Any person engaging in or carrying on any business herein regulated without a license therefor, or any person violating any of the regulations of this ordinance, shall be deemed guilty of a misdemeanor, and upon conviction thereof by any magistrate, either upon confession of the party or competent testimony, may be fined not more than ten dollars for each offense, and in default of payment of such fine may be committed to prison by such magistrate until the same be paid; but such imprisonment shall not exceed ten days. (Id., § 62, as amended June 29, 1909.)

York for pay" is to be deemed a public express (§ 330). It is to bear a designation accordingly with its official number (§ 331). Its owner is to give a bond to the State for "every vehicle licensed in a penal sum of $100, with sufficient surety, approved by the Mayor or Chief of the Bureau of Licenses, conditioned for the safe and prompt delivery" of all articles (§ 332). Provision is also made for the regular inspection of "all licensed vehicles and places of business" (§ 374), the report of any change of residence to the Bureau of Licenses (*id.*), the exhibition of licenses upon demand (§ 375), and the display of the prescribed letters and numbers (§ 376). Penalties are provided for the violation of these requirements, and any person carrying on any business regulated by the ordinance, without license, is guilty of a misdemeanor (§§ 307, 315, 379).

The Adams Express Company, an unincorporated association organized under the laws of New York, has been engaged in interstate commerce, as a common carrier of packages, since the year 1854. It transacts its business in many States; and in the City of New York it handles daily about 50,000 interstate shipments, employing 341 wagons and 68 automobiles. About one-half of these wagons are stabled in Jersey City. Its shipments from New York City to the south and west are hauled to Jersey City and there loaded on express cars of the Pennsylvania Railroad; those destined to points east are taken to the terminal in New York City of the New York, New Haven and Hartford Railroad; and there is also traffic for points on the New York, Ontario and Western Railroad, and tributary thereto, which is carried to the terminal of that road at Weehawken, New Jersey. Shipments received from out of the State for delivery in New York City are taken by the Company's vehicles to the consignees either directly from these railroad terminals or through intermediate distributing offices. The Company also

does a local business in the City of New York and, in addition, receives packages for transportation between that city and such points within the State of New York as are on the line of the New York, New Haven and Hartford Railroad. The interstate business, however, in the number of packages, comprises ninety-eight per cent. of the total business transacted in New York City, and, it being impracticable to effect a separation, the local and the other intrastate shipments are handled in the same vehicles, and by the same men, that are employed in connection with the interstate transportation. It was not until recently that the City sought to compel the Company, in the transaction of this business, to comply with its license ordinances, although there have been ordinances requiring licenses for both express wagons and their drivers for over fifty years (Kent's ed. (1856); Valentine's ed. (1859), pp. 374, 375; Shepard & Shafer's ed. (1881), §§ 380–386; Laird's ed. (1894), §§ 380–386; Percy & Collins' ed., §§ 497–504). The provisions here involved (except § 315) received their present form in 1899. (Ord. app. May 22, 1899, *ante*, p. 25, *note*.) It is conceded that the Company has never been compelled to obtain a license for the conduct of its interstate express business, and that its wagons and drivers employed therein have never been licensed, except "that for several years last past about 40 licenses for wagons and drivers have been taken out." The evidence shows that in 1908 an arrangement was made, by way of compromise, that the forty licenses should be issued (twenty having been taken out the year before). The Company agreed to this number, without prejudice, asserting that it was larger in proportion to the total number of wagons than the local business warranted and also that the latter was merely incidental to the interstate business and hence not subject to the license requirements. In the fall of 1910, however, at a time when the business of the Company was interrupted

by a strike of its drivers, and it was endeavoring to replace those who had stopped work, the City through its officers undertook to enforce the ordinances with respect to all the wagons and drivers of the Company, threatening to arrest unlicensed drivers of unlicensed wagons notwithstanding they might be engaged in interstate transportation and to remove, if necessary, unlicensed wagons from the streets. This was the occasion of the present suit.

The Circuit Court held that §§ 305 and 306 were inoperative so far as they purported to require the complainant to obtain a local license for transacting its interstate business, and further that the requirement of licenses as to express automobiles, and chauffeurs, had been superseded by a state statute (Laws of 1910, c. 374). To this extent the City, and its officers who were codefendants, were enjoined. But with respect to the payment of license fees for express wagons and drivers, and the other regulations which we have briefly described, the court held that the enactments were valid and an injunction was refused. 189 Fed. Rep. 268. Both parties appeal, the Company insisting that it was entitled to the entire relief sought, and the City, that no relief whatever should have been granted.

In restraining the enforcement of §§ 305 and 306, as stated, we think that the court was right. In the absence of a controlling state decision construing the group of ordinances in question and the statute authorizing the City to license businesses (Greater New York Charter, § 51), we are not satisfied that they were designed, despite the broad definition contained in § 330, to apply to interstate business. The practical construction which they received before the present controversy arose is very persuasive to the contrary (*City of New York* v. *New York City Ry. Co.*, 193 N. Y. 543, 549; *United States* v. *Hermanos*, 209 U. S. 337, 339). But, if the above-mentioned sections are

to be deemed to require that a license must be obtained as a condition precedent to conducting the interstate business of an express company, we are of the opinion that so construed they would be clearly unconstitutional. It is insisted that, under the authority of the State, the ordinances were adopted in the exercise of the police power. But that does not justify the imposition of a direct burden upon interstate commerce. Undoubtedly, the exertion of the power essential to assure needed protection to the community may extend incidentally to the operations of a carrier in its interstate business, provided it does not subject that business to unreasonable demands and is not opposed to Federal legislation. *Smith* v. *Alabama*, 124 U. S. 465; *Hennington* v. *Georgia*, 163 U. S. 299; *N. Y., N. H. & H. R. R. Co.* v. *New York*, 165 U. S. 628; *Lake Shore & M. S. Ry. Co.* v. *Ohio*, 173 U. S. 285. It must, however, be confined to matters which are appropriately of local concern. It must proceed upon the recognition of the right secured by the Federal Constitution. Local police regulations cannot go so far as to deny the right to engage in interstate commerce, or to treat it as a local privilege and prohibit its exercise in the absence of a local license. *Crutcher* v. *Kentucky*, 141 U. S. 47, 58; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 496; *Leloup* v. *Mobile*, 127 U. S. 640, 645; *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 148; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *International Text Book Co.* v. *Pigg*, 217 U. S. 91, 109; *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 260; *Buck Stove Co.* v. *Vickers*, 226 U. S. 205, 215; *Crenshaw* v. *Arkansas*, 227 U. S. 389; *Minnesota Rate Cases*, 230 U. S. 352, 401. As was said by this court in *Crutcher* v. *Kentucky*, 141 U. S. p. 58, "a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it."

The requirements of §§ 305 and 306, with the schedule

of fees in § 308, cannot be regarded as imposing a fee, or tax, for the use of the streets; if they were such, the question would at once arise as to the validity of the discrimination involved in such an exaction. Nor can they be considered as a regulation in the interest of safety in street traffic. Other ordinances provide for the "rules of the road" to which wagons of express companies, as well as those of other persons, are subject (Code of Ordinances, chap. 12). The sections now under consideration constitute a regulation of the express "business." Article I is entitled "Business Requiring a License"; § 305, containing the enumeration, provides that "the following businesses must be duly licensed" and § 306, that "no person shall engage in or carry on any such business without a license therefor" under a stated penalty (*ante*, p. 24, *note*). The right of public control, in requiring such a license, is asserted by virtue of the character of the employment, but while such a requirement may be proper in the case of local or intrastate business, it cannot be justified as a prerequisite to the conduct of the business that is interstate. Not only is the latter protected from the action of the State, either directly or through its municipalities, in laying direct burdens upon it, but, in the present instance, Congress has exercised its authority and has provided its own scheme of regulation in order to secure the discharge of the public obligations that the business involves. Act of June 29, 1906, c. 3591, 34 Stat. 584; *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 505; *United States* v. *Adams Express Co.*, 229 U. S. 381.

It would seem to follow, necessarily, that the annual license fees prescribed by § 308 (*ante*, p. 25, *note*) cannot be exacted, so far as the interstate business is concerned. They cannot be regarded as coming within the category of inspection fees, which are sustained when fairly commensurate with the cost of local supervision of such matters as are under local control (*Western Union Tel. Co.* v.

New Hope, 187 U. S. 419, 425; *Atlantic &c. Tel. Co.* v. *Philadelphia*, 190 U. S. 160, 164). The provisions of § 308 are inseparably connected with those of §§ 305 and 306. The sums fixed "for each express wagon" and "for each driver" measure the amount to be exacted for the granting of the license required for the carrying on of business. And it is difficult to see how the payment can be enforced as to the interstate business if the taking out of the license therefor cannot be compelled.

Similar considerations are controlling with respect to the provision of § 332 for the giving of license bonds. This in terms is related to the requirement of § 305. It is provided that a bond shall be given "for each and every vehicle licensed" and it is to be conditioned "for the safe and prompt delivery of all baggage, packages," etc., entrusted to the owner or driver "of any such licensed express." As applied to the Company's business of interstate transportation, it must fall with the provision regarding the license, and, further, it must be regarded as repugnant to the exclusive control asserted by Congress in occupying the field of regulation with regard to the obligations to be assumed by interstate express carriers. (*Adams Express Co.* v. *Croninger*, *supra*; *Southern Ry. Co.* v. *Reid*, 222 U. S. 424; *Same* v. *Reid & Beam*, *id.*, 444, 447.)

Section 315 provides for separate licenses for drivers. We may assume the propriety of suitable provision to ensure careful driving over the city streets and the existence of ample power to meet this local necessity. It is also clear that regulations for this purpose, when the movement of interstate traffic is involved, should be entirely reasonable and should not arbitrarily restrict the facilities upon which it must depend. If the provision of § 315 could be regarded as severable from the requirement of a license for the conduct of business, we should still have great difficulty in sustaining it as a reasonable regu-

lation with regard to drivers employed in the interstate transportation which has been described. Reading § 315 in connection with § 307, as we understand the City contends it should be read, no driver can be licensed except a citizen of the United States or one who has regularly declared intention to become a citizen, and the assurance of his qualifications does not depend simply upon the applicant's ability to meet appropriate tests so as to satisfy the official judgment but the application must be accompanied by the indorsement in writing of two reputable residents of the city testifying to his competence. When the importance to the entire country of promptness and facility in the conduct of the business of the express companies in New York City, and the obvious convenience of their being able to secure drivers in Jersey City as well as in New York, are considered, the provision would seem to be unnecessarily burdensome. We are not called upon, however, to decide this point. Section 315 relates exclusively to drivers of a "licensed hack or express." There is no such provision as to drivers of wagons generally. While the driver's license is separate, the ordinance refers only to such drivers as are employed in the business for the carrying on of which a license may be required. Whatever might otherwise be the City's power as to the regulation of drivers, this provision cannot be divorced from the license scheme of which it is a part.

Other requirements, such as the marking of the vehicles with their official numbers, the exhibition of licenses upon demand, and the inspection of "licensed vehicles and places of business" have obvious reference to the same license plan.

We conclude that the complainant was entitled to an injunction restraining the enforcement of the ordinances in question against the Company with respect to the conduct of its interstate business and its wagons and drivers

employed in interstate commerce. In this view it is unnecessary to consider whether the ordinances have been superseded, as to automobiles, by the state statute.

The decree of the Circuit Court is reversed and the case is remanded to the District Court with direction to enter a decree in favor of the complainant in conformity with this opinion.

It is so ordered.

PLATT, TREASURER OF UNITED STATES EXPRESS COMPANY, *v.* CITY OF NEW YORK.

CITY OF NEW YORK *v.* PLATT, TREASURER OF UNITED STATES EXPRESS COMPANY.

APPEAL AND CROSS-APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 85, 86. Argued December 3, 4, 1913.—Decided January 5, 1914.

Adams Express Co. v. *New York*, *ante*, p. 14, followed to the effect that certain municipal ordinances of the City of New York are void and unconstitutional as applied to the interstate commerce of express companies.

189 Fed. Rep. 268, reversed.

THE facts, which involve the constitutionality under the commerce clause of the Federal Constitution of certain ordinances of the City of New York as applied to the interstate business of express companies, are stated in the opinion.

Mr. Walker D. Hines for United States Express Company.[1]

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[1] For arguments see p. 20, *ante*.

Mr. Terence Farley, with whom *Mr. Archibald R. Watson* was on the brief, for the City of New York.[1]

MR. JUSTICE HUGHES delivered the opinion of the court.

This suit was brought by the complainant as treasurer of the United States Express Company to restrain the enforcement against that company of certain license requirements contained in the ordinances of the City of New York. The ordinances are the same as those which were under consideration in *Adams Express Co.* v. *New York*, decided this day, and the decree of the Circuit Court was to the same effect in both cases. 189 Fed. Rep. 268.

The United States Express Company is an unincorporated association organized under the laws of New York and is extensively engaged in interstate commerce as a common carrier of packages. Over ninety-eight per cent. of its total business in New York City consists of the handling of traffic in interstate transportation. The interstate shipments in New York City are hauled by the Company's wagons to and from the rail terminals of the Central Railroad of New Jersey, the Lehigh Valley Railroad and the Delaware, Lackawanna and Western Railroad, all within the State of New Jersey. It employs in its business 343 express wagons of which 189 are stabled in and operated exclusively from Jersey City, New Jersey; 123 are similarly kept in Communipaw, New Jersey; and the remainder, or 31, are kept in the Borough of Manhattan. Both the local and interstate traffic are handled in these wagons indiscriminately. The Company has never taken out any licenses in the City of New York for its wagons or drivers.

The questions are the same as those which were presented in *Adams Express Co.* v. *New York*, *supra*, and a like

[1] For arguments see p. 21, *ante*.

decree should be entered restraining the enforcement of the ordinances against the Company with respect to the conduct of its interstate business and its wagons and drivers employed in interstate commerce.

The decree of the Circuit Court is reversed and the case is remanded to the District Court with direction to enter a decree in favor of the complainant in conformity with this opinion.

It is so ordered.

UNITED STATES *v.* REGAN.

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

No. 503. Argued October 22, 1913.—Decided January 5, 1914.

While in strictly criminal prosecutions the jury may not return a verdict against the defendant unless the evidence establishes his guilt beyond a reasonable doubt, in civil actions it is the duty of the jury to resolve the issues of fact according to the reasonable preponderance of the evidence, and this although they may involve a penalized or criminal act.

In an action brought by the United States under § 5 of the Alien Immigration Act of February 20, 1907, c. 1134, 34 Stat. 898, to recover the prescribed pecuniary penalty for an alleged violation of § 4 of the act, it is not essential to a recovery by the Government that the evidence establish the violation beyond a reasonable doubt, as in a criminal case, but a reasonable preponderance of proof is sufficient.

203 Fed. Rep. 433, reversed.

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

Mr. Assistant Attorney General Denison, with whom *Mr. Assistant Attorney General Harr* was on the brief, for the United States:

The rule as to proof beyond a reasonable doubt in criminal prosecutions has no application to civil suits to recover penalties or forfeitures. *St. Louis Ry. Co.* v. *United States*, 183 Fed. Rep. 770; *Norfolk & Western Ry. Co.* v. *United States*, 191 Fed. Rep. 302, 308; *N. Y. Cent. & H. R. R. R. Co.* v. *United States*, 165 Fed. Rep. 833; *Atch., Top. &c. Ry. Co.* v. *United States*, 178 Fed. Rep. 12; *Mo., Kan. &c. Ry. Co.* v. *United States*, 178 Fed. Rep. 15; *United States* v. *Wabash Ry. Co.*, 182 Fed. Rep. 802; *Mont. Cent. Ry. Co.* v. *United States*, 164 Fed. Rep. 400; *United States* v. *Brown*, 24 Fed. Cas. No. 14,662; *Hawloetz* v. *Kass*, 25 Fed. Rep. 765; *United States* v. *Cent. of Ga. Ry. Co.*, 157 Fed. Rep. 893; *United States* v. *Phila. & Reading Ry. Co.*, 160 Fed. Rep. 696; *United States* v. *Louis. & Nash. R. R. Co.*, 162 Fed. Rep. 185; *United States* v. *Penna. R. R. Co.*, 162 Fed. Rep. 408; *United States* v. *Chicago G. W. Ry. Co.*, 162 Fed. Rep. 775; *United States* v. *Nevada County R. R. Co.*, 167 Fed. Rep. 695; *United States* v. *Boston & Maine R. R. Co.*, 168 Fed. Rep. 148; *United States* v. *Balt. & Ohio R. R. Co.*, 170 Fed. Rep. 456; *United States* v. *Southern Ry. Co.*, 170 Fed. Rep. 1014; *United States* v. *Chi., R. I. & Pac. Ry. Co.*, 173 Fed. Rep. 684; *United States* v. *Southern Pacific Co.*, 157 Fed. Rep. 459; *United States* v. *Southern Pacific Co.*, 162 Fed. Rep. 412.

No authoritative Federal decisions support the court below, *United States* v. *Ill. Cent. R. Co.*, 156 Fed. Rep. 182, having been reversed by the Court of Appeals, 170 Fed. Rep. 542; also overruling *United States* v. *Louis. & Nash. R. Co.*, 157 Fed. Rep. 979; *United States* v. *Shapleigh*, 54 Fed. Rep. 126.

All the state court decisions are in accord, except *Riker* v. *Hooper*, 35 Vermont, 457, and *L. & N. R. R. Co.* v. *Commonwealth*, 112 Kentucky, 635, but see *Ins. Co.* v.

Johnson, 11 Bush, 593. For cases taking a middle ground, holding on the one hand that proof beyond reasonable doubt is not necessary, but on the other that a mere, or "very slight, preponderance" is not sufficient, see *Toledo &c. Ry. Co.* v. *Foster*, 43 Illinois, 480; *Ruth* v. *City*, 80 Illinois, 418; *A., T. & S. F. Ry. Co.* v. *People*, 227 Illinois, 270; *Palmer* v. *People*, 109 Ill. App. 269.

As to *Glenwood* v. *Roberts*, 59 Mo. App. 167, see *State* v. *K. C. &c. R. R.*, 70 Mo. App. 643.

For state court decisions on this precise point see *Louis. & Nash. R. R. Co.* v. *Hill*, 115 Alabama, 334, 352; *Munson* v. *Atwood*, 30 Connecticut, 102; *Webster* v. *People*, 14 Illinois, 365, 367; *State* v. *Chi., Mil. & St. P. Ry. Co.*, 122 Iowa, 22; *Roberge* v. *Burnham*, 124 Massachusetts, 277; *O'Connell* v. *O'Leary*, 145 Massachusetts, 311; *Ellis* v. *Buzzell*, 60 Maine, 209; *Campbell* v. *Burns*, 94 Maine, 127; *Essex* v. *Kansas City &c. R. R. Co.*, 70 Mo. App. 634; *Hitchcock* v. *Munger*, 15 N. H. 97; *People* v. *Briggs*, 114 N. Y. 56, 64, 65; *De Veaux* v. *Clemens*, 17 Ohio C. C. 33; *Sparta* v. *Lewis*, 91 Tennessee, 370; *Houston & Tex. Cent. R. R. Co.* v. *State*, 103 S. W. Rep. 449; 4 Wigmore on Evidence, § 2498.

Mr. David L. Podell, with whom *Mr. Max D. Steuer* was on the brief, for respondent:

By the provision of the statute (§ 4) its violation is made a misdemeanor. In order to recover the penalty provided thereby the violation must be proved beyond a reasonable doubt. *Boyd* v. *United States*, 116 U. S. 616; *Chaffee* v. *United States*, 18 Wall. 516; *Hepner* v. *United States*, 213 U. S. 103; *Lees* v. *United States*, 150 U. S. 476; *Lilienthal* v. *United States*, 97 U. S. 237; *Oceanic Steam Nav. Co.* v. *Stranahan*, 214 U. S. 320; *Regan* v. *United States*, 183 Fed. Rep. 293; *Schick* v. *United States*, 195 U. S. 65; *United States* v. *Stevenson*, 215 U. S. 190; *United States* v. *The Burdett*, 9 Peters, 682.

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

This was an action of debt prosecuted by the United States, under § 5 of the act of February 20, 1907, c. 1134, 34 Stat. 898, 900, known as the Alien Immigration Act, to recover $1,000 as a penalty for an alleged violation by the defendant of § 4 of that act; and the question now to be considered is, whether it was essential to a recovery that the evidence should establish the violation beyond a reasonable doubt. The District Court instructed the jury that this measure of proof was required, and the instruction was approved by the Circuit Court of Appeals. 183 Fed. Rep. 293; 203 Fed. Rep. 433. The two sections are as follows:

"SEC. 4. That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this Act.

"SEC. 5. That for every violation of any of the provisions of section four of this Act the persons, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised

labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States."

These sections are largely copied from the like-numbered sections of the act of March 3, 1903, c. 1012, 32 Stat. 1213, the words "shall be unlawful" in § 4 being changed to "shall be a misdemeanor," and the words "shall forfeit and pay for every such offense" in § 5, with what follows them, remaining as before.

Whether cases like this are civil or criminal and whether they are attended by the incidents of the one or the other have been so often considered by this court that our present duty, as we shall see, is chiefly that of applying settled rules of decision.

In *Stockwell* v. *United States*, 13 Wall. 531, the question arose, whether the United States could maintain a civil action of debt to recover a penalty incurred under the act of March 3, 1823, c. 58, 3 Stat. 781, providing that any person receiving, concealing or buying merchandise, knowing that it was illegally imported and subject to seizure, should, "on conviction thereof," forfeit and pay double the value of the merchandise, there being also a provision that the penalty might be "sued for and recovered," in the name of the United States, in any court of competent jurisdiction; and this court held that the civil action was maintainable, saying (p. 542): "But it is insisted that when the government proceeds for a penalty based on an offense against law, it must be by indictment or by information. No authority has been adduced in support of this position, and it is believed that none exists. It cannot be that whether an action of debt is maintainable or not depends upon the question who is the plaintiff. Debt lies whenever a sum certain is due to the plaintiff, or a sum which can readily be reduced to a certainty—a sum requiring no future valuation to settle its amount,

It is not necessarily founded upon contract. It is immaterial in what manner the obligation was incurred, or by what it is evidenced, if the sum owing is capable of being definitely ascertained." And again (p. 543): "The expression 'sued for and recovered' is primarily applicable to civil actions, and not to those of a criminal nature."

In *United States* v. *Zucker*, 161 U. S. 475, the Government by an action of debt sought to recover, as a penalty, the value of imported merchandise the entry of which had been fraudulently secured in violation of § 9 of the act of June 10, 1890, c. 407, 26 Stat. 131, 135, which subjected one committing that offense to a forfeiture of the merchandise, or its value, and to a fine and imprisonment. At the trial the United States sought to read in evidence the deposition of an absent witness theretofore taken in the cause, but the deposition was excluded upon the theory that the case, though civil in form, was in substance criminal, and therefore that the defendants were entitled, under the Sixth Amendment to the Constitution, to be confronted with the witnesses against them. This resulted in a judgment for the defendants, and when the case came here this court pronounced the trial court's theory untenable, sustained the Government's right to read the deposition, and reversed the judgment, saying (p. 481): "A witness who proves facts entitling the plaintiff in a proceeding in a court of the United States, even if the plaintiff be the Government, to a judgment for money only, and not to a judgment which directly involves the personal safety of the defendant, is not, within the meaning of the Sixth Amendment, a witness against an 'accused' in a criminal prosecution; and his evidence may be brought before the jury, in the form of a deposition, taken as prescribed by the statutes regulating the mode in which depositions to be used in the courts of the United States may be taken. The defendant, in such a case, is no more entitled to be confronted at the trial with the witnesses

of the plaintiff than he would be in a case where the evidence related to a claim for money that could be established without disclosing any facts tending to show the commission of crime."

In *Hepner* v. *United States*, 213 U. S. 103, the Government had brought an action of debt, under § 5 of the Alien Immigration Act of 1903, 32 Stat. 1213, 1214, to recover the penalty prescribed for a violation of § 4 of that act—they being the sections from which those now under consideration are largely copied—and in the progress of the cause it became necessary for this court to consider whether a verdict for the Government could be directed under the rule applicable in civil actions. Upon an extended review of the cases bearing upon the subject, including *Atcheson* v. *Everitt*, 1 Cowp. 382, the question was answered in the affirmative, and it was said:

(p. 108) "It must be taken as settled law that a certain sum, or a sum which can readily be reduced to a certainty, prescribed in a statute as a penalty for the violation of law, may be recovered by civil action, even if it may also be recovered in a proceeding which is technically criminal. Of course, if the statute by which the penalty was imposed contemplated recovery only by a criminal proceeding, a civil remedy could not be adopted. *United States* v. *Claflin*, 97 U. S. 546. But there can be no doubt that the words of the statute on which the present suit is based are broad enough to embrace, and were intended to embrace, a civil action to recover the prescribed penalty. It provides that the penalty of one thousand dollars may be 'sued for' and recovered by the United States or by any 'person' who shall first begin his 'action' therefor 'in his own name and for his own benefit,' 'as debts of like amount are now recovered in the courts of the United States;' and 'separate suits' may be brought for each alien thus promised labor or service of any kind. The district attorney is required to prosecute every such

'suit' when brought by the United States. These references in the statute to the proceeding for recovering the penalty plainly indicate that a civil action is an appropriate mode of proceeding.

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(p. 111) "But the decision in the *Zucker* case is important in that it recognizes the right of the Government, by a civil action of debt, to recover a statutory penalty, although such penalty arises from the commission of a public offense. It is important also in that it decides that an action of that kind is not of such a criminal nature as to preclude the Government from establishing, according to the practice in strictly civil cases, its right to a judgment by depositions taken in the usual form, without confronting the defendant with the witnesses against him.

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(p. 115) "The defendant was, of course, entitled to have a jury summoned in this case, but that right was subject to the condition, fundamental in the conduct of civil actions, that the court may withdraw a case from the jury and direct a verdict, according to the law, if the evidence is uncontradicted and raises only a question of law."

In *Atcheson* v. *Everitt*, approvingly cited in that case, the question for decision was, whether certain testimony, admissible by statute in civil but not in criminal causes, could be received in an action of debt for the pecuniary penalty for bribery at an election of a Member of Parliament, an act not merely prohibited but indictable as a crime. Notwithstanding the defendant's insistent objection, the testimony was held to be rightly receivable, it being said by Lord Mansfield, who spoke for the entire court (1. Cowp. 391): "Penal actions were never yet put under the head of criminal law, or crimes. The construction of the statute must be extended by equity to make this a criminal case. It is as much a civil action, as an action for money had and received."

In *Wilson* v. *Rastall*, 4 D. & E. 753, 758, also approvingly cited in the *Hepner Case*, one of the questions was, whether, after a verdict for the defendant, a new trial could be granted, upon the plaintiff's motion, in an action of debt for the pecuniary penalty for bribing voters, an indictable crime, and the court gave an affirmative answer and awarded a new trial, Lord Kenyon, Ch. J., observing: "All the cases of indictments I lay out of the case, because they are criminal cases, and are exceptions to the general rule. But I consider this as a civil action."

In *United States* v. *Stevenson*, 215 U. S. 190, which was a prosecution by indictment for a violation of § 4 of the present Alien Immigration Act, the question for decision was, whether that mode of enforcing the penalty was admissible in view of the provisions of § 5 permitting a civil action. It was held that an indictment would lie, and in the course of the opinion, after observing that in the absence of some provision to the contrary a statutory penalty may be recovered by either a criminal prosecution or a civil action of debt, it was said (p. 198): "It is to be noted that this statute (§ 5 of the Immigration Act) does not in terms undertake to make an action for the penalty an exclusive means of enforcing it, and only provides that it may be thus sued for and recovered. There is nothing in the terms of the act specifically undertaking to restrict the Government to this method of enforcing the law. It is not to be presumed, in the absence of language clearly indicating the contrary intention, that it was the purpose of Congress to take from the Government the well-recognized method of enforcing such a statute by indictment and criminal proceedings." And then, after commenting upon the change in § 4 whereby the words "shall be unlawful" were replaced by "shall be a misdemeanor," and observing that the only purpose in this was to make clear the right of the Government to prosecute as for a crime, it was further said (p. 199): "Congress having

declared the acts in question to constitute a misdemeanor, and having provided that an action for a penalty may be prosecuted, we think there is nothing in the terms of the statute which will cut down the right of the Government to prosecute by indictment if it shall choose to resort to that method of seeking to punish an alleged offender against the statute. Nor does this conclusion take away any of the substantial rights of the citizen. He is entitled [meaning in a prosecution by indictment] to the constitutional protection which requires the Government to produce the witnesses against him, and no verdict against him can be directed, as might be the case in a civil action for the penalty. *Hepner* v. *United States*, 213 U. S. 103."

The latest case in this court bearing upon the subject is *Chicago, Burlington & Quincy Railway Co.* v. *United States*, 220 U. S. 559, which was an action to recover penalties incurred by the violation of the Safety Appliance Acts of Congress. In the trial court the Government prevailed, and when the judgment came here for review the railway company contended that the action was in effect a criminal prosecution and in consequence not controlled by the prior decision in *St. Louis, Iron Mt. & Southern Railway Co.* v. *Taylor*, 210 U. S. 281, a strictly civil case arising under the same statutes and upon which the Government relied; but it was held otherwise, the court saying (p. 578): "This contention is unsound, because the present action is a civil one."

It is a necessary conclusion from these cases (1) that, as respects a pecuniary penalty for the commission of a public offense, Congress competently may authorize, and in this instance has authorized, the enforcement of such penalty by either a criminal prosecution or a civil action; (2) that the present action is a civil one and appropriate under the statute; and (3) that, if not directed otherwise, such an action is to be conducted and determined accord-

ing to the same rules and with the same incidents as are other civil actions.

It is of no moment in this case that the act penalized, which theretofore was declared unlawful and styled an offense, was by the statute of 1907 denominated a misdemeanor, for the purpose in that, as was explained in *United States* v. *Stevenson*, was merely to make clear the Government's alternative right to prosecute as for a crime. There was no purpose to revoke the existing right to resort to a civil action or to take from the action any of the usual incidents of a civil case. Indeed, a purpose to the contrary is shown by the reënactment, without change, of the provision authorizing the action. It not only specifies who shall have the civil right of recovery, but also the mode of its exercise and enforcement; for it declares that the penalty "may be sued for and recovered" by the United States, or by any person, including the alien, who shall first bring the action in his own name and for his own benefit, "as debts of like amount are now recovered in the courts of the United States." This plainly contemplates that the proceedings in the action are to be in conformity with the recognized mode of adjudicating and enforcing debts of like amount in those courts, and this whether the action be by the Government or by an individual.

While the defendant was entitled to have the issues tried before a jury, this right did not arise from Article III of the Constitution or from the Sixth Amendment, for both relate to prosecutions which are strictly criminal in their nature (*Counselman* v. *Hitchcock*, 142 U. S. 547, 563; *United States* v. *Zucker*, 161 U. S. 475, 481; *Callan* v. *Wilson*, 127 U. S. 540, 549), but it did arise out of the fact that in a civil action of debt involving more than twenty dollars a jury trial is demandable. And while in a strictly criminal prosecution the jury may not return a verdict against the defendant unless the evidence estab-

lishes his guilt beyond a reasonable doubt, in civil actions it is the duty of the jury to resolve the issues of fact according to a reasonable preponderance of the evidence, and this although they may involve a penalized or criminal act.

So, in providing that the penalty may be sued for and recovered as debts of like amount are recovered, we think it was intended that a reasonable preponderance of the proof should be sufficient, that being one of the recognized incidents of an action of debt as well as of other civil actions.

This is the view which other Federal courts have generally applied in the administration of statutes authorizing a civil recovery of such penalties. *United States* v. *Brown*, 24 Fed. Cas. 1248; *3880 Boxes of Opium* v. *United States*, 23 Fed. Rep. 367; *Hawloetz* v. *Kass*, 25 Fed. Rep. 765; *The Good Templar*, 97 Fed. Rep. 651; *United States* v. *Southern Pacific Co.*, 162 Fed. Rep. 412; *New York Central & Hudson River Railroad Co.* v. *United States*, 165 Fed. Rep. 833; *United States* v. *Illinois Central Railroad Co.*, 170 Fed. Rep. 542; *Atchison, Topeka & Santa Fe Railway Co.* v. *United States*, 178 Fed. Rep. 12; *St. Louis Southwestern Railway Co.* v. *United States*, 183 Fed. Rep. 770. And such, also, is the prevalent course of decision in the state courts. 4 Wigmore on Evidence, § 2498; *People* v. *Briggs*, 114 N. Y. 56; *State* v. *Chicago, Milwaukee & St. Paul Railway Co.*, 122 Iowa, 22; *Hitchcock* v. *Munger*, 15 N. H. 97; *Sparta* v. *Lewis*, 91 Tennessee, 370; *O'Connell* v. *O'Leary*, 145 Massachusetts, 311, 312; *Munson* v. *Atwood*, 30 Connecticut, 102; *State* v. *Kansas City &c. Co.*, 70 Mo. App. 634; *Deveaux* v. *Clemens*, 17 Ohio C. C. 33; *Semon* v. *People*, 42 Michigan, 141; *Walker* v. *State*, 6 Blackf. 1; *Roberge* v. *Burnham*, 124 Massachusetts, 277. In the last case the Supreme Judicial Court of Massachusetts, in applying this measure of persuasion in an action for a penalty, said:

"The rule of evidence requiring proof beyond a reasonable doubt is generally applicable only in strictly criminal proceedings. It is founded upon the reason that a greater degree of probability should be required as a ground of judgment in criminal cases, which affect life or liberty, than may safely be adopted in cases where civil rights only are ascertained. 2 Russell on Crimes (7th Am. ed.), 727. It often happens that civil suits involve the proof of acts which expose the party to a criminal prosecution. Such are proceedings under the statute for the maintenance of bastard children, proceedings to obtain a divorce for adultery, actions for assaults, actions for criminal conversation or for seduction, and others which might be named. And in such actions, which are brought for the determination of civil rights, the general rule applicable to civil suits prevails, that proof by a reasonable preponderance of the evidence is sufficient."

The cases upon which the defendant relies do not compel or lead to a different conclusion. While in *United States* v. *The Brig Burdett*, 9 Pet. 682, language was used giving color to the contention that in an action such as this the true measure of persuasion is that applied in criminal prosecutions, the court was careful in *Lilienthal's Tobacco* v. *United States*, 97 U. S. 237, to point out (pp. 266–267) the distinction in this regard between criminal prosecutions and civil cases, and to show (p. 272) that the case of *The Burdett* is not an authority for disregarding the distinction and that in an action to enforce a forfeiture the jury, if satisfied of the truth of the charge upon which the forfeiture depends, "may render a verdict for the Government, even though the proof falls short of what is required in a criminal case prosecuted by indictment." In *Chaffee & Co.* v. *United States*, 18 Wall. 516, the trial court, probably in deference to what was said in the case of *The Burdett*, had instructed the jury that proof beyond a reasonable doubt was essential to a recovery; but as the Gov-

ernment had a verdict and judgment and was not in a position to assign error upon the instruction, the case hardly can be regarded as settling the propriety of such an instruction, especially as in *Coffey* v. *United States*, 116 U. S. 436, 443, thirteen years later, it was plainly assumed that in such actions the true measure of persuasion is not proof beyond a reasonable doubt but the preponderating weight of the evidence. The cases of *Boyd* v. *United States*, 116 U. S. 616, and *Lees* v. *United States*, 150 U. S. 476, are without present application, for they deal with the guaranty in the Fifth Amendment to the Constitution against compulsory self-incrimination, which, as this court has held, embraces proceedings to enforce penalties and forfeitures as well as criminal prosecutions and is of broader scope than are the guaranties in Article III and the Sixth Amendment governing trials in criminal prosecutions. *Counselman* v. *Hitchcock*, 142 U. S. 547, 563; *United States* v. *Zucker*, 161 U. S. 475, 481; *Hepner* v. *United States*, 213 U. S. 103, 112. See also *Callan* v. *Wilson*, 127 U. S. 540, 549; *Schick* v. *United States*, 195 U. S. 65, 68.

We conclude that it was error to apply to this case the standard of persuasion applicable to criminal prosecutions; and the judgment is accordingly reversed, with a direction for a new trial.

Judgment reversed.

SWIFT *v.* McPHERSON.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

No. 77. Argued November 14, 1913.—Decided January 5, 1914.

While there may be a presumption that a dismissal in equity without qualifying words is a final decision on the merits, that presumption of finality disappears when the record shows that the court did not pass upon the merits but dismissed the bill on any ground not going to the merits.

The scope of a decree dismissing a bill in equity must in all cases be measured not only by the allegations of the bill but by the ground of demurrer or motion on which the dismissal is based. *Vicksburg* v. *Henson*, 231 U. S. 259.

A decree of the Circuit Court of the United States dismissing a bill in equity on motion of the parties and not for want of merit *held*, in this case, not to be a bar to a subsequent suit in the state court on the same cause of action, and the refusal of the state court to treat the decree as conclusive on points left open did not deprive the defendant of any Federal right.

27 So. Dak. 296, affirmed.

McPHERSON, as Assignee of Miller, brought suit against Swift in a Circuit Court of South Dakota, seeking to establish his rights to an undivided one-half interest in certain land then in the possession of Swift. The defendant denied that McPherson had any interest in the property. He further claimed that McPherson had once before brought a similar suit which, after being removed to the Circuit Court of the United States, had been dismissed and that this dismissal finally adjudicated the matters at issue in favor of Swift and against McPherson. The record in the former suit was set out in the answer; and as the pleadings in the two cases both deal with the same matters, it will conduce to brevity to state the facts in narrative form.

Swift, on May 8, 1888, purchased a tract of land in Deadwood, South Dak., paying therefor $18,500 and taking the deed in his own name. Miller, who was a resident of Deadwood, had been active in securing the land and, on May 14, 1888, Swift and he made a contract which recited that Miller "had purchased the land for Swift and for joint account." For his services in collecting the rents and looking after the property, Miller was to receive one-half of the net profits, first deducting 8 per cent. interest on the purchase price of $18,500. "In consideration of Miller's agreement to pay Swift one-half of any ultimate loss that might accrue on said purchase, Swift agreed that Miller should receive one-half of the profits ultimately accruing from the sale of the property over and above the purchase price"—$18,500.

Miller died January 12, 1891, and his Administrator obtained an order for the sale of Miller's interest in the land described in the agreement with Swift. After advertisement, this interest was sold to McPherson for $5,005. Thereupon, on May 18, 1893, McPherson filed in the state court a bill against Swift, which was removed to the United States Circuit Court. In it McPherson set out his purchase of Miller's interest, and alleged that at all times since Miller's death, the land could have been sold for a sum largely in excess of $18,500, but that Swift had neglected to sell or to account for the rents and profits. McPherson, in the bill, tendered Swift $9,250, one-half of the original purchase price and demanded a conveyance and an accounting. Swift's demurrer having been overruled he answered, alleging, among other things, that the original contract had been fraudulently procured by Miller, but claiming that if originally valid, it was a mere contract of employment which had been revoked by the death of Miller, and which, therefore, could not pass to McPherson under the Administrator's sale.

A replication was filed. Several terms passed without

any testimony having been taken and Swift finally notified McPherson that he would accept the tender of $9,250 and recognize him as a partner and joint owner on the terms stated in the bill. McPherson made no reply to this offer and thereupon Swift filed a petition in the cause reciting McPherson's refusal to pay the $9,250 tendered in the bill, renewed his offer to accept the tender, and asked leave to withdraw from his answer those paragraphs which set up an affirmative defense and "to submit to a decree in plaintiff's favor on such terms as might by the court be found equitable and just."

A copy of this petition was served on McPherson, who was required to show cause why it should not be granted.

At the February term (1896) McPherson appeared in person and by his solicitors, filed a response under oath in which he moved the court to dismiss his bill of complaint, stating that his tender had been made at a time when the value of the property was such that it could have been sold at a price to net a profit; that Swift had declined to accept the tender and the property was now much depreciated in value; and that the tender had been withdrawn before the procurement of the order to show cause. McPherson's response concluded by the statement that "the contract does not require this affiant to pay any part of the purchase money for the property, but the same is to be paid at affiant's option out of the proceeds of the sale; and while he was willing to have paid the $9,250 at the time the tender was made, the defendant's refusal for an unreasonable time, and the depreciation of the value was so great that affiant is not willing now to exceed the strict letter of the contract in reference to the mode and manner of reimbursing the defendant for the original purchase price, wherefore he prays the court to discharge the order to show cause and to dismiss the complaint herein as prayed for in this motion."

After argument by counsel, the court made an order re-

citing that "the cause coming on to be heard on the application of Swift for leave to withdraw pars. 13 and 14 of his answer and to submit to a decree in plaintiff's favor on such terms as might be equitable . . . and the resisting affidavit of the plaintiff who, at the same time, by his solicitors moved to dismiss the bill . . . and the court having heard the matter upon the affidavit, bill of complaint, verified answer and replication, it is ordered that Swift's application be denied, and it is further adjudged and decreed that this suit and bill of complaint . . . be and the same is hereby dismissed and that defendant have and recover of the plaintiff, McPherson, the costs of this suit." The defendant excepted, but there is no record of any appeal having been taken by Swift.

In June, 1901, five years later, McPherson brought the present suit in the state court alleging that Swift had collected large sums by way of rent on the land and the sale of lots, which sums were more than sufficient to reimburse Swift for the purchase price of $18,500, interest and expenses, and that upon an accounting, McPherson would be entitled to one-half of these net profits and to an undivided one-half of the lots remaining unsold. McPherson prayed for such relief and for partition.

The defendant answered, attacking the validity of the contract. He also set out the proceedings in the former suit and pleaded that decree of dismissal by the United States Circuit Court as a bar to the present suit.

The trial resulted in Swift's favor, but the decree was reversed by the Supreme Court of the State. 22 S. Dak. 165. On the second trial the court found that there had been no fraud on Miller's part; that the contract was not one of employment but created an interest in the property which was assignable; that McPherson was the owner thereof by virtue of the Administrator's sale; that Swift had received $103,436 from rental and sale of land, and

that after proper deductions there was a net profit of $22,374. A decree was thereupon entered in favor of McPherson for $11,187 and also for an undivided one-half of over 100 city lots remaining unsold. On appeal the decree was affirmed (27 S. Dak. 296) and the case was then brought here by writ of error.

Mr. Edwin Van Cise, with whom *Mr. William H. Beck*, *Mr. Frank L. Grant* and *Mr. Philip S. Van Cise* were on the brief, for plaintiff in error.

Mr. Norman T. Mason, with whom *Mr. Chambers Kellar* and *Mr. James G. Stanley* were on the brief, for defendant in error.

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

In the record there are sixty assignments of error involving many rulings of the trial court and the construction of the contract. We can only consider those which present the Federal question that, in failing to sustain the plea of *res judicata*, the court denied plaintiff a right arising under the laws of the United States. The refusal of the state court to treat the decree of the United States court as a bar to the present action is said to have impaired the obligation of that decree as a contract; denied the full faith and credit to which it was entitled and deprived Swift of it as property without due process of law. But all these contentions finally resolve themselves into the single question as to whether the dismissal was on the merits finally adjudicating that McPherson had no enforceable rights under the contract which was the basis of that suit.

Ordinarily, such a question is answered by a mere inspection of the decree—the presumption being that a

dismissal in equity, without qualifying words, is a final decision on the merits. That presumption of finality, however, disappears whenever the record shows that the court did not pass upon the merits but dismissed the bill because of a want of jurisdiction, for want of parties, because the suit was brought prematurely, because the plaintiff had a right to file a subsequent bill on the same subject-matter, or on any other ground not going to the merits. The scope of such decree must in all cases be measured not only by the allegations of the bill, but by the ground of the demurrer or motion on which the dismissal was based. *Hughes* v. *United States*, 4 Wall. 232, 237; *Mayor of Vicksburg* v. *Henson*, 231 U. S. 259.

From an examination of this record it is evident that the dismissal by the United States court was not for want of merit in the bill, because the demurrer had already been overruled. It was not for insufficiency of the testimony, because none had been taken though answer and replication had been filed. It was not a dismissal after a hearing on bill and answer alone, for the defendant was asking to withdraw his affirmative defense and insisting that a decree be entered in favor of McPherson. It was not a dismissal as on a *retraxit*, for the plaintiff not only did not renounce his cause of action, but, in his motion asserted his rights under a contract which provided for a future adjustment of profits and liabilities, whenever the amount of profits or losses was ultimately determined by the actual sale of the land.

McPherson seems, at first, to have assumed that it was not necessary to wait until the property had been sold, but that by a then present payment of $9,250 he could at once acquire title to an undivided half interest in the lots. His tender of that sum was however declined by Swift who, a year or more later, finally decided to accept the money and asked that a decree be entered in McPherson's favor. McPherson then refused to pay what

he had previously offered, explaining in his response to Swift's motion, that since the rejection of the tender the land had decreased in value and, asserting that he was not then willing to do more than was required by the contract —under which he could wait until the ultimate sale of the property to determine what, if anything, he was bound to pay. He thereupon "moved the court to dismiss the bill as prayed for in this motion." The motion was granted, and Swift excepted.

The record presented an unusual and somewhat ludicrous shifting of positions,—with the defendant insisting that a decree be entered against himself; the complainant resisting a decree in his favor; and the defendant, with no cross-bill filed, excepting to a dismissal. Of course this reversal of position does not change the legal effect of the decree, but it serves to emphasize the fact that it was not a decree against plaintiff on the merits, but one based on McPherson's motion which asserted a contract fixing liability and giving him rights dependent on the ultimate outcome of the investment. The court did not decide what those rights were, nor did it adjudicate that a suit to enforce them could not thereafter be filed. The decree not being on the merits could not be a bar to such subsequent suit in a state or United States court (*Texas Co.* v. *Starnes*, 128 Fed. Rep. 183). The refusal to treat the decree as conclusive of a point which had been left open did not deprive Swift of any Federal right and the judgment of the Supreme Court of South Dakota must be

Affirmed.

NATIONAL SAFE DEPOSIT COMPANY *v.* STEAD, ATTORNEY GENERAL OF THE STATE OF ILLINOIS.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 138. Argued December 16, 1913.—Decided January 5, 1914.

The word "possession" is more or less ambiguous, and is interchangeably used to describe both actual and constructive possession; and not decided in this case whether the contents of a safe deposit box are in possession of the renter or of the Deposit Company.

The State has power to regulate the incidents of distribution of property within the State belonging to decedents, and can prescribe times and conditions for delivery thereof by safe deposit companies; and a statute operating to seal safe deposit boxes for a reasonable period after the death of the renter is not an unconstitutional deprivation of property without due process of law, and so *held* as to § 9 of the Inheritance Tax Law of Illinois of 1909.

Such a statute does not impair the obligation of the charter of a safe deposit company if it provides the conditions under which delivery shall be made to the proper parties within a reasonable period.

The prohibition in the Fourth Amendment against unreasonable searches and seizures does not apply to the States. *Lloyd* v. *Dollison*, 194 U. S. 445.

Contracts for joint rental of safe deposit boxes are made in the light of the State's power to legislate for the protection of the estate of any joint renter, and a statute preventing withdrawal of contents for a reasonable period does not impair the contract between the deposit company and the renters.

The renter of a safe deposit box cannot object to a state statute affecting his right to open the box after death of a joint renter which was in force when the rental contract was made.

250 Illinois, 584, affirmed.

By the act of July 1, 1909, the Illinois legislature passed an Inheritance Tax Law like that considered in *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283. The ninth section of the statute provides in substance:

That no safe deposit company, corporation or person

having in possession or under control securities or assets belonging to or standing in the name of a decedent, or in the joint name of the decedent and another person, or in the name of a partnership of which he was a member—shall deliver such assets, to the legal representative of the deceased or to the survivor of the joint-holders or to the partnership of which he was a member, without ten days' notice to the Attorney General and Treasurer of the State, who were authorized to examine the securities at the time of the delivery. It was further provided that no delivery should be made unless such holder should retain a sufficient portion of the assets to pay the state tax thereafter assessed, unless such state officers gave consent in writing. Failure to give the notice or to retain such amount rendered the deposit company, corporation or person, liable for the tax and to a penalty of $1,000.

On March 15, 1910, the National Safe Deposit Company filed in the Circuit Court of Cook County, Illinois, a bill against the Treasurer and Attorney General, alleging that the Company was incorporated in 1881 to do a safe deposit business and that in pursuance of its charter it had erected a building with large vaults into which 13,291 safe deposit boxes had been built and 9,702 rented—317 to partnerships and 4,104 were held jointly by more than one person. That prior to July 1, 1909, it had made yearly contracts for the rental of said boxes, most of which were still of force. The rent contracts recited that in consideration of $———— paid, the Company "had rented to ———— safe No. ———— in the vaults of this company for the term of one year," and that its liability was limited to the exercise of ordinary diligence in preventing the opening of the safe by any person other than the renter or his duly authorized representative. "No one except the renter, or his deputy to be designated in writing on the books of the company, or in case of death, his legal representative, to have access to the safe." . . . No renter will be

permitted to enter the vaults except in the presence of the vaultkeeper. In case of loss of key or combination the lock will be changed at the expense of the renter. . . .

The bill alleged that the safes could be opened only by two keys, or two combinations, one of which keys or combinations was held by or known only to the renter, the other being held or known only by the company's agents. So that it required the joint act of the customer and the Company to secure access to the contents,—the Company having no right or means of access to the box itself, nor did it possess any knowledge or information as to the ownership of the securities deposited therein.

The bill further alleged that notwithstanding these facts, the defendants insisted that the Deposit Company had such possession or control of the contents as to make it incumbent upon it to prevent access thereto by all persons for ten days after the death of the sole or joint-renter; that this deprived the Deposit Company of the right to do the business for which it had been chartered, made it break its contract that it would allow no one except the renter or his agent or representative to have access to the boxes; interfered with its business by depriving the representative and survivor of their right to use the box and contents; imposed upon the Deposit Company the risk of determining who was the owner of the contents of the box and imposed the duty of acting as a tax-collecting agent for the State. The bill also alleged that the Company had been threatened with suits by depositors if it yielded to the command of such void act. In order to prevent a multiplicity of suits and to avoid the heavy statutory penalties the Company prayed that the defendants be enjoined from enforcing the statute against it.

The defendants' demurrer was sustained. That ruling was affirmed by the Supreme Court of Illinois, three judges dissenting (250 Illinois, 584). The case was then brought here by writ of error.

Mr. George Packard and *Mr. John S. Miller*, with whom *Mr. Merritt Starr* was on the brief, for plaintiff in error:

The relation of bailor and bailee does not exist between the safe deposit company and its customers; it is rather that of lessor and lessee of a diminutive room called a box. *Tullock* v. *Mulvane*, 184 U. S. 513.

Only in exceptional cases does the company assume a right of forcible entry.

The elements of possession, control and bailment are absolutely wanting. *Union Trust Co.* v. *Wilson*, 198 U. S. 530, 537; *Moore* v. *Mansfield*, 182 Massachusetts, 302; 2 Ency. Sup. Ct. Reps. 783; Story on Bailments (9th ed.), § 2; Jones on Bailments, 1; Schouler's Bailments, § 2· *Security Warehousing Co.* v. *Hand*, 206 U. S. 415, 421.

The State has no vested financial right in the estate or property by which the tax is measured. *Kochersperger* v. *Drake*, 167 Illinois, 122; *Merrifield* v. *The People*, 212 Illinois, 400; *Knowlton* v. *Moore*, 178 U. S. 41, 47; *Magoun* v. *Ill. Savings Bank*, 170 U. S. 283; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 162.

Where an impairment of contract or a deprivation of property rights without due process are relied upon, this court will determine for itself the existence and nature of the contract or the property right. *Hoadley* v. *San Francisco*, 124 U. S. 645; *Scott* v. *McNeal*, 154 U. S. 34, 45.

The statute deprives the company of the right to pursue a lawful business, free from legislative burdens which are not imposed through such police regulations as are consistent with constitutional guaranties. The right to contract is property in this sense.

Section 9 of the act imposes possession, control and power of transfer. It incorrectly assumes that a deposit

company has in its possession or under its control the contents of its rented boxes and can deliver or transfer the same.

"Possession" means exercise of power over a corporate thing, at pleasure, to the exclusion of all others. *Union Trust Co.* v. *Wilson*, 198 U. S. 530, 537; *Rice* v. *Frayser*, 24 Fed. Rep. 460, 463; *Gilkeson-Sloss Co.* v. *London*, 53 Arkansas, 403; *Smith* v. *Race*, 76 Illinois, 491.

"Control" has no legal or technical meaning apart from its popular sense, and is synonymous with "manage." *Ure* v. *Ure*, 185 Illinois, 216, 218.

Taking possession and control and the right to possession and control from the box lessee's personal representative and bestowing it on the safe deposit lessor against its consent, in direct conflict with the basic principle of the safety deposit business, is a legislative interference amounting to a deprivation without process of law, of the latter's right to carry on its lawful business. *State* v. *Peel Splint Co.*, 36 W. Va. 856; *State* v. *Goodwill*, 33 W. Va. 179; *Allgeyer* v. *Louisiana*, 165 U. S. 589; *Gulf &c. Ry.* v. *Ellis*, 165 U. S. 150, 154; *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 409; *Braceville Coal Co.* v. *People*, 147 Illinois, 69.

A lawful vocation is not to be arbitrarily and vexatiously burdened. *People* v. *Steele*, 231 Illinois, 351.

There is no process of law. The mere passage of the act making interference with plaintiff in error's business possible is not due process of law. *Davidson* v. *New Orleans*, 96 U. S. 97, 102; *Hurtado* v. *California*, 110 U. S. 516, 535; *Smyth* v. *Ames*, 169 U. S. 527.

The privilege of contracting is both a liberty and a property right. *Matthews* v. *People*, 202 Illinois, 401; *Williams* v. *Fears*, 179 U. S. 270, 274; *Bailey* v. *People*, 190 Illinois, 28, 33.

To force an office or duty on one against his will offends the right of contract.

The law makes the safe deposit company in effect a trustee of its customers' property.

To impose upon one a trusteeship without his consent, deprives him of his property right of contract. *Bethune* v. *Dougherty*, 21 Georgia, 257; Underhill on Trusts (Am. ed.), 190; Perry on Trusts, § 259; 28 Am. & Eng. Ency. of Law, 971; 39 Cyc. 77, 252; *Taylor* v. *Holmes*, 14 Fed. Rep. 498, 509; Beckett, Trusts & Trustees, § 548.

As lessors of rented space, there is unjust discrimination and arbitrary action of government, in imposing burdens on them not placed on other lessors of space. *Missouri* v. *Lewis*, 101 U. S. 22, 31; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Hayes* v. *Missouri*, 120 U. S. 68, 71; *Duncan* v. *Missouri*, 152 U. S. 377; *Gulf &c. Ry.* v. *Ellis*, 165 U. S. 150, 165.

The legislative grant to carry on the business of safety deposit is impaired. The act is not a regulation of a charter right. *Venner* v. *Chicago City Ry.*, 246 Illinois, 170, 176.

The existence, scope and effect of the contract claimed to be impaired, is open for determination by this court, as part of the Federal question involved. *Mobile &c. R. R.* v. *Tennessee*, 153 U. S. 486, 494; *Douglas* v. *Kentucky*, 168 U. S. 488, 502; *Louisville Gas Co.* v. *Citizens Gas Co.*, 115 U. S. 683, 697; *St. Paul Gas Co.* v. *St. Paul*, 181 U. S. 143; *Terre Haute &c. R. R.* v. *Indiana*, 194 U. S. 579, 589; *Powers* v. *Detroit &c. R. R.*, 201 U. S. 543, 556.

The act deprives safe deposit companies of their property right to pursue a lawful calling by the unconstitutional invasion of their customers' rights. *Lampasas* v. *Bell*, 180 U. S. 276.

The company is directly affected by the unconstitutional operation of the law. The outrage of its customers' rights destroys its business. *Chadwick* v. *Kelley*, 187 U. S. 540, 547; *Hooker* v. *Burr*, 194 U. S. 419; *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 550.

Much of the business of safety deposit is with joint box renters. A surviving joint box renter, having a right of exclusive access to the joint box, by being denied access to his own property, is deprived of liberty and property without due process and is denied the equal protection of the laws. *City* v. *Wells*, 236 Illinois, 129, 132.

The superimposed construction of the act that the law extends to surviving business partners of business co-partnerships holding boxes in the partnership name, is unconstitutional. Where one is clothed with the State's powers, his acts are those of the State. *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20, 35; *Chicago &c. R. R.* v. *Chicago*, 166 U. S. 233.

That the purpose of the act is to effectuate the ascertainment and collection of a tax, does not justify its summary disregard of constitutional rights.

Extreme departures from law and justice are not permitted even in the case of tax collection. *Turpin* v. *Lemon*, 187 U. S. 51, 58; *C., B. & Q. Ry.* v. *City*, 166 U. S. 226, 236; *Henderson Bridge Co.* v. *Henderson*, 173 U. S. 615; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 563.

The citizen, be he individual or corporation, must be protected from the arbitrary action of government. *Twining* v. *New Jersey*, 211 U. S. 101.

Mr. Patrick J. Lucey, Attorney General of the State of Illinois, with whom *Mr. Lester H. Strawn* was on the brief, for defendants in error:

The charter rights of plaintiff in error are qualified and limited by § 9 of the General Incorporation Act then in force, which provided that the General Assembly shall at all times have power to prescribe such regulations and provisions for corporations formed under the act as it may deem advisable. *Danville* v. *Water Co.*, 178 Illinois, 299, 306; *Water Co.* v. *Freeport*, 180 U. S. 587, 596; *Union Traction Co.* v. *Chicago*, 199 Illinois, 484, 538; *People* v.

Rose, 207 Illinois, 352; *White Machine Co.* v. *Harris*, 252 Illinois, 361.

This court will follow the construction placed upon such a statute by the Supreme Court of the State of Illinois. *Covington* v. *Kentucky*, 173 U. S. 231, 237.

The safe deposit company is in the position of a bailee for hire. *Mayer* v. *Bransinger*, 180 Illinois, 110; *Lockwood* v. *Manhattan Storage Co.*, 50 N. Y. Supp. 974; *Cussen* v. *So. Cal. Savings Bank*, 133 California, 534; *Roberts* v. *Safe Deposit Co.*, 123 N. Y. 57; *Safe Deposit Co.* v. *Pollock*, 85 Pa. St. 391.

The act does not make the safe deposit company an involuntary tax collector. *Carstairs* v. *Cochran*, 193 U. S. 10; *United States* v. *B. & O. R. Co.*, 17 Wall. 322; *National Bank* v. *Commonwealth*, 9 Wall. 353; *Citizens National Bank* v. *Kentucky*, 217 U. S. 443; 2 Cooley on Taxation (3d ed.), 832.

Statutes have frequently required agents to return for taxation property in their possession, and made such agents liable for the tax if they surrender the property without the tax thereon being paid. *Walton* v. *Westwood*, 73 Illinois, 125; *Ottawa Glass Co.* v. *McCabe*, 81 Illinois, 556; *Lockwood* v. *Johnson*, 106 Illinois, 334.

The right to take property, either real or personal, by inheritance or by bequest or devise is purely a statutory right and one which rests wholly within legislative enactment, and the State, acting in its sovereign capacity, by appropriate legislation, may regulate and control the devolution of property after the death of the owner. *Kochersperger* v. *Drake*, 167 Illinois, 122; *In re Speed*, 216 Illinois, 23; *In re Mulfords*, 217 Illinois, 242; *In re Graves*, 242 Illinois, 212; *Magoun* v. *Ill. Tr. & Sav. Bank*, 170 U. S. 283.

Where there is a succession tax due the State, the State has a vested interest. *In re Stanford*, 126 California, 112; *In re Graves*, 242 Illinois, 212; *Magoun* v. *Ill. Tr. & Sav. Bank*, 170 U. S. 283.

As to contracts made after the act complained of was passed, the act is not contrary to the impairment clause of the Constitution. *Lehigh Water Co.* v. *Easton*, 121 U. S. 388; *Blackstone* v. *Miller*, 188 U. S. 189.

Inspection has always been permitted. See Succession Duty Act of England of 1853, 16 & 17 Vict., c. 51, § 49; English Finance Act of 1894, § 8; Norman's Digest of Death Duties (3d ed.), 2, 174.

See also Illinois Administration Act of 1845, Rev. Stat. of Illinois, 1845, c. 109, par. 90, p. 556. Also the act of 1869, Hurd's Rev. Stat., 1912, c. 3, pars. 86–9, pp. 25–6.

The unreasonable search and seizure provision of the Fourth Amendment does not prevent a State from adopting effectual means to collect a tax which it has imposed. *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 176; *Int. Com. Comm.* v. *Brimson*, 154 U. S. 447; *Int. Com. Comm.* v. *Baird*, 194 U. S. 25.

Any legal procedure enforced by public authority whether sanctioned by age and custom or newly devised in the discretion of the legislature in furtherance of the general public good must be held to be due process of law. *Hurtado* v. *California*, 110 U. S. 537; *Davidson* v. *New Orleans*, 96 U. S. 97; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107.

The mere temporary invasion of one's possession to determine a right is not the taking of property without due process of law. *Montana Co.* v. *St. Louis Mining Co.*, 152 U. S. 161.

The liberty of contract guaranteed by the court against deprivation without due process of law is the liberty of natural and not artificial persons. *Western Turf Assn.* v. *Greenburg*, 204 U. S. 359, 363; *Northwestern Life Ins. Co.* v. *Riggs*, 203 U. S. 243, 255.

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

The Illinois Inheritance Tax Law operates to seal safe

deposit boxes for at least ten days after the death of the renter. In view of the uncertainty as to who might own the contents of boxes, standing in the joint name of the deceased and others, the statute sealed their boxes also for a like period. The act further provided that in neither case could the securities be removed except after notice to officers designated by the State, and even then the Company was required to retain possession of enough of the assets to pay the State's tax. The Deposit Company insists that this statute violated the Fourteenth Amendment, for that, without due process of law, it imposed upon the Company a duty as to property over which it had no control; required it to assume the risk of determining who was the true owner, and forced upon it the obligations and liabilities of a tax-collecting agent of the State. In the court below and on the argument here, the validity of the section under review was said to depend upon the relation between the Company and the renter—it being argued for the State that the contract was one of bailment where, on the death of the bailor, the Deposit Company, as bailee, was bound to surrender the securities to the owner or person having a right thereto, one of whom, in each case, was the State to the extent of its tax. On the other hand, the complainant insisted that if there was no possession in fact there could be no possession in law; and that if no possession existed it was beyond the power even of the legislature to charge the Company with liabilities that could only arise out of a possession actually existing.

This is one of that class of cases which illustrate the fact that, both in common speech and in legal terminology, there is no word more ambiguous in its meaning than Possession. It is interchangeably used to describe actual possession and constructive possession which often so shade into one another that it is difficult to say where one ends and the other begins. *Union Trust Co.* v. *Wilson*, 198 U. S. 530, 537. Custody may be in the servant and pos-

session in the master; or title and right of control may be in one and the property within the protection of the house of another, as in *Bottom* v. *Clarke*, 7 Cush. 487, 489, where such possession of a locked trunk was held not to include possession of the contents. So that, as pointed out by Pollock and Wright in their work on the subject, controversies arising out of mixed possession have inevitably led to many subtle refinements in order to determine the rights of conflicting claimants, or to lay the proper charge of ownership in prosecutions for larceny of goods belonging to one in the custody of another or found by the defendant.

In the present case, however, the Federal question presented by the record does not call for a decision as to the exact relation between the parties during the life of the renter,—whether there was a strict bailment; whether the renter was in possession of the box with the Deposit Company as guard over the contents; whether the property was in the custody of the Company with the renter having a license to enter the building and remove the securities; or whether, as held in *People* v. *Mercantile Safe Deposit Co.* (Sup. Ct. App. Div. 143 N. Y. Supp. 849), construing a similar statute of New York—the relation was that which exists between tenants and landlord of an office building who keeps under his control the general means of access to the building and offices therein, but as to which offices and their contents, the rights of the tenants are exclusive. The Illinois Supreme Court held that the relation created by the Deposit Company's contract was that of bailor and bailee. That construction by the state court is controlling, unless, as claimed by the complainant, it makes the statute violate the Fourteenth Amendment as being an arbitrary attempt to create liabilities arising out of possession, where there was no possession in fact.

Certainly the person who rented the box was not in actual possession of its contents. For the valuables were

in a safe built into the company's vault and therefore in a sense "under the protection of the house." The owner could not obtain access to the box without being admitted to the vault, nor could he open the box without the use of the company's master key. Both in law, and by the express provisions of the contract, the company stood in such relation to the property as to make it liable if, during the lifetime of the owner, it negligently permitted unauthorized persons to remove the contents, even though it might be under color of legal process. *Roberts* v. *Safe Deposit Company*, 123 N. Y. 57; *Mayer* v. *Brensinger*, 180 Illinois, 110. After his death, it would be likewise liable if it permitted unauthorized persons, be they heirs, legal representatives, or joint-renters, to take the property of the decedent. In the exercise of its power to provide for the distribution of his property, the State could make it unlawful, except on conditions named, for his personal representative to receive or the holder to deliver, effects belonging, or apparently belonging, in whole or in part, to the deceased. As the State could provide for the appointment of administrators, for the distribution to heirs or legatees of all the property of the deceased and for the payment of a tax on the transfer, it could, of course, legislate as to the incidents attending the collection of the tax and the time when the administrator or executor could take possession. If, before representatives were appointed any one, having the goods in possession or control, delivered them to an unauthorized person he would be held liable as an executor *de son tort*. The fixing by this statute of the time and condition on which delivery might be made by a deposit company was also, in effect, a limitation on the right of the heir or representatives to take possession. If they had no right to receive except on compliance with the statutory conditions, neither could the Safe Deposit Company, as bailee or custodian, surrender the contents except upon like compliance with statutory conditions.

The contention that the Company could not be arbitrarily charged with the duty of supervising the delivery and determining to whom the securities belonged is answered by the fact that in law and by contract it had such control as to make it liable for allowing unauthorized persons to take possession. Both by the nature of its business and the terms of its contract it had assumed the obligation cast upon those having possession of property claimed by different persons. If the parties could not agree as to who owned the securities the Company had the same remedy by Bill of Interpleader that was afforded all others confronted with similar conditions. There was certainly nothing arbitrary or unreasonable in compelling one, who had received such control of property from another, to surrender it after his death only to those having the right thereto. Nor was there any deprivation of property, nor any arbitrary imposition of a liability, in requiring the Company to retain assets sufficient to pay the tax that might be due to the State. There are many instances in which, by statute, the amount of the tax due by one is to be reported and paid by another—as in the case of banks required to pay the tax on the shares of a stockholder. *National Bank* v. *Commonwealth*, 9 Wall. 353, 363. These conclusions answer the other constitutional objections and make it unnecessary to deal with each of them separately at length.

It is contended that the statute impaired the complainant's charter power to do a safe deposit business. But it no more interferes with the right of the Company to do that business than it does with the right of a private person to contract to take possession or control of securities belonging to another. But, having regard to the radical change wrought by the death of the owner and the subsequent duty to make delivery to one authorized by law to receive possession, the statute points out when and on what conditions such delivery may be made to the per-

sonal representative, surviving partners or persons jointly interested.

The objection that the act, in directing the state officers to inspect the contents of the box, operates as an unreasonable search and seizure raises no Federal question, since the prohibition on that subject in the Fourth Amendment, does not apply to the States. *Ohio ex rel. Lloyd* v. *Dollison*, 194 U. S. 445, 447.

The claim that the statute compels the company to break its contract with joint-renters and deprives the latter, for ten days, of access to the box and the right to use it or remove the contents is without merit. The Company, joint-renters or firms, each made the contract in the light of the State's power to legislate for the protection of the estate of any one of the joint-renters or partners, that might die during the term. As it now appears that all of the rentals were from year to year, and that all had expired before final hearing and were renewed after the passage of the law, it can also be said that all such contracts of joint-rental are made in the light of the provisions of this particular statute. The boxes were leased with the knowledge that the State had so legislated as not only to protect the interests of one dying after the rental, but also to secure the payment of the state tax out of whatever might be found in the box belonging to the deceased. The inconvenience was one of the not unreasonable incidents of the joint-relationship.

Judgment affirmed.

UNITED STATES *v.* BUCHANAN.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 589. Argued December 3, 1913.—Decided January 5, 1914.

The term, "Public lands subject to settlement or entry," does not include lands that have been entered and a certificate of entry obtained therefor, and § 3 of the act of February 25, 1885, c. 149, 23 Stat. 322, does not apply to such lands.

An entry withdraws the land from entry or settlement by another and segregates it from the public domain, and the possessory right acquired by the entryman is in the nature of private property and entitled to protection as such; and interference with the peaceable possession of the entryman is not punishable under a Federal statute applicable only to public lands still subject to entry.

THE Grand Jury for the District of Colorado indicted Buchanan for a violation of the act "to prevent unlawful occupancy of the public land." The indictment charged that in February, 1907, one Edward Scott made a homestead entry, at the proper office, of a quarter-section of land in Colorado, and died, March 28, 1910, leaving the homestead entry in full force and effect; that thereafter "his heirs were in lawful possession of and were engaged in cultivating the said homestead land for the purpose of protecting their right as heirs to the same, until May 9, 1911, when the defendant, Buchanan, wilfully, wickedly, unlawfully and feloniously did prevent and obstruct said heirs from peaceably entering upon and establishing a settlement and residence on the said homesteaded land of the United States subject to settlement and entry under the public land laws." The defendant demurred on the ground that the facts charged did not constitute an offense punishable under § 3 of the act of February 25, 1885, c. 149, 23 Stat. 321, 322, which provides:

"SEC. 3. That no person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, . . . any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States."

The defendant's demurrer was sustained and the Government brought the case here under the Criminal Appeals Act.

Mr. Assistant Attorney General Knaebel, with whom *Mr. S. W. Williams* was on the brief, for the United States:

The third section of the act of February 25, 1885, was intended for the protection of the right of a homestead claimant to continue his settlement and residence throughout the period required by the homestead law, no less than for the protection of his right to initiate settlement and residence; and the ruling of the trial court to the contrary was error. *Buford* v. *Houtz*, 133 U. S. 320; *Cameron* v. *United States*, 148 U. S. 301; *Camfield* v. *United States*, 167 U. S. 518; *Dickey* v. *Turnpike Co.*, 37 Kentucky, 113; *Golconda Cattle Co.* v. *United States*, 201 Fed. Rep. 281; *Heirs of Stevenson* v. *Cunningham*, 32 L. D. 650; *State* v. *Rogers*, 107 Alabama, 444; *United States* v. *Lacher*, 134 U. S. 624; *United States* v. *Mills*, 190 Fed. Rep. 513; *United States* v. *Perry*, 45 Fed. Rep. 759; see also Revised Statutes, § 2291; Black's Law Dict. 436; Cong. Rec., vol. 15, pt. 5, pp. 4768–4783; Cong. Rec., vol. 16, pt. 1, p. 622; Id., pt. 2, pp. 1456, 1478; Report H. R., No. 1325, 48th Cong., 1st Sess.; Sen. Ex. Doc., No. 127, 48th Cong., 1st Sess.; Sen. Rep., No. 979, 48th Cong., 2d Sess.

Mr. S. E. Naugle, with whom *Mr. C. W. Waterman* was on the brief, for defendant in error.

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

The statute, under which the defendant was indicted, makes it unlawful to prevent "any person from peaceably entering upon or establishing a settlement or residence on public land, subject to settlement or entry." The indictment charges that the defendant prevented the heirs of the homesteader "from entering upon and establishing a settlement and residence on homesteaded lands of the United States subject to settlement and entry." This difference between the language of the statute—"public land of the United States"—and the charge in the indictment—"homesteaded land of the United States"—raises the question whether, after entry and before patent, land covered by a homestead claim is public land within the meaning of the act "to prevent unlawful occupancy of the public land."

In construing the statute it must be remembered that at the time of its passage in 1885, by tacit consent of the Government, any person could graze sheep and cattle upon any part of the public domain. *Buford* v. *Houtz*, 133 U. S. 320, 326; *Light* v. *United States*, 220 U. S. 523, 535. Many availed themselves of this privilege and the cattle of different owners fed together on the open prairie, no one claiming that thereby any exclusive right had been acquired. The first fences were built only around very small areas. But from this small beginning the practice rapidly grew, until in some cases vast tracts were fenced in by herdsmen who treated the land as though it was their own property. 5 H. R. 1325, 48th Cong. 1st Sess. These unlawful fences not only closed the roads and obstructed the mails, but there were occasions in which citizens were prevented from peaceably taking possession of these enclosed public lands and by settlement thereon securing the right to enter the same at the Register's office.

Under these circumstances Congress passed the act intended to protect the rights of the United States as proprietor, by making unlawful "all inclosures of any public land"; to prevent obstruction of the roads; to create a method for summary removal of fences; and to provide a punishment for those who prevented others from entering upon or establishing a settlement on public land subject to settlement or entry. But all its provisions related to public lands—not to private lands; to land subject to entry—not to land which had been entered in the Register's office; to land subject to settlement—not to land on which a settlement had already been established. For, as shown by the context, the word "established" did not mean "to fix unalterably" (*Osborne* v. *San Diego Co.*, 178 U. S. 22, 39), but to create or set up the settlement which had to be made prior to entry at the Register's office in the case of a preëmptor and could be so made in the case of a homesteader. Rev. Stat., §§ 2289, 2259, 2263, 2264, act of May 14, 1880; 21 Stat. 140, c. 89, § 3. *Stearns* v. *United States*, 152 Fed. Rep. 900, 902 (10); 4 Op. of Atty. Gen. 493. These provisions refer not to something to be done in the future but to a settlement already completed and require that within thirty days after this finished act, proof of such settlement shall be made. When, on that proof, or compliance with other statutory conditions, entry was made, the Preëmptor or Homesteader was entitled to possession and could protect himself by legal proceedings against intrusion by cattlemen or others.[1]

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[1] SEC. 2289. Every person who is the head of a family . . . shall be entitled to enter one-quarter section . . . of unappropriated public land. . . .

SEC. 2259. Every person, being the head of a family . . . who has made, or hereafter makes, a settlement in person on the public lands subject to preëmption, and who inhabits and improves the same, and who has erected or shall erect a dwelling thereon, is authorized to

The indictment here charges that, after having entered this quarter-section at the Register's office, Moore remained in possession for three years and that when he died the homestead was in full force and was thereafter maintained by his heirs. This negatives any idea of abandonment. It implies that he not only entered the land at the proper office, but had established a settlement, erected a dwelling, and both acquired and maintained that "inceptive right" which "was the commencement of title." *Chotard* v. *Pope*, 12 Wheat. 586, 588; *Hoofnagle* v. *Anderson*, 7 Wheat. 212.

The land covered by the homestead of Moore was therefore not public land of the United States subject to entry or settlement. For, "in no just sense can land be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before the entry, after it they are private property." *Wisconsin R. R. Co.* v. *Price County*, 133 U. S. 496, 506; *Svor* v. *Morris*, 227 U. S. 524–528. The entry by Moore withdrew the land from entry or settlement by any other,

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enter with the Register of the land office . . . any number of acres not exceeding 160 . . . upon paying to the United States the minimum price of such land.

SEC. 2263. Prior to any entries being made under the provisions of § 2259, proof of the settlement and improvement thereby required shall be made to the satisfaction of the Register. . . .

SEC. 2264. When any person settles or improves a tract of land subject at the time of settlement to private entry, and intends to purchase the same under the preceding provisions of this chapter, he shall, within thirty days after the date of such settlement, file with the register of the proper district a written statement, describing the land settled upon and declaring his intention to claim the same under the preëmption laws; and he shall, moreover, within twelve months after the date of such settlement, make the proof, affidavit, and payment hereinbefore required. If he fails to file such written statement, or to make such affidavit, proof, and payment within the several periods named above, the tract of land so settled and improved shall be subject to the entry of any other purchaser.

and segregated the quarter-section from the public domain. The legal title remained in the Government until patent issued; but as against all except the United States he was the lawful possessor clothed with an inceptive title (*Sturr* v. *Beck*, 133 U. S. 541, 547, 549; *Bunker Hill Co.* v. *United States*, 226 U. S. 548, 550), which entitled him to maintain suits in equity or actions at law to obtain redress for a violation of his possessory rights. *Russian-American Co.* v. *United States*, 199 U. S. 570, 577. The homesteader having thus acquired the right to "treat the land as his own" so far as was necessary to carry out the purposes of the statute (*Shiver* v. *United States*, 159 U. S. 491, 497), it is apparent that this right was in the nature of private property, and entitled to protection as such. Interference with the possession of the homesteader or his heirs living on land thus withdrawn from entry was not punishable under a Federal statute applicable only to public lands subject to entry.

This view is sustained by the terms of the statute and is in accord with the policy to leave the protection of such possessory claims to the laws of the several States. Congress could have legislated so as to make the statute applicable until patent issued. But instead of doing so, it left the homesteader, who had acquired a possessory title, to avail himself of the same rights that were open to others holding lands, by title absolute or inchoate. In both cases there was right of possession, and in both cases wrongs against possession could be redressed. Such seems to have been the practical construction of the statute since its passage, twenty-eight years ago, for we are cited to no case in which a prosecution has been instituted, in a Federal court, against one interfering with the possession of a homesteader after entry and before patent.

Judgment affirmed.

LAPINA *v.* WILLIAMS, COMMISSIONER OF IMMIGRATION.

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

No. 7. Submitted December 1, 1913.—Decided January 5, 1914.

The authority of Congress over the admission of aliens to the United States is plenary.

Congress may exclude aliens altogether, or it may prescribe the terms and conditions upon which they may come into or remain in this country.

The provisions of the Immigration Act of 1907 respecting admission and deportation apply to an alien who, having remained in this country for more than three years after first entry, and having gone abroad for a temporary purpose with the intention of returning, again seeks and gains admittance to the United States.

The immigration acts of 1903 and 1907 were revisions or compilations with some modifications of previous acts pertaining to the same subject, and those acts having confined the exclusion and deportation provisions to "alien immigrants" and that term having been construed as not including aliens once admitted and returning after temporary absence, the omission of the word "immigrant" and application of those provisions to "aliens" will be construed as indicating an intention to extend the act to all aliens, whether entering for the first time or returning after a temporary absence.

Debates in Congress are unreliable as a source from which to discover the meaning of the language employed in an act, and this court is not disposed to go beyond the reports of the committees.

It is only in a doubtful case that the title of an act can control the meaning of the enacting clauses, and so *held*, that the use of the word "immigration" in the title of the act of 1907 cannot overcome the fact as evidenced by the act itself that Congress intended its provisions to apply to all aliens and not exclusively to alien immigrants. *Taylor* v. *United States*, 207 U. S. 120, distinguished.

179 Fed. Rep. 839, affirmed.

THE facts, which involve the deportation provisions of the Alien Immigration Act of 1907, are stated in the opinion.

Mr. William Hawkins for petitioner:

The majority of the Circuit Courts of Appeals are in petitioner's favor,—four as against two. For those against petitioner's contention, see *Ex parte Hoffman*, 179 Fed. Rep. 839; *Taylor* v. *United States*, 152 Fed. Rep. 1; reversed, 207 U. S. 120; *United States* v. *Sprung*, 187 Fed. Rep. 905. In favor of petitioner's contention, see *Rodgers* v. *United States*, 152 Fed. Rep. 346; and see also 191 Fed. Rep. 979; *Redfern* v. *Halpert*, 186 Fed. Rep. 151; *United States* v. *Aultman*, 148 Fed. Rep. 1022; *United States* v. *Nakashima*, 160 Fed. Rep. 842. And see also District Court cases, *Re Petterson*, 166 Fed. Rep. 536; *Re White*, 166 Fed. Rep. 1007; *Re Kleibs*, 128 Fed. Rep. 656; *Re Funaro*, 164 Fed. Rep. 152; *Re Crawford*, 165 Fed. Rep. 830.

The petitioner, in the eye of the law, was a domiciled alien resident, and therefore not within the scope of the Immigration Act of 1907.

She did not put herself in motion to quit the country, *sine animo revertendi*. *The Venus*, 8 Cranch, 280.

Domicile is largely a matter of intention. See McCrary on Elections, Appx., 2d ed., 449, 561.

A man may acquire a domicile or residence if he be personally present in a place and elect that as his home. *Behrensmeyer* v. *Kreitz*, 135 Illinois, 591; *Cobb* v. *Smith*, 88 Illinois, 201; *Wilson* v. *Marshall*, 80 Illinois, 78.

In the Western States where petitioner lived there is no distinction between resident aliens and citizens except as to voting and holding public office. *State* v. *Fowler*, 41 La. Ann. 380.

The words "aliens" and "alien" as used in the immigration statutes existing prior to 1903 and 1907, were both construed uniformly by the Federal courts as referring to "alien immigrants" exclusively. *Moffitt* v. *United States*, 128 Fed. Rep. 375; *United States* v. *Burke*, 99 Fed. Rep. 895.

Under the 1891 act a person in circumstances similar to the one at bar did not come within the scope of the immigration statutes. *Re Panzara*, 51 Fed. Rep. 275; *Re Martorelli*, 63 Fed. Rep. 437; *Re Maiola*, 67 Fed. Rep. 114.

The use of the word "aliens" in acts of 1903 and 1907, instead of "alien immigrants," does not indicate any intention on the part of Congress to make the statutes of 1903 and 1907 apply to an alien statused as in the case at bar. *United States* v. *Dauphin*, 20 Fed. Rep. 628; *Goodell* v. *Jackson*, 20 Johns. 722; *Taylor* v. *Delancey*, 2 Caine's Cases, 151; *Dominick* v. *Michael*, 4 Sandf. 409.

Where the language of a statute is ambiguous or otherwise doubtful; or, being plain, a literal construction would lead to such absurdity, hardship or injustice, as to render it irrational to impute to the law-making power a purpose to produce or permit such result, the title may be resorted to as tending to throw light upon the legislative intent of its scope or operation. *United States* v. *Fisher*, 2 Cranch, 386; *Holy Trinity Church* v. *United States*, 143 U. S. 462; *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 563; *Binns* v. *United States*, 194 U. S. 486.

For Congressional history of the alien immigration acts, see 57th Cong. H. R. 12199; Cong. Rec., 1st Sess., 57th Cong. Vol. 35, Pt. 6, pp. 5757, 5764, 5767; 9 Sen. Rep. No. 2119, 57th Cong., 1st Sess., Cong. Rec. Vol. 36, Pt. 1, pp. 97, 105, 129; Vol. 36, Id., p. 2805; Cong. Rec. Vol. 36, p. 134, 57th Cong., 2nd Sess., Sen. Doc. 62, 57th Cong., 1st Sess., Vol. 6, Sen. Doc., Serial No. 4421, pp. 100–102, 195, 402, 405, 410, 450, 466.

The Government's present contention is negatived by the statistical rules issued by the government department. See government print dated 1908,—approved by Secretary Straus, June 22, 1907, Rule 30.

The Government's present contention was not recognized by the Secretary of Commerce and Labor at the

time the 1907 act was enacted,—and long afterwards. The Department's own written response to Congress proves this. See 60th Cong., 2d Sess., H. R. Doc. No. 1494, Letter of Feb. 25, 1909, from the Secretary of Commerce and Labor transmitting a response to the inquiry of the House as to admission of aliens into the United States. See *United States* v. *Ala. R. R. Co.*, 142 U. S. 621.

The words "alien" and "aliens" and "passengers" had been used in four previous immigration statutes as meaning "immigrant." *Re Lea*, 126 Fed. Rep. 233.

If a domiciled alien who has taken out his first papers goes abroad and is subjected to pains by a government other than that of his origin, the United States Ambassadors have been held justified, on proper showing, to interfere on behalf of such inchoate citizen. See Foreign Relations of U. S., 1884, p. 552.

Penal statutes are to be strictly construed. The rule is founded on the tenderness of the law for the rights of the individual. *United States* v. *Wiltberger*, 5 Wheat. 95; *Hackfeld* v. *United States*, 197 U. S. 442; *Canfara* v. *Williams*, 186 Fed. Rep. 354.

Mr. Assistant Attorney General Denison and *Mr. Francis H. McAdoo* for respondent:

For an earlier case on this question see *Bugajewitz* v. *Adams*, 228 U. S. 585.

The word "alien" as used in the later immigration statutes does not mean "alien immigrant," but is intended to cover any "alien" entering the country, whether or not previously here.

Neither in the section itself nor elsewhere does the act place any restriction on the word "alien."

The elimination by Congress of the word "immigrant" throughout the act was a positive indication of an intention to withdraw the restriction on the word "alien"

which its presence in the prior acts had been held by the courts to imply.

The administrative construction supports the construction given by the court below.

The policy of the act is against the restoration, by construction, of the restricting words. *Aultman* v. *United States*, 148 Fed. Rep. 1022; *Barlin* v. *Rodgers*, 191 Fed. Rep. 970; *Ex parte Crawford*, 165 Fed. Rep. 830; *Frick* v. *Lewis*, 195 Fed. Rep. 693; *Funaro* v. *Watchorn*, 164 Fed. Rep. 152; *Ex parte Hoffman*, 179 Fed. Rep. 839; *In re Kleibs*, 128 Fed. Rep. 656; *Lem Moon Sing* v. *United States*, 158 U. S. 538; *Low Wah Suey* v. *Backus*, 225 U. S. 460; *In re Maiola*, 67 Fed. Rep. 114; *In re Martorelli*, 63 Fed. Rep. 437; *Moffitt* v. *United States*, 128 Fed. Rep. 375; 23 Opinions Attorney General, p. 278; *In re Ota*, 96 Fed. Rep. 487; *In Panzara*, 51 Fed. Rep. 275; *Ex parte Petterson*, 166 Fed. Rep. 536; *Prentiss* v. *Stathakos*, 192 Fed. Rep. 469; *Redfern* v. *Halpert*, 186 Fed. Rep. 150; *Rodgers* v. *Buchsbaum*, 152 Fed. Rep. 346; *Sibray* v. *United States*, 185 Fed. Rep. 401; *Sinischalchi* v. *Thomas*, 195 Fed. Rep. 701; *Taylor* v. *United States*, 207 U. S. 120; *Taylor* v. *United States*, 152 Fed. Rep. 1; *United States* v. *Aultman*, 143 Fed. Rep. 922; *United States* v. *Nakashima*, 160 Fed. Rep. 842; *United States* v. *Sprung*, 187 Fed. Rep. 903; *United States* v. *Villet*, 173 Fed. Rep. 500; *White* v. *Hook*, 166 Fed. Rep. 1007.

If a restriction on the word "alien" is to be implied, it should cover persons bona fide domiciled and not this petitioner. *Barlin* v. *Rodgers*, 191 Fed. Rep. 971; *Ex parte Petterson*, 166 Fed. Rep. 536.

Mr. Justice Pitney delivered the opinion of the court.

The petitioner, an unmarried woman and a native of Russia, came to the United States in the year 1897 or 1898, at the age of about twelve years, accompanied by

a man who had promised to marry her, and during the four years immediately following she practiced prostitution in the City of New York and supported her companion with the proceeds of her prostitution; she then left that city, and thereafter continuously practiced prostitution in various parts of the United States, including different towns and cities in the States of Washington, Arizona, and Texas. In the month of March, 1908, she returned to Russia for the purpose of visiting her mother, intending at the same time to return to this country; she reëntered the United States at the port of New York in June, 1908, accompanied by her mother, at which time petitioner falsely represented, for the purpose of facilitating her landing, that she was Mrs. Joseph Fiore, and the wife of an American citizen; at the time of this, her second entry, she intended to continue the practice of prostitution in the United States, and almost immediately upon being admitted she engaged in that practice, and was continually engaged in it until September 21, 1909, on which date she was arrested in a house of prostitution in Phoenix, Arizona, upon a warrant of arrest duly issued by the Acting Secretary of Commerce and Labor under the provisions of the Immigration Act of February 20, 1907, c. 1134, 34 Stat. 898. Upon a hearing properly accorded to her, the foregoing facts were established, and an order of deportation was made upon the ground that she was a prostitute and was such at the time of her entry into the United States; that she entered the United States for the purpose of prostitution; and that she had been found an inmate of a house of prostitution and practicing the same within three years after her entry. She obtained a writ of *habeas corpus*, which, after a hearing, was dismissed by the District Court for the Southern District of New York. Upon appeal, the Circuit Court of Appeals affirmed the order of dismissal (*sub nom. Ex parte Hoffman*, 179 Fed. Rep. 839). The present writ of cer-

tiorari was then allowed because of the division of judicial opinion upon the question presented, which is whether the provisions of the Immigration Act of 1907 respecting admission and deportation apply to an alien such as the petitioner, who, having remained in this country for more than three years (in this instance for more than ten years), after first entry, and having gone abroad for a temporary purpose and with the intention of returning, again seeks and gains admittance into the United States.

The pertinent provisions of the act of 1907 are set forth in the margin.[1] So far as the present question is concerned, the act is not materially different from—certainly not less stringent than—the act of March 3, 1903 (32 Stat. 1213, c. 1012). The Circuit Court of Appeals in the present case followed its own decision in *Taylor* v. *United States*, 152 Fed. Rep. 1, which was based upon the act of

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[1] SEC. 2. That the following classes of aliens shall be excluded from admission into the United States: . . . prostitutes, or women or girls coming into the United States for the purpose of prostitution or for any other immoral purpose; . . . 34 Stat. 898.

SEC. 3. . . . any alien woman or girl who shall be found an inmate of a house of prostitution or practicing prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States and shall be deported as provided by sections twenty and twenty-one of this Act. 34 Stat. 899.

SEC. 20. That any alien who shall enter the United States in violation of law, . . . shall, upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States. 34 Stat. 904.

SEC. 21. That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this Act, or that an alien is subject to deportation under the provisions of this Act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came, as provided by section twenty of this Act, . . . 34 Stat. 905.

1903, and in which it was held that while the provisions of the act of March 3, 1891 (26 Stat. 1084, c. 551) had been construed as restricted to "alien immigrants," the act of 1903 had been so framed as to cover aliens whether immigrants or not. In behalf of the petitioner it is contended that the court erred in its judgment as to the purpose of Congress in modifying the language of previous acts on adopting the revision of 1903, and that this act and the act of 1907, as well as those that preceded them, when properly construed, refer to "alien immigrants" exclusively.

The acts of 1903 and 1907 being revisions or compilations (with some modifications) of previous acts pertaining to the same general subject-matter, a reference list, in chronological order, is for convenience set forth in the margin.[1]

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[1] IMMIGRATION ACTS.

Rev. Stat. title "Immigration," §§ 2158–2164.

"An act supplementary to the acts in relation to immigration," approved March 3, 1875, 18 Stat. 477, c. 141.

"An act to regulate Immigration," approved August 3, 1882, 22 Stat. 214, c. 376.

"An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia," approved February 26, 1885, 23 Stat. 332, c. 164.

"An act to amend an act to prohibit the importation and immigration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia," approved February 23, 1887, 24 Stat. 414, c. 220.

"An act making appropriations to supply deficiencies," etc., approved October 19, 1888, containing clauses amending acts of February 26, 1885, and of February 23, 1887, 25 Stat. 565, 566, 567, c. 1210.

"An act in amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor," approved March 3, 1891, 26 Stat. 1084, c. 551.

"An act to facilitate the enforcement of the immigration and contract-labor laws of the United States," approved March 3, 1893, 27 Stat. 569, c. 206.

In a number of cases in the Federal District and Circuit Courts, it was held that the provisions of the act of March 3, 1891, and the acts that preceded it, relating to the exclusion and deportation of persons arriving in the United States from foreign countries, were confined in their operation to "alien immigrants"; and that this term did not include aliens previously resident in this country, who had temporarily departed with the intention of returning. *In re Panzara* (1892), 51 Fed. Rep. 275; *In re Martorelli* (1894), 63 Fed. Rep. 437; *In re Maiola* (1895), 67 Fed. Rep. 114; *In re Ota* (1899), 96 Fed. Rep. 487. The same view was expressed by the Circuit Court of Appeals for the Ninth Circuit in *Moffitt* v. *United States* (1904), 128 Fed. Rep. 375.

Upon the reasoning and authority of these cases, a similar construction was given to the act of 1903 in *United States* v. *Aultman Co.* (1906), 143 Fed. Rep. 922 (affirmed by the Circuit Court of Appeals, 148 Fed. Rep. 1022), the attention of the court apparently not having been directed to the question whether any significant change had been made in the law by the revision of 1903.

But in *Taylor* v. *United States* (1907), 152 Fed. Rep. 1, which was a review by the Circuit Court of Appeals for the Second Circuit of a judgment of conviction upon an indictment for a misdemeanor for permitting an alien sailor to land in New York, contrary to § 18 of the act of

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"An act making appropriations for sundry civil expenses," etc., approved August 18, 1894, containing clauses amending immigration laws, 28 Stat. 372, 390, 391, c. 301.

"An act to regulate the immigration of aliens into the United States," approved March 3, 1903, 32 Stat. 1213, c. 1012.

"An act to regulate the immigration of aliens into the United States," approved February 20, 1907, 34 Stat. 898, c. 1134.

"An act to amend an act entitled 'An act to regulate the immigration of aliens into the United States,' approved February twentieth, nineteen hundred and seven," approved March 26, 1910, 36 Stat. 263, c. 128.

1903, which made it the duty of the owners, officers, and agents of any vessel bringing an alien to the United States to adopt due precautions to prevent the landing of any such alien, etc., the court reviewed the changes made by Congress in the revision of 1903, "following decisions of the courts which tended to relax the provisions of earlier acts," and, finding that § 18 of the act of 1903 substantially reënacted a part of § 8 of the act of 1891, employing the term "alien" in the place of the term "alien immigrant," and that similar changes were made in other parts of the act, came to the conclusion that the change evinced an intent of Congress to use the word "alien" in its ordinary and unqualified meaning. This decision was reviewed in this court, and the judgment was reversed, but upon the ground (207 U. S. 120, 124) that § 18 did not apply to the ordinary case of a sailor deserting while on shore leave.

Shortly after the decision of the Circuit Court of Appeals in the *Taylor Case*, the Circuit Court of Appeals for the Third Circuit, in *Rodgers* v. *United States, ex rel. Buchsbaum* (1907), 152 Fed. Rep. 346, held that the provision of § 2 of the act of 1903, enumerating the classes of aliens to be excluded from admission into the United States, and amongst them "persons afflicted with a loathsome or with a dangerous contagious disease," and the provision of § 19, for the deportation of "aliens brought into this country in violation of law," could not be construed so as to extend to aliens domiciled in this country; affirming *In re Buchsbaum*, 141 Fed. Rep. 221. In *United States* v. *Nakashima* (1908), 160 Fed. Rep. 842, the Circuit Court of Appeals for the Ninth Circuit adopted the same view of the act of 1903 expressed in the *Aultman* and *Buchsbaum* cases, rejecting that adopted by the Court of Appeals in *Taylor* v. *United States*.

On the other hand, the latter decision has been followed in a number of cases arising under the act of 1907, which in this respect does not materially differ from the act of

1903. *Ex parte Petterson* (1908), 166 Fed. Rep. 536; *United States* v. *Hook* (1908), 166 Fed. Rep. 1007; *United States* v. *Villet* (1909), 173 Fed. Rep. 500; *Ex parte Hoffman* (1910), 179 Fed. Rep. 839 (being the case now under review); *Sibray* v. *United States* (1911), 185 Fed. Rep. 401; *United States* v. *Williams* (1911), 186 Fed. Rep. 354; *United States* v. *Sprung* (1910), 187 Fed. Rep. 903; *Frick* v. *Lewis* (1912), 195 Fed. Rep. 693; *Siniscalchi* v. *Thomas* (1912), 195 Fed. Rep. 701. *Contra, Redfern* v. *Halpert* (1911), 186 Fed. Rep. 150; and see *United States* v. *Rodgers* (1911), 191 Fed. Rep. 970.

The authority of Congress over the general subject-matter is plenary; it may exclude aliens altogether, or prescribe the terms and conditions upon which they may come into or remain in this country. *Chinese Exclusion Case*, 130 U. S. 581, 603; *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 713: *Lem Moon Sing* v. *United States*, 158 U. S. 538, 547.

The question, therefore, is not the power of Congress, but its intent and purpose as expressed in legislation. The cases that have held the immigration acts not to apply to domiciled aliens returning after a temporary absence have been rested in part upon the use of the term "immigration" in the titles of the respective acts, and in part upon the employment of that or similar terms in the enacting clauses.

As authority for a liberal interpretation of the acts, two decisions of this court have at times been referred to, which have, however, little, if any, present pertinency. *Holy Trinity Church* v. *United States*, 143 U. S. 457, held that the Contract-labor Law of February 26, 1885 (23 Stat. 332, c. 164), did not forbid a contract for employing a clergyman. The act was construed according to its spirit rather than its letter, and in view of its title, the evil intended to be remedied, the circumstances surround-

ing the appeal to Congress for legislation, and the reports of committees in each House, it was held to be the legislative purpose simply to stay the influx of cheap unskilled labor. Since this decision, an express exception has been made of "ministers of any religious denomination." In *Lau Ow Bew* v. *United States*, 144 U. S. 47, this court held that the provision of the Chinese Restriction Act of May 6, 1882 (22 Stat. 58, c. 126, § 6) as amended by act of July 5, 1884 (23 Stat. 115, c. 220), requiring every Chinese merchant coming into this country to procure and produce a certificate from the Chinese Government, did not apply to Chinese merchants already domiciled in the United States, who, having left this country for some temporary purpose, sought to reënter it upon their return to their homes here. But this decision was based in part upon the language of the particular statute and in part upon the fact that our treaty with China gave to Chinese merchants domiciled in the United States the right of egress and ingress, and the other rights, privileges, and immunities enjoyed in this country by the citizens or subjects of the most favored nation.

The legislative history of the act of 1903 demonstrates that the elimination of the word "immigrant" and other equivalent qualifying phrases was done deliberately. The bill originated in the House of Representatives, where the Committee Report declared that its general purpose was "to bring together in one act scattered legislation heretofore enacted in regard to the immigration of aliens into the United States . . . to amend such portions thereof as have been found, either as the result of experience in administering the law *or of judicial decision*, to be inadequate to accomplish the purpose plainly intended thereby; and to add thereto such further provisions as seemed to be demanded by the consensus of enlightened public opinion." H. Rept. 982, 57th Cong., 1st Sess. The report of the Senate Committee likewise explained

the bill as being in the main a reënactment of existing laws on the subject of immigration, stating—"The necessity for such reënactment is due in part to the fact that, *as a result of judicial decisions*, as well as of administrative experience, the efficiency of such laws to accomplish the evident purpose of their enactment has been shown to be materially less than appeared to be the case at the time of such enactment, and therefore a new expression of the legislative will upon the subject of immigration has become desirable." The Senate inserted the word "immigrant" in one place, but it was eliminated in conference. S. Rept. 2119, 57th Cong., 1st Sess.; S. Doc. 62, 57th Cong., 2d Sess. Cong. Record, Vol. 36, p. 2949, 57th Cong., 2d Sess.

Counsel for petitioner cites the debates in Congress as indicating that the act was not understood to refer to any others than immigrants. But the unreliability of such debates as a source from which to discover the meaning of the language employed in an act of Congress has been frequently pointed out (*United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 318, and cases cited), and we are not disposed to go beyond the reports of the committees. *Holy Trinity Church* v. *United States*, 143 U. S. 457, 463; *Binns* v. *United States*, 194 U. S. 486, 495; *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 19.

It is earnestly insisted that the omission of the word "immigrant" is of little consequence, because it does not apply at all to the excluding section. It is said that the words "alien immigrant" did not occur in the acts of 1875, 1882, 1885, or 1887, and did not occur in the excluding section of the act of 1891, but only in its eighth section —that which related to manifesting. But in the act of 1893, "To facilitate the enforcement," etc., each section was made to apply to "alien immigrants." The force of the argument pretty well disappears when we recall that it was in spite of the absence of the word "immigrant" in the

excluding clause that courts had held that because the word occurred in the title and in other provisions of the pertinent acts, the excluding clauses likewise were confined to immigrants, in the sense of aliens who had no domicile in this country. Of course, there were other considerations; the extreme hardship in individual cases where the aliens had long been resident in this country, and the practically uncontrolled authority of the executive officers of the Government, being among them. But, whatever considerations may have combined to bring about the judicial interpretation of the acts that preceded the Revision of 1903, the committee reports already cited sufficiently show that the language of the new act was chosen not for the purpose of adopting, but in order to avoid, that interpretation.

Upon a review of the whole matter, we are satisfied that Congress, in the act of 1903, sufficiently expressed, and in the act of 1907 reiterated, the purpose of applying its prohibition against the admission of aliens, and its mandate for their deportation, to all aliens whose history, condition or characteristics brought them within the descriptive clauses, irrespective of any qualification arising out of a previous residence or domicile in this country.

The excluding section as found in the act of 1907 contains in its own language the clearest answer to the entire argument for the petitioner. It reads as follows (34 Stat. 898, c. 1134, § 2): "That the following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics, insane persons, and persons who have been insane within five years previous; persons who have had two or more attacks of insanity at any time previously; paupers; persons likely to become a public charge; professional beggars; persons afflicted with tuberculosis or with a loathsome or dangerous contagious disease; persons not comprehended within any of the foregoing excluded classes who are found to be

and are certified by the examining surgeon as being mentally or physically defective, such mental or physical defect being of a nature which may affect the ability of such alien to earn a living; persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; polygamists, or persons who admit their belief in the practice of polygamy, anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States, or of all government, or of all forms of law, or the assassination of public officials; prostitutes, or women or girls coming into the United States for the purpose of prostitution or for any other immoral purpose; persons who procure or attempt to bring in prostitutes or women or girls for the purpose of prostitution or for any other immoral purpose; persons hereinafter called contract laborers, who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled;" etc., etc. None of these excluded classes (with the possible exception of contract laborers, whose exclusion depends upon somewhat different considerations) would be any less undesirable if previously domiciled in the United States. And besides, the section contains its own specific provisos and limitations, and these, on familiar principles, strongly tend to negative any other and implied exception.

There remains, therefore, only the use of the word "immigration" in the title of the act to furnish support for petitioner's contention. But it is only in a doubtful case that the title of an act can control the meaning of the enacting clauses, and there is no such doubt here. *United States* v. *Fisher*, 2 Cranch, 358, 386; *Holy Trinity Church* v. *United States*, 143 U. S. 457, 462; *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550, 563; *Patterson* v.

Bark Eudora, 190 U. S. 169, 173; *Cornell* v. *Coyne*, 192 U. S. 418, 430.

It was not intended, in the opinion of this court in *Taylor* v. *United States*, 207 U. S. 120, 126, to intimate an opinion with respect to the construction of § 18 of the act of 1903 that is inconsistent with the result now reached. There the Circuit Court of Appeals (one judge dissenting) had construed that section as excluding even the ordinary sailor, if an alien; basing this construction upon the changes wrought by Congress in the revision of 1903. This court, speaking by Mr. Justice Holmes, said: "A reason for the construction adopted below was found in the omission of the word 'immigrant' which had followed 'alien' in the earlier acts. No doubt that may have been intended to widen the reach of the statute, but we see no reason to suppose that the omission meant to do more than to avoid the suggestion that no one was within the act who did not come here with intent to remain. It is not necessary to regard the change as a mere abbreviation, although the title of the statute is 'An act to regulate the immigration of aliens into the United States.'" Of course, this language was employed with reference to the facts of that case, and was not intended to negative a purpose on the part of Congress to bring within the reach of the statute aliens who had previously resided in this country. In that case there was no element of previous residence.

Judgment affirmed.

GILA VALLEY, GLOBE & NORTHERN RAILWAY COMPANY *v.* HALL.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 68. Submitted November 13, 1913.—Decided January 5, 1914.

On an appeal from the territorial court this court cannot consider errors, not fundamental in character, which might have been, but were not, brought under review in the appellate court below.

Where the local practice of the Territory requires specific assignments of error and treats all others as waived, and the transcript filed here does not contain the assignment of errors below, this court confines itself to errors mentioned in the opinion of the appellate court below.

Whether an accident did or did not occur in a manner theoretically impossible according to expert opinions of defendant's witnesses, is properly submitted to the jury if there is evidence to sustain the plaintiff's contention, and if the court cannot hold as a conclusion of law that the accident could not possibly have occurred in that manner.

One employed for only a few days, and whose duties did not include inspection of the equipment or care respecting its condition, *held*, not chargeable as matter of law with assumption of risk on the ground of presumed knowledge of a defect in the condition of the equipment, there being no direct evidence that he knew of it.

Where the fact is in dispute as to whether a defect in a machine is such as to render its use dangerous, it cannot be properly held as matter of law that the risk is obvious even to one who knew of the defect.

An employé assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as they are not attributable to the employer's negligence; but the employé has a right to assume that his employer has exercised proper care with respect to providing safe appliances for the work, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence, until the employé becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it.

In order to charge an employé with the assumption of a risk attributable to a defect due to the employer's negligence it must appear not only that he knew (or is presumed to have known) of the defect, but that

he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it.

Questions of admissibility of evidence are for the determination of the trial court, whether its admission depends upon matter of law or of fact, and the finding upon such a question is not subject to reversal on appeal or error if fairly supported by the evidence; and so *held* as to the exclusion of evidence offered by defendant to prove remarks made by a third person in presence of the plaintiff before the injury as to defects in the appliance used by him.

The territorial appellate court having held that while in case of an excessive verdict for unliquidated damages tainted with passion or prejudice a new trial should be granted and the verdict not simply reduced, the trial judge is in the better position to judge if the verdict is merely excessive and should be allowed to stand if voluntarily reduced by the plaintiff to a reasonable amount, this court sees no reason for disturbing that decision, there being no constitutional obstacle to the practice.

13 Arizona, 270, affirmed.

THE facts, which involve the validity of a verdict and judgment for damages for personal injuries obtained in the territorial courts, are stated in the opinion.

Mr. Eugene S. Ives for plaintiffs in error:

In order to justify the court in sending case to the jury the evidence must clearly tend to sustain a verdict for plaintiff. *Root* v. *Fay*, 5 Arizona, 19; *Randall* v. *R. R. Co.*, 109 U. S. 478; *Richardson* v. *Powers*, 11 Arizona, 31.

Where facts proved are equally consistent with the absence of negligence as of its existence, the question should not be submitted to the jury. *McFadden* v. *Campbell*, 34 N. Y. Supp. 136; *Baulec* v. *Railroad Co.*, 59 N. Y. 356.

If the injury may have resulted from one of two causes for only one of which the defendant is liable, plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result. *Warner* v. *R. R. Co.*, 178 Missouri, at p. 134; *Pierce* v. *Kile*, 80 Fed. Rep. 865; *Ellison* v. *Truesdale*, 49 Minnesota, 240.

A verdict based on conjecture will not be permitted. *Wheelan* v. *Railway Co.*, 85 Iowa, 167; *B. & O. R. R.* v. *State*, 71 Maryland, 599; *Cumberland & P. R. Co.* v. *State*, 73 Maryland, 74.

An expert witness in testifying as to the condition of the velocipede which caused the accident must state specific facts and not his conclusion that its condition was very bad. *McMahon* v. *Dubuque*, 107 Iowa, 62.

In cross-examination of an expert witness it is proper to ask the witness if other causes may not have produced the result. 5 Ency. of Evi. 632; *Schlenker* v. *State*, 9 Nebraska, 241.

An answer to a question to which the opposing counsel objected, cannot be stricken out upon motion of the party who propounded it. *Hogan* v. *Shuart*, 11 Montana, 498.

Evidence offered by the defendant as to a conversation which the plaintiff might have heard is admissible, and it is for the jury to determine whether the plaintiff actually overheard such conversation. *Bush* v. *McCarty*, 127 Georgia, 308; *Berry* v. *House*, 1 Tex. Civ. App. 562; *Wright* v. *Stewart*, 130 Fed. Rep. 905; 1 Wigmore on Ev., § 261.

The court may call and examine a witness who has not been called by the parties. 8 Ency. Pl. & Pr. 72.

The fact that evidence is cumulative is no reason for excluding it. 3 Ency. Ev. 929 and note 39; *Barhyte* v. *Summers*, 68 Michigan, 34; *S. Danville* v. *Jacobs*, 42 Ill. App. 533.

Where the servant had the opportunity to know or in the exercise of reasonable or ordinary care should have known the risks to which he is exposed in the course of his employment, he will be held to have assumed them. 26 Cyc. 1196, n. 99; 26 Cyc. 1204, n. 17; *Thomas* v. *Mo. Pac. Ry. Co.*, 109 Missouri, 187; Thompson on Negligence, 1008; *H. & T. C. R. Co.* v. *Fowler*, 56 Texas, 45; *Larson* v. *R. R. Co.*, 43 Minnesota, 423; *Ragon* v. *Ry. Co.*, 97 Michigan, 265; *Perigo* v. *Ry. Co.*, 52 Iowa, 276; *Evansville Ry.*

Co. v. *Henderson*, 134 Indiana, 636; *Linton Coal Co.* v. *Parsons*, 15 Ind. App. 69.

Mr. Edward H. Thomas for defendant in error.

Mr. Justice Pitney delivered the opinion of the court.

This is a review of a judgment of the Supreme Court of Arizona, rendered prior to Statehood, affirming the judgment of one of the territorial district courts, in an action brought by Hall against the Railway Company to recover damages for personal injuries. Hall was in the employ of the Company as chainman, and on April 23, 1907, was engaged, with another employé named Ryan, in measuring distances for locating mile-posts along the line of its railway. For purposes of transportation they used a three-wheeled gasoline car or "velocipede" furnished by the Company. This car had two wheels on the right-hand side, over which were the engine, a seat for the use of the operator, and a seat in front for another person; the third wheel—or "pony wheel," as it was called—was a small wheel on the left-hand side nearly opposite the front wheel on the right-hand side, and fastened to the machine by a bar extending across. The wheels, like the ordinary car wheel, had inside flanges designed to keep the treads of the wheels upon the tracks. On the day mentioned, Hall and Ryan were upon this car traveling upon the line of railway, Ryan operating the machine and Hall sitting in front. While running at a speed of from eight to twelve miles an hour the car suddenly left the track, going to the left, the side on which the "pony wheel" was located. Hall was thrown in front and run over, sustaining severe injuries. The ground relied upon to support a recovery of damages from the employer was that the flange upon the third wheel was worn and cracked in a manner that rendered its use dangerous; that the defect was of such a

character that it would have been discovered in the course of reasonable inspection; and that by reason of this defect the machine left the track. The company denied negligence on its part, set up contributory negligence, and averred that Hall knew or had opportunity to know the condition of the car, and that he assumed the risk of injury resulting from the alleged defect. Upon the trial the jury returned a verdict in his favor for $10,000. The Company moved for a new trial, and, pending this motion, Hall voluntarily remitted $5,000 from the amount of the verdict. Thereafter the trial court denied the motion, and entered judgment in Hall's favor for $5,000 and costs. From this judgment and from the order denying the motion for new trial the Company appealed to the territorial Supreme Court, which affirmed the judgment, as already stated. 13 Arizona, 270.

This writ of error is sued out by the Railway Company and the sureties upon the *supersedeas* bond that was given for the purposes of the appeal to the territorial Supreme Court. A reversal of the judgment is sought because of alleged trial errors.

At the outset we lay aside certain assignments of error filed in this court that are designed to raise various questions which do not appear, from anything in the record before us, to have been presented to the territorial Supreme Court for its consideration. It is inadmissible for this court to consider errors, not fundamental in their character, which might have been but were not brought under review in the appellate court below; for it is that court's judgment which is alone subject to our review. The impropriety of allowing a party, conceiving himself to have suffered from an erroneous ruling of a trial court in a matter not jurisdictional, nor essential to the foundation of the action, but involving a mere matter of procedure, to invoke the judgment of this court thereon, without availing himself of the opportunity for a review

thereof in the appropriate appellate court of the Territory, has been repeatedly pointed out. *Montana Railway Co.* v. *Warren*, 137 U. S. 348, 351; *San Pedro & Cañon Del Agua Co.* v. *United States*, 146 U. S. 120, 136; *Jordan Mining Co.* v. *Société des Mines*, 164 U. S. 261, 264.

The local practice required specific assignments of error, and treated errors not thus assigned as being waived. Arizona Rev. Stat. 1901, pars. 1523 and 1586; Supreme Court Rules 3 and 6; 4 Arizona, ix and xi; 35 Pac. Rep. vi and vii; *Daggs* v. *Phoenix Nat'l Bank*, 5 Arizona, 409, 415; *County of Santa Cruz* v. *Barnes*, 9 Arizona, 42, 49; *Bail* v. *Hartman*, 9 Arizona, 321, 327. The transcript filed here does not contain the assignments of error below, so that there is nothing to show what errors were assigned or relied upon in the territorial Supreme Court, except as they receive particular mention in its opinion. Confining our attention to these, the questions presented are the following:

First, it is contended that the trial court ought to have instructed the jury to return a verdict in favor of the defendant, and this upon the ground that there was no evidence to sustain a recovery, unless it could be found in the proof of the defective condition of the flange of the "pony wheel"; it being at the same time contended to be a physical impossibility that this defect in the flange could have caused the accident. The wheel itself was in evidence as an exhibit, and it was testified that the inside of the flange, where it came next to the rail, was irregularly worn; or, as a witness put it,—"cut in different places so that it is very rough, and it would have a tendency (for a person to look at it) to show hard and soft places in the wheel." This witness declared that this condition of the wheel would cause it to "bounce and leave the track." Another witness testified that there were "three gouged out places" in the flange, and (in effect) that if one of these should strike a protruding joint between rails

"the sharp edge of the flange would mount that rail and go off." It is insisted, however, that by the uncontroverted testimony the car, at the time of the accident, was traveling upon a curve towards the left, and was therefore necessarily impelled by centrifugal force towards the right, so that the defective flange was drawn away from the rail and was performing no function. The theory is that the centrifugal force must have kept the right-hand wheels constantly bearing upon the inside of the outer or right-hand rail, and that therefore in the absence of some extraneous cause, it was impossible for the car to be thrown toward the left. We are unable to say as a conclusion of law, that such a car, while running upon a curve towards the left, at a speed of from eight to twelve miles an hour, and with interior flanges upon the right-hand wheels preventing it from leaving the track on that side, would not be occasionally thrown with a lurch away from the right-hand rail and against the opposite rail, even were the car at the time traveling upon a constant curve. But however this may be, there was evidence from which the jury might reasonably infer that at the point where the car left the track it was just leaving the curve and going upon a tangent. At this point it might naturally be subjected to a lurch that would throw its weight with momentum against the left-hand rail and thus bring into operation the tendency of the "pony wheel" to mount the rail because of the worn condition of the inside of the flange. And, as already mentioned, the car in fact went off the track towards the left. Therefore, upon this question, the case was properly submitted to the jury.

The motion for direction of a verdict seems to have been rested upon the additional ground that the alleged defect was so obvious that its existence must have been known to the plaintiff, and that he therefore assumed the risk. There was no direct evidence that he knew of the defect,

and it does not appear to have been a part of his duties to inspect the machine or the wheel, or to look after their condition. He had been employed for only three or four days in work that required him to ride upon the car, and at the utmost it was a question for the jury whether the defective condition of the wheel was so patent that he should be presumed to have known of it. And then, the question whether the defect was such as to render the use of the car dangerous was in dispute at the trial; hence, it could not be properly held that the risk was indisputably obvious, even to one who knew of the defect. It is quite clear, therefore, that a verdict could not properly have been directed in favor of the defendant upon the ground that the plaintiff, in using the car, had assumed an obvious risk.

There was a request for instructions to the effect that the plaintiff assumed the risk of injury from defects which he knew, or by the exercise of ordinary care in the discharge of his duties might have known, or which he had opportunity to know. These instructions the court refused to give, but charged the jury upon this question —"The true test is not in the exercise of ordinary care to discover dangers, by the employé, but whether the defect is known or plainly observable by him. An employé is not charged by law with the assumption of a risk arising out of defective appliances provided by his employer, unless his employment was of such a nature as to bring to his attention and cause him to realize and comprehend the dangers incident to the use of such appliances." This, we think, was a correct instruction under the circumstances of the case. An employé assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as these are not attributable to the employer's negligence. But the employé has a right to assume that his employer has exercised proper care with respect to providing a safe

place of work, and suitable and safe appliances for the work, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence, until the employé becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it. Moreover, in order to charge an employé with the assumption of a risk attributable to a defect due to the employer's negligence, it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it. *Union Pacific Railway Co.* v. *O'Brien*, 161 U. S. 451, 457; *Texas & Pacific Railway* v. *Archibald*, 170 U. S. 665, 671; *Choctaw, Oklahoma &c. R. R. Co.* v. *McDade*, 191 U. S. 64, 68; *Texas & Pacific Ry. Co.* v. *Swearingen*, 196 U. S. 51, 62; *Burns* v. *Delaware & Atlantic Telegraph Co.*, 70 N. J. Law, 745, 752.

The next error alleged is the refusal of the trial court to permit Ryan, the operator of the car, to testify to a remark made, concerning the condition of the wheel, on the day before the accident. Ryan had testified that he noticed the alleged defect at the time referred to; that he, and Hall, and one Regna, and somebody else, were present; that a conversation was had in which Regna made a remark with respect to the crack in the wheel; and that this remark was made in his natural tone of voice while Hall was less than twenty yards away and within hearing distance, and so that he could have heard it if he had been listening. It was not shown that Hall made any comment upon the car or the wheel, or made any answer to Regna's remark, or took any part in the conversation. Plaintiff's counsel objected to the admission of the conversation on the ground that it had not been established that Hall heard it, and this objection was sustained.

It is insisted that the conversation was admissible as

proving notice to Hall of the condition of the wheel; and so it was, provided it appeared that he heard it. Whether he did hear it, was of course a question of fact. Plaintiff in error contends that this should have been submitted to the jury, with an instruction that if they believed Hall heard the conversation they might take that into consideration in determining whether he knew the condition to the wheel and the effect of using it in that condition.

We agree that the testimony was such as to render it a matter of doubtful inference whether Hall heard the conversation; but we think this question of fact was one to be determined by the trial court, and not by the jury. Questions of the admissibility of evidence are for the determination of the court; and this is so whether its admission depend upon matter of law or upon matter of fact. And the finding of the trial judge upon such a preliminary question of fact is not subject to be reversed on appeal or error if it be fairly supported by the evidence, as it is in the case before us. *Bartlett* v. *Smith*, 11 M. & W. 483, 485; *Doe, dem. Jenkins* v. *Davies*, 10 Ad. & El., N. S. 314, 323; *Spring Co.* v. *Edgar*, 99 U. S. 645, 658; *Stillwell Mfg. Co.* v. *Phelps*, 130 U. S. 520, 527; *Inland & Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551, 559; *State* v. *Monich*, 74 N. J. Law, 522, 526; *State* v. *Tomassi*, 75 N. J. Law, 739, 743; *Gorton* v. *Hadsell*, 9 Cush. 508, 511. And see *Tayloe* v. *Riggs*, 1 Pet. 591, 597.

Finally, it is insisted that there was error in entering judgment in favor of the plaintiff for $5,000, after the residue of the verdict of $10,000 was remitted pending the motion for new trial. The argument is that the voluntary remission of so large an amount by the plaintiff was an admission that the verdict was excessive; that an excessive verdict may not be cured by a remitter where the amount of the damages cannot be measured by any fixed standard or determined with certainty; that a verdict so excessive

is conclusive evidence that it was the product of prejudice on the part of the jury, and that this vice goes to the entire verdict, and not merely to the excess. The practice, however, is recognized by the Civil Code (Ariz. Rev. Stat. 1901, pars. 1450 and 1451), which permit any party in whose favor a verdict or judgment has been rendered to remit any part thereof, after which execution shall issue for the balance only of such judgment. In *Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S. 642, 646, an action in a territorial court to recover damages for personal injuries that necessitated the amputation of a leg, there was a verdict in favor of the plaintiff for $25,000, a motion for a new trial on various grounds, among others that the damages were excessive, and the court ordered that a new trial be granted unless plaintiff remitted $15,000 of the verdict, and, in case he did so, that the motion should be denied. He remitted the amount, and judgment was entered in his favor for the balance, which the Supreme Court of the Territory affirmed. This court held that the matter was within the discretion of the court; and this even without the sanction of a statute. The constitutional question involved was reëxamined in *Arkansas Cattle Co.* v. *Mann*, 130 U. S. 69, 73, and the decision in the *Herbert Case* was adhered to, it being held that the practice under criticism did not in any just sense impair the right of trial by jury.

In *Southern Pacific Co.* v. *Tomlinson*, 4 Arizona, 126, 132, and in *Southern Pacific Co.* v. *Fitchett*, 9 Arizona, 128, 134, the general practice was sustained by the territorial Supreme Court. In the former case, however, it was said (4 Arizona, 132) that "if it is apparent to the trial court that the verdict was the result of passion or prejudice, a *remittitur* should not be allowed, but the verdict should be set aside. In passing upon this question the court should not look alone to the amount of the damages awarded, but to the whole case." In the *Fitchett*

Case, it appearing that the trial court was of the opinion that more than half of the damages awarded for the appellee's injured feelings were excessive, the Supreme Court held that evidently the verdict was not the result of cool and dispassionate consideration, and that the question of the proper sum to be awarded ought not to have been determined by the trial court, but should have been submitted to the determination of another jury. In the present case (13 Arizona, 276) the majority of the court declared they were not prepared to adhere to the views expressed in the *Fitchett Case:* that while there is authority for the position that in no case of unliquidated damages should the court permit a remission where the verdict is excessive, without the consent of the defendant, the great weight of authority supports the practice; citing the decisions of this court already referred to; and declaring that while, if it appears that the verdict is tainted with prejudice or passion, and does not represent the dispassionate judgment of the jury upon the question of the right of the plaintiff to recover, a new trial should be granted, yet the trial court is in a better position to determine this than the appellate court, so that its determination should ordinarily be accepted. We see no ground for disturbing this decision.

Judgment affirmed.

BANK OF ARIZONA *v.* THOMAS HAVERTY COMPANY.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 87. Submitted December 4, 1913.—Decided January 5, 1914.

In this case this court thinks there was sufficient evidence as to the authority of the agent to make the agreement to support the verdict against the principal, and that the jury was warranted in finding that an agreement had been reached before certain questions reserved for further consideration had been raised.

The evidence tending to show that the agreement was a compromise between a mortgagee and a lienor in view of doubts that had arisen as to which had priority, this court agrees with the lower courts that there was no guaranty as to the exact status of the lien either as to amount or priority.

Improprieties in remarks of counsel in addressing the jury may be cured by the instructions of the trial judge.

Where the record does not show that an objection was raised upon the appeal to the territorial Supreme Court it cannot be considered by this court. *Gila Valley Ry.* v. *Hall*, *ante*, p. 94.

13 Arizona, 418, affirmed.

THE facts, which involve the validity of a verdict and judgment for damages for breach of contract obtained in the territorial courts, are stated in the opinion.

Mr. Walter Bennett for plaintiff in error:

Demurrer to complaint should have been sustained; the agency of attorneys at law to bargain to buy claim was not proved; the terms of transfer were not agreed upon.

There was misconduct of counsel in argument to jury.

The alleged agreement violates the Statute of Frauds.

Admitting declaration of alleged agents to establish agency was error.

The questions to and answers by attorney at law was in violation of rule of privilege. See *Boyle* v. *Smithman* (Pa.), 23 Atl. Rep. 398; *Chicago &c.* v. *Judge*, 135 Ill. App. 377; *Dow* v. *Town &c.* (N. H.), 44 Atl. Rep. 489; *Foss* v. *Smith* (Vt.), 65 Atl. Rep. 553; *McKenna* v. *McKenna*, 118 Ill. App. 240; *Parlin* v. *Orendorff Co.*, 137 Ill. App. 454; *Wicks* v. *Wheeler*, 139 Ill. App. 412.

Mr. A. B. Browne, Mr. Alexander Britton, Mr. Evans Browne, Mr. J. L. B. Alexander and *Mr. George D. Christy* for defendant in error.

Mr. Justice Pitney delivered the opinion of the court.

The Thomas Haverty Company, defendant in error, sued the Bank of Arizona in a District Court of the Territory of Arizona to recover $9,313.90 upon a special agreement set out in the complaint substantially as follows: That in February, 1908, the company had a claim against one John Noble for $14,306, for materials furnished and work done in the construction of the Noble Building, in Phoenix, Arizona; that the company had taken the necessary steps, under the provisions of the mechanics' lien statutes, to fix a lien upon the building and the lands on which it stood; that in March, 1908, the company instituted a suit to enforce the lien and the payment of the claim; that Noble, one Hugo Richards, and others, were joined as defendants in that action; that Richards at the time held a mortgage upon the premises, which had been given to him for the use and benefit of the Bank of Arizona, the Bank being the real party in interest; that while the action was pending, and on or about November 30, 1908, it was agreed between the Bank and the Haverty Company that if the Company would prosecute its suit to judgment the Bank would buy its demand and claim of

lien and pay the Company for it the sum of $9,313.90 upon assignment of the judgment to the Bank; the sum just mentioned being the amount claimed by the Company ($14,306) less the sum of $4,992.10, which was the value of two boilers and a certain heating apparatus and certain tools, furnished by the Haverty Company and used in the construction of the building, and for which the Company claimed a lien; which boilers, heating apparatus and tools the Company was to be at liberty to remove from the building if this could be done without injury thereto; that thereupon the Company agreed to sell to the Bank its demand against Noble and its claim for a lien upon the premises, and agreed to prosecute the action thereon to judgment, and to assign the judgment to the Bank; that the Company proceeded with its action, and recovered therein a judgment for $12,429.22, with a foreclosure of its lien; and that thereafter the Company was ready and offered to assign the judgment to the Bank, but the Bank refused to receive it or to pay the agreed sum of $9,313.90 for it.

The Bank, by demurrer to the complaint and afterwards by answer, interposed the defense that the Company had failed to perform the agreement, in that it had recovered a judgment for only $12,429.22, and that although the claim for lien set up by the Company in its suit against Noble was one alleged to be prior and superior to the lien of the mortgage held by Richards for the benefit of the Bank, it was by the judgment in that suit determined to be inferior and subordinate to the Bank's lien.

There was a trial by jury, in the course of which it appeared that the alleged agreement, if made at all, was made between attorneys representing the Haverty Company, and attorneys representing the Bank. The principal questions of fact were whether the agreement was made substantially as alleged, and, if so, then whether the Bank's attorneys were specially authorized to make it,

or whether the Bank afterwards ratified their action with knowledge of the facts. There was a verdict for the plaintiff for the full amount claimed, and, on appeal, the resulting judgment was affirmed by the Supreme Court of the Territory (13 Arizona, 418); whereupon the present writ of error was sued out.

It is insisted that the evidence fails to show that the attorneys who acted for the Bank were authorized by it to enter into the alleged agreement to purchase the Haverty claim. But we think there was sufficient evidence to support the verdict of the jury in favor of plaintiff upon this question.

It is also insisted that the parties never in fact came to an agreement, because an item of about $100 for certain freight charges was left open for further consideration. But the jury was warranted by the evidence in finding that an agreement had in fact been reached before the question respecting freight was raised.

The principal contention here, as in the court below, is that the agreement alleged and proved was not performed, in that the Haverty Company did not prosecute its claim to judgment; the claim having been for $14,306, with a prior lien upon the building and lots, but subject to a deduction of $4,992.10, provided the boilers and tools could be removed without injury to the building; while the judgment recovered was for $12,429.22, with a lien subordinate to the Bank's mortgage. We agree with the court below that neither the averments of the complaint nor the evidence at the trial imported a guaranty on the part of the Haverty Company as to the exact amount of the judgment or the precise status of the lien. The evidence tended to show that the agreement was made as a compromise between the Bank and the Haverty Company, in view of doubts that had arisen whether in law the lien of the Haverty Company was entitled to priority over the Bank's mortgage.

Error is assigned respecting certain remarks made by counsel for plaintiff in addressing the jury; but if there was any impropriety it was cured by the instructions of the trial judge.

The only other point deserving notice is the contention that the motion of plaintiff in error (defendant below) for a direction of a verdict in its favor ought to have been granted because of § 4, c. 99, p. 230, Session Laws 1907 of Arizona, which is in effect that a contract for sale of any chose in action of the value of $500 or upwards shall not be enforceable unless some note or memorandum in writing be signed by the party to be charged, or his agent. Assuming—what is not clear—that the point was brought to the attention of the trial court, it is sufficient for present purposes to say that there is nothing in the record to show that the question was raised upon the appeal to the territorial Supreme Court. *Gila Valley &c. Railway Co.* v. *Hall, ante,* p. 94, and cases cited.

Judgment affirmed.

ROSS *v.* DAY.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 122. Argued December 11, 1913.—Decided January 5, 1914.

Whether parties had actually improved Cherokee lands in such sense as to give them a preferential right of selection and allotment under § 11 of the act of July 1, 1902, c. 1375, 32 Stat. 716, is not a mere question of law but one of fact and law, and, as far as it involves the drawing of correct inferences from the evidence it is a question of fact.

Where, in such a case, the whole controversy depends upon whether the allotment was in accord with actual ownership of the improvements

thereon and there is neither fraud nor clear mistake of law in the decision of the Secretary of the Interior on final appeal to him, his findings are conclusive.

29 Oklahoma, 186, affirmed.

THE facts, which involve the title to certain lands allotted under the Cherokee Indian Allotment Act of July 1, 1902, are stated in the opinion.

Mr. Kenneth S. Murchison for plaintiffs in error:

The rights of possession are to be determined by Cherokee laws.

Plaintiffs had no remedy at law.

The jurisdiction and powers of the Secretary of the Interior in allotment of Cherokee lands were like those exercised by the Land Department over public lands.

The record made before the referee in this cause is the only record that this court has the power to examine, because, by the constitution of the State of Oklahoma, the District Courts, even in cases where appeals may be taken to those courts, can only try cases *de novo*, and, if the court had jurisdiction at all of this case, it could only try the same upon the record brought into the court through its own processes. See *Cherokee Nation* v. *Georgia*, 5 Pet. 1; *Cherokee Nation* v. *Journeycake*, 155 U. S. 180; *Cherokee Trust Funds*, 117 U. S. 228; *Hand* v. *Cook*, 92 Pac. Rep. 3; *Johnson* v. *Towsley*, 13 Wall. 72; *Jones* v. *Germania Iron Co.*, 107 Fed. Rep. 597; *Mackey* v. *Coxe*, 18 How. 100; *Musgrove* v. *Harper*, 94 Pac. Rep. 187; *Rector* v. *Gibbon*, 111 U. S. 276; *R. R. Co.* v. *Forsythe*, 159 U. S. 46; *Talton* v. *Mayes*, 163 U. S. 376; *United States* v. *McDaniel*, 7 Pet. 1; *United States* v. *Thurber*, 28 Fed. Rep. 56; *United States* v. *Winona & St. P. R. R. Co.*, 67 Fed. Rep. 954; *Wallace* v. *Adams*, 143 Fed. Rep. 720; aff'd 204 U. S. 415.

Mr. Jerre P. O'Meara, with whom *Mr. James A. Veasey* was on the brief, for defendant in error:

The findings of fact contained in the decision of the Secretary of the Interior are conclusive upon this court.

The Secretary of the Interior committed no errors of law in the decision sought to be avoided by plaintiffs in error. See *Vance* v. *Burbank*, 101 U. S. 514; *Quinby* v. *Conlan*, 104 U. S. 420; *Gonzales* v. *French*, 164 U. S. 338; *Greenameyer* v. *Coate*, 212 U. S. 434; *Baldwin* v. *Starks*, 107 U. S. 463; *Shepley* v. *Cowan*, 91 U. S. 330; *Ross* v. *Stewart*, 227 U. S. 530; *United States* v. *Throckmorton*, 98 U. S. 61; *Moore* v. *Robbins*, 96 U. S. 530; 32 Stat. 716.

Mr. Justice Pitney delivered the opinion of the court.

This action was brought by the present plaintiffs in error for the purpose of obtaining a decree declaring the defendant in error to be a trustee for the plaintiffs with respect to the title to certain lands in the Cherokee Nation (a tract of twenty acres, and a separate tract of ten acres within the same quarter-section), that were allotted to defendant in error under the act of July 1, 1902, 32 Stat. 716, c. 1375. The decision of the Oklahoma Supreme Court in favor of the latter is reported in 29 Oklahoma, 186.

Plaintiffs are citizens by blood of the Cherokee Nation, and entitled to allotments under § 11 of the act; defendant is a registered Delaware, entitled to allotment under § 23. Defendant filed applications in the Cherokee Land Office for the lands in controversy on May 5, 1904, and they were set apart to him as portions of his allotment selection. Later, and on July 1 in the same year, the plaintiff, Robert B. Ross, appeared at the Land Office and made application for the same lands, a portion to be set apart to himself and a portion for his wife. These applications being refused because the lands had already been selected by defendant, plaintiffs immediately brought contests, which were consolidated and heard together by

the Commissioner to the Five Civilized Tribes, and he decided in favor of contestants. Upon appeal to the Commissioner of Indian Affairs this decision was affirmed. But upon a further appeal to the Secretary of the Interior there was a decision against the plaintiffs and in favor of defendant. The contests were based upon the same alleged equity upon which the present action is founded; that is, contestants, admitting the prior allotments to contestee, insisted that his application was subject to their prior right of selection upon the ground that they were the owners of improvements that were upon the property at the time contestee entered upon it. The question turns upon the effect of § 11 of the act of July 1, 1902, 32 Stat., p. 717, already referred to, which reads as follows: "There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, *which land may be selected by each allottee so as to include his improvements.*"

The findings of the Secretary were as follows: That the lands in question were claimed prior to 1902 by a firm of Johnstone & Keeler, Cherokee citizens, and constituted portions of a large tract which was at one time wholly or partially inclosed by wire fence; that the members of the firm divided their holdings between them, and Keeler took that part which included the lands in contest; that on November 1, 1902, Keeler transferred his possessory interest in this land, with the improvements thereon, to the contestants by bill of sale; but at this time the fencing was pretty well down, and the land contained no improvements of material value, except that about one and a half

acres were under cultivation by one Bixler, a non-citizen who farmed adjacent lands, but whose improvement was not to be credited to contestants; that contestants did nothing in the way of placing improvements upon the property until March 1, 1904, when their son, Dr. Ross, visited the land, and, with the assistance of a surveyor and two other persons, located the lines, and indicated them by setting posts or stakes; that these posts were cut and set by two men in about five hours; that some of the posts were about the size of a man's arm, and others were mere stakes or poles; that they were placed from 50 to 100 feet apart, except at the corners, where five posts were set in comparative proximity; the posts bounding the tracts were not joined, by wire or otherwise, so as to make a connected fence; and no further act of improvement or occupation was done in behalf of the contestants. That, on the other hand, the contestee, who had lived in the neighborhood of the land for about thirty years and claimed to have cut timber, posts, and fuel upon it for twenty-five years past, when he learned on March 1, 1904, of the efforts made by Dr. Ross and his party to survey and inclose it, immediately purchased the necessary wire and proceeded to fence the property, cutting a part of the posts and buying part; that, he being assisted by his son, the work required about two and a half days; that in constructing this fence two wires were used for the greater part of its length, and the controverted tracts were substantially inclosed; that after thus fencing the land, and before filing thereon, he erected a three-room house at a cost of about $250 upon one of the tracts, and immediately took up his residence therein.

The Secretary of the Interior concluded that the fences upon the tracts in question at the time of the alleged purchase by the plaintiffs from Keeler were not of sufficient consequence or value in connection with the land to be entitled to be classed as improvements; that the

posts established by Dr. Ross, March 1, 1904, did not constitute a lawful improvement, but were merely set for the purpose of marking or defining a prospective allotment; and further, that the improvements erected by contestee, while built possibly later than the former, were of material value to the land, and also that contestee actually entered into possession.

The contention of the plaintiffs in error here, as in the court below, is that under the laws of the Cherokee Nation and the act of Congress they acquired the right of possession of the lands in controversy by virtue of the bill of sale from Keeler, dated November 1, 1902, and thereby succeeded to the same right to allot these lands that Keeler had before; that this right was made exclusive by what was done on March 1, 1904, looking to the placing of improvements upon the tracts; that this was sufficient to give notice to other citizens of the Cherokee Nation of the intention of plaintiffs to locate the lands, and that defendant was present at the time and had actual notice of the work done by Dr. Ross. Reference is made to the constitution of the Cherokee Nation, Art. I, § 2, and to its laws (1892), §§ 706, 761, and 762. It will not be necessary to recite them at length, because all that is claimed with respect to their effect upon the present controversy was conceded or assumed in the decision of the Secretary of the Interior; that is, that citizens of the Cherokee Nation might improve portions of the public domain within the Nation, and thereby establish a prior right to the possession of the improved lands, which right might be transferred to another citizen by a sale of the improvements. The Secretary evidently construed § 11 of the act of Congress of July 1, 1902, as recognizing and confirming this right. But he held that no valuable interest was acquired by plaintiffs under the purchase from Keeler because Keeler owned no improvements of material value. He found plaintiffs were not entitled to credit for the

small improvement of the non-citizen Bixler, and there is nothing before us to show that the Keeler bill of sale included the Bixler improvements, or that Bixler held as tenant either of Keeler or of plaintiffs. And he held in effect that the question of the sufficiency of what was done by contestants on March 1, 1904, depended not upon whether it was sufficient to give notice to contestee, but whether it was sufficient to constitute an improvement within the meaning of the act of Congress. And so the whole controversy in effect depended upon whether the allotment to defendant was in accord with the ownership of the actual improvements upon the land, and the fact respecting the improvements was the principal matter to be determined in the contest proceedings, wherein the final appeal was to the Secretary of the Interior.

In order to obviate the established rule that the decisions of the Executive Departments in matters confided to them by the acts of Congress are not to be disturbed by the courts unless there be allegations of fraud raised in the pleadings and established at the trial, it is contended that this rule extends only to findings upon mere questions of fact, and that the decision of the Secretary of the Interior upon the contest here in question was based solely upon an erroneous conclusion of law.

But, in our opinion, whether plaintiffs had improved the lands in such sense as to give them a preferential right under the statute was not a mere question of law, but rather a mixed question of law and fact. So far as it involved an appreciation of the term "improvements," as employed in the statute, it was a question of law; so far as it involved the drawing of correct inferences from the evidence it was a question of fact. At best, it was a close question, about which reasonable men might well differ.

In *Whitcomb* v. *White*, 214 U. S. 15, 16, this court, speaking by Mr. Justice Brewer, said: "The decision of the

Land Department was not rested solely upon the fact that White's formal application was filed a few hours before that of the trustee for the occupants of the townsite, but rather chiefly upon the priority of the former's equitable rights. So far as such decision involves questions of fact it is conclusive upon the courts [citing cases]. And this rule is applied in cases where there is a mixed question of law and fact, unless the court is able to so separate the question as to see clearly what and where the mistake of law is. As said by Mr. Justice Miller in *Marquez* v. *Frisbie, supra* [101 U. S. 473], p. 476: 'This means, and it is a sound principle, that where there is a mixed question of law and of fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive.'" And see *Moore* v. *Robbins*, 96 U. S. 530, 535; *Quinby* v. *Conlan*, 104 U. S. 420, 426; *Gonzales* v. *French*, 164 U. S. 338.

There being no fraud, and no clear mistake of law in the decision of the Secretary of the Interior, his findings are conclusive upon the parties in the present controversy.

Judgment affirmed.

BARNES *v.* ALEXANDER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 109. Submitted December 1, 1913.—Decided January 12, 1914.

Where the remarks in the opinion are not necessary to the decision, which was placed mainly on other grounds, and are contrary to an earlier decision, this court is at least warranted in treating the question as at large.

Although it might be its duty to do so, it would be a strong thing for

this court to decide that there was nothing to warrant a conclusion, whether of law or of fact, sanctioned by the highest court of a Territory that has since become a State, upon a matter no longer subject to review here. *Phœnix Ry.* v. *Landis*, 231 U. S. 578.

An informal business transaction should be construed as adopting whatever form consistent with the facts as is most fitted to reach the result seemingly desired. *Sexton* v. *Kessler*, 225 U. S. 90.

It is an ancient principle even of the common law that words of covenant may be construed as a grant when they concern a present right.

In equity, a contract to convey a specific object even before it is acquired will make a contractor a trustee as soon as he gets title thereto.

An obligation to pay, but definitely limited to payment out of the fund, creates a lien. There should be but one rule in this respect and that is the one suggested by plain good sense.

Where parties have a lien on a fund they can follow it, as soon as identified, into the hands of others than the person originally receiving it. On this point this court follows the territorial court.

In this case *held* that parties promised for a consideration a definite portion of a contingent fee if earned had a lien thereon when received by the promisor that they could follow and enforce.

13 Arizona, 338, affirmed.

THE facts, which involve the validity of a judgment obtained by the defendants in error against the plaintiff in error in the courts of the Territory of Arizona, are stated in the opinion.

Mr. Eugene S. Ives for appellants.

Mr. J. L. B. Alexander, Mr. W. M. Seabury, Mr. Aldis B. Browne, Mr. Alexander Britton and *Mr. Evans Browne* for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

The proceeding out of which this case arises was brought by the appellant Mrs. Barnes, for an account of the prop-

erty received in settlement of certain mining suits and for a recovery of one-fourth of the same. The defendants, Shattuck, Hanninger and Marks, were parties to these suits and employed as their attorneys the firm of Barnes and Martin and one O'Connell under an agreement that the lawyers should have as their compensation one-fourth of all that was received by the said defendants. It may be assumed that Mrs. Barnes represented this claim. While the present suit was pending another firm, whose claim now is represented by the appellees, intervened and claimed one-third of this contingent fee of one-fourth. At the trial it appeared that the original defendants had paid to O'Connell the amount due; $18,750. Pending the suit O'Connell paid over $10,625 of this to Mrs. Barnes, retaining $6250, and paying Martin, the junior member of the firm of Barnes and Martin, $1875. The court entered no decree against the original defendants but did decree that Mrs. Barnes was liable to the appellees for $6250, being one-third of the contingent fee. She appealed to the Supreme Court of the Territory, but it affirmed the judgment below. *Barnes* v. *Shattuck,* 13 Arizona, 338. The other two appellants in this court are the sureties on her supersedeas bond.

The main question is whether the facts set forth in the findings certified justify the conclusion of the courts below. The whole matter rests on conversations, in one of which Barnes said to Street and Alexander 'if you will attend to this case I will give you one third of the fee which I have coming to me on a contingent fee from Shattuck, Hanninger and Marks. Mr. O'Connell, who is associated with me, is entitled to the other third.' In others also he explained what his firm was to have and told Street and Alexander that they should get one-third of that if they would do certain work that he had not time to attend to. Street and Alexander did the work required, it does not matter whether it was more or less;—there

was some attempt to raise a question about the fact, but we regard it as beyond dispute. The only serious argument is that, whatever they did, their compensation depended upon a personal promise that gave them no specific claim against the fund. For this proposition reliance is placed upon *Trist* v. *Child*, 21 Wall. 441. In that case Child had an agreement with Trist that Child should take charge of a claim of Trist before Congress and should receive twenty-five per cent. of whatever sum Congress might allow. The suit alleged a lien on the sum allowed and prayed that Trist might be enjoined from withdrawing the money from the Treasury and might be decreed to pay the amount due. The bill was dismissed on the ground that the contract was illegal, but it was added that Child had no lien because it was forbidden by act of Congress, and also, it was said, because there was no sufficient appropriation of the fund, so that the only remedy, if there had been one, would have been at law. (*Wright* v. *Ellison*, 1 Wall. 16; *Christmas* v. *Russell*, 14 Wall. 69.) This decision, so far as it concerns us here, seems to have overlooked *Wylie* v. *Coxe*, 15 How. 415, which decided that a contract for a contingent fee out of a fund awarded constituted a lien upon the fund. The remarks in *Trist* v. *Child* were not necessary to the decision which was placed mainly on other grounds, so that at least we are warranted in treating the question as at large.

It would be a strong thing to decide that there was nothing to warrant the conclusion, whether of law or fact, sanctioned by the highest court of a Territory that since has become a State, upon a matter no longer subject to review by us. See *Phoenix Ry. Co.* v. *Landis*, 231 U. S. 578. But it might be our duty and we pass that consideration by. We start, however, with the principle that an informal business transaction should be construed as adopting whatever form consistent with the facts is most fitted to reach the result seemingly desired. *Sexton* v.

Kessler, 225 U. S. 90, 96, 97. Obviously the only thing intended or desired was to give the appellees a claim to one-third of the fund received by Barnes if and when he should receive it. It is true that there was in a sense a *res* as to which present words of transfer might have been used. There was a right vested in Barnes unless discharged to try to earn a fee contingent upon success. But in a speculation of this sort the parties naturally turned their eyes toward the future and aimed at the fruits when they should be gained. They therefore used words of contract rather than of conveyance; but the important thing is not whether they used the present or the future tense but the scope of the contract. In this case it aimed only at the fund. Barnes gave no general promise of reward; he did not even give a promise qualified and measured by success to pay anything out of his own property, referring to the fund simply as the means that would enable him to do it. See *National City Bank* v. *Hotchkiss*, 231 U. S. 50, 57. He promised only that if, when and as soon as he should receive an identified fund one-third of it should go to the appellees. But he promised that. At the latest, the moment the fund was received the contract attached to it as if made at that moment. It is an ancient principle even of the common law that words of covenant may be construed as a grant when they concern a present right. *Sharington* v. *Strotton*, Plowden, 298, 308. *Hogan* v. *Barry*, 143 Massachusetts, 538. *Ladd* v. *Boston*, 151 Massachusetts, 585, 588. And it is one of the familiar rules of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing. *Mornington* v. *Keane*, 2 DeG. & J. 292, 313. *Holroyd* v. *Marshall*, 10 H. L. C. 191, 211.

The obligation of Barnes was as definitely limited to payment out of the fund as if the limitation had been stated in words, and therefore creates a lien upon the

principle not only of *Wylie* v. *Coxe, supra,* but of *Ingersoll* v. *Coram,* 211 U. S. 335, 365–368, which cites it and later cases. See further to the same point, *Burn* v. *Carvalho,* 4 My. & Cr. 690, 702, 703. *Rodick* v. *Gandell,* 1 DeG., M. & G. 763, 777, 778. *Harwood* v. *La Grange,* 137 N. Y. 538, 540. It is suggested that there is an American doctrine opposed to that which is established in England. We know of no such opposition. There is or ought to be but one rule, that suggested by plain good sense.

After making their contracts the parties seem to have construed them as we have done. Barnes wrote to his partner, when they had succeeded in the cases concerned, in terms showing that he regarded their own claim as specific, 'to have one-fourth of the ground,' the principle on which this suit was brought; and when a settlement was to be made he went to Phoenix and notified Street and Alexander. For the same reason the latter firm filed no claim against the estate of Barnes, thinking that it owed them nothing but that they had one-third of the contingent fee. It is not necessary to consider whether the lien attached to what we have called the *res,* before the fund was received, as a covenant to set apart rents and profits creates a lien upon the land. *Legard* v. *Hodges,* 1 Ves., Jr. 477. It is enough that it attached not later than that moment.—We have considered the case upon the merits. The argument upon them for the appellants is mixed with others as to the sufficiency of the complaint in intervention. Upon the point of pleading we see no occasion to go behind the decision below. *Phoenix Ry. Co.* v. *Landis,* 231 U. S. 578.

Another matter argued is that the appellees should not have been allowed to prove the payment made after the suit was begun. But the appellees properly were allowed to intervene in a suit to recover the fund. Rev. Stat. Arizona, 1901, § 1278. *London, Paris & American Bank* v. *Abrams,* 6 Arizona, 87, 90; *Louisville, Evansville & St.*

Louis R. R. Co. v. *Wilson,* 138 U. S. 501. Even if their lien was only inchoate when the suit was begun, which we do not intimate, they had a right to protect their interest and of course were not deprived of it by the plaintiff's reaching the result that they also desired. Having a lien upon the fund, as soon as it was identified they could follow it into the hands of the appellant Barnes. On this point also we shall go into no question of pleading or procedure but shall accept the decision of the territorial Supreme Court.

The only remaining objection that seems to us to need a word of answer, is that as Mrs. Barnes only received $10,625, she should not have been charged with the whole third, $6,250. As the lien of the appellees attached to the whole two-thirds of the quarter remaining to Barnes and Martin after taking out O'Connell's third, we do not see on what ground she could complain, if the objection is open. It seems probable that it is only an after thought of counsel and that the sum retained by Martin was what would come to him after deducting the share of Street and Alexander's fee that properly fell upon him as between him and his former partner's estate.

Judgment affirmed.

CAIN *v.* COMMERCIAL PUBLISHING COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

No. 797. Submitted January 6, 1914.—Decided January 19, 1914.

Revolutions in the practice and efficacy of the right of removal of causes from the state to the Federal court will not lightly be presumed; and so *held* that the modification of the prior law and practice by the Judicial Code did not take from the Federal Court the power it has necessarily possessed to pass not only upon the merits of the case, but also upon the validity of the process on the question of jurisdiction over the person of the defendant.

Prior to the adoption of the Judicial Code it was settled that:

The right and the procedure of removal of causes are to be determined by the Federal law, *Goldey* v. *Morning News*, 156 U. S. 518; neither the legislature nor the judiciary of a State can limit either the right or its effect. *Id.*

The Federal court has jurisdiction according to the Constitution and laws of the United States. *Id.*

A suit must be actually pending in the state court before it can be removed; but its removal is not an admission that it was rightfully pending and that defendant can be compelled to answer. *Id.*

After removal defendant can avail in the Federal court of every reserved defense, to be pleaded in the same manner as though the action had been originally commenced in the Federal court. *Id.*

Exercising the right of removal and filing the petition does not amount to a general appearance.

These rules have not been altered by the adoption of §§ 29 and 38 of the Judicial Code.

The word "plead" in § 29 Judicial Code includes a plea to the jurisdiction.

Under the Conformity Act, § 914, Rev. Stat., a special appearance in a case removed to the Federal court from the state court of Mississippi does not become a general appearance because of the provisions to that effect in § 3946, Mississippi Code of 1906.

THE facts, which involve the construction and effect of §§ 29 and 38 of the Judicial Code, are stated in the opinion.

Mr. Marcellus Green, Mr. Garner W. Green and *Mr. Marcellus Green, Jr.*, for plaintiff in error:

This court has jurisdiction of this writ of error. Judicial Code, § 238; *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437; *Davis* v. *Cleveland*, 217 U. S. 157.

Proceedings for removal are wholly the creature of statute, and the amendment of the Removal Acts (25 Stat. 433, §§ 108, 109, 110, 1 Desty's Fed. Pro., 9th ed.) by §§ 29, 38, Judicial Code, made the filing of a petition for removal a general entry of appearance, and require the party removing to plead or demur to the declaration, within thirty days after filing a copy of the record in the Federal court; and thereby, also, a plea to the jurisdiction of the court for want of proper service of the writ of summons in the state court was abolished.

The words, "plead, answer or demur to the declaration" cover both common law, code and equity proceedings, and mean a plea or demurrer to the declaration, and not one in abatement to the service of the writ.

A plea in abatement to the jurisdiction for want of service is a plea to the writ and not one to the declaration. *Thornton* v. *Fitzhugh*, 10 S. & M. (Miss.) 438; *United States* v. *Bell Tel. Co.*, 29 Fed. Rep. 17; *Chamberlain* v. *Lake*, 36 Maine, 388.

If the defect appears upon the face of the record a motion to dismiss the suit for want of service of the writ is a proper remedy. *Wabash Ry. Co.* v. *Brow*, 164 U. S. 280; *Goldey* v. *Morning News*, 156 U. S. 518.

The evils of delay and expense in the proceedings in removed causes, under the former Removal Acts, had grown up, and the amendment by Judicial Code, §§ 29, 38, was to expedite and compel a speedy hearing on the merits, and to abolish delay in removal proceedings under the practice theretofore prevailing, whereby a party could appear, either generally or specially, in his petition to remove (*Wabash Ry. Co.* v. *Brow, supra; Goldey* v. *Morning*

News, supra) in answer to the service of the summons, and apparently be in court and file his petition for removal on the ground of diverse citizenship, and thus defeat a speedy trial in the state court and then, after much delay, upon removal, defeat a trial in the United States court on the ground that the special appearance did not give jurisdiction.

The Statutes of Pleading, Practice and Procedure of Mississippi constitute a part of the jurisprudence of the United States courts when not in conflict therewith, and under § 3946, Code Miss. 1906, the filing of the petition for removal in the state court, even though a special entry of appearance, constituted a general entry of appearance, and upon removal, under §§ 29, 38 of Judicial Code, the defendant was compelled to plead to the declaration within thirty days after the filing of the record. Section 914, Rev. Stats.; *Boston & M. R. R. Co.* v. *Gokey*, 210 U. S. 155, 162; *Ia. Cent. R. R. Co.* v. *Hampton &c. Co.*, 204 Fed. Rep. 966.

A special is a general entry of appearance under § 3946, Code of 1906. *I. C. R. R. Co.* v. *Swanson*, 92 Mississippi, 485, 492. See also *York* v. *Texas*, 137 U. S. 15.

This Texas statute conflicted with the express provisions of the Federal statutes, especially as to the venue of the jurisdiction in the Federal court, and the Federal statutes were held to prevail, but only to the extent of the conflict. *Sou. Pac. Ry. Co.* v. *Denton*, 146 U. S. 202; *Galveston &c. Ry. Co.* v. *Gonzales*, 151 U. S. 496.

The rule followed in *Wabash Railway Co.* v. *Brow*, 164 U. S. *supra*, and *Goldey* v. *Morning News*, 156 U. S. *supra*, obtained in States other than those in which a statute like § 3946 of the Code of 1906 prevailed, and are distinguishable because of this fact, as well as because they arose before the amendment by the Judicial Code.

Mr. Luke E. Wright, Mr. Lovick P. Miles, Mr. Roane Waring and *Mr. Sam. P. Walker* for defendant in error:

The construction of the Judicial Code insisted upon by plaintiff in error would not only be in conflict with the express language of § 38 of that Code, but would overrule a long established practice and destroy a great right which, by repeated decisions of the Supreme Court of the United States, has become fixed in our people. *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 439; *Wabash West'n Ry.* v. *Brow*, 164 U. S. 271, 278; *Goldey* v. *Morning News*, 156 U. S. 518.

Prior to the Judicial Code, the right to plead to the jurisdiction of the court, and to have reversal in the Supreme Court of the United States for error in ruling upon such plea, was recognized and guarded carefully by Federal statutes. Sections 1011, Revised Statutes, as corrected by act of February 18, 1875, c. 80; act of February 25, 1889, 25 Stat. 693, c. 236; act of March 3, 1891, 26 Stat. 826, 827, c. 517; Court of Appeals Act of 1891, as amended in 1897.

It has been expressly recognized that just such plea to the jurisdiction as was filed in the instant case, raised a question of jurisdiction reviewable by the Supreme Court of the United States. *Remington* v. *Central Pac. R. Co.*, 198 U. S. 95; *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 440.

The statutes of Mississippi and the decisions of its courts are not conclusive upon Federal courts in determining whether the defendant was suable in the State of Mississippi, or whether the parties served were persons upon whom service of summons could be had, so as to give jurisdiction of the defendant. Nor would any statute of Mississippi give jurisdiction where facts necessary to give a Federal court jurisdiction did not exist. *Mechanical Appliance Co.* v. *Castleman, supra.* See also *Peterson* v. *Chicago, R. I. & Pac. Ry. Co.*, 205 U. S. 364; *Green* v. *C., B. & Q. Ry. Co.*, 205 U. S. 530; *Wold* v. *Colt Co.*, 114 N. W. Rep. (Minn.) 243.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action for libel brought in the Circuit Court of Hinds County, First District, State of Mississippi. Plaintiff in error, as he was plaintiff in the action we will so refer to him, alleged himself to be a citizen of the State of Mississippi, that defendant in error, Commercial Publishing Company, referred to herein as defendant, published a libel against him in its "newspaper called the Commercial Appeal in the City of Memphis, State of Tennessee, but that the said Commercial Appeal has a large circulation throughout the State of Mississippi and all adjoining States and among foreign cities and also in foreign countries." $10,000 actual damages were prayed and $10,000 punitive damages.

Summons was issued and returned served by the sheriff of the county, as: "Executed personally on the Commercial Publishing Company" by delivering a copy to E. K. Williams, described as "its agent, at Jackson, Miss.," and to A. C. Walthall, described as "its correspondent, at Jackson, Mississippi."

Defendant filed a petition for removal of the action to the District Court of the United States, which petition stated the nature of the action, that plaintiff was a resident and citizen of Mississippi, that defendant was a corporation chartered under and by virtue of the laws of Tennessee, that the time for answering or pleading to the declaration had not expired, that defendant had not appeared therein and that defendant appeared only specially and for the sole purpose of requesting the removal of the cause to the District Court of the United States, and that it did not waive any objections or exceptions to the jurisdiction. A bond as required by law was duly given, which was approved, and an order of removal was duly made. The copy of the record was duly filed in the

District Court of the United States. The defendant then filed in the latter court a plea to the jurisdiction over the person of defendant, appearing specially for that purpose. The plea alleged that the state court had not acquired jurisdiction of the defendant, because (a) it was a corporation of the State of Tennessee, and that it had never taken out a license to do business in Mississippi, nor, at the time of the service of the summons, did it have an agent, office or place of business in Hinds County, State of Mississippi; (b) the persons upon whom service was made were neither agents nor officers of, nor in any relation to, defendant for the reason that defendant was not doing business in the State of Mississippi.

Plaintiff demurred to the plea, stating as grounds (1) that it was directed to the service of process and not to the declaration as required under § 29 of the Judicial Code; (2) no right exists to enter a special appearance in the Hinds County Circuit Court under the laws of the State of Mississippi, all appearances being general, even though process be invalidly served.

The demurrer was overruled and issue joined on the plea to the jurisdiction, and the court having heard the evidence decided that neither of the persons upon whom summons was served was such an agent of defendant that service upon him would give jurisdiction over the person of defendant, and thereupon found the issue for defendant.

Before judgment was entered plaintiff called up his motion for judgment for default because defendant had not pleaded or demurred to the declaration within thirty days after the filing of the copy of the record of removal as required by § 29 of the Judicial Code. The motion was overruled, the court reciting in its order that it was of "opinion that defendant was not required to plead or demur to the declaration unless the process of summons in the state court was duly served upon an agent of defend-

ant upon whom service of process was authorized to be made."

Judgment was then entered quashing the service of process and dismissing the action "without prejudice to the right of plaintiff to sue upon the causes of action set up in the declaration."

Plaintiff prayed a writ of error to this court upon the question of jurisdiction. It was allowed in open court, the court reciting that it was allowed on the question of jurisdiction only, the court having dismissed the action "on the sole question that the court had no jurisdiction of the action."

The question in the case is the simple one of what is the effect of §§ 29 and 38 of the Judicial Code. Section 29 provides for the filing of a petition for the removal of a suit from a state court to the District Court of the United States at any time before the defendant is required by the laws of the State to answer or plead, and the filing therewith of a bond for "entering in such District Court, within thirty days from the date of filing said petition, a certified copy of the record in such suit." It provides that, this being done, the state court shall accept the petition and bond and "proceed no further in such suit." It provides further that notice of the petition and bond shall be given to the adverse party and that "the said copy being entered within said thirty days as aforesaid in said District Court of the United States, the parties so removing the said cause shall within thirty days thereafter plead, answer or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said District Court."

Section 38 provides that the District Court in suits so removed shall "proceed therein as if the suit had been originally commenced in said District Court, and the same proceedings had been taken in such suit in said

District Court as shall have been had therein in said state court prior to its removal."

The argument is that these sections abolish the practice declared in *Goldey* v. *Morning News*, 156 U. S. 518, and *Wabash Railway Co.* v. *Brow*, 164 U. S. 271. In the former case the following propositions were laid down: (1) The right and procedure of removal of actions from a state court are to be determined by the Federal law. (2) The legislature or the judiciary of a State can neither defeat the right nor limit its effect. (3) The act of Congress by which the practice, pleadings, and forms and modes of proceeding in actions at law in the courts of the United States are required to conform as near as may be to those existing in the state courts applies only to cases of which the court has jurisdiction according to the Constitution and laws of the United States. (4) A suit must be actually pending in a state court before it can be removed, but its removal to the court of the United States does not admit that it was rightfully pending in the state court, or that the defendant could have been compelled to answer therein; but enables the defendant to avail himself in the United States court of any and every defense duly and seasonably reserved and pleaded to the action (p. 524) "'in the same manner as if it had been originally commenced in said circuit court.'" The words quoted, it will be observed, are repeated in § 29, "District Court" being substituted for "Circuit Court."

In *Wabash Railway Co.* v. *Brow*, 164 U. S. 271, 279, it is said, "By the exercise of the right of removal, the petitioner refuses to permit the state court to deal with the case in any way, because he prefers another forum to which the law gives him the right to resort. This may be said to challenge the jurisdiction of the state court, in the sense of declining to submit to it, and not necessarily otherwise.

"We are of opinion that the filing of a petition for

removal does not amount to a general appearance, but to a special appearance only."

Subsequent cases have applied this ruling. *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437, and cases cited therein.

It is contended, however, as we have seen, that §§ 29 and 38 of the Judicial Code have instituted a new and more expeditious practice. This is deduced from that part of § 29 which provides that the party desiring to remove a case shall make and file with his petition a bond for entering in the District Court within thirty days from the date of filing his petition a certified copy of the record, written notice thereof to be given the adverse party, and the copy of the record being so entered, "*the parties so removing the said cause shall, within thirty days thereafter, plead, answer or demur to the declaration or complaint in said cause. . . .*"

The purpose of these provisions, which are an amendment to the prior law, it is contended, is to expedite trials and preclude a defendant from preventing a speedy trial in the state court by removal proceedings and "then consume the time and expense and exercise of jurisdiction of the Federal court by invoking, by motion, the court's jurisdiction to dismiss the cause, and thus compel plaintiff to go upon a fool's errand." To prevent this consequence, it is further insisted, the record was required to be filed within thirty days from the date of filing the petition for removal, which, necessarily, it is said, would be in vacation, and that therefore the requirement that within thirty days after it is filed the defendant "shall plead, answer or demur to the declaration or complaint in said cause" necessarily means "a plea or demurrer to the declaration and cannot mean a plea in abatement to the service of the Writ."

It may be conceded that the purpose of the amendment was to secure expedition in the disposition of the

case, but a revolution in the practice and efficacy of the right of removal is not lightly to be inferred. And a revolution it would be. It would take from the Federal courts the power they have possessed under the cases cited, a power not only to pass upon the merits of the case but upon the validity of the service of process, that is, upon the question of jurisdiction over the person of the defendant. How essential this power is to the right of removal is obvious. Without it a State could prescribe any process or notice or a plaintiff, as in the pending case, serve process on a person having no relation with a defendant and compel him to submit to it and to a jurisdiction not of his residence, or give up his right to take the case to what in contemplation of law may be a more impartial tribunal for the determination of the action instituted against him and which it is the purpose of the removal proceedings to secure to him, and, it must be assumed, completely, not by surrender of any of his rights but in protection and security of all of them.

The weakness of plaintiff's contention is demonstrated not only when we consider all of the language of § 29, but the language of § 38, which provides that in all suits removed the District Court shall proceed therein as if the suit had been originally commenced in the District Court, "and the same proceedings had been taken in such suit in said District Court as shall have been had therein in said state court prior to its removal." In other words, the cause is transferred to the District Court as it stands in the state court and the defendant is enabled to avail himself in the latter court of any defenses and, within the time designated, plead to the action "in the same manner as if it had been originally commenced in said District Court." And these words, we have seen, were explicitly given such effect in the cited cases.

It is clear, therefore, that plaintiff gives too restrictive a meaning to the word "plead" in § 29. It must be con-

strued to include a plea to the jurisdiction, and, so construing it, all of the provisions for removal of causes become accordant and their purposes fulfilled—the right of a speedy disposition of the suit to the plaintiff and the right of the defendant to have all questions determined by the Federal tribunal.

Plaintiff further contends that under the Mississippi Code the filing of the petition for removal constitutes a general entry of appearance, that therefore, if § 29 does not compel the removing party to plead to the declaration within thirty days, "then, under § 914, Rev. Stat.; U. S. Comp. Stat. of 1901, p. 684, the 'practice, pleadings, forms and modes of proceeding' in the state court, adopted in the Federal court, would make the plea to the jurisdiction here in the District Court a general entry of appearance and would require a plea to the merits at the next term of the District Court under the Code of the State," because "a special is a general entry of appearance under § 3946, Code of 1906."

The contention is untenable. *Goldey* v. *Morning News*, and *Mechanical Appliance Co.* v. *Castleman, supra.*

Judgment affirmed.

BACON ET AL., PUBLIC SERVICE COMMISSION OF THE STATE OF VERMONT, *v.* RUTLAND RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

No. 760. Argued January 9, 1914.—Decided January 19, 1914.

Although the state statute may permit an appeal from an order of the state railroad commission to the Supreme Court of the State, if legislative powers have not been conferred upon that court, a rail-

road corporation is not obliged to take such an appeal in order to obtain relief from an order that violates the Federal Constitution. It may assert its rights at once in the Federal courts.

The constitution of Vermont does not confer legislative powers on the courts of that State, and the appeal given by §§ 4599 and 4600, Pub. Stat. of 1909, from orders of the state railroad commission to the Supreme Court is a purely judicial remedy.

Prentis v. *Atlantic Coast Line*, 211 U. S. 210, distinguished, as the Supreme Court of Virginia possesses legislative powers enabling it not only to review the state railroad commission but to substitute such order as in its opinion the commission should have made.

THE facts, which involve the validity of an order concerning a passenger station made by the Public Service Commission of Vermont, are stated in the opinion.

Mr. Frederic D. McKenney, with whom *Mr. John Spalding Flannery*, *Mr. William Hitz*, and *Mr. Robert C. Bacon* were on the brief, for appellants:

Without differentiating in the constitutional sense between the powers and duties of administrative bodies engaged in the regulation of common carriers, when establishing a tariff of rates for the future, and when condemning in the interest of the public safety and convenience existing facilities and requiring the installation of improved or additional accommodation, the principles expounded in *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, are not only applicable to, but should control the disposition of, this case.

As in that case, so in this, the order complained of confiscates complainant's property and infringes the Fourteenth Amendment.

In Vermont the Public Service Commission is established and its powers are defined at length by the public statutes of the State, while in Virginia the State Corporation Commission was established and its powers are defined by the constitution of the State. Both Commissions are "courts" within the meaning of Rev. Stat., § 720,

—but whether in the commonly accepted sense of that word does not matter.

The statutory powers of the Vermont Commission with respect to the establishment and maintenance by railroad companies doing business in that State of public transportation service facilities and conveniences, are at least equal to those conferred upon the Virginia Commission.

When a State by appropriate legislation sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned, and it is unnecessary in the present case to determine whether the appellants here when making the order complained of by the appellee were exercising legislative or judicial powers.

In this case, as in the *Prentis Case*, the aggrieved party was possessed of the uncontradicted and undeniable right of appeal and in the instant case, as was there ruled, that right should have been availed of by the aggrieved corporation so as to make it absolutely certain that the officials of the State would try to establish and enforce an unconstitutional rule before resort was had to the Federal District Court to tie the hands and cripple the powers of the State Commission.

Mr. Edwin W. Lawrence for appellee.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill in Equity brought by the appellee, the Railroad Company, to restrain the Public Service Commission of Vermont from enforcing an order concerning a passenger station of the Company at Vergennes. The order is alleged to violate the Fourteenth Amendment. The Commission moved to dismiss the bill on the ground that until the appellee had taken the appeal from the order to the Supreme Court of the State that is provided

for by Pub. Stat. Vt. 1906, §§ 4599, 4600, it ought not to be heard to complain elsewhere. The motion was overruled and the defendants not desiring to plead an injunction was issued as prayed.

The defendants rely upon *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 229, 230. The ground of that decision was that by the state constitution an appeal to the Supreme Court of Appeals from an order of the State Corporation Commission fixing rates was granted, with power to the court to substitute such order as in its opinion the Commission should have made. The court was given legislative powers, and it was held that in the circumstances it was proper, before resorting to the Circuit Court of the United States, to make sure that the officials of the State would try to establish an unconstitutional rule. But it was laid down expressly that at the judicial stage the railroads had a right to resort to the courts of the United States at once. p. 228. Therefore before that case can apply it must be established at least that legislative powers are conferred upon the Supreme Court of the State of Vermont.

The appeal in Vermont is given by statute, not by the Constitution, which separates legislative, executive and judicial powers. c. 2, § 6. The material provisions are as follows: § 4599. "Any party to a cause who feels himself aggrieved by the final order, judgment or decree of said board shall have the right to take the cause to the supreme court by appeal, for the correction of any errors excepted to in its proceedings, or in the form or substance of its orders, judgments and decrees, on the facts found and reported by said board." By § 4600 appeals are to be taken in the manner and under the laws and rules of procedure that govern appeals from the court of chancery. "The Supreme Court shall have the same power therein as it has over appeals from such court. It may reverse or affirm the judgments, orders or decrees of said board,

and may remand a cause to said board with such mandates as law or equity shall require; and said board shall enter judgment, order or decree in accordance with such mandates." Pub. Stats. 1906. It is apparent on the face of these sections that they do not attempt to confer legislative powers upon the court. They only provide an alternative and more expeditious way of doing what might be done by a bill in equity. Whether the alternative is exclusive or concurrent, whether it opens matters that would not be open upon a bill or not, if exceptions are taken (which does not appear in this case), is immaterial; the remedy in any event is purely judicial: to exonerate the appellant from an order that exceeds the law. This, we understand, is the view taken by the Supreme Court of the State, *Bacon* v. *Boston & Maine R. R.*, 83 Vermont, 421, 457; *Sabre* v. *Rutland R. R. Co.*, 86 Vermont, 347, 368, 369, and this being so, by the rule laid down in *Prentis* v. *Atlantic Coast Line Co.*, the railroad company was free to assert its rights in the District Court of the United States.

Decree affirmed.

PATSONE *v.* COMMONWEALTH OF PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

No. 38. Argued November 4, 1913.—Decided January 19, 1914.

The act of May 8, 1909, of Pennsylvania, making it unlawful for unnaturalized foreign born residents to kill wild game except in defence of person or property and to that end making the possession of shot guns and rifles unlawful, is not unconstitutional under the due process and equal protection provisions of the Fourteenth Amendment.

A State may protect its wild game and preserve it for its own citizens. *Geer* v. *Connecticut*, 161 U. S. 519.

A State may classify with reference to the evil to be prevented.

The determination of the class from which an evil is mainly to be feared and specialized in the legislation is a practical one dependent upon experience; and this court is slow to declare that the state legislature is wrong in its facts. *Adams v. Milwaukee*, 228 U. S. 572.

A State may direct its police regulations against what it deems the evil as it actually exists without covering the whole field of possible abuse. *Central Lumber Co.* v. *South Dakota*, 227 U. S. 157.

The provisions in Article II of the treaty with Italy, giving citizens of Italy the right to carry on trade on the same terms as natives of this country, and provisions in the treaty with Switzerland, applicable to citizens of Italy under the favored nation clause in Article XXIV of the treaty with Italy, relate to trade, and are not applicable to personal use of firearms; and a state statute protecting wild game and prohibiting aliens from owning shot guns and rifles is not incompatible with or violative of such treaty provisions.

Quære, and not to be decided on this record, whether the statute in this case can be construed as precluding an alien from possessing a stock of guns for purposes of trade and whether in that event it would violate rights under the treaty with Italy of 1871.

Equality of rights assured to citizens of Italy under the treaty of 1871 is that of protection and security for persons and property and nothing in that treaty purports or attempts to prevent a State from exercising its power for preservation of wild game for its own citizens.

231 Pa. St. 46, affirmed.

THE facts, which involve the constitutionality of the wild game statute of Pennsylvania making it unlawful for any unnaturalized foreign born resident to kill wild birds or animals and the validity of such statute as applied to an Italian citizen in view of the treaty with Italy, are stated in the opinion.

Mr. Marcel Viti for plaintiff in error:

The statute violates the Fourteenth Amendment. It deprives persons of liberty and property without due process of law. *Barbier* v. *Connolly*, 113 U. S. 27; *Mugler* v. *Kansas*, 123 U. S. 623, 661.

While the legislature may have authority to declare unlawful property which is innocent in itself, yet such power must not be exercised in such a way as to infringe fundamental rights to a greater extent than is absolutely necessary for the accomplishment of the legal purpose in view. Neither *Lawton* v. *Steele*, 152 U. S. 133, nor *Geer* v. *Connecticut*, control this case.

The cases of *People* v. *West*, 106 N. Y. 293, 297; *Osborn* v. *Charlevoix*, 114 Michigan, 655; *Luck* v. *Sears*, 29 Oregon, 421; *State* v. *Lewis*, 134 Indiana, 250; *McConnell* v. *McKillip*, 71 Nebraska, 712, can all be distinguished.

A State may forbid absolutely the possession of game within its borders because the individual only acquires therein a qualified right of property; it may also forbid the possession of articles which are not adapted to any but an unlawful use and may confiscate articles actually put to an illegal use or found under circumstances, from which it must necessarily be inferred that such articles had been or were about to be used for an illegal purpose.

Under the terms of the present act the mere possession of property, innocent in itself, and having lawful uses, is made an offence apart from its being used unlawfully and its forfeiture is fixed as part of the penalty.

The legislature cannot provide that implements which are susceptible of beneficial use and which have not been perverted to an unlawful use, be summarily abated or declared forfeited after a hearing, as part of a penalty for the offence of having them in possession.

Shot guns and rifles are articles of property not harmful in themselves, necessary for legitimate uses, and there is no manifest necessity to forbid their possession in order to prevent aliens from hunting game.

The State has not the right to confiscate such property under such circumstances and without a hearing at which he can offer a defence.

The possession of property harmless in itself and which is necessary for lawful purposes cannot be prohibited and the property itself confiscated merely because it is also capable of being put to an illegal use.

The equal protection provisions of the Fourteenth Amendment are violated by the act. It forbids the possession of shot guns and rifles by resident aliens alone, thus depriving them of efficient and essential instruments for protection of person and property. It provides for the confiscation of valuable, innocent property when owned by aliens, notwithstanding that it has never been put to any illegal use. It singles out a class for discriminating and hostile legislation. *Duncan* v. *Missouri*, 152 U. S. 377, 382; *Missouri* v. *Lewis*, 101 U. S. 22, 31.

There is a further discrimination against resident aliens as distinguished from non-resident aliens, as the latter are apparently allowed to possess shot guns and rifles, and use them within the State for the purpose of hunting game for periods of ten days, subject only to the general game laws of the State. *Plessy* v. *Ferguson*, 163 U. S. 530, 537; *State* v. *Montgomery*, 94 Maine, 192; *Templar* v. *Barbers' Board*, 131 Michigan, 254.

These inequalities cannot be justified on the ground of proper classification; see *Railway* v. *Ellis*, 165 U. S. 150, 155; *Yick Wo.* v. *Hopkins*, 118 U. S. 356, 369.

The statute contravenes the existing treaty between the United States and Italy of 1871; see Arts. II, III, 17 Stat. 845; and under the favored nation clause, Art. XXIV of that treaty, this statute also violates the provisions of the treaty with Switzerland of 1855, 9 Stat. 597, putting citizens on a footing of reciprocal equality. By this statute an Italian farmer in Pennsylvania cannot protect his property from birds and dogs even though wild and subject to be killed by citizens. See *In re Marshall*, 102 Fed. Rep. 325.

The wording of the treaty is plain and shows that the

contracting parties intended that their subjects should at least enjoy in the territory of each other the same liberty of carrying on trade and protection and security of their persons and property as natives under like conditions. *Maiorano* v. *Balt. & Ohio R. R. Co.*, 213 U. S. 268; *Crowley* v. *Christianson*, 137 U. S. 91.

The terms of the act are not limited to any class or nationality whatsoever. An alien merchant or manufacturer who may have spent most of his life in Pennsylvania, adding to its wealth as well as his own, not only may not shoot game, upon his own land, which has been held a right of property in *State* v. *Mallory*, 73 Arkansas, 236, but he is not allowed the possession of a shot gun or rifle upon such property for the protection thereof or for use in hunting game in other States where he might lawfully shoot under regulations applying to non-resident aliens.

No State may prohibit the possession of any lawful article of trade and commerce to Italian subjects and at the same time allow its possession by natives without violating the quoted treaty provisions.

In addition to violating the Italian treaty the act violates the treaty with Switzerland by imposing upon Italian subjects more burdensome conditions and other conditions in respect to the possession of property and the exercise of commerce than are imposed upon natives.

Treaties are the supreme law of the land and all state authority is subordinate thereto, especially when the treaty, as in this case, is self-executing, *Hauenstein* v. *Lynham*, 100 U. S. 484, and relates to a proper subject of treaty negotiation. *Jacobson* v. *Massachusetts*, 197 U. S. 11, 24. See also *Matter of Heff*, 197 U. S. 405, 488.

Mr. John C. Bell, Attorney General of the State of Pennsylvania, and *Mr. William M. Hargest*, with whom *Mr. W. H. Lemon* was on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff in error was an unnaturalized foreign born resident of Pennsylvania and was complained of for owning or having in his possession a shot gun, contrary to an act of May 8, 1909. Laws, 1909, No. 261, p. 466. This statute makes it unlawful for any unnaturalized foreign born resident to kill any wild bird or animal except in defence of person or property, and 'to that end' makes it unlawful for such foreign born person to own or be possessed of a shot gun or rifle; with a penalty of twenty-five dollars and a forfeiture of the gun or guns. The plaintiff in error was found guilty and was sentenced to pay the above mentioned fine. The judgment was affirmed on successive appeals. 231 Pa. St. 46. He brings the case to this court on the ground that the statute is contrary to the Fourteenth Amendment and also is in contravention of the treaty between the United States and Italy, to which latter country the plaintiff in error belongs.

Under the Fourteenth Amendment the objection is two-fold; unjustifiably depriving the alien of property and discrimination against such aliens as a class. But the former really depends upon the latter, since it hardly can be disputed that if the lawful object, the protection of wild life (*Geer* v. *Connecticut*, 161 U. S. 519), warrants the discrimination, the means adopted for making it effective also might be adopted. The possession of rifles and shot guns is not necessary for other purposes not within the statute. It is so peculiarly appropriated to the forbidden use that if such a use may be denied to this class, the possession of the instruments desired chiefly for that end also may be. The prohibition does not extend to weapons such as pistols that may be supposed to be needed occasionally for self-defence. So far, the case is within the principle of *Lawton* v. *Steele*, 152 U. S. 133.

See further *Silz* v. *Hesterberg*, 211 U. S. 31. *Purity Extract Co.* v. *Lynch*, 226 U. S. 192.

The discrimination undoubtedly presents a more difficult question. But we start with the general consideration that a State may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 80, 81. The State 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses.' *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 160. *Rosenthal* v. *New York*, 226 U. S. 260, 270. *L'Hote* v. *New Orleans*, 177 U. S. 587. See further *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36. The question therefore narrows itself to whether this court can say that the Legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent. *Barrett* v. *Indiana*, 229 U. S. 26, 29.

Obviously the question so stated is one of local experience on which this court ought to be very slow to declare that the state legislature was wrong in its facts. *Adams* v. *Milwaukee*, 228 U. S. 572, 583. If we might trust popular speech in some States it was right—but it is enough that this court has no such knowledge of local conditions as to be able to say that it was manifestly

wrong. See *Trageser* v. *Gray*, 73 Maryland, 250. *Commonwealth* v. *Hana*, 195 Massachusetts, 262.

The defence under the treaty with Italy of February 26, 1871, 17 Stat. 845, appears to us to present less difficulty. The provisions relied upon are those in Article 2, giving to citizens of Italy the right to carry on trade and to do anything incident to it upon the same terms as the natives of this country; in Article 3, assuring them security for persons and property and that they "shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives" and in Article 24 promising to the Kingdom of Italy the same favors in respect to commerce and navigation that may be granted to other nations. We will say a word about each.

The last article is supposed to make applicable a convention with Switzerland (proclaimed November 9, 1855, 11 Stat. 597) providing against more burdensome conditions being imposed upon the residence of Swiss than upon that of citizens. But Article 24 refers only to commerce and navigation and the case must stand wholly upon Articles 2 and 3. As to Article 2 it will be time enough to consider whether the statute can be construed or upheld as precluding Italians from possessing a stock of guns for purposes of trade when such a case is presented. The act was passed for an object with which possession in the way of trade has nothing to do and well might be interpreted as not extending to it. There remains then only Article 3. With regard to that it was pointed out below that the equality of rights that it assures is equality only in respect of protection and security for persons and property. The prohibition of a particular kind of destruction and of acquiring property in instruments intended for that purpose establishes no inequality in either respect. It is to be remembered that the subject of this whole discussion is wild game, which the State may preserve for

its own citizens if it pleases. *Geer* v. *Connecticut*, 161 U. S. 519, 529. We see nothing in the treaty that purports or attempts to cut off the exercise of their powers over the matter by the States to the full extent. *Compagnie Francaise de Navigation a Vapeur* v. *State Board of Health*, 186 U. S. 380, 394, 395.

Judgment affirmed.

THE CHIEF JUSTICE dissents.

CHESAPEAKE & OHIO RAILWAY CO. *v.* COCKRELL, ADMINISTRATOR.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 100. Argued December 5, 1913.—Decided January 19, 1914.

As the right to remove a cause from a state to a Federal court exists only in enumerated classes of cases, the petition must set forth the particular facts which bring the case within one of such classes; general allegations and mere legal conclusions are not sufficient.

The right of a non-resident defendant to remove the case cannot be defeated by the fraudulent joinder of a resident defendant; but the defendant seeking removal must allege facts which compel the conclusion that the joinder is fraudulent; merely to apply the term "fraudulent" to the joinder is not sufficient to require the state court to surrender its jurisdiction.

Where plaintiff's statement of his case shows a joint cause of action, as tested by the law of the State, the duty is on the non-resident defendant seeking removal to state facts showing that the joinder was a mere fraudulent device to prevent removal.

It is not sufficient for a non-resident railroad corporation, joined as defendant in a suit for personal injuries with two resident employés in charge of the train which did the injury, to show in its petition an absence of good faith on plaintiff's part in bringing the action at all;—the petition must show that the joinder itself is fraudulent.

This court, while affirming the judgment of the Court of Appeals of the State, may, as it does in this case, express its disapproval of the reasoning on which it was based.

Issues of fact arising upon a petition for removal are to be determined in the Federal court; and, where the petition sufficiently shows a fraudulent joinder and the proper bond has been given, the state court must surrender jurisdiction, leaving any issue of fact arising on the petition to the Federal court. *Wecker* v. *National Enameling Co.*, 204 U. S. 176.

Where the state court refuses to give effect to a proper petition and bond on removal, the defendant may resort to certiorari from the Federal court to obtain the certified transcript and injunction to prevent further proceedings in the state court.

144 Kentucky, 137, affirmed.

THE facts, which involve the validity of a judgment of the Court of Appeals of the State of Kentucky and the construction of the statutes relative to removal of causes from the state to the Federal court, are stated in the opinion.

Mr. John T. Shelby, with whom *Mr. Henry T. Wickham*, *Mr. Henry Taylor, Jr.*, and *Mr. D. L. Pendleton* were on the brief, for plaintiff in error:

Although plaintiff's declaration states a good cause of action against the resident defendants and, under the law of Kentucky it makes out a case of joint liability on all the defendants, still, as the averments of fact upon which he predicates the charge of joint liability is palpably untrue, and the joinder made for the fraudulent purpose of depriving the non-resident defendant of the right to invoke the jurisdiction of the Federal court, the right of removal will not be destroyed by such joinder. *Wecker* v. *National Enameling Co.*, 204 U. S. 176.

Where a non-resident defendant in a petition for removal appropriately attacks as false and fraudulent the averments of fact upon which, in the plaintiff's petition the charge of joint liability is based, the allegations of

the removal petition must, for the purpose of determining the right of removal, be taken as true by the state court, and if the plaintiff desires to make an issue as to their truth, he must do this, in the Federal court, which latter alone has jurisdiction to try such issue. Where, admitting the averments of fact made in the removal petition to be true, they make a proper case for removal, the application *ipso facto* works the transfer to the Federal court and deprives the state court of its jurisdiction to proceed further. *Stone* v. *South Carolina*, 117 U. S. 430; *Carson* v. *Hyatt*, 118 U. S. 279; *Carson* v. *Dunham*, 121 U. S. 421; *Burlington &c. R'y Co.* v. *Dunn*, 122 U. S. 513; *Crehore* v. *O. & M. R'y Co.*, 131 U. S. 240; *Kansas City R'y Co.* v. *Daughtry*, 138 U. S. 298; *Tex. & Pac. R'y Co.* v. *Eastin*, 214 U. S. 153; *Ill. Cent. R'y Co.* v. *Sheegog*, 215 U. S. 308, 316.

Notwithstanding the clearness with which this court has so often reiterated this rule, the Kentucky Court of Appeals in *I. C. R. R. Co.* v. *Coley*, 121 Kentucky, 385, and *Dudley* v. *I. C. R. R. Co.*, 127 Id. 221, and other cases, has erroneously held that even where the removal petition contains allegations which, if true, make a case for removal, the state court has the right to inquire whether the facts alleged in the petition for removal be true. *Ala. & G. S. R. R. Co.* v. *Thompson*, 200 U. S. 206, is not applicable to this case.

Mr. Edward S. Jouett, with whom *Mr. Beverley R. Jouett* and *Mr. A. F. Byrd* were on the brief, for defendant in error:

The state court is not bound to surrender its jurisdiction unless the face of the record shows the defendant entitled to remove. *Ala. & G. S. R'y Co.* v. *Thompson*, 200 U. S. 206; *Carson* v. *Hyatt*, 118 U. S. 279; *Crehore* v. *O. & M. R'y Co.*, 132 U. S. 240; *Louis. & Nash. R. R. Co.* v. *Wanglin*, 132 U. S. 599; *Stone* v. *South Carolina*, 117 U. S. 430.

Joint action is maintainable against the corporation

and its employé. *Cent. Pass. R'y Co.* v. *Kuhn*, 86 Kentucky, 578; *C., N. O. & T. P. R'y Co.* v. *Bohon*, 200 U. S. 221; *C. & O. R'y Co.* v. *Dixon*, 179 U. S. 131; *I. C. C. R. Co.* v. *Coley*, 28 K. L. R. 336; *Jones* v. *I. C. R. R. Co.*, 26 K. L. R. 31; *Pugh* v. *C. & O. R'y Co.*, 101 Kentucky, 77; *Rutherford* v. *I. C. R. R. Co.*, 27 K. L. R. 397.

The mere allegation that the joinder is fraudulent is not sufficient to authorize removal. Facts showing actual fraud in connection with the joinder must be alleged. *Alabama G. S. R'y Co.* v. *Thompson*, 200 U. S. 206; *Ches. & Ohio R'y Co.* v. *Dixon*, 179 U. S. 135; *Ches. & Ohio R'y Co.* v. *McCabe*, 213 U. S. 215; *Cin., N. O. & Tex. Pac. R'y Co.* v. *Bohon*, 200 U. S. 221; *C., B. & Q. R. Co.* v. *Willard*, 220 U. S. 413; *C., R. I. & P. R'y Co.* v. *Schwyhart*, 227 U. S. 184; *Ill. Cent. R'y Co.* v. *Sheegog*, 215 U. S. 308.

A removal petition which, as in this case, alleges no extraneous facts in connection with the joinder, but merely enumerates the plaintiff's charges of negligence against the resident defendant and declares that each such allegation is false, was known so to be by plaintiff, and was made for the fraudulent purpose of defeating removal, is insufficient. *Enos* v. *Kentucky Distilleries Co.* (C. C. A.), 189 Fed. Rep. 342; *Ill. Cent. R'y Co.* v. *Sheegog*, 215 U. S. 308.

The opinion of the court below shows that the fireman was negligent and was personally liable for his negligence.

Before this suit was filed the Kentucky courts had decided that the fact, admitted here, of the fireman not looking ahead upon approaching a crossing constituted negligence. *L. & N. R. R. Co.* v. *Gilmore*, 114 S. W. Rep. 752; *L. & N. R. R. Co.* v. *Taylor*, 104 S. W. Rep. 776.

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

This was an action begun in the Circuit Court of Clark County, Kentucky, by an administrator, to recover

damages for the death of his intestate, the defendants being a railway company and the engineer and fireman of one of its trains which struck and fatally injured the intestate at or near a public crossing in Winchester, Kentucky. The administrator, engineer and fireman were citizens of Kentucky, and the railway company was a Virginia corporation. The latter in due time presented to the court a verified petition and proper bond for the removal of the cause into the Circuit Court of the United States, but the court declined to surrender its jurisdiction and, over the company's protest, proceeded to a trial which resulted in a judgment against the company, and the Court of Appeals of the State affirmed the judgment, including the ruling upon the petition for removal. 144 Kentucky, 137.

The sole question for decision here is, whether it was error thus to proceed to an adjudication of the cause notwithstanding the company's effort to remove it into the Federal court.

Rightly understood and much abbreviated, the plaintiff's petition, after stating that the train was being operated by the engineer and fireman as employés of the railway company, charged that the injury and death of the intestate were caused by the negligence of the defendants (a) in failing to maintain an adequate lookout ahead of the engine, (b) in failing to maintain any lookout upon the left or fireman's side, from which the intestate went upon the track, (c) in failing to give any warning of the approach of the train, and (d) in continuing to run the train forward after it struck the intestate, and was pushing her along, until it eventually ran over and fatally injured her, when it easily could have been stopped in time to avoid material injury. There was a prayer for a judgment against the three defendants for $25,000, the amount of damages alleged.

The railway company's petition for removal, while not

denying that the engineer and fireman were in the employ of the company or that they were operating the train when it struck and injured the intestate, did allege that the charges of negligence (all being specifically repeated) against the defendants were each and all "false and untrue, and were known by the plaintiff, or could have been known by the exercise of ordinary diligence, to be false and untrue, and were made for the sole and fraudulent purpose of affording a basis, if possible, for the fraudulent joinder" of the engineer and fireman with the railway company and of "thereby fraudulently depriving" the latter of its right to have the action removed into the Federal court, and that none of the charges of negligence on the part of the engineer or fireman could be sustained on the trial.

It will be perceived that but for the joinder of the two employés as co-defendants with the railway company, the latter undoubtedly would have been entitled to remove the cause into the Federal court on the ground of diverse citizenship, there being the requisite amount in controversy; and that the railway company attempted in the petition for removal to overcome the apparent obstacle arising from the joinder. Whether the petition was sufficient in that regard is the subject of opposing contentions.

The right of removal from a state to a Federal court, as is well understood, exists only in certain enumerated classes of cases. To the exercise of the right, therefore, it is essential that the case be shown to be within one of those classes, and this must be done by a verified petition setting forth, agreeably to the ordinary rules of pleading, the particular facts, not already appearing, out of which the right arises. It is not enough to allege in terms that the case is removable or belongs to one of the enumerated classes, or otherwise to rest the right upon mere legal conclusions. As in other pleadings, there must be a statement of the facts relied upon, and not otherwise appearing,

in order that the court may draw the proper conclusion from all the facts and that, in the event of a removal, the opposing party may take issue, by a motion to remand, with what is alleged in the petition. *Gold-Washing & Water Co.* v. *Keyes*, 96 U. S. 199, 202; *Carson* v. *Dunham*, 121 U. S. 421, 426; *Crehore* v. *Ohio & Mississippi Ry. Co.*, 131 U. S. 240, 244; *Chesapeake & Ohio Railway Co.* v. *Powers*, 169 U. S. 92, 101.

A civil case, at law or in equity, presenting a controversy between citizens of different States and involving the requisite jurisdictional amount, is one which may be removed by the defendant, if not a resident of the State in which the case is brought; and this right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy. *Louisville & Nashville R. R. Co.* v. *Wangelin*, 132 U. S. 599, 601; *Alabama Southern Railway Co.* v. *Thompson*, 200 U. S. 206, 218; *Wecker* v. *National Enameling Co.*, 204 U. S. 176; *Illinois Central R. R. Co.* v. *Sheegog*, 215 U. S. 308, 316. So, when in such a case a resident defendant is joined with the non-resident, the joinder, even although fair upon its face, may be shown by a petition for removal to be only a fraudulent device to prevent a removal; but the showing must consist of a statement of facts rightly engendering that conclusion. Merely to traverse the allegations upon which the liability of the resident defendant is rested or to apply the epithet "fraudulent" to the joinder will not suffice: the showing must be such as compels the conclusion that the joinder is without right and made in bad faith, as was the case in *Wecker* v. *National Enameling Co.*, *supra*. See *Illinois Central R. R. Co.* v. *Sheegog*, *supra*; *Chicago, Rock Island & Pacific Railway Co.* v. *Dowell*, 229 U. S. 102, 114.

Here the plaintiff's petition, as is expressly conceded, not only stated a good cause of action against the resident defendants, but, tested by the laws of Kentucky, as it

should be, stated a case of joint liability on the part of all the defendants. As thus stated the case was not removable, the joinder of the resident defendants being apparently the exercise of a lawful right. And while the plaintiff's statement was not conclusive upon the railway company, it did operate to lay upon the latter, as a condition to a removal, the duty of showing that the joinder of the engineer and fireman was merely a fraudulent device to prevent a removal. Of course, it was not such unless it was without any reasonable basis.

Putting out of view, as must be done, the epithets and mere legal conclusions in the petition for removal, it may have disclosed an absence of good faith on the part of the plaintiff in bringing the action at all, but it did not show a fraudulent joinder of the engineer and fireman. With the allegation that they were operating the train which did the injury standing unchallenged, the showing amounted to nothing more than a traverse of the charges of negligence, with an added statement that they were falsely or recklessly made and could not be proved as to the engineer or fireman. As no negligent act or omission personal to the railway company was charged and its liability, like that of the two employés, was, in effect, predicated upon the alleged negligence of the latter, the showing manifestly went to the merits of the action as an entirety and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants. Plainly, this was not such a showing as to engender or compel the conclusion that the two employés were wrongfully brought into a controversy which did not concern them. As they admittedly were in charge of the movement of the train and their negligence was apparently the principal matter in dispute, the plaintiff had the same right, under the laws of Kentucky, to insist upon their presence as real defendants as upon that of the railway company. We conclude, therefore, that the petition for

removal was not such as to require the state court to surrender its jurisdiction.

While this conclusion requires an affirmance of the judgment, we would not be understood as approving the reasoning upon which the action of the trial court was sustained by the Court of Appeals of the State. That court, apparently assuming that the petition for removal contained a sufficient showing of a fraudulent joinder, held that the questions of fact arising upon the petition were open to examination and determination in the state court, and that no error was committed in refusing to surrender jurisdiction, because upon the subsequent trial the evidence indicated that the showing in the petition was not true as to the fireman. In so holding the Court of Appeals fell into manifest error, for it is thoroughly settled that issues of fact arising upon a petition for removal are to be determined in the Federal court, and that the state court, for the purpose of determining for itself whether it will surrender jurisdiction, must accept as true the allegations of fact in such petition. *Stone* v. *South Carolina*, 117 U. S. 430, 432; *Crehore* v. *Ohio & Mississippi Ry. Co.*, *Illinois Central R. R. Co.* v. *Sheegog*, and *Chicago, Rock Island & Pacific Ry. Co.* v. *Dowell*, *supra*. In this case had the petition contained a sufficient showing of a fraudulent joinder, accompanied as it was by a proper bond, the state court would have been in duty bound to give effect to the petition and surrender jurisdiction, leaving any issue of fact arising upon the petition to the decision of the Federal court, as was done in *Wecker* v. *National Enameling Co.*, *supra*. And had the state court refused to give effect to the petition, it and the bond being sufficient, the railway company might have obtained a certified transcript of the record, resorting if necessary to a writ of certiorari for that purpose, and, upon filing the transcript in the Federal court, might have invoked the authority of the latter to protect its jurisdiction by enjoining the plaintiff from tak-

ing further proceedings in the state court, unless the cause should be remanded. *Traction Co.* v. *Mining Co.*, 196 U. S. 239, 245; *Chesapeake & Ohio Railway Co.* v. *McCabe*, 213 U. S. 207, 217, 219; *Chesapeake & Ohio Railway Co.* v. *McDonald*, 214 U. S. 191, 195; *French* v. *Hay*, 22 Wall. 250; *Dietzsch* v. *Huidekoper*, 103 U. S. 494.

Judgment affirmed.

UNITED STATES *v.* YOUNG.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

No. 710. Submitted January 8, 1914.—Decided January 26, 1914.

Under § 5480, Rev. Stat., it was necessary to charge not only that a scheme to defraud was devised but that it was intended to be effected by opening or intending to open correspondence with some other person by means of the post office; under § 215 of the Criminal Code it is only necessary to charge that the scheme be devised or intended to be devised and a letter placed in the post office for the purpose of executing the scheme or attempting to do so.

THE facts, which involve the construction of § 215 of the Criminal Code, are stated in the opinion.

The Solicitor General for the United States.

There was no appearance or brief filed for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Indictment under § 215 of the Criminal Code charging the use of the mails in furtherance of a scheme to defraud.

It consists of two counts to which demurrer was filed, which, in specific objections, challenged the sufficiency of the indictment. The demurrer was sustained and judgment entered quashing the indictment. The charges of the indictment, condensed, are as follows:

On the fifth of May, 1911, within the County of Mobile and the jurisdiction of the court, defendant devised a scheme and artifice to defraud various banks, persons and corporations, particularly such as could be induced through the firm of Hollingshead and Campbell, of New York City, to purchase or lend money upon the notes of the Southern Hardware & Supply Company, engaged in the mercantile business at Mobile, Alabama, and of which defendant was the president.

Hollingshead and Campbell were money brokers and engaged in the business of inducing banks, persons and corporations to purchase and lend money upon commercial paper, and it was the intention and purpose of defendant in his negotiations with said firm to induce and cause it to sell and dispose of the notes of the Hardware & Supply Company and to obtain money and credit for its notes and other evidences of indebtedness. The defendant was authorized to sign such notes and other evidences of indebtedness and to prepare statements of the financial and business condition of the company.

It was a part of the scheme for defendant to induce Hollingshead and Campbell to sell and dispose of the notes of the Hardware & Supply Company and to persuade and influence the various banks, etc., to lend money upon the notes of that company, to prepare and cause to be prepared and sent through the United States mails to Hollingshead and Campbell, false and fraudulent statements of the business affairs and financial condition of the Hardware & Supply Company, and which defendant was to, and did, represent to be statements showing the correct and true condition of the business affairs and financial condition

of the Hardware & Supply Company. These statements did not show the true condition of the company's affairs, but were to show and did show its assets to be greatly in excess of those actually had and owned by it, and its liabilities to be much less than their true amount and "falsely and fraudulently showed the company to be in a much better financial condition than it was in fact at the time such statements were made and were to be made."

Part of the scheme was to make Hollingshead and Campbell believe the statements were correct, and they did make that firm so believe, and to rely upon them, and, so relying upon their truth, to recommend the purchase of the Hardware & Supply Company's notes and the lending of money upon them, defendant knowing that that company "was not then and there in a strong financial condition."

Defendant caused the statements to be sent through the United States mails to Hollingshead and Campbell. Hollingshead and Campbell believed them, and, relying upon their truth, recommended various banks, persons and corporations to purchase the notes and lend money upon the notes of the Hardware & Supply Company. The names of certain banks and the amounts they loaned are given.

For the purpose of executing the scheme and artifice, defendant deposited in the United States post office at Mobile, Alabama, a letter, dated June 27, 1911, addressed to Hollingshead and Campbell at New York. The letter contained a statement of the financial condition of the company showing the assets, liabilities and profits of the Hardware & Supply Company. It also contained comments upon the business of the company and its relations with Hollingshead and Campbell. It was sent through the mails and delivered to the latter at New York. The letter and the statements are charged to have shown the assets of the Hardware & Supply Company to be greater

and its liabilities to be less than they actually were. And it is charged that defendant having devised a scheme and artifice to defraud, and for the purpose of their execution, placed and caused to be placed in the United States post office at Mobile, Alabama, the letter above stated, and that it was sent and delivered by the Post Office Establishment of the United States.

The second count in the indictment charges defendant with having devised "a scheme and artifice for obtaining moneys, goods, and chattels by means of false and fraudulent representations and promises from various banks, persons, firms and corporations." The manner and means are charged as in the first count.

The scheme, it will be observed, was to defraud certain banks and persons and it was to be accomplished by deception practiced on Hollingshead and Campbell, money brokers, through false statements sent to that Company through the mails, whereby they would be induced to recommend the commercial value of the notes and other evidences of indebtedness of the Southern Hardware & Supply Company, of which defendant was the president. The first count charges a scheme to defraud various banks, etc., through the representations of Hollingshead and Campbell "out of their's, the said banks', and persons', firms' and corporations' moneys, goods and chattels." In the second count the scheme is alleged to be "for obtaining moneys, goods and chattels by means of false and fraudulent representations and promises" from the various banks and persons.

Commenting on the indictment, the District Court said, "The first count of the indictment does not clearly set out the scheme to defraud. It fails to allege that the scheme devised to defraud said banks, etc., was by means of false or fraudulent pretenses, representations or promises. And it fails to allege how the scheme was to be executed. It does not allege that the scheme devised was to be exe-

cuted by the use of the Post Office establishment or mails of the United States." The conclusion of the court was that the "said first count of the indictment" was "defective and insufficient."

Further commenting, the court said: "The second count of the indictment is subject to the same defects and objections as are found in the first count, except that the second count does allege that the scheme to defraud was by means of false and fraudulent representations and promises. It does not directly allege that the scheme to defraud was to be executed by the use of the Post Office Establishment or mails of the United States. In some part of the second count it is implied in an allegation in this way: That it was a part of the said scheme that the defendant was to and did prepare statements of the business affairs and financial condition of the Southern Hardware & Supply Company, and sent the same to Hollingshead & Campbell to induce them to do certain things, etc. The gist of the offense is the use of the United States mails in the execution of the scheme, or in attempting so to do. It is not an unlawful scheme unless the use of the mails was a part of the scheme, and the indictment must affirmatively allege every fact necessary to constitute the offense sought to be charged, that the court may see that an unlawful scheme has been devised. It is alleged that said statements were false and fraudulent, and that they were sent through the mails to Hollingshead & Campbell, from which it might be implied that such was a part and intention of the scheme." The court further said that implication of a material and essential fact could not supply the place of its direct averment, that there was no allegation that the banks and others to be defrauded had seen the statements sent Hollingshead and Campbell or had knowledge of them or of their contents or that they were intended to deceive the banks and to induce them to lend their money, except as this might be implied from

sending the statements to Hollingshead and Campbell. The court expressed the opinion that while "the second count is better than the first, it is insufficient in the particulars mentioned."

We have made these quotations from the court's opinion as the case is here by direct appeal under the Criminal Appeals Act as involving the construction of the statute and not of the indictment. And this is the contention of the Government, and that the court erred in failing to "note the essential differences between section 5480 of the Revised Statutes and section 215 of the Criminal Code (Act of March 4, 1909, c. 321, 35 Stat. 1088, 1130) which succeeded it."

Section 5480 (as amended in 1889, 3 Comp. Stat. U. S., p. 3697), provided, "If any person having devised or intending to devise any scheme or artifice to defraud, . . . to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the Post-Office Establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme . . . place or cause to be placed any letter . . . in any post-office . . . to be sent or delivered by the said Post-Office Establishment, . . . such person so misusing the Post-Office Establishment shall, upon conviction, be punishable . . . "

Section 215 of the Criminal Code is as follows: "Whoever, having devised, or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . shall, for the purpose of executing such scheme or artifice or attempting so to do, place . . . any letter, . . . whether addressed to any person residing within or outside the United States, in any post-

office, . . . to be sent or delivered by the Post-Office Establishment of the United States, . . . shall be" punishable by fine . . .

It is contended by the Government that these provisions are broader than those of § 5480 of the Revised Statutes, that under the latter it was necessary to charge not only a scheme to defraud was devised but that it was intended to be effected by opening or intending to open correspondence with some other person by means of the Post Office Establishment. Under § 215 of the Criminal Code it is only necessary that the scheme should be devised or intended to be devised and a letter be placed in the post office for the purpose of executing the scheme or attempting to do so. And as declaring the elements of the offense under § 215 and its distinction from an offense under § 5480 of the Revised Statutes, the following cases are cited: *Ex parte King*, 200 Fed. Rep. 622; *United States* v. *Maxey*, 200 Fed. Rep. 997; *Stockton* v. *United States* (C. C. A. Seventh Circuit), 205 Fed. Rep. 462; *United States* v. *Goldman*, 207 Fed. Rep. 1002.

There is a distinction between the sections, and the elements of an offense under § 215 are (a) a scheme devised or intended to be devised to defraud, or for obtaining money or property by means of false pretenses, and, (b) for the purpose of executing such scheme or attempting to do so, the placing of any letter in any post office of the United States to be sent or delivered by the Post Office Establishment. The District Court apparently overlooked the distinction between the sections and was of opinion that something more was necessary to an offense under § 215, than the averment of the scheme and its attempted execution in the manner stated. The court expressed the view, we have seen, that the indictment did not clearly set out the scheme to defraud, that it did not allege the scheme devised or attempted was by means of false or fraudulent pretenses, representations or promises, or that

the scheme was to be executed by the use of the Post Office Establishment or mails of the United States. And the court said that it was a necessary element of the offense that the false statements sent to Hollingshead and Campbell by defendant were to be used by the latter company to induce the person intended to be defrauded to purchase the notes of the Southern Hardware & Supply Company or to lend money upon them, or that such person had knowledge of the contents of the statements. It is manifest that the court considered these facts were necessary to be averred in order to constitute an offense under § 215. In this the court was in error.

Judgment reversed and cause remanded with direction to overrule the demurrer.

BURBANK *v.* ERNST, TUTRIX OF BURBANK, A MINOR.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 151. Argued January 15, 16, 1914.—Decided January 26, 1914.

Where the jurisdiction of the court rendering the judgment depends upon domicile that question is open to reëxamination in the court of another State asked to give the judgment full faith and credit as required by the Federal Constitution. *Andrews* v. *Andrews*, 188 U. S. 14.

Where the evidence as to domicile of the deceased is conflicting and the state court is warranted in finding that the court of probate of another State did not have jurisdiction to probate a will because the domicile of deceased was not in that State, this court will not retry the facts; and under the facts, as found in this case, the decree of probate is not entitled to full faith and credit in another State.

Where the headnote of a decision of a state court is not given special

force by statute or rule of court, the opinion is to be looked to for original and authentic grounds of the decision.

129 Louisiana, 528, affirmed.

THE facts, which involve the validity of a judgment of the Supreme Court of the State of Louisiana, and the determination whether that court was required to give full faith and credit to a judgment of the probate court of Texas, are stated in the opinion.

Mr. Charles S. Rice and *Mr. Sam Streetman*, with whom *Mr. R. B. Montgomery* was on the brief, for plaintiffs in error.

Mr. Henry P. Dart for defendants in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case arises in the matter of the succession of T. Scott Burbank. He died in Texas on May 10, 1910, leaving a will dated March 22, 1910, which was admitted to probate there. The executors sought to have the will registered in Louisiana, but the tutrix of Burbank's minor daughter and sole heir filed in the succession record a direct action to annul the will on the ground that the testator died domiciled in Louisiana and that by the laws of that State the will was void. The Supreme Court of Louisiana gave judgment against the will and ordered the application for registry to be dismissed 'as of non-suit.' *Succession of Burbank*, 129 Louisiana, 528. The error assigned is that full faith and credit were not given to the Texas decree.

Of course the jurisdiction of the Texas court depended upon the domicile of Burbank, which therefore was open to reëxamination. *Andrews* v. *Andrews*, 188 U. S. 14. The objection urged is that the Louisiana court attributed conclusive effect to Burbank's conduct in Louisiana taken

in connection with the laws there, instead of recognizing that no statute of that State could prevent his acquiring a domicile wherever he actually might be, elsewhere, and instead of treating the question as one of intent and fact. Burbank was one of the executors under his father's will and as such, on April 8, 1909, at that time being a resident of New Orleans, declared before a notary that then being about to absent himself temporarily from Louisiana and in order to comply with the law, especially Article 1154 of the Revised Civil Code, he constituted one Billings his attorney. If he left the State permanently, his duty, we are told by the Supreme Court, was to surrender his trust, render an account and pay over any balance due. It is true that in his Texas will he declared that Texas was his permanent home, and that he made similar declarations orally and in writing, but on the other hand it is found that his agent continued to represent him, and it seems that he continued to act, as an executor temporarily absent. He had made a will in Louisiana just before leaving, but ten days before making the Texas will he had consulted a lawyer as to making a will that would be valid by the law of Texas, which law allowed dispositions not valid by the law of Louisiana where most of his property was. The Supreme Court not unnaturally suspected, from the declaration of domicile in the will and the circumstances, that Burbank was making up a fictitious case in the hope of avoiding the restrictions of his real domicile before he killed himself, as it is said that he did, in May; and found that the Texas declarations were more than counterbalanced by his declaration of record and his official acts as executor resident in Louisiana. There can be no question that the evidence was conflicting and that the court was warranted in finding as it did.

It is not for us to retry the facts. The ground of the argument here is a statement in the opinion of the court that the recital in the notarial act was conclusive evidence

that Burbank left the State with the intention of returning; but that does not import a failure to recognize, as the court clearly did recognize, that he might change his mind. Reliance also is placed upon the head note of the decision, which states that the intent to leave only temporarily is conclusively presumed to continue until the notarial procuration is recalled, and that the executors are concluded from asserting a change of domicile. But the head note is given no special force by statute or rule of court, as in some States. It inaccurately represents the reasoning of the judgment. In 129 Louisiana it is said to have been made by the court. However that may be, we look to the opinion for the original and authentic statement of the grounds of decision. It may be that in fact the conduct of the testator in Louisiana was given greater weight, because of the statutes of the State, than others might give it, but no error of law appears that would warrant a reversal of the judgment below. *German Savings & Loan Society* v. *Dormitzer*, 192 U. S. 125, 128.

Judgment affirmed.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *v.* POLT.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

No. 161. Argued January 16, 1914.—Decided January 26, 1914.

While the States have a large latitude in the policy they will pursue in regard to enforcing prompt settlement of claims against railroad companies, the rudiments of fair play to the companies as required by the Fourteenth Amendment must be recognized.

The statute of South Dakota of 1907, c. 215, making railroad companies liable for double damages in case of failure to pay a claim or to offer

a sum equal to what the jury finds the claimant entitled to, held to be unconstitutional as depriving the companies of their property without due process of law. *St. Louis, Iron Mtn. & Southern Ry.* v. *Wynne*, 224 U. S. 354, followed; *Yazoo & Miss. Valley R. R.* v. *Jackson Vinegar Co.*, 226 U. S. 217, distinguished.

26 So. Dak. 378, reversed.

THE facts, which involve the validity under the due process provisions of the Fourteenth Amendment of a judgment for double damages entered under a railroad claim statute of South Dakota, are stated in the opinion.

Mr. William G. Porter, with whom *Mr. Burton Hanson*, *Mr. Ed. L. Grantham* and *Mr. Harrison C. Preston* were on the brief, for plaintiff in error:

Chapter 215, Session Laws of South Dakota for 1907, is unconstitutional in that it imposes a penalty for delinquency in payment of a debt.

The act discriminates against one class of litigants in favor of another, denying to plaintiff in error equal protection of the laws.

The law in its operation is pernicious and works a rank injustice.

In support of these contentions see *A., T. & S. F. Ry. Co.* v. *Matthews*, 174 U. S. 96; *Builders' Supply Depot* v. *O'Connor*, 150 California, 265; *Black* v. *M. & St. L. Ry. Co.*, 122 Iowa, 32; *Calder* v. *Bull*, 3 Dallas, 387, 388; *Coal Co.* v. *Rosser*, 53 Oh. St. 22, 24; *Chicago, St. L. & N. O. R. Co.* v. *Moss*, 60 Mississippi, 641; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79; *County of San Mateo* v. *So. Pac. R. Co.*, 13 Fed. Rep. 722; *Denver & R. G. Co.* v. *Outcalt*, 2 Colo. App. 394; *Grand Island Ry. Co.* v. *Swinbank*, 51 Nebraska, 521; *Gulf, Col. &c. Ry. Co.* v. *Ellis*, 165 U. S. 150; *Hurtando* v. *California*, 110 U. S. 535; *Hocking Valley Coal Co.* v. *Rosser*, 52 Oh. St. 12; *Jolliffe* v. *Brown*, 14 Washington, 155; *Railroad Tax Cases*, 13 Fed. Rep. 722, 782; *St. L., I. M. & S. Ry. Co.* v. *Wynne*, 224 U. S. 258;

Seaboard Air Line v. *Seegers*, 207 U. S. 73; *South. & N. Ala. R. Co.* v. *Morris*, 65 Alabama, 193; *Sutpeck* v. *Un. Pac. Ry. Co.*, 200 Fed. Rep. 192; *Un. Pac. Ry. Co.* v. *DeBusk*, 12 Colorado, 294; *Wadsworth* v. *Un. Pac. Ry. Co.*, 19 Colorado, 600; *Williamson* v. *Liverpool, L. & G. Ins. Co.*, 105 Fed. Rep. 31; *Wilder* v. *C. & N. W. Ry. Co.*, 70 Michigan, 382.

There was no appearance or brief filed for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This was a suit against the plaintiff in error for loss of property destroyed by fire communicated from its locomotive engine. A statute of South Dakota, after making the Railroad Company absolutely responsible in such cases, goes on to make it liable for double the amount of damage actually sustained unless it pays the full amount within sixty days from notice. If, within sixty days, it shall "offer in writing to pay a fixed sum, being the full amount of the damages sustained and the owner shall refuse to accept the same, then in any action thereafter brought for such damages when such owner recovers a less sum as damages than the amount so offered, then such owner shall recover only his damages, and the railway company shall recover its costs." South Dakota Laws, 1907, c. 215. The plaintiff got a verdict for $780. The Railroad had offered $500; less, that is, than the amount of the verdict, while the plaintiff on the other hand demanded more. In his demand, his declaration and his testimony he set the damage at $838.20. A judgment for double damages was affirmed by the Supreme Court of the State. 26 So. Dak. 378.

The defendant in error presented no argument, probably because he realized that under the recent decisions

of this court the judgment could not be sustained. No doubt the States have a large latitude in the policy that they will pursue and enforce, but the rudiments of fair play required by the Fourteenth Amendment are wanting when a defendant is required to guess rightly what a jury will find, or pay double if that body sees fit to add one cent to the amount that was tendered, although the tender was obviously futile because of an excessive demand. The case is covered by *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Wynne*, 224 U. S. 354. It is not like those in which a moderate penalty is imposed for failure to satisfy a demand found to be just. *Yazoo & Mississippi Valley R. R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217.

Judgment reversed.

STATE OF ALABAMA *v.* SCHMIDT.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 595. Argued January 12, 1914.—Decided January 26, 1914.

The act of March 2, 1819, c. 47, § 6, 3 Stat. 489, under which Alabama became a State, vested the legal title of section 16 of every township in the State absolutely although the statute declared that it was for the use of schools.

While the trust created by a compact between the States and the United States that section 16 be used for school purposes is a sacred obligation imposed on the good faith of the State, the obligation is honorary and the power of the State where legal title has been vested in it is plenary and exclusive. *Cooper* v. *Roberts*, 18 How. 173.

Statutes of limitation providing for title by adverse possession against the State after a specified period are a valid exercise of the power of the State and apply to lands conveyed to the State absolutely by the United States although for the use of schools. *Nor. Pac. Railway Co.* v. *Townsend*, 190 U. S. 267, distinguished.

A statute passed by a State disposing of lands conveyed in the enabling act by the United States to be used by the State for school lands,

held not to impair the obligation of the contract created by the acceptance of the enabling act. The State has the right to subject such lands in its hands to the ordinary incidents of title. *Cooper* v. *Roberts*, 18 How. 173.

THE facts are stated in the opinion.

Mr. Robert C. Brickell, Attorney General of the State of Alabama, with whom *Mr. R. B. Evins* was on the brief, for plaintiff in error:

Sections 16 in this State were granted by Congress to the inhabitants of the several townships for the specific use of schools. Acts of March 2, 1819, 3 Stats. 489, and March 2, 1827, 4 Stats. 237.

This grant which was in the form of a proposal to the people of the Alabama Territory, the acceptance of which was a prerequisite for the admission of the State into the Union, was accepted, as made, by the inhabitants of the State, in convention assembled, on August 2, 1819. Ordinance, Const. Conv. of 1819; 1 Code, Alabama, 1907, pp. 82–83.

Upon the acceptance of these proposals, the State was admitted into the Union. 3 Stats. 608.

By the grant of these lands for the particular use, the United States retained title for all other purposes or uses. *Nor. Pac. Ry. Co.* v. *Townsend*, 190 U. S. 267.

The State of Alabama, in accepting the proposals upon which its admission into the Union was made contingent, disclaimed all right and title to waste or unappropriated lands lying within said Territory. Clause in fourth proposal in act of Congress of March 2, 1819, 3 Stats. 489; Ordinance of 1819, *supra;* 1 Code, p. 82.

All other uses or purposes to which said Sections 16 might be put, except the use for schools, being unappropriated by the United States, came within the above disclaimer.

A state statute of limitations, whereby lands granted by

the United States to a specific use, are diverted from that use into private ownership, are in conflict with the act of Congress making the grant, and void.

The State has no power to divert sixteenth section lands from the specific use, for schools, to which they were dedicated by the act of Congress. *Nor. Pac. Ry. Co.* v. *Townsend*, 190 U. S. 267; *Vincennes University* v. *Indiana*, 14 How. 269; *Springfield* v. *Quick*, 6 Indiana, 83; *S. C.*, 22 How. 56; *Davis* v. *Indiana*, 94 U. S. 792; *Morton* v. *Granada Academies*, 16 Mississippi, 773.

The acceptance of the proposals of the act of March 2, 1819, created a contract between the United States and the State of Alabama, and the attempted diversion of these lands from the use to which granted, by a state statute of limitations, violates the obligation of this contract, and is void. *Fletcher* v. *Peck*, 6 Cranch, 87; *Fenn* v. *Kinsey*, 45 Michigan, 446, 8 N. W. Rep. 64; *Covington* v. *Kentucky*, 154 U. S. 204; *United States* v. *Great Falls*, 21 Maryland, 119; *Lowery* v. *Francis*, 2 Yerg. (Tenn.) 534.

The acts of Congress making the grant are construed most strongly against the grantee, and in favor of the United States. *United States* v. *Michigan*, 190 U. S. 379.

The acts of March 2, 1819, and March 2, 1827, are *in pari materia*, and must be construed as if passed at the same time. *Plummer* v. *Murray*, 51 Barbour (N. Y.), 201; *People* v. *Aichison*, 7 How. Pr. 241.

The grant of Sections 16 for the use of schools, is a part of the land system of the United States. 2 Kent. Com. (13th ed.) 196, note e, and see act of Congress of 1875, providing that lot No. 16 of every township shall be so reserved. And see also § 3 of the Ordinance establishing the North West Territory.

Mr. J. K. Dixon, with whom *Mr. William B. White* and *Mr. John P. Tillman* were on the brief, for defendant in error;

The grant of Sections 16 to the inhabitants of the townships for the use of schools in the State of Alabama, and the acceptance of the proposal contained in § 6 of the act for the admission of Alabama by the convention operated as a present grant and immediately divested the title of the United States to Sections 16. *Cooper* v. *Roberts*, 18 How. 173; *Hedrick* v. *Hughes*, 15 Wall. 123; *Kissel* v. *St. Louis Public Schools*, 18 How. 19; *Campbell* v. *Township Number One*, 13 How. 244; *McNee* v. *Donahue*, 142 U. S. 587; *Johanson* v. *Washington*, 190 U. S. 179; *Beecher* v. *Wetherby*, 95 U. S. 517; *United States* v. *Tully*, 140 Fed. Rep. 899.

The Alabama grant of Sections 16 being a grant of the entire title thereto, without reservation, vests in the grantee or grantees an indefeasible fee simple title and is not governed by the rules of law laid down with reference to grants of rights-of-way to railroads. Cases *supra*, and see also *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241; *Rutherford* v. *Greene*, 2 Wheat. 196; *Toltec Ranch Co.* v. *Cook*, 191 U. S. 532; *Iowa Land Co.* v. *Blumer*, 206 U. S. 482; *Missouri Valley Land Co.* v. *Wiese*, 208 U. S. 234; *Nor. Pac. R. R. Co.* v. *Ely*, 197 U. S. 1.

No one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee except the grantor or its successors. The same rule applies to a grant upon condition proceeding from the government. *Schulenberg* v. *Harriman*, 21 Wall. 44; *Spokane &c. R. Co.* v. *Washington &c. R. Co.*, 219 U. S. 166; *United States* v. *Nor. Pac. R. Co.*, 152 U. S. 281.

Nothing in the Alabama grant of Sections 16 school lands imports a limitation of the fee. *Stuart* v. *Easton*, 170 U. S. 383.

Adverse possession as against a trustee operates as well against the beneficiaries of the trust. *Meeks* v. *Olpherts*, 100 U. S. 564.

Adverse possession against any party in which title is

so vested that such party may grant an indefeasible estate in fee simple ripens into a fee simple title by the operation of the Statute of Limitations. *Nor. Pac. R. Co.* v. *Ely*, 197 U. S. 1; *Coxe* v. *University of Alabama*, 161 Alabama, 639.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit brought by the State of Alabama to recover possession of a specified part of Section 16, Township 17, Range 5, Talladega County. It was agreed that the land was a part of the sixteenth section school lands given to the State by the act of March 2, 1819, c. 47, § 6, 3 Stat. 489, 491, and still belonged to the State if the defendant had not got a title by adverse possession, which it was agreed the defendant had if the statutes of Alabama limiting suits like the present to twenty years were valid. The trial court ruled that the statutes were valid and ordered judgment for the defendant, and this judgment was affirmed by the Supreme Court of the State.

We are of opinion that the judgment must be affirmed. The above mentioned act of Congress, under which Alabama became a State, provided that section sixteen in every township 'shall be granted to the inhabitants of such township for the use of schools.' Of course the State must admit, as it expressly agreed, that these words vested the legal title in it, since it relies upon them for recovery in the present case. Any other interpretation hardly would be reasonable. In some cases the grant has been to the State in terms, but in whichever way expressed probably it means the same thing, so far as the legal title is concerned. Certainly it has the same effect with regard to the scope of the State's legal control.

The argument for the plaintiff in error relies mainly upon *Northern Pacific Ry. Co.* v. *Townsend*, 190 U. S. 267, 271, which held that a right of way over public land

granted by the United States for railway purposes could not be extinguished by adverse possession under the statute of limitations of the State in which the land lay. The ground of that decision was that the grant to the railroad was not a conveyance of the land in fee simple absolute but a limited grant 'upon an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted.' This decision has been met for some similar cases elsewhere by the act of June 24, 1912, c. 181, 37 Stat. 138. *Union Pacific R. R. Co.* v. *Laramie Stock Yards Co.*, 231 U. S. 190. *Union Pacific R. R. Co.* v. *Snow*, 231 U. S. 204. But it does not apply to a gift to a State for a public purpose of which that State is the sole guardian and minister. As long ago as 1856 it was decided "the trusts created by these compacts relate to a subject certainly of universal interest, but of municipal concern, over which the power of the State is plenary and exclusive," and it was held that the State of Michigan could sell its school lands without the consent of Congress. *Cooper* v. *Roberts*, 18 How. 173, 181. This decision adverted to the fact that it had been usual for Congress to authorize the sale of lands if the State should desire it, but suggested that it was unnecessary, (which, indeed, followed from what was decided), and thus met the further argument here pressed that a qualified permission to sell was given to Alabama by a much later act of March 2, 1827, c. 59, 4 Stat. 237. It also disposes of other forms of the same contention, that the state law impairs the obligation of its contract, or involves a breach of trust, supposing that such positions are open to the State to take. *American Emigrant Co.* v. *Adams County*, 100 U. S. 61. *Spokane & British Columbia Ry. Co.* v. *Washington & Great Northern Ry. Co.*, 219 U. S. 166. The gift to the State is absolute, although, no doubt, as said in *Cooper* v. *Roberts*, 18 How. 173, 182, 'there is a sacred obligation imposed on its public faith.' But that

obligation is honorary like the one discussed in *Conley* v. *Ballinger*, 216 U. S. 84, and even in honor would not be broken by a sale and substitution of a fund, as in that case; a course, we believe, that has not been uncommon among the States. See further *Stuart* v. *Easton*, 170 U. S. 383, 394.

Some reliance was placed upon *Trustees for Vincennes University* v. *Indiana*, 14 Howard, 268, but the decision of the majority in that case rested upon the grant having been made to a private corporation of which the rights could not be impaired by the State.

The result of *Cooper* v. *Roberts* and of what we have said is that the State had authority to subject this land in its hands to the ordinary incidents of other titles in the State and that the judgment must be affirmed. *Northern Pacific Ry. Co.* v. *Ely*, 197 U. S. 1, 8.

Judgment affirmed.

TANEY, TRUSTEE OF MILLER PURE RYE DISTILLING COMPANY, *v.* PENN NATIONAL BANK OF READING.

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

No. 115. Argued December 9, 10, 1913.—Decided January 26, 1914.

In determining the relative rights of the trustee in bankruptcy and a secured creditor the legal effect of the transaction securing the loan depends upon the local law.

The rule that physical retention by the vendor of goods capable of delivery to the vendee is a fraud *per se* does not apply in Pennsylvania in a transaction, the inherent nature of which necessarily precludes delivery, or in which the absence of a physical delivery is excused by the applicable usages of trade.

Under the revenue laws of the United States the Government, although not strictly a bailee, is in complete control of a distillery warehouse which is in effect a bonded warehouse of the United States.

A distiller is not debarred from passing title or creating a special interest by way of pledge in whiskey deposited in his distillery warehouse in conformity with the revenue laws of the United States.

This court will not condemn honest transactions growing out of the recognized necessities of a lawful business; and so *held*, that the established practice of the distillery business to issue warehouse receipts for whiskey deposited in the distillery warehouse and pledge such receipts as security for loans is not one opposed to public policy.

In Pennsylvania, certificates issued by the owner of a distillery on whiskey in the distillery warehouse represent the property, and the delivery thereof as security for a loan made in good faith and in accordance with the usages of the trade amounts to actual delivery of the property itself.

187 Fed. Rep. 689, affirmed.

THE facts, which involve the relative rights of the trustee in bankruptcy, and the holder as security for loans of warehouse receipts for whiskey in a distilling warehouse issued by the distiller, are stated in the opinion.

Mr. Joseph Hill Brinton for appellant:

The company retained physical possession and control of the whiskey and received for its own use the charges for storage, except in so far as the Government's interest is concerned in the protection of its taxes.

The whiskey ordinarily could not be subject to the pledge in the absence of an actual or constructive delivery. Nothing appeared on the books of the company, and no other step was taken or attempted to negative the apparent ownership of the bankrupt company in whose possession and under whose control the whiskey was when the trustee took charge.

Where the pledge is left in the possession of the debtor, the burden of proof that there was a constructive delivery is upon the creditor claimant. *Barr* v. *Reitz*, 53 Pa. St. 256; *Hunter Construction Co.* v. *Lyons*, 233 Pa. St. 561.

Pennsylvania has adopted the English rule that if there be nothing but the absolute conveyance without the possession, that in point of law is fraudulent.

Appearances must agree with the real state of things, and the real state of things must be honest and consistent with public policy, affording no unnecessary facility for deception. *Clow* v. *Woods*, 5 S. & R. (Pa.) 277.

Where possession has been withheld pursuant to the terms of the agreement some good reason for the arrangement besides the convenience of the parties should appear, since public policy requires change of possession.

Where the subject of the sale or pledge is in the possession of a third party as bailee, constructive delivery is sufficient.

The law of Pennsylvania controls, and the courts of that State have universally held that a man may not be his own warehouseman. *Bank* v. *Jagode*, 186 Pa. St. 556; *Moors* v. *Jagode*, 195 Pa. 163; *Security Warehousing Co.* v. *Hand*, 206 U. S. 415; *In re Millbourne Mills Co.*, 172 Fed. Rep. 177.

Appellant contends that:

Either actual delivery by payment of tax and release of the whiskey for that purpose, or constructive delivery by removal to a general bonded warehouse and delivery of its warehouse receipt, was practicable, but neither means was adopted.

No constructive or symbolical delivery could be or was made by the so-called warehouse receipt given to the appellee.

The alleged custom of the trade, being contrary to public policy, cannot be sustained.

Individual interests arising from such a custom must suffer the consequences when the courts hold that they exist contrary to public policy. *Collins' Appeal*, 107 Pa. St. 590.

The convenience of the parties is not of moment. *Jenkins* v. *Eichelberger*, 4 Watts (Pa.), 121.

The real test is one of public policy and the question is not what rights as to possession the owner may have exercised, as between himself and the Government, but what opportunity he had of creating secret liens to the prejudice of the innocent and credulous.

A building erected by a distiller on the distillery premises pursuant to the statute has none of the characteristics of a regular warehouse. *Bucher* v. *Commonwealth*, 103 Pa. St. 523; *National Bank* v. *Sherer*, 225 Pa. St. 470.

Should the distiller desire to sell or pledge whiskey the act of August 27, 1894, §§ 51, 52, 28 Stat. 564, affords ample relief.

The court, for reasons of public policy, will not permit a man to be his own warehouseman and pass title by delivery of receipts, and thus afford an opportunity for duplication and fraud. The supervision of the Government lessens the danger of such fraud. Although the District Court held that the Government is a bailee, it is clear that in the one respect essential to prevent fraud, it is in no sense a bailee for it does not issue or control the issue of warehouse receipts and keeps no record of change of ownership.

Generally speaking, the Government cannot be said to be a bailee. It issues no receipts, recognizes no transfer of title or other interest, assumes no responsibility, and is not chargeable with negligence.

The Federal Government exercises the same control over the distillery as it does over the warehouse proper. The Internal Revenue Acts of the United States, Rev. Stat., §§ 3267, 3276, 3287, 3288, 3293, 3292 A, 3301, 3303, provide for the warehouse construction and custody and control thereof by the Government.

In no sense are the goods bailed to the Government, so as to permit constructive delivery to be made. *United States* v. *Thirty-six Barrels*, 7 Blatchf. 459; *Witten* v. *United States*, 143 U. S. 76.

In order that both the Government and the public

might be protected from fraudulent duplication of receipts, the act of 1894 was passed, whereby the distiller could defer the payment of tax and permit his product to ripen, but denied to him the opportunity of preying upon the credulous public. It is therefore in furtherance both of the convenience of the distiller and the protection of the public, that warehouse receipts should be negotiable only where the whiskey is deposited in a public bonded warehouse.

The injury to the liquor traffic dwelt upon by counsel is imaginary rather than real, and is indeed a weak support for a principle of law affording so widespread an opportunity for fraud and deceit. It is urged that the trade would be injured, and therefore the court should countenance a practice running counter to public policy. This injury, if real, could and would be corrected by proper legislation requiring the counter signature of some person in authority, in control of the warehouse, or some other simple provision entirely safeguarding the interests of the public. Such fraud is not possible in Pennsylvania since the passage of the act of May 16, 1901, Pub. Laws p. 194, and as to the law in that State see *Barlow* v. *Fox*, 203 Pa. St. 114; *Miller* v. *Browarsky*, 130 Pa. St. 372; *Rosenbaum* v. *Batjer*, 154 Pa. St. 544; *Sloan* v. *Johnson*, 20 Pa. Super. Ct. 643; *White* v. *Gunn*, 205 Pa. St. 229, citing *Clow* v. *Woods*, 5 S. & R. (Pa.) 575. See also *Conrad* v. *Fisher*, 37 Mo. App. 352; *Union Trust Co.* v. *Trumbull*, 137 Illinois, 146.

As to the law of the Federal courts relative to warehouse receipts, see *United States* v. *Witten*, 143 U. S. 76.

As to the rights of the trustee in bankruptcy in such a case as this, see *Bank* v. *Staake*, 202 U. S. 149; *Security Warehousing Co.* v. *Hand*, 206 U. S. 415.

Mr. Lawrence Maxwell, *Mr. Philip S. Zieber* and *Mr. A. Leo Weil*, with whom *Mr. Thomas Iaeger Snyder* was on the brief, for appellee.

MR. JUSTICE HUGHES delivered the opinion of the court.

On February 3, 1908, a petition in bankruptcy was filed against the Miller Pure Rye Distilling Company; it was adjudicated a bankrupt on February 19, 1908, and the appellant was appointed trustee. The Penn National Bank of Reading, Pennsylvania, the appellee, intervened in the bankruptcy proceeding with a petition asking for the delivery to it of two hundred barrels of whiskey stored in the bonded warehouse of the distilling company, upon the ground that the property had been lawfully pledged by the company to the bank. The District Court sustained the lien and accordingly held the claimant entitled to the delivery sought (176 Fed. Rep. 606); and, on appeal, this decree was affirmed by the Circuit Court of Appeals (187 Fed. Rep. 689).

The pertinent facts are these: On August 27, 1907, the bank lent to the distilling company $2500 for which the company gave its four months' note reciting the deposit with the bank, as collateral security, of "200 bbls. whiskey in bonded warehouse at Womelsdorf, Pa., as per Warehouse Rects, gauger's ctf. &c. accompanying." The form of the receipts is shown by the following copy of one of them:

"No. 5454. 25 Bbls.

First District of Pennsylvania.

United States Internal Revenue Distillery Bonded Warehouse of Miller Pure Rye Distilling Company.

Ryeland, Berks Co., Pa., August 26th, 1907.

Received on Storage from Ourselves Twenty-five (25) Barrels of Miller Pure Rye Whiskey Distilled, Marked and Numbered as per Record Attached, Subject to our Order and Risk of Loss or Damage by Fire, The Elements, Leakage, Evaporation or Accident, Deliverable only upon Surrender of this Certificate, Payment of Tax and other

Charges due Thereon, and Storage at the Rate of Five Cents per Barrel per month, from August 26th, 1907.

Inspection Spring 1907.

Stored in Warehouse No. 2.

Serial Nos. of Packages 7964/7988.

Miller Pure Rye Distilling Co.,

S. V. NAGLE, President.

Address all Communications to Miller Pure Rye Distilling Company, Philadelphia, Pa.

Special Notice—Particular care should be taken of this Certificate as the whiskey cannot be delivered without its surrender."

These receipts were indorsed by the company, and, with the gauger's certificates, were delivered to the bank. The whiskey itself was not actually delivered and remained in the bonded warehouse. The note not being paid at maturity, the bank upon notice sold the warehouse receipts at public sale on February 5, 1908, and became the purchaser. This sale, however, is not material to the present question which turns upon the validity of the lien.

There is no doubt as to the intention and actual good faith of the parties. The loan was made in reliance upon the designated security and the ground of attack is that the lien failed for want of delivery of possession.

The legal effect of the transaction depends upon the local law. *Thompson* v. *Fairbanks*, 196 U. S. 516; *Humphrey* v. *Tapman*, 198 U. S. 91; *York Manufacturing Co.* v. *Cassell*, 201 U. S. 344; *Hiscock* v. *Varick Bank*, 206 U. S. 28; *Security Warehousing Co.* v. *Hand*, 206 U. S. 415, 425; *Bryant* v. *Swofford Bros.*, 214 U. S. 279. Reviewing the decisions of the Supreme Court of Pennsylvania with respect to sales—the principles of which were deemed to be applicable—the Circuit Court of Appeals reached the following conclusion: "It suffices to say that the law of

Pennsylvania in respect of the question we are now considering, is settled by a line of cases extending through nearly a century. Starting with the policy of the statute of Elizabeth, for the circumvention of fraud and deceit in sales of personal property (which nowhere in terms refers to retention of possession by a vendor), it has wisely developed the spirit of that statute and evolved the salutary rule, that where there is nothing in the case but the retention of a physical possession by the vendor, which he is capable of delivering to the vendee, such retention is fraud *per se*, and not merely evidence of fraud, even though there be nothing inconsistent with the most perfect honesty. But this rule is not applied by the courts of Pennsylvania to cases where the inherent nature of the transaction and the attendant circumstances are such as to preclude the possibility of a delivery by the vendor, that would be consistent with the avowed and fair purpose of the sale, or where the absence of a physical delivery is excused by the usages of the trade or business in which the sale was made." 187 Fed. Rep. 689, 696.

We entertain no doubt as to the correctness of this statement (*Clow* v. *Woods*, 5 S. & R. 275; *Barr* v. *Reitz*, 53 Pa. St. 256; *McKibbin* v. *Martin*, 64 Pa. St. 352; *Crawford* v. *Davis*, 99 Pa. St. 576; *Stephens* v. *Gifford*, 137 Pa. St. 219; *Pressel* v. *Bice*, 142 Pa. St. 263; *Garretson* v. *Hackenberg*, 144 Pa. St. 107; *Barlow* v. *Fox*, 203 Pa. St. 114; *White* v. *Gunn*, 205 Pa. St. 229); and it was in the light of these principles that the court below held that, considering the situation of the property and the usages of the business, the transaction in question was valid.

To insure collection of the heavy tax that is laid upon distilled spirits, the production is carefully supervised and the product is impounded. Rev. Stat., §§ 3247–3334, as amended; Act of May 28, 1880, c. 108, 21 Stat. 145; Act of August 27, 1894, c. 349, §§ 48–67, 28 Stat. 509, 563–568: 2 Comp. Stat. U. S. pp. 22 *et seq.* Every dis-

tiller is required to provide, at his own expense, "a warehouse, to be situated on and to constitute a part of his distillery premises, and to be used only for the storage of distilled spirits of his own manufacture until the tax thereon shall have been paid." This warehouse, when approved by the Commissioner of Internal Revenue, is declared by the statute to be "a bonded warehouse of the United States, to be known as a distillery warehouse," and is "under the direction and control of the collector of the district, and in charge of an internal-revenue store-keeper, assigned thereto by the commissioner" (§ 3271). While the statute provides that "every distillery warehouse shall be in the joint custody of the store-keeper and the proprietor thereof," the control of the Government's representative is made dominant, as in the nature of the case it must be in order to fulfill the purposes of the act. The warehouse, the statute continues, "shall be kept securely locked, and shall at no time be unlocked, or opened, or remain open, unless in the presence of such store-keeper, or other person who may be designated to act for him, as provided by law; and no articles shall be received in or delivered from such warehouse except on an order or permit addressed to the store-keeper and signed by the collector having control of the warehouse" (§ 3274). Under the departmental regulations "the only lock to the warehouse door must be the Government lock, the key of which must at all times be in charge of the store-keeper." There must be an immediate removal of the distilled spirits to the distillery warehouse as soon as they are drawn into casks or packages and gauged, proved and marked, as required, and thereupon the internal revenue gauger "shall, in the presence of the store-keeper of the warehouse, place upon the head of the cask or package an engraved stamp, which shall be signed by the collector of the district and the store-keeper and gauger; and shall have written thereon the number of proof-gallons con-

tained therein, the name of the distiller, the date of the receipt in the warehouse, and the serial number of each cask or package, in progressive order, as the same are received from the distillery" (§ 3287; Act of May 28, 1880, c. 108, § 6). The spirits must be entered for deposit in the warehouse under the regulations prescribed by the commissioner and bond must be given for the payment of the tax. The statute gives the form of the entry which, made in triplicate and duly verified, must set forth the name of the person making it, the designation of the warehouse, the specification of the spirits deposited, with the marks and serial numbers of the packages, etc., and a statement of the amount of tax. Withdrawal may be made on payment of the tax—which is payable within eight years—by application to the collector in charge of the warehouse and the making of a withdrawal entry (§§ 3293, 3294; Act of May 28, 1880, c. 108, §§ 4, 5, 21 Stat. 145; Act of August 27, 1894, c. 349, §49, 28 Stat. 509, 563). Provision is made for regauging and for an allowance for loss from leakage or evaporation (*Id.* § 50, 28 Stat. p. 564; Act of Mar. 3, 1899, c. 435, 30 Stat. 1349; Act of Jan. 13, 1903, c. 134, 32 Stat. 770); and after four years the spirits may be bottled in bond, in a separate portion of the warehouse set apart for that purpose, under the supervision of the government official (Act of March 3, 1897, c. 379, 29 Stat. 626). The storekeeper is to keep "a warehouse-book" in which all deposits and deliveries are to be entered with appropriate description including marks and serial numbers (§ 3301). And the removal "of any distilled spirits from a distillery warehouse . . . in any manner other than is provided by law" is punishable by fine and imprisonment (§ 3296).

The minute regulations of the statute, and the provision for prolonged governmental control, proceed upon a recognition of the exigencies of the business. It is a

matter of common knowledge that the product is not ready to be marketed for consumption when it is drawn from the still. It must undergo an aging process and for this purpose it is kept in store for several years. In laying the tax, Congress has taken this necessity into consideration permitting a long postponement of the required payment, the spirits meanwhile being held in charge of the Government's representative. It is, however, a matter of obvious business importance that the distiller should be able to release the capital represented in the cost of production of the spirits in store and to make it available for further production; and hence the practice is well established to deal with the product in the bonded warehouse by sale or pledge, storage certificates suitably identifying the property being delivered in lieu of the actual transfer of possession. The District Court found as a fact that it is "the unbroken custom of the trade to treat storage receipts for spirits as completely equivalent to the spirits themselves, and to sell or pledge them freely without question." This finding is approved by the Circuit Court of Appeals, and the fact that this custom exists we understand to be undisputed.

It is argued for the appellant that one cannot make himself a warehouseman of his own goods and issue so-called receipts to take the place of the delivery which the law requires to give effect to his sale or pledge (*Security Warehousing Co.* v. *Hand*, 206 U. S. 415, 422; *Bank* v. *Jagode*, 186 Pa. St. 556). The argument ignores the special circumstances of the case and the restrictions imposed by law upon the distiller. The building is his, but the Government is in complete control. The spirits are his, but he is subject to fine and imprisonment if he attempts to remove them. It is undoubtedly true that the Government is not strictly a bailee. It assumes no responsibility to the distiller for the safe-keeping of the goods (*United States* v. *Whitten*, 143 U. S. 76, 78). But the immunity

which is incident to the exercise of governmental power in no way limits its effect upon the distiller's relation to the goods. They are effectually taken out of his power so that he is absolutely unable to make a physical delivery of them until the tax is paid. On the other hand, to pay the tax and remove the property before the aging process is completed would defeat the object of the deposit for which the statute provides, and would frustrate the purpose of a transfer of spirits in bond, which is an entirely lawful transaction. In these circumstances, the certificates—such as were here used—appropriately represent the property.

It is said that the distiller need not use his own warehouse but may place the goods in one of the general bonded warehouses established under the act of 1894 (28 Stat. pp. 564, 565). The appellee asserts that this would be impracticable; that no general bonded warehouse had been established in the collection district in question; that there are only twelve in the entire country with a capacity that is extremely small in comparison with the output of the distilleries. But, aside from this, the distillery warehouse is equally recognized by law; it is "a bonded warehouse of the United States." If it is a fit place for storage, the distiller is not obliged to remove the spirits elsewhere. And while they are thus deposited in conformity with law he is not debarred from passing title or creating a special interest by way of pledge.

The fundamental objection is that the custom, to which the entire trade is adjusted, is opposed to public policy. But we know of no ground for thus condemning honest transactions which grow out of the recognized necessities of a lawful business. The case is not one where credit may be assumed to be given upon the faith of the ostensible ownership of goods in the debtor's possession. Everyone dealing with distillers is familiar with the established practice in accordance with which spirits are held in store,

under governmental control, and are transferred by the delivery of such documents as we have here. There is no warrant for saying that creditors are misled by delusive appearances. The usage serves a fair purpose and there is no public policy which requires that the trade should be thrown into disorder by a refusal to uphold it. It is urged that frauds may be perpetrated by the duplication of such documents; but the present dispute does not call for the determination of the equities as between two innocent purchasers. We are concerned here simply with the rights of creditors represented by a trustee in bankruptcy and we agree with the court below in its conclusion that, in the circumstances disclosed, his right is inferior to that of the appellee.

The decree is affirmed.

Affirmed.

CHAPMAN & DEWEY LUMBER CO. *v.* ST. FRANCIS LEVEE DISTRICT.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 82. Argued December 12, 1913.—Decided January 26, 1914.

Whether particular lands patented by the United States to a State have passed from the latter to one or the other of two persons claiming adversely through the State is a question of local law, but whether the patent from the United States embraced the lands is a Federal question.

Where public lands are patented "according to the official plat of the survey returned to the General Land Office by the Surveyor General," the notes, lines, landmarks and other particulars appearing upon the plat become as much a part of the patent, and are as much

to be considered in determining what it is intended to include, as if they were set forth in it.

The specification in a patent of the acreage of the land conveyed is an element of the description, and, while of less influence than other elements, is yet an aid in ascertaining what land was intended.

A patent for "the whole" of a township "according to the official plat of the survey" is here construed, in view of what appeared upon the plat and of the acreage specified in the patent, as embracing the whole of the surveyed lands in the township, but not an unsurveyed area, approximating 8,000 acres, which was represented upon the plat as a meandered body of water.

The Swamp Land Act of 1850 in itself passed to the State only an inchoate title, and not until the lands were listed and patented under the act could the title become perfect.

The compromise and settlement negotiated in 1895 between the United States and the State of Arkansas, whereby the latter relinquished its inchoate title to all swamp lands not theretofore patented, approved or confirmed to it, is binding on the St. Francis Levee District as a subordinate agency of the State. *Little* v. *Williams*, 231 U. S. 335.

100 Arkansas, 94, reversed.

The facts, which involve the construction of a patent for swamp lands to a State and the extent of the lands conveyed thereby, are stated in the opinion.

Mr. Henry D. Ashley, with whom *Mr. William S. Gilbert* was on the brief, for plaintiffs in error:

The whole township theory, which is the only one which would put the title in the Levee Board, is against decisions of this court, rulings of the Land Department and the entire system for the survey and disposition of the public lands. 37 L. D. 345; 37 L. D. 462; *Cragin* v. *Powell*, 128 U. S. 691; *Little* v. *Williams*, 88 Arkansas, 37; *Gazzam* v. *Phillips*, 20 How. 372.

When in the extension of lines of public surveys a lake is meandered, its area is segregated from the public domain and beds of island non-navigable meandered lakes or lands uncovered by the recession of the waters of such

lakes from natural or artificial causes, since the survey and disposition of the adjacent shore lands, do not belong to the United States but to the riparian owners. *Hardin* v. *Jordan*, 140 U. S. 371; *Mitchell* v. *Smale*, 140 U. S. 406; *Kean* v. *Calumet Club*, 190 U. S. 466; *Whittaker* v. *McBride*, 197 U. S. 510; *Harrison* v. *Fite*, 148 Fed. Rep. 781; *Grand Rapids & I. R. Co.* v. *Butler*, 159 U. S. 87.

The common-law doctrine of riparian rights is fully recognized in Arkansas. *Harrison* v. *Fite*, 148 Fed. Rep. 781; *Warren* v. *Chambers*, 25 Arkansas, 120; *Rhodes* v. *Cissell*, 82 Arkansas, 367; *Little* v. *Williams*, 88 Arkansas, 37.

On the question whether the title is still in the United States or in plaintiff in error, so far as the Land Department has power to pass on this question it has rendered diametrically opposed decisions. *Hardin* v. *Jordan*, 140 U. S. 371.

While the courts have generally held the doctrine of estoppel as not applicable to the United States, where private rights have accrued and parties have changed their condition on the faith of the ruling of the Land Department, there should be some consistent continuity to such rulings. *Noble* v. *Union Logging Co.*, 147 U. S. p. 176; *United States* v. *Stone*, 2 Wall. 525, 535. See also application for survey, 23 L. D. 430; *Ex parte Michael Denody*, 11 L. D. 504; *United States* v. *Bank of Metropolis*, 15 Pet. 377.

It does not appear from the circumstances of this case that any action has been taken by the Government through any of its officers which should operate as an equitable estoppel.

Riparian rights are based upon the common law and are older than this Government, are part of *Lex Naturæ*, have no dependence on plats or surveys, and are important legal incidents to grants. Both by the common law and by the provisions of § 2476, Rev. Stat. (*Kean* v. *Calumet*

Canal Co., 190 U. S. p. 480; *Scott* v. *Lattig*, 227 U. S. 229) in the absence of the survey system a description of this property would carry the bottom of non-navigable lakes.

Nothing but surveyed area can pass as swamp land because the entire vesting of title has its origin in the Swamp-Land Act of 1850, which, though in the earlier cases described as a grant *in præsenti*, calls for surveys and selections and patents.

The mistake in the surveys which prevented the doctrine of *Hardin* v. *Jordan* and cases following from being applied in cases of *Horne* v. *Smith*, 159 U. S. p. 40, and *Niles* v. *Cedar Point Club*, 175 U. S. p. 300, would equally apply to mistake in a metes and bounds description which was based on a private survey or on no survey at all, but called for ancient monuments, such as trees, and so forth, and failed in its courses and distances to go to the water covered area for which the description called.

Whether areas outside meander lines as marked on government plats passed as swamp lands under the act of 1850, and surveys, selections, and patents made in pursuance thereof is a pure question of the construction of the Federal statutes, but the question of whether non-navigable lakes and ponds have passed by riparian right as an incident to a conveyance of bordering lands meandered in any method on such lakes and ponds is a question of common law.

By leave of the court, *The Solicitor General*, on behalf of the United States as *amicus curiæ*, submitted:

The lands involved in this controversy, and other similar areas in the State of Arkansas, generally known as "sunk lands" and sometimes erroneously designated as "lakes," were omitted from the original public land surveys. In the year 1908 the Secretary of the Interior, after hearing persons interested, including the parties to this

litigation, decided that the "sunk lands" here involved and other areas of like character, not having been surveyed or specifically disposed of, remained the property of the United States, and accordingly ordered that they be surveyed and held for disposition under the general land laws. See "*Arkansas Sunk Lands*," 37 L. D. 345, *S. C.*, *ib.* 462. Homestead rights are being asserted to a large part, if not practically all, of these "sunk lands," and suits have been begun by the United States, and others are in immediate prospect, for the purpose of clearing its title against all adverse claims, including such as are asserted by the respective parties to the case at bar. Approximately 40,000 acres will be embraced in these suits.

The record in the present case being silent as to the existence of the Government's claim, this suggestion of it is made, not as bearing upon the merits of the controversy now presented, but as a matter of possible interest to the court in guarding its opinion.

Mr. Samuel Adams, with whom *Mr. H. F. Roleson*, *Mr. J. C. Hawthorne* and *Mr. N. F. Lamb* were on the brief, for defendant in error:

Complete title to the entire township passed to the State of Arkansas under the Swamp-Land Act (9 Stat. 520; Rev. Stat. § 2479), and see 11 Stat. 251.

The Swamp-Land Act did not require that the lands be surveyed but only identified as coming within the terms of the act. See *In re Florida*, 8 L. D. 65, 18 L. D. 26, 19 L. D. 251, 24 L. D. 147.

It may be noted also that some of the earlier surveys ordered by Congress in the Northwest Territory provided that only part of the townships should be subdivided. 1 Stat. 465; 38 L. D. 4.

Where the description of lands in a conveyance is clear the entire area within the description will pass and no exception exists unless that exception is clearly stated.

2 Devlin on Deeds, § 979; *Wendall* v. *Fisher*, 187 Massachusetts, 81.

The fact that there is an expressed exception of section 16 shows that no other was intended. *Mitchell* v. *Smale*, 140 U. S. 406, 413; *Kean* v. *Calumet Company*, 190 U. S. 452, 459.

The statement of area in the approved list and patent is immaterial. Warville on Abstracts, § 207; *Bishop* v. *Morgan*, 82 Illinois, 352; *Ufford* v. *Wilkins*, 33 Iowa, 110; *Fuller* v. *Carr*, 33 N. J. Law, 157; *Veve* v. *Sanchez*, 226 U. S. 234, 240.

In a conveyance of land by deed in which the land is certainly bounded it is very immaterial whether any or what quantity is expressed, for the description of the boundary is conclusive. *Powell* v. *Clark*, 5 Massachusetts, 355.

See also: 3 Washburn on Real Property (6th ed.), § 2322, p. 386; 2 Devlin on Deeds, § 1044; *Bowles* v. *Craig*, 8 Cranch, 371; *Spreckels* v. *Brown*, 212 U. S. 208; *Hyde* v. *Phillips* (Wash.), 112 Pac. Rep. 257; *Wright* v. *Wright*, 34 Alabama, 194; *Dalton* v. *Rust*, 22 Texas, 133; *Hall* v. *Mayhew*, 15 Maryland, 551; *Pierce* v. *Faunce*, 37 Maine, 63; *Reddick* v. *Leggat*, 7 N. Car. (3 Murph.) 539; *Hunter* v. *Morse*, 49 Texas, 219; *Jackson* v. *Barringer*, 15 Johns. 471; *Kruse* v. *Scripps*, 11 Illinois, 98; *Petts* v. *Gaw*, 15 Pa. St. 218; *Doe* v. *Porter*, 3 Arkansas, 60; *Towel* v. *Etter*, 69 Arkansas, 34.

As the areas shown on plats of surveys made before the Swamp-Land Acts were passed, were made primarily for the purpose of ascertaining the quantity of upland for which a purchaser from the Government should pay, they had no effect in restricting patents under the Swamp-Land Act. *Kean* v. *Calumet*, 190 U. S. 452; *McDade* v. *Bossier Levee Board*, 109 Louisiana, 626; *Tolleston Gun Club* v. *State*, 141 Indiana, 197; *Kean* v. *Roby*, 145 Indiana, 221. See also *Stoner* v. *Rice*, 121 Indiana, 51; *People* v.

Warner, 116 Michigan, 228; *Kean* v. *Roby*, 145 Indiana, 221.

Meander lines in government surveys and plats are principally intended not as boundary lines, but to assist in fixing the acreage of uplands for which a purchaser was expected to pay. *McDade* v. *Bossier Levee Board, Tolleston Gun Club* v. *State, Kean* v. *Roby*, and *Kean* v. *Calumet Company, supra.* See also *Hardin* v. *Jordan*, 140 U. S. 371, 380; *Niles* v. *Cedar Point Club*, 175 U. S. 300.

Only where the meander line is part of the boundary and acreage is sold, is the recitation of the amount regarded as material. *Security Land Co.* v. *Burns*, 193 U. S. 167; *French-Glenn Co.* v. *Springer*, 185 U. S. 47; *Niles* v. *Cedar Point Club*, 175 U. S. 300; *Horn* v. *Smith*, 159 U. S. 40; *Western Hawaiian Co.* v. *National Bank*, 35 Oregon, 298.

Plaintiffs in error have shown no title in themselves to the land in question.

The compromise agreement between the United States and the State of Arkansas made in 1898 does not affect the land in question. Act of April 29, 1898, 30 Stat. 367.

The Swamp Land Act was a grant *in præsenti* and passed equitable title to the State which the State conveyed to the levee district. The levee district is therefore entitled to assert its ownership as against all third persons. *Wright* v. *Roseberry*, 121 U. S. 488; *Tubbs* v. *Wilhoit*, 138 U. S. 134; *Iowa Land Co.* v. *Blumer*, 206 U. S. 482; *Michigan Land Co.* v. *Rust*, 168 U. S. 589, distinguished.

Similar grants have been held irrevocable even by express action of the state legislature. *Grogan* v. *San Francisco*, 18 California, 590; *Franklin School* v. *Bailey*, 62 Vermont, 467; *Mount Hope Cemetery* v. *Boston*, 158 Massachusetts, 509. See also *Jackson* v. *Dilworth*, 39 Mississippi, 772; *Higginson* v. *Slattery*, 212 Massachusetts, 583; *Webb* v. *New York*, 64 How. Pr. 10; Dillon on

Mun. Corp., 3d ed., p. 91; *Board of Education* v. *Blodgett*, 155 Illinois, 441, 450.

Property rights of municipal corporations cannot be taken away by legislative action without compensation. This rule especially applies where it is contemplated that the district should expend money and incur financial obligations on the faith of the grant made.

Concerning the suggestions filed by the Solicitor General on behalf of the United States as *amicus curiæ*, it is to be noted that the decisions in 37 L. D. 342 and 462 are contrary to two former opinions of the Department in August, 1894, and November 17, 1892, and are based principally on the decision of the Arkansas Supreme Court in *Little* v. *Williams*, 88 Arkansas, 37, now pending in this court on writ of error and expressly distinguished by the Arkansas Supreme Court in this case. Nowhere in the departmental opinions is there any finding that the lands were not swamp or overflowed. In fact, it is stated that they were such. 37 L. D. 348.

If homesteaders are going on these lands, it is of importance that the proper interpretation of the State's original title should be fixed in order that innocent persons may be guarded against a waste of their time and labor. *Irvine* v. *Marshall*, 20 How. Rep. 558, 567.

This court, in guarding the rights of owners of real estate under early patents from the Government, has repeatedly overruled the Land Department when it has misconstrued government surveys and patents and has acted on the assumption that a meander line was intended primarily as a boundary line. *Hardin* v. *Jordan*, 140 U. S. 371; *Mitchell* v. *Smale*, 140 U. S. 406, and *Kean* v. *Calumet Company*, 190 U. S. 452.

Cragin v. *Powell*, 128 U. S. 691; *Gazzam* v. *Phillips*, 20 How. 372; 37 L. D. 345 and 462, and *Little* v. *Williams*, 88 Arkansas, 37, cited by plaintiffs in error, are inapposite to this case.

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

The chief controversy in this case is over the title to about 1,500 acres of unsurveyed lands in Poinsett County, Arkansas, which were part of the public domain at the date of the Swamp-Land Act of September 28, 1850, c. 84, 9 Stat. 519, and the Federal question to be considered is, whether under the operation and administration of that act these lands have passed from the United States or are still its property.

Although within the exterior lines of a township surveyed in 1840 and 1841, they, with other lands, were excluded from the survey, were meandered as if they were a lake, and were designated upon the official plat as a meandered body of water called "Sunk Lands," a name frequently applied in that region to areas which subsided during the New Madrid earthquake, a little more than a century ago, and subsequently became submerged. Other unsurveyed areas, designated as meandered bodies of water, were also shown upon the plat. The township was approximately six miles square and the plat bore an inscription to the effect that the total of the surveyed areas was 14,329.97 acres, so the unsurveyed areas represented as water must have amounted to 8,000 acres or more.

After the enactment of the Swamp-Land Act, the State requested that the township be listed as swamp lands and patented to it under that act, both of which were done, the former in 1853 and the latter in 1858. In requesting the listing, the State described the township as containing 14,329.97 acres, the total of the surveyed areas as inscribed upon the plat, and in making the list, the Secretary of the Interior took the same total and deducted 514.30 acres in fractional section 16, which already had passed to the State under the school-land grant,

thereby making the listed area 13,815.67 acres. The patent embraced lands in several townships, the portion of the description material here being: "Township 12 North of Range 7 East. The whole of the Township (except Section sixteen), containing thirteen thousand, eight hundred and fifteen acres and sixty-seven hundredths of an acre . . . according to the official plats of survey of said lands returned to the General Land Office by the Surveyor General."

In the state courts the levee district, the plaintiff, claimed title to the lands in controversy under the Swamp-Land Act and an act of the state legislature in 1893 (Laws Ark. 1893, p. 172) granting to the levee district "all the lands of this State" lying within the boundaries of the district; and the defendants opposed this claim upon two grounds: One, that if these lands had passed to the State the defendants had succeeded to the title by riparian right in virtue of their ownership, under conveyances from the State in 1871, of the fractional sections and subdivisions abutting on the meandered area called "Sunk Lands;" and the other, that the lands in controversy had not passed to the State, but were still the property of the United States. The trial court sustained the plaintiff's claim and entered a decree accordingly, which was affirmed by the Supreme Court of the State, the Chief Justice dissenting. 100 Arkansas, 94.

Both courts found as matter of fact from the evidence produced at the trial that at the time of the survey and at the date of the Swamp-Land Act the unsurveyed area designated upon the plat as "Sunk Lands" was not a lake or permanent body of water, but only temporarily overflowed, and was not distinctly lower or materially different from the adjoining lands; and with this as a premise it was held that the lands in controversy did not pass to the State or to the defendants with the adjoining lands as an incident of riparian ownership, but were con-

veyed to the State by the patent issued in 1858, and thence to the levee district by the state act of 1893.

If the patent conveyed these lands to the State we are not concerned with their subsequent disposal, for that is a question of local law. But did the patent include them? This, of course, is a Federal question. In answering it in the affirmative, the state courts regarded the words "Sunk Lands," shown upon the plat, as meaning that the unsurveyed area to which they were applied was land and not water, and also regarded the words "The whole of the Township (except Section sixteen)," as used in the patent, as embracing all that was within the exterior lines of the township, except Section 16, whether surveyed or unsurveyed and even although meandered and excluded from the survey. We are unable to accede to this view of either the plat or the patent.

Had the plat shown that all the lands were surveyed, it doubtless is true that the words "Sunk Lands" would not have indicated the presence of a body of water, but would have been taken in much the same way as would such words as "valley," "broken hills" or "level plateau." But the plat showed, as did also the field notes, that the area to which the words were applied was not included in the survey, but was excluded therefrom and meandered as a body of water, and also that the adjoining sections and subdivisions were surveyed as fractional, as is usual with lands abutting on a lake or similar body of water. Thus, what appeared upon the plat had the same meaning as if this area had been called "Sunk Lands Lake." And that the officers of the State and of the United States so understood is shown by the fact that in the proceedings preliminary to the issuance of the patent, as also in the patent, this and similar areas were excluded in specifying the amount of land in the township.

Of course, the words in the patent "The whole of the Township (except Section sixteen)" are comprehensive,

but they are only one element in the description and must be read in the light of the others. The explanatory words "according to the official plats of survey of said lands returned to the General Land Office by the Surveyor General" constitute another element, and a very important one, for it is a familiar rule that where lands are patented according to such a plat, the notes, lines, landmarks and other particulars appearing thereon become as much a part of the patent and are as much to be considered in determining what it is intended to include as if they were set forth in the patent. *Cragin* v. *Powell*, 128 U. S. 691, 696; *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178, 194. The specification of the acreage is still another element, and, while of less influence than either of the others, it is yet an aid in ascertaining what was intended, for a purpose to convey upwards of 22,000 acres is hardly consistent with a specification of 13,815.67 acres. *Ainsa* v. *United States*, 161 U. S. 208, 229; *Security Land Co.* v. *Burns*, 193 U. S. 167, 180; 3 Washburn on Real Property, 5th ed., 427. Giving to each of these elements its appropriate influence and bearing in mind that the terms of description are all such as are usually employed in designating surveyed lands, we are of opinion that the purpose was to patent the whole of the lands surveyed, except fractional section 16, and not the areas meandered and returned, as shown upon the plat, as bodies of water. That it is now found, as shown by the decisions below, that these areas ought not to have been so meandered and returned, but should have been surveyed and returned as land, does not detract from the effect which must be given to the plat in determining what was intended to pass under the patent. *Niles* v. *Cedar Point Club*, 175 U. S. 300, 306; *Hardin* v. *Shedd*, 190 U. S. 508, 520.

As, then, the lands in controversy were not included in the patent, and, under the findings below, did not pass to the State or to the defendants by riparian right with the

adjoining fractional sections and subdivisions, it follows that they remain the property of the United States. *Niles* v. *Cedar Point Club, supra; French-Glenn Live Stock Co.* v. *Springer,* 185 U. S. 47; *Security Land Co.* v. *Burns, supra.*

But it is said on behalf of the levee district that, even though the lands were not included in the patent, they passed to the State under the Swamp-Land Act independently of any patent, and passed thence to the district under the state act of 1893. The contention is not tenable. The lands were never listed as swamp lands and their listing does not appear to have been even requested, doubtless because they were not surveyed. Assuming that in fact they were swamp lands, the State's title under the Swamp-Land Act was at most inchoate and never was perfected. Not only so, but the State relinquished its inchoate title to the United States as part of a compromise and settlement negotiated in 1895, and the relinquishment is binding upon the levee district as a subordinate agency of the State. *Little* v. *Williams,* 231 U. S. 335. See *Carson* v. *St. Francis Levee District,* 59 Arkansas, 513, 533–535.

The levee district was therefore not entitled to prevail in respect of the unsurveyed lands.

Decree reversed.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

No. 590. Argued December 1, 2, 1913.—Decided January 26, 1914.

Whatever transportation service or facility the law requires the carriers to supply they have the right to furnish.

Under § 15 of the Act to Regulate Commerce, as amended by the Hepburn Act, the carrier has not only the duty but the right to furnish all ice needed in refrigeration.

A carrier cannot be compelled to keep facilities for the benefit of shippers and the shippers allowed to furnish these facilities themselves.

The carrier cannot compel a shipper of fruit to have it refrigerated.

When ice is actually needed and used in transportation of fruit, it depends upon the circumstances of each case whether the icing is a part of preparation which can be done by the shipper or part of refrigeration which the carrier has the exclusive right to furnish.

Neither the carrier nor the shipper can insist upon wasteful or expensive service in transportation for which the consumer must ultimately pay. In this regard the court will consider the interests of the public.

Loading the car, by whomsoever done, must be such as to prepare the freight for shipment, and a consignor may, in the absence of a regularly filed tariff covering this work, not only put perishable freight, such as fruit, in a car placed at his warehouse, but may do all other acts, including icing, necessary to fit the fruit for shipment and filling bunkers in the car with ice for its preservation.

Filing a tariff withdrawing a privilege to shippers affects a practice and a rule within the meaning of the Act to Regulate Commerce, and the Commission has power under § 15, as amended by the Hepburn Act, to determine after a hearing whether the new rate is unreasonable and if so what is just, and require the carrier to conform to the rates and practice prescribed by it.

An order of the Commission fixing carload rates apparently excluding any compensation for hauling the ice necessary for refrigerating, is not confiscatory when it appears that the rate for the fruit itself practically includes the rate for the ice.

In a suit based entirely on reasonableness of carload rates the issue of whether it discriminates against shippers of small lots will not be

considered when that issue is not presented on any assignment of error in this court.

What are proper rates for transportation and fair charges for facilities furnished and services rendered, and differences between carload and less than carload lots, are all rate-making matters committed to the Commission and within its discretion.

The courts have no power to fix rates or establish practices and cannot interfere with those fixed and established by the Commission except in cases where the orders are void. *Interstate Commerce Commission* v. *Un. Pac. R. R. Co.*, 222 U. S. 547.

204 Fed. Rep. 647, affirmed.

In 1909, Associations, representing California fruit-growers, filed with the Commerce Commission complaints against numerous railroad companies attacking the freight and refrigeration charges on citrus fruit shipped from California to Eastern points. Much testimony was taken, from which it appeared that the orange crop amounted to about 50,000 cars per annum, of which the 20,000, shipped in warm weather, required some form of refrigeration in order to keep the fruit in condition for use at the end of the journey. At the close of the first hearing June 11, 1910, the Commission held (19 I. C. C. 148) that $1.15 per cwt. was a reasonable freight-rate on oranges. Other questions in the case were postponed until January 14, 1911, when the Commission made a report (20 I. C. C. 106) as to the reasonableness of the carriers' charges of $62.50 per car for refrigeration and $30 for services in shipments pre-cooled by the consignor.

The Commission found that in refrigeration by the carriers they furnished all the ice and performed all of the services, including re-icing en route. It found that there was a total of about 11 tons of ice furnished, but owing to the melting the average weight of ice hauled was 8,000 lbs., the freight on which to Chicago, was .25 per 100. It cost something to repair the bunkers, and the Commission recognized the right to include an additional sum to cover risk and profit.

The total revenue of $345.30 from such shipments was made up of the following items:

Freight on 27,200 lbs. of oranges @ $1.15		$312.80
Cost of 11 tons of ice	$30.	
Freight on 8,000 lbs. average weight of ice hauled @ .25	20.	
Damage to bunkers	5.	
Sum to cover risk and profit	7.50	
		62.50
Gross Receipt		$375.30
Less cost of ice		30.00
Freight and refrigeration charges		$345.30

The Commission found that the charge of $62.50 for refrigeration services was reasonable.

It further appeared that the Government had conducted certain experiments with a view of determining whether an advantage would not be derived from pre-cooling the fruit before the bunkers were filled with ice. There was testimony that the carriers had reached the conclusion that if the fruit was pre-cooled before the movement of the car began, there would be a corresponding saving in the amount of ice needed in the bunkers. They accordingly had erected plants at which the fruit could be pre-cooled and included such pre-cooling service in the regular refrigeration charge of $62.50.

Certain shippers claimed that better results were obtained where the fruit was pre-cooled immediately after it was taken from the grove and before it was placed in the car. They therefore adopted a method in which the shipper chills the fruit, cools the car, furnishes the ice and fills the bunkers at a cost to himself of $32.50. The carrier for its services in connection with hauling such pre-cooled shipment charged $30, intending thereby to make the rates on pre-cooled fruits the same, whether the

pre-cooling was by the shipper or the carrier. In determining whether this $30 was a reasonable charge for service rendered by the carrier in hauling fruit pre-cooled by the shipper, the Commission said (20 I. C. C. 120) that no re-icing was necessary en route and that "it would be a liberal estimate to put the average weight of the ice during the entire journey at 5,000 lbs. For the hauling of this ice the carriers are entitled to fair compensation, as they are in the case of Standard Refrigeration." There is also an "expense in providing and keeping in repair the ice bunkers. . . . The carrier is, therefore, entitled to this additional cost, which is about $5 per car per trip one way." (20 I. C. C. 120.)

Where the fruit is pre-cooled by the shipper, the boxes are packed so much closer together that the load is one-sixth greater than in case of shipments pre-cooled and refrigerated by the carrier. The result is that the revenue from a car of fruit pre-cooled by the shipper would be—

Freight on 33,000 lbs. of oranges at $1.15	$379.50
Freight on 5,000 lbs. of ice at 25 cents per hundred	12.50
Damage to bunkers (and profit allowed?)	7.50
	$399.50

or, $54 more than the revenue of $345.30 from a car pre-cooled and refrigerated by the carrier.

The Commission further said: "As bearing upon the reasonableness of the rate, the carriers showed the cost of the movement of these oranges per gross ton—that is, per ton of combined weight of car and of contents as compared with other articles—claiming that this was the true basis upon which to fix rates. So treating these pre-cooled shipments, it will be found that the carrier receives more per gross ton for handling the pre-cooled car than for either the ventilated or the refrigerated shipment. By every canon of rate-making which has been applied by carriers in the past, or which is relied upon by them now,

these pre-cooled shipments at the standard rate without additional compensation are better business than either the ventilated or the refrigerated movement. Clearly these growers who have devised and perfected this system of shipment, should not be compelled to pay for the privilege of using it more than the fair cost to the carrier of providing the additional facilities which are not included in the ventilated rate with a fair profit." 20 I. C. C. 121.

The report concluded as follows: "We are of the opinion that the present pre-cooling charges of the defendants of $30 per car are unjust and unreasonable, and that these charges should not exceed for the future $7.50 per car, but the defendants may, as a condition of making this charge, require that pre-cooled cars be loaded seven tiers wide and two tiers high, and may provide by their tariffs a proper minimum to accomplish this result, the amount of which would depend upon the length of the car." 20 I. C. C. 123.

The carriers, in obedience to this order, put in a tariff of $7.50 for pre-cooling services, but at once filed another tariff, effective July 1, 1911, reciting that "the privilege heretofore permitted to shippers of citrus fruit to pre-ice carload shipments is withdrawn, the carriers retaining and exercising the exclusive right and control of furnishing and doing all icing and refrigeration of citrus fruit in all cases where shipper does not specifically request or direct shipments to move solely under ventilation."

Immediately thereafter the orange-growers' associations filed proceedings to cancel this withdrawal tariff and to compel the carriers to continue to extend to shippers the old privilege of pre-cooling at the new rate of $7.50. At the hearing the evidence and reports of the Commission in the former case were stipulated into the record and, on April 8, 1912 (23 I. C. C. 267, 271), the Commission held that the shippers had the right to the pre-cooling

privilege and again ruled that $7.50 was a reasonable charge for the services rendered by the carriers.

The Railroad Companies then filed a petition in the Commerce Court attacking the original order of January 14, 1911 (fixing $7.50 as a reasonable charge on pre-cooled shipments) and the last order of April 8, 1912, (requiring the roads to permit pre-cooled shipments at that sum), contending that shippers had no right to ice the bunkers. They also insisted that the $7.50 rate was confiscatory and did not equal the $17.50, which the Commission itself had found to be the actual cost of services rendered in connection with pre-cooled shipments. The carriers, thereupon prayed that both orders should be annulled and set aside.

The Commerce Court (204 Fed. Rep. 647, 651) adopted the finding of the Commission that in pre-cooled shipments the revenue was $54 greater than in the Railroads' method of refrigeration, and concluded by saying that, in view of that fact, "we do not think that the petitioners have any valid complaint to make of the charge of $7.50 per car established by the Commission." It further held that under the facts appearing in the record, the shipper had the right to furnish the ice in pre-cooled shipments and thereupon it dismissed the petition. The case was then brought here by appeal.

Mr. Gardiner Lathrop and *Mr. F. H. Wood,* with whom *Mr. Robert Dunlap, Mr. T. J. Norton, Mr. A. S. Halsted, Mr. C. W. Durbrow* and *Mr. W. F. Herrin* were on the brief, for appellants:

The Commission has no power or authority to require carriers against their will to permit the shippers to perform any part of the refrigeration or transportation service, and the order of the Commission suspending and finally setting aside the amendment to the tariffs of the carriers withdrawing any permission or privilege theretofore

granted to shippers of pre-icing the carriers' cars was and is erroneous and invalid.

Shippers may pre-cool intended shipments in their own plants, but are not lawfully entitled to refrigerate the carriers' cars or perform a part of that service.

The carriers never claimed that the pre-cooling done by the shippers is a part of the transportation. But the icing of their equipment is a part of the transportation service.

For definition of refrigeration see 23 I. C. C. 267. See also *Int. Com. Comm.* v. *Louis. & Nash R. R. Co.*, 227 U. S. 88.

Furnishing of ice, loading it into bunkers of the car of the carrier which is under the control of the carrier, is a part of the refrigeration service. See *Matter of Charges*, 11 I. C. C. 129, 138; *Truck Farmers' Assn.* v. *Northeastern Ry.*, 6 I. C. C. 295, 316.

The railroad company is charged with the duty of refrigeration under the statute. *Florida Fruit Assn.* v. *Atlantic Coast Line*, 14 I. C. C. 476, 507; *Albree* v. *B. & M. R. R.*, 22 I. C. C. 303, 321; *Waxelbaum & Co.* v. *A. C. L. R. Co.*, 12 I. C. C. 178.

It was the same at common law. *Johnson* v. *Toledo &c. Ry.*, 133 Michigan, 596; 4 Elliott on Railroads, § 1474; 2 Hutchinson on Carriers, 3d ed., § 505.

Where duty has been imposed upon the carrier it is responsible for the safe transit of the shipments transported under such duty and takes the risk of the same being properly attended to, and cannot relieve itself from this liability or risk by contract with the shipper. *Taft* v. *Am. Exp. Co.*, 133 Iowa, 522; *New York &c.* v. *Cromwell*, 98 Virginia, 227; *In re Charges*, 11 I. C. C. 129, 138; *St. Louis &c. Ry.* v. *Renfroe*, 82 Arkansas, 143; *St. Louis &c. Ry.* v. *Jackson*, 55 Tex. Civ. App. 407; *McLean* v. *Gulf &c. Ry.*, 55 Tex. Civ. App. 130; *M., K. & T. Ry.* v. *McLean*, 55 Tex. Civ. App. 130.

See also the obligation imposed by the Carmack Amendment to § 20 of the Interstate Commerce Act.

The burden, responsibility and liability having been placed upon the carrier under the common law, and later by express statute, the carrier cannot be denied the right to perform the entire transportation service in order that it may make certain that the shipment will be carried in such a manner as will insure its safe transit and delivery.

The shipper is not legally entitled to perform any part of refrigeration without the carrier's consent.

Such duties as are imposed upon it, either by common or statute law, the carrier must discharge and perform either directly or through the instrumentality of some agency, and as it is responsible for the performance, and has imposed upon it the risk of proper performance, it may select its own agency therefor. *Refrigeration of Fruit,* 11 I. C. C. 129, 137.

Agency is a matter of contract and the Commission has not the power to impose such contracts upon carriers. *L. & N. R. R. Co.* v. *West Coast Co.,* 198 U. S. 483, 497; *Central Stock Yards Co.* v. *L. & N. R. R.,* 192 U. S. 568.

The carriers in this case were and are prepared to pre-cool shipments in cars. If they are lacking in proper appliances or fail to discharge the obligations, the shipper's right to relief is found in the courts because the Commission has not been vested with judicial power to determine these questions or to enforce the shipper's rights in these respects. *Int. Comm. Comm.* v. *Nor. Pac. Ry.,* 216 U. S. 538.

Pre-icing as well as icing the car is a part of transportation. There is no more right in the shipper to pre-ice or re-ice a car of the carrier and thus furnish a part of the transportation service than there is to demand that the carrier accept and use the cars of the shipper and make allowance therefor. *Int. Comm. Comm.* v. *Diffenbaugh,* 222 U. S. 42, 47; *Cons. Forwarding Co.* v. *Southern Pac.*

Co., 9 I. C. C. 182, 197, 206; *In re Transportation*, 10 I. C. C. 360, 374; *Matter of Charges*, 11 I. C. C. 129, 138.

A shipper cannot force his own car or equipment upon the carrier without the carrier's consent and demand an allowance therefor. *Central Stock Yards Co.* v. *Louis. & Nash. Ry. Co.*, 118 Fed. Rep. 113; *S. C.*, 192 U. S. 568.

If these services are necessary in the refrigeration of the car, the law enjoins upon the carrier the obligation of furnishing them and imposes upon the carrier the obligation of answering to the shipper in the event the services are not properly performed. 1 Wyman, Pub. Serv. Corps., § 796, p. 669, note 1; *Atlantic Coast Line* v. *Geraty*, 166 Fed. Rep. 10; *Calender Co.* v. *Chicago &c. R. Co.*, 99 Minnesota, 295; *Undell* v. *Ill. Cent. R. R. Co.*, 13 Mo. App. 254; *Mathis* v. *Southern Ry. Co.*, 65 So. Car. 271; *Chicago & A. R. Co.* v. *Davis*, 159 Illinois, 53; *International &c. Ry. Co.* v. *Welbourne*, 113 S. W. Rep. 780; *St. L., I. M. & S. R. Co.* v. *Cumbie*, 101 Arkansas, 172; *Pennsylvania R. R. Co.* v. *Orem*, 111 Maryland, 356; *McConnell Bros.* v. *Southern Ry. Co.*, 144 Nor. Car. 87. See, also, note to *St. Louis &c. Ry. Co.* v. *Renfroe*, 10 L. R. A. (N. S.) 317.

The Commerce Court had power to review the decision and order of the Commission although it may have involved an administrative ruling. Whether or not a given practice or regulation of the carrier is reasonable is a question of law for the ultimate determination of the courts in an appropriate proceeding. Here, however, there was simply involved the legal right of the carrier to insist upon itself performing the entire transportation service and to withdraw from certain shippers a privilege theretofore accorded to perform a part thereof with an allowance therefor.

Common carriers have the right to make reasonable rules and regulations for the conduct of their business, governing the use of their cars and the manner of receipt,

transportation, delivery and care of freight while in their custody, and there is a presumption that such regulations are reasonable. *Harp* v. *Choctaw &c. R. R. Co.*, 125 Fed. Rep. 445, 450; *Robinson* v. *B. & O. R. R. Co.*, 129 Fed. Rep. 753; *Platt* v. *Lecocq*, 158 Fed. Rep. 724, 730; 2 Hutchinson on Carriers, 3d ed., §§ 943, 1033, 1077.

The reasonableness of any rule or regulation of a carrier is a question of law to be determined by the court. *Pullman Co.* v. *Krauss*, 145 Alabama, 395; 40 So. Rep. 399; *Gregory* v. *C. & N. W. Ry. Co.*, 100 Iowa, 345; *Central of Georgia Ry.* v. *Motes*, 117 Georgia, 923; *Ill. Cent. R. R. Co.* v. *Whittemore*, 43 Illinois, 420, 423; *Vedder* v. *Fellows*, 20 N. Y. 126, 130; *Railroad Co.* v. *Fleming*, 14 Lea (Tenn.), 145.

The question resolves itself into one of law. The Commission has committed an error of law in rendering its decision, and has entered an order which transcends its power and authority. The court should have determined these questions of law as an original proposition and not have felt constrained to accept the conclusions, findings, and order of the Commission as final. *Ill. Cent. R. R. Co.* v. *I. C. C.*, 215 U. S. 452; *Int. Comm. Comm.* v. *Un. Pac. R. R. Co.*, 222 U. S. 541.

The $7.50 charge prescribed by the Commission as compensation to the carrier for refrigeration where the shipper is permitted to pre-ice is unreasonable, unlawful, arbitrary and confiscatory and contrary to the findings of the Commission.

Carriers are entitled to a reasonable profit for each particular service rendered. *Southern Ry. Co.* v. *St. Louis Hay Co.*, 214 U. S. 297; *Int. Comm. Comm.* v. *Stickney*, 215 U. S. 98; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79, 93, 94.

The order of the Commission gives those shippers with cold storage plants an advantage over others by the difference between $7.50 and $30, or $22.50 on every car.

Mr. Blackburn Esterline, Special Assistant to the Attorney General, with whom *The Solicitor General* was on the brief, for the United States:

The findings of fact set forth in the report of the Commission put it beyond the power of the appellants to challenge the validity of its order. Their counsel advance elaborate arguments and the citation of numerous authorities on the respective functions of the Commission and the court. The whole evidence is also discussed. The respect due to the repeated decisions of this court forbids the counsel for the Government from entering into any discussion of those questions. The elaborate brief of the appellants fails to set forth any single, distinct and dominant proposition of law which the Commission erroneously decided. They have cleared the way for the affirmance of the judgment. *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Railway Co.*, 218 U. S. 88, and other authorities.

The Interstate Commerce Commission found as a fact that "the filling of the bunkers with ice is a part of the preparation of the car for shipment, and not a part of the transportation service," and that "pre-cooling and pre-icing" is inseparable and one and the same thing. The appellants concede the right of the shippers to pre-cool the fruits and place them in the cars. The concession brings the case to an end, as there is no legal question for review.

The carriers, the shippers, the Commission, and the Commerce Court all treated "pre-cooling and pre-icing" as one and the same thing until after the Commission condemned the charge of $30 per car, and the Commerce Court denied the first motion for preliminary injunction. The carriers then took the position, for the first time, that pre-cooling and pre-icing are different and separable; that pre-icing is refrigeration, and refrigeration is transportation, which the carriers, under the Act to Regulate Com-

merce, have the sole and only right to perform. This was an afterthought, suggested by the pressure and exigencies of the case. *Railway Co.* v. *McCarthy*, 96 U. S. 258, 267.

The carriers first established the "pre-cooling and pre-icing" privilege. It was not until after all hope of levying the extortionate charge of $30 per car was gone, that they sought to cancel the tariff, and raise these numerous objections to the practice, such as damage to, and wear and tear of, the cars; the inferior quality and irregular dimensions of the ice blocks; the lack of proper refrigeration; the irregularity of the shippers in pre-cooling and pre-icing; the necessity for extra icing during delays in transit; the alleged increase of damage claims resulting, and the experimental purposes for which the practice is said to have been installed. While the carriers were levying the extortionate charge of $30 per car, which would aggregate, on all shipments, approximately $800,000 a year, these groundless objections laid dormant. Had no complaint been filed, or had the Commission dismissed the complaint, or refused to interfere, no objection would ever have been raised by the carriers to the practice.

The Commission was dealing with loaded cars and the weight of the contents. The "pre-cooling and pre-icing" is the highest standard of refrigeration and the most efficient system ever devised. It brings more revenue per car to the carriers as a result of the difference in the loading than any other system. No equivalent is offered by the carriers. The allowance of $7.50 for the wear and tear on the bunkers is adequate.

The argument that the order of the Commission will result in gross discrimination against the small shipper has already been rejected. *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 88.

Mr. P. J. Farrell for the Interstate Commerce Commission:

The order of January 14, 1911, is fully supported by the evidence contained in the record made by the parties in the proceedings before the Commission.

The charge of $7.50 covers only services of carriers in keeping ice bunkers in repair.

To vary charge of repairing ice bunkers according to variations in distances over which traffic is transported would be impracticable and improper.

The Commission's finding concerning cost to shippers of pre-cooling and pre-icing is fully supported by evidence upon which it is based.

The reasons advanced by counsel in support of their contention that the order is invalid are based upon an erroneous view concerning matters covered by the charge of $7.50.

The order of April 8, 1912, is not based upon an erroneous construction of the Act to Regulate Commerce.

Pre-icing can be done more economically and satisfactorily by shippers than by carriers.

Shippers, within certain limits, have control of the condition in which traffic may be delivered to carriers for transportation.

The cases cited in their brief by counsel for the carriers are inapposite.

Carriers cannot compel shippers to pay for refrigeration services they do not ask for and do not need.

The right of carriers to re-ice in order to protect themselves against damages which would otherwise result from delays en route is freely admitted.

The shippers' right to pre-ice does not depend upon carrier's view of result which will ensue if shippers avail themselves of such right.

To serve their own interests the carriers are seeking to compel shippers to adopt an unnecessarily expensive method of shipment.

The Hepburn Act did not make the pre-icing in question a part of transportation.

Such pre-icing is an indispensable element of the pre-cooling process.

If the Commission had permitted cancellation tariffs of carriers to become operative, shipments of fruit would have been thereby subjected to new rates in excess of those formerly in effect.

Carriers may not render ineffective an order of the Commission by canceling tariffs voluntarily published and filed by them upon which the order is based.

In support of these contentions see *Int. Comm. Comm.* v. *Del., Lack. & West. R. R. Co.*, 220 U. S. 235; *Int. Comm. Comm.* v. *Diffenbaugh*, 222 U. S. 42; *Investigation and Suspension of Certain Regulations*, 23 I. C. C. 267; *Pacific Coast Lumber Assn.* v. *Atchison &c. Ry. Co.*, 14 I. C. C. 154.

Mr. William E. Lamb, with whom *Mr. George E. Farrand*, *Mr. Rush C. Butler* and *Mr. Stephen A. Foster* were on the brief, for the Arlington Heights Fruit Company *et al.*, intervenors.

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

There are many cases between shipper and carrier in which each insists that the other is bound to furnish service or facilities connected with the transportation of freight. The present record, however, presents an instance where both parties are contending for the privilege of supplying an article needed in the proper shipment of fruit—the consignor claiming that icing is a necessary part of the loading, which he is authorized to supply; while the carriers insist that icing is a part of refrigeration, by statute made transportation, which they are bound to provide and for which they are entitled to collect reasonable compensation. The determination of these conflict-

ing claims necessitates an examination of the two methods under which, in warm weather, oranges are shipped from California to the East.

In what is called Standard Refrigeration, the boxes, of the aggregate weight of 27,200 pounds, are so placed as to leave spaces between them wide enough to admit of a free circulation of air chilled by ice in the bunkers. Subsequently the carriers put in a system of pre-cooling, under which after the cars had been loaded they were taken from the point of shipment to Refrigerating Plants owned by the carriers, where whole trainloads are pre-cooled at one time by means of blasts of very cold air driven into the car through and around the boxes. At the end of three or four hours the fruit is sufficiently chilled, the bunkers are then filled with about 10 tons of ice, furnished by the carrier, and the train is started on its journey to the East—the bunkers being re-iced from time to time as needed at stations along the route. For this entire service the Commission held that the carrier's charge of $62.50 was reasonable.

A different method obtains where the icing of the car is done by the shipper at his own expense. In that class of cases the oranges are taken from the grove directly to a cold room having a temperature of about 33°F. There the boxes are allowed to remain for periods of from 24 to 48 hours, and until the fruit is chilled to the center. When thus pre-cooled, the boxes are ready for shipment. A refrigerator car is then placed on the track opposite the door of the cold room of the warehouse with which it is connected by a collapsible enclosed passageway, so arranged as to exclude the outside air, while at the same time allowing that from the cold room to enter and cool the interior of the car. Through this passageway the oranges are trucked from the warehouse to the car and, as they have been chilled to the center, the boxes are packed close together forming a solid mass weighing

33,000 lbs., with a temperature of about 35°F. The doors and vents of the car are promptly and tightly closed, the bunkers are immediately filled with unusually large cakes of ice, in order to reduce the rate of melting, and the fruit is then forwarded under a filed tariff which provides that re-icing is unnecessary, and that the shipper will make no claim for damage occasioned by failure to re-ice in transit. For their services in connection with such pre-cooled shipments the carriers were allowed to charge $7.50 but the Commission refused to permit them to charge for the ice needed to keep the fruit cool between warehouse and destination.

1. This ruling is attacked by the appellants, who contend that icing is a part of refrigeration, which the Hepburn Act [1] makes a part of the transportation they are bound to furnish upon reasonable request. They insist that in order to meet the duty, thus imposed by statute, they have been compelled at great expense to erect immense plants where trainloads of fruit can be cooled and where an enormous quantity of ice is manufactured for refrigeration purposes. They argue that, being bound to furnish all necessary icing and re-icing and having at great cost prepared to furnish the supply, it is not only just, but a right given by statute, that they should be allowed to provide all needed icing or refrigeration at a rate to be approved by the Commission.

Whatever transportation service or facility the law requires the carrier to supply they have the right to furnish. They can therefore use their own cars, and cannot be compelled to accept those tendered by the shipper on

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[1] . . . The term "transportation" shall include . . . all services in connection with the receipt, delivery . . . ventilation, refrigeration or icing, . . . of property transported; and it shall be the duty of every carrier . . . to provide and furnish such transportation upon reasonable request therefor. (Act of June 29, 1906, c. 3591, § 1, 34 Stat. 584.)

condition that a lower freight rate be charged. So, too, they can furnish all the ice needed in refrigeration, for this is not only a duty and a right, under the Hepburn Act, but an economic necessity due to the fact that the carriers cannot be expected to prepare to meet the demand, and then let the use of their plants depend upon haphazard calls, under which refrigeration can be demanded by all shippers at one time and by only a few at another.

This contention was sustained by the Commission, which recognized that "the shipper has no right to provide refrigeration himself today and call upon the railroad company for that service tomorrow. To permit such a course is to demoralize the service of the defendants and prevent them from discharging their duty with economy and efficiency. . . . It is the duty of the carrier to furnish refrigeration upon reasonable demand, and in so far as the furnishing of that refrigeration is a part of the service rendered by the carrier, the carrier may insist upon its right to furnish that service exclusively." 20 I. C. C. 116.

2. But of course this does not mean, that because the carriers have ice on hand, they can compel the shipper to have his fruit refrigerated, when, on account of the state of the weather or for other cause, he prefers to have it forwarded under ventilation only. When, however, ice is actually needed and is actually used, the question arises as to whether icing is a part of preparation which can be done by the shipper; or a part of refrigeration (transportation) which, by statute the carrier has the exclusive right to furnish.

To this question no answer can be given that will apply in all cases. For in the shipment of fruit, as in that of other articles, it is impossible to lay down a rule which definitely fixes what loading includes and by whom it must be done. Nor is there any consistent practice on this subject, since from reported cases it appears that the

claims of the parties are based rather on interest than on some definite principle. Sometimes the shipper, as here, insists on the right to load and provide necessary appliances. At other times he demands that such service and appliances be furnished by the railroad company. Conversely the carriers sometimes claim, as here, the right to furnish service and facilities, while in other cases insisting that one or both must be supplied by the consignor. *Cf. National Lumber Dealers Association* v. *Atlantic Coast Line*, 14 I. C. C. 154; *Schultz* v. *Southern Pacific*, 18 I. C. C. 234; *In re Allowance for Lining and Heating Cars*, 26 I. C. C. 681; 25 I. C. C. 497.

These inconsistent and conflicting demands serve to emphasize the fact that, before the haul actually begins, the right or duty of each party, where not absolutely fixed by statute, must be decided with reference to the special facts of each case.

As a general rule, the carrier loads all freight tendered in less than carload lots while the consignor loads in all cases where, for his convenience, the car is placed at his warehouse or on public team tracks. This practice has grown up not only because the work can be more satisfactorily performed by the owner, but also because it is impossible for railroad companies economically to load cars at private warehouses or on those tracks where vehicles of the consignor or consignee come and go at the direction of the owner. 25 I. C. C. 490.

3. But loading may involve more than the mere placing of the freight on the car, since the character of the shipment may be such as to require the furnishing and placing of stakes, racks, blocks and binders needed to make the transportation safe; or, the freight may be such as to require special covering, packing, icing or heating, in order to preserve the merchandise in condition fit for use at the end of the journey. Who is to furnish these needed facilities, may be quite as uncertain as who is to place the

freight on the car, and can only be determined by considering the character of the shipment, the place where the loading begins, and who can most economically perform the service required.

Neither party has a right to insist upon a wasteful or expensive service for which the consumer must ultimately pay. The interest of the public is to be considered as well as that of shippers and carriers—their rights in turn having been adjusted by a reduction in the rate, if the loading is done in whole or in part by the shipper; and by an increase in the rate where the loading is done in whole or in part by the carrier. But, by whomsoever done, the loading must be such as to fit the freight for shipment, and when—by statutory requirement, by valid order of the Commission, or by the carriers' voluntary act,—the car is placed at the consignor's warehouse to be loaded by the shipper, he may not only put the freight on the car but may do all other acts required to fit the freight for its proper shipment—at least, until under a tariff regularly filed, the carrier offers to do what is necessary to secure or preserve what has thus been placed on its car for transportation. The refrigeration and pre-cooling offered by the carrier to shippers of pre-cooled fruit was found not to be the equivalent of the method adopted by the shipper.

4. In the present case the carriers concede that in pre-cooling shipments the consignor had the right to take all of the steps for preparation except the last. They concede that he had the right to pre-cool the fruit, to pre-cool the car, to place the boxes on board the car, to stop the vents and seal the doors. But they deny that he could ice the bunkers, even though that was necessary to the complete preparation, or loading, needed in that particular class of shipments and without which the fruit would be damaged by the rise in temperature, occurring during the time the car is being hauled from the warehouse of the shipper to the icing station of the carrier. Such delay in

filling bunkers would nullify most of the advantage of the expensive chilling of fruit and car necessary in the pre-cooling shipments,—permitted, if not originally encouraged, by the carrier. The privilege was withdrawn—not because the railroad companies were in position to furnish the ice at the proper time and place, but solely because the Commission had reduced the carriers' charge on pre-cooled oranges from $30 to $7.50 per car.

The icing may have been so related to refrigeration as to authorize the carriers to render that service. But manifestly they could not be expected to build refrigerating plants near each warehouse; and, the carrier not being in a position to do such icing, the consignor had the same right to provide the necessary supply that he would have had to ice a shipment of fish, to furnish and place standards to secure lumber on an open car, or to fasten to the floor articles which otherwise might be damaged by the jerks and jolts of a moving train. In the absence, therefore, of the carriers' offer, under a filed tariff, to furnish ice at the time and place needed in pre-cooled shipments, or to substitute a service of equal value at practically the same cost, they had no right to prevent the consignor from filling the bunkers so as to fit the freight for proper transportation.

5. The tariffs, withdrawing the pre-cooling privilege after July, 1911, would have changed the practice, recognized by the carriers themselves and actually approved by the Commission's order fixing $7.50 for the carrier's services in connection with such practice. As the withdrawal "affected a practice and a rate," the Commission had power to cancel that tariff and to require the carriers to conform to the order establishing the $7.50 charge on pre-cooled shipments. Such an order was justified by the provisions of the Hepburn Act (34 Stat. 589), which authorizes the Commission, after a hearing, to determine whether rates, or practices affecting rates, are unreasonable, to determine what practice in respect to trans-

portation is just, and to require the carrier to conform to those prescribed by the Commission.[1]

6. The appellants insist, however, that even if the shippers are entitled to furnish the ice the carriers are entitled to pay for hauling it. They claim that the charge of $7.50 is confiscatory because it does not cover what the Commission found to be the actual cost of the carriers' pre-cooling service. They point to the fact that the rate of $1.15 per cwt. on oranges was found to be reasonable, without regard to the character of the shipment and whether the fruit moved under Ventilation, Standard Refrigeration or Pre-cooling Shipment,—additional sums being allowed for furnishing or hauling ice needed in transportation of the fruit. They admit that more revenue is derived from a carload of pre-cooled fruit, weighing 33,000 lbs. than from a car where the load weights 27,200, but insist that the greater revenue is because of a greater service rendered and a greater weight hauled. On the authority of *Int. Com. Comm.* v. *Stickney*, 215 U. S. 98, 105 they contend that the receipt of a fair return for carrying 33,000 lbs. of fruit affords no reason for compelling them to haul 5,000 lbs. of ice 2000 miles for nothing, when, as found by the Commission, the actual cost of the haul is $12.50.

The order does not show the items going to make up the $7.50 charge. In the brief for the Commission it was

[1] Sec. 15. The Commission is authorized . . . whenever, after a full hearing . . . it shall be of the opinion that any of the rates, or charges . . . for the transportation of persons or property . . . or that any regulations or practices . . . affecting such rates, are unjust or unreasonable, . . ., to determine and prescribe what will be the just and reasonable rate . . . and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, . . . and shall conform to the regulation or practice so prescribed. (Act of June 29, 1906, c. 3591, § 4, 34 Stat., 584, 589.)

said to include $5 for damage to the bunkers and $2.50 for profit. And since the report shows that the carriers were also entitled to $12.50 for hauling the ice, a charge of only $7.50 for a $20.00 service would at first blush appear to be not only unreasonable but confiscatory. But the order is to be read in connection with the report of which it forms a part. When so read it is evident that the Commission did not intend to require the carriers to haul 5,000 lbs. of ice without reasonable compensation, but considered that the haul of the ice was so much a part of the haul of the pre-cooled freight, that the expense could properly be treated as included or absorbed in the rate on the fruit itself. *Cf. Farrar Co.* v. *N. C. & St. L.*, 25 I. C. C. 25; *Swift* v. *M. P. Ry. Co.*, 22 I. C. C. 385.

The cost of such haul was $12.50—equivalent to 3.8 on the 33,000 lbs. of oranges in a pre-cooled shipment, and as a mere matter of figures, it was immaterial to the carriers whether they were permitted to charge $1.11.2 on the fruit and $12.50 for the ice, or $1.15 on the fruit alone without any distinct charge for transporting the ice. In either event, the revenue received was more than that derived from a car of Standard Refrigeration without corresponding increase in cost.

7. The claim that the order modifies the established rate of $1.15 and reduces it to $1.11.2 in pre-cooled shipments, thereby discriminating against the small fruit-grower and those who forward under ventilation or under the carriers' method of refrigeration, is not an issue presented by any assignment of error in this record, even if the carriers were in position to make such a contention. *Int. Com. Comm.* v. *Chicago, Rock Island & Pac. Ry.*, 218 U. S. 88, 109. There is no claim in this case that such rate, thus distributed, is unreasonable.

8. What is a proper rate on fruit in pre-cooling shipments, or a fair charge for hauling necessary ice or rendering other transportation services are all rate-making

matters committed to the Commission. It may determine what shall be the difference in rate between carload and less than carload lots. It may decide whether the difference in revenue, due to a difference in method of loading, warrants a difference in the rate on carload shipments of the same article. It may prescribe the form in which schedules shall be prepared and arranged (§ 6) and may approve tariffs stating that the single rate includes both the line haul and accessorial services absorbed in the rate. Conversely, it may prescribe a tariff fixing a through rate which includes not only the haul of the fruit, but the haul of the ice necessary to keep the fruit in condition. All these are matters committed to the decision of the administrative body, which, in each instance, is required to fix reasonable rates and establish reasonable practices. The courts have not been vested with any such power. They cannot make rates. They cannot interfere with rates fixed or practices established by the Commission unless it is made plainly to appear that those ordered are void. *Int. Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541, 547. No such showing is made in this case. The decree must, therefore, be

Affirmed.

THOMAS *v.* MATTHIESSEN.

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

No. 171. Argued January 19, 1914.—Decided February 2, 1914.

While a corporation cannot, without authority from the stockholders, make them answerable in a way not contemplated by the charter, a provision in the charter of a corporation organized in one State authorizing it to do business in another State may subject the stock-

holders to the liability imposed in the latter State, notwithstanding there are other provisions in the charter exempting stockholders from liability for debts of the corporation.

Stockholders of a corporation organized in one State under a charter expressly authorizing it to do business in another State create the corporation their agent for the making of contracts within the latter State in accordance with its laws.

Stockholders of a corporation organized in Arizona under a charter which expressly authorized the corporation to do business in California *held*, in this case, subject to the liability imposed by § 322, Civil Code of the latter State.

Under the laws of California a stockholder is liable for his proportion of the debts of the corporation as a principal and not as a surety; nor in this case was he relieved of liability on notes held by a bank which had deposits to the credit of the corporation and did not apply the same to payment of the notes.

192 Fed. Rep. 495, reversed.

THE facts, which involve the liability under the laws of California of a stockholder of a corporation organized in Arizona for the purpose of carrying on business in California, are stated in the opinion.

Mr. Alfred Adams Wheat, with whom *Mr. Philip Ashton Rollins* was on the brief, for petitioner:

This case is controlled by *Pinney* v. *Nelson*, 183 U. S. 144, the doctrine enunciated in which has been accepted by the courts of California and has been approved by *State* v. *New Orleans Warehouse Co.*, 109 Louisiana, 72. See also *Peck* v. *Noee*, 154 California, 341.

In *Thomas* v. *Wentworth Hotel Co.*, 158 California, 275, the court met every point that could be used to distinguish this case from *Pinney* v. *Nelson*, except the facts that defendant is not a resident of California, and that there is a finding of fact that it was the purpose and intent of subscribers that their obligations as such and as stockholders should be controlled and determined by the articles of incorporation of said company and by the laws of Arizona. Neither of these findings supplies a sound rea-

son for varying the rule and therefore defendant is liable under the law of California.

The fact that the articles of incorporation contain a declaration, as authorized by the Arizona law, that the stockholders shall not be personally liable for the debts of the corporation, does not distinguish this case from *Pinney* v. *Nelson.* See 26 Am. & Eng. Enc. (2d ed.), 1017; *Terry* v. *Little,* 101 U. S. 216; *Citizens Savings Bank* v. *Owensboro,* 173 U. S. 636, 644; *Knights of Pythias* v. *Weller,* 93 Virginia, 605, 613; *Danville* v. *Water Co.,* 178 Illinois, 299, 306.

The finding that it was the purpose and intent of the stockholders that their obligations should be controlled by the articles of incorporation and by the laws of Arizona, does not distinguish this case from *Pinney* v. *Nelson. Risdon Iron Works* v. *Furness,* L. R. (1906) 1 K. B. 49, does not apply. See Keener on Quasi-Contracts, p. 5.

The fact that defendant is not a resident of California does not distinguish this case from *Pinney* v. *Nelson.*

As defendant contracted to assume the liabilities imposed by the California law for debts incurred by the corporation in that State the place of his residence is not material.

The stockholders' liability imposed by the law of California is contractual in nature. *Kennedy* v. *California Bank,* 97 California, 93; *Flash* v. *Conn,* 109 U. S. 371; *Whitman* v. *Oxford Bank,* 176 U. S. 559; 26 Am. & Eng. Enc. (2d ed.), 1020.

Plaintiff pursued the proper remedy in a court of adequate jurisdiction.

The United States courts have jurisdiction to enforce such a liability outside of the State where it was created. *Bernheimer* v. *Converse,* 206 U. S. 516, 529; *Whitman* v. *Oxford Bank,* 176 U. S. 558, 563; *Flash* v. *Conn,* 109 U. S. 371; Cook on Corp., § 223, n. 2; *Ferguson* v. *Sherman,* 116 California, 169, 173.

The California statute provides no peculiar remedy and therefore the general liability created thereby may be enforced by a common-law action in the Federal court. *Mills* v. *Scott*, 99 U. S. 25; *National Park Bank* v. *Peary*, 64 Fed. Rep. 912; *Aldrich* v. *Anchor Coal Co.*, 24 Oregon, 32.

The liability of a stockholder under the California law is not that of a surety but is primary, absolute, unconditional, and in no wise contingent, and it is distinct from that of the corporation. A suspension or bar of the remedy against the corporation does not suspend or bar it against the stockholder. It is not affected by any security given to or held by the creditor or by any lien acquired by him through judgment, attachment or otherwise. It is not released or diminished by any extension of time given to the corporation, and if the stockholder discharges his liability to a creditor he can recover no portion of the same back, either by subrogation or otherwise. *Mokelumne Hill Co.* v. *Woodburn*, 14 California, 265; *Davidson* v. *Rankin*, 34 California, 503; *Young* v. *Rosenbaum*, 39 California, 646; *Sonoma Valley Bank* v. *Hill*, 59 California, 107; *Faymonville* v. *McCullough*, 59 California, 285; *Mitchell* v. *Beekman*, 64 California, 383; *In re California Ins. Co.*, 81 California, 364; *Hyman* v. *Coleman*, 82 California, 650; *Knowles* v. *Sandercock*, 107 California, 629; *Herman* v. *Hecht*, 116 California, 553; *Sacramento Bank* v. *Pacific Bank*, 124 California, 147; *Morrow* v. *Superior Court*, 64 California, 383; *Neilson* v. *Crawford*, 52 California, 248.

Even though the personal liability of a stockholder under the California law were merely that of a surety the facts alleged in the supplemental answer would not constitute a defense.

A bank, the payee or holder of a note, does not discharge a surety by failing to apply money of the maker which happens to be on deposit at or after the time the note matures. *Strong* v. *Foster*, 17 C. B. 217; *Citizens Bank* v. *Elliott*, 9 Kans. App. 797; *Martin* v. *Mechanics*

Bank, 6 Har. & J. (Md.) 235; *McShane* v. *Howard Bank*, 73 Maryland, 135; *Citizens Bank* v. *Booze*, 75 Mo. App. 189; *Houston* v. *Braden*, 37 S. W. Rep. 467; *Bank of British Columbia* v. *Jeffs*, 15 Washington, 230; *National Bank* v. *Peck*, 127 Massachusetts, 301; *Voss* v. *German-Am. Bank*, 83 Illinois, 599; *National Bank* v. *Smith*, 66 N. Y. 271; *Glazier* v. *Douglass*, 32 Connecticut, 383.

Plaintiff's failure to prosecute diligently his action against the corporation did not release defendant, even though his liability was merely that of a surety. *Lowman* v. *Yates*, 37 N. Y. 601; *Douglass* v. *Ferris*, 138 N. Y. 192; *McKin* v. *Williams*, 134 Massachusetts, 13; *Greenway* v. *Orthwein Grain Co.*, 85 Fed. Rep. 536; *Hunt* v. *Purdy*, 82 N. Y. 486; *Jones* v. *Allen*, 85 Fed. Rep. 523; *Biggins* v. *Raisch*, 107 California, 210; *Monroe County* v. *Otis*, 62 N. Y. 88; *Clark* v. *Sickler*, 64 N. Y. 231.

The judgment should be reversed, and, as all the material facts have been stipulated and the damages recoverable are liquidated, no new trial should be awarded and the court below should be directed to render the proper judgment against defendant. *Rathbone* v. *Board of Commissioners*, 83 Fed. Rep. 125; *Irvine* v. *Angus*, 93 Fed. Rep. 629; *Churchill* v. *Buck*, 102 Fed. Rep. 38; *Ft. Scott* v. *Hickman*, 112 U. S. 150; *Allen* v. *St. Louis Bank*, 120 U. S. 20; *Saltonstall* v. *Russell*, 152 U. S. 628.

Under the California law the stockholder is liable for his *pro rata* share of interest as well as principal. *Wells, Fargo & Co.* v. *Enright*, 127 California, 669.

Mr. Arthur C. Rounds, with whom *Mr. Harold Otis* was on the brief, for respondent:

Pinney v. *Nelson*, 183 U. S. 144, does not establish the right of the petitioner to a recovery. In that case the only question decided by the California court was the constitutionality of § 322 of the Civil Code of California. That was the sole question presented for determination.

The decision in that case that when a corporation is formed in one State and "by the express terms of its charter it is created for doing business in another State and business is done in that State it must be assumed that the charter contract was made with reference to" the laws of the latter State, was expressly based upon the special and peculiar provision of the charter there under consideration, that the company was "created for doing business" in the other State. The court did not hold that if it clearly appeared upon a fair construction of the charter that the parties in fact contracted with a view to the laws of the incorporating State, the court must nevertheless assume the contrary in order to impose upon the stockholders a liability which they never agreed to assume and from which they were exempt by the laws of the incorporating State and by the company's express charter provisions. *Risdon Iron Works* v. *Furness*, L. R. (1905) 1 K. B. 304, *S. C.*, L. R. (1906) 1 K. B. 49; *Thomas* v. *Matthiessen*, 192 Fed. Rep. 495.

In this case the charter provided that the capital stock should be non-assessable, and that the private property of the stockholders in the company should be forever "exempt from all liability for its debts and obligations."

The trial below having been by the court without a jury, the court's findings of fact are not a mere report of the evidence, but a statement of the ultimate facts on which the law of the case must determine the rights of the parties. *Norris* v. *Jackson*, 9 Wall. 125. And see *Miller* v. *Life Ins. Co.*, 12 Wall. 285; *Raimond* v. *Terre Bonne*, 132 U. S. 192; *Collins* v. *Riley*, 104 U. S. 322.

The law cannot read into the contract of the incorporators and stockholders an agreement to assume a liability under the California statute which is inconsistent with their actual intent and with the express stipulations of the charter. *Grover & Baker* v. *Radcliffe*, 137 U. S. 287.

Nor is the obligation *quasi*-contractual. *Buchanan* v. *Rucker*, 9 East, 192; *Pennoyer* v. *Neff*, 95 U. S. 714, 722,

Huntington v. *Attrill*, 146 U. S. 657, 669; *Freeman* v. *Alderson*, 119 U. S. 185, 188.

The right of a corporation to exist rests upon and is derived from the laws of the incorporating State and its powers are conferred upon it by those laws subject to such restrictions and limitations as they may prescribe. *Canada Southern R. R. Co.* v. *Gebhard*, 109 U. S. 527, 537; *Nashua Savings Bank* v. *Anglo-American Co.*, 189 U. S. 221, 320; *Christopher* v. *Norvell*, 201 U. S. 216, 228.

No court outside of California has ever considered that the *Pinney Case* declared or was authority for any such rule of liability as petitioner contends. *Coulter Dry Goods Co.* v. *Rosenbaum*, 74 Misc. (N. Y.) 579. For other cases involving the existence or enforceability of liability of stockholders of this corporation, see *Thomas* v. *Wentworth Hotel Co.*, 158 California, 275; *S. C.*, 16 Cal. App. 403; *Peck* v. *Noee*, 154 California, 351. *State* v. *New Orleans Warehouse Co.*, 109 Louisiana, 72, distinguished.

If, under any such rule of liability as plaintiff contends for, innocent stockholders are chargeable not merely with the liabilities imposed by the law of the domicil of the corporation, but as well with the varying liabilities prescribed by the laws of the various States where the corporation under its charter powers, may engage in business, corporate stock is liable to become in this country an uncertain and even dangerous asset. *Thomas* v. *Matthiessen*, 192 Fed. Rep. 495, 498; *Leyner Engineering Works* v. *Kempner*, 163 Fed. Rep. 605, 608.

Defendant when he subscribed for his stock contracted with reference to the laws of Arizona. He did not agree to assume any liabilities under the California law. And the debts, which the hotel company subsequently contracted in California, were not binding upon or enforceable against him as contractual obligations.

The mere fact that the articles provided that the principal place of the company outside of Arizona should be in

California is not sufficient to overcome the inference as to the intent of the incorporators to contract with reference to the laws of Arizona.

While the laws of a foreign State in which the company may attempt to do business may prevent the doing of business or limit the exercise of the corporate powers, *Relfe* v. *Rundle*, 103 U. S. 222, 226, such laws cannot enlarge the powers of the corporation or provide for the conduct of its business in a way which is not permitted by the law of its incorporation. Nor can such laws affect the position of the stockholders in the company by enlarging, limiting or modifying their rights as members of the corporation or by altering their liabilities to its creditors as fixed by the law under and subject to which they became stockholders. *Railway Co.* v. *Allerton*, 18 Wall. 233, 235; *Christopher* v. *Norvell*, 201 U. S. 216, 226; *Miles* v. *Woodward*, 115 California, 308, 311; Morawetz on Corporations, § 874; *Nashua Savings Bank* v. *Anglo-American Co.*, 189 U. S. 221, 230; *Canada Southern R. R. Co.* v. *Gebhard*, 109 U. S. 527, 537. See also, *Glenn* v. *Liggett*, 135 U. S. 533, 548; *Hawkins* v. *Glenn*, 131 U. S. 319, 322; *Relfe* v. *Rundle*, 103 U. S. 222, 226; *Converse* v. *Hamilton*, 224 U. S. 243, 253; *O'Connor* v. *Witherby*, 111 California, 523, 527; *Merrick* v. *Van Santvoord*, 34 N. Y. 208, 216; *Converse* v. *Aetna Bank*, 79 Connecticut, 163, 169; *Risdon Locomotive Works* v. *Furness*, L. R. 1906, 1 K. B. 49; *S. C.*, L. R. 1905, 1 K. B. 304; *Leyner Engineering Works* v. *Kempner*, 163 Fed. Rep. 605.

The suggestion that a stockholder is liable under the statute as upon a contract because the corporation is the agent of the stockholders for the purpose of subjecting them to the liability, *Kennedy* v. *California Savings Bank*, 97 California, 93, 96; *McGowan* v. *McDonald*, 111 California, 57, 71, cannot be sustained, as the relationship between a stockholder and the corporation cannot prop-

erly be described as that of principal and agent or the liabilities of the stockholders be supported on principles of agency.

The court has found that the defendant agreed with the company, its incorporators and stockholders, that neither the company, its officers or agents should have power to subject the defendant or the other stockholders to any personal liability for the debts or obligations of the company.

It was competent for the creditors to waive their right of recourse against the stockholders. *Robinson* v. *Bidwell*, 22 California, 379, 388; *French* v. *Teschemaker*, 24 California, 518, 559–560; *Wells* v. *Black*, 117 California, 157, 161; *United States* v. *Stanford*, 161 U. S. 412.

The power of the company and its officers to bind the defendant for the debts of the company as defined and limited in the charter and by the agreement of the parties could not as against him, a non-resident of California, be enlarged by the statutes of that State. *Pope* v. *Nickerson*, 3 Story, 465, 475, 480; *Liverpool Steam Co.* v. *Phoenix Ins. Co.*, 129 U. S. 397, 449; *King* v. *Sarria*, 69 N. Y. 24, 33; *Grover & Baker Co.* v. *Radcliffe*, 137 U. S. 287, 299.

If the partnership articles restrict the powers of a partner to act for the firm or pledge the credit of his copartner, notice of the restriction binds the creditor. *Johnson* v. *Haws*, 47 App. Div. 597; aff'd, 168 N. Y. 654; *Ensign* v. *Wands*, 1 Johns. Cases, 171; Story on Partnership, § 130; *King* v. *Sarria*, 69 N. Y. 24; *Ward* v. *Joslyn*, 186 U. S. 142, 151. See also *Boyd* v. *Herron*, 125 California, 443, 455; *Thomas* v. *Wentworth Hotel Co.*, 16 Cal. App. 403, 414.

The California statute could not and did not impose upon the defendant below, a non-resident of California and not subject to its jurisdiction, any liability to the creditors of the company for debts incurred in California or elsewhere. *Flash* v. *Conn*, 109 U. S. 371, 377; *Christopher*

v. *Norvell*, 201 U. S. 216, 229; *Richmond* v. *Irons*, 121 U. S. 27, 55; *Whitman* v. *Oxford Natl. Bank*, 176 U. S. 559, 563; *Bernheimer* v. *Converse*, 206 U. S. 516, 529; *Hawthorne* v. *Calef*, 2 Wall. 10, 22; *Howarth* v. *Lombard*, 175 Massachusetts, 570, 573; *Howarth* v. *Angle*, 162 N. Y. 179, 187; *Kennedy* v. *Bank*, 97 California, 93.

No State can by its law prescribe the terms and conditions upon which a non-resident may become a stockholder in a foreign corporation or impose liabilities upon him as such. Morawetz on Corporations, § 874; *Pennoyer* v. *Neff*, 95 U. S. 714. And see *Huntington* v. *Attrill*, 146 U. S. 657, 669; *Freeman* v. *Anderson*, 119 U. S. 185, 188; *Buchanan* v. *Rucker*, 9 East, 192; Story on Conflict of Laws, 8th ed., §§ 7, 20; Cooley's Const. Lim., 7th ed., p. 176.

A State cannot enlarge the authority of an agent for a non-resident principal beyond that actually conferred. *Pope* v. *Nickerson*, 3 Story, 465, 475; *King* v. *Sarria*, 69 N. Y. 24, 33; *Liverpool Steam Co.* v. *Phoenix Ins. Co.*, 129 U. S. 397, 454; *Grover & Baker Co.* v. *Radcliffe*, 137 U. S. 287, 299; *Leyner Engineering Works* v. *Kempner*, 163 Fed. Rep. 605.

The defendant at the time of the transactions in question was and still is a non-resident of California. It does not appear that he has ever been in California or has ever been subject to its jurisdiction or laws.

The company is a distinct legal entity, having its own property, its own rights and powers, and subject to its own liabilities. *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406; *People* v. *American Bell Telephone Co.*, 117 N. Y. 241, 255. See also *Peterson* v. *Chicago &c. Ry. Co.*, 205 U. S. 364, 391; *Risdon &c. Works* v. *Furness*, L. R. 1906, 1 K. B. 49, 59; *United States* v. *American Bell Telephone Co.*, 29 Fed. Rep. 17; *Richmond Const. Co.* v. *Richmond R. R. Co.*, 68 Fed. Rep. 105, 108.

Section 322 of the Civil Code, properly construed, did

not extend or purport to extend to the stockholders of the corporation. *National Park Bank* v. *Remsen*, 158 U. S. 337, 344; *Young* v. *Moore*, 162 Michigan, 60; *Williams* v. *Gaylord*, 186 U. S. 157, 165; *Miles* v. *Woodward*, 115 California, 308, 311; *London Bank* v. *Aronstin*, 117 Fed. Rep. 601, 609.

Statutes imposing liability upon stockholders are in derogation of the common law and are to be strictly construed. *Brunswick Terminal Co.* v. *The Bank*, 192 U. S. 386, 390; *Davidson* v. *Rankin*, 34 California, 503; *Buchanan* v. *Rucker*, 9 East, 192, 194.

The notes here in question having been payable at the banking houses of the First National Bank and Union Savings Bank, respectively, the plaintiff's assignors, those banks were bound to apply to their payment at maturity the deposits then or thereafter on hand and applicable thereto. Having failed to do so the plaintiff is not entitled to charge the defendant for the resulting loss. *Aetna Natl. Bank* v. *Fourth Natl. Bank*, 46 N. Y. 82, 88; *Indig* v. *National City Bank*, 80 N. Y. 100, 106; 5 Cyc. 555. See 2 Morse on Banks, 4th ed., §§ 557–563, pp. 949–956; 5 Cyc. 554; *Fullerton* v. *Bank of United States*, 1 Pet. 604, 617; *Bank of United States* v. *Carneal*, 2 Pet. 543, 548.

This should be the rule in favor of an endorser, surety or guarantor of the note. *Pursifull* v. *Pineville Banking Co.*, 97 Kentucky, 154; *Commercial Bank* v. *Henninger*, 105 Pa. St. 496; *German Bank* v. *Foreman*, 138 Pa. St. 474; *Bank* v. *Petty*, 176 Pa. St. 513; *Dawson* v. *The Bank*, 5 Arkansas, 283; *McDowell* v. *The Bank*, 1 Harr. (Del.) 369.

While the liability may be primary in the sense that the stockholder can be sued in the first instance even though no effort has been made to enforce the claim against the company, a stockholder in a solvent company who has been sued by a creditor and compelled to pay his proportion of the debt, as against the company and his fellow

stockholders is entitled to be reimbursed from its assets. *Re California Mutual Life Ins. Co.*, 81 California, 364, 365; *Prince* v. *Lynch*, 38 California, 528, 538.

A bank holding a note due at its office discharges a surety by failing to apply money of the maker it holds on deposit at or after the time the note matures.

In *Bank* v. *Peck*, 127 Massachusetts, 298; *Strong* v. *Foster*, 17 C. B. 201; *Bank* v. *Smith*, 66 N. Y. 271; *Citizens Bank* v. *Booze*, 75 Mo. App. 189; *Bank of British Columbia* v. *Jeffs*, 15 Washington, 230; *Voss* v. *German-American Bank*, 83 Illinois, 599; *Citizens Bank* v. *Elliott*, 9 Kan. App. 797, and *Martin* v. *Mechanics Bank*, 6 Har. & J. (Md.) 235, the notes were not or did not appear to have been made payable at the bank. *Huston* v. *Braden*, 37 S. W. Rep. 467; *Glazier* v. *Douglas*, 32 Connecticut, 393; *McShane* v. *Howard Bank*, 73 Maryland, 135, are also distinguishable.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit by a citizen of California, the holder of two notes made in California by the Wentworth Hotel Company, to recover from a stockholder in that corporation, a citizen of New York, a proportionate share of the sums due upon the same. The facts as agreed and found are as follows. The corporation was formed under the laws of the Territory of Arizona, among many other things, to buy and sell real estate, 'to build, maintain, operate and carry on, in all its branches, the business of hotel keeping' and to build or purchase gas or electric works in Arizona or California, 'both for its own use in the hotel business and for the purpose of selling and disposing of the same.' The principal place of business in Arizona was Tucson, and that outside of it was Los Angeles, California, with power to change to Pasadena, in that State. Before the incorporation, the defendant, re-

siding in New York, signed a writing reciting the intent of the subscribers to form a corporation in Arizona for the purpose of acquiring a portion of the Oak Knoll, and building a first class hotel thereon; and he thereby subscribed for a certain number of shares. Later he took and paid for one thousand shares. The Oak Knoll is near Pasadena in California, and the defendant and his associates intended the corporation to have the power to build and manage a hotel in that neighborhood and expected that it would do so, but intended their liability to be controlled by the laws of Arizona.

The corporation complied with the laws of California, bought the land, built the hotel, went into business, and finally was adjudged insolvent. The notes in question were given for loans to the Company. At the time of subscribing the defendant agreed with the Company that he should be exempt from personal liability and that neither the corporation nor its officers should have power to subject him or the other stockholders to it. Such exemption was expressed also in the certificate of incorporation. But by the statutes of California each stockholder of a corporation is personally liable for such proportion of the debts contracted while he is such, as the amount of his stock bears to the whole subscribed, and the liability of each stockholder of a corporation formed under the laws of any other State or Territory of the United States but doing business in California is the same. Civil Code, § 322. The courts below ruled that the defendant could not be held, the Circuit Court of Appeals citing *Risdon Iron & Locomotive Works* v. *Furness* (1906), 1 K. B. 49, in which it was held that the law of California could not impose liability upon an English shareholder in an English corporation without his assent. 192 Fed. Rep. 495, 113 C. C. A. 101.

We agree that without authority from the stockholder a corporation cannot make him answerable in a way not

contemplated by the charter. We will assume for purposes of decision, although we express no opinion upon the point, that a provision for doing business in other States without any express reference to the possible difference in their laws would not be enough to change the rule. But a provision exempting the stockholder alongside of one authorizing the doing of business elsewhere cannot be taken to limit the latter authority to those States that grant a like exemption or be deemed an attempt to override the law of the place where the business is to be done. That law may fail to operate for want of power over the person sought to be affected, but the charter leaves it open to that person to come in under it by assent. If the law of California forbade a foreign corporation to do business there unless all the stockholders filed a written assent to its conditions, the Arizona charter would not make such an agreement void. If this be true then a particular stockholder may give such assent outside of the instrument of incorporation and be bound by it.

In this case the defendant expressed in writing his wish that the corporation should set up a hotel in California. It is true that he also desired and stipulated that he should be free from personal charge. But that is merely the not infrequent occurrence of a party bringing about the facts and attempting to prohibit their legal consequence to which we lately had occasion to advert in *National City Bank* v. *Hotchkiss*, 231 U. S. 50, 56. See also *Butler* v. *Farnsworth*, 4 Wash. C. C. 101, 103, 104. This of course he cannot do. In such cases the only question is which of two inconsistent orders is the dominant command. Here the usual prevalence of the specific over the general is fortified by the consideration that the building and carrying on of the California hotel was the main object for which the parties came together. When the defendant authorized that, he could not avoid the consequences by saying that he did not foresee or intend, or that he forbade

them. He knew that California had laws and he took his risk of what they might be, when, as we must hold, he gave his assent to doing business there. We cannot interpret his words as giving merely a conditional assent. We follow the language of *Pinney* v. *Nelson*, 183 U. S. 144, so far as it sanctions the views that we have expressed. See also *Thomas* v. *Wentworth Hotel Co.*, 158 California, 275, 280.

There remains only the question whether the liability is of a kind that will be enforced outside of the California courts. Analysis on this point often is blurred by the vague statement that the liability is 'contractual.' An obligation to pay money generally is enforced by an action of assumpsit and to that extent is referred to a contract even though it be one existing only by fiction of law. But such obligations when imposed upon the members of a corporation may vary very largely. The incorporation may create a chartered partnership the members of which are primary contractors, or it may go no farther than to impose a penalty; or again it may create a secondary remedy for a debt treated as that of the corporation alone, like the right to attach the corporation's real estate; or the liability may be inseparable from the local procedure, or the law may be so ambiguous as to leave it doubtful whether the liability is matter of remedy and local or creates a contract on the part of the members that will go with them wherever they are found. *McClaine* v. *Rankin*, 197 U. S. 154, 161. *Christopher* v. *Norvell*, 201 U. S. 216, 225, 226. In the present case we think that there can be no doubt of the meaning of the California statute. It reads 'Each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities' &c., as we have stated, and supposes the action against him to be brought 'upon such debt.' Civil Code § 322. This means that by force of the statute, if the corporation incurs a debt within the juris-

diction, the stockholder is a party to it and joins in the contract in the proportion of his shares. And while the statutes of California cannot force an agent upon a foreign principal, still, if he has created such an agency in advance, he has come within the jurisdiction by his agent, as in other cases of contract made within a State from outside, and will be bound. *Flash* v. *Conn*, 109 U. S. 371. *Whitman* v. *Oxford National Bank*, 176 U. S. 559.

The defendant was a principal debtor. *Hyman* v. *Coleman*, 82 California, 650. The fact that the corporation had deposits in the banks that held the notes did not discharge the notes *pro tanto*. *Strong* v. *Foster*, 17 C. B. 201. *National Mahaiwe Bank* v. *Peck*, 127 Massachusetts, 298. The judgment must be reversed and judgment entered for the plaintiff on the agreed facts.

Judgment reversed.

THE CHIEF JUSTICE dissents.

MR. JUSTICE HUGHES took no part in the decision.

MIEDREICH *v.* LAUENSTEIN.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 20. Argued October 31, 1913.—Decided February 2, 1914.

Although the record is meager of attempts to raise it, if the state court holds that a Federal question is made before it, according to its practice, and proceeds to determine it, this court regards the question as duly made.

It is only in exceptional cases, where what purports to be a finding of fact is not strictly such but is so involved with, and dependent upon, questions of law, that this court departs from the rule that it accepts

as binding the findings of fact made by the highest court of the State from which the case comes.

This court has always recognized the difficulty of satisfactorily defining the term "due process of law" in general terms applicable to all cases, and the desirability of judicial determination in each case as the question arises. *Davidson* v. *New Orleans*, 96 U. S. 97.

Law, in its regular course of administration through courts of justice, is due process, and, when secured by the law of the State, the constitutional requirement is satisfied. *Leeper* v. *Texas*, 139 U. S. 462.

In the absence of fraud or collusion, where the original party did all that the law required in the issue and attempt to serve process, but the sheriff made a false return to the effect that service had been made, the state court, in the absence of direct attack upon the return, in acting thereon as though it were true, and holding that the sole remedy was an action against the sheriff for a false return, did not deny the party due process of law within the meaning of the Fourteenth Amendment.

One damaged by reason of a false return of the sheriff as to service of process, and who is given a remedy against the sheriff, is not denied due process of law by the enforcement of the judgment based on such false return because the amount of the sheriff's bond is less than the amount of his loss.

172 Indiana, 140, affirmed.

THE facts, which involve the validity under the due process clause of the Fourteenth Amendment of a judgment based on a false return of service made by a sheriff, are stated in the opinion.

Mr. George K. Denton for plaintiff in error, submitted:

Each of the six assignments of error state a Federal question arising under the Fourteenth Amendment which was necessarily involved in this case. As the state court decided them, it is not material whether or not it stated them as Federal questions. *Carpenter* v. *Strange*, 141 U. S. 87, 103; *Huntington* v. *Attrill*, 146 U. S. 657, 683; *Atherton* v. *Atherton*, 181 U. S. 155, 160; *Jacobs* v. *Marks*, 182 U. S. 583, 587; *Stearns* v. *Minnesota*, 179 U. S. 223, 233; *Wilson* v. *Standefer*, 184 U. S. 399, 411.

Due process of law implies a tribunal of competent jurisdiction, and a sufficient service on the defendant, or an appearance on his part, to render him amenable to that jurisdiction. *Pennoyer* v. *Neff*, 95 U. S. 714.

An opportunity to be heard is essential to due process of law. *Murray* v. *Hoboken Land Company*, 18 How. 272.

No court is authorized to render a judgment or decree against anyone, or his estate, until after due notice by service of process to appear and defend. *Hollingsworth* v. *Barbour*, 4 Pet. 466; *Knowles* v. *Logansport Gas Co.*, 19 Wall. 58, 70; *Thompson* v. *Whitman*, 18 Wall. 457.

In its restricted sense, jurisdiction means the power to decide. Without this any judgment is subject to direct or collateral attack as an absolute nullity. Jurisdiction of this kind is twofold: (1) of the subject-matter, (2) of the person. If either is wanting there is no jurisdiction. *Chicago Board of Trade* v. *Hammond Elevator Co.*, 198 U. S. 424; *Shepherd* v. *Adams*, 168 U. S. 618; *Remington* v. *Central R. R. Co.*, 198 U. S. 95.

A court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf or by his waiver, by general appearance or otherwise, of the want of due service. *D'Arcy* v. *Ketchum*, 11 How. 165; *Knowles* v. *Logansport Gaslight Co.*, 19 Wall. 58; *Hall* v. *Lanning*, 91 U. S. 160; *York* v. *Texas*, 137 U. S. 15; *Wilson* v. *Seligman*, 144 U. S. 41.

Service of a mesne process from a court of a State, not made upon a defendant or his authorized agent within the State although there made in some other manner recognized as valid by its legislative acts and judicial decisions, can be allowed no validity in the Federal court after the removal, unless defendant can be held by virtue of a general appearance or otherwise to have waived the defect

in the service, and to have submitted himself to the jurisdiction of the court. *Goldey* v. *Morning News*, 156 U. S. 518.

Process must be personally served on minors in order that jurisdiction may be acquired, and no guardian *ad litem* can be appointed by the court for an infant defendant who has not been personally served with process, if a resident, or if a non-resident with notice by publication. *Carver* v. *Carver*, 64 Indiana, 194; *Galpin* v. *Page*, 18 Wall. 350.

Federal courts will not give effect to a judgment in a state court unless the state court has lawfully acquired jurisdiction of the defendant, even despite recitals in the judgment of the state court of facts which, if true, would have given it jurisdiction. *Thompson* v. *Whitman*, 18 Wall. 457; *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437.

Returns of officers of service of process may be impeached. *Hauswurth* v. *Sullivan*, 6 Montana, 203; *Smith* v. *Movill*, 11 Colo. App. 284; *McClurg* v. *Whorter*, 47 W. Va. 150; *Campbell* v. *Warderect*, 50 Nebraska, 282; *Murres* v. *Security Co.*, 131 Indiana, 37; *Johnson* v. *Gregory*, 4 Washington, 111; *Wabash Ry. Co.* v. *Brow*, 164 U. S. 271; *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437.

A domestic judgment is open to jurisdictional inquiries. *Needham* v. *Thayer*, 147 Massachusetts, 536; *Nations* v. *Johnson*, 24 How. 195, 203; *Earle* v. *McVeigh*, 91 U. S. 507; *Starbuck* v. *Murray*, 5 Wend. 148; *Windsor* v. *McVeigh*, 93 U. S. 274; *Cooper* v. *Reynolds*, 10 Wall. 308; *Wonderly* v. *Lafayette Co.*, 150 Missouri, 635; *Ferguson* v. *Crawford*, 70 N. Y. 253; *Hauswurth* v. *Sullivan*, 6 Montana, 203; *Johnson* v. *Gregory*, 4 Washington, 111.

Neither the finding nor the rulings of the state court should be permitted to prevent the determination of the right asserted under the Constitution and laws of the

United States. *St. Louis &c. Ry. Co.* v. *Arkansas*, 217 U. S. 136; *Kansas City Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 573.

This court may examine the entire record including the evidence, if properly incorporated therein, to determine whether what purports to be a general finding of facts against one party necessarily involves the decision of questions of law bearing upon a Federal right claimed by such party in the state court. *Kansas City Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 573; *Mackay* v. *Dillon*, 4 How. 421, 447; *Dower* v. *Richards*, 151 U. S. 658, 667; *Stanley* v. *Schwalby*, 162 U. S. 255, 274; *Schlemmer* v. *Buffalo R. & P. R. Co.*, 205 U. S. 1; *Louisville Gas Co.* v. *Citizens Gas Light Co.*, 115 U. S. 683, 697; *Huntington* v. *Attrill*, 146 U. S. 657, 683.

Parties interested in the premises who were not served with process, are not bound by a decree of foreclosure of a mortgage thereon, and may redeem from sale thereunder, the same as if no decree had been made. *Noyes* v. *Hall*, 97 U. S. 34; *Damron* v. *Overmeyer, Adm.*, 141 Indiana, 438; *Johnson* v. *Hosford*, 110 Indiana, 572.

The right of redemption is a favored right. *Russel* v. *Southard*, 12 How. 139; *Villa* v. *Rodriguez*, 12 Wall. 323; *Bigler* v. *Waller*, 14 Wall. 297; *Noyes* v. *Hall*, 97 U. S. 34; *Bryan* v. *Brasius*, 162 U. S. 415; *Romig* v. *Gillett*, 187 U. S. 111.

Equity may vacate or enjoin a judgment in an action of which defendant had no legal notice, the trial court assuming jurisdiction on the strength of a false return of service of process by the sheriff or other officer. *Willman* v. *Willman*, 57 Indiana, 50; *Martin* v. *Barney*, 20 Alabama, 369; *Ryan* v. *Boyd*, 33 Arkansas, 778; *Lapham* v. *Campbell*, 61 California, 296; *Du Bois* v. *Clarke*, 12 Colo. App. 220, *Cassidy* v. *Automatic Time Stamp Co.*, 185 Illinois, 431; *Wolf* v. *Shenandoah Nat'l Bank*, 84 Iowa, 138; *McNeill* v. *Edie*, 24 Kansas, 108; *Bramlett* v. *McVey*, 91 Kentucky,

151; *Hermandez* v. *James*, 23 La. Ann. 483; *Jones* v. *Commercial Bank*, 5 How. (Miss.) 43; *Hauswurth* v. *Sullivan*, 6 Montana, 203; *Mather* v. *Parsons*, 32 Hun (N. Y.), 338; *Huntington* v. *Cronter*, 33 Oregon, 408; *Miller* v. *Gorman*, 38 Pa. St. 309; *Dowell* v. *Goodwin*, 22 R. I. 287; *Ruff* v. *Elkin*, 40 So. Car. 69; *Ingle* v. *McCurry*, 1 Heisk. (Tenn.) 26; *State* v. *Dashiell*, 32 Tex. Civ. App. 454; *Wardsboro* v. *Whitingham*, 45 Vermont, 450; *Johnson* v. *Gregory*, 4 Washington, 109; *Johnson* v. *Coleman*, 23 Wisconsin, 452; *Dobbins* v. *McNamara*, 113 Indiana, 54.

Plaintiff in error has pursued her only remedy for relief under the facts of the case. *Bruer* v. *Osgood*, 154 Indiana, 375; *Emerick* v. *Miller*, 159 Indiana, 317, 328; *Walker* v. *Robbins*, 14 How. 584.

Mr. Louis T. Michener, with whom *Mr. Perry G. Michener* and *Mr. Peter Maier* were on the brief, for defendant in error.

Mr. Justice Day delivered the opinion of the court.

The plaintiff in error, by complaint filed in the Superior Court of Vanderburgh County, State of Indiana, sought to vacate a judgment of foreclosure rendered by that court in a prior case and to be permitted to redeem the property therein involved and prays for other relief, and, judgment having been entered in favor of the defendant in error, which was affirmed by the Supreme Court of Indiana (172 Indiana, 140), this writ of error was sued out.

The facts, so far as pertinent to our review, are: The complaint, in the fourth paragraph, alleged that the plaintiff in error was the owner of certain property, subject to a mortgage foreclosed in a former suit; that she was a minor when the foreclosure proceedings were had; that she was not a resident of Vanderburgh County, where the action was brought, but was and had been for many years

a resident of Gibson County, and that she was not summoned in such action, had no knowledge of its pendency, and did not waive service or enter her appearance therein. It was further alleged that the plaintiff in error was not amenable to the jurisdiction of the sheriff of Vanderburgh County, but that, although she was not served with process, he made a false return of a pretended summons, by which the court was wrongfully imposed upon, and, being so advised, at the instance of attorneys for the predecessor of defendant in error, the court appointed a guardian *ad litem* for her, who answered in the suit, and that a decree was rendered, her property sold and bid in by the predecessor of the defendant in error. The demurrer of the defendant in error to this paragraph thus construed was sustained by the lower court and its decision affirmed by the Supreme Court. Other paragraphs of the complaint alleged fraud on the part of the predecessor of the defendant in error and her attorneys. The lower court found against this charge, and the Supreme Court, after stating that there was legal evidence to support the finding, refused to disturb it.

The record is meager of attempts to raise a Federal question by reason of alleged violations of rights secured by the Constitution of the United States, aptly set forth and referred to in some proper way, and it is contended by the defendant in error that the writ should be dismissed for that reason. We find in the opinion of the Supreme Court of Indiana a statement that "both parties have treated this suit as one arising under the provisions of the Fourteenth Amendment to the Federal Constitution, and as presenting the question of due process of law and rights guaranteed by article I, § 21, of the state constitution," and the court, after making this statement, takes up the various grounds of attack upon the original decree for alleged fraudulent service or want of service upon the minor defendant in the foreclosure proceedings

and disposes of them against the contention of the plaintiff in error. There is no repudiation of the position of both parties that questions were raised under the Fourteenth Amendment to the United States Constitution, and we think the court may be fairly taken to have regarded such questions as duly before it for consideration. Where a state court holds that a Federal question is made before it, according to its practice, and proceeds to determine it, this court will regard the question as duly made. *San Jose Land & Water Co.* v. *San Jose Ranch Co.*, 189 U. S. 177, 179–180; *Haire* v. *Rice*, 204 U. S. 291, 299; *Chambers* v. *Baltimore & Ohio R. R.*, 207 U. S. 142, 148; *Atchison, Topeka & Sante Fé Ry.* v. *Sowers*, 213 U. S. 55, 62.

In the opinion of the Supreme Court upon rehearing the charge that the service of process was fraudulently procured by the predecessor in title of the defendant in error or her attorneys was held to be foreclosed by the findings of the court below, and the Supreme Court held that the findings were supported by testimony in the record showing competent evidence to that end. It is urged that upon this writ of error this court should reëxamine the conclusions of fact just referred to and the rulings of the Supreme Court of Indiana in respect thereto. This court has repeatedly held that in cases coming to it from the Supreme Court of a State it accepts as binding the findings upon issues of fact duly made in that court. *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 107; *Rankin* v. *Emigh*, 218 U. S. 27, 34; *Kerfoot* v. *Farmers' & Merchants' Bank*, 218 U. S. 281, 288. That principle is applicable here. The case does not come within the exceptional class of cases where what purports to be a finding of fact is not strictly such but is so involved with and dependent upon questions of law bearing upon the alleged Federal right as to be a decision of those questions rather than of a pure question of fact, or where there is that entire lack of evidence to

support the conclusion upon the Federal question that gives this court the right of review. *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 573, 591; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261; *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 611; *Portland Ry. Co.* v. *Oregon R. R. Com'n*, 229 U. S. 397, 411–412.

The Supreme Court of Indiana stated the question upon the decision of which the Federal question of due process arises as follows:

"The question is then presented whether the allegations, that appellant was a minor, was not a resident of Vanderburgh county, was a resident of Gibson county, and had been for many years, that no summons was served on her, that she had no knowledge of the proceedings, did not waive service, nor did any one for her or in her behalf or with her consent, enter appearance for her, that she was not amenable to the jurisdiction of the sheriff of Vanderburgh county, that, notwithstanding that she was not served with process, the sheriff of Vanderburgh county made a false return of a summons, and the court was wrongfully imposed upon by such false return, and, being thus falsely advised at the instance of appellant's attorneys, [i. e., the attorneys for the predecessor of the defendant in error] appointed a guardian *ad litem* for her—constitute a charge of fraud. The return was regular on its face. The court had jurisdiction of the subject-matter, and apparently jurisdiction of the person of appellant. The false return was not procured by the fraud, collusion or imposition of the plaintiff or his [her] attorneys [in the foreclosure suit]. It is not alleged that either knew of the fact that there had been no service on appellant. The allegations practically present this question. If, without any fraud, or any act on the part of a party to an action or his attorney, a return is made by a sheriff showing service, regular on its face, without knowledge of the party that there was in fact no service, and no act is done

or thing said to mislead the sheriff, is it an imposition or fraud upon the court to present such summons and return and obtain a judgment upon it, and is it a charge of fraud or imposition upon the court to allege that the court was wrongfully imposed upon by such false return, and was thus falsely advised? The whole allegations must be taken together, and the scope and theory of the paragraph, as we construe it, is that the court was misled by a false return of the sheriff. The court had a right to rely and act upon the return. It imports verity to the court. The sheriff assumes the responsibility, in taking the office, of seeing to it that he does make the right service. *Nichols* v. *Nichols* (1884), 96 Indiana, 433; *State, ex rel.*, v. *Leach* (1858), 10 Indiana, 308; *State, ex rel.*, v. *Lines* (1853), 4 Indiana, 351.

"If this were not true, no litigant could ever know when his rights were adjudicated and set at rest, and, to the end that the party may be made whole, an action for a false return will lie. *Splahn* v. *Gillespie* (1874), 48 Indiana, 397; *Rowell* v. *Klein* (1873), 44 Indiana, 290.

"If it be said that the amount of bond a sheriff is required to give might not cover the damage in any or every case, it is sufficient to say that that is a legislative matter, and not a judicial one."

The question then is, does the ruling predicated upon the principles thus stated, made in the state court wherein the party has been duly heard, amount to a denial of due process of law within the meaning of the Federal Constitution?

This court has recognized the difficulty of satisfactorily defining in general terms which shall apply to all cases what is meant by the term "due process of law," and the desirability of judicial determination upon each case as the question arises. *Davidson* v. *New Orleans*, 96 U. S. 97. If the exercise of judicial power be such "as the settled maxims of law permit and sanction, and under such

safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs," there has been no deprivation of due process of law. Cooley on Constitutional Limitations (7th ed.), 506; *Leigh* v. *Green*, 193 U. S. 79, 87. And this court, speaking by Mr. Chief Justice Fuller, in *Leeper* v. *Texas*, 139 U. S. 462, 468, said: "Law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied." This language was quoted with approval in *Iowa Central Ry. Co.* v. *Iowa*, 160 U. S. 389, 393.

In the present case the State has made provision for the service of process, and the original party in the foreclosure proceeding did all that the law required in the issue of and attempt to serve process; and, without fraud or collusion, the sheriff made a return to the court that service had been duly made. The duty of making such service and return by the law of the State is delegated to the sheriff, and, although contrary to the fact, in the absence of any attack upon it, the court was justified in acting upon such return as upon a true return. If the return is false the law of the State, as set forth by its Supreme Court, permitted a recovery against the sheriff upon his bond. We are of the opinion that this system of jurisprudence, with its provisions for safeguarding the rights of litigants, is due process of law. It may result, unfortunately, as is said to be the fact in this case, that the recovery upon the sheriff's bond will not be an adequate remedy, but statutes must be framed and laws administered so as to protect as far as may be all litigants and other persons who derive rights from the judgments of courts. So far as this record discloses the purchaser at the sheriff's sale had a right to rely upon the record, which imported verity as to the nature of the service upon the plaintiff in error. If this were not true, as the Supreme Court of

Indiana points out, there would be no protection to parties who have relied upon judicial proceedings importing verity, upon the faith of which rights have been adjudicated and value parted with. In a case of this character the law must have in view, not only the rights of the defendant who has been a victim of a false return on the part of the sheriff, but of persons who have relied upon the regularity of the return of officials necessarily trusted by law with the responsibility of advising the court as to the performance of such duties as are here involved. Were the law otherwise titles might be attacked many years after they were acquired, where the party had been guilty of no fraud and had acted upon the faith of judicial proceedings apparently perfect in every respect.

This has been the rule of law applied to a similar situation in the courts of other States. *Gregory* v. *Ford*, 14 California, 138; *Stites* v. *Knapp*, Ga. Dec. 36, pt. 2; *Taylor* v. *Lewis*, 25 Kentucky, 400; *Gardner* v. *Jenkins*, 14 Maryland, 58; *Smoot* v. *Judd*, 184 Missouri, 508; *Johnson* v. *Jones*, 2 Nebraska, 126; *Wardsboro* v. *Whitingham*, 45 Vermont, 450; *Preston* v. *Kindrick*, 94 Virginia, 760. And see in this connection *Walker* v. *Robbins*, 14 How. 584, 585; *Knox County* v. *Harshman*, 133 U. S. 152, 156.

Without the necessity of deciding more in the present case, it is enough to say that the decision of the Supreme Court of Indiana, made under the circumstances detailed, did not in our opinion deprive the plaintiff in error of due process of law within the meaning of the Fourteenth Amendment.

It follows that the judgment of the Supreme Court of Indiana should be affirmed.

Judgment affirmed.

NORTH CAROLINA RAILROAD COMPANY *v.* ZACHARY, ADMINISTRATOR OF BURGESS.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 144. Argued December 17, 18, 1913.—Decided February 2, 1914.

In order to bring a case within the terms of the Federal Employers' Liability Act of 1908, the defendant must have been, at the time of the occurrence, engaged as a common carrier in interstate commerce and the injured employé must have been employed by such carrier in such commerce.

Where the defendant is a common carrier engaged in interstate commerce and the employé for whose injuries the suit is brought was employed by the defendant in such commerce, the Federal Employers' Liability Act of 1908 governs to the exclusion of the state statutes.

Where the state court improperly refuses to apply the provisions of the Federal Employers' Liability Act in an action for injuries to an employé of a common carrier while both employer and employé were engaged in interstate commerce and the result might have been different, the judgment must be reversed.

The persons related to the deceased employé as specified in the Employers' Liability Act of 1908 are the beneficiaries of an action prescribed by the act and the damages are to be based upon the pecuniary loss sustained by such beneficiaries.

Whether the question of employment by the deceased employé in interstate commerce was properly raised in the state court as a bar to the action in accordance with the local code, is a question of state practice, and if the highest court of the State assumed or decided that the record presented that question and decided it against the party asserting it, this court has jurisdiction to review the judgment under § 237, Judicial Code.

A railroad company, leasing its entire line, which is wholly intrastate, to another railroad company doing an interstate business creates the latter its agent and becomes a common carrier by railroad engaged in interstate commerce; and if under the local law the lessor remains responsible for the lessee's acts, the Employers' Liability Act of 1908

controls as to liability for injuries to employés of the lessee engaged in interstate commerce.

Where, upon the evidence, any essential matter bearing on the question of whether an employé of a railroad company was, at the time of the injury, engaged in interstate commerce is in doubt, it should be submitted to the jury under proper instructions.

Where the state court refused to submit questions to the jury on the ground that there was no evidence to sustain the Federal right asserted, this court will analyze the evidence to the extent necessary to give plaintiff in error the benefit of such Federal right if it was improperly denied. *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601.

When a freight train for an intrastate point is being made up of cars including some from a train which started from another State, it is a reasonable inference that such cars were being carried forward as a part of a through movement of interstate commerce.

Hauling empty cars from one State to another is interstate commerce within the meaning of the Employers' Liability Act of 1908.

The Employers' Liability Act is *in pari materia* with the Safety Appliance Act, and this court, following its rulings in regard to the latter, holds that the hauling of empty cars from one State to another is interstate commerce within the meaning of the act. *Johnson* v. *Southern Pacific Co.*, 146 U. S. 1.

Acts of an employé in preparing an engine for a trip to move freight in interstate commerce, although done prior to the actual coupling up of the interstate cars, are acts done while engaged in interstate commerce.

Although absent temporarily from his train for a short time for a purpose not inconsistent with his duty to his employer, a railroad employé may still be on duty and engaged in interstate commerce within the meaning of the Employers' Liability Act of 1908.

156 Nor. Car. 496, reversed.

THE facts, which involve the construction of the Employers' Liability Act of 1908 and its application to employés engaged in hauling interstate cars between intrastate points, and also to the owner of an intrastate railroad which it has leased to a common carrier engaged in interstate commerce, are stated in the opinion.

Mr. John K. Graves for plaintiff in error:

As the Federal act applies, the judgment must be re-

versed as the record discloses neither allegation nor proof of the existence of any beneficiary or beneficiaries designated in the Federal act. *Mich. Cent. R. R. Co.* v. *Vreeland*, 227 U. S. 59; *Gulf &c. Ry. Co.* v. *McGinnis*, 228 U. S. 173.

The testimony clearly shows that the cars were in the course of a through interstate journey and were therefore employed in interstate commerce regardless of whether they were loaded or empty. *Johnson* v. *Southern Pac. Co.*, 196 U. S. 1, 21; *Nor. Pac. Ry. Co.* v. *Maerkl*, 198 Fed. Rep. 1; *Pedersen* v. *Del., L. & W. R. Co.*, 229 U. S. 146.

The preparation of the engine was an interstate service and the fireman while engaged in that service was employed in interstate commerce. *Pedersen* v. *Del., L. & W. R. Co.*, 229 U. S. 146.

For other cases where the act was applied, see *St. Louis &c. Ry. Co.* v. *Seale*, 229 U. S. 156; *Neil* v. *Idaho &c. R. Co.* (Idaho), 125 Pac. Rep. 331, 336; *Horton* v. *Oregon &c. Co.* (Wash.), 130 Pac. Rep. 897; *Freeman* v. *Powell* (Texas), 144 S. W. Rep. 1033; *Montgomery* v. *Southern Pac. Co.* (Oregon), 131 Pac. Rep. 507; *Kansas City &c. Ry. Co.* v. *Pope* (Texas), 152 S. W. Rep. 185.

The pleadings establish the status of the deceased as employed in his duties as fireman at the time of the accident, especially when it is observed that the action is brought and sought to be maintained under the so-called Fellow-servant Act of North Carolina (§ 2646, Nor. Car. Revisal, 1908), which provides for the recovery of damages by an employé of any railroad injured or killed in the course of his services or employment, etc.

Nothing in the evidence tends in any way to throw a different light upon the status of the deceased at the time of the accident. If deceased was on duty at the time of the accident such duty must be assigned to his employment as fireman on an engine which was being prepared for a

movement in interstate commerce. *Second Employers' Liability Cases*, 223 U. S. 1.

The deceased's status as a servant on duty having been established, this status had not been broken nor had it ceased. *Missouri &c. R. Co.* v. *United States*, 231 U. S. 112; *Kitchenham* v. *S. S. Johannesburg*, L. R. App. Cases, 1911, p. 417; *Philadelphia &c. R. Co.* v. *Tucker*, 35 App. D. C. 123; *Ewald* v. *Chicago &c. R. Co.*, 70 Wisconsin, 420; *Boldt* v. *New York &c. R. Co.*, 18 N. Y. 432; *United States* v. *Chicago &c. Ry. Co.*, 197 Fed. Rep. 624. See also to the same effect: *United States* v. *Atchison &c. R. Co.*, 220 U. S. 37; *United States* v. *Denver &c. R. Co.*, 197 Fed. Rep. 629; *United States* v. *Kansas City Ry. Co.*, 189 Fed. Rep. 471; *United States* v. *St. Louis &c. R. Co.*, 189 Fed. Rep. 954.

The situation is not affected by the fact that the lessor and not the lessee who was operating the railroad is sued.

In enacting the Employers' Liability Act of 1908, Congress undertook to cover the relation of master and servant with respect to injuries or death suffered by the servant in railroad service when the master and the servant were engaged in interstate commerce. Congress intended to go to the limit of its constitutional power as to every one in fact occupying the position or relation of master with respect to injuries to servants employed in interstate commerce on railroads engaging in interstate commerce. *Colasurdo* v. *Central R. R. Co.*, 180 Fed. Rep. 832.

This case falls within the scope of the act.

Even assuming that the state court was correct in its suggestion that the plaintiff in error was not itself engaged in interstate commerce if § 1 only of the Federal act is considered, under § 7 the term "common carrier" includes the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier, and this includes as

lessor the plaintiff in error. *Logan* v. *North Carolina R. Co.*, 116 Nor. Car. 941.

The Federal Employers' Liability Act applies to the cause of action presented in this case to the exclusion of the state law.

Mr. Thomas H. Calvert, with whom *Mr. John A. Barringer* and *Mr. George S. Bradshaw* were on the brief, for defendant in error:

The North Carolina Railroad Co. is not a common carrier by railroad while engaging in commerce between any of the several States. Its tracks and property lie wholly within the State of North Carolina. It is in existence, has its officers and directors, receives its annual rents from its lessee, the Southern Railway Company, and distributes them among its stockholders; but it is not an interstate carrier within the meaning of the Federal Employers' Liability Act. While *Logan* v. *Railroad Co.*, 116 Nor. Car. 941, has held that this lessor is responsible for all acts of negligence of its lessee, that is because a railroad corporation cannot escape its responsibility by leasing its road.

Plaintiff in error had the right and the opportunity to make its lessee, the Southern Railway Company, a party defendant.

On the pleadings, if there had been any evidence tending to show that the deceased was engaged in interstate service, it would have been the province of the jury to determine that fact.

Under § 527, Revisal of Nor. Car. of 1905, and following the well-recognized practice in this State, it has been held in many cases that where the evidence is conflicting, or different inferences may properly be drawn from the testimony, it is the duty of the trial judge to submit the questions of fact to the jury. *Marks* v. *Cotton Mills*, 138 Nor. Car. 401; *Ramsbottom* v. *Railroad Co.*, 138 Nor. Car. 38; *Stewart* v. *Railroad Co.*, 137 Nor. Car. 687.

And it is for the jury to pass upon the credibility which should be given to the testimony of a witness. *Manufacturing Co.* v. *Railroad Co.*, 128 Nor. Car. 285; *Halton* v. *Railroad Co.*, 127 Nor. Car. 255; *Cox* v. *Railroad Co.*, 123 Nor. Car. 604. See also *Bolden* v. *Railroad Co.*, 123 Nor. Car. 614; *Simonton* v. *Winter*, 5 Pet. 141.

There was not sufficient evidence to submit to the jury the question whether or not the deceased was engaged in interstate commerce.

As the plaintiff in error raised the question in the answer whether or not the deceased, at the time he was killed, was engaged in interstate commerce, it devolved upon it to show clearly that the deceased was so engaged.

At the time he was killed the deceased had left the engine and was going across the main line and the tracks in the yard toward his boarding-house.

His service at the time of his death would not be changed to an interstate service by evidence that subsequently interstate freight was put on the train.

As to why the original act of 1906 was held to be invalid, see *Employers' Liability Cases*, 207 U. S. 463.

It is not sufficient that the employé should at times have been engaged in interstate commerce, but the act of 1908 particularly declares that the injury or death must have been caused while he was employed by such carrier in such commerce.

The prayers for instruction, being predicated on a state of facts upon which there was not sufficient evidence to submit the question to the jury, were properly refused. *Stewart* v. *Carpet Co.*, 138 Nor. Car. 60; *Stewart* v. *Railroad Co.*, 136 Nor. Car. 385; *Bryan* v. *Railroad Co.*, 134 Nor. Car. 538; *Joines* v. *Johnson*, 133 Nor. Car. 487; *Trust Co.* v. *Benbow*, 131 Nor. Car. 413; *Burton* v. *Mfg. Co.*, 132 Nor. Car. 17; *Carson* v. *Railroad Co.*, 128 Nor. Car. 95.

If the plaintiff desired to insist on its further defense that the deceased was engaged in interstate commerce,

it was its duty to tender an issue on which that fact could properly be inquired into. Code of Civ. Proc., Revisal of 1905, §§ 545, 546. And see also Revisal of 1905, §§ 503, 548, as construed in *Manufacturing Co.* v. *Cloer*, 140 Nor. Car. 128; *Pollock* v. *Warwick*, 104 Nor. Car. 638; *Mining Co.* v. *Smelting Co.*, 99 Nor. Car. 445; *Oakley* v. *Van Noppen*, 95 Nor. Car. 60; *Simmons* v. *Mann*, 92 Nor. Car. 12; *Piedmont Wagon Co.* v. *Byrd*, 119 Nor. Car. 460; *Womble* v. *Grocery Co.*, 135 Nor. Car. 474; *Walker* v. *Scott*, 106 Nor. Car. 56; *Baltimore &c. R. Co.* v. *Darr*, 204 Fed. Rep. 751.

Mr. Justice Pitney delivered the opinion of the court.

This action was brought in the Superior Court of Guilford County, North Carolina, to recover damages for the negligent killing of Burgess, a locomotive fireman in the employ of the Southern Railway Company, lessee of the defendant, which occurred at Selma, North Carolina, on April 29, 1909. Under the local law, as laid down in *Logan* v. *Railroad*, 116 Nor. Car. 940, the lessor is responsible for all acts of negligence of its lessee occurring in the conduct of business upon the lessor's road; and this upon the ground that a railroad corporation cannot evade its public duty and responsibility by leasing its road to another corporation, in the absence of a statute expressly exempting it. The responsibility is held to extend to employés of the lessee, injured through the negligence of the latter.

The complaint set forth in substance that plaintiff's intestate, being in the employ of defendant's lessee, and engaged at the Selma switchyards in the discharge of his duties as fireman upon Engine No. 862, about eight o'clock, p. m., on the date mentioned, after inspecting, oiling, firing, and preparing the engine for starting on a trip from Selma to Spencer, N. C., attempted to cross certain tracks that intervened between the engine and his

boarding-house, which was located a short distance away; that another engine, No. 716, was standing upon a side-track in such position as to shut off intestate's view of the main track; that No. 716 had its blower on, and was making a noise so loud that intestate could not hear a third engine—No. 1551, the shifting engine used in the yards—which at this time was running backward at a reckless and dangerous rate of speed, without headlight and without an adequate and competent crew; and that as intestate stepped from the track in the rear of Engine No. 716 and was about to step upon the main line in the attempt to cross it, he was struck and killed by the shifting engine. Defendant's answer, besides denying the allegations of negligence, set up as a special defense that at the time plaintiff's intestate was killed, he was engaged in interstate commerce as an employé upon a train of defendant's lessee which was moving from Selma, North Carolina, to Spencer, in the same State, and carrying cars loaded with freight from the State of Virginia to the State of North Carolina and other States; that the liability of the defendant to him or to the plaintiff as his representative was fixed and regulated by the Federal Employers' Liability Act of April 22, 1908; and that under that act the plaintiff was not entitled to recover.

Upon the trial, at the close of plaintiff's evidence, which tended generally to support the averments of the complaint, defendant moved for a non-suit, and among other grounds assigned the following:—that from the uncontradicted evidence it appeared that at the time of the occurrence in question defendant, through its lessee, was a common carrier by railroad engaged in interstate commerce, and plaintiff's intestate was at that time a person employed by such carrier in such commerce; that the act of Congress already referred to exclusively regulated the liability of defendant to plaintiff's intestate, and that upon all the evidence plaintiff had failed to make out a

case of liability under that act. The court, in denying the motion, held that the action was brought under the statute of North Carolina, that the Federal act had no application, and that the cause was triable under the statutes of the State. To this ruling, defendant excepted. At the close of the case, defendant again undertook to invoke the protection of the Federal act by requested instructions to the jury, which were refused and exceptions allowed.

There was a verdict for plaintiff and judgment thereon, followed by an appeal to the Supreme Court of the State. That court overruled the contention of defendant that the Federal Employers' Liability Act of April 22, 1908, applied, and held that the action was properly tried under the state law. The result was an affirmance, 156 Nor. Car. 496, and the case comes here under § 709 Rev. Stat. (Jud. Code, § 237).

In order to bring the case within the terms of the Federal act (35 Stat. 65, c. 149, printed in full in 223 U. S., p. 6), defendant must have been, at the time of the occurrence in question, engaged as a common carrier in interstate commerce, and plaintiff's intestate must have been employed by said carrier in such commerce. If these facts appeared, the Federal act governed, to the exclusion of the statutes of the State. *Second Employers' Liability Cases* (*Mondou* v. *New York &c. Railroad Co.*), 223 U. S. 1, 55; *St. Louis & San Francisco Ry.* v. *Seale*, 229 U. S. 156, 158.

It is not disputed that if the provisions of the Federal act had been applied, the result of the action might have been different. To mention only one matter: there was neither averment in the pleadings nor evidence at the trial that deceased left a widow, child, parent, or dependent next of kin. Persons thus related to deceased are the respective beneficiaries of the action prescribed by the act of Congress, and the damages are to be based upon the

pecuniary loss sustained by the beneficiary. *Michigan Central R. R.* v. *Vreeland,* 227 U. S. 59, 68; *Gulf, Colorado &c. Ry. Co.* v. *McGinnis,* 228 U. S. 173. The state law (Revisal 1908, § 2646) seems not to recognize this limitation upon the measure of recovery; certainly the damages in the present case were assessed without regard to it.

In support of the judgment, it is earnestly argued that the question whether deceased was employed in interstate commerce was not properly raised in the trial court in accordance with the pertinent provisions of the local Code of Civil Procedure. But this is a question of state practice; and since it appears that defendant expressly claimed immunity by reason of the act of Congress, and the highest court of the State either decided or assumed that the record sufficiently presented a question of Federal right and decided against the party asserting that right, the decisions of this court render it clear that it is our duty to pass upon the merits of the Federal question. *Home for Incurables* v. *City of New York,* 187 U. S. 155, 157; *Land & Water Co.* v. *San Jose Ranch Co.,* 189 U. S. 177, 179; *Haire* v. *Rice,* 204 U. S. 291, 299; *Chambers* v. *Balt. & Ohio R. R.,* 207 U. S. 142, 148; *Miedreich* v. *Lauenstein,* decided this day, *ante,* p. 236.

The court based its decision that the Federal act did not apply, in part upon the ground that the North Carolina Railroad is not an interstate railroad—its tracks and property lying wholly within the State—and that the corporation itself is not, although its lessee is, engaged in interstate commerce; the lessor's activities being confined to receiving annual rents and distributing them among its stockholders. The responsibility of the lessor for all acts of negligence of the lessee occurring in the conduct of business on the lessor's road, as established by the same court in *Logan* v. *Railroad,* 116 Nor. Car. 940, was recognized—indeed reasserted. "But," it was said, "that is because a railroad corporation cannot escape its respon-

sibility by leasing its road. It is still liable for its lessee's acts of commission and omission, whether they occur in interstate or intrastate commerce, although the lessor is not actually engaged in either." 156 Nor. Car. 500.

It is plain enough, however, that the effect of the rule thus laid down, especially in view of the grounds upon which it is based, is, that although a railroad lease as between the parties may have the force and effect of an ordinary lease, yet with respect to the railroad operations conducted under it, and everything that relates to the performance of the public duties assumed by the lessor under its charter, such a lease—certainly so far as concerns the rights of third parties, including employés as well as patrons—constitutes the lessee the lessor's substitute or agent, so that for whatever the lessee does or fails to do, whether in interstate or in intrastate commerce, the lessor is responsible. This being the legal situation under the local law, it seems to us that it must and does result, in the case before us, that the lessor is a "common carrier by railroad engaging in commerce between the States," and that the deceased was "employed by such carrier in such commerce," within the meaning of the Federal act; provided, of course, he was employed by the lessee in such commerce at the time he was killed.

It was, however, further held by the Supreme Court of North Carolina that deceased, at the time he was killed, was not in fact employed by the Southern Railway, the lessee, in interstate commerce. There are several grounds upon which this decision was based, or upon which it is said to be supportable; and these will be separately noticed. Of course, if upon the evidence any essential matter of fact was in doubt, it should have been submitted to the jury under proper instructions. The rulings of the trial court deprived plaintiff in error of the opportunity to go to the jury upon the question. But it is now insisted that there was no evidence tending to show that

deceased was engaged in interstate commerce. This renders it incumbent upon us to analyze the evidence to the extent necessary to give to plaintiff in error the benefit of its asserted Federal right. *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 611, and cases cited.

The evidence tended to show that Train No. 72 of the Southern Railway had come in to Selma, N. C., from Pinners Point, Va., and other places, and that a shifting crew was "working" this train so as to take two cars from it and put them into a train that was to include these and other cars to be hauled from Selma to Spencer, N. C., by Engine No. 862, and that deceased was employed on this engine as fireman for the trip that was about to begin, and had already prepared his engine for the purpose. It is contended that the evidence failed to show that the two cars thus taken from Train No. 72 had come in from Virginia, rather than from the "other places," which it is said might be intermediate North Carolina points. We find, however, evidence that the train which was to be hauled from Selma to Spencer by Engine No. 862, was being made up in part from cars that had come in from Pinners Point; and it was at least a reasonable inference that the two cars referred to were being put into the Spencer train in order to be carried forward as a part of a through movement of interstate commerce.

There seems to be no clear evidence as to the contents of these cars, and it is argued that, in the absence of evidence, it is as reasonable to infer that they were empty as that they were loaded; and that it was incumbent upon defendant to show that they contained interstate freight. We hardly deem it so probable that empty freight cars would be hauled from the Virginia point to Spencer. But were it so, the hauling of empty cars from one State to another is, in our opinion, interstate commerce within the meaning of the act. Such is the view that has obtained with respect to empty cars in actions based upon the

Safety Appliance Act of March 2, 1893 (27 Stat. 531, c. 196). *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 21; *Voelker* v. *Railway Co.*, 116 Fed. Rep. 867, 873. And the like reason applies, as we think, to actions founded upon the Employers' Liability Act, which, indeed, is *in pari materia* with the other.

It is argued that because, so far as appears, deceased had not previously participated in any movement of interstate freight, and the through cars had not as yet been attached to his engine, his employment in interstate commerce was still *in futuro*. It seems to us, however, that his acts in inspecting, oiling, firing, and preparing his engine for the trip to Selma were acts performed as a part of interstate commerce, and the circumstance that the interstate freight cars had not as yet been coupled up is legally insignificant. See *Pederson* v. *Del., Lack. & Western R. Co.*, 229 U. S. 146, 151; *St. Louis & San Francisco Ry.* v. *Seale*, 229 U. S. 156, 161.

Again, it is said that because deceased had left his engine and was going to his boarding-house, he was engaged upon a personal errand, and not upon the carrier's business. Assuming (what is not clear) that the evidence fairly tended to indicate the boarding-house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for the purpose, and that he had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding-house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still "on duty," and employed in commerce, notwithstanding his temporary absence from the locomotive engine. See *Missouri, Kansas & Texas Ry. Co.* v. *United States*, 231 U. S. 112, 119.

We conclude that with respect to the facts necessary to bring the case within the Federal act, there was evi-

dence that at least was sufficient to go to the jury. It is doubtful whether there was substantial contradiction respecting any of these facts; but this we need not consider.

From what has been said, it follows that the state courts erred in holding that the Federal act had no application. As the case stands, we are not called upon to determine the validity of the several contentions that were raised by defendant at the trial on the strength of that act, nor to pass upon the mode in which they were raised. Upon these matters, therefore, we express no opinion.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

BILLINGS *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES *v.* BILLINGS.

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

Nos. 66 and 625. Argued January 6, 7, 1914.—Decided February 24, 1914.

The jurisdiction of this court on direct writ of error is not confined to the constitutional questions, but embraces every issue in the case. *Williamson* v. *United States*, 207 U. S. 425.

The Circuit Court of Appeals has no power to ask instructions upon an issue which it has no right to decide, nor has this court authority to instruct on such a subject.

This court cannot refuse to decide questions which are properly before it for judgment.

Where one party has taken a writ of error direct from this court to the Circuit Court based on the constitutional question decided against

it, and the other party has obtained a writ of error from the Circuit Court of Appeals as to other questions decided against it, which court has certified that question to this court, and the record is in such condition as to enable this court to decide the whole case, this court may treat the writ of error from the Circuit Court of Appeals as a cross-writ and so determine all the issues involved.

Under § 37 of the Tariff Act of August, 1909, imposing a tax on the use of foreign-built yachts owned or chartered for more than six months by citizens of the United States, to be collected annually on September 1, the tax became due on the first day of September next occurring after the act became effective; further *held* that the six months' clause relates only to the chartering of the yachts, and the word "annually" indicates continuity and that the tax is not a sporadic one to cease after a single payment.

Where words are used in a statute in their every-day sense and not in a technical one, they should be so construed.

The use of a foreign-built yacht which renders the owner subject to the tax imposed by § 37 of the Tariff Act of 1909 is active and actual use and not the potential use arising from the mere fact of ownership. See *Pierce* v. *United States*, p. 290, *post*.

The fact that a tax statute operates retroactively does not necessarily cause it to be unconstitutional. *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107.

The rule that statutes should be construed if possible so as not to operate retroactively does not authorize a judicial reënactment of the statute to save it from acting retroactively if Congress intended it so to do.

Section 37 of the Tariff Act of 1909, imposing a tax on foreign-built yachts, is not unconstitutional because it operates retroactively as to the tax levied for the year 1909, and the use of yachts within the meaning of the statute during the year 1909, renders the owner or charterer liable for the tax for that year.

The requirement of uniformity imposed by the Constitution on Congress in levying excise taxes is not intrinsic but geographic.

The Constitution is not self-destructive—it does not take away by one provision powers conferred by another, and the express authority to tax is not limited or restricted by subsequent provisions or amendments, especially the due process clause of the Fifth Amendment. *McCray* v. *United States*, 195 U. S. 27.

The difference between things domestic and things foreign is recognized by the Constitution itself, and a classification for taxation of foreign-

built yachts is not so repugnant to justice as to amount to denial of due process of law because domestic-built yachts are not subject to the same tax; nor is § 37 of the Tariff Act of 1909, unconstitutional for lack of uniformity.

The state rule as to interest on taxes differs from the United States rule—the former excludes interest unless the statute so provides; the latter allows interest unless forbidden by statute. This court will not now apply the state rule, as to do so would repudiate settled principles and disregard the sanction expressly or impliedly given by Congress to the rule adopted by the Federal courts.

The Government is entitled to interest on taxes on use of foreign-built yachts under § 37 of the Tariff Act of 1909, from the date when the taxes become due, and may maintain an action against the owner or charterer therefor.

190 Fed. Rep. 359, modified and affirmed.

THE facts, which involve the construction and constitutionality of § 37 of the Tariff Act of 1909, imposing a tax on the use of foreign-built yachts, are stated in the opinion.

Mr. William D. Guthrie for the owners of foreign-built yachts, in this and other cases argued simultaneously herewith:

The classification in § 37 violates the Fifth Amendment.

A tax law must be imposed impartially upon all in the same class similarly situated, and must apply equally and uniformly to all persons in like circumstances or under like conditions.

The yacht owners purchased their yachts when no import duty or excise tax was imposed or ever had been imposed by Congress upon foreign-built yachts, *The Conqueror*, 166 U. S. 110, and presumably have duly paid the tonnage tax laid upon all vessels classed as foreign. The practical effect of this legislation is to penalize them and compel them to pay an import duty of thirty-five per centum *ad valorem* as the alternative to submitting to this new tax. The act is precisely the same as if it had provided in so many words that all citizens who had theretofore acquired foreign-built yachts should pay a retrospective im-

port "duty of thirty-five per centum *ad valorem*" in order to escape an annual tax of seven dollars per ton. *Henderson* v. *New York*, 92 U. S. 259, 268; *Bailey* v. *Alabama*, 219 U. S. 219, 244. See Cooley on Taxation, 3d ed., pp. 4, 260.

The classification is in conflict with sound principles of constitutional taxation. *Knowlton* v. *Moore*, 178 U. S. 41, 77; *Am. Sugar Co.* v. *Louisiana*, 179 U. S. 89, 92; *The Conqueror*, 166 U. S. 110, 115. See also *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Gulf, Colo. &c. Ry.* v. *Ellis*, 165 U. S. 150, 165; *Magoun* v. *Illinois Trust Bank*, 170 U. S. 283, 301; *Home Ins. Co.* v. *New York*, 134 U. S. 594, 606, 607; *Giozza* v. *Tiernan*, 148 U. S. 657, 662; *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429, 599; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 121; *Detroit &c. Ry. Co.* v. *Fuller*, 205 Fed. Rep. 86, 89; *Southern Ry. Co.* v. *Greene*, 216 U. S. 400.

As to the selection of property according to origin as a subject for a special form of taxation, see *Phillips* v. *Raynes*, 136 App. Div. 417, aff'd 198 N. Y. 539, holding void under the Fourteenth Amendment, § 190 of the New York Labor Law prohibiting sale of convict-made goods without the payment of an annual license fee of $500. See also *Farrington* v. *Mensching*, 187 N. Y. 8, 17; *People* v. *Hawkins*, 157 N. Y. 1, 9; *Knowlton* v. *Rock County*, 9 Wisconsin, 410, 422.

While in the case of import duties the foreign origin of the article imported is necessarily the basis and test of the duty, the yacht tax now before the court purports to be an excise tax upon the use of an article and not upon its importation. The law, therefore, must be treated solely as an excise tax upon use, and cannot be sustained upon a theory which might uphold an import duty.

There is no substantial difference between the requirement of due process of law contained in the Fifth Amendment and that in the Fourteenth Amendment. *Carroll* v.

Greenwich Ins. Co., 199 U. S. 401, 410; *Twining* v. *New Jersey*, 211 U. S. 78, 101.

The act of Congress requires use of a foreign-built yacht during the taxable period.

Tax statutes, especially when attempting to impose special, novel and extraordinary taxes, should be strictly construed, and, if any ambiguity be found to exist, it must be resolved in favor of the citizen. *Eidman* v. *Martinez*, 184 U. S. 578, 583; *United States* v. *Wigglesworth*, 2 Story, 369, 374; *Mutual Benefit Life Ins. Co.* v. *Herold*, 198 Fed. Rep. 199, 201, aff'd 201 Fed. Rep. 918; *Parkview Bldg. Assn.* v. *Herold*, 203 Fed. Rep. 876, 880; *Mutual Trust Co.* v. *Miller*, 177 N. Y. 51, 57.

The language plainly indicates that it was the intention to levy a tax not upon foreign-built yachts as property but solely upon their use. *The Anjer Head*, 46 Fed. Rep. 664.

The distinction between an excise tax on the use of a thing and a direct tax upon the thing itself is, of course, fundamental and substantial. But it would vanish into nothingness if "use" be now construed to mean not actual use at all but mere capacity for use.

The word "use" was advisedly employed in order to avoid creating what might be held to be a direct tax on the property, and as such necessary to be apportioned. *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429; 158 U. S. 601; *McCoach* v. *Minehill Railway Co.*, 228 U. S. 295, 306. The court will not, therefore, now adopt a construction of the statute which would create grave doubts as to its constitutionality, when another construction, which avoids all constitutional difficulties, is not only equally consistent with the terms of the act, but more consonant with its plain intent. *United States* v. *Del. & Hud. Co.*, 213 U. S. 366, 408; *The Abby Dodge*, 223 U. S. 166, 175; *United States* v. *Nipissing Mines Co.*, 206 Fed. Rep. 431; *Abrast Realty Co.* v. *Maxwell*, 206 Fed. Rep. 333.

The tax is not leviable in respect of foreign-built yachts not within the jurisdiction of the United States.

Property in order to be the subject of taxation must be within the jurisdiction of the power assuming to tax. *Buck* v. *Beach*, 206 U. S. 392, 400. If the yachts in question had no permanent situs anywhere, the fact that their owners were domiciled abroad would fix their situs there. *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63, 69; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194.

The power to tax depends upon jurisdiction of the subject-matter of the tax.

Taxation must have relation to some subject-matter actually within the jurisdiction of the taxing power, otherwise it violates the constitutional guaranty against the taking of property without due process of law. Neither a State nor the Federal Government can tax the property of citizens situated in foreign countries, or the use of such property in foreign countries. *Railroad Co.* v. *Jackson*, 7 Wall. 262, 267; *State Tax on Foreign-held Bonds*, 15 Wall. 300, 319; *Pullman Co.* v. *Pennsylvania*, 141 U. S. 18, 22; *Louisville Ferry Co.* v. *Kentucky*, 188 U. S. 385, 398; *Old Dominion S. S. Co.* v. *Virginia*, 198 U. S. 299, 307; *Delaware &c. R. R.* v. *Pennsylvania*, 198 U. S. 341, 353; *Chi., B. & Q. Ry. Co.* v. *Babcock*, 204 U. S. 585, 592; *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395, 399; *Selliger* v. *Kentucky*, 213 U. S. 200, 203; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1, 38; *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63, 73; *Gromer* v. *Standard Dredging Co.*, 224 U. S. 362, 372, 376, 377; *Detroit &c. Ry. Co.* v. *Fuller*, 205 Fed. Rep. 86, 90.

There is no law of the United States which authorizes the Secretary of the Treasury to extend any special right or privilege to foreign-built yachts owned by American citizens, and the action of the Treasury Department cannot make these yachts American vessels or classify them otherwise than Congress has done. *White's Bank* v. *Smith*, 7 Wall. 646, 655, 656.

Conceding that Congress has power to tax the use of foreign-built yachts owned and used outside of the United States by American citizens permanently residing abroad, it has not expressed the intention so to do. Such a novel tax burden should be expressed in plain terms, free from doubt or ambiguity. *Eidman* v. *Martinez*, 184 U. S. 578, 583; *Lynch* v. *Union Trust Co.*, 164 Fed. Rep. 161, 163.

Section 37 fails to reveal any such legislative intent. 190 Fed. Rep. 368, 369.

Section 37 should not be construed as retrospective so as to tax the use of foreign-built yachts during the year 1909.

One who has owned property, or exercised or enjoyed a right or privilege, or carried on a vocation, at a time and under circumstances when such ownership or acts were not taxable, ought not to be subjected to a special, novel and extraordinary tax by a subsequent statute operating retrospectively upon his past ownership or acts. *N. Y. C. & H. R. R. R. Co.* v. *Gaus*, 200 N. Y. 328, 330.

A tax should not be levied upon past ownership so as to cover a period when the property was not subject to taxation. *People* v. *Trust Co. of America*, 205 N. Y. 74, 77. A statute imposing a tax upon use should not be construed retrospectively unless the language imperatively requires it. *U. S. Fidelity Co.* v. *Struthers*, 209 U. S. 306, 314; *United States* v. *Heth*, 3 Cr. 399, 413; *Assur. Soc'y* v. *Miller*, 179 N. Y. 227; 180 N. Y. 525, 526; *Metz* v. *Hagerty*, 51 Oh. St. 521. See also *United States* v. *Burr*, 159 U. S. 78, 82; *United States* v. *Am. Sugar Co.*, 202 U. S. 563, 577; *Holliday* v. *Atlanta*, 96 Georgia, 377; *Young* v. *Henderson*, 76 N. Car. 420; 2 Lewis' Sutherland Stat. Const. (2d ed.), p. 640.

If it be held that it must be presumed that Congress intended that the obligation to pay the tax should begin to accrue from the date when the act took effect, this annual tax on use should be apportioned according to the period of actual use during the year ending September 1, 1909,

while the tax law was in force and operation. *Mutual Trust Co.* v. *Miller*, 177 N. Y. 51, 54, 56. See *Lincoln Trust Co.* v. *Glynn*, 132 App. Div. 546, 547, aff'd 198 N. Y. 501, and distinguished in *N. Y. C. & H. R. R. R. Co.* v. *Gaus*, 200 N. Y. 328, 331.

The Government is not entitled to recover interest. The burden of a tax should not be increased by the addition of interest unless such a purpose of the legislature has been clearly expressed. *Hartford* v. *Hills*, 75 Connecticut, 599, 600. What the State omitted to demand, the court cannot require. *People* v. *Gold & Stock Tel. Co.*, 98 N. Y. 67, 80.

The act itself shows that Congress did not intend to exact interest as a penalty for delay in payment of the tax.

Courts may not find an intention to impose interest as a penalty for delay in payment of taxes and cannot award interest on taxes unless there be some express statutory provision to that effect. *Crabtree* v. *Madden*, 54 Fed. Rep. 426, 431; *People* v. *Gold & Stock Tel. Co.*, 98 N. Y. 67, 79; *Rochester* v. *Bloss*, 185 N. Y. 42, 52; *Camden* v. *Allen*, 26 N. J. L. 398, 399; *Belvidere* v. *Warren R. R. Co.*, 34 N. J. L. 193, 199; *Road Commissioners* v. *Freeholders*, 44 N. J. L. 570, 571, aff'd 45 N. J. L. 173; *Brennert* v. *Farrier*, 47 N. J. L. 75; *Shaw* v. *Peckett*, 26 Vermont, 482, 486; *Hughes* v. *Kelley*, 69 Vermont, 443, 445; *Perry* v. *Washburn*, 20 California, 318, 350; *People* v. *C. P. R. R. Co.*, 105 California, 576, 595; aff'd 162 U. S. 91; *Sargent & Co.* v. *Tuttle*, 67 Connecticut, 162, 167; *Hartford* v. *Hills*, 72 Connecticut, 599; *Cromwell* v. *Savage*, 85 Connecticut, 376, 377; *Stitt* v. *Stringham*, 55 Oregon, 89, 94; *State* v. *Mutual Life Ins. Co.*, 175 Indiana, 59, 85; *State* v. *Southwestern R. R. Co.*, 70 Georgia, 11, 32, 33; *Georgia R. R. Co.* v. *Wright*, 124 Georgia, 596, 618; 125 Georgia, 589, 610, reversed on other grounds in 207 U. S. 127; *McWilliams* v. *Jacobs*, 128 Georgia, 375, 378; *Louisville & N. R. Co.* v. *Commonwealth*, 89 Kentucky, 531, 538; *Illinois Cent. R. Co.* v. *Adams*, 29 So. Rep. 996, 997 (Miss.); *New Whatcom* v. *Roe-*

der, 22 Washington, 570, 575; *State* v. *New England Furniture Co.*, 107 Minnesota, 52, 53; *Perry County* v. *Railroad Co.*, 65 Alabama, 391, 401; *Edmonson* v. *Galveston*, 53 Texas, 157, 161; *West. Un. Tel. Co.* v. *State*, 55 Texas, 314, 319, reversed on other grounds in 105 U. S. 460; *Cave* v. *Houston*, 65 Texas, 619, 622; *Brooks* v. *State*, 58 S. W. Rep. 1032, 1035 (Tex.); *Rockland* v. *Ulmer*, 87 Maine, 357, 361; *Danforth* v. *Williams*, 9 Massachusetts, 324; *Greer* v. *Richards*, 3 Arizona, 227, 235; 1 Cooley on Taxation, 3d ed., pp. 19, 20; 27 Am. & Eng. Encyc. of L., 2d ed., p. 777; 37 Cyc. 1165.

This is not a suit for the recovery of taxes in an action in the nature of debt as *Meredith* v. *United States*, 13 Pet. 486; *United States* v. *Chamberlin*, 219 U. S. 250. The form of procedure cannot change their character. See also *Boston* v. *Turner*, 201 Massachusetts, 190, 193; *Gautier* v. *Ditmar*, 204 N. Y. 20, 27.

In nearly all of the tax cases cited by the Government in the court below, the question of interest was not before the court.

Mr. Assistant Attorney General Adkins, with whom *Mr. Karl W. Kirchwey* was on the brief, for the United States, in this and other cases argued simultaneously herewith:

The tax was due September 1, 1909. The act was approved August 5, 1909, and took effect from its passage. The act, as so construed, is not retroactive. Endlich, Statutes, § 280; *Johnston* v. *United States*, 17 Ct. Cl. 157, 171; *Locke* v. *New Orleans*, 4 Wall. 172; *People* v. *Spring Valley Co.*, 92 N. Y. 383, 390; *Frellsen* v. *Mahan*, 21 La. Ann. 79, 103; *McClellan* v. *Railroad*, 11 Lea (Tenn.), 336. See also *State* v. *Certain Lands*, 40 Arkansas, 344; *Litson* v. *Smith*, 68 Mo. App. 397, 402; *Fennell* v. *Pauley*, 112 Iowa, 94; *Hudson* v. *Miller*, 10 Kans. App. 532; *Hardesty* v. *Fleming*, 57 Texas, 395; *Brown* v. *Houston*, 114 U. S. 622.

The contention that another rule of construction applies to an indirect tax like the present cannot prevail. The tax is upon the present use of the property, whether that use has endured for a year or for a day. The tax is called an annual one, which means that the tax is to be collected once a year.

Even if such construction does give the statute a retroactive effect, Congress intended the tax to be paid September 1, 1909.

Congress has the power to lay a retrospective tax. *Locke* v. *New Orleans*, 4 Wall. 172; *Stockdale* v. *Ins. Companies*, 20 Wall. 323, 331; *Railroad Co.* v. *Rose*, 95 U. S. 78, 80; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 108; Cooley, Taxation, 3d ed., 492, 494.

Courts will construe a statute retrospectively when that is clearly the legislative intent. *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Lamb* v. *Powder River Co.*, 132 Fed. Rep. 434.

The language of the act shows a clear intention to make it immediately effective. *Pauley Mfg. Co.* v. *Crawford County*, 84 Fed. Rep. 942.

Punctuation is to be given little weight in determining the legislative intent. *Hammock* v. *Loan & Trust Co.*, 105 U. S. 77, 84; *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 480.

A construction which leads to absurd and unjust consequences is to be avoided if possible. *Pickett* v. *United States*, 216 U. S. 456, 461.

The tax cannot be apportioned. *McClellan* v. *Railroad*, 11 Lea, 336.

The tax is upon consumption or upon the privilege of using, and is not avoided by failure to employ the yacht on cruises.

The language of the act indicates that the tax is to be levied upon the use of foreign-built yachts.

The transaction of active business is the thing taxed;

the income derived therefrom is included in the measure of the tax. Were it otherwise the tax would probably run counter to the decision of this court in *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429.

A privilege tax is not direct simply because measured by capacity for use. *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 166; *United States* v. *Singer*, 15 Wall. 111; *Hylton* v. *United States*, 3 Dall. 171.

While economically the incidence of the present tax is upon the yacht itself, its legal incidence is upon the privilege of using, and whether this be called a tax upon consumption, potential use, or capacity for use, it is indirect in the constitutional sense. *Knowlton* v. *Moore*, 178 U. S. 81, 83; *Missouri &c. Ry. Co.* v. *United States*, 231 U. S. 112.

The reasonable construction of the act shows that the tax is primarily a revenue measure and secondarily designed to encourage the building of yachts in America, and there would be no object in exempting yachts out of commission.

The privilege of use, as shown by ownership or a charter of more than six months, is the only test of liability imposed by the act.

The tax applies to every foreign-built yacht belonging to a citizen of the United States, though such citizen be domiciled and resident abroad and the yacht has acquired a permanent situs abroad.

The statute is to be construed sensibly and to accomplish the legislative intent. *Johnson* v. *Southern Pacific Co.*, 196 U. S. 17.

The congressional proceedings, however, clearly indicate that Congress understood that the tax would apply to the specific yachts now involved. Cong. Rec., Part V, 61st Cong., 1st sess., p. 4875. See *Eidman* v. *Martinez*, 184 U. S. 591.

Every citizen of the United States comes within the

description. *United States* v. *Chamberlin*, 219 U. S. 263.

In other income statutes there were reasons for naming non-resident citizens. See act of August 5, 1861, 12 Stat. 309; act of June 30, 1864, 13 Stat. 281; Tariff Act of October 3, 1913.

The United States merely asks that the language used be given its plain meaning, and that no words of exception be read into the statute under the guise of construction.

The annual tax is an excise, and is uniform throughout the United States. Geographical uniformity is the only limitation imposed by the Constitution. This limitation being observed, the tax does not amount to deprivation of property without due process of law, even if in its operation it be found intrinsically unequal. And the present tax would be valid, even were the equal protection of the laws clause of the Fourteenth Amendment applicable.

Admittedly, the tax is an excise. *Hylton* v. *United States*, 3 Dall. 171; *Knowlton* v. *Moore*, 178 U. S. 41, 84; *Patton* v. *Brady*, 184 U. S. 608; *McCray* v. *United States*, 195 U. S. 27; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107.

The present tax meets this requirement of geographical uniformity. It operates upon every citizen of the United States owning a foreign-built yacht, wherever such citizen may be found.

The classification of the statute is reasonable within the equal protection of the laws clause of the Fourteenth Amendment. *District of Columbia* v. *Brooke*, 214 U. S. 138; *Second Employers' Liability Cases*, 223 U. S. 1.

As to the scope of the equal protection of the laws clause, see *Citizens' Telephone Co.* v. *Fuller*, 229 U. S. 322; *Mutual Loan Co.* v. *Martell*, 222 U. S. 225; *Metropolis Theater Co.* v. *Chicago*, 228 U. S. 61, 69; *Chicago Dock Co.* v. *Fraley*, 228 U. S. 680, 686.

One assailing the classification must carry the burden

of showing that it does not rest on any reasonable basis, but is essentially arbitrary. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78; *Barrett* v. *Indiana*, 229 U. S. 26, 30.

A tax law may be adopted to further a specific policy or to accomplish a certain purpose. *Quong Wing* v. *Kirkendall*, 223 U. S. 59.

The classification involved includes all citizens who own or charter foreign-built yachts. Two reasons exist for putting them in a class apart from owners of domestic-built vessels—one a question of revenue, and the other a matter of policy. *Travellers' Ins. Co.* v. *Connecticut*, 185 U. S. 364.

As a matter of policy, Congress desired to develop the shipbuilding industry of the United States.

A classification by which the producer-seller and the purchaser-seller are distinguished is proper. *Am. Sugar Co.* v. *Louisiana*, 179 U. S. 89; *St. John* v. *New York*, 201 U. S. 633; *Adams* v. *Milwaukee*, 228 U. S. 572.

The principle of imposing a duty because of the foreign origin of goods is the foundation of our tariff system. See § 5 of the Tariff Act of 1897, 30 Stat. 205; §§ 3385, 3386, Rev. Stat.

The United States may tax the use of yachts owned by its citizens, even though such citizens are domiciled abroad and their yachts have a foreign situs. *Union Transit Co.* v. *Kentucky*, 199 U. S. 194; *Ayer & Lord* v. *Kentucky*, 202 U. S. 409; *Southern Pacific Co.* v. *Kentucky*. 222 U. S. 63, do not apply.

These decisions have arisen from attempts by a State to tax absent property. The United States, as a nation, is not bound by the same rule, as it is not confined by its territorial limitations in the protection of its citizens and their property. Its protection extends throughout the world. The United States may tax its citizens residing abroad. Acts of June 30, 1864, § 116, 13 Stat. 281;

March 2, 1867, 14 Stat. 477; August 27, 1894, 28 Stat. 553; July 14, 1870, 16 Stat. 257. See *United States* v. *Erie Ry. Co.*, 106 U. S. 330.

Ships are in a class by themselves. A yacht belonging to a citizen of the United States, even though not a vessel of the United States in the sense that it is entitled to registry or enrollment, yet flies the American flag, and is the object of peculiar protection by the United States.

These yachts fly the American flag. *The Conqueror*, 166 U. S. 119.

They are territory of the United States to which our laws extend. Clark & Marshall on Crimes, 2d ed., p. 737; 2 Moore, Int. Law, pp. 256, 266, and see § 272, Penal Code, 35 Stat. 1142.

Treaties have been made with foreign nations permitting the punishment by this country of certain offenses committed on such vessels in foreign ports. *Wildenhus's Case*, 120 U. S. 1, 12.

The protection thus given by the United States to these yachts is as great as if they were entitled to registry or enrollment; and it is conceivable that such a case may arise with respect to one of them as to involve the United States in war with a foreign country.

Additional privileges within the waters of the United States are extended to these yachts. Sections 4225, 4226, Rev. Stat., and see also § 4190, Rev. Stat.

The owner of the yacht is exempt from the payment of the light money. *The Miranda*, 47 Fed. Rep. 815, aff'd 51 Fed. Rep. 523; and see *The Conqueror*, 166 U. S. p. 119; *The Alta*, 136 Fed. Rep. 513.

The right to tax may be supported by analogy to the right of a nation to punish its citizens for crimes committed abroad. Clark & Marshall, Crimes, p. 743; Beale, Crim. Pl. & Pr., p. 2; 2 Moore, Int. Law, 255.

The paragraph of § 37, permitting the owner of any yacht to pay a duty of 35 per cent. *ad valorem* in lieu of the

annual tax, is not unconstitutional, and if so may be separated from other legal provisions and effect be given to the latter.

Section 37 is not unconstitutional because it originated in an amendment first proposed in the Senate. *Flint* v. *Stone-Tracy Co.*, 220 U. S. p. 143.

A foreign-built yacht is liable to the tax, notwithstanding the treaty of July 3, 1815, with Great Britain.

The court below finds as a fact that under the law of Great Britain a ship is not a British vessel unless owned by a subject or corporation of that country. Where the bill of sale has been recorded with the collector of customs of a United States port, the yacht has lost her character as a British vessel and is not within the treaty.

A treaty is repealed by an inconsistent subsequent act of Congress.

A suit *in personam* lies to recover the duty. *United States* v. *Chamberlin*, 219 U. S. 250, 258.

The United States is entitled to interest on the several taxes from the time they became due. *Rochester* v. *Bloss*, 6 L. R. A. (N. S.) 694.

Although a State does not see fit to exert its extraordinary power of imposing heavy penalties, it is none the less entitled to the ordinary interest upon the tax from the time it falls due until it is paid. *Young* v. *Godbe*, 15 Wall. 562, 565; *People* v. *New York*, 5 Cowen, 334.

Duties on imported merchandise constitute personal debts to the United States from the importers and an action of debt will lie to collect them with interest. *United States* v. *Lyman*, 1 Mason, 482; *Meredith* v. *United States*, 13 Pet. 486; *Cheang-Kee* v. *United States*, 3 Wall. 320; *United States* v. *Dodge*, 1 Deady, 124; *United States* v. *Cobb*, 11 Fed. Rep. 76; *United States* v. *Mexican Int. Ry. Co.*, 154 Fed. Rep. 519.

It is immaterial that the tax is technically a debt. The amount is definite, and time of payment fixed and cer-

tain. *Railroad Co.* v. *United States*, 101 U. S. 550; *Litchfield* v. *Webster County*, 101 U. S. 773; *United States* v. *Erie Ry. Co.*, 106 U. S. 327.

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

It is necessary to determine whether these two cases from different courts are not virtually one and to be considered in that aspect.

The United States sued for the amount of a tax with interest. The alleged liability under the statute was challenged and if it existed the statute was alleged to be repugnant to the Constitution of the United States and right to interest was denied. The court held the statute to be constitutional and judgment was awarded for the sum claimed, but the prayer for interest was rejected. Error was prosecuted directly from this court by the defendant and from the Circuit Court of Appeals by the United States, the first because of the constitutional questions and the second because of the disallowance of interest. The Circuit Court of Appeals certified a question concerning the right to recover interest, and the two cases before us consist of the direct writ of error on the one hand and the certificate on the other. Both writs of error when taken were authorized. *Ohio R. R. Comm.* v. *Worthington*, 225 U. S. 101; *Macfadden* v. *United States*, 213 U. S. 288. Our jurisdiction, however, on the direct writ of error is not confined to the constitutional questions, but embraces every issue in the case. *Williamson* v. *United States*, 207 U. S. 425. The Circuit Court of Appeals, however, has no power to ask instructions upon an issue which it has no right to decide and we have no authority to instruct on such a subject or to refuse to decide issues which are properly before us for judgment.

Under these conditions, we think the better practice is,

as regards the controversy as to interest which was taken to the Circuit Court of Appeals by writ of error and in which cases the certificates now before us were drawn, to treat the writ of error from the Circuit Court of Appeals as in substance pending here on a cross-writ by the United States, and as without further orders the record is in such a condition as to enable us to decide the whole case, we proceed to do so.

Section 37 of the Tariff Act of August 5, 1909, c. 6, 36 Stat. 11, 112, provided in part as follows:

"There shall be levied and collected annually on the first day of September by the collector of customs of the district nearest the residence of the managing owner, upon the use of every foreign-built yacht, pleasure-boat or vessel, not used or intended to be used for trade, now or hereafter owned or chartered for more than six months by any citizen or citizens of the United States, a sum equivalent to a tonnage tax of seven dollars per gross ton."

The second paragraph of the provision which we need not quote, gives the right to the owner of any "foreign-built yacht, pleasure-boat or vessel above described" to pay a duty of 35 per cent. *ad valorem* and thus secure an exemption from the tax provided by the first paragraph.

The act went into effect on August 6, 1909, and the collector of the port of New York thereafter made a demand upon C. K. G. Billings, the plaintiff in error, for the payment of $7,644.00, that is, of the sum produced by calculating seven dollars per ton on 1,091.71 tons, the tonnage of the foreign-built yacht Vanadis, owned and controlled by him.

Failing to pay, in January, 1911, the United States sued in the court below to recover the tax. The defendant was alleged to be a citizen of the United States and the suit was averred to have been brought in the district nearest his residence. The ownership and use by him of the pleasure-yacht Vanadis, an English foreign-built vessel,

the levy based upon her tonnage according to the statute of the amount of $7,644, the demand for payment, the failure to pay on the first day of September, 1909, under the statute, were all alleged, and recovery of the tax as well as of interest was prayed. The answer admitted citizenship and the ownership of the yacht and that she was a foreign-built pleasure craft, but set up three distinct defenses, the first, that the vessel was not enrolled, registered, or documented as a vessel of the United States and enjoyed no privileges because she was of that character. It was expressly admitted that "during the year preceding the first day of September, 1909" the said yacht "has been used by the defendant outside of the waters and territorial limits or jurisdiction of the United States from time to time and at various times . . . and was not used for six months during such year within the waters and territorial limits or jurisdiction of the United States or elsewhere."

The second defense expressly averred that the tax imposed by the statute was intended by Congress to be "an annual tax, that it should be prospective and operate only upon the future use of any such foreign-built yacht, pleasure-boat or vessel, and that said annual tax did not accrue and could not be duly levied and collected prior to the first day of September in the year 1910."

The third defense, after fully averring that there were within the United States many pleasure yachts not foreign-built which were in use and whose use was identical with that of a foreign-built yacht like the one which the defendant used, charged that the law imposing the burden sought to be enforced was void because repugnant to the due process clause of the Fifth Amendment. The case was submitted to the court on bill and answer and as we at the outset said, there was a judgment holding that the sum claimed was due by the defendant as an excise or duty upon the use of his yacht and that the act imposing

the tax was not repugnant to the Constitution, but that the Government was not entitled to recover interest.

To avoid if it may be the necessity of determining the constitutional question, we shall first decide what, if any, burden the statute imposes, and then if necessary consider its asserted repugnancy to the Constitution. In view of the requirement that direct taxes be apportioned and assuming as we do assume, that the act before us was adopted by Congress in the light of the ruling in *Pollock* v. *Farmers Loan & Trust Company*, 157 U. S. 429, 158 U. S. 601, it is certain that the tax levied by the provision was intended to be an excise tax upon "the use of every foreign-built yacht, pleasure-boat or vessel . . . now or hereafter owned or chartered for more than six months by any citizen or citizens of the United States." This is not seriously, if at all, disputed in argument, the controversy turning first upon the period when the tax provided for is to take effect and the nature and character of the use which is taxed. These subjects are so interwoven that we consider and dispose of them together.

Was the tax due on the first day of September, 1909, or was it only due on the same day in September, 1910? In view of the positive direction that the tax shall be levied and collected on the first day of September, we can see no escape from the conclusion that the court below was right in holding that it became due on the first day of September after the passage of the act. The word "annually" upon which so much reliance to the contrary is placed, is manifestly used not for the purpose of postponing the time of payment, but rather as provision for continuity; that is, the word but shows the purpose of fixing the annual duty of levying and collecting the tax on the designated day. This becomes quite apparent when it is observed that if the word "annually" be removed, there would be room for the implication that the tax was to be but sporadic and would therefore cease to

be collectible after one payment. And it is equally clear that the six months clause is concerned not with the period when the tax imposed shall be levied and collected, but addresses itself to the subject-matter upon which the tax is placed; in other words, it qualifies the word "charter" and therefore only indicates when the use of a chartered vessel shall become subject to the duty imposed. The tax being leviable and collectible, on the first of September in each year after the passage of the act, upon what was it assessed? is the question. It seems difficult to answer it in clearer terms than does the text of the act when it provides that it shall be upon the use of the yachts with which the provision is concerned. But it is said to respond in the language of the act leaves the question virtually unanswered, since the extent of the use and its essential period are left wholly undetermined. But this is a misconception based upon a disregard of the fact that the word "use" in the text is unqualified, from which it results that the recurrence of the tax is annual and depends upon two elements, ownership or charter rights, as specified in the act, and use for any time during the year. It is to be observed that the provision deals with ownership and distinguishes between ownership and use, since it bases the tax not upon the former but upon the latter. From this it follows that it is not ownership but the election during the taxing period of the owner to take advantage of one of the elements which are involved in ownership, the right to use which is the subject upon which the statute places the excise duty. In this view the fact of use, not its extent or its frequency, becomes the test, as distinguished from mere ownership, for that in the statutory sense could exist without use having taken place. The words of the statute under this construction were used in an every-day sense and not in a technical one: in other words but convey the distinction without reference to nice analysis of the nature of things which is

commonly conceived to exist between ownership and use. Let it be conceded that the ownership of property includes the right to use, plainly we think, as use and ownership are distinguished one from the other in the provision, the word "use" as there employed means more than the mere privilege of using which the owner enjoys, and relates to its primary signification, as defined by Webster; "The act of employing anything or of applying it to one's service; the state of being so employed or applied." If the use which arises from the fact of ownership without more was what the statute proposed, then it is inconceivable why the difference between use and ownership was marked in the provision and made the basis of the tax which it imposed. While this construction in this case leads to the same conclusion as does that which the court below affixed to the statute, that is, that it taxed the privilege of use, or, in other words the potentiality of using involved in ownership, inherently there is this fundamental difference between the interpretation we give and that which the lower court adopted, since the privilege of use is purely passive (or subjective), a right which necessarily pertains to ownership and must exist where there is ownership, as one may not obtain ownership without acquiring the privileges of use which ownership gives. The other, on the contrary, that is, use in the statutory sense, although it arises from ownership, is active (objective), that is, it is the outward and distinct exercise of a right which ownership confers but which would not necessarily be exerted by the mere fact of ownership. The contention that inequality must be the result from making the tax depend upon mere use without reference to the extent of its duration, addresses itself not to the question of power, and is therefore beyond the scope of judicial cognizance. But it is to be observed that it may well have been that the character of the property with which the statute deals and the mere element of

caprice as to its use and the uncertainties of the subject led to the fact of making the use alone the criterion as the wiser and juster method of operating equally upon all. Again let it be conceded that the causing the tax for the annual period to become due in September, 1909, is to give it in some respects a retroactive effect, such concession does not cause the act to be beyond the power of Congress under the Constitution to adopt. *Flint* v. *Stone-Tracy Company*, 220 U. S. 107 and authorities there cited. While the rule is that statutes should be so construed as to prevent them from operating retroactively, that principle is one of construction and not of reconstruction and therefore does not authorize a judicial reënactment by interpretation of a statute to save it from producing a retroactive effect.

As under the meaning which we thus give the statute the admitted use of the vessel was within its provision and therefore the amount due for excise was rightfully imposed and under our interpretation was due when demanded, we must consider whether the asserted repugnancy of the statute to the Constitution is well founded.

It has been conclusively determined that the requirement of uniformity which the Constitution imposes upon Congress in the levy of excise taxes is not an intrinsic uniformity, but merely a geographical one. *Flint* v. *Stone-Tracy Company*, 220 U. S. 107; *McCray* v. *United States*, 195 U. S. 27; *Knowlton* v. *Moore*, 178 U. S. 41. It is also settled beyond dispute that the Constitution is not self-destructive. In other words, that the powers which it confers on the one hand it does not immediately take away on the other; that is to say, that the authority to tax which is given in express terms is not limited or restricted by the subsequent provisions of the Constitution or the amendments thereto, especially by the due process clause of the Fifth Amendment. *McCray* v. *United States*, 195 U. S. 27 and authorities there cited.

Nor is there anything in *Carroll* v. *Greenwich Insurance Company*, 199 U. S. 401, or *Twining* v. *New Jersey*, 211 U. S. 78, which in the remotest degree nullifies or restricts the principle thus stated. Indeed it is apparent, if the suggestion as to the meaning of those cases were assented to, it would result in rendering the Constitution unconstitutional. This certainly was the view entertained by the pleader when the answer in the case was prepared, since the sole attack on the constitutionality of the statute was based upon the assertion that it was repugnant to the due process clause of the Fifth Amendment. And such also is the line of the argument at bar where the fundamental rights secured by the Fifth Amendment are constantly referred to as the basis upon which the unconstitutionality of the statute is urged. Is there foundation for this claim under the Fifth Amendment? is then the issue, and that of course requires a statement of the grievances which it is asserted result from upholding the tax. They all come to this, that to impose a burden in the shape of a tax upon the use of a foreign-built yacht when a like tax is not imposed on the use of a domestic yacht under similar circumstances is so beyond the power of classification, so abhorrent to the sense of justice, and so repugnant to the conceptions of free government as to be void even in the absence of express constitutional limitation. We do not stop to point out the obvious unsoundness of the contentions, nor indeed to direct attention to the self-evident demonstration of their want of merit even from the point of view of the power to classify, since the difference between things domestic and things foreign and their use are apparent on the face of things and are expressly manifested by the text of the Constitution. We say we do not stop to do these things because in any event we are of opinion the conclusion cannot be escaped that the propositions, each and all of them, whatever may be their form of expression, are in substance and effect but an

assertion that the tax which the statute imposes is void because of a want of intrinsic uniformity, and therefore all the contentions are adversely disposed of by the previous decisions of this court on that subject. That which is settled beyond dispute may not be disregarded and be brought into the realm of that which is controvertible and questionable by the mere garb in which propositions are clothed.

Was the Government entitled to interest? is then the remaining question which we must decide in view of the purpose which we at the outset expressed of treating the United States as here present and urging its right to interest on a cross-writ of error. The cyclopedias and textbooks state the doctrine to be that in the absence of a statute expressly so directing, taxes bear no interest. The principle is thus announced in 37 Cyc., p. 1165: "Delinquent taxes do not bear interest unless it is expressly so provided by statute. But it is competent for the legislature to prescribe the payment of interest as a penalty for delay in the payment of taxes and to regulate its rate. This, however, can be effected only by an act plainly manifesting the legislative intention as to the right to recover interest, its amount, and the date from which it shall begin, the latter being ordinarily the time when the assessment is complete and the taxes become payable." Cooley on Taxation, p. 17; Sedgwick on Damages (9th ed.), § 332; Sutherland (3d ed.), § 337; Black on Tax Titles (2d ed.), § 236, and see note in 6 L. R. A. (N. S.), p. 694. And the statement of the text is borne out by the decided cases in nearly all of the state courts of last resort. On the other hand, the Government relies upon four cases in this court where interest was allowed as a matter of course on taxes due the United States. *Cheang-Kee* v. *United States*, 3 Wall. 320; *Railroad Co.* v. *United States*, 101 U. S. 543; *Litchfield* v. *County of Webster*, 101 U. S. 773; *United States* v. *Erie Railway Company*, 106

U. S. 327. We say as a matter of course because in the cases referred to, the subject was not discussed and the liability for interest was practically admitted. The Government also relies on a careful and clear opinion by Maxey, Judge, in the Circuit Court for the Western District of Texas, holding that interest was due to the United States on customs duties. *United States* v. *Mexican &c. R. Co.*, 154 Fed. Rep. 519. Whether the practice applied in the previous decisions of this court should be now followed or the theory established by the state cases adopted and made the rule as to taxes due the United States, is therefore the question. Its solution must depend not upon the mere authority of the state cases, but upon the conclusiveness of the principles upon which such cases rest and their concurrence with the principles by which interest is allowed in the courts of the United States, considerations which require us to determine the nature of the duty which arises from the liability for a tax imposed by the United States, not only inherently but as well from the practice which has obtained in the past in the enforcement of the law of the United States and the implication of legislative sanction, if any, to such practice which may have arisen. It would serve no purpose to refer to the abhorrence which obtained in early times concerning the payment of interest and the evolution by which the legitimate character of interest was gradually understood and it came to be recognized that its payment was, as a general principle, but the compensation due for the use of money or that its allowance was merely for damages caused by delay in discharging a duty and therefore in default on a contract to pay money even without express legislation so directing, interest would be allowed. The subject was explained in *National Bank* v. *Mechanics National Bank*, 94 U. S. 437 and was reviewed in *Reid* v. *Rensselaer Glass Factory*, 3 Cow. 393, 5 Cow. 587. To avoid prolixity we do not review the

state cases as to non-liability for interest on default for taxes but content ourselves with stating that we think it is apparent that the conclusion which they sustain, leaving aside minor differences rests upon two fundamental propositions: First the necessity for an express statute providing for interest except in cases of contract, and second, that even where there is a statute providing for interest on all debts, such statute is not applicable to taxes because they are not debts and therefore must be enforced alone by virtue of express legislative penalties, except where a provision exists giving *eo nomine* interest on taxes. But both of these propositions are in conflict with the settled doctrine established by the decision of this court. Thus, as to the necessity for a statute it was long ago here decided in view of the true conception of interest, that a statute was not necessary to compel its payment where in accordance with the principles of equity and justice in the enforcement of an obligation, interest should be allowed. *Young* v. *Godbe*, 15 Wall. 562, 565:

"It is said there is no law in the Territory of Utah prescribing a rate of interest in transactions like the one in controversy in this suit, and that, therefore, no interest can be recovered. But this result does not follow. If there is no statute on the subject, interest will be allowed by way of damages for unreasonably withholding payment of an overdue account. The rate must be reasonable, and conform to the custom which obtains in the community in dealings of this character."

And the decisions of this court have often since exemplified the principle by considering the question of the responsibility for interest from the point of view of reason and justice even though no express statute existed for compelling this payment. So also as to the nature and character of the obligation to pay taxes. As long ago as *Meredith* v. *United States*, 13 Peters, 486, it was decided, the court speaking by Mr. Justice Story (p. 493):

"It appears to us clear upon principle, as well as upon the obvious import of the provisions of the various acts of Congress on this subject, that the duties due upon all goods imported constitute a personal debt due to the United States from the importer. . . ."

Again in *United States* v. *Chamberlin*, 219 U. S. 250, the nature and character of an obligation to pay a stamp duty was considered, and the right to collect it by action of debt was passed upon and it was held that the obligation to pay was a debt and that it could be enforced by suit in the absence of an exclusive remedy created by the statute by which the obligation was imposed. In the course of the opinion, various decisions of this court recognizing the right of the United States to enforce internal revenue duties by suit were referred to and the statute to the same end was cited and its application to the case in hand was pointed out upon grounds which in reason may well be said to cause the statute to be applicable to the case here before us. In addition, in repeated adjudications in this court it has been settled that in a suit to recover taxes which have been illegally assessed interest would be allowed against the official although the real responsibility was on the Government. The concluded doctrine on this subject was thus stated in a recent case after referring to the exemption of the United States from liability for interest (*National Volunteer Home* v. *Parrish*, 229 U. S. 494, 496):

"On the contrary, in suits against collectors to recover moneys illegally exacted as taxes and paid under protest the settled rule is, that interest is recoverable without any statute to that effect, and this although the judgment is not to be paid by the collector but directly from the Treasury. *Erskine* v. *Van Arsdale*, 15 Wall. 75; *Redfield* v. *Bartels*, 139 U. S. 694."

The conflict between the systems is pronounced and fundamental. In the one, the state rule, except as to

contract, no interest without statute; in the United States rule, interest in all cases where equitably due unless forbidden by statute. In one no suit for taxes as a debt without express statutory authority, in the other the right to sue for taxes as for a debt in every case where not prohibited by statute.

From this review it results that the doctrine as to nonliability to pay interest for taxes which have become due which prevails in the state courts is absolutely in conflict with the doctrine applied to the same subject in this court and cannot now be made the rule without repudiating settled principles which have been here applied for many years in various aspects and without in effect disregarding the sanction either expressly or impliedly given by Congress to such rules. From this it follows that although in the cases in this court to which we at the outset made reference which enforced the liability for interest and which are here controlling if they be not now overruled, there was no controversy as to the liability for interest, this was presumably because the matter was deemed not disputable as the direct result of the then settled doctrine that interest could be recovered by the United States on a default in payment of import duties. Under this condition we can see no ground for departing from the rule which the cases enforced, and we are therefore constrained to the conclusion that the court below was wrong in rejecting the prayer of the Government for interest and its action in that respect must be reversed while in others it must be affirmed.

Modified and affirmed.

UNITED STATES *v.* BILLINGS.

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

BILLINGS *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 626 and 67. Argued January 6, 7, 1914.—Decided February 24, 1914.

Decided on authority of *Billings* v. *United States*, *ante*, p. 261. 190 Fed. Rep. 359, modified and affirmed.

THE facts are stated in the opinion.

Mr. Assistant Attorney General Adkins, with whom *Mr. Karl W. Kirchwey* was on the brief, for the United States.[1]

Mr. William D. Guthrie for the yacht owner in this and other cases argued simultaneously herewith.[2]

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

These two cases are controlled by the two cases between the same parties just decided. In the case which is here on error, the suit was brought by the United States to recover the amount of the tax which became due upon the yacht Vanadis, on the first day of September, 1910, under the act of August 5, 1909, which was under consideration in the previous cases. The complaint, leaving aside some additional averments which it is unnecessary to refer to, was the same as the one in the cases already passed upon, and this is true also of the answer. The case

[1] See argument, p. 269, *ante*.

[2] See argument, p. 263, *ante*.

by stipulation was submitted to the court without a jury and the steps essential to save all the questions in the case were properly taken. The use of the vessel during the taxing period was shown. There was a judgment in favor of the United States for the amount of the tax, but against it for interest and error was prosecuted from the Circuit Court of Appeals to review that subject and such case is here on certificate. Taking jurisdiction of both cases and treating them as one, as was done in the previous cases, and applying the conclusions in those cases expressed, to this, it results that the judgment below must be modified, so far as the interest is concerned, by allowing the claim of the United States in that respect, and in other respects it must be affirmed.

And it is so ordered.

PIERCE *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES *v.* PIERCE.

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

Nos. 64 and 623. Argued January 6, 7, 1914.—Decided February 24, 1914.

Billings v. *United States*, *ante*, p. 261, followed and distinguished, to the effect that the owner of a foreign-built yacht is not liable for the tax imposed by § 37 of the Tariff Act of 1909, if the yacht was not actually used at all during the preceding year.

190 Fed. Rep. 359, reversed.

THE facts are stated in the opinion.

Mr. William D. Guthrie, for the yacht owner in this and other cases argued simultaneously herewith.[1]

[1] See argument, p. 263, *ante*.

Mr. Assistant Attorney General Adkins, with whom *Mr. Karl W. Kirchwey* was on the brief, for the United States.[1]

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

These two cases involve the liability of the plaintiff in error in No. 64 for a tax on the foreign-built yacht Yacona, which became due on the first of September, 1909. The complaint in every substantial particular was identical with that filed in the *Billings Case* this day decided, and this is true also of the defenses set up in the answer except that the answer in this case contained this distinct averment which was not in the *Billings Case:* "That the said yacht Yacona was not in use by the defendant or by any other person at any time during the year next preceding the first day of September, 1909, but was out of commission and laid up unused at Brooklyn in the State of New York, throughout the whole of such year." The case was submitted on bill and answer and the liability for the tax which was upheld by the court below was rested upon the construction as to potential use that is a tax on the privilege of using which we decided in the *Billings Case* to be unsound. In this case, as in that, the certificate is concerned with a writ of error prosecuted by the United States to the Circuit Court of Appeals because of the rejection of a prayer for interest. Treating both the cases in this instance as one, as we did in the previous cases, and applying to this the construction which we have given the statute in those cases, it follows that the judgment below was wrong and must be reversed, with direction to dismiss the complaint.

And it is so ordered.

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[1] See argument, p. 269, *ante*.

PIERCE *v.* UNITED STATES (NO. 2).

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES *v.* PIERCE.

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

Nos. 65, 624. Argued January 6, 7, 1914.—Decided February 24, 1914.

Decided on authority of *Pierce* v. *United States*, *ante*, p. 290.
190 Fed. Rep. 359, reversed.

THE facts are stated in the opinion.

Mr. William D. Guthrie for the yacht owner in this and other cases argued simultaneously herewith.[1]

Mr. Assistant Attorney General Adkins, with whom *Mr. Karl W. Kirchwey* was on the brief, for the United States.[2]

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

These cases concern the right to recover a tax on the yacht Yacona, becoming due on the first of September, 1910. The complaint filed by the United States in No. 65 was in substance like that filed in the previous cases and the answer in effect set up the same defenses, especially the defense relating to the non-use of the yacht. The case, by stipulation, was submitted to the court without a jury, a finding of facts was made which distinctly established

[1] See argument, p. 263, *ante*.
[2] See argument, p. 269, *ante*.

the non-use during the taxing year and the court gave a judgment for the tax, although it rejected the interest, upon the same construction of the act which it applied in the previous cases. The certificate in this as in the other cases is here in consequence of error prosecuted by the United States to the Circuit Court of Appeals, because of the rejection of the interest claimed. Treating this case as we treated the others and applying the construction in those cases given, it follows that the judgment in this case must be reversed.

And it is so ordered.

UNITED STATES *v.* GOELET.

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

Nos. 631, 632. Argued January 6, 7, 1914.—Decided February 24, 1914.

Billings v. *United States, ante*, p. 261, followed to the effect that the tax on the use of foreign-built yachts imposed by § 37 of the Tariff Act of 1909 is not an unconstitutional exercise of power by Congress, and it became due for the year 1909 on the first day of September, 1909.

While Congress may have the power to impose an excise duty on a citizen permanently domiciled abroad, such an imposition is so unusual that an intent to do so will not be presumed unless clearly expressed.

The expectation of those who sought the enactment of legislation may not be used for the purpose of affixing to such legislation, when enacted, a meaning which it does not express.

The tax imposed by § 37 of the Tariff Act of 1909 does not apply to the use of a foreign-built yacht owned by a citizen of the United States who was permanently resident and domiciled in a foreign country for more than one year prior to September 1, 1909, and to the levy of such tax.

THE facts, which involve the construction and constitutionality of § 37 of the Tariff Act of 1909, imposing a tax

on foreign-built yachts and the application of that section to a yacht owned by an American citizen permanently domiciled abroad and which had not been within the jurisdiction of the United States during a part of the period for which the tax was levied, are stated in the opinion.

Mr. Assistant Attorney General Adkins, with whom *Mr. Karl W. Kirchwey* was on the brief, for the United States.[1]

Mr. William D. Guthrie for the yacht owner in this and other cases argued simultaneously herewith.[2]

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

The questions asked in both of these cases relate to § 37 of the Tariff Act of 1909 which we have construed in several opinions just announced. They both concern the sum of excise duties levied on the foreign-built yacht Nahma, the one assessed for the year ending on the first of September, 1909 and the other on the first of September, 1910. The cases were decided by the trial court at the same time with other cases for a like period, the case relating to the tax for 1909 having been submitted on bill and answer as a result of the overruling of a demurrer filed by the Government to the answer of the defendant and the election to plead no further, and the case involving the levy for 1910 having been decided by the court along with other cases without the intervention of a jury as the result of a stipulation between the parties. The certificate fully states the situation as to both periods of taxation conforming to the conditions of fact which we have recapitulated in the opinions in the two *Billings Cases*, *ante*,

[1] See argument, p. 269, *ante*.

[2] See argument, p. 263, *ante*.

pp. 261 and 289, and the questions asked concerning the construction of the statute, its operation and its constitutionality involve all the subject-matters which we have disposed of in the previous opinions. In both of these cases however, differing from those which we have previously decided, in the pleadings concerning the 1909 tax it was expressly averred and by the demurrer conceded that the owner of the yacht at least for a year prior to the levy of the tax, was domiciled in a foreign country and that the yacht whose use was taxed had a permanent situs in such country, and so far as the levy for 1910 is concerned that state of things as shown by the certificate was expressly covered by the findings of fact; and if the opinion of the trial court be considered, it will appear that it was one of these peculiarities of fact, that is, the permanent domicile abroad, which led that court, instead of deciding in favor of the tax, to hold that as to both periods it was unauthorized by the statute. To make the situation perfectly clear we quote from the certificate in the case concerning the 1909 tax (No. 631) the exact language of the answer on the subjects just stated, the equivalent of which is embraced in case involving the 1910 tax (No. 632), as follows:

"That the defendant was, on September 1, 1909, and for several years prior thereto had been permanently a resident of and domiciled at Paris, in the Republic of France; and that since 1901 her said yacht had not been within the jurisdiction of the United States, but had had a permanent situs within the jurisdiction of Great Britain."

For the purpose of enabling it to determine the influence of the facts thus stated upon the decision of these two cases, the court, in its certificate in addition to many questions involving the issues of construction and constitutionality which we have disposed of in the other cases asks two questions whose order of statement we rearrange as follows:

"II. Does the tax purporting to be imposed by said act of Congress apply to the use of a foreign-built yacht owned by a citizen of the United States who was permanently resident and domiciled in a foreign country for more than one year prior to September 1, 1909, and to the levy of such tax?

"I. Does the tax purporting to be imposed by section 37 of the act of Congress, approved August 5, 1909, apply to the use of a foreign-built yacht owned by a citizen of the United States, when such yacht, for a period of more than one year prior to September 1, 1909, and to the levy of such tax, was used wholly outside of the limits and territorial jurisdiction of the United States?"

It is manifest from what we have said that the response to these two questions will be substantially determinative of all the questions which the certificate propounds since if we answer either of them in the negative, the case will be disposed of and there will be no occasion to reply to the others, and if on the contrary we answer both of them in the affirmative there will be no need to do anything but state our reply to the other questions, since the reasons for such reply will be controlled by the opinions which we have previously announced. We come then to consider the questions in the order stated.

Not in the slightest degree questioning that there was power to impose the excise duty on the citizen owning a foreign-built yacht wholly irrespective of the fact that he was permanently domiciled in a foreign country and putting out of view all questions concerning the non-application of the statute to the case in hand purely because of the situs of the yacht itself, the single matter for decision is, do the terms of the statute provide for the payment by a citizen of the United States who has a permanent residence and domicile abroad of an excise duty because of the use by him as owner or charterer under the terms of the statute of a foreign-built yacht? It may not

be doubted, as observed by the trial court in these cases (omitting the consideration of taxes imposed on property having a situs within the jurisdiction of the taxing authority), speaking in a general sense that the taxing power, when exerted, is not usually applied to those, even albeit they are citizens, who have a permanent domicile or residence outside of the country levying the tax. Indeed we think it must be conceded that the levy of such a tax is so beyond the normal and usual exercise of the taxing power, as to cause it to be, when exerted, of rare occurrence and in the fullest sense exceptional. This being true, we must approach the statute for the purpose of ascertaining whether its provisions sanction such rare and exceptional taxation. Considering the text, we search in vain for the express declaration of such authority. True, it is argued by the United States, that as the tax is levied on any citizen using a foreign-built yacht and as any includes all, therefore the statute expressly embraces a citizen permanently domiciled and residing abroad. But this argument in effect begs the question for decision which is whether the use of the general words, any citizen, without more should be considered as expressing more than the general rule of taxation, or in other words can be treated without the expression of more as embracing the exceptional exertion of the power to tax one permanently residing abroad. As illustrative and throwing light on the real question for decision, action taken by Congress in exerting its taxing power is at least worthy of note. For instance the provisions of the income tax law of June 30, 1864 (c. 173, 13 Stat. 223, 281), expressly extended that tax to those domiciled abroad and a like purpose is beyond doubt expressed in the income tax of 1913 (subdivision 1 of the Tariff Act of October 3, 1913). But without resting this case upon the implication against the conferring of the authority here claimed from the mere want of express statement in the statute of the giving of such exceptional

power, and treating such implication as not in and of itself absolutely conclusive, we think when to the force of such inference, even though it be limited, there is added the weight arising from that which is expressly stated in the statute, the conclusion against want of power conferred to levy the tax here asserted is established. This arises from the command of the statute that the tax shall be levied "by the collector of customs of the district nearest the residence of the managing owner" etc., since the consequence of such command is to associate residence with citizenship and establishes such a relationship between them as to bring about the result which we have just stated. Nor do we think there is anything as suggested by the argument of the United States in the case of *Eidman* v. *Martinez*, 184 U. S. 578, which militates against the views just stated and this also is true of the suggestion made in argument concerning the circulation by those interested in the enactment, of the provision of a list of yachts which would become subject to the tax if the provision was enacted, which list included the yacht taxed in this case. The expectations of those who sought the enactment of legislation may not be used for the purpose of affixing to legislation when enacted a meaning which it does not express.

For the reasons just stated we conclude to answer the second question in the negative and not to reply to the others, as it becomes unnecessary to do so.

And it will be so certified.

UNITED STATES v. BENNETT.

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

No. 629. Argued January 6, 7, 1914.—Decided February 24, 1914.

The rule of interpretation that where there are two possible constructions of a statute, one of which will give rise to grave doubts of its constitutionality and the other avoids such question, the latter will be adopted, is based on the existence of both conditions as to more than one construction and doubt and is not applicable where neither of those conditions exists.

The limitations of due process of law which prevent States from taxing property in another State do not apply to the United States, the admitted taxing power of which is co-extensive with the limits of the United States and knows no restriction save as expressed in or arising from the Constitution itself.

The Government of the United States as a nation by its very nature benefits the citizen and his property wherever found, and no imaginary barrier shuts that Government off from exerting the powers which inherently belong to it by virtue of its sovereignty.

The tax imposed by § 37 of the Tariff Act of 1909 applies to the use of a foreign-built yacht owned by a citizen of the United States, although such yacht, for a period of more than one year prior to September 1, 1909, and to the levy of such tax, was used wholly outside of the limits and territorial jurisdiction of the United States.

The tax imposed by said act operated retrospectively, so as to be payable on September 1, 1909, in respect of the year then ended, and not only prospectively so as to become first due and payable on September 1, 1910.

The whole amount of the tax imposed by said act became due and payable on September 1, 1909, and not only such proportion thereof as the time during which the act was in force at that date bore to the whole year.

Congress has the power to levy a tax upon the use by a citizen of the United States of a yacht which is not actually, and since a time preceding the passage of the act was not, at any time used within the territorial jurisdiction of the United States and which has its permanent situs in a foreign country.

Said act of Congress, imposing a tax upon the use of foreign-built yachts alone, provides a valid tax, and a valid classification for purposes of taxation, within the power to lay and collect taxes delegated to Congress by the Constitution of the United States.

The tax imposed by said act is not in conflict with the requirement of due process of law contained in the Fifth Amendment to the Constitution of the United States.

The United States is entitled to recover interest upon the tax imposed upon the use of foreign-built yachts under § 37 of the Tariff Act of August 5, 1909.

This court answers the questions certified, in this case, according to the facts stated in the certificate, and nothing in the replies should be so construed as to deprive the court below of the power to take such steps as it may deem necessary to avoid injustice by reason of any mistake of fact that may be corrected.

THE facts, which involve the construction and constitutionality of § 37 of the Tariff Act of 1909 imposing a tax on foreign-built yachts and its application to a yacht owned by an American citizen but which had not been within the jurisdiction of the United States during any part of the period for which the tax was levied, are stated in the opinion.

Mr. Assistant Attorney General Adkins, with whom *Mr. Karl W. Kirchwey* was on the brief, for the United States.[1]

Mr. William D. Guthrie for the yacht owner in this and other cases argued simultaneously herewith.[2]

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

So far as we deem it material to the question we are called upon to answer, the certificate in this case is as follows:

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[1] See argument, p. 269, *ante*.

[2] See argument, p. 263, *ante*.

"The United States, plaintiff below, sued out a writ of error to this court to review a judgment of the United States Circuit Court for the Southern District of New York in the above-entitled cause, entered on July 6, 1911, dismissing the amended complaint of the United States in an action brought against the defendant below to recover the tax imposed by § 37 of the tariff act of August 5, 1909, c. 6, 36 Stat. 112, for the year ended September 1, 1909, upon the use of the foreign-built yacht 'Lysistrata,' owned by the defendant."

After reciting the averment as to the assessment of the tax by the collector amounting to $13,601 and the failure of the defendant to pay, his citizenship and ownership of the yacht and the conformity of the assessment to the statute, the certificate states that there was a prayer for the recovery of the amount with interest. It then proceeds to state the answer of the defendant, setting up the non-registry and non-enrollment of the yacht, that she enjoyed no protection or privileges of any kind under the laws of the United States and that the yacht since 1904 "had not been within the jurisdiction of the United States, but had had a permanent situs within the jurisdiction of the Republic of France." The certificate then proceeds to state the facts as to ownership of other yachts in the United States in the exact words used in the answers in previous cases which we have this day decided and upon which the want of due process of law was set up. Then the certificate declares the United States demurred to this answer and that this demurrer was overruled and the United States electing to plead no further, there was judgment rejecting its claim and that error was then prosecuted to the Circuit Court of Appeals by the United States. The seven questions propounded are the equivalent of the questions in the *Goelet Cases*, just decided, except there is no question asked concerning the power to tax under the statute in case of the permanent domicile of

the owner in a foreign country which was the basis of the decision in the *Goelet Cases* because, as is shown by the certificate there was no assertion or proof that there was a permanent foreign domicile of the owner in this case. So that the first question in this case concerns the liability of a citizen of the United States having a domicile therein, for a tax on a yacht owned and used during the taxing period outside of the United States and is as follows: "I. Does the tax purporting to be imposed by section 37 of the act of Congress, approved August 5, 1909, apply to the use of a foreign-built yacht owned by a citizen of the United States, when such yacht, for a period of more than one year prior to September 1, 1909, and to the levy of such tax, was used wholly outside of the limits and territorial jurisdiction of the United States?" And if this question is answered in the affirmative, then the duty will arise of deciding whether because of that aspect the act is repugnant to the due process clause of the Constitution, since in determining the constitutionality of the act in the previous cases we were not called upon to decide whether the due process clause of the Fifth Amendment operates to prevent the levy of such a tax.

The statute applies, since, under the construction we have given it, it clearly establishes three standards as the basis of the excise duty which it imposes: citizenship and domicile within the United States, control by ownership or charter of a foreign-built yacht within the terms of the statute, and its use by the owner during the taxing period. But it is said that as in any event the use which the statute taxes is solely a use within the United States, therefore the statute does not embrace this case, since the finding establishes that the yacht whose use is here taxed was wholly used and located outside of the territorial limits of the United States. We fail, however, to find in the provisions of the statute any language which would justify our affixing to the word "use" the restricted sense upon which

the proposition is based. On the contrary, the use provided for in the statute is unqualified, is generic and must be enforced in that sense if the statute is to be given its plain meaning. It is true that in deciding a previous case we held that the statute would not be construed without clear intendment manifested to that effect as including a tax on a citizen permanently domiciled outside of the geographical limits of the United States. But that ruling was based upon the proposition that as a taxing statute was usually confined to persons within the territorial jurisdiction of a taxing authority and to do otherwise would be exceptional, unless such view was compelled by its terms, the statute here involved ought not to be construed as having been adopted to accomplish such unusual and strange result. The directly opposite, is here applicable, since it is usual, where the taxing power is called into play as to an individual domiciled within the territorial limits of the taxing authority, to cause the manifestation of taxing power to be coterminous with the taxing authority of the Government levying the tax. Therefore it follows that the principle of interpretation previously applied has no possible application to the construction of the word, "use," which we are now considering. The difference between the two rules is that which must exist between not assuming in the one case that something exceptional has been done, and taking for granted in the other that a power expressed embraces that which is usual and incidental to its exertion. The argument that the statute should not be construed as applying to the use of a yacht wholly beyond the territorial limits of the United States, since if so interpreted it would be repugnant to the Constitution, rests upon what in effect is a misconception of the elementary rule of interpretation that where there are two possible constructions of a statute, one of which will give rise to grave doubt as to its constitutionality and the other avoids such question, the latter will be adopted.

The foundation of this rule is the possibility of two constructions and the existence of the grave doubt as to constitutionality. To apply the rule in a case like this, where neither of such conditions exists would be to cause an imaginary doubt as to the constitutionality of a statute to render it necessary to give to the statute a wholly fictitious and unauthorized meaning, that is to say, the effect of adopting the contention would be but to declare that in every case where the construction of a statute was in issue its misconstruction would become necessary if only it was asserted that if rightly construed repugnancy to the Constitution would result. We come then to consider the contention that when the statute is correctly interpreted there will arise a conflict between its provisions and the safeguards of the Constitution not only for the purpose of demonstrating the unsoundness of the assertion of constitutional right, but also with the object of making it clear that even if the statute were susceptible of a different construction by resort to subtlety of reasoning or refinement of distinction, there is nothing of such gravity in the asserted constitutional question as to lead us to resort to such means in order to avoid giving to the statute the meaning which we have affixed to it resulting from its unambiguous text.

As not even an intimation is made in the argument that any limitation on the taxing power of Congress in this regard can be deduced from the provisions of the Constitution concerning the taxing authority and as the only limiting provision relied upon is the due process clause of the Fifth Amendment, it follows in this case, as it did in the *Billings Case*, that after all the assertion of want of power must rest upon the assumption that an attempt by the United States to tax the property of a citizen residing within its jurisdiction where such property is beyond the territorial limits of the United States, is so in conflict with obvious principles of justice and so inconsistent with

every conception of representative and free government as to cause the exertion of power to come within the limitations of the due process clause of the Fifth Amendment. We might well leave the answer to the contention when it is thus rightly understood to result from its mere statement, from the obvious misconceptions as to the nature and extent of the authority of a sovereign although it be a representative government, and from a true appreciation of the privileges as well as the duties arising from citizenship and the past and recent exertions by Congress of the very taxing authority which is now challenged. (See act of June 30, 1864, 13 Stat. 223, 281.) We do not however leave the contentions to be destroyed by their own weakness, but come briefly to consider the authorities which it is insisted maintain their correctness and to point out the error of the reasoning upon which their asserted applicability is based. We do not cite or review the cases relied on because we concede that the doctrine which it is asserted they decided is elementary and in fact is the settled rule in this court. The principle of the cases is thus stated in the argument: "It is a settled rule of constitutional law that the power to tax depends upon jurisdiction of the subject-matter of the tax. A long line of unbroken authority illustrates this firmly established doctrine in its various aspects and although the cases have all arisen under state tax laws, their reasoning is applicable to and controlling in the case of a Federal tax act." But the misapprehension consists not in a misconception as to what the cases relied on decided, but in taking for granted that because the doctrine stated has been applied and enforced in many decisions with respect to the taxing power of the States, that the same principle is applicable to and controlling as to the United States in the exercise of its powers. The confusion results from not observing that the rule applied in the cases relied upon to many forms of exertion of state taxing power is based on

the limitations on state authority to tax resulting from the distribution of powers ordained by the Constitution. In other words, the whole argument proceeds upon the mistaken supposition, which is sometimes indulged in, that the calling into being of the Government under the Constitution, had the effect of destroying obvious powers of government instead of preserving and distributing such powers. The application to the States of the rule of due process relied upon comes from the fact that their spheres of activity are enforced and protected by the Constitution and therefore it is impossible for one State to reach out and tax property in another without violating the Constitution, for where the power of the one ends the authority of the other begins. But this has no application to the Government of the United States so far as its admitted taxing power is concerned. It is coëxtensive with the limits of the United States; it knows no restriction except where one is expressed in or arises from the Constitution and therefore embraces all the attributes which appertain to sovereignty in the fullest sense. Indeed the existence of such a wide power is the essential resultant of the limitation restricting the States within their allotted spheres, for if it were not so then government in the plenary and usual acceptation of that word would have no existence. Because the limitations of the Constitution are barriers bordering the States and preventing them from transcending the limits of their authority and thus destroying the rights of other States and at the same time saving their rights from destruction by the other States, in other words of maintaining and preserving the rights of all the States, affords no ground for constructing an imaginary constitutional barrier around the exterior confines of the United States for the purpose of shutting that government off from the exertion of powers which inherently belong to it by virtue of its sovereignty. But it is said in the decided cases relied upon, the principle which was an-

nounced was that the power to tax was limited by the capacity of the taxing government to afford that benefit and protection which is the true basis of the right to tax and which causes, therefore, taxation where such capacity to confer benefit and afford protection does not exist to be a mere arbitrary and unwarranted burden. But here again the confusion of thought consists in mistaking the scope and extent of the sovereign power of the United States as a nation and its relation to its citizens and their relations to it. It presumes that government does not by its very nature benefit the citizen and his property wherever found. Indeed, the argument, while holding on to citizenship, belittles and destroys its advantages and blessings by denying the possession by government of an essential power required to make citizenship completely beneficial.

Concluding from what we have just said that the first question must be answered in the affirmative, it follows from the considerations just stated and the views which we have expressed in the previous cases as to the operation and constitutionality of the act in other respects, that the remaining questions must be answered as follows: The second, Yes; the third, Yes, the whole tax; the fourth, Yes; the fifth, Yes; the sixth, No; the seventh relating to interest, Yes.[1]

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[1] The questions propounded were as follows:

I. Does the tax purporting to be imposed by section 37 of the act of Congress, approved August 5, 1909, apply to the use of a foreign-built yacht owned by a citizen of the United States, when such yacht, for a period of more than one year prior to September 1, 1909, and to the levy of such tax, was used wholly outside of the limits and territorial jurisdiction of the United States?

II. Did the tax purporting to be imposed by said act of Congress operate retrospectively, so as to be payable on September 1, 1909, in respect of the year then ended, or only prospectively, so as to become first due and payable on September 1, 1910?

III. Did the whole amount of the tax purporting to be imposed by said act of Congress become due and payable on September 1, 1909,

As by these answers the right to impose and collect the tax under the facts stated will be established, in view of what we shall say in a case between the same parties which follows this, we think it proper to observe that nothing in our reply to these questions is to be so construed as to deprive the court below of the power to take such steps as it may deem necessary to avoid injustice if it should be deemed that by some mistake of fact such a result might occur. The answers to the questions will be certified in accordance with the directions above given.

And it is so ordered.

UNITED STATES *v.* BENNETT (NO. 2).

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

No. 630. Argued January 6, 7, 1914.—Decided February 24, 1914.

United States v. *Goelet, ante*, p. 293, followed to effect that the tax imposed by § 37 of the Tariff Act of 1909 does not apply to the use of a foreign-built yacht owned by a citizen of the United States who

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or only such proportion thereof as the time during which the act was in force at that date bears to the whole year?

IV. Has Congress the power to levy a tax upon the use by a citizen of the United States of a yacht which is not actually and since the year 1904 was not at any time used within the territorial jurisdiction of the United States and which has its permanent situs in a foreign country?

V. Does said act of Congress, by purporting to impose a tax upon the use of foreign-built yachts alone, provide a valid tax, or a valid classification for purposes of taxation, within the power to lay and collect taxes delegated to Congress by the Constitution of the United States?

VI. Is the tax purporting to be imposed by said act of Congress in conflict with the requirement of due process of law contained in the fifth article of amendment to the Constitution of the United States?

VII. Is the United States entitled to recover interest upon the tax imposed upon the use of foreign-built yachts in and by section 37 of the Tariff Act of August 5, 1909?

was permanently resident and domiciled in a foreign country for more than one year prior to September 1, 1909, and to the levy of such tax.

THE facts are stated in the opinion.

Mr. Assistant Attorney General Adkins, with whom *Mr. Karl W. Kirchwey* was on the brief, for the United States.[1]

Mr. William D. Guthrie for the yacht owner in this and other cases argued simultaneously herewith.[2]

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

The certificate discloses that this case involves the right of the United States to recover an excise duty levied under § 37 of the Tariff Act of 1909 which became due on September 1, 1910, on the same yacht which was the subject of the duty becoming due in 1909 and which we have passed upon in the case just decided. All the statements as to the complaint and answer, the submission of the case by stipulation to the court without a jury, the judgment rejecting the claim of the United States and the prosecution of error from the court below are in substance like those stated in the case concerning the tax for 1910 between the United States and Goelet this day decided. As the result of this situation, the certificate recites, differing in that respect from the *Bennett Case* just previously decided, the trial court made the following finding: "Defendant is a citizen of the United States and for some years past has been domiciled in and resident of the Republic of France."

Conformably to this finding the second question propounded by the court below in this case, asks whether the act applies where the owner of the yacht, although a citizen, was permanently domiciled and residing in a foreign country for more than two years prior to Sep-

[1] See argument, p. 269, *ante*.

[2] See argument, p. 263, *ante*.

tember 1, 1910, and to the levy of such tax. As for the reasons stated in the *Goelet Case*, such question was answered in the negative, it follows that a like reply must be made here and therefore there is no need of replying to any of the other questions. In deciding the previous case between the same parties, we made a reservation concerning the power of the court below to deal with the former case in the future, because of the fact that the findings in this case are absolutely in conflict with the state of things exhibited in the previous *Bennett Case*. Our order will be, second question answered in the negative and the other questions not answered.

And it will be so certified.

RAINEY *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES *v.* RAINEY.

CERTIFICATE FROM THE CIRCUIT OF APPEALS FOR THE SECOND CIRCUIT.

RAINEY *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES *v.* RAINEY.

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

Nos. 74, 627, 73, 628. Argued January 6, 7, 1914.—Decided February 24, 1914.

Billings v. *United States*, *ante*, p. 261, followed to the effect that under § 37 of the Tariff Act of 1909, in imposing a tax on the use of foreign-built yachts there is authority to bring an action *in personam* against the owner for the recovery; that the tax became due on the first day

of September next following the passage of the act; that the six months' clause applied only to the charterer and not to the owner of such a yacht; and that the statute does not violate the due process clause of the Fifth Amendment.

The second paragraph of § 37 of the Tariff Act of 1909 giving the owner of a foreign-built yacht an option to pay an *ad valorem* of 35 per cent. in lieu of the annual tonnage tax imposed on the use of such yacht by the first paragraph of the section, is separable from the first paragraph and its validity is not involved in an action to recover the tonnage tax from the owner of a foreign-built yacht who has not availed of the option.

Quære, whether one not the subject of the other contracting power to a treaty with the United States can invoke the protection of that treaty in regard to property rights.

When a treaty is inconsistent with a subsequent act of Congress the latter will prevail.

The Constitution does not declare that the law established by a treaty shall never be altered or repealed by Congress; and while good faith may cause Congress to refrain from making any change in such law, if it does so its enactment becomes the law.

Although the other contracting power to a treaty may have ground for complaint if Congress passes a law changing the law established by the treaty, every person is still bound to obey the latest law passed.

No person acquires any vested right to the continued operation of a treaty.

Even if there is judicial power to inquire whether a provision in a duly promulgated act of Congress raising revenue originated in the House of Representatives in accordance with Art. I, § 7 of the Constitution, it is sufficient if it appears that it was an amendment in the Senate to an act that originated in the House; and, after the act has been enrolled and duly authenticated, the court will not inquire whether the amendment was or was not outside the purposes of the original bill.

Where on direct appeal from the Circuit Court by one party based on constitutional questions the whole case can be disposed of, the questions certified by the Circuit Court of Appeals on an appeal taken by the other party need not be answered, and the judgment of the Circuit Court can be modified to the extent necessary and affirmed.

190 Fed. Rep. 359, modified and affirmed.

THE facts, which involve the construction and constitutionality of § 37 of the Tariff Act of 1909 imposing

a tax on the use of foreign-built yachts and the liability of the owner for such tax, are stated in the opinion.

Mr. C. Andrade, Jr., for Rainey:

The act on its face shows that it was intended to operate prospectively; and therefore the tax is not payable until September 1, 1910.

The act does not levy a tax, but deprives defendant of his property without due process of law. The 35% duty is a direct tax, and void because not apportioned.

The seven dollar per ton annual tax on the use of the yacht is an excise or indirect tax, and void for want of uniformity.

Defendant's use of the yacht prior to August 5, 1909, tax free, was property. In order to make the tax fall due September 1, 1909, it is necessary to destroy such tax-free use of the yacht prior to August 5, 1909, which is a deprivation of property without due process of law.

A recovery in this action would destroy rights vested in the defendant under the British treaty of 1815, and would deprive defendant of his property without due process of law; and further Congress did not intend to annul the treaty of 1815.

The act does not authorize any action *in personam* against the owner or managing owner.

The yacht tax is void, as it is a bill for raising revenue, and it originated in the Senate and not in the House of Representatives.

In support of these contentions, see act of June 5, 1794, § 3; *American* v. *Worthington*, 141 U. S. 468; *Benziger* v. *United States*, 192 U. S. 38; British Treaties of July 3, 1815, October 20, 1818, August 6, 1827; *Chew Heong* v. *United States*, 112 U. S. 536; Cong. Rec., 61st. Cong., pp. 1573, 4275; Cooley, Const. Lim., p. 528; *Harvey* v. *Tyler*, 2 Wall. 328; *Hylton* v. *United States*, 3 Dall. 171; *Knowlton* v. *Moore*, 178 U. S. 41; *Lewis* v. *Penna. R. R.*

Co., 220 Pa. St. 317; *McEwen* v. *Den*, 24 How. 242; *Murray* v. *Gibson*, 15 How. 421; *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601; *Re Pennsylvania Telephone Co.*, 2 Chest. Co. Rep. (Pa.) 129, 131; Rev. Stat., §§ 4131, 4132; *Sohn* v. *Waterson*, 17 Wall. 596; *State* v. *Smith*, 28 N. W. Rep. 241; Story on Const., 4th ed., p. 622; *The Miranda*, 47 Fed. Rep. 815, aff'd, 51 Fed. Rep. 523; *Thomas* v. *United States*, 192 U. S. 363, 370; *Twenty per Cent Cases*, 20 Wall. 179; *United States* v. *Heath*, 3 Cranch, 399; *United States* v. *Reese*, 5 Dillon (Kans.), 405; *United States* v. *Wigglesworth*, 2 Story (Mass.), 369; *Warren* v. *Crosby*, 34 Pac. Rep. 661.

Mr. Assistant Attorney General Adkins, with whom *Mr. Karl W. Kirchwey* was on the brief, for the United States.[1]

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

The first two of the foregoing cases relate to a tax becoming due on the first of September, 1909, and the other two to a tax becoming due on the first of September, 1910, the taxes in all cases having been levied pursuant to § 37 of the Tariff Act of 1909 on the British built yacht Cassandra owned by the plaintiff in error. In these cases, as in those arising under the same act, which we have just decided, the certificates of the Circuit Court of Appeals are here because of writs of error from that court prosecuted by the United States for the purpose of reviewing the action of the trial court in rejecting a demand for interest and the two other cases are here on direct writ of error to the court below, to review its action in upholding the tax. In both the cases brought directly here, the pleadings of the Government asserted the citizenship of the defendant, the use of the yacht during the taxing period and the other statutory

[1] For abstract of argument, see p. 269, *ante*.

essentials to fix liability. The answers not traversing citizenship, ownership or use, set up the same defences as were urged in the cases we have just decided, somewhat however reiterated and changed in form of statement, and other defences not made in the previous cases. In the first direct case, judgment was rendered in favor of the Government for the tax by submission on bill and answer. In the second a like judgment was rendered, the case having been submitted by stipulation to the court without a jury, and in that case the finding of fact made by the court as to the use of the yacht is as follows: "During the period from the said twenty-fifth day of June, 1908, the date when the defendant purchased the said yacht, to the first day of September, 1910, the yacht was used by the defendant both in the waters of the United States and in the waters of foreign countries, as well as on the high seas, and in the year immediately preceding the first day of September, 1910, the said yacht was used by the defendant continuously in the waters of the United States, except for the period from June 20, 1910, to July 30, 1910, when she was used by the defendant on a cruise to the Gulf of St. Lawrence."

Separate assignments of error were made in the two cases which are here on direct review and are referred to and discussed in the arguments at bar. They are all, in both cases, however, embraced in the ten separate propositions stated in the argument, and both cases will therefore be disposed of by briefly considering and deciding them. In doing so we shall bring the several assignments under common headings for the purpose of avoiding repetition. First, that the court erred in holding there was authority to bring an action *in personam* against the owner for the recovery of the tax. This is disposed of by the reasoning adopted in the *Billings Case* in passing on the question of liability for interest. Second, that error was committed in holding the first installment of

the tax was due in September 1909, and in deciding that the six months clause, under the section in question "applied only to the charterer and did not apply to the owner of a foreign-built yacht." Third, that error was committed in deciding that the tax did not violate the due process clause of the Fifth Amendment and was not in conflict with the uniformity clause of Art. I, § 8 of the Constitution. These grounds also are disposed of by the opinion in the *Billings Case*. Fourth, that error was committed in not deciding that § 37 of the act of 1909 "in so far as it lays a duty of 35 per cent. *ad valorem* is a direct tax and void because not apportioned in contravention of Art. I, § 2, and Art. I, § 9 of the Constitution of the United States." This proposition is concerned with the second paragraph of the statute in question which gives a right to the owner of foreign-built yachts of commutation, as follows:

"In lieu of the annual tax above prescribed the owner of any foreign-built yacht, pleasure-boat or vessel above described may pay a duty of thirty-five per centum ad valorem thereon, and such yacht, pleasure-boat or vessel shall thereupon be entitled to all the privileges and shall be subject to all the requirements prescribed by sections forty-two hundred and fourteen, forty-two hundred and fifteen, forty-two hundred and seventeen, and forty-two hundred and eighteen of the Revised Statutes and Acts amendatory thereto in the same manner as if said yacht had been built in the United States, and shall be subject to tonnage duty and light money only in the same manner as if said yacht had been built in the United States."

We think the reasons given in the comprehensive opinion of the lower court in ruling adversely on this proposition are so conclusive that we adopt them and make them our own. The court said:

"The owner is not required to pay this duty. He is merely given the option to pay it. In its nature it would

seem to be a duty on imports and such duties are not held to be direct taxes requiring apportionment. But it is unnecessary to pass upon this question. These actions are for the recovery of the annual tonnage tax and the validity of the ad valorem tax is not involved. The provisions concerning that tax are separable from those concerning the annual tax. The one is not dependent upon the other and there is no indication that Congress would not have adopted the one without the other. Under such conditions it is well settled that unconstitutional provisions may be separated from legal provisions and effect be given to the latter."

Fifth, that error was committed in not holding that enforcement of the tax "would destroy rights vested in the defendant under the British Treaty of July 3, 1815" and would for such reason "deprive the defendant of his property without due process of law." The court below adequately disposed of this contention upon reasons which we also approve and adopt.

The court said:

"This defendant does not claim to be a British subject, and it is by no means clear that he is entitled to invoke the protection of the treaty. But, however that may be, it is well settled that when a treaty is inconsistent with a subsequent Act of Congress, the latter will prevail. *Taylor* v. *Morton*, 2 Curtis, 454; and see *Whitney* v. *Robertson*, 124 U. S. 190; *Head Money Cases*, 112 U. S. 580; *Cherokee Tobacco Case*, 11 Wall. 616; *Ropes* v. *Clinch*, 8 Blatchf. 304.

"Treaties are contracts between nations and by the Constitution are made the law of the land. But the Constitution does not declare that the law so established shall never be altered or repealed by Congress. Good faith toward the other contracting nation might require Congress to refrain from making any change, but if it does act, its enactment becomes the controlling law in this country. The other nation may have ground for complaint, but

every person is bound to obey the law. And as a corollary it follows that no person acquires any vested right to the continued operation of a treaty."

Sixth, that error was committed in not deciding that § 37 of the act was not void "as it is a bill for raising revenue, and it originated in the Senate and not in the House of Representatives, in contravention of Article I, section 7, of the Constitution of the United States." Without intimating that there is judicial power after an act of Congress has been duly promulgated to inquire in which House it originated for the purpose of determining its validity, and upon the assumption for the sake of the argument that such power may be invoked, again we think the court below disposed of the contention upon a ground entirely satisfactory which we adopt and approve, the court saying:

"I am also satisfied that the section in question is not void as a bill for raising revenue originating in the Senate and not in the House of Representatives. It appears that the section was proposed by the Senate as an amendment to a bill for raising revenue which originated in the House. That is sufficient. Having become an enrolled and duly authenticated Act of Congress, it is not for this Court to determine whether the amendment was or was not outside the purposes of the original bill."

Following the practice adopted in the cases previously decided and treating, as we did in these cases, the United States as here on a cross-writ of error complaining of the refusal to allow interest, it follows that the questions asked by the Circuit Court of Appeals covered by the certificates need not be answered and that the judgments of the court below in the cases on direct writ of error in so far as they rejected the claim of interest will be modified to the extent necessary to allow such claim and in other respects will be affirmed. Therefore our order will be

Modified and affirmed.

HARRISON, SECRETARY OF STATE OF OKLAHOMA, *v.* ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 34. Submitted November 4, 1913.—Decided February 24, 1914.

The judicial power of the United States, as created by the Constitution and provided for by Congress pursuant to constitutional authority, is wholly independent of state action and cannot be directly or indirectly destroyed, abridged, limited or rendered inefficacious by exertion of state authority.

The right conferred by law of the United States to remove a cause pending in a State to a Federal court on compliance with the Federal law is paramount and free from restraint or penalization by state action; and whether the right exists and has been properly exercised are Federal questions determinable by the Federal courts free from limitation or interference by state power.

A state statute which forbids a resort to the Federal courts on the ground of diversity of citizenship and punishes by extraordinary penalties any assertion of a right to remove a case under the Federal law and attempts to divest the Federal courts of their power to determine whether the right exists, is unconstitutional as an attempted exertion of state power over the judicial power of the United States.

A State cannot destroy the right to remove causes to the Federal courts by imposing arbitrary conditions as to state citizenship which render it impossible for one entitled to the right to avail of it.

A suit by a non-resident against officers of a State to enjoin the enforcement of a state statute which violates constitutional rights of complainant is not a suit against the State within the prohibition of the Eleventh Amendment.

A state statute which deprives those entitled thereto of a Federal right is not made constitutional by the fact that it does not discriminate but operates on all alike.

The Oklahoma statute of May 26, 1908, forbidding foreign corporations

from asserting any citizenship other than of that State and providing for the revocation and forfeiture of the charter of any corporation filing a petition for removal of a cause from the state, to the Federal, court, is unconstitutional as to corporations doing an interstate business as an attempt to restrain and penalize the assertion of a Federal right. *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, and *Security Co.* v. *Prewitt*, 202 U. S. 246, distinguished.

Where the plain text of a state statute leaves no doubt that it is an attempt to prevent removal of causes to the Federal court, it will not be construed as a mere exercise of reasonable control over corporations.

When the construction of a state statute given by the state court and the state officers is plainly right, this court will not give the statute a different construction because under the one so given the statute is flagrantly repugnant to the Constitution.

THE St. Louis & San Francisco Railroad Company, a corporation chartered under the laws of Missouri and a citizen and resident of that State, owned, controlled or operated, for the purpose of interstate and intrastate commerce, many hundreds of miles of railway in Oklahoma and extending into adjoining States and beyond. These lines existed and were operated by the company, some, it may be, before the Territory of Oklahoma was organized and most, if not all, before Oklahoma was endowed with Statehood. The lines composing the system originated in various charters, some enacted by Congress accompanied with grant of land, and others by territorial grant. The unified system resulted from foreclosures, consolidations, etc. In 1908 the company was sued by a citizen and resident of Oklahoma, in a court of that State. On the ground of diversity of citizenship a petition and bond in due form and seasonable time were filed by the company for removal to the Circuit Court of the United States for the Western District of Oklahoma. What action was taken by the state court does not appear, but presumably the petition was denied—the following document having been issued by the Secretary of State.

"STATE OF OKLAHOMA.

Revocation of Charter of St. Louis & San Francisco Railroad Company in Oklahoma.

GUTHRIE, OKLAHOMA, *August 29th*, 1908.

In the District Court.

GERTRUDE GOODE, Administratrix of the Estate of Frank R. Goode, Deceased, Plaintiff,

vs.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant.

Petition for Removal to the Circuit Court of the United States.

STATE OF OKLAHOMA,

Comanche County:

Having received due and legal notice from J. T. Johnson, Judge of the District Court of Comanche County, that the above named corporation defendant, St. Louis & San Francisco Railroad Company has filed a petition for removal to the United States Court, a certified copy of which is on record in the office of the Secretary of State at the Capitol in the City of Guthrie in the State of Oklahoma.

Therefore, I, Leo Meyer, Assistant Secretary of State and now Acting Secretary of State of the State of Oklahoma by authority invested in me under section four of House Bill No. 131 approved by the Governor of the State of Oklahoma, C. N. Haskell, May 26th, 1908, do hereby declare the license of the said St. Louis & San Francisco Railroad Company to transact business in the State of Oklahoma forfeited and revoked.

In testimony whereof, I have set my hand and caused to be affixed the great Seal of the State.

Done at the city of Guthrie this twenty-ninth day of August, A. D., 1908.

[SEAL] LEO MEYER,

Acting Secretary of State."

Thereupon the suit which is now before us was commenced by the Railroad Company against the Secretary of State and his assistant, seeking to enjoin them from giving effect to the certificate or in any way disturbing or interfering with the company in carrying on business in the State. With much amplitude of statement the source and history of the title of the various railroads forming part of the complainant's system in Oklahoma were enumerated. In addition to asserting that rights secured to the corporation by the state constitution had been denied by the action complained of, violations of the Constitution of the United States were specifically asserted on the following grounds: First, because the state law under which the Secretary of State had purported to act and the action taken thereunder constituted an unwarranted interference on the part of the State and its officers with the judicial power of the United States; second, because the attempt to exclude the Company from the State and prevent it from doing business therein, under the circumstances stated, was repugnant to the commerce clause of the Constitution, the due process clause of the Fourteenth Amendment and the contract clause, the latter being based on the assertion that the congressional and legislative acts by which the roads forming part of the system of the company had been incorporated, constituted contracts giving a right to do business in Oklahoma which that State had no power to impair. The court allowed a restraining order. The bill was demurred to on the ground of want of jurisdiction and want of equity. The demurrer was overruled. The court, in an elaborate opinion, expounded its reasons for so doing, holding that it had jurisdiction because of diversity of citizenship, the complainant being a citizen of Missouri and the defendants, citizens and residents of Oklahoma. In reaching this conclusion, the court analyzed the various transactions, foreclosure, and consolidations, etc., by which the railroad company had acquired the lines

composing its system and held that there was nothing in any of them which destroyed the Missouri citizenship of the complainant. It moreover held in any event there was ample ground for jurisdiction because of the constitutional rights asserted.

As to the alleged want of equity in the bill, the court, after stating that the obvious purpose of the legislation under which the Secretary of State had acted as deduced from its text was to prevent the removal of causes from the State to a court of the United States, declared that the defendant in argument had so conceded. It was decided that the State was without authority to legislate to that effect and therefore the law in question and the action of the Secretary of State taken under it were void because of repugnancy to the Constitution of the United States. The answer which was then filed, admitted the incorporation of the complainant in Missouri and the citizenship in Oklahoma of the defendants, as well as the jurisdictional amount. The allegations of the complaint as to interference with the authority of the courts of the United States as to the commerce and contract clauses of the Constitution and the due process and equal protection clauses of the Fourteenth Amendment, were sought to be traversed by copious averments concerning the subject. Finally it was asserted, 1, that the Missouri corporation was never authorized to acquire any railroad in either the Indian or Oklahoma Territory and it therefore had no standing to assert as a Missouri corporation, its ownership and control of such roads as a basis for removal; 2, that in forming the line or lines of railway which constituted its system, the complainant had consolidated parallel and competing roads in violation of the anti-trust laws of the Territory and of the State of Oklahoma, as well as the law of the United States and therefore the corporation was not in a position to assert its Missouri citizenship; and 3, that the acquisition by the complainant of various

roads forming parts of its system which were covered by charters granted by Congress or by Oklahoma Territory was in conflict with such charters, and for this reason, moreover, the corporation could not be heard to assert its Missouri citizenship. An exception of the complainant to the relevancy of the three grounds just stated, was maintained, and they were stricken from the answer. By agreement between the parties, the present appellant, the successor in office as Secretary of State, was substituted as defendant. Thereupon, the case having been submitted to the court on bill and answer, a decree was entered perpetually enjoining the Secretary of State from giving effect to the order of revocation or interfering with or disturbing the complainant in the transaction of its business in the State. It was expressly decreed that the act of the legislature of Oklahoma upon which the action of the Secretary of State was taken was void and unenforceable because of its repugnancy to the Constitution of the United States. This appeal was then taken.

Mr. Charles West, Attorney General of the State of Oklahoma, and *Mr. Ben F. Harrison*, Secretary of State of the State of Oklahoma, for appellant:

The purpose of the act is to enforce the State's visitorial powers over corporations doing business within its borders.

It is immaterial what any persons may have thought as to, or even what were, the motives of the legislature. *Calder* v. *Michigan*, 218 U. S. 591.

That the act was not intended to hinder the Federal courts is evident because it necessarily fails to accomplish that purpose. *Southern Ry. Co.* v. *Allison*, 190 U. S. 330.

Constitutional and other statutory provisions which are to be considered as *in pari materia*, urge that this is but a visitorial statute.

The difference between the Oklahoma act and the other acts involved in former decisions of this court is that those acts discriminate against foreign corporations, while the Oklahoma act does not. It is not within the reasoning of *Herndon* v. *C., R. I. & P. Ry. Co.*, 218 U. S. 135; *Pullman Co.* v. *Kansas*, 216 U. S. 56; *Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 146; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1; *Southern Co.* v. *Greene*, 216 U. S. 400.

In all of those cases the statute was held to be either direct interference with interstate commerce, or else discriminated against companies doing interstate commerce, and in each instance was held to violate the obligation of a contract.

The Oklahoma act does none of these things.

The Oklahoma act works no discrimination, and should be sustained under *Security Co.* v. *Prewitt*, 202 U. S. 248; *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535; *National Council* v. *State Council*, 203 U. S. 163.

The State may domicile within itself all corporations doing intrastate business within its limits. Thompson, Corporations, 2d ed., §§ 490 *et seq.*; *St. L. R. Co.* v. *James*, 161 U. S. 545; *Matrine* v. *Ins. Co.*, 53 N. Y. App. 339; *Safford* v. *Topeka Water Co.*, 52 Pac. Rep. 422; *Aspinwall* v. *Ohio & Miss. R. R. Co.*, 20 Indiana, 492; *Attorney General* v. *Lumber Co.*, 59 N. W. Rep. 1048; *Simmons* v. *Norf. & Balt. Stbt. Co.*, 113 N. Car. 147; *Attorney General* v. *Milwaukee Ry. Co.*, 45 Wisconsin, 579; *Commonwealth* v. *Pittsburg R. R. Co.*, 58 Pa. St. 26; *Rolling Stock Co.* v. *People*, 147 Illinois, 234; *State* v. *So. Pac. Co.*, 24 Texas, 78; *People* v. *Oakland Bank*, 1 Douglas (Mich.), 282; *Huglar* v. *Craigin Cattle Co.*, 40 N. J. Eq. 392.

The act is one properly within the police power of the State. Its purpose is to subject corporations doing intrastate business within the State to the full visitorial and regulative powers of the State, by requiring a domicile in the State, together with the attendant circumstances

of the persons of the officers, books, papers, etc., within Oklahoma.

The State has the same right to require a domestic domicile of a foreign corporation doing intrastate business, as it would have of its own corporations.

The State may oust a corporation repudiating its creative powers, whether such corporation be one of its own children or one of its foster children. See Comp. Laws Oklahoma, 1909, Snyder, *supra*, in §§ 1400 to 1406.

A foreign corporation is left the right to resort to the Federal courts upon any ground that a citizen of the State might resort to those courts, and in addition to the right given by the laws of the United States for a resort to the Federal court, either by removal or original action, because the domesticity of the citizen is not taken away, although the consequence of the claim of foreign domicile will be to prevent it from doing further intra business in the State. As long as the corporation is left free to exercise the option of remaining in the State as a domestic corporation, or of repudiating the domicile of the State, and losing its domestic privilege, this cannot be an unconstitutional exercise of state power, provided it is not administered in an arbitrary or discriminatory manner.

The act does not deprive any person of a privilege or deny any person equal protection of the law. It does not discriminate against foreign corporations.

The act is not an interference with interstate commerce. *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 45; *Louis. & Nash. R. Co.* v. *Kentucky*, 183 U. S. 512, 518.

Mr. W. F. Evans and *Mr. E. T. Miller* for appellee:

The evident purpose of the act of 1908 is to prevent foreign corporations doing business in Oklahoma from invoking jurisdiction of the Federal courts in that State. If such be the purpose of the act, it is ineffectual to that end. *Buck Stove Co.* v. *Vickers*, 226 U. S. 205; *Herndon* v.

C., R. I. & P., 218 U. S. 135; *Ludwig* v. *Western Union*, 216 U. S. 146; *Pullman Co.* v. *Kansas*, 216 U. S. 56; *St. L. & S. F. R. R. Co.* v. *James*, 161 U. S. 545; *Southern Co.* v. *Greene*, 216 U. S. 400; *Southern Pac. Co.* v. *Denton*, 146 U. S. 202; *Southern R. R. Co.* v. *Allison*, 190 U. S. 326; *Textbook Co.* v. *Pigg*, 217 U. S. 91; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1.

Appellee having the right to remove the case from the state to the Federal court, cannot be lawfully excluded from the State for exercising that constitutional right, because—

It has a contract with the United States, permitting it to remain in the State of Oklahoma for the purpose of operating its railroad.

It had a contract with the Territory of Oklahoma, which is protected by the Constitution of the United States and by the provision of the constitution of Oklahoma, preserving all rights previously existing.

To exclude appellee from the State would be to impair the obligation of those contracts, in violation of Federal and state constitutional guaranties.

To exclude appellee from the State would be to destroy its property in that State, aggregating many millions of dollars, and to deprive appellee of its property without due process of law. *Am. Smelting Co.* v. *Colorado*, 204 U. S. 103; *California* v. *Pac. Ry. Co.*, 127 U. S. 1; *Cessna* v. *United States*, 169 U. S. 165; *Hager* v. *Reclamation Dist.*, 111 U. S. 701; *Holden* v. *Hardy*, 169 U. S. 366; *Kansas Pac. Ry. Co.* v. *A., T. & S. F. Ry.*, 112 U. S. 414; *Londoner* v. *Denver*, 210 U. S. 373; *New Jersey* v. *Yard*, 95 U. S. 104; *N. Y., L. E. & W. Ry.* v. *Pennsylvania*, 153 U. S. 628; *Pennsylvania* v. *Wheeling Co.*, 13 How. 518; *Powers* v. *Detroit & G. H. Ry.*, 201 U. S. 559; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 392; *Roberts* v. *Nor. Pac. Ry. Co.*, 158 U. S. 1; *St. Paul &c. Ry. Co.* v. *Phelps*, 137 U. S. 528; *Smith* v. *A., T. & S. F. Ry.*, 64 Fed. Rep. 272; *United States* v.

Percheman, 7 Pet. 51; *Vincennes* v. *State*, 14 How. 263.

The act is void because it is an indirect interference with, and imposes a direct burden upon, interstate commerce. *Atl. Coast Line* v. *Wharton*, 207 U. S. 328; *Buck Stove Co.* v. *Vickers*, 226 U. S. 205; *Darnell* v. *Memphis*, 208 U. S. 113; *Gibbons* v. *Ogden*, 9 Wh. 1; *Heiman* v. *Southern Ry. Co.*, 203 U. S. 270; *Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 146; *Pensacola Tel. Co.* v. *West. Un. Tel. Co.*, 96 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1.

Appellee did not consolidate with the various corporations specified in the amended bill.

The order attempting to revoke the license of appellee is void. *Van Wyck* v. *Knevals*, 106 U. S. 360.

The act is void because in violation of the Eighth Amendment to the Constitution of the United States and § 18, Art. II of the constitution of Oklahoma, forbidding the imposition of excessive fines. *Ex parte Young*, 209 U. S. 123.

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

We have stated the case only to the extent necessary to make clear the questions essential to be decided.

The assignments of error in general terms assail the overruling of the demurrer, the striking of matter from the answer and the final decree. The propositions, however, which are urged at bar to sustain these general assignments are numerous and we think in some aspects redundant. To consider them in the order in which they are urged would besides giving rise to repetition tend to produce confusion. We hence disregard the mere order in which they are stated in the argument and come to consider the fundamental propositions necessary to be taken

into view in order to determine whether the court below was right in holding that the law under which the Secretary of State acted, as well as the action of that officer, were void because inconsistent with the judicial power of the United States, reserving until that is done such separate consideration of the propositions relied on as we may deem it necessary to make.

It may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of state action and which therefore the several States may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious. The doctrine is so elementary as to require no citation of authority to sustain it. Indeed, it stands out so plainly as one of the essential and fundamental conceptions upon which our constitutional system rests and the lines which define it are so broad and so obvious that, unlike some of the other powers delegated by the Constitution, where the lines of distinction are less clearly defined, the attempts to transgress or forget them have been so infrequent as to call for few occasions for their statement and application. However, though infrequent, occasions have not been wanting, especially on the subject of the removal of causes with which we are now dealing, where the general principle has been expounded and applied so as to cause the subject, even from the mere point of view of authority, to be beyond the domain of all possible controversy.

See for general question *Ex parte Young*, 209 U. S. 123; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 391; *Hess* v. *Reynolds*, 113 U. S. 73, 77; *Madisonville Traction Co.* v. *Mining Co.*, 196 U. S. 239, 252, and on subject of removal, *Southern Pacific Company* v. *Denton*, 146 U. S. 202; *St. Louis & S. F. Ry. Co.* v. *James*, 161 U. S. 545;

Southern Railway Company v. *Allison*, 190 U. S. 326; *Herndon* v. *C., R. I. & P.*, 218 U. S. 135.

With this general principle in hand let us come to fix one or more of the essentials of the right to remove as a prelude to testing the assailed statute and the action taken under it. In the first place, the right unrestrained and unpenalized by state action on compliance with the forms required by the law of the United States to ask the removal of a cause pending in a State to a United States court is obviously of the very essence of the right to remove conferred by the law of the United States. In the second place, as the right given to remove by the United States law is paramount, it results that it is also of the essence of the right to remove, that when an issue of whether a prayer for removal was rightfully asked arises, a Federal question results which is determinable by the courts of the United States free from limitation or interference arising from an exertion of state power. In the third place, as the right freely exists to seek removal unchecked or unburdened by state authority and the duty to determine the adequacy of a prayed removal is a Federal and not a state question, it follows that the States are in the nature of things without authority to penalize or punish one who has sought to avail himself of the Federal right of removal on the ground that the removal asked was unauthorized or illegal. Let us come then to the text of the statute with the object of determining its constitutionality.

Its first section provides "that the domicile of every person, firm or corporation conducting a business in person, by agent, through an office, or otherwise transacting business within the State of Oklahoma, and which has complied with or may comply with the constitution and laws of the State of Oklahoma, shall be for all purposes deemed and held to be the State of Oklahoma." The second section provides for the immediate revocation of "the license or charter to do business within the State of

Oklahoma of every person, firm or corporation conducting a business in person, by agent, through an office or otherwise transacting business within said State of Oklahoma, who shall claim or declare in writing before any court of law or equity within said State of Oklahoma, domicile within another State or foreign country." The third section makes it the duty of the judge of any court before which any claim of foreign domicile is made within the contemplation of the second section to at once make report of the fact to the Secretary of State and to transmit to that officer a copy of the claim, and the fourth section imposes on the Secretary of State the duty immediately on the receipt of such report and copy of the declaration to "declare the license or charter of any person, firm or corporation so filing said claim or declaration, forfeited and revoked," and the fifth causes it to be a misdemeanor subjecting to a penalty of not less than one thousand nor more than five thousand dollars each day or part of day, for any person whose license or charter is revoked to do business in Oklahoma in conflict with the prohibitions of the statute.

While the provisions of the statute are dependent one upon the other and are unified in the sense that they all are components of a common purpose, that is, tend to the realization of one and the same legislative intent, its provisions nevertheless, for the purpose of analysis, are plainly two-fold in character, that is, one, the compulsory citizenship and domicile within the State which the first section imposes and the other the prohibition which the statute pronounces against any assertion in a court of the existence of any other citizenship and domicile than that which the statute ordains and the means and penalties provided for sanctioning such prohibition. Although theoretically, the first would seem to be the more primary and fundamental of the two, since the second after all consists but of methods provided for making the first

operative, the second from the point of view we are examining is the primal consideration, since it directly deals with the assertion in a state court of a right to remove and provides the mechanism which was deemed to be effectual to render the assertion of such right impossible. In other words, the difference between its two provisions is that which exists between an attempt on the one hand to render the enjoyment of a Federal right impossible by arbitrarily creating a fictitious legal status incompatible with the existence of the right and on the other hand the formulation of such prohibitions and the establishment of such penalties against the attempt to avail of the Federal right as to cause it to be impossible to assert it. Coming then to consider the statute from the second or latter point of view, we think it is clear that it plainly and obviously forbids a resort to the Federal courts on the ground of diversity of citizenship in the contingency contemplated, punishes by extraordinary penalties any assertion of a right to remove under the laws of the United States, and attempts to divest the Federal courts of their power to determine, if issue arises on the subject, whether there is a right to remove. Indeed, the statute goes much further, since when an application to remove is made, in order to prevent a judicial consideration of its merits even by the state court, it in effect commands the judge of such court on the making of the application to refuse the same and to certify the fact that it was made to a state executive officer to the end that such officer should without judicial action strip the petitioning corporation of its right to do business, besides subjecting it to penalties of the most destructive character as a means of compelling acquiescence. When the nature of the statute is thus properly appreciated, nothing need be further said to manifest its obvious repugnancy to the Constitution or to demonstrate the correctness of the decree of the court below.

The conclusion just stated leaves us only the duty of

separately and briefly referring to some of the propositions pressed in argument: *a*, the contention that because the object of the suit was to enjoin state officers from violating the constitutional rights of the complainant, it was therefore a suit against the State and not maintainable, is so plainly in conflict with the settled doctrine to the contrary that we do not further notice it. *b*, The contention so much insisted upon, that the act should not be declared unconstitutional because it does not discriminate, we assume refers to the provision of the statute creating an arbitrary standard of state citizenship and domicile; but as we see no possibility of separating that provision from the unconstitutional attempt to prevent access to the courts of the United States, there is no occasion to further deal with the subject of discrimination. If, however, we were to separately consider it, at once it is to be observed that the contention proceeds upon a self-evident misconception which is this, that if only wrong be indiscriminately done it becomes rightful. *c*, The proposition that the constitutionality of the statute and the action taken under it, is supported by the decisions in *Doyle* v. *Continental Insurance Company*, 94 U. S. 535 and *Security Company* v. *Prewitt*, 202 U. S. 246, is we think plainly unfounded. Those cases involved state legislation as to a subject over which there was complete state authority, that is, the exclusion from the State of a corporation which was so organized that it had no authority to do anything but a purely intrastate business, and the decisions rested upon the want of power to deprive a State of its right to deal with a subject which was in its complete control, even though an unlawful motive might have impelled the State to exert its lawful power. But that the application of those cases to a situation where complete power in a State over the subject dealt with, does not exist, has since been so repeatedly passed upon as to cause the question not to be open. *Western Union Telegraph Company* v. *Kansas*,

216 U. S. 1; *Pullman Company* v. *Kansas, ib.* 56; *Textbook Company* v. *Pigg*, 217 U. S. 91; *Buck Stove & Range Co.* v. *Vickers*, 226 U. S. 205, and *Herndon* v. *C., R. & I. P. Ry.*, 218 U. S. 135. The grounds of the decision in the last case show the extremely narrow scope of the rulings in the *Doyle* and *Prewitt* cases, and render their inapplicability to this case certain. Indeed, the ruling in the *Herndon Case* and in those subsequent to the *Doyle* and *Prewitt* cases, most of which were reviewed in the *Herndon Case*, demonstrates that no authority is afforded by those two cases for the conception that it is within the power of a State in any form, directly or indirectly, to destroy or deprive of a right conferred by the Constitution and laws of the United States. *d*, The matters which the court below ordered stricken from the answer were irrelevant to the issue for decision even if it be conceded hypothetically that they had merit, because under that assumption they would have only been properly cognizable if presented in an appropriate manner and at the proper time to the Federal tribunal which had a right to pass upon them when considering the propriety of the removal which was prayed. *e*, We consider that the plain text of the statute, the meaning affixed to it by the state court when the application to remove was made, the subsequent action taken by the state officers, the character of the pleadings, the concession as stated by the court below which was made in the argument, all leave no room for the contention that at all events the statute should be construed not as an attempt on the part of the State to prevent the removal of causes, but simply as an effort on the part of the State to exert reasonable control over corporations within its borders. The argument that because the statute, if understood as we understand it, is so flagrantly repugnant to the Constitution as to suggest the impossibility of believing that it was enacted with that end in view but repudiates, as we have seen, the action of the state court and of the

state officers under it and the whole course of the trial, and comes at last to the contention that the more plainly an enactment violates the Constitution, the more urgent the duty of deciding that it does not do so.

Affirmed.

BACCUS *v.* STATE OF LOUISIANA.

ERROR TO THE THIRD JUDICIAL DISTRICT COURT, PARISH OF CLAIBORNE, STATE OF LOUISIANA.

No. 170. Argued January 19, 1914.—Decided February 24, 1914.

This court will not disregard the construction placed upon a state statute by the highest court of the State especially if it involves giving the statute one meaning for the purpose of determining whether the acts in question are within its terms and another meaning for the purpose of escaping the Federal question.

A State may classify and regulate itinerant vendors and peddlers, *Emert* v. *Missouri*, 156 U. S. 296, and may also regulate the sale of drugs and medicines.

The statute of Louisiana of 1894, prohibiting sale of drugs, etc., by itinerant vendors or peddlers, is not unconstitutional under the Fourteenth Amendment either as denying due process of law by preventing a citizen from pursuing a lawful vocation or as denying equal protection of the law.

THIS writ of error was directed to a district court of the State of Louisiana, as that court had jurisdiction, in last resort, over the conviction sought to be reviewed. The information upon which the conviction was based charged that the accused had, in violation of § 12 of Act 49 of the Laws of Louisiana for 1894, illegally, as an itinerant vendor or peddler, "sold drugs, ointments, nostrums and applications intended for the treatment of diseases and deformity." A motion was made to quash on the following

grounds: First, because the statute upon which the charge was based provided for no offense; second, because if it did, the acts charged were not, generally speaking, within the statute, and especially were not embraced by its provisions because the sale of drugs or proprietary preparations put up in sealed packages with directions for use, did not constitute the practice of medicine; third, because if the statute embraced, as asserted, the acts charged, it was in conflict with the state constitution, since it permitted all persons to sell drugs, ointments, etc., except itinerant vendors; fourth, because if the statute operated as contended for, it was repugnant to the Fourteenth Amendment to the Constitution of the United States "*a*, because it prevents a citizen from pursuing a lawful vocation; *b*, it denies to other citizens rights enjoyed by all others in the State, and . . . is class legislation in its effect, as it gives to the local dealer a monopoly in the sale of such drugs, etc., and deprives the itinerant vendor or dealer of the privilege to sell such articles . . ." The motion to quash having been overruled, the case was submitted to the court without a jury, upon an agreed statement of facts to the following effect: 1st, "that the defendant was an itinerant vendor of drugs, nostrums," etc., and as such had sold the articles "intended for the treatment of diseases as alleged in the information." 2nd, "that the drugs so sold by the defendant as an itinerant vendor were compounded and prepared by the Rawleigh Medical Co. of the State of Illinois, and that said remedies, drugs, nostrums, ointments and applications were put up in sealed packages or bottles ready for use with printed directions on the packages or bottles and that defendant was an itinerant vendor of same in original packages and bottles and prepared by the proprietors." 3rd, "that all persons except itinerant vendors have the right to sell said remedies, that is, patent and proprietary drugs, nostrums, ointments and applications, intended for the cure

of diseases." By requests to charge which were overruled, and to which exceptions were reserved, the defenses based both upon the state and the United States Constitution, embodied in the motion to quash were reiterated and on conviction and sentence after an unsuccessful effort by certiorari to procure as an act of grace, a review of the case by the Supreme Court of the State, this writ of error was sued out.

Mr. Thomas D. O'Brien, with whom *Mr. John A. Barnes* was on the brief, for plaintiff in error:

The act cannot be sustained if interpreted to prohibit the mere selling of drugs by an itinerant while permitting such selling by all others.

The enforcement of the statute would unwarrantably deprive plaintiff in error of liberty.

The business and occupation attempted to be prohibited is lawful.

The statute denies to plaintiff in error equal protection of the laws.

The statute is equally obnoxious under the construction placed upon it by the Supreme Court of Louisiana.

In support of these contentions see *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Butchers Union Co.* v. *Crescent City Co.*, 111 U. S. 746; *Barbier* v. *Connolly*, 113 U. S. 27; *C., B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226; *Kentucky* v. *Payne Medicine Co.*, 138 Kentucky, 164; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79; *Civil Rights Cases*, 109 U. S. 23; *Chicago* v. *Netcher*, 183 Illinois, 104; *Carrollton* v. *Bazzette*, 159 Illinois, 284; *Ex parte Virginia*, 100 U. S. 347; Food and Drug Regulations, Louisiana Board of Health, July 1, 1913; *Gundling* v. *Chicago*, 177 U. S. 183; *Hovey* v. *Elliott*, 167 U. S. 409; *Holden* v. *Hardy*, 169 U. S. 366; *In re Jacobs*, 98 N. Y. 98; *Lochner* v. *New York*, 198 U. S. 45; *Lawton* v. *Steele*, 152 U. S. 133; *Mugler* v. *Kansas*, 123 U. S. 623; *Noel* v. *People*, 187 U. S. 587; *Natl. Cotton Oil*

Co. v. *Texas*, 197 U. S. 129; *People* v. *Wilson*, 249 Illinois, 195; *Price* v. *People*, 193 Illinois, 114; *Scott* v. *McNeal*, 154 U. S. 34; *State* v. *Donaldson*, 41 Minnesota, 74; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; Second Revised Laws of Louisiana, p. 1232; *State* v. *Loomis*, 115 Missouri, 313; *State* v. *Ashbrook*, 154 Missouri, 375; *Spiegler* v. *Chicago*, 216 U. S. 114; *State* v. *Scougal*, 3 So. Dak. 55; *State* v. *Bayer*, 34 Utah, 257; *State* v. *Judge*, 105 Louisiana, 371; *Wynne* v. *Judge*, 106 Louisiana, 400; *Pettigrew* v. *Hall*, 109 Louisiana, 290; *People* v. *Gilson*, 17 N. E. Rep. 343 (N. Y.); 34 Stat. 768, Food and Drugs Act; *Williams* v. *State*, 99 Arkansas, 149; Westervelt's Pure Food and Drug Laws; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

Mr. R. G. Pleasant, Attorney General of the State of Louisiana, and *Mr. G. A. Gondran* for defendant in error, submitted.

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

We accept the construction affixed by the court below to the statute and upon which alone it could in reason have held that the acts charged were embraced by its provisions. We hence disregard an intimation made in the argument of the defendant in error, that the statute is susceptible of a different interpretation and therefore that the claim of Federal right which was made below and which was necessarily passed upon need not be here considered. It is inconceivable that the statute should mean one thing for the purpose of determining whether the acts charged were within its terms and should then be held to mean another, for the purpose of escaping the Federal question. Thus considering the case in its true aspect, the single issue to be decided is, Did the State have power, without violating the equal protection or due process of

law clause of the Fourteenth Amendment, to forbid the sale by itinerant vendors of "any drug, nostrum, ointment or application of any kind intended for the treatment of disease or injury," although allowing the sale of such articles by other persons? That it did have such authority is so clearly the result of a previous ruling of this court (*Emert* v. *Missouri*, 156 U. S. 296), or at all events is so persuasively made manifest by the authorities cited and the reasoning which sustained the ruling of the court in the case just stated, as to leave no room for controversy on the subject (pp. 306–307). Moreover, the power which the state Government possessed to classify and regulate itinerant vendors or peddlers exerted in the statute under consideration is cumulatively sustained and made if possible more obviously lawful by the fact that the regulation in question deals with the selling by itinerant vendors or peddlers of drugs or medicinal compounds, objects plainly within the power of government to regulate.

Affirmed.

TEXAS & PACIFIC RAILWAY COMPANY *v.* RAILROAD COMMISSION OF LOUISIANA.

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

No. 186. Argued January 23, 1914.—Decided February 24, 1914.

Findings of fact concurred in by two lower courts will not be disturbed by this court unless shown to be clearly erroneous.
192 Fed. Rep. 280, affirmed.

THE facts are stated in the opinion.

Mr. Thomas J. Freeman for appellant, submitted.

Mr. Wylie M. Barrow, with whom *Mr. Ruffin G. Pleasant*, Attorney General of the State of Louisiana, was on the brief, for appellees.

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

Appellant, a corporation organized under the laws of the United States, filed its bill in equity in the Circuit Court for the Eastern District of Louisiana to restrain the enforcement of an order of the Louisiana Railroad Commission fixing rates for the carriage of cotton-seed and its products, on the ground that the order exceeded the powers conferred upon the Commission by the state law, indeed, was so unreasonably low as to be a violation of the due process clause of the state constitution. After issue joined the testimony was heard by a special master who found for complainant. The Circuit Court on exceptions filed by respondents to the master's report after reviewing the facts gave judgment sustaining the exceptions, setting aside the report and dismissing the bill on the ground that the evidence did not support the master's report—in other words, that the complainant had failed to prove its case. On appeal to the Circuit Court of Appeals the evidence was again reviewed, and the judgment affirmed. (192 Fed. Rep. 280.) This appeal was then taken.

Both the courts below passed on the facts and agreed in holding that appellant failed to establish by the evidence its right to the relief demanded, and the rule is well settled that findings of fact concurred in by two lower courts will not be disturbed by this court unless shown to be clearly erroneous. *Chicago Junction R. Co.* v. *King*, 222 U. S. 222; *Dun* v. *Lumbermen's Credit Ass'n*, 209 U. S. 20. As from an examination of the record we find no ground for concluding that there was plain error, the decree must be and is affirmed.

Affirmed.

LEROY FIBRE COMPANY *v.* CHICAGO, MILWAUKEE & ST. PAUL RAILWAY.

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

No. 175. Submitted January 19, 1914.—Decided February 24, 1914.

One's lawful uses of his own property cannot be subjected to the servitude of the wrongful use by another of the latter's property.

In an action at law by the owner of a natural product of the soil, such as flax straw, which he lawfully stored on his own premises and which was destroyed by fire caused by the negligent operation of a locomotive engine, to recover the value thereof from the railroad company operating the engine, it is not a question for the jury whether the owner was also negligent without other evidence than that the railroad company preceded the owner in the establishment of its business, that the property was inflammable in character and that it was stored near the railroad right of way and track.

It is not a question for the jury whether an owner who lawfully stores his property on his own premises adjacent to a railroad right of way and track is held to the exercise of reasonable care to protect it from fire set by the negligence of the railroad company and not resulting from unavoidable accident or the reasonably careful conduct of its business.

As respects liability for the destruction by fire of property lawfully held on private premises adjacent to a railroad right of way and track, the owner discharges his full legal duty for its protection if he exercises that care which a reasonably prudent man would exercise under like circumstances to protect it from the dangers incident to the operation of the railroad conducted with reasonable care.

THE following questions are certified:

"1. In an action at law by the owner of a natural product of the soil, such as flax straw, which he lawfully stored on his own premises and which was destroyed by fire caused by the negligent operation of a locomotive engine, to recover the value thereof from the railroad company operating the engine, is it a question for the jury whether the owner was also negligent without other evidence than

that the railroad company preceded the owner in the establishment of its business, that the property was inflammable in character and that it was stored near the railroad right of way and track?

"2. Is it a question for the jury whether an owner who lawfully stores his property on his own premises adjacent to a railroad right of way and track is held to the exercise of reasonable care to protect it from fire set by the negligence of the railroad company and not resulting from unavoidable accident or the reasonably careful conduct of its business?

"3. As respects liability for the destruction by fire of property lawfully held on private premises adjacent to a railroad right of way and track, does the owner discharge his full legal duty for its protection if he exercises that care which a reasonably prudent man would exercise under like circumstances to protect it from the dangers incident to the operation of the railroad conducted with reasonable care?"

The LeRoy Fibre Company, plaintiff in error (we will refer to it as plaintiff), brought an action against defendant in error (referred to herein as defendant) in a state court of Minnesota to recover the value of certain flax straw alleged to have been negligently burned and destroyed by defendant. The cause was removed to the Circuit Court for the District of Minnesota, where it was tried. One of the grounds of negligence set forth was that a locomotive engine of defendant, while passing the premises of plaintiff, was so negligently managed and operated by defendant's employés that it emitted and threw sparks and coals of unusual size upon the stacks of flax straw and thereby set fire to and destroyed them.

The evidence at the trial showed the following without dispute: "Some years after defendant had constructed and commenced operating its line of railroad through Grand Meadow, Minnesota, the plaintiff established at

that village a factory for the manufacture of tow from flax straw. The plaintiff had adjacent to its factory premises, a tract of ground abutting upon the railroad right of way and approximately 250 by 400 feet in dimension upon which it stored flax straw it purchased for use in its manufacturing business. There were about 230 stacks arranged in two rows parallel with the right of way. Each stack contained from three to three and a half tons of straw. The distance from the center of the railroad track to the fence along the line of the right of way, was fifty feet, from the fence to the nearest row of stacks, twenty or twenty-five feet, and from the fence to the second row of stacks, about thirty-five feet. A wagon road ran between the fence and the first row. On April 2, 1907, during a high wind, a fire started upon one of the stacks in the second row, and as a result all were consumed. The fire did not reach the stack through the intervening growth or refuse but first appeared on the side of the stack above the ground. The flax straw was inflammable in character. It was easily ignited and easily burned.

"There was substantial evidence at the trial tending to show that the fire was started by a locomotive engine of defendant which had just passed and that through the negligent operation of defendant's employés in charge, it emitted large quantities of sparks and live cinders which were carried to the straw stack by a high wind then prevailing. It was contended at the trial by defendant, that plaintiff itself was negligent and that its negligence contributed to the destruction of its property. There was no evidence that plaintiff was negligent save that it had placed its property of an inflammable character upon its own premises so near the railroad tracks, that is to say, the first row of stacks, seventy or seventy-five feet and the second row in which the fire started about eighty-five feet from the center of the railroad track. In other words, the character of the property and its proximity

to an operated railroad for which plaintiff was responsible was the sole evidence of plaintiff's contributory negligence.

"The trial court charged the jury that though the destruction of the straw was caused by defendant's negligence, yet if the plaintiff in placing and maintaining two rows of stacks of flax straw within a hundred feet of the center line of the railroad, failed to exercise that ordinary care to avoid danger of firing its straw from sparks from engines passing on the railroad that a person of ordinary prudence, would have exercised, under like circumstances and that the failure contributed to cause the accident the plaintiff could not recover. The trial court also submitted two questions to the jury as follows:

"1. Did the Fibre Company in placing and keeping two rows of flax straw within one hundred feet of the center line of the railroad, fail to use the care to avoid danger to its straw from sparks of fire from engines operating on that railroad, that a person of ordinary prudence would have used under like circumstances? 2. Did the engineer McDonald, fail to use that degree of care to prevent sparks from his engine from firing the stacks as he passed them, on April 2, 1907, that a person of ordinary prudence would have used under like circumstances?

"The jury answered both questions in the affirmative and found a general verdict for the defendant. Judgment was accordingly entered for defendant. The plaintiff duly saved exceptions to the charge of the court regarding its contributory negligence and to the submission of the first question to the jury, and has assigned the action of the court as error."

Mr. John F. Fitzpatrick, *Mr. E. P. Sanborn* and *Mr. F. M. Catlin* for Le Roy Fibre Company:

In an action at law by the owner of a natural product

of the soil such as flax straw, which he lawfully stored on his own premises and which was destroyed by fire caused by the negligent operation of a locomotive engine to recover the value thereof from the railroad company operating the engine, it is not a question for the jury whether the owner was also negligent without other evidence than that the railroad company preceded the owner in the establishment of its business, that the property was inflammable in character and that it was stored near the railroad right of way and track.

The owner has the same right to use his property adjacent to a railroad right of way for any lawful purpose for which it is adapted as he would have if there was no railroad there. The only limitation upon the use and enjoyment of his property is that he use it in such a manner as not to injure that of another.

In storing his own property upon his own premises he exercises a lawful right. From that act no possible injury can come. In locating it on his own premises even near the right of way he owes the railroad company no duty to anticipate or guard against injury to it from the negligence of the railroad company. Without the breach of some duty by the owner there can be no negligence on his part.

He has violated no duty and hence is guilty of no negligence. *Grand Trunk R. R. Co.* v. *Richardson*, 91 U. S. 454, 473; *Cincinnati &c. R. R. Co.* v. *South Fork Coal Co.*, 139 Fed. Rep. 530; Thompson on Negligence, § 2314; Shearman & Redfield on Negligence, § 680; *Richmond & D. R. R. Co.* v. *Medley*, 75 Virginia, 499; *Louis. & Nash. R. R. Co.* v. *Marbury Lumber Co.*, 125 Alabama, 235; *Patten* v. *St. Louis &c. R. R. Co.*, 87 Missouri, 117; *Kellogg* v. *C. N. W. R. R. Co.*, 26 Wisconsin, 223; *Salmon* v. *Ry. Co.*, 38 N. J. L. 5; *L. & N. R. R. Co.* v. *Richardson*, 66 Indiana, 43; *Pittsburgh &c. R. R. Co.* v. *Jones*, 86 Indiana, 496; *Louisville & N. R. R. Co.* v.

Beeler (Ky.), 103 S. W. Rep. 300; *Cleveland, C. St. L. R. R. Co.* v. *Scantland* (Ind.), 51 N. E. Rep. 1068; *Phila. R. R. Co.* v. *Hendrickson*, 80 Pa. St. 182; *Reed* v. *Missouri P. R. R. Co.*, 50 Mo. App. 504; *Rutherford* v. *Texas & P. R. R. Co.* (Texas), 61 S. W. Rep. 422; *Gulf, C. & S. R. R. Co.* v. *Fields*, 2 Texas App. Civ. Cas. 700; *Kimball* v. *Borden*, 97 Virginia, 477; *Kalbfleisch* v. *Long Island R. R. Co.*, 102 N. Y. 520; *Louisville & N. R. R. Co.* v. *Malone*, 116 Alabama, 600; 3 Elliott on Railroads, § 1228.

It is not a question for the jury whether an owner who lawfully stores his property on his own premises adjacent to a railroad right of way and track is held to the exercise of reasonable care to protect it from fire set by the negligence of the railroad company and not resulting from unavoidable accident or the reasonably careful conduct of its business.

The doctrine of contributory negligence of the owner has no application in such a case. *Louis. & Nash. R. R. Co.* v. *Marbury*, 125 Alabama, 235; 50 L. R. A. 620; *Phila. R. R. Co.* v. *Hendrickson*, 80 Pa. St. 182; 13 Am. & Eng. Ency. 482; 2 Thompson on Negligence, § 2314; *Kendrick* v. *Towle*, 60 Michigan, 363; *Mississippi Ins. Co.* v. *Louisville R. R. Co.*, 70 Mississippi, 119; *Louisville R. R. Co.* v. *Beeler* (Ky.), 11 L. R. A. (N. S.) 930.

As respects liability for the destruction by fire of property lawfully held on private premises adjacent to a railroad right of way and track the owner discharges his full legal duty for its protection if he exercises that care which a reasonably prudent man would exercise under like circumstances to protect it from the dangers incident to the operation of the railroad conducted with reasonable care. *Fero* v. *Buffalo R. R. Co.*, 22 N. Y. 209; *Cook* v. *Champlain Trans. Co.*, 1 Denio, 91.

The negligence of the railroad company is the proximate cause of the loss. *Reed* v. *Mo. Pac. R. Co.*, 50 Mo. App. 504; *Louis. & Nash. R. R. Co.* v. *East Tenn. R. R.*

Co., 60 Fed. Rep. 993; *Inland Co.* v. *Tolson*, 139 U. S. 551, 558.

Mr. H. H. Field and *Mr. M. B. Webber* for the Railway Company:

The contention of plaintiff in error that no matter how one may conduct his business upon his own premises, contributory negligence cannot be urged against him in a case brought by him to recover damages caused to his property by the negligence of an adjacent owner; that no case of the kind can arise which presents the question of contributory negligence as one of fact for a jury; that one may conduct his own business in a manner best adapted to invite the very peril which overtakes him, and nevertheless recover damages notwithstanding his culpable carelessness, because his negligent act was committed upon his own premises, is unsound. The question is, whether under all the circumstances an ordinarily prudent man would or would not have so acted, and such questions are eminently for a jury.

When one conducts his business in a manner, and at a place, such as a person of ordinary care and prudence would not, then he is not within the protection of the law as outlined in cases relied upon by opposing counsel. *Railway Co.* v. *Johnson*, 54 Fed. Rep. 474; *Clark* v. *Railway Co.*, 129 Fed. Rep. 341.

The voluntary and needless accumulation of shavings or other combustible matter upon the land close to a railroad has been regarded and held to constitute contributory negligence. Such a case is plainly distinguishable from those cases in which combustible matter had accumulated by the act of nature. Shearman & Redfield on Negligence, § 679; *Murphy* v. *Chicago &c. Ry. Co.*, 45 Wisconsin, 222; *Ward* v. *Milwaukee Ry. Co.*, 29 Wisconsin, 144; see also *Collins* v. *N. Y. Cent. Ry. Co.*, 5 Hun, 499; *S. C.*, 71 N. Y. 609; *Niskern* v. *Chicago Ry. Co.*, 22 Fed. Rep. 811; *Railway*

Co. v. *Shanefelt*, 47 Illinois, 497; *Hoffman* v. *C., M. & St. P. Ry. Co.*, 40 Minnesota, 60; *Karsen* v. *C., M. & St. P. Ry. Co.*, 29 Minnesota, 12; *Martin* v. *North Star Iron Works*, 31 Minnesota, 407; *Schell* v. *Second National Bank*, 14 Minnesota, 34; *Murphy* v. *C. & N. W. Ry. Co.*, 45 Wisconsin, 222; *Fero* v. *Buffalo &c. Ry. Co.*, 22 N. Y. 209; *Omaha Fair Co.* v. *Mo. Pac. Ry. Co.*, 60 N. W. Rep. 320.

A party who erects his buildings on or near the track of a railway company knows the dangers incident to the use of steam as a motive power, and must be held to assume some of the hazards connected with its use on those great thoroughfares. *Toledo, W. & W. R. R. Co.* v. *Larmon*, 67 Illinois, 68; *Chicago & Alton R. R. Co.* v. *Pennell*, 94 Illinois, 448; see also *Kansas City &c. R. R.* v. *Owen*, 25 Kansas, 419; *K. P. R. R. Co.* v. *Bradey*, 17 Kansas, 380; *Mo. Pac. Ry. Co.* v. *Cornell*, 30 Kansas, 35; *G. W. Ry. Co.* v. *Haworth*, 39 Illinois, 347.

The rule that contributory negligence on the part of plaintiff will bar a recovery, is relaxed in Illinois, only in cases where the negligence of the plaintiff is slight, and that of the defendant in comparison gross. *Railroad Co.* v. *Hillmar*, 72 Illinois, 235; *Ill. Cent. R. R. Co.* v. *Hammer*, 72 Illinois, 347; *C. & N. W. Ry. Co.* v. *Hatch*, 79 Illinois, 137; *Kewanee* v. *Depew*, 80 Illinois, 119; *C., B. & Q. Ry. Co.* v. *Gregory*, 58 Illinois, 272.

However, the doctrine of comparative negligence does not prevail in Minnesota, and we believe does obtain only in Illinois and Georgia. Neither does the last chance doctrine prevail in Minnesota. Such a rule in cases of concurrent negligence proximately contributing to the injury, would practically do away with the doctrine of contributory negligence. *Fonda* v. *St. Paul City Ry. Co.*, 71 Minnesota, 438. See Bigelow on Torts, 311, see also *Keese* v. *C. & N. W. Ry. Co.*, 30 Iowa, 78; *Garrett* v. *Railway Co.*, 36 Iowa, 121; *Slosson* v. *Railway Co.*, 60 Iowa, 215; *Bryant* v. *Railway Co.*, 56 Vermont, 710.

Many of the cases cited by counsel, when limited to the precise points presented by their facts, can be distinguished from this case. So as to *Inland Coasting Co.* v. *Tolson*, 139 U. S. 551; *Grand Trunk R. R. Co.* v. *Richardson*, 91 U. S. 454; *Louisville Ry. Co.* v. *Beeler*, 11 L. R. A. (N. S.) 930.

In the absence of special legislation a man does not become a wrongdoer by leaving his property in a state of nature. *Salmon* v. *Railroad Co.*, 38 N. J. L. 5; *Kellogg* v. *Railroad Co.*, 26 Wisconsin, 223.

It is not always a breach of duty that constitutes negligence. One may be negligent in using his own property, and yet owe no duty to his neighbor to handle it carefully. But when such negligence combined with that of his neighbor causes one damage, which would not have resulted had he been ordinarily careful, he cannot saddle the loss upon his neighbor.

The instant case is not one involving damage to property left in its natural state,—as for instance a timber lot, a farmer's meadow, or the stubble on his grain field,—but does involve the affirmative act of bringing in from the adjacent country the most inflammable product of the field, and stacking it on a vacant lot abutting the right of way of the defendant in error, where it was more likely to be burned than not,—an act no ordinarily prudent person would have done.

If the contention of counsel for plaintiff in error is declared the law, a ready and profitable market will then be made for many kinds of property not otherwise saleable.

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

The questions certified present two facts—(1) The negligence of the railroad was the immediate cause of the destruction of the property. (2) The property was placed

by its owner near the right of way of the railroad, but on the owner's own land.

The query is made in the first two questions whether the latter fact constituted evidence of negligence of the owner to be submitted to the jury. It will be observed, the use of the land was of itself a proper use—it did not interfere with nor embarrass the rightful operation of the railroad. It is manifest, therefore, the questions certified, including the third question, are but phases of the broader one, whether one is limited in the use of one's property by its proximity to a railroad; or, to limit the proposition to the case under review, whether one is subject in its use to the careless as well as to the careful operation of the road. We might not doubt that an immediate answer in the negative should be given if it were not for the hesitation of the Circuit Court of Appeals evinced by its questions, and the decisions of some courts in the affirmative. That one's uses of his property may be subject to the servitude of the wrongful use by another of his property seems an anomaly. It upsets the presumptions of law and takes from him the assumption and the freedom which comes from the assumption, that the other will obey the law, not violate it. It casts upon him the duty of not only using his own property so as not to injure another, but so to use his own property that it may not be injured by the wrongs of another. How far can this subjection be carried? Or, confining the question to railroads, what limits shall be put upon their immunity from the result of their wrongful operation? In the case at bar, the property destroyed is described as inflammable, but there are degrees of that quality; and how wrongful must be the operation? In this case, large quantities of sparks and "live cinders" were emitted from the passing engine. Houses may be said to be inflammable, and may be, as they have been, set on fire by sparks and cinders from defective or carelessly handled locomotives. Are they to be subject as well as

stacks of flax straw, to such lawless operation? And is the use of farms also, the cultivation of which the building of the railroad has preceded? Or is that a use which the railroad must have anticipated and to which it hence owes a duty, which it does not owe to other uses? And why? The question is especially pertinent and immediately shows that the rights of one man in the use of his property cannot be limited by the wrongs of another. The doctrine of contributory negligence is entirely out of place. Depart from the simple requirement of the law, that every one must use his property so as not to injure others, and you pass to refinements and confusing considerations. There is no embarrassment in the principle even to the operation of a railroad. Such operation is a legitimate use of property; other property in its vicinity may suffer inconveniences and be subject to risks by it, but a risk from wrongful operation is not one of them.

The legal conception of property is of rights. When you attempt to limit them by wrongs, you venture a solecism. If you declare a right is subject to a wrong you confound the meaning of both. It is difficult to deal with the opposing contention. There are some principles that have axiomatic character. The tangibility of property is in its uses and that the uses by one owner of his property may be limited by the wrongful use of another owner of his, is a contradiction. But let us pass from principle to authority.

Grand Trunk Railroad Company v. *Richardson*, 91 U. S. 454, was an action for damages for the destruction of a sawmill, lumber shed and other buildings and manufactured lumber, by fire communicated by a locomotive engine of a railroad. Some of the buildings were erected in part on the company's land near its track, and the railroad company requested the court to charge the jury that the erection of the buildings or the storing of lumber so near the company's track, as the evidence showed, was an

improvident or careless act, and that if such location contributed in any degree to the loss which ensued, then the plaintiffs could not recover, even though the fire was communicated by the railroad company's locomotive. The court refused the request and its action was sustained. Mr. Justice Strong, speaking for the court, said, "Such a location, if there was a license for it [it not then being a trespass], was a lawful use of its property by the plaintiffs; and they did not lose their right to compensation for their loss occasioned by the negligence of the defendant. *Cook* v. *Champlain Transp. Co.*, 1 Den. 91; *Fero* v. *Railroad*, 22 N. Y. 215."

In *Cincinnati &c. R. R. Co.* v. *South Fork Coal Co.*, 139 Fed. Rep. 528, 530, there was the destruction of lumber placed on the railroad's right of way by permission of the railroad. It was destroyed by fire occurring through the negligent operation of the railroad's trains. Contributory negligence was urged against the right of recovery. The court (Circuit Court of Appeals for the Sixth Circuit), commenting on the cases cited by the railroad, said: "But in so far as the opinions go upon the theory that a plaintiff must lose his right of compensation for the negligent destruction of his own property situated upon his own premises because he had exposed it to dangers which could come to it only through the negligence of the railroad company, they do not meet our approval."

After citing cases, the court continued, "The rights of persons to the use and enjoyment of their own property are held upon no such tenure as this. The principle would forbid the use of property for many purposes if in such proximity to a railroad track as to expose it to dangers attributable to the negligent management of its business." Other cases might be adduced. They are cited in Thompson on Negligence, § 2314, and Shearman and Redfield on Negligence, § 680, for the principle that an owner of property is not limited in the uses of his property by its

proximity to a railroad, or subject to other risks than those which come from the careful operation of the road or unavoidable accident.

The first and second questions we answer in the negative, and the third question in the affirmative.

So ordered.

MR. JUSTICE HOLMES partially concurring.

The first two questions concern a standard of conduct and therefore that which in its nature and in theory is a question of law. In this, I gather, we all agree, although the proposition often is forgotten or denied. But while the standard is external to the judgment of the party concerned and must be known and conformed to by him at his peril, *The Germanic*, 196 U. S. 589, 596, courts, by a practice that seems at first sight an abdication of their function where it is most needed but that I dare say is justified by good sense, in nice cases leave the standard to the jury as well as the facts. In the questions before us, however, the elements supposed are few and frequently recurring, so that but for what I have to say I should be very content to find that we were able to lay down the proper rule without a jury's aid. Furthermore, with regard to what that rule should be, I agree, for the purposes of argument, that as a general proposition people are entitled to assume that their neighbors will conform to the law; that a negligent tort is unlawful in as full a sense as a malicious one, and therefore that they are entitled to assume that their neighbors will not be negligent.

Nevertheless I am not prepared to answer the first question, No, if it is to be answered at all. We are bound to consider that at a trial the case would be presented with more facts—that this case was presented with at least one more fact bearing upon the right to recover—I mean the distance. If a man stacked his flax so near to a railroad

that it obviously was likely to be set fire to by a well-managed train, I should say that he could not throw the loss upon the road by the oscillating result of an inquiry by the jury whether the road had used due care. I should say that although of course he had a right to put his flax where he liked upon his own land, the liability of the railroad for a fire was absolutely conditioned upon the stacks being at a reasonably safe distance from the train. I take it that probably many, certainly some, rules of law based on less than universal considerations are made absolute and universal in order to limit those over refined speculations that we all deprecate, especially where such rules are based upon or affect the continuous physical relations of material things. The right that is given to inflict various inconveniences upon neighboring lands by building or digging, is given, I presume, because of the public interest in making improvement free, yet it generally is made absolute by the common law. It is not thought worth while to let the right to build or maintain a barn depend upon the speculations of a jury as to motives. A defect in the highway, declared a defect in the interest of the least competent travellers that can travel unattended without taking legal risks, or in the interest of the average man, I suppose to be a defect as to all. And as in this case the distinction between the inevitable and the negligent escape of sparks is one of the most refined in the world, I think that I must be right so far, as to the law in the case supposed.

If I am right so far, a very important element in determining the right to recover is whether the plaintiff's flax was so near to the track as to be in danger from even a prudently managed engine. Here certainly, except in a clear case, we should call in the jury. I do not suppose that any one would call it prudent to stack flax within five feet of the engines or imprudent to do it at a distance of half a mile, and it would not be absurd if the law ulti-

mately should formulate an exact measure, as it has tended to in other instances; (*Martin* v. *District of Columbia*, 205 U. S. 135, 139;) but at present I take it that if the question I suggest be material we should let the jury decide whether seventy feet was too near by the criterion that I have proposed. Therefore, while the majority answer the first question, No, on the ground that the railroad is liable upon the facts stated as matter of law, I should answer it Yes, with the proviso that it was to be answered No, in case the jury found that the flax although near, was not near enough to the trains to endanger it if the engines were prudently managed, or else I should decline to answer the question because it fails to state the distance of the stacks.

I do not think we need trouble ourselves with the thought that my view depends upon differences of degree. The whole law does so as soon as it is civilized. See *Nash* v. *United States*, 229 U. S. 373, 376, 377. Negligence is all degree—that of the defendant here degree of the nicest sort; and between the variations according to distance that I suppose to exist and the simple universality of the rules in the Twelve Tables or the Leges Barbarorum, there lies the culture of two thousand years.

I am authorized to say that THE CHIEF JUSTICE concurs in the opinion that I express.

JONES, RECEIVER, *v.* ST. LOUIS LAND AND CATTLE CO.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 203. Argued January 27, 1914.—Decided February 24, 1914.

The act of June 21, 1860, expressly reserved the adverse rights of parties to the Mexican and Spanish grants confirmed thereby and provided that the confirmations should only be considered as quitclaims and relinquishments on the part of the United States.

The act of June 21, 1860, confirming Mexican and Spanish grants, was intended to be a discharge of the obligations of our treaty with Mexico and a confirmation of existing rights as they existed; it was not a gratuity like the railroad land grant acts, nor are overlapping rights in grants confirmed thereby to be shared equally as overlapping railroad grants are shared. *Southern Pacific R. R. Co.* v. *United States*, 183 U. S. 519, distinguished.

Where two grants confirmed by the act of June 21, 1860, overlapped, the rights of the owner of each as against the other were reserved by the act, and the judicial inquiry extends to the character of the original concessions, and the court must determine which gave the better right to the disputed premises.

In this case *held*, that of two overlapping Mexican grants both confirmed by the act of June 21, 1860, the earlier grant was in all of its steps prior to the other grant and included all of the overlap.

A survey was necessary to the accurate segregation and delimitation of a Mexican grant confirmed by the act of 1860. *Stoneroad* v. *Stoneroad*, 158 U. S. 240.

THE facts, which involve the title of the parties to certain Mexican land grants, are stated in the opinion.

Mr. Andrieus A. Jones for appellant:

The Jefe Politico was never authorized to grant lands.

The Spanish system was abrogated by Independence.

The Plan of Iguala did not continue Spanish system.

The Spanish system was abolished by law of 1823.

There is no presumption in favor of the Beck grant.

The survey of the Beck grant gives no preference.

The confirmation of the Beck grant does not relate back to the date of the application to Surveyor General.

In support of these contentions appellant cites: *Banks* v. *Moreno*, 39 California, 233; *Barry* v. *Gamble*, 3 How. 32; *Beard* v. *Federy*, 3 Wall. 479; *Berthold* v. *McDonald*, 24 Missouri, 126; *Berthold* v. *McDonald*, 22 How. 334; *Bissell* v. *Henshaw*, 1 Sawyer, 553; *Butler and Bakers Case*, 2 Coke, 29; *Carpentier* v. *Montgomery*, 13 Wall. 480; *Cessna* v. *United States*, 169 U. S. 165; *Chicago &c. R. R.* v. *United States*, 159 U. S. 372; *Chouteau* v. *Eckert*, 2 How. 345; *In re Cooper*, 143 U. S. 503; *Dent* v. *Emmeger*, 14 Wall. 308; *Doe* v. *Eslava*, 9 How. 421; *Ely* v. *United States*, 171 U. S. 220; *Evans* v. *Durango Land Co.*, 85 Fed. Rep. 433; *Gibson* v. *Chouteau*, 13 Wall. 101; *Good* v. *McQueen*, 3 Texas, 241; *Hale* v. *Ackers*, 69 California, 160; *Hayes* v. *United States*, 170 U. S. 637; *Henshaw* v. *Bissell*, 18 Wall. 225; *Holliman* v. *Prebles*, 1 Texas, 673; *Jackson* v. *Baird*, 4 Johns. 230; *Jones* v. *Garza*, 11 Texas, 186; *Jones* v. *Muisbach*, 26 Texas, 236; *Jones* v. *United States*, 137 U. S. 202; *Lanfear* v. *Hunley*, 4 Wall. 204; *Landis* v. *Brandt*, 10 How. 370; *Leese* v. *Clark*, 3 California, 16; *Lesbois* v. *Brammell*, 4 How. 449; *Lynch* v. *Bernal*, 9 Wall. 315; *McCabe* v. *Worthington*, 16 How. 86; *Maynard* v. *Massie*, 8 How. 307; *Mitchell* v. *Furman*, 180 U. S. 402; *Moore* v. *Steinbach*, 127 U. S. 70; *Pino* v. *Hatch*, 1 New Mex. 125; *Republic* v. *Thorn*, 3 Texas, 499; *Rodriguez* v. *United States*, 1 Wall. 482; *St. Paul &c. Co.* v. *Winona Co.*, 112 U. S. 720; *Sheldon* v. *Milmo*, 29 S. W. Rep. 832; *Sioux City &c. Co.* v. *United States*, 159 U. S. 349; *So. Pac. Ry. Co.* v. *United States*, 183 U. S. 519; *Stoneroad* v. *Beck*, 16 New Mex. 754; *Stoneroad* v. *Stoneroad*, 158 U. S. 241; *Trenier* v. *Stewart*, 101 U. S. 797; *United States* v. *Peralta*, 19 How. 347; *United States*

v. *Coe*, 171 U. S. 681; *United States* v. *Hartley*, 22 How. 288; *Yates* v. *Iams*, 10 Texas, 168; *Yates* v. *Houston*, 3 Texas, 433.

Mr. Charles A. Spiess and *Mr. S. B. Davis, Jr.*, for appellee, submitted:

Looking behind the confirmations, the claimants of the Beck grant had a better title under Mexican Government than the claimants of the Perea grant.

There is no title in claimants of Perea grant under the Mexican Government.

There is a perfect legal title in claimants of Beck grant under the Mexican Government.

The acts of officers of the Mexican Government in accordance with laws of Spain raises a legal presumption that the authority existed to dispose of public domain.

The Beck grant was ratified by Mexican Government.

The title to the Beck grant is better than that to the Perea grant even if not perfect under the laws of Mexico.

The proceedings had before tribunals and officers of United States give the better title to the Beck grant.

An approved survey was essential to attaching of confirmation, and the Beck grant was first to obtain approved survey.

The confirmation of the Beck grant was legally prior to that of the Perea grant.

In support of these contentions appellee cites: *Ainsa* v. *United States*, 160 U. S. 234; *Astiazaran* v. *Santa Rita Mining Co.*, 148 U. S. 84; *Beard* v. *Federy*, 3 Wall. 491, 493; *Berthold* v. *McDonald*, 22 How. 340; *Bryan* v. *Forsythe*, 19 How. 334; *Crowley* v. *Wallace*, 12 Missouri, 145; *Dent* v. *Emmeger*, 14 Wall. 312; *Doe* v. *Eslava*, 9 How. 446; *Ely* v. *United States*, 171 U. S. 221; *Foster* v. *Neilson*, 2 Pet. 253; *Garcia* v. *Lee*, 12 Pet. 515; *Grisar* v. *McDowell*, 6 Wall. 375, 379; *Haynes* v. *United States*, 170 U. S. 637; *Henshaw* v. *Bissell*, 18 Wall. 265, 266; *Jackson*

v. *M'Michael*, 3 Cowen, 75; *Landes* v. *Brant*, 10 How. 372, 373; *Langdeau* v. *Hanes*, 21 Wall. 521, 530; *Leese* v. *Clark*, 3 California, 16; *Malarin* v. *United States*, 1 Wall. 289; *Miller* v. *Dale*, 92 U. S. 474; *Moore* v. *Steinbach*, 127 U. S. 80; *Pino* v. *Hatch*, 1 New Mex. 133; *Pollard* v. *Files*, 2 How. 603; *Rodrigues* v. *United States*, 1 Wall. 582; *Russell* v. *Maxwell Land Co.*, 158 U. S. 258; *Rutherford* v. *Green*, 2 Wh. 296; *Shaw* v. *Kellogg*, 170 U. S. 341; *Shipley* v. *Cowan*, 91 U. S. 337; *So. Pac. R. R. Co.* v. *United States*, 183 U. S. 519; *Stark* v. *Starrs*, 6 Wall. 418; *Stoneroad* v. *Stoneroad*, 158 U. S. 241, 243; *Trenier* v. *Stewart*, 101 U. S. 810; *United States* v. *Conway*, 175 U. S. 67; *United States* v. *Green*, 185 U. S. 257; *United States* v. *Pena*, 175 U. S. 504; *United States* v. *Peralta*, 19 How. 347, 348; *United States* v. *Pico*, 5 Wall. 539; *United States* v. *Sherbeck*, 27 Fed. Cas. No. 16275; *United States* v. *Vallejo*, 1 Black, 541.

MR. JUSTICE MCKENNA delivered the opinion of the court.

In the year 1876 this suit was instituted by William P. Beck *et al.* for the purpose of determining the title of the parties to what is known as the Preston Beck grant, and for a partition of the same. This grant conflicts with a certain other grant, known as the Perea grant, to the extent of about 5,000 acres. In the year 1903, Andrieus A. Jones, appellant, was appointed receiver of the Beck grant and entered into possession of it, including the land in conflict. The St. Louis Land & Cattle Company, appellee, filed an intervening petition in the cause and set up a claim to the land in conflict and prayed as relief that the receiver be ordered to surrender to it the land claimed. Answer was filed to the petition which, among other things, denied that the Land & Cattle Company had any right, title or interest in the land.

After hearing, the district court decided in favor of the receiver and dismissed the petition in intervention. The decree was reversed by the Supreme Court of the Territory and this appeal was then taken.

The question in the case is, Of which grant is the conflict land a part?

Both grants were reported favorably by the Surveyor General of the Territory to Congress for confirmation, the Beck grant September 30, 1856, the Perea grant September 15, 1857. Both were confirmed by Congress in the act of June 21, 1860, c. 167, 12 Stat. 71. The act recited the fact of the recommendation for confirmation by the Surveyor General of the Territory of certain private land claims in the Territory and confirmed them under the numbers by which he had designated them, the Beck grant being No. 1 and the Perea grant being No. 16.

Section 4 of the act provided "That the foregoing confirmations shall only be considered as quit claims or relinquishments, on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever."

The arguments of counsel have taken a wide range, but we think the decision of the case can be put on a short ground. Both grants have the same Mexican source, that is, they are grants by the political chief (governor) and the territorial deputation. The Beck grant was the prior one, its date being December, 1823; that of the Perea grant, March, 1825. Juridical possession was given of the Beck grant; it was not of the Perea grant. The Beck grant was presented for confirmation to the Surveyor General of New Mexico in May, 1855, and declared valid by that officer, and a report made thereof September 30, 1856, to the Secretary of the Interior for confirmation by Congress. The Perea grant was presented for confirmation in 1857, decided to be valid and reported to the Secretary of the Interior. Both grants, we have seen, were con-

firmed by Congress by the same act. In 1860 the Beck grant was duly surveyed and the survey approved, and on June 13, 1883, a patent was duly issued for the grant as surveyed. The survey of the Perea grant was not made until 1871. It will be observed, therefore, that the Beck grant, in all of its steps, preceded the Perea grant.

The Supreme Court of New Mexico, however, was of opinion that those steps could not be considered and that both grants were invalid under the Mexican law and took their efficacy solely from the act of Congress, and that, therefore, the parties "holding by the same act of Congress, in so far as their grants conflict or overlap, have each an 'equal undivided moiety of the lands within the conflict,'" applying the principle of *Southern Pacific Railroad Co.* v. *United States*, 183 U. S. 519. In this, we think the court erred. The act of Congress was not a gratuity, it was intended to be a discharge of the obligations of the treaty between the United States and Mexico. It was a confirmation of rights which existed, and as they existed.

The reports of the Surveyor General were made under the authority of the act of Congress of July 22, 1854, c. 103, § 8, 10 Stat. 308, 309, which made it the duty of that officer "to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico." He was required to make report thereof "denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages and customs of the country before its cession to the United States, . . . which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants, and give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico."

The proceedings, therefore, for the confirmation of titles,

derived from Mexico commenced with the Surveyor General and were consummated by the confirming act, the Surveyor General deciding in the first instance. The petition to him "is the commencement of proceedings, which necessarily involve the validity of the grant from the Mexican government." Congress, however, constituted itself the tribunal of ultimate decision of the validity or invalidity of the claim, as, of course, it might do in the discharge of the treaty obligations, or delegate that duty to the judicial department. *Tameling* v. *United States Freehold Co.*, 93 U. S. 644; *Astiazaran* v. *Santa Rita Mining Co.*, 148 U. S. 80, 82, 84; *Stoneroad* v. *Stoneroad*, 158 U. S. 240, 248.

The confirmation, therefore, cannot be dissociated from what preceded it, and it may be said of such direct confirmation by act of Congress, as has been said of confirmation through special tribunals created by Congress, that it constitutes a declaration of the validity of the claim under the Mexican laws and that the claim is entitled to recognition and protection by the stipulations of the treaty. *Beard* v. *Federy*, 3 Wall. 478, 492. And if there be claims under two patents, each of which reserves the rights of the other parties, the inquiry must extend to the character of the original concession. The controversy can only be settled by determining which of these two gives the better right to the demanded premises. *Henshaw* v. *Bissell*, 18 Wall. 255, 266.

In *Miller* v. *Dale*, 92 U. S. 473, 474, there was a conflict between a concession of the Mexican government, confirmed by the tribunals of the United States and a survey thereon and a patent of the United States issued upon a similar confirmed concession, and the question in the case was which gave the better right to the premises. This court said: "To answer the question we must look into the character of the original concessions; and, if they furnish no guide to a correct conclusion, we must seek a

solution in the proceedings had before our tribunals and officers by which the claims of the parties were determined." This rule is the only just and practical one, and, besides, the act of Congress confirming the Beck and Perea grants saved to each rights against the other by § 4 of the act.

It is urged, however, that this doctrine is opposed by *Dent* v. *Emmeger*, 14 Wall. 308, 312, *Les Bois* v. *Bramell*, 4 How. 449, and the cases cited by them. In *Dent* v. *Emmeger*, it was said of grants which were described as of "imperfect obligation and affected only the conscience of the new sovereign" and received from it "a vitality and efficacy which they did not before possess," that "when confirmed by Congress they became American titles and took their validity wholly from the act of confirmation and not from any French or Spanish element which entered into their previous existence. The doctrine of senior or junior equities and of relation back has no application in the jurisprudence of such cases."

Of the same character were the rights in the other cases. In some of them there were mere orders for surveys and promises of title which the new sovereign was under no obligation to yield to. In the case at bar we are dealing with rights which were recognized by the new sovereign because they were supposed to have legal validity under the old sovereign.

It is true in the case at bar, such validity is contested, and the contest is certainly justified as to the Perea grant. It was decided in *Hayes* v. *United States*, 170 U. S. 637, 643, 644, that after it was decreed by the general constituent Congress July 6, 1824, that "the province of New Mexico remains a territory of the federation," the adoption by the same Congress of a general colonization law, August 18, 1824, and a permanent constitution October 24 of the same year, the officials of the Territory had no "power to dispose of the public lands, even though it be

arguendo conceded that such power had been theretofore possessed by the officials who exercised authority within the area which was made a territory by the constitution." But this only in passing. We are not called upon to consider the power of the territorial officers. The validity of the grants have been pronounced by Congress and we are only required to consider their relation to each other and the public domain. We have seen that the Beck grant in all of its steps, was prior to the Perea grant. Juridical possession was given of it before the Perea grant was applied for and the conveyance of the land embraced within its boundaries made complete. It was confirmed first by the Surveyor General of the Territory and surveyed first by the Interior Department, and a survey "was essential to its accurate segregation and delimitation." *Stoneroad* v. *Stoneroad, supra,* 158 U. S. 240, 250.

It follows from these views that the land in conflict is part of the Beck grant, and the judgment of the Supreme Court of the Territory is reversed and the cause remanded to the Supreme Court of the State for further proceedings not inconsistent with this opinion.

Reversed.

TAYLOR, ADMINISTRATRIX, *v.* TAYLOR.

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

No. 224. Argued January 30, 1914.—Decided February 24, 1914.

The Employers' Liability Act of 1908, as amended in 1910, supersedes all state statutes upon the subject covered by it, and the distribution of the amount recovered in an action for death of an employé is determined by the provisions of that act and not by the state law.

The source of right of the widow of an employé of an interstate carrier to maintain an action for his death is the Federal statute, whether the cause of action is based on § 1 or § 9, and the father of the deceased is not entitled to share in the amount recovered.

THE facts, which involve the construction of the Federal Employers' Liability Act of 1908 as amended in 1910, are stated in the opinion.

Mr. Frederic D. McKenney, with whom *Mr. George F. Brownell*, *Mr. John Spalding Flannery* and *Mr. William Hitz* were on the brief, for plaintiff in error:

It was error for the state court to hold that the net proceeds of the judgment recovered in the action of the administratrix against the railroad company, under the circumstances shown in the record herein, were not distributable under the provisions of the Federal Employers' Liability Act of 1908 as amended in 1910.

The net proceeds of this judgment are not "assets of the decedent's estate" within the ordinary acceptation of that phrase.

In support of these contentions see: *American R. R. Co.* v. *Didrickson*, 227 U. S. 145, 149; *Florida Cent. Ry. Co.* v. *Sullivan*, 120 Fed. Rep. 799; *Gulf &c. R. Co.* v. *McGinnis*, 228 U. S. 173, 175; *McCarty* v. *N. Y., L. E. & W. R. Co.*, 62 Fed. Rep. 437; *McCulloch* v. *Maryland*, 4 Wh. 316; *McCune* v. *Essig*, 199 U. S. 387; *Marvin* v. *Maysville St. R. R. Co.*, 49 Fed. Rep. 436; *Mich. Cent. R. Co.* v. *Vreeland*, 227 U. S. 56, 67; *Mo., Kans. & Tex. Ry. Co.* v. *Wulf*, 226 U. S. 570, 576; *Mondou* v. *N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1; *St. L., Iron M. & S. R. Co.* v. *Hesterly*, 228 U. S. 702; *St. Louis &c. R. Co.* v. *Seale*, 229 U. S. 156, 158; *Smith* v. *Alabama*, 124 U. S. 465, 473; *Stewart* v. *Balt. & Ohio R. R. Co.*, 168 U. S. 445; *United States* v. *Hall* 98 U. S. 343; *Wilson* v. *Tootle*, 55 Fed. Rep. 211.

No brief was filed for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The plaintiff in error and defendant in error are respectively the widow and father of one Howard Taylor, a resident of Orange County, State of New York, who through the negligence of the Erie Railroad Company met with an accident which caused his death.

Plaintiff in error was appointed the administratrix of his estate with right to prosecute any right of action granted by special provision of law as such administratrix. She brought suit, as such administratrix, against the Railroad Company for damages, alleging the employment of her husband in interstate commerce upon a train running from Port Jervis, New York, to Jersey City, New Jersey, the negligence of the Railroad Company as the cause of his death, and that the action was brought under the act of Congress of April 22, 1908, c. 149, 35 Stat. 65, entitled "An Act relating to the Liability of Common Carriers by Railroad to their Employés in Certain Cases," known as the Employers' Liability Law.

By permission of the Surrogate of Orange County, she compromised with the railroad, accepting a judgment for $5,000.

Defendant in error filed a petition in the Supreme Court of Orange County for an order directing plaintiff in error to pay over to him one-half of the net proceeds of the judgment in accordance with the statute of distribution of the State. The motion was denied and an order was entered determining that plaintiff in error, as widow of the deceased, was entitled to receive and retain for her own use all of the net proceeds of the judgment. The order was reversed by the Appellate Division of the Supreme Court and the judgment of reversal, on appeal to the Court of Appeals, was affirmed and the record re-

mitted to the Supreme Court. This writ of error was then prosecuted.

The Appellate Division was of opinion that the law of the State gave the right of action and determined the distribution of the proceeds of the judgment. Considering the act of Congress and its provisions, the court was of the view that the act of Congress "should be construed as one granting a new remedy under certain circumstances, where none, or a less adequate one, existed under the state laws, and as not intended to supplant or abrogate a right of action of practically equal extent existing under the laws of the State." The court further said, "It is only on the theory that this act of Congress constitutes the exclusive rule applicable to the facts of the case before us that the order of the Special Term [the order under review] can be upheld. If the remedy afforded by our laws be concurrent with that provided by Congress, then we think that our public policy will not permit an administratrix appointed by our courts under our laws, to use the Federal statute simply for the purpose of defeating our statute of distribution of personal property." The Court of Appeals expressed the opinion that the case presented a case of conflict between the Federal and state statutes and determined that the state statutes must prevail. It was said that the power of Congress "to regulate interstate commerce must end somewhere, and as far as employés of common carriers engaged in interstate commerce are concerned, it appears to us that it must end with the death of the employé." And considering that the consequences of a contrary doctrine would give Congress power over the distribution of real estate which might happen to be purchased by the earnings of an employé in interstate commerce, the court declared that the act of Congress in so far as it attempted to distribute the funds in controversy was "invalid and unauthorized." There were dissenting opinions expressed. The judgment of the

Appellate Division of the Supreme Court was affirmed and the record was remitted to the Supreme Court to be proceeded upon according to law and the judgment of the latter court was entered conformably thereto.

We have had many occasions to declare the comprehensive and exclusive power which Congress possesses over interstate commerce. And starting with that power as a factor, we have only to consider the breadth and meaning of the act of Congress.

Section 1 provides that every common carrier by railroad, while engaged in interstate commerce, "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin, dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier," or by reason of any defect in its instrumentalities.

Section 6, as amended by the act of April 5, 1910, c. 143, 36 Stat. 291, provides that the jurisdiction of the courts of the United States shall be concurrent with that of the courts of the several States, and if the action be brought in a state court it shall not be removed to a court of the United States.

Section 9, as amended by the same act, c. 143, 36 Stat. 291, is as follows:

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

The act has come up for consideration in a number of cases. In *Mondou* v. *New York, New Haven & Hartford R. R. Co.*, 223 U. S. 1, it and its amendments were declared to be constitutional, that having been enacted in pursuance of a power reserved to Congress, state laws must give away to them. They established the policy for all, it was decided, and the courts of a State cannot refuse to enforce them on the ground that they are not in harmony with the policy of the State. Congress having acted, it was said, p. 55, "the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is."

In *Missouri, Kansas & Texas Ry.* v. *Wulf*, 226 U. S. 570, 576, the *Mondou Case* was applied. The action was brought by the mother of a deceased employé in interstate commerce, under the state statute. The petition was subsequently amended to embrace a right of action by her under the Federal law as the personal representative of the decedent. The amendment was held not to be the commencement of a new action. It was said that notwithstanding the original petition asserted a cause of action under the state statute without making reference to the act of Congress, the court was presumed to be cognizant of the Federal enactment, and "to know that, with respect to the responsibility of interstate carriers by railroad to their employés injured in such commerce after its enactment it had the effect of superseding state laws upon the subject."

In *Michigan Central R. R. Co.* v. *Vreeland*, 227 U. S. 59, 68, it is again said that the act of Congress has undertaken to cover the subject of the liability of railroad companies to their employés injured while engaged in interstate commerce and that state legislation was superseded by it. "The obvious purpose of Congress," it was said, "was to save a right of action to certain relatives dependent upon an employé wrongfully injured, for the loss and

damage resulting to them financially by reason of the wrongful death." And again, "It is one beyond that which the decedent had,—one proceeding upon altogether different principles."

The same view was expressed in *American Railroad Co.* v. *Didrickson*, 227 U. S. 145, 149. The action was by surviving parents, they being the sole beneficiaries under the statute. A distinction was expressed between a cause of action to an injured employé and in case of his death, a cause of action to dependent relatives; and of the first it was said that it does not survive his death but that in such case the act "creates a new and distinct right of action for the benefit of the dependent relatives named in the statute" for the damages which results to them because they have been deprived of a reasonable expectation of pecuniary benefits on account of his wrongful death.

In *Gulf, Colorado & Santa Fe Railway Co.* v. *McGinnis, Administratrix*, 228 U. S. 173, the statute was again considered as giving a cause of action to the personal representative of the deceased employé for the benefit of the persons designated because of the pecuniary loss resulting to them.

In *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Hesterly*, 228 U. S. 702, the same principles were applied. In *St. Louis, S. F. & Texas Ry. Co.* v. *Seale*, 229 U. S. 156, the action was by the widow and parent of an interstate commerce employé. The petition stated a case under the state statute. The Railroad Company contended that the Federal statute was the applicable one. There was a conflict between the statutes. The state statute gave the right of action to the surviving husband, wife, children and parents; the Federal statute vested the right of action in the personal representative of the deceased for certain named beneficiaries, the parents of the deceased having no rights if there be a widow, husband or children. The Railroad Company, therefore, interposed the objec-

tion grounded on the Federal statute that the plaintiffs were not entitled to recover on the case proved. The state court overruled the objection and we declared the ruling to be error. We said, p. 162, "Two of the plaintiffs, the father and mother, in whose favor there was a separate recovery, are not even beneficiaries under the Federal statute, there being a surviving widow; and she was not entitled to recover in her own name, but only through the deceased's personal representative, as is shown by the terms of the statute and the decisions before cited."

These cases were all brought under the statute as originally enacted and before the amendments of 1910. Section 1, however, was not amended, and in *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Hesterly, supra,* it was said that the amendment of April 5, 1910, which added § 9, quoted above, "in like manner allows but one recovery, although it provides for survival of the right of the injured person."

It is clear from these decisions that the source of the right of plaintiff in error was the Federal statute; and this whether the cause of action is based on the first section of the act or on § 9, added in 1910. From plaintiff in error's complaint against the Railroad Company it is not clear whether she counted on § 1 alone or on that and § 9. If under § 1, the cause of action was not derived from the deceased in the sense of a succession from him. As said in one of the cited cases, her cause of action was "one beyond that which the decedent had,—one proceeding upon altogether different principles." It came to her, it is true, on account of his death but because of her pecuniary interest in his life and the damage she suffered by his death. It was her loss, not that which his father may have suffered. The judgment she recovered was for herself alone. He had no interest in it. Any loss he may have suffered was not and could not have been any part of it, as we have seen.

If the action included a right under § 9, the recovery was for her benefit exclusively as the widow of the decedent. The language of the section is that the right of action given to the employé survives to his personal representatives for the benefit of his parents only when there is no widow.

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

CALAF Y FUGURUL *v.* CALAF Y RIVERA.

APPEAL FROM THE SUPREME COURT OF PORTO RICO.

No. 199. Argued January 26, 1914.—Decided February 24, 1914.

While under the laws of Toro parol acts, although not amounting to a solemn recognition, may have entitled a natural child to sue in Porto Rico for a share of the parent's inheritance and prove the acts in the same suit, the existing Code requires a preliminary proceeding to prove those acts and to declare their effect, and limits the time within which such proceeding can be brought. *Cordova* v. *Folgueras*, 227 U. S. 375.

A judgment or decree bars all grounds for the relief sought and, as *res judicata*, it is a bar to a subsequent suit between the same parties the object of which is to reach the same result by different means.

Whether the judgment in a former suit between the same parties was or was not final is a question of local practice upon which this court follows the local court unless strong reasons are produced against it.

17 Porto Rico, 185, affirmed.

THE facts, which involve the construction of the laws of Porto Rico relating to the recognition as heirs of natural children, are stated in the opinion.

Mr. Manuel Rodriguez Serra, with whom *Mr. Charles Hartzell* was on the brief, for appellants.

Mr. Paul Fuller, with whom *Mr. Frederic R. Coudert* was on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the appellants against the testamentary heir of Salvador Calaf, seeking to have the institution of the defendant as heir declared void and the intestate succession of Salvador Calaf opened. The appellants alleged that four of them were natural children and the fifth the natural grandson of Ramon Calaf, and that they were his ab-intestate heirs; that Ramon was born on August 31, 1840 and died on October 9, 1895, his parents being Salvador Calaf and Maria Antonia Martinez, who, in short, had legal capacity to marry, and that Salvador recognized Ramon as his natural son; that Salvador died on February 11, 1903, leaving a will by which the defendant, a natural son, was instituted universal heir and the plaintiffs were ignored. The answer denied most of the allegations of the complaint, and alleged that Maria Martinez was a negro slave; that the plaintiff had brought a previous suit against the defendant, claiming one-half of the said Salvador's estate as his successor, which was dismissed on demurrer without leave to amend; and that the cause of action was prescribed by Articles 199 and 1840 of the Civil Code in force, and 1964, 1939 and 137 of the original Civil Code. The Supreme Court of Porto Rico held that in a suit to nullify the institution of an heir the recognition of Ramon could be proved only by a judgment or an act in solemn and authentic form, and that there was no such proof; and also that the matter was *res judicata* and barred. On these grounds it ordered the complaint to be dismissed.

The former ground was established by this court in *Cordova* v. *Folgueras*, 227 U. S. 375, 378, in which it was decided that "while, under the laws of Toro, the acts of

recognition alleged, although not amounting to a solemn recognition, may have entitled a natural child to sue for her share of the inheritance and to prove the acts in the same suit, the Code requires a preliminary proceeding to prove those acts and to declare their effect, and limits the time within which such proceeding can be brought." It was added, "This hardly can be called an interference with vested rights, when a reasonable time for bringing the preliminary proceeding is allowed." The change was not a denial of any rights previously acquired, but only a change in the procedure by which such alleged rights were to be proved (as, if disputed, they had to be proved in some proceeding in order to be enjoyed), with a limitation of the time for doing it. We hardly understand it to be asserted that there was any solemn act or authentic instrument satisfying the requirements of the Code for the purposes of the present suit. At all events, we see no reason for doubting the decision of the court below on this point. This being so, the appellant could not prove in this action by private acts of Salvador that Ramon was his natural son, and the Supreme Court seems to be plainly right in its intimation that the time for a proceeding in which the filiation might be established by such acts has gone by. See *Burnet* v. *Desmornes*, 226 U. S. 145.

Another defence is that the same matter has been adjudged between the parties. The Civil Code in force, Article 1219, requires identity 'between the things, causes, and persons of the litigants,' according to the translation in the record. It was said by the court below that there was identity of things, because the end of both suits was to share in the inheritance of Salvador Calaf; that the cause of action was the same, that is, recognition of Ramon as a natural son, asked for in one case and taken for granted in the other; and (with immaterial changes) that the persons were the same. We understand the Codes and the court to assert a doctrine substantially that of our own

law. The filiation decided against in the former case is a material fact in this one and is *res judicata* unless it is avoided by distinctions as to which we will say a word.

In the former suit the appellants alleged the same descent, but instead of alleging express and solemn recognition of Ramon by Salvador as his natural son, sought to have him declared such and therefore entitled to inherit one-half of Salvador's estate. Its immediate object was to establish filiation by a judgment, while the immediate object here is to nullify a will. The theory put forward was so far different, that unless the complaint in this case had been interpreted as alleging a recognition in solemn form it would have been held bad on its face. In the former suit also the mother was alleged to have been a slave. But these differing allegations are simply different means to reach the same result; the possession by Ramon of the rights of a natural son; and the evidence offered in this case like the allegations in the former one was only of private acts. In these circumstances the true principle has been declared by this court to be that a judgment or decree bars all grounds for the relief sought. *Northern Pacific Ry. Co.* v. *Slaght*, 205 U. S. 122, 130, 131. *United States* v. *California & Oregon Land Co.*, 192 U. S. 355, 358. The Supreme Court of Porto Rico has applied the principle here and we should require the clearest authority before we overruled an application that seems to us so obviously correct. It is urged further that there was no final judgment in the former case. Upon a question of that sort we follow the local court unless stronger reasons against it are produced than can be shown here. *Tiaco* v. *Forbes*, 228 U. S. 549, 558.

Judgment affirmed.

MONTOYA AND UNKNOWN HEIRS OF VIGIL *v.* GONZALES.

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

No. 204. Argued January 27, 1914.—Decided February 24, 1914.

The disposition of this court is to leave decisions of the territorial court on questions of local procedure undisturbed.

The Supreme Court of the Territory of New Mexico having construed the statute permitting intervention in partition during the pendency of the suit as allowing an intervention after the judgment for partition and report of commissioners that actual partition could not be made, but before the final action of the court on such report, this court approves that construction. *Clark* v. *Roller*, 199 U. S. 541.

A statute of limitations may give title.

The evident purpose of the statute of New Mexico, giving title under a deed purporting to convey a fee simple after ten years to lands included in grants by Spain, Mexico or the United States, is to ripen disseisin into title and is not unconstitutional as taking property without due process of law.

Nor does such statute deny equal protection of the law by its classification of Spanish, Mexican and United States grants; such a classification in the Territory of New Mexico is a reasonable one to prevent the evil of attempts to revive stale claims in regard to such grants.

16 New Mexico, 349, affirmed.

THE facts, which involve the title to a Spanish grant of land in New Mexico and the construction and constitutionality of a statute of limitation of the Territory, are stated in the opinion.

Mr. Alonzo B. McMillen for appellants.

Mr. George S. Klock, with whom *Mr. Neill B. Field* was on the brief, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This action was begun on June 12, 1906, for the partition, among the remote heirs of Juan Gonzales, of the Alameda Land Grant, a Spanish grant of land in New Mexico, confirmed as perfect by the Court of Private Land Claims of the United States. On June 17, 1907, a judgment of partition was entered, declaring the persons named to be entitled to stated fractional undivided interests, and appointing commissioners to divide the land, or to report to the court if it could not be divided without prejudice to the owners. On July 3, 1907, the commissioners reported that partition could not be made, and before further action of the court, on July 20, 1907, the appellees asked leave to intervene in order to assert adverse interests. The application was allowed on November 20, 1907, and the questions now before this court arise between these intervenors and heirs of Gonzales.— By way of parenthesis we will dispose of a preliminary objection at this point. It was argued that the decree of partition was a final decree and that the intervention came too late; but apart from the often stated disposition of this court to leave decisions upon matters of local procedure undisturbed, *Tiaco* v. *Forbes*, 228 U. S. 549, 558, the right to intervene was given by statute 'during the pendency of such suit' and the decision that the suit still was pending was right. New Mex. Compiled Laws, 1897, § 3182, Acts of 1907, c. 107, sub-section 269. See further *Clark* v. *Roller*, 199 U. S. 541, 546.

The main questions concern the merits of the case. The greater part of the Alameda Grant it is found, has been occupied in strips, from beyond the memory of men now living. The intervenors claim such strips, most of them but a few yards wide, but extending, as they say, from the Rio Grande westward to the Ceja or ridge of Rio Puerco, a distance of some sixteen miles. They have

no documentary evidence of a title derived from Juan Gonzales, but they and their predecessors in title have occupied the bottom lands between the Rio Grande and the foothills to the west for more than ten years under deeds purporting to convey a fee simple in the respective strips to the ridge of Rio Puerco. The eastern part has been fenced, cultivated and built upon; but from the foothills to the Ceja of Rio Puerco the land is unfenced, and by a general custom has been used mainly for the grazing of cattle by the intervenors and others claiming ownership in the grant. The title to this last-mentioned land alone is in question now, and it will be seen that if the intervenors have the title they claim, it must have been gained by the lapse of time during which they have held what they have held under the above mentioned deeds. The judgment was in their favor in the courts below. 16 New Mex. 349.

The title of the intervenors does not depend upon the ordinary statute of limitations and some considerations that might be relevant under that statute are not relevant here. The title rests upon a peculiar statute that has been in force unchanged in any particular affecting this case, it is said, since 1858. Compiled Laws, 1865, c. 73, § 1. Compiled Laws, 1897, § 2937. By this act, possession for ten years, under a deed purporting to convey a fee simple, of any lands which have been granted by Spain, Mexico or the United States, gives a title in fee to the quantity of land specified in the deed, if during the ten years no claim by suit in law or equity effectually prosecuted shall have been set up. We state the statute according to its construction by the court below, with which, again, we should be slow to interfere, *Gray* v. *Taylor*, 227 U. S. 51, 57, and which also seems plainly right. The intervenors therefore are brought precisely within the words of the act, and we think it unnecessary to spend time on the suggestion that the appellants equally are within it, and

therefore, on the principle of cases such as *Hunnicutt* v. *Peyton*, 102 U. S. 333, are entitled to prevail on the strength of their older title so far as they were not actually excluded from the land. The purpose of the act is to ripen disseisin into title according to the deed under which the disseisor holds, and it is especially directed against ancient claims such as the appellants set up.

It only remains to consider whether there is anything in the Constitution of the United States to prevent the statute from doing its work. We limit our inquiry to its operation in the present case, and do not speculate as to whether other cases could be put in which the letter of some parts of the law could not be sustained. As applied to the intervenors, the statute simply enacts that possession for ten years of the front and cultivable portion of a strip under a deed carrying the whole of it back to the ridge of the Puerco, shall give title to the whole. We can see no taking of property without due process of law in this. A statute of limitation may give title. *Toltec Ranch Co.* v. *Cook*, 191 U. S. 532. *Davis* v. *Mills*, 194 U. S. 451, 456, 457. *United States* v. *Chandler-Dunbar Water Power Co.*, 209 U. S. 447. The disseisee has notice of the law and of the fact that he is dispossessed, and that a deed to the disseisor may purport to convey more than is fenced in. If he chooses to wait ten years without bringing suit, he is not in a position to complain of the consequences—at least, not when, as in the present case, the deeds do not purport to convey more than a reasonable man probably would have anticipated. See *Soper* v. *Lawrence Brothers Co.*, 201 U. S. 359, 367, 368. For we should conjecture, if it were material, that in this case the deeds under which the intervenors held were in a form that was usual and expected in that place.

The statute does not deny the equal protection of the laws, even if it should be confined to Spanish and Mexican grants. For there very well may have been grounds for

the discrimination in the history of those grants and the greater probability of an attempt to revive stale claims, as is explained by the Supreme Court of New Mexico. There is no other matter that we think proper for reconsideration here.

Judgment affirmed.

MITCHELL STORE BUILDING COMPANY *v.* CARROLL, TRUSTEE IN BANKRUPTCY OF HERMAN KECK MANUFACTURING COMPANY.

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

No. 212. Argued January 28, 1914.—Decided February 24, 1914.

Section 24a of the Bankruptcy Act provides for appeals in controversies arising in bankruptcy proceedings and controls a proceeding brought by the trustee to restrain a landlord from prosecuting a suit for rent in the state court. In such a case the appeal takes the course prescribed in the Circuit Court of Appeals Act of 1891.

Although a case taken to the Circuit Court of Appeals under § 7 of the act of 1891 is not one of the class made final by § 6 of that act, the jurisdiction of this court under § 6 relates solely to final orders of the District Court reviewed by the Circuit Court of Appeals.

An interlocutory decree of the District Court granting a temporary injunction against prosecuting a suit in the state court, is not a final order, and from the judgment of the Circuit Court of Appeals affirming it there is no appeal to this court.

This court cannot entertain an appeal from a judgment of the Circuit Court of Appeals upon a petition to revise under § 24b of the Bankruptcy Act.

Appeal from 193 Fed. Rep. 616, dismissed.

THE facts, which involve the jurisdiction of this court of appeals in controversies arising in bankruptcy proceedings, are stated in the opinion.

Mr. P. Lincoln Mitchell and *Mr. Walter A. DeCamp* for appellant.

Mr. Joseph S. Graydon, with whom *Mr. Joseph L. Lackner* and *Mr. Lawrence Maxwell* were on the brief, for appellee.

MR. JUSTICE DAY delivered the memorandum opinion of the court.

An involuntary petition in bankruptcy was filed against The Keck Manufacturing Company on February 8, 1909, in the District Court of the United States for the Southern District of Ohio, and it was later adjudicated a bankrupt. Upon application a receiver was appointed for the Duhme Jewelry Company, an adjunct of The Keck Manufacturing Company, all of the stock of the former being owned by the latter company, and subsequently the receiver, in pursuance of an order of the court, transferred all the property and assets of The Duhme Jewelry Company to the trustee of the bankrupt, by him to be kept under separate account.

The Mitchell Store Building Company had leased certain premises to The Duhme Jewelry Company, which on June 30, 1910, the rent being paid to that time, the latter company vacated, although the lease had not yet expired. The Mitchell Store Building Company brought suit against The Duhme Jewelry Company in the Common Pleas Court of Hamilton County, Ohio, to recover under the lease, also applying to the District Court for an order on the trustee to withhold sufficient in amount of the assets of The Duhme Jewelry Company to satisfy its claim, which was eventually refused by the referee and is now before the District Judge upon petition for review.

Upon the petition of the trustee The Mitchell Store Building Company was made a party to the bankruptcy proceeding, in the District Court, and later the trustee

sought to restrain that company from prosecuting its suit in the state court. The District Judge granted a temporary injunction and upon appeal the Circuit Court of Appeals affirmed the order of the District Court. There was also a petition to review the order of the District Court granting the temporary injunction, but that was not passed upon by the Circuit Court of Appeals. The case was then brought to this court by appeal, the petition for appeal stating that "this cause is one in which the United States Circuit Court of Appeals for the Sixth Circuit has not final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal."

The jurisdiction of the appellate courts of the United States, including this court, under the Bankruptcy Act, is regulated by §§ 24 and 25 of that act. Under the latter section appeals may be taken in certain cases from the District Court to the Circuit Court of Appeals, and, under certain limitations, appeals may be allowed from the latter court to this court, from final decisions of the Circuit Court of Appeals allowing or rejecting claims. This case does not come within § 25. Section 24a provides for appeals in controversies arising in bankruptcy proceedings and controls the present case. In such cases the appeal takes the course prescribed in the Circuit Court of Appeals Act (act of March 3, 1891, c. 517, 26 Stat. 826, 828). See *Hewit* v. *Berlin Machine Works*, 194 U. S. 296; *Coder* v. *Arts*, 213 U. S. 223.

It is undertaken to sue out the appeal in this case from the Circuit Court of Appeals under § 6 of the Circuit Court of Appeals Act, as the petition for allowance of appeal shows; while the appeal to the Circuit Court of Appeals was under § 7 of that act, as amended (act of June 6, 1900, c. 803, 31 Stat. 660), providing for an appeal from an interlocutory order of a District or Circuit Court, granting an injunction, to the Circuit Court of Appeals

in a cause in which an appeal from a final decree might have been taken under the act. No provision is made in this section, or in any other, for a further appeal, concerning such interlocutory orders, to this court.

Section 6 regulates appeals from the Circuit Court of Appeals to this court, providing that cases not made final by that section shall be entitled to review in this court. While this case, taken to the Circuit of Appeals under § 7, is not one of the class made final in that court by § 6, it is well settled that this court's jurisdiction under § 6 relates solely to final orders of the District Court reviewed by the Circuit Court of Appeals. The decree in the District Court being an interlocutory order granting a temporary injunction, and the Circuit Court of Appeals simply affirming that order, it is not a proper case for appeal to this court. *Kirwan* v. *Murphy*, 170 U. S. 205.

If this case were treated as an appeal from the judgment of the Circuit of Court Appeals, upon a petition to revise under § 24b of the Bankruptcy Act, this court would not entertain the appeal. *Holden* v. *Stratton*, 191 U. S. 115.

It follows that the appeal

Must be dismissed. The petition for a writ of certiorari filed in this cause is denied.

WEEKS *v.* UNITED STATES.

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

No. 461. Argued December 2, 3, 1913.—Decided February 24, 1914.

Under the Fourth Amendment Federal courts and officers are under such limitations and restraints in the exercise of their power and authority as to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law.

The protection of the Fourth Amendment reaches all alike, whether accused of crime or not; and the duty of giving it force and effect is obligatory on all entrusted with the enforcement of Federal laws.

The tendency of those executing Federal criminal laws to obtain convictions by means of unlawful seizures and enforced confessions in violation of Federal rights is not to be sanctioned by the courts which are charged with the support of constitutional rights.

The Federal courts cannot, as against a seasonable application for their return, in a criminal prosecution, retain for the purposes of evidence against the accused his letters and correspondence seized in his house during his absence and without his authority by a United States marshal holding no warrant for his arrest or for the search of his premises.

While the efforts of courts and their officials to bring the guilty to punishment are praiseworthy, they are not to be aided by sacrificing the great fundamental rights secured by the Constitution.

While an incidental seizure of incriminating papers, made in the execution of a legal warrant, and their use as evidence, may be justified, and a collateral issue will not be raised to ascertain the source of competent evidence, *Adams* v. *New York*, 192 U. S. 585, that rule does not justify the retention of letters seized in violation of the protection given by the Fourth Amendment where an application in the cause for their return has been made by the accused before trial.

The court has power to deal with papers and documents in the possession of the District Attorney and other officers of the court and to direct their return to the accused if wrongfully seized.

Where letters and papers of the accused were taken from his premises by an official of the United States, acting under color of office but

without any search warrant and in violation of the constitutional rights of accused under the Fourth Amendment, and a seasonable application for return of the letters and papers has been refused and they are used in evidence over his objections, prejudicial error is committed and the judgment should be reversed.

The Fourth Amendment is not directed to individual misconduct of state officers. Its limitations reach the Federal Government and its agencies. *Boyd* v. *United States*, 116 U. S. 616.

THE facts, which involve the validity under the Fourth Amendment of a verdict and sentence and the extent to which the private papers of the accused taken without search warrant can be used as evidence against him, are stated in the opinion.

Mr. Martin J. O'Donnell for plaintiff in error:

The decision of the District Court denying defendant's petition to return his property and private papers after it had taken jurisdiction of the subject-matter set forth in said petition and found that said private papers had come into the possession of the Government as a result of its own unlawful acts in violation of its own Constitution is reversible error. *Adams* v. *New York*, 192 U. S. 585; *Boyd* v. *United States*, 116 U. S. 616; *Hale* v. *Henkel*, 201 U. S. 43; *United States* v. *McHie*, 196 Fed. Rep. 586; *United States* v. *Wilson*, 163 Fed. Rep. 338; *United States* v. *McHie*, 194 Fed. Rep. 894; *United States* v. *Mills*, 185 Fed. Rep. 318; *Wise* v. *Mills*, 220 U. S. 549; *Wise* v. *Henkel*, 220 U. S. 549.

The reception in evidence of the property and papers seized by officers of the Government after the court had inquired into and found that same had been so seized was reversible error. 47 Am. St. Rep. 175; Blackstone's Com., Bk. 3, p. 256; Blackstone, Bk. IV; *Boyd* v. *United States*, 116 U. S. 616; Broom's Leg. Max. (7th ed.) 227; *Counselman* v. *Hitchcock*, 142 U. S. 547; *Ex parte Jackson*, 96 U. S. 727; *Gindrat* v. *People*, 138 Illinois, 103; 1 Greenleaf

on Evidence, § 245a; *Marshall* v. *Riley*, 7 Georgia, 367; Note 1, Blackstone's Com., Bk. III, p. 256; *Rusher* v. *State*, 94 Georgia, 366; *Shields* v. *State*, 104 Alabama, 35; *State* v. *Flynn*, 36 N. H. 64; *State* v. *Underwood*, 78 S. E. 1103; *Thornton* v. *State*, 117 Wisconsin, 338; *Underwood* v. *State*, 78 S. E. Rep. 1103; *United States* v. *Wong Quong*, 94 Fed. Rep. 832; 4 Wigmore on Evidence, §§ 2251–2270.

The common law rules of evidence embodied in the Constitution have, by being so embodied, been clothed with the dignity of a fundamental law and the application of same under the Constitution is not limited by the rules of the common law. *Boyd* v. *United States*, 116 U. S. 616; Black's Int. of Laws; *Bram* v. *United States*, 168 U. S. 532, 542; *Brown* v. *Walker*, 161 U. S. 596–597; *Counselman* v. *Hitchcock*, 142 U. S. 547; *Emery's Case*, 107 Massachusetts, 172; *Enbeck* v. *Carrington*, 19 How. St. Tr. 1029; *People* v. *Kelly*, 24 N. Y. 74; Sohm in Inst. of Roman Law, 2d ed., p. 30; Thayer on Evidence, 263, 276.

The Solicitor General and *Mr. Assistant Attorney General Denison* for the United States, submitted:

The defendant having been found guilty—on a single count only—comes here on writ of error, making fifteen assignments of which the only one requiring notice is in substance that the retention of this property and its admission in evidence against him violated his right to be secure from unreasonable searches and seizures and to refrain from being a witness against himself, as guaranteed by the Fourth and Fifth Amendments.

The question is no longer open. *Adams* v. *New York*, 192 U. S. 585; *Hale* v. *Henkel*, 201 U. S. 43; *Am. Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, 302; *Holt* v. *United States*, 218 U. S. 245, 252; *United States* v. *Wilson*, 163 Fed. Rep. 338; *Hardesty* v. *United States*, 164 Fed. Rep. 420.

The *Adams Case* is sought to be distinguished on the

ground that it involved a state action, whereas this involves a Federal action. The distinction does exist on the facts, but it is immaterial because the court passed that phase of the *Adams Case* and based the decision on the point that, even if the Amendments were applicable to state action, *Twining* v. *New Jersey*, 211 U. S. 78, 92, they had not been violated.

Mr. Justice Day delivered the opinion of the court.

An indictment was returned against the plaintiff in error, defendant below, and herein so designated, in the District Court of the United States for the Western District of Missouri, containing nine counts. The seventh count, upon which a conviction was had, charged the use of the mails for the purpose of transporting certain coupons or tickets representing chances or shares in a lottery or gift enterprise, in violation of § 213 of the Criminal Code. Sentence of fine and imprisonment was imposed. This writ of error is to review that judgment.

The defendant was arrested by a police officer, so far as the record shows, without warrant, at the Union Station in Kansas City, Missouri, where he was employed by an express company. Other police officers had gone to the house of the defendant and being told by a neighbor where the key was kept, found it and entered the house. They searched the defendant's room and took possession of various papers and articles found there, which were afterwards turned over to the United States Marshal. Later in the same day police officers returned with the Marshal, who thought he might find additional evidence, and, being admitted by someone in the house, probably a boarder, in response to a rap, the Marshal searched the defendant's room and carried away certain letters and envelopes found in the drawer of a chiffonier. Neither the marshal nor the police officers had a search warrant.

The defendant filed in the cause before the time for trial the following petition:

"Petition to Return Private Papers, Books and Other Property.

"Now comes defendant and states that he is a citizen and resident of Kansas City, Missouri, and that he resides, owns and occupies a home at 1834 Penn Street in said City;

"That on the 21st day of December, 1911, while plaintiff was absent at his daily vocation certain officers of the government whose names are to plaintiff unknown, unlawfully and without warrant or authority so to do, broke open the door to plaintiff's said home and seized all of his books, letters, money, papers, notes, evidences of indebtedness, stock, certificates, insurance policies, deeds, abstracts, and other muniments of title, bonds, candies, clothes and other property in said home, and this in violation of Sections 11 and 23 of the Constitution of Missouri and of the 4th and 5th Amendments to the Constitution of the United States:

"That the District Attorney, Marshal and Clerk of the United States Court for the Western District of Missouri took the above described property so seized into their possession and have failed and refused to return to defendant portion of same, to-wit:

"One (1) leather grip, value about $7.00; one (1) tin box valued at $3.00; one (1) Pettis County, Missouri, bond, value $500.00; three (3) Mining stock certificates which defendant is unable to more particularly describe valued at $12,000.00, and certain stock certificates in addition thereto issued by the San Domingo Mining Loan and Investment Company, about $75.00 in currency; one (1) newspaper published about 1790, an heirloom; and certain other property which plaintiff is now unable to describe:

"That said property is being unlawfully and improperly

held by said District Attorney, Marshal and Clerk in violation of defendant's rights under the Constitution of the United States and the State of Missouri:

"That said District Attorney purposes to use said books, letters, papers, certificates of stock, etc., at the trial of the above entitled cause and that by reason thereof and of the facts above set forth defendant's rights under the amendments aforesaid to the Constitution of Missouri, and the United States have been and will be violated unless the Court order the return prayed for:

"Wherefore, defendant prays that said District Attorney, Marshal and Clerk be notified, and that the Court direct and order said District Attorney, Marshal and Clerk to return said property to said defendant."

Upon consideration of the petition the court entered in the cause an order directing the return of such property as was not pertinent to the charge against the defendant, but denied the petition as to pertinent matter, reserving the right to pass upon the pertinency at a later time. In obedience to the order the District Attorney returned part of the property taken and retained the remainder, concluding a list of the latter with the statement that, "all of which last above described property is to be used in evidence in the trial of the above entitled cause, and pertains to the alleged sale of lottery tickets of the company above named."

After the jury had been sworn and before any evidence had been given, the defendant again urged his petition for the return of his property, which was denied by the court. Upon the introduction of such papers during the trial, the defendant objected on the ground that the papers had been obtained without a search warrant and by breaking open his home, in violation of the Fourth and Fifth Amendments to the Constitution of the United States, which objection was overruled by the court. Among the papers retained and put in evidence were a number of

lottery tickets and statements with reference to the lottery, taken at the first visit of the police to the defendant's room, and a number of letters written to the defendant in respect to the lottery, taken by the Marshal upon his search of defendant's room.

The defendant assigns error, among other things, in the court's refusal to grant his petition for the return of his property and in permitting the papers to be used at the trial.

It is thus apparent that the question presented involves the determination of the duty of the court with reference to the motion made by the defendant for the return of certain letters, as well as other papers, taken from his room by the United States Marshal, who, without authority of process, if any such could have been legally issued, visited the room of the defendant for the declared purpose of obtaining additional testimony to support the charge against the accused, and having gained admission to the house took from the drawer of a chiffonier there found certain letters written to the defendant, tending to show his guilt. These letters were placed in the control of the District Attorney and were subsequently produced by him and offered in evidence against the accused at the trial. The defendant contends that such appropriation of his private correspondence was in violation of rights secured to him by the Fourth and Fifth Amendments to the Constitution of the United States. We shall deal with the Fourth Amendment, which provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

The history of this Amendment is given with particularity in the opinion of Mr. Justice Bradley, speaking for

the court in *Boyd* v. *United States,* 116 U. S. 616. As was there shown, it took its origin in the determination of the framers of the Amendments to the Federal Constitution to provide for that instrument a Bill of Rights, securing to the American people, among other things, those safeguards which had grown up in England to protect the people from unreasonable searches and seizures, such as were permitted under the general warrants issued under authority of the Government by which there had been invasions of the home and privacy of the citizens and the seizure of their private papers in support of charges, real or imaginary, made against them. Such practices had also received sanction under warrants and seizures under the so-called writs of assistance, issued in the American colonies. See 2 Watson on the Constitution, 1414 *et seq.* Resistance to these practices had established the principle which was enacted into the fundamental law in the Fourth Amendment, that a man's house was his castle and not to be invaded by any general authority to search and seize his goods and papers. Judge Cooley, in his Constitutional Limitations, pp. 425, 426, in treating of this feature of our Constitution, said: "The maxim that 'every man's house is his castle,' is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen." "Accordingly," says Lieber in his work on Civil Liberty and Self-Government, 62, in speaking of the English law in this respect, "no man's house can be forcibly opened, or he or his goods be carried away after it has thus been forced, except in cases of felony, and then the sheriff must be furnished with a warrant, and take great care lest he commit a trespass. This principle is jealously insisted upon." In *Ex parte Jackson,* 96 U. S. 727, 733, this court recognized the principle of protection as applicable to letters and sealed packages in the mail, and held that consistently

with this guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures such matter could only be opened and examined upon warrants issued on oath or affirmation particularly describing the thing to be seized, "as is required when papers are subjected to search in one's own household."

In the *Boyd Case, supra,* after citing Lord Camden's judgment in *Entick* v. *Carrington,* 19 Howell's State Trials, 1029, Mr. Justice Bradley said (630):

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment."

In *Bram* v. *United States,* 168 U. S. 532, this court in speaking by the present Chief Justice of *Boyd's Case,* dealing with the Fourth and Fifth Amendments, said (544):

"It was in that case demonstrated that both of these Amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change."

The effect of the Fourth Amendment is to put the courts

of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

What then is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases. 1 Bishop on Criminal Procedure, § 211; Wharton, Crim. Plead. and Practice, 8th ed., § 60; *Dillon* v. *O'Brien and Davis*, 16 Cox C. C. 245. Nor is it the case of testimony offered at a trial where the court is asked to stop and consider the illegal means by which proofs, otherwise competent, were obtained—of which we shall have occasion to treat later in this opinion. Nor is it the case of burglar's tools or other proofs of guilt found upon his arrest within the control of the accused.

The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States Marshal holding no warrant for his arrest and none for the search of his premises. The accused, without awaiting his trial, made timely application to the court for an order for the return of these letters, as well as other property. This application was denied, the letters retained and put in evidence, after a further application at the beginning of the trial, both applications asserting the rights of the accused under the Fourth and Fifth Amendments to the Constitution. If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. The United States Marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information and describing with reasonable particularity the thing for which the search was to be made. Instead, he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the Government, and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action. Under such circumstances, without sworn information and particular description, not even an order of court would

have justified such procedure, much less was it within the authority of the United States Marshal to thus invade the house and privacy of the accused. In *Adams* v. *New York*, 192 U. S. 585, this court said that the Fourth Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law acting under legislative or judicial sanction. This protection is equally extended to the action of the Government and officers of the law acting under it. (*Boyd Case, supra.*) To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.

The court before which the application was made in this case recognized the illegal character of the seizure and ordered the return of property not in its judgment competent to be offered at the trial, but refused the application of the accused to turn over the letters, which were afterwards put in evidence on behalf of the Government. While there is no opinion in the case, the court in this proceeding doubtless relied upon what is now contended by the Government to be the correct rule of law under such circumstances, that the letters having come into the control of the court, it would not inquire into the manner in which they were obtained, but if competent would keep them and permit their use in evidence. Such proposition, the Government asserts, is conclusively established by certain decisions of this court, the first of which is *Adams* v. *New York, supra.* In that case the plaintiff in error had been convicted in the Supreme Court of the State of New York for having in his possession certain gambling paraphernalia used in the game known as policy, in violation of the Penal Code of New York. At the trial certain papers, which had been seized by police officers executing a search warrant for the discovery and

seizure of policy slips and which had been found in addition to the policy slips, were offered in evidence over his objection. The conviction was affirmed by the Court of Appeals of New York (176 N. Y. 351), and the case was brought here for alleged violation of the Fourth and Fifth Amendments to the Constitution of the United States. Pretermitting the question whether these amendments applied to the action of the States, this court proceeded to examine the alleged violations of the Fourth and Fifth Amendments, and put its decision upon the ground that the papers found in the execution of the search warrant, which warrant had a legal purpose in the attempt to find gambling paraphernalia, were competent evidence against the accused, and their offer in testimony did not violate his constitutional privilege against unlawful search or seizure, for it was held that such incriminatory documents thus discovered were not the subject of an unreasonable search and seizure, and in effect that the same were incidentally seized in the lawful execution of a warrant and not in the wrongful invasion of the home of the citizen and the unwarranted seizure of his papers and property. It was further held, approving in that respect the doctrine laid down in 1 Greenleaf, § 254a, that it was no valid objection to the use of the papers that they had been thus seized, and that the courts in the course of a trial would not make an issue to determine that question, and many state cases were cited supporting that doctrine.

The same point had been ruled in *People* v. *Adams*, 176 N. Y. 351, from which decision the case was brought to this court, where it was held that if the papers seized in addition to the policy slips were competent evidence in the case, as the court held they were, they were admissible in evidence at the trial, the court saying (p. 358): "The underlying principle obviously is that the court, when engaged in trying a criminal cause, will not take notice of

the manner in which witnesses have possessed themselves of papers, or other articles of personal property, which are material and properly offered in evidence." This doctrine thus laid down by the New York Court of Appeals and approved by this court, that a court will not in trying a criminal cause permit a collateral issue to be raised as to the source of competent testimony, has the sanction of so many state cases that it would be impracticable to cite or refer to them in detail. Many of them are collected in the note to *State* v. *Turner*, 136 Am. St. Rep. 129, 135 *et seq.* After citing numerous cases the editor says: "The underlying principle of all these decisions obviously is, that the court, when engaged in the trial of a criminal action, will not take notice of the manner in which a witness has possessed himself of papers or other chattels, subjects of evidence, which are material and properly offered in evidence: *People* v. *Adams*, 176 N. Y. 351, 98 Am. St. Rep. 675, 68 N. E. 636, 63 L. R. A. 406. Such an investigation is not involved necessarily in the litigation in chief, and to pursue it would be to halt in the orderly progress of a cause, and consider incidentally a question which has happened to cross the path of such litigation, and which is wholly independent thereof."

It is therefore evident that the *Adams Case* affords no authority for the action of the court in this case, when applied to in due season for the return of papers seized in violation of the Constitutional Amendment. The decision in that case rests upon incidental seizure made in the execution of a legal warrant and in the application of the doctrine that a collateral issue will not be raised to ascertain the source from which testimony, competent in a criminal case, comes.

The Government also relies upon *Hale* v. *Henkel*, 201 U. S. 43, in which the previous cases of *Boyd* v. *United States, supra, Adams* v. *New York, supra, Interstate Com-*

merce Commission v. *Brimson*, 154 U. S. 447, and *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, are reviewed, and wherein it was held that a *subpœna duces tecum* requiring a corporation to produce all its contracts and correspondence with no less than six other companies, as well as all letters received by the corporation from thirteen other companies located in different parts of the United States, was an unreasonable search and seizure within the Fourth Amendment, and it was there stated that (201 U. S. p. 76) "an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd Case*, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpœna duces tecum*, against which the person, be he individual or corporation, is entitled to protection." If such a seizure under the authority of a warrant supposed to be legal, constitutes a violation of the constitutional protection, *a fortiori* does the attempt of an officer of the United States, the United States Marshal, acting under color of his office, without even the sanction of a warrant, constitute an invasion of the rights within the protection afforded by the Fourth Amendment.

Another case relied upon is *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, in which it was held that the seizure by the United States Marshal in a copyright case of certain pictures under a writ of replevin did not constitute an unreasonable search and seizure. The other case from this court relied upon is *Holt* v. *United States*, 218 U. S. 245, in which it was held that testimony tending to show that a certain blouse which was in evidence as incriminating him, had been put upon the prisoner and fitted him, did not violate his constitutional right. We

are at a loss to see the application of these cases to the one in hand.

The right of the court to deal with papers and documents in the possession of the District Attorney and other officers of the court and subject to its authority was recognized in *Wise* v. *Henkel*, 220 U. S. 556. That papers wrongfully seized should be turned over to the accused has been frequently recognized in the early as well as later decisions of the courts. 1 Bishop on Criminal Procedure, § 210; *Rex* v. *Barnett*, 3 C. & P. 600; *Rex* v. *Kinsey*, 7 C. & P. 447; *United States* v. *Mills*, 185 Fed. Rep. 318; *United States* v. *McHie*, 194 Fed. Rep. 894, 898.

We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States acting under color of his office in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed. As to the papers and property seized by the policemen, it does not appear that they acted under any claim of Federal authority such as would make the Amendment applicable to such unauthorized seizures. The record shows that what they did by way of arrest and search and seizure was done before the finding of the indictment in the Federal court, under what supposed right or authority does not appear. What remedies the defendant may have against them we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government and its agencies. *Boyd Case*, 116 U. S., *supra*, and see *Twining* v. *New Jersey*, 211 U. S. 78.

It results that the judgment of the court below must be reversed, and the case remanded for further proceedings in accordance with this opinion.

Reversed.

UNITED STATES OF AMERICA *v.* LEXINGTON MILL & ELEVATOR COMPANY.

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

No. 548. Argued January 5, 1914.—Decided February 24, 1914.

The primary purpose of Congress in enacting the Food and Drugs Act of 1906 was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated food.

As against adulteration the statute was intended to protect the public health from possible injury by adding to articles of food consumption poisonous and deleterious substances which might render such articles injurious to health.

Where such a purpose has been effected by plain and unambiguous language by an act within the power of Congress, the only duty of the courts is to give the act effect according to its terms.

The inhibition in subdivision 5 of § 7 of the Food and Drugs Act of 1906 against the addition of any poisonous or other added deleterious ingredient which may render an article of food injurious to health is definitely limited to the particular class of adulteration specified, and in order to condemn the article under subdivision 5 it is incumbent upon the Government to establish that the added substance may render the article injurious to health.

In subdivision 5 of § 7 of the Food and Drugs Act of 1906 the word "may" is used in its ordinary and usual signification; and if an article of food may not by the addition of a small amount of poisonous substance by any possibility injure the health of any consumer, it may not be condemned under this subdivision of the act.

202 Fed. Rep. 615, affirmed.

THE facts, which involve the construction of subdivi-

sions 4 and 5 of § 7 of the Food and Drugs Act of 1906, are stated in the opinion.

Mr. Attorney General McReynolds, with whom *Mr. Francis G. Caffey* was on the brief, for the United States:

The seized flour was adulterated within subd. 5, § 7 of the Food and Drugs Act. *French Silver Dragee Co.* v. *United States*, 179 Fed. Rep. 824; *United States* v. *1,950 Boxes of Macaroni*, 181 Fed. Rep. 427; *United States* v. *Mayfield*, 177 Fed. Rep. 765; *United States* v. *Rosebrock & Co.*, Notice of Judgment, 825; *United States* v. *Koca Nola Co.*, Notice of Judgment, 202; *Friend* v. *Matt*, 68 J. P. 589.

The Circuit Court of Appeals erred in reviewing the weight of evidence as to whether the flour was adulterated within subd. 4 of § 7 of the act.

The bleaching conceals newness and imparts color of better grade and inferior flour is made to resemble patent.

Flour milled from inferior wheat is made to appear as if milled from first-quality.

The Circuit Court of Appeals had no power to review the jury's findings. *Behn* v. *Campbell*, 205 U. S. 403; *Lancaster* v. *Collins*, 115 U. S. 222; *Chicago & North Western Ry. Co.* v. *Ohle*, 117 U. S. 123.

The Court of Appeals was correct in holding that there was no error in submitting to the jury the charges of adulteration under subd. 1 of § 7 of the act.

The Food and Drugs Act is constitutional. *Hipolite Egg Co.* v. *United States*, 220 U. S. 45; *Booth* v. *Illinois*, 184 U. S. 425; *Otis* v. *Parker*, 187 U. S. 606; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Buttfield* v. *Stranahan*, 192 U. S. 470; *United States* v. *Johnson*, 221 U. S. 488; *Shawnee Milling Co.* v. *Temple*, 179 Fed. Rep. 517; *United States* v. *74 Cases Grape Juice*, 181 Fed. Rep. 629; *United States* v. *420 Sacks of Flour*, 180 Fed. Rep. 518; *United States* v.

Heinle Specialty Co., 175 Fed. Rep. 299; *United States* v. *100 Cases of Apples*, 179 Fed. Rep. 985.

Mr. Edward P. Smith and *Mr. Bruce S. Elliott*, with whom *Mr. Edward L. Scarritt*, *Mr. C. J. Smyth* and *Mr. W. C. Scarritt* were on the brief, for respondent:

Congress possesses no police power, and the Food and Drugs Act, if sustained at all, must be sustained on the ground that it is a regulation of commerce between the States. *Crutcher* v. *Kentucky*, 141 U. S. 47; *Lawton* v. *Steele*, 152 U. S. 133; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Hannibal & St. Joe R. R. Co.* v. *Hewson*, 95 U. S. 465; *Wilkinson* v. *Rahrer*, 140 U. S. 545.

The power to make the ordinary regulations of police remains with the individual States and cannot be assumed by the National Government, and in this respect it is not interfered with by the Fourteenth Amendment. *Mugler* v. *Kansas*, 123 U. S. 623; *Plumley* v. *Massachusetts*, 155 U. S. 461; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *United States* v. *Knight*, 156 U. S. 1; *Int. Com. Comm.* v. *Brimson*, 154 U. S. 447; *Employers' Liability Case*, 207 U. S. 463.

The Food and Drugs Act is to be regarded as an act to regulate commerce, and the court erred in charging the jury that the Government need not prove that the flour in question, or foodstuffs made by the use of it, would injure the health of the consumer; that it is the character—not the quantity—of the added substance which is to determine this case.

Congress never intended the statute in question should be construed as the trial court construed it in this instruction to the jury.

In the passage of this act Congress intended the words of this section to be used as above indicated, in their usual and ordinary sense. It was never intended by Congress that this act should ever be construed to mean that the

useful and harmless property of a citizen should, by the methods providing for the prevention of the sale of harmful and injurious foods, be confiscated, condemned and destroyed. This would be contrary to the policy and spirit of our laws and the fundamental principles of our government. *Church of Holy Trinity* v. *United States*, 143 U. S. 457; *United States* v. *C. & N. W. Ry. Co.*, 157 Fed. Rep. 618; *Binns* v. *United States*, 194 U. S. 495; *Blake* v. *Natl. City Bank*, 23 Wall. 307; *Wadsworth* v. *Boysen*, 148 Fed. Rep. 771.

The language used in the act in question is not susceptible of the interpretation placed thereon by the trial court. *Montclam* v. *Ramsdell*, 107 U. S. 147; *Postmaster General* v. *Early*, 6 L. C. P. 147; 12 Wheat. 136.

In order to bring an article of food within its condemnation, it must be shown that its consumption would injure the health of the consumer.

Giving to all the words of the statute, therefore, their plain, usual and ordinary meaning, it is plain that the trial court erroneously construed it. *French Silver Dragee Co.* v. *United States*, 179 Fed. Rep. 824.

The construction contended for has been sustained by the English courts in construing a similar statute, 38 and 39 Vict., c. 63, § 3. *Friend* v. *Mapp*, 68 J. P. 589; *Hull* v. *Horsnell*, 68 J. P. 591.

The act as construed by the trial court is arbitrary and an unreasonable interference with the rights of property. *Jew Ho* v. *Williamson*, 103 Fed. Rep. 10.

If the flour did not contain anything which might render it injurious to health, it is wholly without the power of Congress or any other branch of the Government to exclude it from the channels of commerce or to prohibit its sale.

Congress has not undertaken to exclude flour such as this from the markets. Congress only attempted to exclude from the markets such flour as may be injurious to

health. The trial court by its instructions forced the condemnation and destruction of this flour, even though it contained nothing which would in any wise render it injurious to health. This is not the exercise of a legislative power, but is an arbitrary and illegal taking of property which this court has in many cases condemned. *Powell* v. *Pennsylvania*, 127 U. S. 678; *Mugler* v. *Kansas*, 123 U. S. 623; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Collins* v. *New Hampshire*, 171 U. S. 30; *Lochner* v. *New York*, 198 U. S. 45.

There is no reasonable foundation in this case for holding that it is necessary or appropriate to safeguard the public health or the health of the individuals to destroy and condemn the flour in question. *State* v. *Layton*, 160 Missouri, 474; *State* v. *Addington*, 12 Mo. App. 219; *State* v. *Fisher*, 52 Missouri, 174; *Toledo* v. *Jacksonville*, 67 Illinois, 37; *River Rendering Co.* v. *Behr*, 77 Missouri, 9; *McConnell* v. *McKillipp*, 71 Nebraska, 712.

The interpretation placed upon the act by the Circuit Court of Appeals is reasonable, gives effect to all the language contained in the act, and is the only interpretation under which its constitutionality can be sustained. *Knowlton* v. *Moore*, 178 U. S. 41; *Collins* v. *New Hampshire*, 171 U. S. 30; *Interstate Drainage Co.* v. *Commissioners*, 158 Rep. Fed. 270.

The statute in question is a penal statute, and as to the rule applicable to the construction of such statutes see *Martin* v. *United States*, 168 Fed. Rep. 198, 201; *United States* v. *Wiltberger*, 5 Wheat. 77; *United States* v. *Germaine*, 99 U. S. 508; *Field* v. *United States*, 137 Fed. Rep. 6; *United States* v. *Lake*, 129 Fed. Rep. 499.

The intent of Congress, as indicated by the title of the act, was to make the condition of the food the determining factor of adulteration.

The principle of construction adopted by the Circuit Court of Appeals is sustained in numerous decisions. See

Maillard v. *Lawrence*, 16 How. 251; *Levy* v. *M'Cartee*, 6 Pet. 110; *Parsons* v. *Hunter*, 2 Sumner, 422; *Bernier* v. *Bernier*, 147 U. S. 246; *Washington Market Co.* v. *Hoffman*, 101 U. S. 115; *United States* v. *Fisher*, 109 U. S. 145; *Lake Superior Canal Co.* v. *Cunningham*, 155 U. S. 380; *Rhodes* v. *Iowa*, 170 U. S. 423; *Lake County* v. *Rollins*, 130 U. S. 670; *Hamilton* v. *Rathbone*, 175 U. S. 421; *Swarts* v. *Seigel*, 117 Fed. Rep. 18; *Glover* v. *United States*, 164 U. S. 298; *Harless* v. *United States* (C. C. A.), 88 Fed. Rep. 102.

The construction of the law contended for by the Government would render contraband many admittedly harmless articles of food. Other well known articles of food, admittedly harmless, contain nitrites.

The Circuit Court of Appeals committed no error in sustaining respondent's contention that there was no substantial evidence to support the charge that the seized flour was colored in a manner whereby damage or inferiority is concealed. *Naylord & Gerrard* v. *Alsop Process Co.*, 168 Fed. Rep. 911, 915.

By leave of court, *Mr. Ralph S. Rounds* filed a brief as *amicus curiæ*.

Mr. Justice Day delivered the opinion of the court.

The petitioner, the United States of America, proceeding under § 10 of the Food and Drugs Act (June 30, 1906, c. 3915, 34 Stat. 768, 771), by libel filed in the District Court of the United States for the Western District of Missouri, sought to seize and condemn 625 sacks of flour in the possession of one Terry, which had been shipped from Lexington, Nebraska, to Castle, Missouri, and which remained in original, unbroken packages. The judgment of the District Court, upon verdict, in favor of the Government, was reversed by the Circuit Court of Appeals for the Eighth Circuit (202 Fed. Rep. 615), and this writ of certiorari is to review the judgment of that court.

The amended libel charged that the flour had been treated by the "Alsop Process," so called, by which nitrogen peroxide gas, generated by electricity, was mixed with atmospheric air and the mixture then brought in contact with the flour, and that it was thereby adulterated under the fourth and fifth subdivisions of § 7 of the act, namely, (1) in that the flour had been mixed, colored and stained in a manner whereby damage and inferiority were concealed and the flour given the appearance of a better grade of flour than it really was, and (2) in that the flour had been caused to contain added poisonous or other added deleterious ingredients, to-wit, nitrites or nitrite reacting material, nitrogen peroxide, nitrous acid, nitric acid and other poisonous and deleterious substances which might render the flour injurious to health. The libel also charged that the flour was adulterated under the first subdivision of § 7, and was misbranded; but the Government does not urge these features of the case here. The verdict was broad enough to cover the charge under the first subdivision of § 7, but in the view we take of the case as to the instruction of the court under subdivision 5 it need not be noticed.

The Lexington Mill & Elevator Company, the respondent herein, appeared, claiming the flour, and answered the libel, admitting that the flour had been treated by the Alsop Process, but denying that it had been adulterated and attacking the constitutionality of the act.

A special verdict to the effect that the flour was adulterated was returned and judgment of condemnation entered. The case was taken to the Circuit Court of Appeals upon writ of error. The respondent contended that, among other errors, the instructions of the trial court as to adulteration were erroneous and that the act was unconstitutional. The Circuit Court of Appeals held that the testimony was insufficient to show that by the

bleaching process the flour was so colored as to conceal inferiority and was thereby adulterated, within the provisions of subdivision 4. That court also held—and this holding gives rise to the principal controversy here—that the trial court erred in instructing the jury that the addition of a poisonous substance, in any quantity, would adulterate the article, for the reason that "the possibility of injury to health due to the added ingredient and in the quantity in which it is added, is plainly made an essential element of the prohibition." It did not pass upon the constitutionality of the act, in view of its rulings on the act's construction.

The case requires a construction of the Food and Drugs Act. Parts of the statute pertinent to this case are:

"SEC. 7. (34 Stat. 769.) That for the purposes of this act an article shall be deemed to be adulterated: . . .

"In the case of food:

"First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength. . . .

"Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

"Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health. . . .

* * * * * * * *

"SEC. 10. (34 Stat. 771.) That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one State, Territory, district, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, . . . shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for

condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this act, the same shall be disposed of by destruction or sale, as the said court may direct."

Without reciting the testimony in detail it is enough to say that for the Government it tended to show that the added poisonous substances introduced into the flour by the Alsop Process, in the proportion of 1.8 parts per million, calculated as nitrogen, may be injurious to the health of those who use the flour in bread and other forms of food. On the other hand, the testimony for the respondent tended to show that the process does not add to the flour any poisonous or deleterious ingredients which can in any manner render it injurious to the health of a consumer. On these conflicting proofs the trial court was required to submit the case to the jury. That court, after stating the claims of the parties, the Government insisting that the flour was adulterated and should be condemned if it contained any added poisonous or other added deleterious ingredient of a kind or character which was capable of rendering such article injurious to health; the respondent contending that the flour should not be condemned unless the added substances were present in such quantity that the flour would be thereby rendered injurious to health, gave certain instructions to the jury. Part of the charge, excepted to by the respondent, reads:

"The fact that poisonous substances are to be found in the bodies of human beings, in the air, in potable water, and in articles of food, such as ham, bacon, fruits, certain vegetables, and other articles, does not justify the adding of the same or other poisonous substances to articles of food, such as flour, because the statute condemns the adding of poisonous substances. Therefore the court charges you that the Government need not prove that this flour or food-stuffs made by the use of it would injure

the health of any consumer. It is the character—not the quantity—of the added substance, if any, which is to determine this case."

On the other hand the respondent insisted that the law is, and requested the court to charge the jury:

"That the burden is upon the prosecution to prove the truth of the charge in the libel, that by the treatment of the flour in question by the said Alsop Process it has been caused to contain added poisonous or other added deleterious ingredients, to-wit, nitrites or nitrite reacting material, which may render said flour injurious to health.

"And in this connection you are further instructed that it is incumbent upon the Government to prove that any such added poisonous or other added deleterious ingredients, if any contained in said flour, are of such a character and contained in the flour seized in such quantities, conditions and amounts as may render said flour injurious to health, and unless you find that all of such facts are so proven you cannot find against the claimant or condemn the flour in question under that charge in the libel, and if you fail to so find your verdict upon that count or charge in the libel must be in favor of the claimant or defendant.

* * * * * * * *

"The law does not prohibit the adding of nitrites or nitrite reacting material to flour, and a jury cannot find for the Government or against the claimant, even if it be shown that nitrites or nitrite reacting material was added to the flour in question, unless they believe from a preponderance of the evidence that such addition, if any, rendered said flour injurious to the health of those who might consume the bread or other foods made from said flour."

It is evident from the charge given and requests refused that the trial court regarded the addition to the flour of any poisonous ingredient as an offense within this statute, no

matter how small the quantity, and whether the flour might or might not injure the health of the consumer. At least such is the purport of the part of the charge above given, and if not correct, it was clearly misleading, notwithstanding other parts of the charge seem to recognize that in order to prove adulteration it is necessary to show that the flour may be injurious to health. The testimony shows that the effect of the Alsop Process is to bleach or whiten the flour and thus make it more marketable. If the testimony introduced on the part of the respondent was believed by the jury they must necessarily have found that the added ingredient, nitrites of a poisonous character, did not have the effect to make the consumption of the flour by any possibility injurious to the health of the consumer.

The statute upon its face shows, that the primary purpose of Congress was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated foods. The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality. As against adulteration, the statute was intended to protect the public health from possible injury by adding to articles of food consumption poisonous and deleterious substances which might render such articles injurious to the health of consumers. If this purpose has been effected by plain and unambiguous language, and the act is within the power of Congress, the only duty of the courts is to give it effect according to its terms. This principle has been frequently recognized in this court. *Lake County* v. *Rollins*, 130 U. S. 662, 670:

"Where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have

plainly expressed, and consequently no room is left for construction."

Hamilton v. *Rathbone*, 175 U. S. 414, 421:

"The cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary."

Furthermore all the words used in the statute should be given their proper signification and effect; *Washington Market Co.* v. *Hoffman*, 101 U. S. 112, 115:

"We are not at liberty," said Mr. Justice Strong, "to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sec. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word, shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times."

Applying these well-known principles in considering this statute, we find that the fifth subdivision of § 7 provides that food shall be deemed to be adulterated: "If it contain any added poisonous or other added deleterious ingredient *which may render such article injurious to health.*" The instruction of the trial court permitted this statute to be read without the final and qualifying words, concerning the effect of the article upon health. If Congress had so intended the provision would have stopped with the condemnation of food which contained any added poisonous or other added deleterious ingredient. In other words, the first and familiar consideration is that, if Congress had intended to enact the statute in that form, it would have done so by choice of apt words to express that intent. It did not do so, but only condemned food containing an added poisonous or other added deleterious ingredient when such addition might render the article of food in-

jurious to the health. Congress has here, in this statute, with its penalties and forfeitures definitely outlined its inhibition against a particular class of adulteration.

It is not required that the article of food containing added poisonous or other added deleterious ingredients must affect the public health, and it is not incumbent upon the Government in order to make out a case to establish that fact. The act has placed upon the Government the burden of establishing, in order to secure a verdict of condemnation under this statute, that the added poisonous or deleterious substances must be such as may render such article injurious to health. The word "may" is here used in its ordinary and usual signification, there being nothing to show the intention of Congress to affix to it any other meaning. It is, says Webster, "an auxiliary verb, qualifying the meaning of another verb, by expressing ability, . . ., contingency or liability, or possibility or probability." In thus describing the offense Congress doubtless took into consideration that flour may be used in many ways, in bread, cake, gravy, broth, etc. It may be consumed, when prepared as a food, by the strong and the weak, the old and the young, the well and the sick; and it is intended that if any flour, because of any added poisonous or other deleterious ingredient, may possibly injure the health of any of these, it shall come within the ban of the statute. If it cannot by any possibility, when the facts are reasonably considered, injure the health of any consumer, such flour, though having a small addition of poisonous or deleterious ingredients, may not be condemned under the act. This is the plain meaning of the words and in our view needs no additional support by reference to reports and debates, although it may be said in passing that the meaning which we have given to the statute was well expressed by Mr. Heyburn, chairman of the committee having it in charge upon the floor of the Senate (Congressional Record, vol. 40, pt. 2, p. 1131):

"As to the use of the term 'poisonous,' let me state that everything which contains poison is not poison. It depends on the quantity and the combination. A very large majority of the things consumed by the human family contain, under analysis, some kind of poison, but it depends upon the combination, the chemical relation which it bears to the body in which it exists as to whether or not it is dangerous to take into the human system."

And such is the view of the English courts construing a similar statute. The English statute provides (§ 3, of the Sale of Food and Drugs Act, 1875):

"No person shall mix, color, . . . or order or permit any other person to mix, color, . . . any article of food with any ingredient or material so as to render the article injurious to health."

That section was construed in *Hull* v. *Horsnell*, 68 J. P. 591, which involved preserved peas, the color of which had been retained by the addition of sulphate of copper, charged to be a poisonous substance and injurious to health. There was a conviction in the lower court. Lord Alverstone, C. J., in reversing and remitting the case on appeal, said:

"In my opinion, if the justices convicted the appellant of an offence under § 3 of the Sale of Food and Drugs Act, 1875, on the ground that the ingredient mixed with the article of food was injurious to health,—that the sulphate of copper was injurious to health, and not on the ground that the peas by reason of the addition of sulphate of copper were rendered injurious to health, the conviction is clearly wrong. To constitute an offence under the latter part of § 3 the article of food sold must, by the addition of an ingredient, be rendered injurious to health. All the circumstances must be examined to see whether the article of food has been rendered injurious to health."

We reach the conclusion that the Circuit Court of Appeals did not err in reversing the judgment of the Dis-

trict Court for error in its charge with reference to subdivision five of § 7.

The Circuit Court of Appeals reached the conclusion that there was no substantial proof to warrant the conviction under the fourth subdivision of § 7, that the flour was mixed, colored and stained in a manner whereby damage and inferiority was concealed. As the case is to be retried to a jury, we say nothing upon this point.

As to the objection on constitutional grounds, it is not contended that the statute as construed by the Circuit Court of Appeals and this court is unconstitutional.

It follows that the judgment of the Circuit Court of Appeals reversing the judgment of the District Court must be affirmed, and the case remanded to the District Court for a new trial.

Affirmed.

RUBBER TIRE WHEEL COMPANY *v.* GOODYEAR TIRE AND RUBBER COMPANY.

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

No. 37. Argued May 7, 1913.—Decided February 24, 1914.

In *Diamond Rubber Co.* v. *Consolidated Rubber Tire Co.*, 220 U. S. 428, the Grant tire patent was sustained as a patentable combination, not as a mere aggregation of elements but as a new combination of parts co-acting so as to produce a new and useful result; nor did the patentability depend on the novelty of any of the elements entering into it.

Where the combination is protected by such a patent, one manufacturing it by assembling the various elements and effecting the combination is not entitled to immunity from prosecution for infringing because he purchases one element from a party who is immune under a provision in a decree permitting it to sell the patented article itself. *Kessler* v. *Eldred*, 206 U. S. 285, distinguished.

In this case *held*, that the immunity given by a provision in a decree to a specified party manufacturing and selling an article as a patentable

combination producing new results, is not transferable, and such party, although immune himself, cannot enjoin the prosecution of suits against another as an infringer because the latter purchases from him one of the elements used in manufacturing the article.
183 Fed. Rep. 978, reversed.

THE facts, which involve the construction of a decree in a patent case and the extent and effect of the immunity granted thereunder to manufacture the patented article and the several elements thereof, are stated in the opinion.

Mr. Frederick P. Fish, with whom *Mr. J. L. Stackpole* was on the brief, for petitioners.

Mr. H. A. Toulmin for respondent.

MR. JUSTICE HUGHES delivered the opinion of the court.

The petitioners are the owners of the Grant patent (No. 554,675) issued February 18, 1896, for an improvement in rubber-tired wheels. In a suit for infringement brought by the petitioners against the Goodyear Tire and Rubber Company (the respondent) it was held by the Circuit Court of Appeals for the Sixth Circuit that the patent was void for want of novelty. *Goodyear Tire & Rubber Co.* v. *Rubber Tire Wheel Co.*, 116 Fed. Rep. 363. Upon the basis of the decree entered upon that decision, the respondent instituted the present suit in the Southern District of Ohio to restrain the petitioners from prosecuting suits for infringement against the respondent's customers. The Circuit Court granted a preliminary injunction. Upon appeal, the Circuit Court of Appeals for the Sixth Circuit sustained the injunction so far as it applied to the prosecution of a suit which the petitioners had brought against John Doherty in the Circuit Court for the Southern District of New York. 183 Fed. Rep. 978. This writ of certiorari was then granted.

The Grant tire is composed of three elements, (1) a channel or groove with tapered or inclined sides, (2) a rubber tire with a described shape, adapted to fit into the channel, and (3) a fastening device consisting of independent retaining wires, which pass through the rubber tire and are placed in a particular position. It was held in the Sixth Circuit that both the elements and the results were old and hence patentability was denied. *Goodyear Tire & Rubber Co.* v. *Rubber Tire Wheel Co., supra; Rubber Tire Wheel Co.* v. *Victor Rubber Tire Co.*, 123 Fed. Rep. 85. In the Second Circuit, and in the Circuit Court for the Northern District of Georgia, the patent was sustained. *Rubber Tire Wheel Co.* v. *Columbia Pneumatic Wagon Wheel Co.*, 91 Fed. Rep. 978; *Consolidated Rubber Tire Co.* v. *Finley Rubber Tire Co.*, 116 Fed. Rep. 629; *Consolidated Rubber Tire Co.* v. *Firestone Tire & Rubber Co.*, 147 Fed. Rep. 739; 151 Fed. Rep. 237; *Consolidated Rubber Tire Co.* v. *Diamond Rubber Co.*, 157 Fed. Rep. 677; 162 Fed. Rep. 892. The controversy came to this court upon certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit in the case last-mentioned and it was finally determined that the patent was valid. *Diamond Rubber Co.* v. *Consolidated Rubber Tire Co.*, 220 U. S. 428. The patented structure was held to be not a mere aggregation of elements but a new combination of parts co-acting so as to produce a new and useful result. It was found that the Grant tire possessed a distinctive characteristic, that is, a "tipping and reseating power." This, said this court, "is the result of something more than each element acting separately. It is not the result alone of the iron channel, with diverging sides, nor alone of the retaining bands or the rubber. They each have uses and perform them to an end different from the effect of either, and they must have been designed to that end, contriving to exactly produce it. There can be no other deduction from their careful relation. The combination of the rubber

and the flaring channel, the shape of that permitting lateral movement and compression, the retaining band, holding and yielding, placed in such precise adjustment and correlation with other parts, producing a tire that 'when compressed and bent sidewise shall not escape from the channel and shall not be cut on the flange of the channel,' and yet shall 'be mobile in the channel.'" 220 U. S. p. 443. There was thus a patentable combination, the patentability of which did not depend on the novelty of any of the elements entering into it, whether rubber, iron or wires.

Doherty, against whom suit was enjoined, had a shop in New York City where he was engaged in the business of applying rubber tires to vehicle wheels. It appeared that having purchased the rubber from the respondent, and the wire and channel from other parties, he combined these elements and fitted them to a carriage wheel, thus constructing a complete tire. This we may assume to be a typical case.

It is at once apparent that the decree in favor of the Goodyear Company in the former suit, does not work an estoppel in favor of Doherty so as to afford him a defense against the charge of infringement in making the patented structure. He was not a party to the suit in which that decree was rendered; nor, at least with respect to tires made by him, can he be regarded as a privy to that decree. We may lay on one side the question as to the rights of one purchasing from the respondent the completed article. Doherty did not purchase it; he made it himself, assembling its various elements for that purpose and effecting the combination. On no possible theory can it be said that, if the tire thus constructed was covered by the patent, Doherty was entitled to immunity simply because he bought one element of the tire from the Goodyear Company.

The respondent, however, is asserting its own right and not that of Doherty. It insists that, by virtue of the

decree in its favor in the infringement suit, it should have the injunction in order to protect its trade. It contends that it has an equitable right to this protection by restraining suits not only against those who buy from it the structure which is the subject of the patent but also against those who buy its rubber and themselves make the patented tire. In urging this contention the respondent relies upon the doctrine of *Kessler* v. *Eldred*, 206 U. S. 285. There, Kessler and Eldred were rival manufacturers of electric cigar lighters. Eldred, being the owner of the Chambers patent, sued Kessler in the Northern District of Indiana for infringement. The Circuit Court, finding non-infringement, dismissed the bill; and this decree was affirmed by the Circuit Court of Appeals for the Seventh Circuit. 106 Fed. Rep. 509. Subsequently, Eldred brought suit on the same patent in the Northern District of New York against Kirkland, who was selling a similar cigar lighter, but not of Kessler's make. The Circuit Court of Appeals for the Second Circuit held the Kirkland lighter to be an infringement. 130 Fed. Rep. 342. Eldred then began a suit for infringement in the Western District of New York against Breitwieser, a user of Kessler's lighters. Thereupon Kessler filed his bill in the Circuit Court for the Northern District of Illinois to enjoin Eldred from prosecuting suit against anyone for alleged infringement of the Chambers patent by purchase, use or sale of any electric cigar lighter manufactured by Kessler and identical with the lighter before the court in the suit of *Eldred* v. *Kessler*. Kessler, being defeated in the Circuit Court, appealed to the Circuit Court of Appeals for the Seventh Circuit. Answering questions certified by that court, this court held that the decree in the suit of *Eldred* v. *Kessler* had the effect of entitling Kessler to continue the business of manufacturing and selling throughout the United States the same lighter he had theretofore been manufacturing and selling, without molestation by Eldred

through the patent which he held; and that the decree also had the effect of making a suit by Eldred against any customer of Kessler for the alleged infringement of the patent by use or sale of Kessler's lighters a wrongful interference with Kessler's business, with respect to which he was without adequate remedy at law. 206 U. S. 287, 290.

It will be observed that the equity thus sustained sprang from the decree in the former suit between the parties and that the decision went no further than to hold it to be a wrongful interference with Kessler's business to sue his customers for using and selling the lighter which Kessler had made and sold to them, and which was the same as that passed upon by the court in the previous suit. His right to make and sell the particular article, the making of which Eldred had unsuccessfully challenged as an infringement, was deemed to include the right to have others secure in buying that article, and in its use and resale. But the present question was in no way involved. It was not held that Kessler would have been entitled to restrain Eldred from suing other manufacturers of lighters who might buy from Kessler some of the materials used in such manufacture.

The distinction is controlling. Under the doctrine of *Kessler* v. *Eldred*, the respondent—by reason of the final adjudication in its favor—was entitled to make and sell the Grant structure, and to have those who bought that structure from it unmolested in taking title and in enjoying the rights of ownership. It may also be assumed that the respondent had the right to make and sell its rubber without hindrance by the petitioners claiming under the patent. The trade right of the respondent, however, whether with respect to the complete structure or its separate parts, is merely the right to have that which it lawfully produces freely bought and sold without restraint or interference. It is a right which attaches to its product—to a particular thing—as an article of lawful com-

merce, and it continues only so long as the commodity to which the right applies retains its separate identity. If that commodity is combined with other things in the process of the manufacture of a new commodity, the trade right in the original part as an article of commerce is necessarily gone. So that when other persons become manufacturers on their own behalf, assembling the various elements and uniting them so as to produce the patented device—a new article—it is manifest that the respondent cannot insist upon their being protected from suit for infringement by reason merely of its right to make and sell, and the fact of its having made and sold, some component part of that article. It must be able to go beyond a mere trade right in that element and to show itself to be entitled to have its customers manufacture the patented structure. Thus the fallacy in the respondent's contention becomes apparent. The decree gave the respondent no right to have others make Grant tires. It could make and sell them, and it could make and sell rubber; it could demand protection for its trade rights in the commodities it produced. But it had no transferable immunity in manufacture. The decree gave it no privilege to demand that others should be allowed to make and sell the patented structure in order that it might have a market for its rubber.

The suit against Doherty was based upon his conduct in constructing Grant tires. The fact that the respondent could not be charged with liability as a participant in the infringement thus alleged did not excuse him; and the petitioners in bringing the suit did not violate any right of the respondent.

It is not necessary to consider the evidence bearing upon the question whether Doherty had authority from the petitioners, as that is a matter between him and them, and if the facts afford him a defense he is free to urge it.

The decree of the Circuit Court of Appeals, in so far

as it affirmed the order of injunction granted by the Circuit Court, is reversed and the cause is remanded to the District Court with instructions to enter an order denying the application for injunction.

It is so ordered.

MR. JUSTICE DAY states that in his view the suit against Doherty was properly enjoined upon the principles established in this court in *Kessler* v. *Eldred*, 206 U. S. 285, and, without repeating, agrees with the reasoning by which that conclusion was reached in the opinion of Judge Warrington, speaking for the Circuit Court of Appeals in this case.

SEIM *v.* HURD.

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

No. 141. Argued December 17, 1913.—Decided February 24, 1914.

Where the separate elements of the combination are all old, and it is only the article resulting from the combination that is protected by the patent, there is no actual infringement by one purchasing the different elements unless and until the article itself is made; but if such purchaser does make that article with the separate elements he cannot escape liability on the ground that he purchased such elements from others.

Where none of the questions certified are apposite to the facts stated in the certificate, this court is not bound to, and will not, answer them. The certificate will be dismissed.

THE certificate in this case is as follows:

"There arises in this case a question of law upon which this Court desires the instruction of the Supreme Court for its proper decision.

"It is therefore ordered that the statement and questions here following be certified to the Supreme Court as provided by the Sixth Section of the Act of March 3rd, 1891.

"United States Patent No. 554,675, was issued February 18, 1896, to Arthur W. Grant for Rubber Tired Wheel. The patentee immediately assigned the entire interest in said patent to the Rubber Tire Wheel Company. October 11, 1897, The Rubber Tire Wheel Company being the sole owner, sold and assigned to the complainant James D. Hurd an exclusive license and shop-right to put on rubber tires according to said patent in Berkshire County, Massachusetts; in the western part of Vermont and in seventeen counties in New York State, 'with the exclusive right to ship and sell the same throughout said territory and not elsewhere,' subject, however, to the rights of the Hartford Rubber Works Company, under a certain contract. Mr. Hurd immediately commenced and has ever since continued to operate under said patent in said territory.

"July 18, 1899, the owner of said patent conveyed the exclusive license to make and vend such tires throughout the United States to the Consolidated Rubber Tire Company, subject however to Hurd's rights and the Hartford Rubber Works Company contract.

"Much litigation has been had in reference to said patent. The following are the only cases important here, all of which were commenced after the exclusive license was granted to the complainant Hurd and in none of which was he a party to the action or in control of the action.

"The Circuit Court of Appeals in the Sixth Circuit, in the case of *Goodyear Tire & Rubber Co.* v. *The Rubber Tire Wheel Company*, 116 Fed. Rep. 363, held that the patent was invalid.

"The Court in the Second Circuit in the case of the

Consolidated Rubber Tire Co. v. *Finley Rubber Tire Co.*, 116 Fed. Rep. 629, held that the patent was valid.

"The Court in the Sixth Circuit in the case of *The Rubber Tire Wheel Co.* v. *The Victor Rubber Co.*, 123 Fed. Rep. 895, held that the patent was void.

"The Court in the Second Circuit, in the case of the *Consolidated Rubber Tire Co.* v. *Firestone Tire & Rubber Co.*, 147 Fed. Rep. 739, affirmed on appeal in 151 Fed. Rep. 237, held that the patent was valid and infringed.

"The Circuit Court of the District of Indiana in the case of the *Consolidated Rubber Tire Company and The Rubber Tire Wheel Co., D. B. Sullivan and Kenny & Sullivan* v. *Kokomo Co., D. C. Sparker, A. Lehman and G. W. Landan*, not reported, dismissed the complaint upon the pleadings, testimony and exhibits for want of equity, no opinion being written and the ground for the decision not being set forth in the order except that the complaint was dismissed 'for want of equity,' the case then being appealed by the complainants to the U. S. Circuit Court of Appeals of the Seventh Circuit, and thereupon dismissed thereafter.

"The Circuit Court of Appeals in the Second Circuit in the case of the *Consolidated Rubber Tire Co.* v. *Diamond Rubber Co. of New York*, 157 Fed. Rep. 678, and on rehearing 162 Fed. Rep. 892, held that the patent was valid and infringed by the defendant.

"The Supreme Court of the United States affirmed this decision in 220 U. S. 428, and held that the patent was valid and infringed by the defendant.

"None of these cases were for infringement in Hurd's exclusive territory.

"In view of the ruling of the Supreme Court in *Kessler* v. *Eldred*, 206 U. S. 285, the Court of Appeals in the Second Circuit inserted the following clause in the final decree in the case of the *Consolidated Rubber Tire Co.* v. *Diamond Rubber Co. of New York* (162 Fed. Rep. 895):

"'Nothing in this injunction shall prevent or is intended to prevent, or enjoin this defendant from handling, using and selling rubber tires and rims covered by the Grant patent, manufactured by the Goodyear Tire & Rubber Company, having a right to manufacture, use, and sell such tires under a judicial decree in the Federal courts of the Sixth Circuit; or manufactured by the Kokomo Rubber Company, having a right to manufacture, use and sell such tires under a judicial decree in the district of Indiana, Seventh Circuit; or manufactured by the Victor Rubber Tire Company, under a judicial decree in a litigation in the Federal courts in the Sixth Circuit, wherein in such litigations it has been judicially determined that the said Grant patent is invalid and void.'

"After the decision of the Supreme Court sustaining the Grant patent Hurd commenced this suit, joining with him the legal owner and licensee of the patent, against defendants residing and doing business within Hurd's exclusive territory. Defendants purchased the infringing tires from the Diamond Rubber Company of New York, which was the defendant in the former litigation, and at the City of New York, and such tires were delivered to defendants at the City of New York, and then taken to Albany, complainant Hurd's territory, and the rubber, metal channel and retaining wires were there assembled and attached to the wheel rim by defendants, and not by the Kokomo Company or the Diamond Rubber Company of New York.

"Defendants now claim that the infringing tires used by them in their business were made by the Kokomo Rubber Company and sold to them by the Diamond Rubber Company of and at New York City, said Kokomo Company being the defendant in the action in the District of Indiana where the complaint was dismissed for want of equity.

"Defendants claim that under the ruling of the Supreme

Court in the case of *Kessler* v. *Eldred*, 206 U. S. 285, the Kokomo Company have the right to manufacture the infringing tires, and that the tires so made are free from the monopoly of the patent and the users of the tires made by the Kokomo Company are immune from prosecution and such tires may be used and sold by any one.

"On the other hand it is claimed by complainants that the doctrine of the case of *Kessler* v. *Eldred* does not apply here for the reason that the patent has since been held valid by the Supreme Court and that the complainant Hurd had possession of his limited territory under his exclusive license before any of the suits in question were commenced, and was not a party to those actions and had no control over any of those actions and is not privy to the parties in those actions and is therefore not bound by the decisions in those actions, also that the decision in *Kessler* v. *Eldred* was upon the ground that a decree that an article in question is, or is not, an infringement of the patent is *res adjudicata* as to similar articles only and does not apply to a case where the patent was held void by the lower court and afterward held valid by the Supreme Court, and also that no specific ground for the decision in the case against the Kokomo Company having been stated by the court, the reasons for that decision cannot now be inferred and such decision cannot be binding upon any person not a party to that action.

Questions Certified.

"The Court entertaining a doubt as to which is the correct interpretation to be put upon the opinion in *Kessler* v. *Eldred*, upon the facts set forth above, desires the instruction of the Supreme Court for the proper decision of this appeal and to that end it certifies to the Supreme Court under Section 6 of the Court of Appeals Act, for its instruction the following questions:

"1st. Has the Kokomo Company the right to manu-

facture the infringing tires free from the monopoly of the patent?

"2nd. Are purchasers and users of infringing tires made by the Kokomo Company immune from prosecution by the owners of the patent?

"3rd. Are the defendants immune from prosecution by the complainant Hurd for using and selling the infringing tires made by the Kokomo Company, and sold and delivered to them by the Diamond Rubber Company of New York at the City of New York, in the exclusive territory conveyed to Hurd prior to the commencement of the action against the Kokomo Company?

"4th. If the Kokomo Company is immune in making the infringing rubber which is only one element of the combination of the patent are its customers who purchase the rubber of the Kokomo Company and the metal rims and retaining wires of other parties and sell them to be assembled upon wheel rims making the completed structure of the patent also immune from prosecution?"

Mr. C. K. Offield for Seim.

Mr. Walter E. Ward for Hurd.

Mr. Justice Hughes, after making the above statement, delivered the opinion of the court.

Hurd, a licensee for a limited territory under the Grant patent for rubber tires, joining with him the legal owner of the patent and the holder of an exclusive license subject to the rights of Hurd and another, brought suit against Seim and Reissig, for infringement. It is stated that the defendants purchased the infringing tires from the Diamond Rubber Company of New York and, also, that it is the contention of the defendants that these tires were bought by the Diamond Rubber Company from the

Kokomo Company. The patent had been sustained in a suit against the Diamond Rubber Company (162 Fed. Rep. 895; 220 U. S. 428) but by a provision in the final decree there was excepted from the operation of the injunction, tires manufactured by parties to other suits in which the patent had been declared invalid, naming among others the Kokomo Company.

The further statement of the certificate, however, makes it plain that the defendants did not purchase the patented structure but made it themselves. The statement is that "such tires" (referring to those purchased by the defendants) "were delivered to defendants at the City of New York, and then taken to Albany, complainant Hurd's territory, and the rubber, metal channel and retaining wires were there assembled and attached to the wheel rim by defendants, and not by the Kokomo Company or the Diamond Rubber Company of New York."

The elements in the Grant structure were old. There had been previous combinations of rubber, metal channels and retaining wires in the effort to produce a successful rubber tire (220 U. S. pp. 438, 439). The claims of the Grant patent were narrow and were limited closely to a specified combination which, through the coöperation of the various parts, when these were correlated in the precise adjustment described, produced a new and useful result.

It is thus apparent that the defendants themselves constructed the device, effecting that union of the separate elements which alone could bring the structure within the patent claims. In this aspect, it is immaterial from whom they bought the rubber or the wires or the channel. It is not the case of the purchase of the article in question from one who had a right to sell. There was no actual infringement until they made the tire and for their act in making it they could not escape liability by the purchase of parts from others. See *Rubber Tire Wheel Co. et*

al. v. *Goodyear Tire & Rubber Co.*, decided this day, *ante*, p. 413.

None of the questions certified is apposite to the facts as we understand the certificate to state them. It may have been the intention by the use of the words "infringing tires" in the first, second and third questions to refer to the rubber stock only. It seems to be conceded in the arguments of both parties that the rubber alone is made by the Kokomo Company. But the questions, as put, are not raised by the case made and for that reason they must go unanswered. Neither the right of the Kokomo Company to make the Grant structure, nor the right of a purchaser or user of that structure if made and sold by the Kokomo Company, is involved.

The fourth question is as follows:

"If the Kokomo Company is immune in making the infringing rubber which is only one element of the combination of the patent are its customers who purchase the rubber of the Kokomo Company and the metal rims and retaining wires of other parties and sell them to be assembled upon wheel rims making the completed structure of the patent also immune from prosecution?"

A similar question is answered in the case of *Woodward Company* v. *Hurd*, decided this day, *post*, p. 428, but it is not presented by the facts of the present case. There is no suggestion that the defendants here purchased the various parts and sold them to be assembled by their customers, but on the contrary, as we have said, the defendants made the structure themselves.

In view of the form of the questions, the certificate must be dismissed.

Dismissed.

WOODWARD COMPANY *v.* HURD.

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

No. 142. Argued December 17, 1913.—Decided February 24, 1914.

Where the manufacturer of one element of a combination is immune under a decree of the Federal court, his customers of that element who use it in connection with the other elements to make the completed article covered by the patent, are not also immune from suit.

THE facts, which involve the construction of a provision of immunity in the decree in a patent case and the rights of parties thereunder, are stated in the opinion.

Mr. C. K. Offield for the Woodward Company.

Mr. Walter E. Ward for Hurd.

MR. JUSTICE HUGHES delivered the opinion of the court.

The recitals of the certificate with respect to the Grant patent, and the decrees which have been rendered in suits brought for its infringement, are identical with those contained in the certificate in *Seim* v. *Hurd*, decided this day, *ante*, p. 420. The questions certified are, in substance, the same. The facts of the present case are thus stated in the certificate:

"After the decision of the Supreme Court sustaining the Grant patent Hurd commenced this suit, joining with him the legal owner and licensee of the patent, against defendants residing and doing business within Hurd's exclusive territory. Defendant purchased the infringing tires—the rubber portion only—not the metal channel or retaining wires—from the Diamond Rubber Company of

New York, which was the defendant in the former litigation and the rubber, metal channels and retaining wires were sold by the defendant The Woodward Company to be assembled and attached to the wheel rim of its purchasers and not by the Kokomo Company.

"Defendants now claim that the infringing tires—the rubber stock only—used by them in their business was made by the Kokomo Rubber Company which was the defendant in the action in the District of Indiana where the complaint was dismissed for want of equity, and sold to them by the Diamond Rubber Company of New York at the City of New York and there delivered."

It thus appears that the Kokomo Company did not make the patented device but only one of its elements—the rubber stock. Nor did the defendant itself make the patented article. The defendant, buying from the Diamond Company the rubber that had been made by the Kokomo Company and otherwise obtaining the necessary channel of metal and the retaining wires, sold all the parts to be united into the patented structure by its customers. Neither the right of the Kokomo Company, by virtue of the decree in its favor, to make and sell the patented thing, or to make and sell its rubber, nor its right to have the commodity which it lawfully produces freely move as an article of commerce through the channels of trade without hindrance by the owners of the patent, is here involved. See *Rubber Tire Wheel Co.* v. *Goodyear Tire & Rubber Co.*, decided this day, *ante*, p. 413. The case as stated concerns the liability of the defendant as a contributory infringer upon the assumption that in the manner described it assembles the various elements essential to the making of the Grant tire and sells them with the intent and purpose that they shall be so combined.

Can the defendant demand immunity upon the ground that one of the elements in which it dealt was made and sold by the Kokomo Company? We think not. It is not

simply a purchaser of, or dealer in, that which the Kokomo Company produces. The defendant goes beyond that; it buys from others the parts that are as much needed in effecting the patented combination as the rubber itself and sells them in order that the infringing device may be constructed by its customers.

The fourth question which is certified by the court below is:

"If the Kokomo Company is immune in making the infringing rubber which is only one element of the combination of the patent are its customers who purchase the rubber of the Kokomo Company and the metal rims and retaining wires of other parties and sell them to be assembled upon wheel rims making the completed structure of the patent also immune from prosecution?"

We answer this question in the negative. The other questions are not raised by the case made and hence are left unanswered.

It is so ordered.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *v.* CITY OF MINNEAPOLIS.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 150. Argued December 19, 1913.—Decided February 24, 1914.

Railroad corporations may be required, at their own expense, not only to abolish grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks or to carry their tracks over such highways.

This rule has been declared as the established law of the State of Minnesota by its highest courts.

The same rule applies to a highway laid out to increase the advantages

of a public park. Such a highway is a crossing devoted to the public use. *Shoemaker* v. *United States*, 147 U. S. 282.

The same rule also applies where the crossing is a canal or water-way connecting other waters and although within a public park; the fact, and not the mode, of public passage, controls.

The condemning of a strip of the right-of-way of a railroad company and compelling that company to build at its own expense a bridge over the part so taken so as to permit a municipality in Minnesota to construct a canal connecting two lakes all within the limits of a park devoted to public recreation is not an unconstitutional taking of private property without due process of law within the meaning of the Fourteenth Amendment.

115 Minnesota, 460, affirmed.

THE facts, which involve the determination of whether the condemnation of a part of the right-of-way of a railroad company, and compelling it, at its own expense, to construct a bridge over a waterway connecting two lakes within a park, amounts to a taking of property without compensation within the meaning of the due process clause of the Fourteenth Amendment, are stated in the opinion.

Mr. F. W. Root, with whom *Mr. Burton Hanson* was on the brief, for plaintiff in error:

The state Supreme Court erred:

In holding that the cost of the bridge required to carry the railway tracks over the canal, need not be included in the award of damages to the plaintiff in error, for the taking of a part of its right-of-way for canal purposes.

In holding, in violation of the Fifth Amendment, that such taking of property without making full compensation sufficient to include not only the value of the land taken, but all resulting expense of the construction and maintenance of the bridge, did not constitute a taking of private property, for public use, without just compensation.

In holding, in violation of § 1, of the Fourteenth Amendment that the taking of the property of the plaintiff in error, without making such full compensation, did not deprive it of its property without due process of law, and

did not deny to plaintiff in error the equal protection of the laws.

The city seeks to take the easement across said right-of-way, for the purpose of constructing and maintaining therein a canal for pleasure boating, connecting Lake Calhoun and Lake of the Isles, the level of whose waters is about eighteen feet below the level of said railway tracks; and as an immediate and direct result of such taking an expensive bridge is required to carry the railway tracks over such canal.

The cost of such bridge, if forced upon the Railway Company, will constitute a taking of its property.

There is not any special statutory provision of Minnesota excepting this case from the general rule; but it is claimed that the taking here is an exercise of its police power, and that such power may be exercised without compensation for property taken or damaged.

In a condemnation proceeding under the right of eminent domain, the property owner is entitled to full compensatory damages, which includes, not only the value of the property actually taken, but also all consequential damage to the remaining property. A denial of damage for the cost of such bridge is a taking of the property of the Railway Company for public use without just compensation, in violation of both the Federal and state Constitutions.

There is no question of public health or safety, no question of danger to anyone. The strip of land taken from the Railway Company is to be used for a canal,—a waterway,—excluding consideration of a crossing of the tracks at grade. So no element of danger appeals to the police power.

A bridge is required, not to relieve the public from dangers incident to the crossing of railway tracks at grade, but because the land is to be used for a canal, leaving a gap in the railroad.

There is nothing to show that the connecting of these two lakes is a matter of such importance to the general public, a matter so vitally affecting the general welfare of the community, as to bring the enterprise within the principle of police power.

Each of these lakes was navigable for pleasure boats without a canal.

The favored few, who may be financially able to provide themselves with pleasure boats upon either lake, and who may have the time and desire to occasionally use this canal, do not constitute the general public.

The proposed canal is not in any way designed to secure the public safety, health or welfare, nor will the opening of such canal operate upon any existing evil that injuriously affects the safety, health, morals or general welfare of the community.

The canal is purely artificial and its sole purpose, as found by the state Supreme Court, is to enhance the usefulness of the lakes (connected thereby), in affording opportunity to the public for recreation and pleasure.

The Railway Company has thus far been required to expend nearly sixteen thousand dollars in original construction, and an unknown amount must also be expended in future maintenance, merely to provide an occasional amorous couple with temptation to prolong their fondlings, perhaps their courtship, by passing from the wearisomeness of one lake into the scenery of another.

The cases cited by defendant in error are not apposite. They involve public safety, but in this case there is no question of public safety, nor is there any state law affecting this question.

Mr. C. J. Rockwood for defendant in error:

Railway companies must adapt their tracks to the public convenience. When changes in the construction or in method of operation become necessary to the com-

munity welfare and convenience, the companies must make them at their own cost.

Compensation to a railway company in eminent domain proceedings need not include the resultant expense of adapting the company's tracks to the changed conditions.

These doctrines are merely expressions of the police power, which is the power to subordinate the individual interest to the community interest in matters of high importance.

For cases imposing on railways the duty of separating grades, or adopting other safety devices, at their own expense, see *Minneapolis* v. *St. Paul, Minn. & Mani. Ry. Co.*, 35 Minnesota, 131; *Minneapolis* v. *Minn. & St. L. Ry. Co.*, 39 Minnesota, 219; *St. P., M. & M. Ry. Co.* v. *District Court*, 42 Minnesota, 247; *Minneapolis* v. *St. P., M. & M. Ry. Co.*, 98 Minnesota, 380, aff'd, 214 U. S. 498; *Duluth* v. *Nor. Pac. Ry. Co.*, 98 Minnesota, 429, aff'd, 208 U. S. 583; *Faribault* v. *W., M. & P. Ry. Co.*, 98 Minnesota, 536; *Minneapolis* v. *Minneapolis St. Ry. Co.*, 115 Minnesota, 514; *Twin City Separator Co.* v. *C., M. & St. P. R. Co.*, 118 Minnesota, 491; *N. Y. & N. E. R. Co.* v. *Bristol*, 151 U. S. 556; *C., B. & Q. Ry. Co.* v. *Chicago*, 166 U. S. 226; *Detroit F. W. & B. I. R. Co.* v. *Osborn*, 189 U. S. 383; *St. L. & S. F. R. Co.* v. *Fayetteville*, 75 Arkansas, 534; *Woodruff* v. *Catlin*, 54 Connecticut, 277; *Cleveland* v. *City Council*, 102 Georgia, 233; *C. & N. W. R. Co.* v. *Chicago*, 140 Illinois, 309; *C., B. & Q. R. Co.* v. *Chicago*, 149 Illinois, 457, aff'd, 166 U. S. 226; *Lake Erie & W. R. Co.* v. *Shelley*, 163 Indiana, 36; *N. Y. C. & St. L. R. Co.* v. *Rhodes*, 171 Indiana, 521; *Boston* v. *County Com'rs*, 79 Maine, 386; *C., B. & Q. R. Co.* v. *State*, 47 Nebraska, 549; *Ry. Co.* v. *Sharpe*, 38 Oh. St. 150; *Thorpe* v. *Rutland &c. R. Co.*, 27 Vermont, 140; *C., M. & St. P. R. Co.* v. *Milwaukee*, 97 Wisconsin, 418.

The measure of damages, in the absence of a statute on the subject, in taking an easement for the crossing of a

railway for highway purposes, does not include the cost of bridges and other safety devices. Cases *supra* and *State* v. *District Court*, 42 Minnesota, 247; *C., I. & W. Ry. Co.* v. *Connersville*, 170 Indiana, 316, aff'd, 218 U. S. 336; *L. & N. R. Co.* v. *Louisville* (Ky.), 114 S. W. Rep. 743; *Albany N. R. Co.* v. *Brownell*, 24 N. Y. 345; *People* v. *N. Y. C. & H. R. R. Co.*, 156 N. Y. 570; *Lehigh V. R. Co.* v. *Canal Board*, 204 N. Y. 476; *So. K. R. Co.* v. *Oklahoma*, 12 Oklahoma, 82.

As to the right of the public to convenient crossings and the duty of protection to the public existing at common law, see *City* v. *St. P., M. & M. R. Co.*, 98 Minnesota, 380, 402; *Chicago & E. R. Co.* v. *Luddington*, 175 Indiana, 35; *Pittsburgh, C., C. & St. L. Co.* v. *Gregg*, 102 N. E. Rep. 691.

The same rule applies to waterways natural and artificial. *C., B. & Q. R. Co.* v. *Illinois*, 200 U. S. 561; *West Chicago St. Ry. Co.* v. *People*, 201 U. S. 506, affi'g 214 Illinois, 9; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *C., B. & Q. R. Co.* v. *Supervisors*, 182 Fed. Rep. 291; *C. & E. R. Co.* v. *Luddington*, 175 Indiana, 35; *Mason City &c. R. R. Co.* v. *Supervisors*, 144 Iowa, 10; *Lehigh V. R. Co.* v. *Canal Board*, 204 N. Y. 476.

Lands and waters reserved for the recreation of the people are devoted to a public use; a use as fully entitled as any other to the protection of the law. *Lamprey* v. *State*, 52 Minnesota, 181; *State Park Commissioners* v. *Henry*, 38 Minnesota, 266; *Shoemaker* v. *United States*, 147 U. S. 282; *Smart* v. *Aroostook L. Co.*, 103 Maine, 37; *Attorney General* v. *Woods*, 108 Massachusetts, 436; *Attorney General* v. *Williams*, 174 Massachusetts, 476; *Pittsburgh &c. R. R. Co.* v. *Gregg*, 102 N. E. Rep. 961; *Grand Rapids* v. *Powers*, 89 Michigan, 94; *People* v. *Adirondack R. Co.*, 160 N. Y. 248, aff'd 176 U. S. 335; *Re City of New York*, 167 N. Y. 624, affi'g 57 App. Div. 166; *Lyon* v. *Columbia W. P. Co.*, 82 So. Car. 181; *Madson* v. *Spokane &c. Water Co.*, 40 Washington, 414.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is a writ of error to review a judgment of the Supreme Court of the State of Minnesota which affirmed a judgment entered in a controversy submitted upon an agreed statement of facts. The statement, in substance, shows:

Within the limits of the City of Minneapolis are Lake Calhoun, Lake of the Isles and Cedar Lake, lying in close proximity to each other and used by the public for pleasure boating and other recreations. The City, having acquired for park and parkway purposes the shores of Lake Calhoun and Lake of the Isles, and a portion of the shores of Cedar Lake, together with large tracts of land in the vicinity, is engaged in constructing two canals which will connect the lakes and will greatly enhance their usefulness to the public. Between Lake Calhoun and Lake of the Isles is a strip of land, six hundred feet wide in its narrowest part, through which one of these canals is to be opened. Along this strip and near its center lies the right-of-way—one hundred feet in width—of the appellant, the Chicago, Milwaukee & St. Paul Railway Company, which is used by it in the operation of its road. The City, in order to provide for the canal and walks on either side, seeks to condemn an easement in a piece of land one hundred feet wide across the right-of-way. The two lakes are now connected by a small water-course which crosses the right-of-way about fifty-nine feet from the center of the proposed canal and is carried under the railway tracks by a pipe about three feet in diameter. The construction of the canal will render the water-course and pipe useless and permit the closing of this channel. At the point where the land is to be taken by the City, the railway tracks are upon an artificial embankment about eighteen feet above the established level of the

water in the lakes. The City's improvement will require the construction of a bridge to carry the tracks across the canal and walks. The agreed value of the mere land proposed to be taken, irrespective of the cost of the bridge, is the sum of ten dollars; and the estimated cost of building a bridge in accordance with plans prepared by the City and accepted by the Railway Company is the sum of $18,513. It is agreed that an adequate bridge for railway purposes, built according to the plans usually adopted by the Railway Company, would cost only $15,969. The difference in cost, or $2,544, is due to ornamental features, and this amount it is agreed that, in any event, the City shall pay. For the purposes of this proceeding, the Railway Company conceded the authority of the City to take the described land under the power of eminent domain; and it was agreed accordingly that the City should take the land and construct the canal and walks, and that the Railway Company should build the bridge after the City's plans; but no claim for damages or compensation to which the Railway Company was entitled under the law by reason of the taking was waived.

The controversy submitted was as to the amount which the Company should receive. It was contended by the Company that it should be paid (1) the sum of ten dollars as the agreed value of the land taken, (2) the entire cost of the bridge, and (3) such further sum as would be sufficient to maintain the bridge. It was also insisted that to divest it of its property without such payment would be a violation both of the state constitution and of § 1 of the Fourteenth Amendment to the Federal Constitution. In the court of first instance it was held that the Company was entitled to recover only the sum of $2,554, being the value of the land and the cost of the ornamental features of the bridge; and this judgment was affirmed by the Supreme Court of the State. 115 Minnesota, 460.

The question thus presented is whether the refusal

to allow compensation for the cost of constructing and maintaining the necessary railroad bridge across the gap in the right-of-way, made by the building of the canal, amounts to a deprivation of property without due process of law.

It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks or to carry their tracks over such highways. *N. Y. & N. E. R. R. Co.* v. *Bristol,* 151 U. S. 556, 567; *C., B. & Q. R. R. Co.* v. *Chicago,* 166 U. S. 226, 252, 255; *C., B. & Q. R. R. Co.* v. *Nebraska,* 170 U. S. 57; *Northern Pacific Ry. Co.* v. *Duluth,* 208 U. S. 583, 597; *St. P., Minn. & Man. Ry. Co.* v. *Minnesota,* 214 U. S. 497; *C., I. & W. Ry. Co.* v. *Connersville,* 218 U. S. 336, 343, 344. See also *Detroit &c. Railway* v. *Osborn,* 189 U. S. 383; *New Orleans Gaslight Co.* v. *Drainage Com'n,* 197 U. S. 453, 462; *C., B. & Q. Ry. Co.* v. *Drainage Com'rs,* 200 U. S. 561, 592, 593; *Atlantic Coast Line* v. *Goldsboro,* decided this day, *post,* p. 548. The rule, as established in the State of Minnesota, was thus declared in the case of *State ex rel. Minneapolis* v. *St. P., Minn. & Man. Ry. Co.,* 98 Minnesota, 380 (see 115 Minnesota, p. 466): "A railroad company receives its charter and franchise subject to the implied right of the State to establish and open such streets and highways over and across its right of way as public convenience and necessity may from time to time require. That right on the part of the State attaches by implication of law to the franchise of the railroad company, and imposes upon it an obligation to construct and maintain at its own expense suitable crossings at new streets and highways to the same extent as required by the rules of the common law at streets and highways in existence when the railroad was constructed." In that case, it appeared that long after the construction of the railroad, the City of Minneapolis had laid

out a street across the railroad right-of-way, building at its own cost a bridge over the railroad tracks. After the bridge had been maintained for several years by the City it was destroyed by fire, and the City then demanded that the railroad company should build a new one. This demand the state court sustained; and, mandamus having thereupon been awarded (101 Minnesota, 545), the case was brought to this court, one of the grounds being that the action of the State deprived the company of its property without due process of law. The judgment was affirmed (*St. P., Minn. & Man. Ry. Co.* v. *Minnesota,* 214 U. S. 497), this conclusion being reached upon the authority of *Northern Pacific Ry. Co.* v. *Duluth,* 208 U. S. 583. Although the *Duluth Case* was earlier in this court, the decision therein by the Supreme Court of the State immediately followed that of the same court in the *Minneapolis Case* and applied the principle which had been there announced. *State ex rel. Duluth* v. *Northern Pacific Ry. Co.,* 98 Minnesota, 429. The facts were that after the railroad had been built, a street had been opened across the right-of-way and subsequently a viaduct for the crossing had been constructed at the joint expense of the City and the railroad company, the former agreeing to maintain it. Later, the City, repudiating the agreement, insisted that the company should repair the viaduct at its own expense. The state court entered judgment for the City, holding that the obligation to construct and maintain the viaduct rested upon the railroad company and that hence the contract was invalid. This court affirmed the judgment saying: "As the Supreme Court of Minnesota points out in the opinion in 98 Minnesota, 380, . . . the state courts are not altogether agreed as to the right to compel railroads, without compensation, to construct and maintain suitable crossings at streets extended over its right of way, after the construction of the railroad. The great weight of state au-

thority is in favor of such right. (See cases cited in 98 Minnesota, 380.) There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power and not in violation of the constitutional inhibition against the impairment of the obligation of contracts. . . . In this case the Supreme Court of Minnesota has held that the charter of the company, as well as the common law, required the railroad, as to existing and future streets, to maintain them in safety, and to hold its charter rights subject to the exercise of the legislative power in this behalf, and that any contract which undertook to limit the exercise of this right was without consideration, against public policy and void. This doctrine is entirely consistent with the principles decided in the cases referred to in this court."

In *C., I. & W. Ry. Co.* v. *Connersville*, 218 U. S. 336, 343, *supra*, a street was opened through an embankment upon which the railroad tracks were laid. At the time of the construction of the railroad that part of the embankment was outside the City limits. But the City was extended, and the intersecting street was laid out in order to provide a suitable means of communication between the parts of the City on either side of the embankment. On reviewing the judgment entered in the condemnation proceeding, it was held that there was no violation of the Fourteenth Amendment in refusing to allow to the company the cost of building a bridge for its tracks over the opening made by the street. "The question," said the court, "as to the right of the railway company to be reimbursed for any moneys necessarily expended in constructing the bridge in question is, we think, concluded

by former decisions of this court. . . . The railway company accepted its franchise from the State, subject necessarily to the condition that it would conform at its own expense to any regulations, not arbitrary in their character, as to the opening or use of streets, which had for their object the safety of the public, or the promotion of the public convenience, and which might, from time to time, be established by the municipality, when proceeding under legislative authority—within whose limits the company's business was conducted. . . . Without further discussion, . . . we adjudge upon the authority of former cases, that there was no error in holding that the City could not be compelled to reimburse the railway company for the cost of the bridge in question."

Under the doctrine of these decisions, it necessarily follows that if the City of Minneapolis had opened a public road through the embankment of the plaintiff in error, the latter would have had no ground to complain that its constitutional rights had been violated because it was compelled to bridge the gap at its own cost. No different rule could be applied because the highway was laid out in order to increase the advantages of a public park. In this aspect, it would be equally a crossing devoted to the public use (*Shoemaker* v. *United States*, 147 U. S. 282, 297); and we see no basis for a distinction in principle in the case of an intersecting public road opened under competent authority because such a highway might lead to public recreation grounds instead of to places of business, or might connect lakes instead of avenues.

If there is a distinction in the present case, it must lie in the fact that the crossing is an artificial waterway instead of a road. But it is none the less a public highway, established to afford an appropriate place of public passage. Walks are provided for those who go afoot, and it does not concern the plaintiff in error that others go in

boats instead of vehicles. "The way sought to be established," said the Supreme Court of Minnesota, p. 465, "a canal or waterway, with walks along each side" was "clearly a public way, subject to the rules governing public ways." It cannot make a difference in the constitutional rights of the Railway Company that this way was not constructed entirely, or chiefly, of solid earth; it is the fact, and not the mode, of public passage that is controlling. The case must be regarded as being one of a public crossing provided by law; and the authorities we have cited lead to the conclusion that the State, without infringing the guaranties of the Federal Constitution, could require the Railway Company to make suitable provision for carrying its tracks over the crossing without compensation.

The judgment is affirmed.

Affirmed.

UNITED STATES *v.* PELICAN.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON.

No. 787. Argued January 13, 1914.—Decided February 24, 1914.

The Colville Reservation in the State of Washington was set apart by Executive order in July, 1872, has been repeatedly recognized by acts of Congress and is a legally constituted reservation, and, as such, is included in Indian country to which § 2145, Rev. Stat., refers.

A legally constituted Indian reservation is none the less embraced within the Indian country referred to in § 2145, Rev. Stat., because it may have been segregated from the public domain.

The authority of Congress to deal with crimes committed on or against Indians upon the lands within an Indian Reservation is not affected

by the admission of the Territory, within which it is included, as a State into the Union.

Lands allotted in severalty to the Indians on the Colville Reservation under the acts of July 1, 1892, and July 1, 1898, when the rest of the reservation was thrown open to settlement were held in trust by the United States for the allottees under the jurisdiction and control of Congress for all governmental purposes relating to the guardianship and protection of the Indians.

Congress has power to punish crimes committed by or against Indians upon allotted lands, and the allotments in severalty are embraced in the term Indian country as used in § 2145, Rev. Stat., and the allotments of the Colville Reservation have not been excluded therefrom by the statutes providing for the allotments.

Territorial jurisdiction of the United States does not depend upon the size of the particular areas held for Federal purposes. Criminal Code, § 272.

The retention by the United States of jurisdiction over Indian allotments is based on the fundamental consideration of the protection of a dependent people. *United States* v. *Rickert*, 188 U. S. 432.

Part of the National policy in regard to Indians is that the United States shall retain control over the allotments in severalty for the statutory period during which the Indians are to be maintained as well as prepared for assuming habits of civilized life and ultimately the privileges of citizenship.

Congress has power under the Constitution to continue the guardianship of the Government over Indians for the period specified in the statutes for keeping the title of the allotments in the United States.

Even if one committing a crime on an Indian allotment is not an Indian, if the crime was committed against an allottee Indian within the trust period, it is punishable under the laws of the United States and the Federal court has jurisdiction.

THE facts, which involve the jurisdiction of the District Court of the United States over crimes committed within Indian country, are stated in the opinion.

Mr. Assistant Attorney General Wallace for the United States.

There was no appearance or brief filed for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

The defendants were indicted for the murder, on August 30, 1913, of Ed Louie, a full-blood Indian and a member of the Colville tribe. It was charged that the crime was committed "at a point about nine miles northwest of the town of Curlew, in the county of Ferry, State of Washington, in the Indian country, to wit, upon the allotment of one Agnes, an Indian, being lot three of section twenty-six, and lot nine of section thirty-five, in township forty north, of range thirty-two, E. W. M., in the Northern Division of the Eastern District of Washington, said land being then held in trust by the United States for the said Agnes for the period of twenty-five years from the date of the trust patent to wit, from the 6th day of December, A. D., 1909."

The indictment was based upon § 2145 of the Revised Statutes which provides that, save as stated, "the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country" (see Rev. Stat., § 5339; Criminal Code, 35 Stat. 1088, c. 321, §§ 272, 273, 341).

A demurrer was filed upon the ground that it did not appear that the crime had been committed within "the Indian country" and hence that the court was without jurisdiction. In connection with the hearing upon the demurrer the parties stipulated that the land described in the indictment as the place of the crime had been allotted to the Indian Agnes under the act approved February 8, 1887, and the act in amendment and extension thereof approved February 28, 1891, and that this land was situated on that part of the Colville Indian Reservation which had been opened to settlement and entry by

the act of Congress. (See act of July 1, 1892, c. 140, 27 Stat. 62.) The District Court, holding that the Agnes allotment was not a part of the Indian country within the meaning of the statute, sustained the demurrer; and the Government brings this writ of error under the Criminal Appeals Act, March 2, 1907, c. 2564, 34 Stat. 1246.

There can be no doubt that the Colville Reservation, set apart by executive order on July 2, 1872 (Exec. Ord. Ind. Reserv. (ed. 1912), 194, 195; 1 Kappler, 915, 916) and repeatedly recognized by acts of Congress,[1] was a legally constituted reservation. *In re Wilson*, 140 U. S. 575, 577. As such it was included in the "Indian country" to which § 2145 of the Revised Statutes refers, and it was none the less embraced within that description because it had been segregated from the public domain. *Donnelly* v. *United States*, 228 U. S. 243, 269. The inquiry, then, is whether, with respect to the part of the original reservation that is comprised in the described allotment, the United States has lost the jurisdiction which it formerly had. The authority of Congress to deal with crimes committed by or against Indians upon the lands within the reservation was not affected by the admission of the State of Washington into the Union (act of February 22, 1889, c. 180, 25 Stat. 676, 677; *Draper* v. *United States*, 164 U. S. 240, 242, 247; *Donnelly* v. *United States*, 228 U. S. 243, 271, 272); and we pass to the consideration of the effect of the Federal legislation by which the reservation was diminished.

By the act of July 1, 1892, c. 140, 27 Stat. 62, a specified tract or portion of the reservation—with certain exceptions—was "vacated and restored to the public domain"

[1] July 4, 1884, c. 180, 23 Stat. 76, 79; February 8, 1887, c. 119, 24 Stat. 388; February 28, 1891, c. 383, 26 Stat. 794; July 1, 1892, c. 140, 27 Stat. 62; February 20, 1896, c. 24, 29 Stat. 9; March 6, 1896, c. 42, 29 Stat. 44; June 18, 1898, c. 465, 30 Stat. 475; July 1, 1898, c. 545, 30 Stat. 571, 593; March 22, 1906, c. 1126, 34 Stat. 80.

and it was provided that this tract should be open to settlement and entry by the proclamation of the President and should be disposed of under the general laws applicable to the disposition of public lands in the State of Washington. The exceptions were made by Congress in order to care for the Indians residing on that portion of the reservation. Every such Indian was entitled to select therefrom eighty acres which was to be alloted to the Indian in severalty (§ 4). The titles to the lands selected were to "be held in trust for the benefit of the allottees, respectively, and afterwards conveyed in fee simple to the allottees or their heirs" as provided in the acts of February 8, 1887, c. 119, 24 Stat. 388, and February 28, 1891, c. 38, 26 Stat. 794. Further, certain school and mill lands within the described tract were reserved from the operation of the statute, unless other lands were selected in their stead (§ 6).

The evident purpose of Congress was to carve out of the portion of the reservation restored to the public domain the lands to be allotted and reserved, as stated, and to make the restoration effective only as to the residue. The vacation and restoration which the statute accomplished (§ 1) was thus expressly made "subject to the reservations and allotment of lands in severalty to the individual members of the Indians of the Colville Reservation" for which the act provided. In 1898, in furtherance of the same object, Congress required the completion of the allotments as soon as practicable and not later than six months after the President's proclamation (act of July 1, 1898, c. 545, 30 Stat. 571, 593). Accordingly, the President issued his proclamation on April 10, 1900, declaring that the restored portion of the reservation would be open to settlement and entry on October 10, 1900, and an appropriate clause was inserted which saved and excepted such tracts as had been or might be "allotted to or reserved or selected for the Indians, or other purposes,"

under the governing statutes. 31 Stat. 1963, 1965. The Government presents extracts from the records of the Department of the Interior which purport to show that the actual allotment to the Indian Agnes, of the land described in the indictment, had been made prior to the date of this proclamation, and we are asked to take notice of that fact. We find it to be unnecessary to pass upon this, but we shall assume in view of the grounds of the decision below that the allotment was duly made under the statutory provisions to which we have referred, and it follows that these allotted lands must be deemed to be among those excepted from the portion of the reservation which was thrown open to settlement.

Although the lands were allotted in severalty, they were to be held in trust by the United States for twenty-five years for the sole use and benefit of the allottee, or his heirs, and during this period were to be inalienable. That the lands, being so held, continued to be under the jurisdiction and control of Congress for all governmental purposes, relating to the guardianship and protection of the Indians, is not open to controversy. *United States* v. *Rickert*, 188 U. S. 432, 437; *McKay* v. *Kalyton*, 204 U. S. 458, 466, 468; *Couture* v. *United States*, 207 U. S. 581; *United States* v. *Celestine*, 215 U. S. 278, 290, 291; *United States* v. *Sutton*, 215 U. S. 291; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 315, 316; *Hallowell* v. *United States*, 221 U. S. 317; *United States* v. *Wright*, 229 U. S. 226, 237. Thus, in the act of January 30, 1897, c. 109, 29 Stat. 506, relating to the introduction of intoxicating liquor "into the Indian country," it is expressly provided that this term "shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States." This statute was upheld in *United States* v. *Sutton*, *supra*, as a valid exercise of Federal power with respect to allotments made under the

act of February 8, 1887, within the Yakima Reservation in the State of Washington. Again, in *Hallowell* v. *United States*, *supra*, the Federal jurisdiction under the same statute was sustained with respect to an allotment to an Omaha Indian in Nebraska, the title being held in trust by the Government under the act of August 7, 1882, c. 434, 22 Stat. 341. There, it appeared that practically all the lands in the Omaha Reservation had been allotted and that many of the allotments of deceased Indians had passed into the hands of the whites, without restrictions, under the provisions of the act of May 27, 1902, c. 888, 32 Stat. 245, 275. Further, the Omaha Indians were exercising the rights of citizenship within the State and the defendant himself, who was charged with taking liquor to his own allotment, was a citizen and had served as a public officer. The question certified to this court was, in effect, whether the fact that the allotment was held by the Government in trust authorized Congress to regulate or prohibit the introduction of liquor. This question was answered in the affirmative, the court saying (221 U. S. p. 324): "In the case at bar, the United States had not parted with the title to the lands, but still held them in trust for the Indians. In that situation its power to make rules and regulations respecting such territory was ample. . . . While for many purposes the jurisdiction of the State of Nebraska had attached, and the Indian as a citizen was entitled to the rights, privileges, and immunities of citizenship, still the United States within its own territory and in the interest of the Indians, had jurisdiction to pass laws protecting such Indians from the evil results of intoxicating liquors as was done in the act of January 30, 1897, which made it an offense to introduce intoxicating liquors into such Indian country, including an Indian allotment." It cannot be doubted that the power of Congress was quite as complete to punish crimes committed by or against Indians upon

allotted lands of this character as to prohibit the introduction of liquor. The present question then is not one of power, but whether it can be said that the descriptive term "Indian country" as it is used in § 2145 of the Revised Statutes is inadequate to embrace these allotments, or, if it is adequate for that purpose, whether Congress in providing for the allotments has excluded them from the purview of that statute.

We find no inadequacy in the statutory description. The lands, which prior to the allotment undoubtedly formed part of the Indian country, still retain during the trust period a distinctively Indian character, being devoted to Indian occupancy under the limitations imposed by Federal legislation. The explicit provision in the act of 1897, as to allotments, we do not regard as pointing a distinction but rather as emphasizing the intent of Congress in carrying out its policy with respect to allotments in severalty where these have been accompanied with restrictions upon alienation or provision for trusteeship on the part of the Government. In the present case, the original reservation was Indian country simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the Government. *Donnelly* v. *United States, supra.* The same considerations, in substance, apply to the allotted lands which, when the reservation was diminished, were excepted from the portion restored to the public domain. The allottees were permitted to enjoy a more secure tenure and provision was made for their ultimate ownership without restrictions. But, meanwhile, the lands remained Indian lands set apart for Indians under governmental care; and we are unable to find ground for the conclusion that they became other than Indian country through the distribution into separate holdings, the Government retaining control.

It is said that it is not to be supposed that Congress has intended to maintain the Federal jurisdiction over hun-

dreds of allotments scattered through territory other portions of which were open to white settlement. But Congress expressly so provided with respect to offenses committed in violation of the act of 1897. Nor does the territorial jurisdiction of the United States depend upon the size of the particular areas which are held for Federal purposes (Criminal Code, § 272). It must be remembered that the fundamental consideration is the protection of a dependent people. As the court said in *United States* v. *Rickert*, 188 U. S. 432, 437, where allotments had been made under the conditions provided by the act of February 8, 1887 (and it was found that the agreement with the Indians, 26 Stat. 1035–1038, did not indicate any different relation of the United States to the allotted lands from that created or recognized by that act): "These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of 1887, and the agreement of 1889, ratified by the act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship." It is true that by section six of the act of 1887, 24 Stat. p. 390, it was provided that upon the completion of the allotments and the patenting of the lands to the allottees under that act every allottee should "have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory" in which he resided. See *Matter of Heff*, 197 U. S. 488. But, by the act of May 8, 1906, c. 2348, 34 Stat. 182, Congress amended this section so as distinctly to postpone to the expiration of the trust period the subjection of allottees under that act to state laws. The first part of the section as amended is: "That at the expiration of the trust period and when the

lands have been conveyed to the Indians by patent in fee, as provided in section five of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." And, at the same time, there was added to the section the explicit proviso: "That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States." We deem it to be clear that Congress had the power thus to continue the guardianship of the Government. (*United States* v. *Kagama*, 118 U. S. 375, 383, 384; *United States* v. *Celestine, supra; Tiger* v. *Western Investment Company, supra; Hallowell* v. *United States, supra; Heckman* v. *United States*, 224 U. S. 413, 437; *Ex parte Webb*, 225 U. S. 663, 683; *United States* v. *Wright, supra; United States* v. *Sandoval*, 231 U. S. 28, 46; *Perrin* v. *United States*, decided this day, *post*, p. 478); and these provisions leave no room for doubt as to the intent of Congress with respect to the maintenance of the Federal jurisdiction over the allotted lands described in the indictment.

A cognate question is presented as to the status of the person with whose murder the defendants are charged. It is not alleged in the indictment that the defendants were Indians and we assume that they were not. But the court below had jurisdiction if the deceased was an Indian ward. *Donnelly* v. *United States, supra*, pp. 269–272. It is alleged, as already stated, that the deceased was "a full-blood Indian, a member of the Colville tribe," and, further, that he had received an allotment of land under the act of 1887, as amended in 1891, and under the act of July 1, 1892, the land being held in trust by the United States for twenty-five years from the date of the patent, July 31, 1900. Upon this statement, the deceased must be regarded as one who was still under the Government's care. Congress had not terminated that relation, and the com-

mission of a crime against his person upon Indian lands, such as we have found the allotted lands in question to be, was punishable under the laws of the United States.

The order sustaining the demurrer is reversed and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

It is so ordered.

GAUTHIER *v.* MORRISON.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 157. Argued December 19, 1913.—Decided February 24, 1914.

Where one specially asserts in the state court a right predicated on the statutes of the United States to enter upon, and remain in possession of, public land, and that right is denied, this court has jurisdiction to review the judgment of the State Court under § 237 Judicial Code.

The surveyor is not invested with authority to determine the character of land surveyed or left unsurveyed or to classify it as within or without the operation of particular laws.

Under the Homestead Law of the United States unsurveyed public lands, if agricultural and unappropriated, are open to settlement by qualified entrymen, and this applies to land of that description left unsurveyed by a surveyor by erroneously marking it on the plat as included within the meander lines of a lake.

One who forces a qualified entryman who has acquired, in compliance with the Homestead Law, an inceptive homestead right on public land open to entry although erroneously shown on the plat as a lake, wrongfully invades the possessory right of the homesteader.

While the Land Department controls the surveying of the public lands and the courts have no power to revise a survey, the courts can determine whether the land was left unsurveyed and whether a right of possession exists under an inceptive claim.

Courts should not interfere with the Land Department in administrative affairs and before patent has issued, but it is not an interference

to restrain trespassers upon possessory rights or to restore possession to lawful claimants wrongfully dispossessed.

As Congress has not prescribed the forum or mode in which such wrongs may be restrained or redressed, the state courts have jurisdiction thereover and should proceed to appropriately dispose of such questions and protect those claiming possession under the Federal statute. *Second Employers' Liability Cases*, 223 U. S. 1.

62 Washington, 572, reversed.

THE facts, which involve the jurisdiction of the state court over questions relating to the public lands and the jurisdiction of this court to review the judgment, are stated in the opinion.

Mr. Fred B. Morrill, with whom *Mr. W. C. Jones*, *Mr. L. F. Chester* and *Mr. John J. Skuse* were on the brief, for plaintiff in error.

Mr. Reese H. Voorhees for defendant in error:

There is no jurisdiction in the state courts of the subject-matter of this action.

As this is a possessory action plaintiff in error must show affirmatively a right to the lands in himself. He cannot lean on the alleged fact that the defendants in error have no right or are trespassers. *George* v. *Columbia Ry. Co.*, 38 Washington, 483; *Helm* v. *Johnson*, 40 Washington, 422; *Humphrey* v. *Stevenson*, 33 Washington, 570; *Seymour* v. *Dufour*, 53 Washington, 650.

Plaintiff in error bases this right, which he is compelled to show, on the alleged fact that he is a settler upon land of the character which can be acquired under the homestead laws, putting the character of the land squarely in issue. He contends that the land is vacant, unsurveyed public land, subject to settlement and residence under the homestead laws.

Of this question of the character of the land the court below had no jurisdiction. The complaint recites that patent has not issued and title is in the United States.

The exclusive control of public lands is in the Interior Department and remains exclusively there until patent has issued therefor and the title has passed from the Government. There is no jurisdiction in the courts either to control the public land or the action of the Government in connection therewith, until patent shall have issued and the land shall have ceased to be public land.

The question is not what is the effect of the survey and classification made by the United States, but is—has the court below now any jurisdiction to consider that or any other question involving the disposition by the United States of these lands, or involving the determination of the right or wrong of the action of the Interior Department in administering them? See, as to duties of surveyors, §§ 453, 2218, 2219, 2395, par. 7, Rev. Stat.; act of March 3, 1909 (Supp. to Fed. Stats. Ann. 563).

This is not a question for the courts. *Cragin* v. *Powell,* 128 U. S. 691; *United States* v. *Schurz,* 102 U. S. 378; *Stoneroad* v. *Stoneroad,* 158 U. S. 240; *Russell* v. *Maxwell Land Grant Co.,* 158 U. S. 253; *Knight* v. *United Land Ass'n,* 142 U. S. 161; *Kirwan* v. *Murphy,* 189 U. S. 35; *Humbird* v. *Avery,* 195 U. S. 480; *Brown* v. *Hitchcock,* 173 U. S. 473.

This general principle, of exclusive jurisdiction in the Interior Department, was applied to the specific case of the designation of the character of the land, in *Michigan Land Co.* v. *Rust,* 168 U. S. 589.

Courts may not anticipate the action of the Land Department or take upon themselves the administration of the land grants of the United States. *Oregon* v. *Hitchcock,* 202 U. S. 60; *Columbia Canal Co.* v. *Benham,* 47 Washington, 249.

The classification of the public lands for the purposes of disposition under the various acts of Congress is a part of the duty imposed by law upon the Secretary of the Interior, and, even after patent has issued, his determina-

tion cannot be reversed by a mere intruder without title. *Ehrhardt* v. *Hogaboom*, 115 U. S. 67; *Knight* v. *U. S. Land Ass'n*, 142 U. S. 161.

As the substantial relief is against the United States, which is not a party, the bill should be dismissed. *Case* v. *Terrell*, 11 Wall. 199.

The cases relied on by plaintiff in error do not apply to this case. *Niles* v. *Cedar Point Club*, 175 U. S. 300; *French-Glenn Live Stock Co.* v. *Springer*, 185 U. S. 47; *Security Land Co.* v. *Burns*, 193 U. S. 168, were to recover possession of lands which were held by the defendants and lay below the meander lines that bordered plaintiff's patented lands. And so also were cases involving riparian rights. *Packer* v. *Bird*, 137 U. S. 661; *Hardin* v. *Jordan*, 140 U. S. 371; *Shivley* v. *Bowlby*, 152 U. S. 1; *Kneeland* v. *Korter*, 40 Washington, 359.

The meander line is but a convenience run to determine the acreage for which payment is to be exacted. *St. P. & P. R. R. Co.* v. *Schurmeier*, 7 Wall. 272; *Griffith* v. *Holman*, 23 Washington, 347; *Washougal &c. Co.* v. *Dalles &c. Co.*, 27 Washington, 487, can be distinguished, as in those cases the jurisdiction rested on the allegations of patented lands and no question with regard to the jurisdiction was raised.

Plaintiff in error was a mere squatter upon the possession of defendants in error. *Zimmerman* v. *McCurdy*, 106 N. W. Rep. 125; *Wood* v. *Murray*, 52 N. W. Rep. 356; *Matthews* v. *O'Brien*, 88 N. W. Rep. 12, distinguished. His possession was not justified under § 942, Remington & Ballinger Code. *Colwell* v. *Smith*, 1 Washington, 92; *Ward* v. *Moore*, 1 Washington, 104, and *La Chapelle* v. *Bubb*, 69 Fed. Rep. 481, do not apply.

The plaintiffs had complied with the homestead laws on land classified as open to settlement. *Hebeisen* v. *Hatchell*, 69 Pac. Rep. 88, holds squarely against plaintiff in error, as does *United States* v. *Waddell*, 112 U. S. 76.

If jurisdiction is taken by the courts it cannot be made

effective. *Pugh's Case,* 14 L. D. 274. The action of the Secretary could render utterly nugatory the judgment of the courts if they took jurisdiction of this action.

Plaintiff in error cannot be heard to complain of hardship in being refused a standing in the courts. There is a proper forum: the Department of the Interior, where appropriate relief can be given him. He has but to secure from the exclusive jurisdiction of that department a reversal of its classification, now standing for thirty-six years, in order to initiate the rightful possession which he now lacks.

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

This case originated in the Superior Court of Spokane County, Washington, and involves the present right of possession of a tract of unsurveyed public land, containing about 75 acres, in that county.

Considerably abridged, the facts stated in the complaint are these: In 1877, when the public lands in that vicinity were surveyed, an area embracing approximately 1,200 acres was by the wrongful act or error of the surveyor omitted from the survey and meandered as a lake, when in truth it was not such but was agricultural land susceptible of cultivation. That area still remains unsurveyed and includes the tract in question. On October 30, 1909, this tract was unappropriated public land, open to settlement under the homestead law of the United States. On that day the plaintiff, being in every way qualified so to do, made actual settlement upon the tract with the purpose of acquiring the title under that law by a full and *bona fide* compliance with its requirements, and, in furtherance of that purpose, erected upon the tract a habitable frame dwelling, furnished the same with all necessary household goods, entered into possession of the tract, and established

his actual residence thereon. Shortly thereafter, during the continuance of his possession and residence, the defendants, with the wrongful purpose of preventing him from complying with the requirements of the homestead law and of subjecting the tract to their own use, unlawfully compelled him to withdraw therefrom and remain away; and when the action was commenced, a few months later, they were wrongfully withholding the tract from him, and were themselves mere trespassers thereon. It also was alleged: "That in order to comply with the requirements of the homestead laws of the United States, and to acquire title to the lands settled upon by this plaintiff, as aforesaid, under said laws, it becomes and is necessary for this plaintiff to reside upon and cultivate such lands, and to have possession thereof for a period of five years, and unless this plaintiff can reside upon, cultivate and have possession of said lands for and during such period of time from and after his said settlement, this plaintiff cannot comply with the requirements of the homestead laws of the United States and sustain and maintain his rights to said lands and acquire title thereto from the Government of the United States under the homestead laws of the United States." The prayer was for a judgment establishing the plaintiff's right to the possession, declaring the defendants were without any right thereto, and awarding costs.

The defendants demurred upon the grounds that the complaint did not state facts sufficient to constitute a cause of action and that the court was without jurisdiction of the subject-matter. The demurrer was sustained, and, the plaintiff electing to stand upon his complaint, a judgment of dismissal was entered. An appeal resulted in an affirmance by the Supreme Court of the State, which held, first, that the land was not subject to settlement under the homestead law, because the surveyer had designated and meandered it as a lake, and, second, that

only the Land Department could undo and correct the wrong or error of the surveyor in that regard. 62 Washington, 572. To secure a reversal of the judgment the plaintiff prosecutes this writ of error.

Although challenged by the defendants, our jurisdiction does not admit of any doubt. The plaintiff asserted a right to settle upon the land notwithstanding the wrongful act or error of the surveyor in designating and meandering it as a lake, and also a right to remain in possession to the end that he might perform the acts essential to the acquisition of the title, and he expressly predicated these rights upon the homestead law of the United States. The decision was against the rights so claimed, and this brings the case within § 709 of the Revised Statutes, now § 237 of the Judicial Code.

The state courts seem to have proceeded upon the theory (*a*) that the surveyor's action in designating and meandering the 1,200-acre area as a lake operated as an authoritative determination that it was not agricultural land, but a permanent body of water, and (*b*) that this determination, while remaining undisturbed by the Land Department, took the land without the operation of the settlement laws, including the homestead law. But in this there was a misconception of the authority of the surveyor. He was not invested with power to determine the character of the land which he surveyed or left unsurveyed, or to classify it as within or without the operation of particular laws. All that he was to do in that regard was to note and report its character, as it appeared to him, as a means of enlarging the sources of information upon that subject otherwise available. In *Barden* v. *Northern Pacific Railroad Co.*, 154 U. S. 288, 292, in disposing of a contention that the lands there in question had been determined and reported by the surveyor as agricultural and not mineral, and that the determination and report remained in force, this court said, p. 320: "But

the conclusive answer to such alleged determination and report is that the matters to which they relate were not left to the Surveyor General. Neither he nor any of his subordinates was authorized to determine finally the character of any lands granted or make any binding report thereon. Information of the character of all lands surveyed is required of surveying officers, so far as knowledge respecting them is obtained in the course of their duties, but they are not clothed with authority to especially examine as to these matters outside of their other duties, or determine them, nor does their report have any binding force. It is simply an addition made to the general information obtained from different sources on the subject." So, if the area designated and meandered as a lake was in truth agricultural land susceptible of cultivation, as alleged in the complaint and admitted by the demurrer, it was as much public land after the survey, and as much within the operation of the settlement laws, as if its true character had been reported by the surveyor. It merely was left unsurveyed. See *Niles* v. *Cedar Point Club*, 175 U. S. 300, 308; *French-Glenn Live Stock Co.* v. *Springer*, 185 U. S. 47; *Security Land &c. Co.* v. *Burns*, 193 U. S. 167, 187; *Scott* v. *Lattig*, 227 U. S. 229, 241.

It will be perceived that we are not speaking of land which was covered by a permanent body of water at the time of the survey and thereafter was laid bare by a subsidence of the water, nor yet of comparatively small areas which sometimes lie within meander lines reasonably approximating the shores of permanent bodies of water. See *Horne* v. *Smith*, 159 U. S. 40; *Kean* v. *Calumet Canal Co.*, 190 U. S. 452; *Hardin* v. *Shedd*, 190 U. S. 508. Neither are we concerned with a collateral attack upon a public survey, as was the case in *Cragin* v. *Powell*, 128 U. S. 691, and *Stoneroad* v. *Stoneroad*, 158 U. S. 240, for the plaintiff is not asking that any of the lines of the survey be rejected or altered, but only that a possessory right ac-

quired by settlement upon public land confessedly left unsurveyed be protected.

The homestead law in terms subjects unsurveyed public lands, if agricultural and unappropriated, to settlement by persons having the requisite qualifications and intending to comply with its requirements as a means of acquiring the title, and also plainly confers upon the settler the right of possession, without which compliance with those requirements would be impossible. Rev. Stat., §§ 2289 *et seq.;* Act May 14, 1880, 21 Stat. 140, c. 89, § 3; Rev. Stat., § 2266; Act March 3, 1891, 26 Stat. 1095, c. 561, § 5; *United States* v. *Waddell*, 112 U. S. 76, 80; *Sturr v. Beck*, 133 U. S. 541, 547; *Nelson* v. *Northern Pacific Railway Co.*, 188 U. S. 108, 125; *Scott* v. *Lattig*, 227 U. S. 229, 240; *Wadkins* v. *Producers Oil Co.*, 227 U. S. 368, 373. So, it clearly appears from the allegations of the complaint, as admitted by the demurrer, that the land in question was open to homestead settlement when the plaintiff settled thereon; that by his settlement and subsequent acts he acquired an inceptive homestead right which entitled him to the possession; and that the defendants, in forcing him to withdraw from the land and in then withholding the same from him, wrongfully invaded this possessory right.

The question of the jurisdiction of the court of first instance, although not difficult of solution, remains to be noticed. It was not held by the appellate court that the jurisdiction of the former under the local laws was not broad enough to enable it to entertain the action and award appropriate relief, but only that this jurisdiction could not be exerted consistently with the laws of Congress, and this upon the theory that the latter invested the Land Department with exclusive authority to deal with the subject.

It is true that the authority to make surveys of the public lands is confided to the Land Department and that

the courts possess no power to revise or disturb its action in that regard, but here the court was not asked to make a survey or to revise or disturb one already made. As has been indicated, the land in question was not surveyed but left unsurveyed, and the plaintiff, whose possession under a lawful homestead settlement had been invaded and interrupted by mere trespassers, was seeking a return of the possession to the end that he might continue his rightful efforts to earn the title. In short, it was not a survey, but the right of possession under an inceptive homestead claim, that was in question.

Generally speaking, it also is true that it is not a province of the courts to interfere with the Land Department in the administration of the public-land laws, and that they are to be deemed in process of administration until the proceedings for the acquisition of the title terminate in the issuing of a patent. But no interference with that department or usurpation of its functions was here sought or involved. It has not been invested with authority to redress or restrain trespasses upon possessory rights or to restore the possession to lawful claimants when wrongfully dispossessed. Congress has not prescribed the forum and mode in which such wrongs may be restrained and redressed, as doubtless it could, but has pursued the policy of permitting them to be dealt with in the local tribunals according to local modes of procedure. And the exercise of this jurisdiction has been not only sanctioned by the appellate courts in many of the public-land States, but also recognized and approved by this court. *Woodsides* v. *Rickey*, 1 Oregon, 108; *Colwell* v. *Smith*, 1 Wash. Ter. 92; *Ward* v. *Moorey*, 1 Wash. Ter. 104, 107; *Arment* v. *Hensel*, 5 Washington, 152; *Fulmele* v. *Camp*, 20 Colorado, 495; *Wood* v. *Murray*, 85 Iowa, 505; *Matthews* v. *O'Brien*, 84 Minnesota, 505; *Zimmerman* v. *McCurdy*, 15 N. Dak. 79; *Whittaker* v. *Pendola*, 78 California, 296; *Sproat* v. *Durland*, 2 Oklahoma, 24, 45; *Peckham* v. *Faught*, 2 Oklahoma, 173;

Lytle v. *Arkansas*, 22 How. 193, 205; *Marquez* v. *Frisbie*, 101 U. S. 473, 475; *Black* v. *Jackson*, 177 U. S. 349; *United States* v. *Buchanan*, *ante*, p. 72. See also *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 190 U. S. 301, 308, 315; *Humbird* v. *Avery*, 195 U. S. 480, 504; *Bunker Hill Co.* v. *United States*, 226 U. S. 548, 550. It was well said by the Supreme Court of Oklahoma in *Sproat* v. *Durland*, *supra:* "To say that no relief can be granted, or that our courts are powerless to do justice between litigants in this class of cases, pending the settlement of title in the Land Department, would be the announcement of a doctrine abhorrent to a sense of common justice. It would encourage the strong to override the weak; would place a premium upon greed and the use of force, and in many instances lead to bloodshed and crime. Such a state of affairs is to be avoided and the courts should not hesitate to invoke the powers inherent in them and lend their aid, in every way possible, in aid of justice by preventing encroachments upon the possessory rights of settlers, or by equitably adjusting their differences."

We are accordingly of opinion that the laws of Congress interposed no obstacle to the jurisdiction of the court of first instance, and that, instead of dismissing the case, it should have proceeded to an appropriate disposition of the asserted right of possession. See R. & B. Ann. Wash. Codes, § 942; *Second Employers' Liability Cases*, 223 U. S. 1, 55–59.

Judgment reversed.

UNITED STATES *v.* BEATTY.

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

No. 555. Argued January 12, 13, 1914.—Decided February 24, 1914.

A judgment of the Circuit Court of Appeals, reversing a judgment of the District Court which confirmed an award of commissioners in condemnation proceedings by the United States and vacating that award and requiring the compensation to be ascertained through a trial by jury, is not a final judgment but essentially interlocutory and not reviewable by this court.

A writ of error to review such a judgment of the Circuit Court of Appeals is premature and must be dismissed; if the judgment is erroneous and ultimately operates prejudicially to the Government, it may have the error corrected by writ of error from this court after the case has proceeded to final judgment in the Circuit Court of Appeals.

If a case can be brought to this court by appeal or writ of error under § 241, Judicial Code, it cannot be brought here by certiorari under § 240, Judicial Code; the two methods of review are not co-existent.

The power given to this court by § 262, Judicial Code (§ 719, Rev. Stat.), contemplates the employment of the writ of certiorari in instances not covered by § 240, Judicial Code.

A decision by the Circuit Court of Appeals that the provision in the Seventh Amendment preserving the right of trial by jury applies to a proceeding to condemn land and remanding the case to the District Court for further proceedings in accord with that decision, is an exercise of undoubted jurisdiction whether right or wrong, and if wrong and ultimately operating to the prejudice of the Government it can be reviewed and corrected by this court on writ of error from the final judgment, but not from the interlocutory judgment.

Interlocutory judgments frequently become of no importance by reason of the final result or of intervening matters.

Writ of error to review, 203 Fed. Rep. 620, dismissed and petition for writ of certiorari denied.

THE facts, which involve the jurisdiction of this court to review judgments of the Circuit Courts of Appeals, are stated in the opinion.

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

Mr. E. Hilton Jackson and *Mr. D. C. O'Flaherty*, with whom *Mr. E. H. Jackson* was on the brief, for defendants in error.

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

This was a statutory proceeding by the United States to acquire for public use, by condemnation under judicial process, certain land in Warren County, in the Western District of Virginia. It was based upon two congressional enactments: one, a provision in the Army Appropriation Act of March 3, 1911, c. 209, 36 Stat. 1037, 1049, appropriating "not to exceed two hundred thousand dollars for the purchase of land accessible to the horse-raising section of the State of Virginia, for the assembling, grazing, and training of horses purchased for the mounted service;" and the other, the act of August 1, 1888, c. 728, 25 Stat. 357, which reads as follows:

"That in every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the United States circuit or district courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney-General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced

for condemnation, within thirty days from the receipt of the application at the Department of Justice.

"SEC. 2. The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding."

The proceeding was initiated, under the Attorney General's direction, by a petition filed in the District Court of the United States for the district wherein the land is situate, praying for the appointment of commissioners, according to the law of the State, to ascertain the just compensation to be paid. Due notice having been given, the owners appeared and interposed objections to the proceeding; all of which having been considered and overruled, an order was entered appointing commissioners agreeably to the prayer in the petition and to the state statute. The commissioners viewed the land, heard the evidence, fixed the compensation at upwards of $30,000, and returned into the District Court a report of their proceedings and ascertainment. Exceptions to the report were filed by the owners and, after a hearing, were overruled; whereupon a judgment was entered confirming the report. 198 Fed. Rep. 284. The owners carried the cause to the Circuit Court of Appeals, and that court, being of opinion that the Seventh Amendment to the Constitution, preserving the right of trial by jury, embraces such a proceeding, reversed the judgment, with a direction that the compensation be determined upon a trial before a common-law jury. 203 Fed. Rep. 620. The United States then sued out the present writ of error, and subsequently presented a petition praying that the judgment of the Circuit Court of Appeals be reviewed upon writ of certiorari, if the writ of error should be regarded as premature.

Consideration of this petition was postponed to the hearing upon the writ of error.

As the proceeding was begun by the United States and the amount in controversy greatly exceeds $1,000, besides costs, there can be no doubt that the case is one in which a final judgment in the Circuit Court of Appeals may be reviewed by this court upon a writ of error. Judicial Code, §§ 128, 241. But the judgment rendered in that court is not final either in form or substance. It reverses the judgment in the District Court, vacates the commissioners' award, and requires that the compensation be ascertained anew through a trial by jury. Thus, it puts at large the principal matter in controversy and refers it to the District Court for solution in the mode indicated. It is therefore essentially interlocutory and cannot be the subject of a writ of error from this court. *Tracy* v. *Holcombe*, 24 How. 426; *Macfarland* v. *Brown*, 187 U. S. 239; *United States* v. *Krall*, 174 U. S. 385; *German National Bank* v. *Speckert*, 181 U. S. 405, 409. If it be erroneous and ultimately operates prejudicially to the United States the latter may, of course, secure its correction by a writ of error from this court, but not until the case proceeds to a final judgment in the Circuit Court of Appeals. *United States* v. *Denver & Rio Grande R. R. Co.*, 191 U. S. 84, 93; *Messenger* v. *Anderson*, 225 U. S. 436, 444; *Zeckendorf* v. *Steinfeld*, 225 U. S. 445, 454; *Union Trust Co.* v. *Westhus*, 228 U. S. 519, and cases cited. Being premature, the writ of error must be dismissed.

The power conferred upon this court by § 240 of the Judicial Code to require, by writ of certiorari, that cases in the Circuit Courts of Appeals be certified here for review and determination is plainly confined to that class of cases in which, according to the provisions of §§ 128 and 241, the final decrees and judgments of those courts are not reviewable upon appeal or writ of error; that is to say, if a case be one which may come here under § 241 by

appeal or writ of error after a final decree or judgment in the Circuit Court of Appeals, it is not a case which may be brought here by certiorari under § 240. It is not intended that these two modes of exercising appellate authority over the Circuit Courts of Appeals, one upon appeal or writ of error and the other upon certiorari, shall be co-existent as respects any case or class of cases, but rather that the former, where it exists at all, shall be exclusive. This is fully recognized in *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58; *American Construction Co.* v. *Jacksonville Co.*, 148 U. S. 372, 385, and *Forsyth* v. *Hammond*, 166 U. S. 506, 513, 514.

This case is not within any of the classes enumerated in the latter part of § 128 and the amount in controversy is greatly in excess of $1,000, besides costs, so it is a case, as before indicated, in which a final judgment by the Circuit Court of Appeals may be reviewed by this court upon writ of error under § 241. And from this it follows that it is not a case which may be brought here by certiorari under § 240.

We do not overlook § 262 of the Judicial Code, formerly § 716 of the Revised Statutes, which empowers this court to issue all writs, not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction and agreeable to the usages and principles of law. No doubt, this provision contemplates the employment of the writ of certiorari in instances not covered by § 240 and affords ample authority for using the writ as an auxiliary process and, whenever there is imperative necessity therefor, as a means of correcting excesses of jurisdiction, of giving full force and effect to existing appellate authority, and of furthering justice in other kindred ways. *American Construction Co.* v. *Jacksonville Co.*, 148 U. S. 372, 380; *In re Chetwood*, 165 U. S. 443, 462; *Whitney* v. *Dick*, 202 U. S. 132; *McClellan* v. *Carland*, 217 U. S. 268. But it may not be used under this provision as a sub-

stitute for an appeal or writ of error to correct mere errors committed in the exercise of a lawful jurisdiction. *American Construction Co.* v. *Jacksonville Co., supra; In re Tampa Suburban R. R. Co.*, 168 U. S. 583; *United States* v. *Dickinson*, 213 U. S. 92, 102.

Here the use sought to be made of the writ is not an admissible one. Whether the Seventh Amendment, preserving the right of trial by jury, embraces a proceeding to condemn land for public use was one of the questions arising for decision in the Circuit Court of Appeals. In deciding it, the court but exercised an undoubted jurisdiction, and this whether the decision was right or wrong. If wrong, it was a mere error, and the land owners, having invited it, will not be heard to complain. The jury may award a less compensation than did the commissioners, and, if so, the United States will hardly be in a position to complain. Interlocutory rulings not infrequently become of no importance by reason of the final result or of intervening matters, and that may be true here. But if the decision ultimately operates prejudicially to the United States, it can be reviewed and, if need be, corrected upon a writ of error from the final judgment, as before indicated. In this situation we perceive no adequate reason for resorting to the writ of certiorari under § 262.

Writ of error dismissed;
Petition for certiorari denied.

THURSTON *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 605. Submitted December 22, 1913.—Decided February 24, 1914.

The Court of Claims has no general jurisdiction over claims against the United States and can take cognizance only of those which are committed to it by some act of Congress. *Johnson* v. *United States*, 160 U. S. 546.

A claim embraced by § 1 of the Indian Depredation Act of March 3, 1891, but which accrued prior to July 1, 1865, is not within the jurisdiction of the Court of Claims if it falls within the restriction clause of § 2 because not allowed or pending prior to the passage of the act.

An appeal to the bounty or generosity of Congress for damages sustained from depredations by other than Indians cannot be considered as a claim for reparation for depredations of Indian wards of the Government within the meaning of the act of 1891.

Jurisdiction of a claim which accrued in 1857, was never allowed and was not pending as a claim for depredations by Indians, was expressly withheld by the act of 1891, and the fact that the same claim was presented to Congress as a claim for depredations by Mormons does not bring it within the jurisdiction.

THE facts, which involve the jurisdiction of the Court of Claims under the Indian Depredation Act of March 3, 1891, and what constitutes a presentation of a claim against the United States for depredations by Indians under the act, are stated in the opinion.

Mr. Harry Peyton, Mr. F. Sprigg Perry and *Mr. J. W. Clark* for appellant:

The Indian Depredation Act does not require that the word "Indian" should have been used in the petition which was filed in Congress.

If the words of a law are clear, there can be no construction which will alter the plain meaning of the words themselves. *United States* v. *Temple*, 105 U. S. 97, 99; *Maxwell*

v. *Moore*, 22 How. 185, 191; *Thornley* v. *United States*, 113 U. S. 310, 313.

In this act Congress has stated that there must have been a claim pending. It did not say that there must have been a claim pending against Indians, or that the tribe of Indians should be named, or that the word "Indian" should appear.

The definition of the term "claim pending" is a claim for a depredation committed by Indians which was pending at the time of the passage of the act. That term is plainly used in the act as a definition of the character of the claim. It is simply a phrase descriptive of a certain class of cases, and was not intended as a technical rule of pleading. Appellant's claim falls within this definition.

Throughout the entire act, the purpose of Congress is shown to be that of the utmost liberality in the manner of presenting claims. A claim must necessarily be one for a depredation committed by Indians. No technicalities are permitted to stand in the way of a just claim. *United States* v. *Gorham*, 165 U. S. 316.

The claim of the appellant arose out of an Indian depredation. There is no question but that the Indians committed the outrage and took the property and the Court of Claims has so held.

As to rules governing construction of statutes bearing on this case, see *United States* v. *Fisher*, 2 Cr. 358.

There can be no construction where there is no ambiguity. This is peculiarly applicable to the present case.

A survey of the entire act strengthens this contention and shows that Congress intended to waive technical objections and to include all just claims. See *Johnson* v. *United States*, 160 U. S. 546; *White* v. *United States*, 191 U. S. 545, 550; *Sturges* v. *Crowninshield*, 4 Wheat. 122, 202; Potter's edition of Dwarris, p. 199; 2 Lewis' Sutherland, 2d ed., § 367.

The act must be read literally so as to include all claims embraced by this clause. *Lewis* v. *United States*, 92 U. S. 618; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, citing *Scott* v. *Reid*, 10 Pet. 524, 527; *Brewer* v. *Blougher*, 14 Pet. 178, 198. See also *Market Co.* v. *Hoffman*, 101 U. S. 116; *Petri* v. *Commercial Bank*, 142 U. S. 650; *McKee* v. *United States*, 164 U. S. 23; *United States* v. *Goldenberg*, 168 U. S. 95.

Congress is presumed to know the meaning of words and the rules of grammar. When Congress used the term "claim pending" it meant what it said and not that a claim had to be pending against the Indians. *Lake Co.* v. *Rollins*, 130 U. S. 662; *Dewey* v. *United States*, 178 U. S. 510; *Marks* v. *United States*, 161 U. S. 297; *Yerke* v. *United States*, 173 U. S. 439.

As to the proviso, it plainly relates solely to the part of the enacting clause which provides for the time of filing claims.

The enacting clause that "all questions of the manner of presenting claims is hereby waived" applies equally to claims for depredations which occurred before and after July 1, 1865.

For the rule limiting the effect of a proviso to the clause which it affects, see Sedgwick on Interpretation, § 186, p. 257; *Spring* v. *Collector*, 78 Illinois, 101; *Lehigh Co.* v. *Meyer*, 102 Pa. St. 479; *Minis* v. *United States*, 15 Pet. 423, 445.

The office of this proviso is to qualify that portion of the enacting clause which relates to the time of the filing of claims and to exclude certain cases from its operation. This is the usual and regular office of a proviso and it is so used in the present act. Compare cases of *American Exp. Co.* v. *United States*, 212 U. S. 422, 434; *Burlingham* v. *Crouse*, 228 U. S. 459, 471; *White* v. *United States*, 191 U. S. 545.

The general office of the proviso is to restrain generality

and to prevent misinterpretation. *Interstate Comm. Commn.* v. *Baird*, 194 U. S. 25, 36.

In this case the proviso does not relate to that part of the enacting clause which waives all questions of the manner of presenting claims. This is an entirely separate and distinct part of the enacting clause and the dependent proviso is in no way connected with it. *Nesbitt* v. *United States*, 186 U. S. 153.

Congress was in no way bound by any rules or regulations of the Secretary of the Interior. *Leahy* v. *United States*, 41 Ct. Cls. 266. And see *United States* v. *Martinez*, 195 U. S. 469.

The saving clause of § 2 preserves from the operation of the proviso those cases which were pending at the time of the passage of the act. *United States* v. *Martinez*, 195 U. S. 476.

For the rule of construction relative to the interpretation of dependent clauses, see *Ryan* v. *Carter*, 93 U. S. 78; *United States* v. *Dickson*, 15 Pet. 141.

Unless this case falls clearly within the terms of the proviso it is to be considered as falling within the terms of the general enacting and saving clauses. *Schlemmer* v. *Buffalo &c. Railroad*, 205 U. S. 1, 10; *Javierre* v. *Central Altagracia*, 217 U. S. 502.

In the determination of claims for Indian depredations filed in the Interior Department, it was not necessary that notice be given to the Indians. *Jaeger* v. *United States*, 27 Ct. Cls. 278, 287; *Leahy* v. *United States*, 41 Ct. Cls. 266.

The court will not undertake to prescribe for Congress any technical rules for pleading.

For a further construction of the term "claim pending" as used in the Tucker and Bowman acts, see cases of *Cahalan*, 42 Ct. Cls. 281, and *Cofer*, 30 Ct. Cls. 131, 134.

The purpose of § 2 was to protect diligent claimants and to prevent the filing of stale claims. *Weston* v. *United*

States, 29 Ct. Cls. 420; *Stevens* v. *United States*, 34 Ct. Cls. 244; *Martin* v. *United States*, 46 Ct. Cls. 200.

The Government cannot claim it was in any way prejudiced by the defective manner in which this claim was filed before Congress.

The massacre which occurred at Mountain Meadows was a public event of great and horrible interest and was of general notoriety throughout the length and breadth of the land. Numerous official investigations and reports to Congress were made by the Indian Office and War Department as early as 1858 and 1859. In all of these reports it officially appeared that the Indians committed the massacre under the leadership of the Mormons.

The courts, and Congress as well, will take judicial notice of a matter of history. *Bank of Augusta* v. *Earle*, 13 Pet. 519, 590; *United States* v. *Union Pac. R. R.*, 91 U. S. 72, 79; 1 Greenleaf's Evidence, 15th ed., § 5; *Swinnerton* v. *Columbia Ins. Co.*, 37 N. Y. 174.

A recovery can be denied in this case only upon highly technical grounds. The equities of the case are all in favor of the claimant. The claimant lost her property as set out in the petition and the Court of Claims has found this fact from the evidence. It is only by a forced and strained construction of the act that the Government can exclude this claim.

A construction of this statute in accordance with the contention of the Government would be in violation of that liberality which characterizes the act.

The findings disclose that they are full and adequate and protect every substantial right of the Government. *Green County* v. *Thomas' Executor*, 211 U. S. 598.

Mr. Assistant Attorney General Thompson for the United States:

The act of March 3, 1891, must be strictly construed. *Price* v. *United States*, 174 U. S. 373; *Wilson* v. *United*

States, 38 Ct. Cls. 6; *Johnson* v. *United States*, 160 U. S. 546; *Wisconsin Cent. R. R. Co.* v. *United States*, 164 U. S. 190, 202.

The Indian Depredation Act required that a claim which accrued previous to July 1, 1865, must, as presented to Congress, have charged Indians with having committed the depredation. All records show that in all cases the claim of the petitioner for redress charges the Mormons with having committed the depredations. Nowhere are Indians mentioned. Under the act the claim, having arisen previous to July 1, 1865, as presented to Congress must have named and charged Indians with having committed the depredation, and the bills introduced must also have charged Indians. Otherwise, this claim was not pending prior to the passage of the Indian Depredation Act of 1891. *Marks* v. *United States*, 161 U. S. 297, 306.

The proviso of the act is one of limitation, and in order that the Court of Claims might have jurisdiction, a claim which accrued prior to July 1, 1865, must have been filed in Congress prior to March 3, 1891.

Appellant's petition before Congress, having prayed for a gratuity, did not allege a claim.

Under *Prigg* v. *Pennsylvania*, 16 Pet. 539, 615, a claim is a demand of some matter as of right.

Appellant had no claim against the Mormons for which the United States would be liable. At the same time the petitions and the affidavits filed therein, having failed to name Indians, would lead to the irresistible conclusion that she had abandoned what claim, if any, she had against them. Therefore, her asserted "claim pending" was not a claim, but merely an appeal to the generosity of Congress, and did not come within the meaning of the proviso of § 2 of the act.

The court, having found from the evidence that both Indians and Mormons confiscated the property, could not

have entered any other judgment than that of dismissal of the petition.

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

This suit was begun in the Court of Claims in 1892, under the Indian Depredation Act of March 3, 1891, c. 538, 26 Stat. 851, to recover from the United States and the Ute Indians the value of certain personal property alleged to have belonged to appellant's intestate and to have been taken and destroyed by members of the Ute tribe in 1857. It was also alleged that the claim had been presented to, and was pending before, the House of Representatives in 1877 and 1878. The allegations of the petition were traversed, and a trial resulted in a judgment of dismissal for want of jurisdiction, upon the ground that the claim accrued before July 1, 1865, and had not been presented to Congress, or any officer authorized to inquire into such claims, prior to the act of 1891, and so was not cognizable under that act.

The facts disclosed in the findings and material to be noticed are these: The depredation occurred at Mountain Meadows, Utah, September 11, 1857, while the appellant's intestate was en route, with an emigrant train, from Arkansas to California, his life being taken at the time. In 1877 and again in 1878 one of his daughters, on behalf of his heirs, presented to Congress a petition praying that they be reimbursed for the property from the public treasury. The petitions, as also the accompanying affidavits, represented that the depredation was committed by Mormons acting under the direction of Brigham Young, and contained no suggestion that it was in any wise chargeable to Ute Indians or to any Indians. In response to each of the petitions a bill was introduced in the House of Representatives, reciting that the depredation was com-

mitted by Mormons at the instance of Brigham Young, and making an appropriation to reimburse the heirs as prayed in the petition, but neither bill was passed and the claim was not otherwise recognized by Congress. In no other way or form was the claim presented to or pending before any department of the Government, or any of its officers or agents, prior to the passage of the act of 1891.

Preliminarily, it is well to observe that the Court of Claims has no general jurisdiction over claims against the United States and can take cognizance only of those which by the terms of some act of Congress are committed to it. *Johnson* v. *United States*, 160 U. S. 546, 549.

Turning to the act of 1891 we find that it is not couched in general terms, but, on the contrary, carefully specifies what claims may be considered and as carefully points out some which it is intended shall not be considered. It is entitled "An Act to provide for the adjudication and payment of claims arising from Indian depredations." Its first section empowers the court to inquire into and adjudicate, among others not material here, "All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for." And the second section declares, 26 Stat. 852:

"That all questions of limitations as to time and manner of presenting claims are hereby waived, and no claim shall be excluded from the jurisdiction of the court because not heretofore presented to the Secretary of the Interior or other officer or department of the Government: *Provided*, That no claim accruing prior to July first, eighteen hundred and sixty-five, shall be considered by the court unless the claim shall be allowed or has been or is pending prior to the passage of this act, before the Secretary of the Interior or the Congress of the United

States, or before any superintendent, agent, sub-agent or commissioner, authorized under any act of Congress to enquire into such claims; but no case shall be considered pending unless evidence has been presented therein: . . . "

Assuming, without so deciding, that the clause quoted from the first section, if not otherwise restrained, is broad enough to embrace the present claim, notwithstanding some of its particulars not here noticed, we come to consider whether it is within the restrictive clause in the second section, declaring that no claim accruing prior to July 1, 1865, shall be considered unless it was allowed or was pending prior to the passage of the act. To a better understanding of this clause and the preceding one in the same section it is well to recall that there was an existing limitation of time upon the prosecution of claims against the Government, (Rev. Stat., § 1069,) and that there had been and were then various statutory and treaty provisions regulating the manner of presenting claims for Indian depredations, by whom they were to be examined, and the evidence required to sustain them. 4 Stat. 729, 731, c. 161, § 17; 11 Stat. 388, 401, c. 66, § 8; 12 Stat. 120, Res. No. 26; 16 Stat. 335, 360, c. 296, § 4; 17 Stat. 165, 190, c. 233, § 7; Rev. Stat., §§ 466, 2098, 2156, 2157; 23 Stat. 362, 376, c. 341; 13 Stat. 674, Art. 6; 15 Stat. 620, Arts. 5 and 6. Both clauses must be read in the light of those limitations and provisions, and when this is done, it is apparent that Congress, while disposed to be very liberal in waiving prior restrictions upon the time and mode of presenting such claims, deemed it unwise to open the door so wide in respect of claims accruing prior to July 1, 1865, and therefore declared that the court should not consider them, save where they had been allowed or had been pending prior to the passage of the act.

The present claim accrued in 1857, was never allowed, and was not a pending claim before the date of the act,

unless it can be said that it was pending before Congress in 1877 and 1878. We think this cannot properly be said. The claim to which the attention of Congress was invited in those years was not for an act of depredation by Indians, but, as was stated in the petitions and accompanying affidavits and in the bills introduced in response thereto, was for a depredation by Mormons. No one could understand from the petitions and affidavits or from the bills that there was any purpose to claim indemnity from the Government on the ground that the depredation was committed by its Indian wards or to obtain reparation from the latter through the exertion of the Government's control over them. Rightly speaking, it was merely an appeal to the bounty or generosity of Congress, and probably was so regarded by the latter. At all events it was not an assertion or presentation of the claim which is the subject of this suit, for the latter is for an act of depredation by Indians, not by Mormons. We are accordingly of opinion that the claim is one, jurisdiction of which is expressly withheld from the Court of Claims by the act of 1891.

Judgment affirmed.

PERRIN *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

No. 707. Submitted January 13, 1914.—Decided February 24, 1914.

Congress has power to prohibit the introduction of intoxicating liquors into an Indian reservation wheresoever situate and to prohibit traffic in such liquors with tribal Indians whether upon or off a reservation, and whether within or without the limits of a State.

That power is sufficiently comprehensive to enable Congress when

securing the cession of a part of an Indian reservation within a State to prohibit the sale of intoxicants upon the ceded lands, if in its judgment the prohibition is reasonably essential to the protection of the Indians residing on the unceded lands.

As Congress possesses this power, the State possesses no exclusive control over the subject and the congressional prohibition is supreme.

The provision in Art. 17 of the agreement with the Yankton Sioux against the sale of intoxicating liquor on the lands ceded to the United States and the prohibition in the act of August 15, 1894, ratifying the agreement, are both within the power of Congress and are proper regulations for the protection of the Indian wards of the Nation.

While a prohibition by act of Congress against the sale of liquor on lands ceded by Indians to the United States within the limits of a State, to be a constitutional exercise of the power of Congress, must not go beyond what is reasonably essential to the protection of the Indians, and may become inoperative when all the Indians affected thereby become completely emancipated from Federal control, Congress is invested with wide discretion and its action, unless purely arbitrary, must be accepted and given full effect by the courts.

The prohibition against the sale of liquor on land ceded by the Yankton Sioux, under the agreement ratified by the act of August 15, 1894, properly remains in force so long as conditions remain, as they still do, substantially the same, and, unless sooner altered by Congress, will continue so long as the presence and status of the Indians sustain it as a Federal regulation.

THE facts, which involve the construction of the provisions in the treaty and statutes establishing the Yankton Sioux Indian Reservation against the sale of liquor and the effect of such provisions on the sale of liquor on ceded lands forming a part of such Reservation, are stated in the opinion.

Mr. Charles H. Bartelt and *Mr. Edwin R. Winans* for plaintiff in error.

Mr. Assistant Attorney General Wallace for the United States.

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

This direct writ of error brings under review a judgment of conviction for unlawfully selling intoxicating liquors upon ceded lands formerly included in the Yankton Sioux Indian Reservation, in the State of South Dakota. This reservation was created by the treaty of April 19, 1858, 11 Stat. 743, for the use of the Yankton tribe of Sioux Indians, and originally embraced 400,000 acres. A considerable part of it was allotted in severalty to the members of the tribe under the act of February 8, 1887, c. 119, 24 Stat. 388, and the amendatory act of February 28, 1891, c. 383, 26 Stat. 794, the allotments being in small tracts scattered throughout the reservation. By an agreement ratified and confirmed by Congress August 15, 1894, 28 Stat. 286, 314, c. 290, the tribe ceded and relinquished to the United States all the unallotted lands. In article 17 of the agreement it was stipulated: "No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858, and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement." And in the ratifying act it was provided, 28 Stat. 319: "That every person who shall sell or give away any intoxicating liquors or other intoxicants upon any of the lands by said agreement ceded, or upon any of the lands included in the Yankton Sioux Indian Reservation as created by the treaty of April nineteenth, eighteen hundred and fifty-eight, shall be punishable by imprisonment for not more than two

years and by a fine of not more than three hundred dollars."

Conformably to § 5 of the act of 1887, each allottee was given a trust certificate declaring that the United States would hold the land embraced in his allotment, for the period of twenty-five years or such extended period as the President might direct, in trust for him, or, in case of his decease, for his heirs, but without power in him or them to convey or make any contract touching the land during the trust period, and at the expiration of that period would issue to him or them a patent conveying the title in fee, discharged of the trust. Some of the allotted lands were subsequently disposed of pursuant to express authority from Congress, and those remaining approach 100,000 acres, occupied by more than 1,500 Indians. Rep. Com. Ind. Affairs, 1911, p. 72. The trust period has not expired, nor has the tribal relation of the Indians been dissolved. An agent or superintendent remains in charge of their affairs and they are still wards of the Government. *Hallowell* v. *United States*, 221 U. S. 317; *United States* v. *Sandoval*, 231 U. S. 28.

The ceded lands, excepting some small tracts retained by the Government as sites for an Indian agency, Indian schools, and the like, were opened to disposition under the homestead and townsite laws, May 21, 1895, 29 Stat. 865, and have largely passed into private ownership.

The place at which the intoxicating liquors were sold was within the defendant's own premises in the town of Dante, an organized municipality located upon a part of the ceded lands then held in private ownership by the inhabitants, none of whom was an Indian. The defendant is a white man, but whether the persons to whom the liquors were sold were white or Indian does not appear, and is immaterial under the statutory provision before quoted, upon which the prosecution was founded.

The objections urged in the District Court against the

conviction, and now renewed, call in question the validity of that statutory provision and are, first, that the power to regulate the sale of intoxicating liquors upon all ceded lands rests exclusively in the State, and, second, that if Congress possesses any such power it necessarily is limited to what is reasonably essential to the protection of the Indians occupying the unceded lands, and that this limitation is transcended by the provision in question because it embraces territory greatly in excess of what the situation reasonably requires and because its operation is not confined to a designated period, reasonable in duration, but apparently is intended to be perpetual.

The power of Congress to prohibit the introduction of intoxicating liquors into an Indian reservation, wheresoever situate, and to prohibit traffic in such liquors with tribal Indians, whether upon or off a reservation and whether within or without the limits of a State, does not admit of any doubt. It arises in part from the clause in the Constitution investing Congress with authority "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," and in part from the recognized relation of tribal Indians to the Federal Government. *United States* v. *Holliday*, 3 Wall. 407, 417; *United States* v. *Sutton*, 215 U. S. 291; *Hallowell* v. *United States, supra; Ex parte Webb*, 225 U. S. 663, 683, 691; *United States* v. *Wright*, 229 U. S. 226; *United States* v. *Sandoval, supra.* "These Indian tribes are the wards of the Nation. They are communities dependent on the United States. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen." *United States* v. *Kagama*, 118 U. S. 375, 383.

Whether this power to protect the Government's Indian wards against the evils of intemperance, of which they are easy victims, is sufficiently comprehensive to enable Congress, when securing the cession of part of an Indian reservation within a State, to prohibit the sale of intoxicants upon the ceded lands, if in its judgment that is reasonably essential to the protection of the Indians residing upon the unceded lands, is the real question presented by the first of the defendant's objections. We say it is the real question, because if Congress possesses power to do this it follows that the State possesses no exclusive control over the subject and that the congressional prohibition is supreme. *United States* v. *Holliday*, *supra*, p. 419.

The stipulation before quoted shows that when the Indians and the commissioners representing the United States agreed upon a cession of the unallotted lands, among which the allotted tracts were interspersed, both were of opinion that due regard for the welfare of the Indians required that traffic in intoxicants upon the ceded lands be interdicted, as it was before the cession; and Congress, evidently being of a like opinion, inserted in the ratifying act the provision making it a punishable offense for any person to sell or give away any intoxicating liquors or other intoxicants upon any of the ceded lands. Stipulations and provisions of this character are not new, but have occasionally appeared in Indian treaties and legislation for more than fifty years. The case of *United States* v. *Forty-three Gallons of Whiskey*, 93 U. S. 188, arose out of a treaty with the Chippewas in 1863, 13 Stat. 668, wherein a considerable portion of a reservation in the State of Minnesota was ceded to the United States. The treaty contained a stipulation that the laws of the United States, then in force or thereafter enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country should be operative throughout the ceded lands

until Congress or the President should direct otherwise, and the principal question in the case was whether this stipulation encroached upon the power of the State and upon its equal footing with the original States. This court upheld the stipulation, and in the course of the opinion, after observing (p. 194) that the power of Congress to regulate commerce with the Indian tribes is "as broad and as free from restrictions as that to regulate commerce with foreign nations," said (p. 195): "As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the Government, Congress has the power to say with whom, and on what terms, they shall deal, and what articles shall be contraband. If liquor is injurious to them inside of a reservation, it is equally so outside of it; and why cannot Congress forbid its introduction into a place near by, which they would be likely to frequent? It is easy to see that the love of liquor would tempt them to stray beyond their borders to obtain it; and that bad white men, knowing this, would carry on the traffic in adjoining localities, rather than venture upon forbidden ground." And again (p. 197): "The chiefs doubtless saw, from the curtailment of their reservation, and the consequent restriction of the limits of the 'Indian country,' that the ceded lands would be used to store liquors for sale to the young men of the tribe; and they well knew, that, if there was no cession, they were already sufficiently protected by the extent of their reservation. Under such circumstances, it was natural that they should be unwilling to sell, until assured that the commercial regulation respecting the introduction of spirituous liquors should remain in force in the ceded country, until otherwise directed by Congress or the President. This stipulation was not only reasonable in itself, but was justly due from a strong government to a weak people it had engaged to protect. . . . Based as it is exclusively on the Federal

authority over the *subject-matter*, there is no disturbance of the principle of state equality." The case came here a second time and the views before expressed were reaffirmed. 108 U. S. 491.

The case of *Dick* v. *United States*, 208 U. S. 340, is even more in point. There the Nez Perce tribe, by an agreement ratified by Congress, had ceded to the United States a large portion of their reservation in the State of Idaho, and in the agreement was a stipulation subjecting the ceded lands, for a period of twenty-five years, to the Federal laws prohibiting the introduction of intoxicants into the Indian country. The major part of the unceded lands was allotted in severalty to members of the tribe under the acts of 1887 and 1891, *supra*, and the ceded lands were opened to disposition under the public-land laws. In regular course, some of the ceded lands were patented to white men and came to be the site of a town. Under the stipulation, Dick was prosecuted for introducing intoxicating liquors into the town and was convicted; whereupon he brought the judgment here for review, his chief contention being that, in view of Idaho's position as a State, Congress was without constitutional power to authorize or ratify the stipulation. Upon full consideration this court affirmed the judgment, and, following *United States* v. *Forty-three Gallons of Whiskey*, *supra*, and other cases, held that the stipulation was a valid regulation and not subject to objection on constitutional grounds. See also *Bates* v. *Clark*, 95 U. S. 204, 208; *Clairmont* v. *United States*, 225 U. S. 551, 558.

We could not sustain the defendant's first objection without departing from the principles announced and applied in those cases, and this we have no disposition to do, for we regard them as embodying a right conception of the power of Congress in dealing with the Indian wards and adopting measures for their protection.

We come, then, to the objection that the prohibition in

the act of 1894 covers an unnecessarily extensive territory and is not limited in duration, and so transcends the power of Congress.

As the power is incident only to the presence of the Indians and their status as wards of the Government, it must be conceded that it does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis. Thus, a prohibition like that now before us, if covering an entire State when there were only a few Indian wards in a single county, undoubtedly would be condemned as arbitrary. And a prohibition valid in the beginning doubtless would become inoperative when in regular course the Indians affected were completely emancipated from Federal guardianship and control. A different view in either case would involve an unjustifiable encroachment upon a power obviously residing in the State. On the other hand, it must also be conceded that, in determining what is reasonably essential to the protection of the Indians, Congress is invested with a wide discretion, and its action, unless purely arbitrary, must be accepted and given full effect by the courts.

The claim that the territory covered by this prohibition is so excessive as to make it purely arbitrary is devoid of merit. The original reservation embraced 400,000 acres, a district practically 25 miles square. The allotments are in small tracts scattered throughout this district and aggregate nearly 100,000 acres. The number of Indians affected is upwards of 1,500 and they are more or less in a state of transition from an unsettled to a settled life. In this situation, and having some regard to the weakness of Indians in respect of the use of intoxicants, we are far from believing that Congress exceeded the limits of its discretion in applying the prohibition to all the ceded lands.

Of the claim that the prohibition is not expressly limited in its duration it is enough to observe that this objection cannot be of present avail. The conditions justifying the prohibition remain substantially the same as when it was adopted. The trust period has not expired, the tribal relation has not been dissolved, and the wardship of the Indians has not been terminated. See *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 315; Act May 8, 1906, 34 Stat. 182, c. 2348; *United States* v. *Pelican* (decided this day, *ante*, p. 442). The fact that the conditions may become so changed in the future as to render the prohibition inoperative affords no reason for condemning it now. Unless sooner repealed, it will continue in force as long as the presence and status of the Indians sustain it as a Federal regulation.

Judgment affirmed.

PRONOVOST *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

No. 128. Submitted January 15, 1914.—Decided February 24, 1914.

Under the act of January 30, 1897, 29 Stat. 506, it is an offense against the United States to introduce liquor into the Indian country, and this act embraces Indian country within a State.

An Indian reservation is Indian country, and this court takes judicial notice of the existence at a specified time of a reservation established by treaty and statute.

With exceptions immaterial here, the jurisdiction of the District Court of the United States, as prescribed by law, embraces all offenses against the United States committed within the district.

THE facts, which involve the jurisdiction of the District Court of a criminal prosecution for introducing intoxicat-

ing liquor into the Indian country, are stated in the opinion.

Mr. Assistant Attorney General Wallace for the United States.

No brief filed by plaintiff in error.

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

This was a criminal prosecution for introducing intoxicating liquors into the Indian country. Upon the trial, the jury found the defendant guilty, and a judgment of conviction followed, to reverse which he sued out this direct writ of error. No brief or argument has been submitted in his behalf, and the grounds upon which he seeks a reversal are not made clear.

It appears that the jurisdiction of the District Court was challenged upon some ground, not disclosed in the record, and that the objection was overruled. The indictment is in the usual form, gives January 2, 1911, as the date of the offense, describes the liquors as consisting of designated quantities of whiskey, wine and beer, and charges that they were introduced by the defendant into the Flathead Indian Reservation, in the State of Montana, the same "then and there being an Indian country." A brief bill of exceptions recites that the Government produced evidence in support of the charge and that the defendant admitted the introduction of the liquors "as charged in the indictment." Nothing more appears respecting what was shown at the trial.

An act of Congress of January 30, 1897, makes the introduction of liquors, such as whiskey, wine and beer, into the Indian country an offense against the United States, and prescribes its punishment. 29 Stat. 506, c. 109.

This act embraces Indian country within the limits of a State. *Hallowell* v. *United States*, 221 U. S. 317; *United States* v. *Wright*, 229 U. S. 226, 237. An Indian reservation is Indian country (*Clairmont* v. *United States*, 225 U. S. 551), and we take judicial notice that on the date named there was an Indian reservation in the State of Montana known as the Flathead Indian Reservation. Treaty of July 16, 1855, 12 Stat. 975, Art. II; Acts, April 23, 1904, 33 Stat. 302, 304, c. 1495, § 12; March 3, 1905, 33 Stat. 1048, 1080, c. 1479, § 9; Rep. Com. Ind. Affairs, 1911, p. 83. Subject to exceptions not here material, the jurisdiction of the District Court, as prescribed by law, embraced all offenses against the United States committed within the State of Montana. Rev. Stat., § 563; act of February 22, 1889, c. 180, § 21, 25 Stat. 676, 682.

Thus we see, not only that the grounds upon which the court's jurisdiction was challenged are not disclosed by the record, but also that, so far as appears, the offense charged in the indictment and shown at the trial was manifestly cognizable in the District Court.

The bill of exceptions contains a further recital that the defendant, at the conclusion of the evidence, requested the court to direct a verdict of acquittal upon the ground that the town of Polson was incorporated under the laws of Montana and subject to the State's police power, and that the subject-matter of the case was not within the control of the United States. In this there may have been an indirect assertion that the liquors were introduced into the town of Polson, not into the Flathead Indian Reservation, and that the offense, if any, was not one against the United States. But, even if so, the assertion has no other support in the record. The indictment makes no mention of the town of Polson, and neither does the recital respecting what was shown at the trial. The latter, as we have seen, states that the Government pro-

duced evidence in support of the charge and that the defendant admitted the introduction of the liquors "as charged in the indictment." The natural import of this is that the liquors were introduced into the Flathead Indian Reservation. In this situation the reference to the town of Polson cannot be regarded as a factor in the case. But, as bearing upon the possible status of the lands occupied by the town, see *Perrin* v. *United States*, *ante*, p. 478; Act of June 21, 1906, c. 3504, § 17, 34 Stat. 325, 354; Act of March 3, 1909, c. 263, § 21, 35 Stat. 781, 795.

As no real question of the District Court's jurisdiction is involved, nor any constitutional or treaty question, there is no basis for the direct writ of error. The Judicial Code, § 238.

Writ of error dismissed.

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

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 156. Submitted January 16, 1914.—Decided February 24, 1914.

The Hepburn Act of 1906, amending the Interstate Commerce Act, established a uniform rule of liability of carriers for loss on interstate shipments which superseded all state laws upon the subject.

In enforcing liability of the carrier for interstate shipments the provisions in the regularly filed tariff enter into and form part of the contract of shipment, and if that tariff offers two rates based on value and the shipper declares the lower value so as to avail of the lower rate, the carrier may avail of the lower value so declared. *Kansas Southern Ry.* v. *Carl*, 227 U. S. 639.

In this case the liability of the interstate carrier on an interstate shipment from Iowa was limited to the declared value notwithstanding § 2074, Iowa Code, prohibited such a defense.

153 Iowa, 103, reversed.

THE facts, which involve the construction of the Carmack Amendment to the Hepburn Act and its effect on state statutes, are stated in the opinion.

Mr. M. L. Bell and *Mr. F. C. Dillard* for plaintiff in error:

The provisions of § 20 of the act of February 4, 1887, as amended by the act of June 29, 1906, constitute an exclusive regulation of contracts for interstate shipments by railroad common carriers, superseding all state regulations upon the same subject. *C., B. & Q. Ry.* v. *Miller*, 226 U. S. 513; *Adams Exp. Co.* v. *Croninger*, 226 U. S. 491; *C., St. P. &c. Ry.* v. *Latta*, 226 U. S. 519.

The liability imposed by said amended § 20, is the liability imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification is reasonable and does not exempt from loss due to negligence.

This is the law with reference to contracts for interstate shipments. *M., K. & T. Ry.* v. *Harriman*, 227 U. S. 567, 672. A carrier is permitted by fair and reasonable agreement to limit the amount recoverable in case of loss, to an agreed value made in order to obtain the lower of two rates. *Adams Exp. Co.* v. *Croninger*, 226 U. S. 491, 509.

In the present case, defendant in error agreed with the plaintiff in error, in order to get the lower of two rates, that in case of loss settlement was to be made on the agreed value of $10.00 per head for each hog. *Kansas City Southern* v. *Carl*, 227 U. S. 639, 652.

An agreed valuation regulation determining a rate is,

when filed and published according to law, in effect a part of the act of Congress. Its reasonableness is not open to question in this action.

A carrier is required by law to publish its rates and any rules or regulations which in any wise effect or determine said rates. After being so published, the carrier cannot deviate therefrom, even in the slightest particular. They stand as the law, binding as well upon the shipper as the carrier. *L. & N. Ry.* v. *Motley*, 219 U. S. 467; *Tex. & Pac. Ry.* v. *Abilene Co.*, 204 U. S. 426; *Armour* v. *United States*, 209 U. S. 56; *Texas & Pacific Ry.* v. *Mugg*, 202 U. S. 242; *Poor Grain Co.* v. *C., B. & Q. Ry.*, 12 I. C. C. 492, 546; *Blinn* v. *Southern Pacific Ry.*, 18 I. C. C. 430.

There was no appearance or brief filed for defendant in error.

Mr. Justice Lamar delivered the opinion of the court.

The plaintiff Cramer, sued the Railroad Company to recover $992 the amount of damage to a car-load of 60 hogs shipped from Galt, Iowa, to Chicago, Illinois. The Company defended on the ground that the plaintiff overloaded the car and placed therein such an excessive quantity of hay as to overheat the animals, thereby damaging some and causing the death of others. It further contended that no agent of the Company had any knowledge as to the value of the hogs, except what was stated by the shipper, who represented that their value did not exceed $10 per head and thereby secured the benefit of the lower of two rates specified in the tariff on file with the Interstate Commerce Commission and at Galt. One of these rates applied where the value of the hogs did not exceed $10 per head, and the other, a higher rate, applied where the value exceeded $10 per head. The defendant claimed that the tariffs were binding on plain-

tiff and that he could not, in any event, recover beyond the valuation on which the freight was charged. This latter defense was stricken out on demurrer and the trial resulted in a verdict in favor of the plaintiff for more than $600. On writ of error the Supreme Court affirmed the judgment and sustained the order striking out the plea on the ground that such defense was prohibited by § 2074 of the Iowa Code, which provides that:

"No contract, receipt, rule or regulation shall exempt any railway corporation engaged in transporting persons or property from the liability of a common carrier, or carriers of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into."

In *Chicago &c. Ry.* v. *Solan*, 169 U. S. 133, decided in January, 1898, it was held that this statute was valid even as applied to interstate shipments. But on June 29, 1906, Congress passed the Hepburn Act, c. 3591, 34 Stat. 584, which established in interstate commerce a uniform rule of liability. That rule of liability is to be enforced in the light of the fact that the provisions of the tariff enter into and form a part of the contract of shipment, and if a regularly filed tariff offers two rates, based on value, and the goods are forwarded at the low value in order to secure the low rate, then the carrier may avail itself of that valuation when sued for loss or damage to the property. The question has been so fully considered in cases determined since the decision herein of the Supreme Court of Iowa, that it is unnecessary to do more than refer to *Kansas Southern Ry.* v. *Carl*, 227 U. S. 639, 645; *Missouri &c. Ry.* v. *Harriman*, 227 U. S. 657, where the facts were substantially like those here involved and where it was held that a carrier had the right to make a defense like that filed in the court below. As it was error to strike the plea, the judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

D. E. FOOTE & COMPANY, INCORPORATED, *v.* STANLEY, COMPTROLLER OF THE STATE OF MARYLAND.

ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

No. 159. Argued January 16, 1914.—Decided February 24, 1914.

The Federal Constitution prohibits a State from regulating interstate commerce; but at the same time authorizes it to burden that commerce by the collection of the expenses if absolutely necessary for enforcing its inspection laws.

There is an essential difference between policing and inspection; and a State cannot include the expense of the former as part of the expense of the latter in determining the amount which it can raise as an inspection tax which affects interstate commerce.

As inspection necessarily involves expense, it is primarily for the legislature to determine the amount; and even though the revenue be slightly in excess of the expense the courts should not interfere.

There is a presumption that the legislature will reduce inspection fees to a proper sum if the amount originally fixed proves to be unreasonably in excess of the amount required. *Red "C" Oil Co.* v. *North Carolina*, 222 U. S. 393.

Effect must be given by the courts to the provisions of the Constitution; and where it does appear that the amount of inspection fees are disproportionate to the inspection service rendered or include something beyond inspection, the tax must be declared void as obstructing the freedom of interstate commerce.

A state statute imposing an inspection tax, the proceeds of which are to be and actually are used partly for inspection and partly for other purposes such as policing state territory, is necessarily void as imposing a burden on interstate commerce in excess of the expenses absolutely necessary for inspection, and so *held* as to the Maryland Oyster Inspection Tax of 1910.

The question of constitutionality of an inspection law depends not only upon whether the excess proceeds of the tax may be used for other purposes, but whether they actually are so used; and it is the duty of the courts to determine whether the tax is excessive and the excess is

so used so as to protect citizens against payment of fees not authorized by the Constitution. *Turner* v. *Maryland*, 107 U. S. 38, distinguished, and *Brimmer* v. *Rebman*, 138 U. S. 83, followed.

While the excess of a state inspection tax may be valid as a tax on property within the State, if it does not appear that the legislature would have separately imposed such a property tax, the whole tax must be declared void if it is unconstitutional as to interstate commerce.

117 Maryland, 335, reversed.

THE plaintiffs are engaged in packing oysters taken from the waters of Maryland, Virginia and New Jersey and shipped to Baltimore where they are inspected under the provisions of the Maryland Oyster Law. This comprehensive statute contains 82 sections, one of which (§ 69) provides for the appointment of 20 special inspectors, to be paid $45 per month each, during the season. They are required to inspect all oysters in the district to which they are assigned and to give a certificate to buyer and seller in substantially the following form:

"I hereby certify that I have this day inspected for Captain ———— of the schooner ————, a cargo of oysters, sold to ————, and found the same to contain ———— bushels of merchantable oysters, and ———— bushels of unmerchantable oysters. . . ."

The section further provides that "a charge of one cent per bushel is hereby levied to help defray the expenses of such inspection and the other expenses of the State Fishery Force, upon all oysters unloaded from vessels at the place where said oysters are to be no further shipped in bulk in vessels."

The fee was to be charged equally to the buyer and seller and in case it was not paid at the end of the week the property of the party indebted was to be levied on and sold by the Comptroller "as in cases of taxes in default, without further process of law."

The four plaintiffs refused to pay the inspection fees charged against them between October, 1910, and April, 1911. The Comptroller threatened to enforce collection by levy and sale, and they filed a Bill in the Circuit Court of Baltimore City seeking an injunction on the ground that the inspection fees were excessive and constituted a burden on interstate commerce and a violation of the provision of the Constitution that "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The case was heard on an agreed statement of facts which in addition to those above recited, showed that the act of April, 1910, was a reënactment of sections of a prior statute (Code of Maryland, c. 72) which was substantially like the present law with the same charge of one cent a bushel for measuring oysters.

Extracts from various annual Reports of the Comptroller were stipulated into the record. They show that the salaries of the inspectors amounted to about $14,000 per annum. After the deduction of salaries of these inspectors there was for 1909 and 1910 respectively, an excess of $22,010 and $28,680. This annual excess was carried to the credit of the Oyster Fund, provided for both in the repealed and reënacted Oyster Law. In the Report of the Comptroller for 1909 he says: "The tax as to one cent per bushel on all oysters inspected in this State, as enacted by Chapter 488 of the acts of 1908, has been sufficient not only to pay the cost of such inspections, but also to carry to this [Oyster] Fund the balance or excess of $22,010.95."

In the Report for 1910, he says: "During the fiscal year ending September 30, 1910, the receipts of taxes on oysters . . . amounted to $43,671.94. The disbursements for account of salaries of the measurers and inspectors of oysters were $14,991, leaving a balance or ex-

cess of $28,680.94, which was carred to the credit of the Maryland State Oyster Fund. . . .

"The receipts from dredging and tonging licenses show a heavy shrinkage by reason of fewer boats being engaged in the industry; nevertheless the excess tax of one cent per bushel on oysters sold, amounted to $28,680.94, making the fund self-sustaining for the year" (1911).

Section 30 of the Oyster Law referred to provides that the Oyster Fund shall only be drawn upon for "the purpose of maintaining sufficient and proper police regulations for the protection of fish and oysters in Maryland waters and in the payment of the officers and men and keeping in repair and supplying the necessary means of sailing the boats and vessels of the State Fishery Force."

After a hearing and consideration of the facts submitted, the Circuit Court held that the inspection tax was valid, refused to enjoin its collection, and dismissed the Bill. That judgment was affirmed by the Court of Appeals (117 Maryland, 335), and the case was brought here by writ of error.

Mr. George Whitelock and *Mr. W. Thomas Kemp* for plaintiffs in error:

The Federal Constitution vests Congress with the exclusive power to regulate interstate commerce, and prohibits a State from laying duties on imports or exports, except such as may be absolutely necessary for purposes of inspection. A State is accorded the right to pass inspection laws and to collect such amounts as may be necessary to pay the expense thereof. *Patapsco Guano Co.* v. *Board of Agriculture*, 171 U. S. 345; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Foote* v. *Clagett*, 116 Maryland, 235.

Under Article I the State of Maryland can impose no tax upon Virginia and New Jersey oysters, except such as may be reasonably necessary for inspection purposes to secure the due quality and measure of the oysters shipped

from Virginia and New Jersey into Maryland and inspected in Maryland at the termination of the shipment.

As to the scope of state inspection laws, see *Gibbons* v. *Ogden*, 9 Wheat. 1, 203; *Brown* v. *Maryland*, 12 Wheat. 419; *Foster* v. *New Orleans*, 94 U. S. 246; *Turner* v. *Maryland*, 107 U. S. 38, 55, aff'g 55 Maryland, 240; *People* v. *Compagnie Generale*, 107 U. S. 59, 62.

Interstate commerce can only be impeded by such local statutes as seek fairly and honestly to protect the citizens of a State from the fraud of short measures, or injury by introduction of dangerous or unwholesome articles.

To introduce a purely extraneous charge as a cost of inspection, or to appropriate the tax collected to a foreign purpose, would take the statute beyond the permitted limitation upon freedom of interstate commerce. It would no longer be "an inspection law," but "a revenue measure."

As to the extent to which courts pass upon constitutionality of inspection laws, see *Foote* v. *Clagett*, 116 Maryland, 240; *Brown* v. *Maryland*, 12 Wheat. 419, 466; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Leisy* v. *Hardin*, 135 U. S. 100, 108, all holding that Congress has the exclusive power over interstate commerce, and that state legislatures may enact only such laws pertaining thereto as come within certain well defined limitations.

The various state legislatures in the exercise of the privilege thus given them to enact proper inspection laws cannot also be regarded as the final judges of the legality of their own acts as would follow if the courts are not to be permitted to decide whether a particular legislature has exceeded its privilege and passed a law imposing a tax which, on its face, or in necessary effect, is to be devoted toward other purposes than the cost of inspection. *Turner* v. *Maryland*, 107 U. S. 38; *McLean* v. *Denver & R. G. R. Co.*, 203 U. S. 38, distinguished, and see *Mugler* v. *Kansas City*, 123 U. S. 623, 661; *In re Rebman*, 41 Fed. Rep. 867,

aff'd *Brimmer* v. *Rebman*, 138 U. S. 78; *Minnesota* v. *Barber*, 136 U. S. 313, 319; *Fertilizer Co.* v. *Board of Agriculture*, 43 Fed. Rep. 609; *Patapsco Guano Co.* v. *Board of Agriculture*, 171 U. S. 345; *Postal Company* v. *Taylor*, 192 U. S. 64; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1, 27; *Red "C" Oil Mfg. Co.* v. *Board of Agriculture*, 222 U. S. 381, 394; *Savage* v. *Jones*, 225 U. S. 501.

The cases cited hold that the Federal Constitution contemplates and permits only such state inspection taxes as are reasonable in amount, single in purpose, and assessed under a law designed for the protection of the health or safety of the community, as distinguished from a tax which, in whole or in part, levies tribute upon interstate commerce for the enrichment of the coffers of the taxing State itself.

Section 69, as reënacted, when tested by its effect on interstate commerce, imposes a tax or charge upon oysters shipped to the appellants from other States which is grossly excessive in amount and is expressly applied to other expenses than the legitimate cost of inspection, and is therefore unconstitutional both under the state and Federal Constitutions.

Mr. Edgar Allan Poe, Attorney General of the State of Maryland, for defendant in error:

The highest court of the State having decided that the act does not offend the state constitution, that question is not subject to review by this court, *Carstairs* v. *Cochrane*, 193 U. S. 10; *Rasmussen* v. *Idaho*, 181 U. S. 198; *Montana Co.* v. *St. Louis Mining Co.*, 152 U. S. 160; as it appears from the complaint and agreed statement that plaintiffs in error are not complaining of the imposition of any inspection charge upon oysters imported from foreign countries, § 10 of Art. I, Const. of United States has no bearing. The only question is whether c. 413, Acts Gen. Ass., Maryland, of 1910, is in contravention of that part of § 8,

Art. I, Const. of the United States relating to interstate commerce.

The vesting in Congress of exclusive power to regulate interstate commerce does not prohibit the States from passing, in the exercise of the police power, inspection laws, even though such laws operate upon articles of interstate commerce. *McLean* v. *Denver & R. G. R. Co.*, 203 U. S. 50; *Patapsco Guano Co.* v. *Board of Agriculture*, 171 U. S. 345; *Neilson* v. *Garza*, 2 Woods, 287; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489.

The act is an inspection measure passed by virtue of the police power of the State for the purpose of protecting the oyster industry of the State and of preserving the health of the people of the State as well as for the purpose of protecting the people against fraudulent practices and of securing improvement in the quality of the oyster.

This court will take judicial notice of the fact that the oyster industry is one of the most important industries of the State of Maryland; that the oyster beds are owned by the State and furnish means of livelihood for a large part of the population thereof, and that the oyster itself is most delicate in character and readily susceptible of contamination, and therefore unless most careful inspection is exercised in connection with it and with its sale as an article of food, the public health will be most seriously menaced, and the wealth of the State greatly diminished.

The law in question does not impose an inspection charge so excessive as to challenge the good faith of the State in enacting it, and so unreasonable as to justify this court in declaring it unconstitutional.

The plaintiffs in error contend that the charge is unreasonable, because it produces revenue that is much more than sufficient to defray the salaries of the inspectors provided for by said act.

The state court held that § 69 is not an independent,

isolated enactment, but a component part of a comprehensive system of law embodied in Art. 72, Code of Pub. Gen. Laws, title "Oysters," containing 82 sections. Each section therefore must be read in connection with, and construed in reference to, all other sections. *State* v. *Popp*, 45 Maryland, 438.

The expense of inspection mentioned in § 69 cannot be separated from the wider inspection provided by other sections, or from the general expenses of the State Fishery Force which is charged with the whole duty of inspection, and the charge imposed is not excessive for the purposes of inspection. The fact that the proceeds of this charge go into the general oyster fund cannot affect the validity of the law. *State* v. *Applegarth*, 81 Maryland, 304.

The interpretation of Art. 72 of the Maryland Code as set forth by the highest court of Maryland is conclusive and binding upon this court, and completely and finally disposes of the contention advanced by plaintiffs in error. *Water Works Co.* v. *Tampa*, 199 U. S. 241; *Gatewood* v. *North Carolina*, 203 U. S. 531; *Linsdley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61.

Assuming, however, that this court were disposed to examine for itself the various provisions of Art. 72, the correctness of the interpretation of the state court is apparent.

The cost of inspection of oysters cannot be limited to the mere salaries of the measurers and inspectors, but must also include, in part at least, the expenses of maintaining the State Fishery Force, since that force is charged also with the task of assisting in carrying out the inspection laws of the State relating to oysters.

The scheme of oyster inspection contemplated by Art. 72 does not consist merely of the inspection by the twenty special inspectors provided by chapter 413. If that were all the inspection that the law furnished, the oyster industry in Maryland would soon become a thing of the past and

the oyster beds would in a short time be completely depleted and denuded. The law expressly and necessarily provides that the State Fishery Police shall not only act as inspectors, but shall also see that the laws relating to inspection are strictly and faithfully complied with.

In fact the inspection fee provided for by chapter 413 is not only not excessive, but is hardly sufficient to defray the proper cost of inspection.

The inspection charge of one cent per bushel, is not so unreasonable and disproportionate to the services rendered as to attack the good faith of the law and to justify this court in holding that the State, under the disguise of an inspection measure, is attempting to subserve other and different purposes prohibited by the Federal Constitution. *McLean* v. *Denver & R. G. R. Co., supra; Standard Stock Food Co.* v. *Wright,* 225 U. S. 549.

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

The plaintiffs are engaged in the business of packing oysters in the City of Baltimore, and, during the season of 1910–11 purchased 736,000 bushels, of which 494,000 bushels were taken from the waters of the State of Maryland, 228,000 from the waters of the State of Virginia, and 14,118 from the State of New Jersey. These oysters were inspected in Baltimore by officers appointed under the provisions of the Maryland statute, which fixed an inspection fee of one cent per bushel to be paid, one-half by the seller and one-half by the buyer. The plaintiffs having refused to pay the inspection charge, assessed against them, litigation followed. The decision was against their claim of immunity under Art. I, §§ 8 and 10, of the Constitution. The case was then brought here on the ground that the inspection fee of one cent per bushel charge was excessive, that it interfered with interstate

commerce and levied an unlawful impost duty upon goods shipped into Maryland from other States.

1. The Constitution prohibits a State from regulating interstate commerce, but at the same time authorizes the collection of the necessary expenses of its inspection laws with the result that interstate commerce is to that extent lawfully burdened. Inspection is intended to determine the weight, condition, quantity and quality of merchandise to be sold within or beyond the State's borders. It is usually "accomplished by looking at or weighing or measuring the thing to be inspected," (*People* v. *Compagnie Gen. Transatlantique*, 107 U. S. 59, 62), though there may be cases in which some degree of supervision or policing is required in order to secure the proper certification of the property intended for sale or shipment. But while the two duties may sometimes overlap, there is a difference between policing and inspection, and if the State imposes upon one set of officers the performance of the two duties and pays the whole or a part of the joint expenses out of inspection fees, it must be made to appear that such tax does not materially exceed the cost of inspection—the burden in such cases being on those seeking to collect the combined charge. For if the cost of inspection is so intermingled with other expenses as to make it impossible to separate the two interstate commerce might be burdened by fees collected both for inspection and revenue,—for a lawful and for an unlawful purpose. Such is the contention here, the plaintiffs insisting that the fees are collected partly for inspecting oysters and partly for the cost of policing the waters of Chesapeake Bay; while the defendant insists that the charge is collected and spent solely for inspection.

2. Inspection necessarily involves expense and the power to fix the fee, to cover that expense, is left primarily to the legislature which must exercise discretion in determining the amount to be charged, since it is im-

possible to tell exactly how much will be realized under the future operations of any law. Beside, receipts and disbursements may so vary from time to time that the surplus of one year may be needed to supply the deficiency of another. If, therefore, the fees exceed cost by a sum not unreasonable, no question can arise as to the validity of the tax so far as the amount of the charge is concerned. And even if it appears that the sum collected is beyond what is needed for inspection expenses, the courts do not interfere, immediately on application, because of the presumption that the Legislature will reduce the fees to a proper sum. *Red "C" Oil Co.* v. *North Carolina*, 222 U. S. 380, 393. But when the facts show that what was known to be an unnecessary amount has been levied, or that what has proved to be an unreasonable charge is continued, then, they are obliged to act in the light of those facts and to give effect to the provision of the Constitution prohibiting the collection by a State of more than is necessary for executing its inspection laws. In such inquiry they treat the fees fixed by the Legislature for inspection proper as *prima facie* reasonable and do not enter into any nice calculation as to the difference between cost and collection; nor will they declare the fees to be excessive unless it is made clearly to appear that they are obviously and largely beyond what is needed to pay for the inspection services rendered. Still, effect must be given to the provision of the Constitution, which, in unusual and emphatic terms, permits the State to collect only what is "absolutely necessary." If, therefore, it is shown, that the fees are disproportionate to the service rendered; or, that they include the cost of something beyond legitimate inspection to determine quality and condition, the tax must be declared void because such costs, by necessary operation obstruct the freedom of commerce among the States. *McLean* v. *Denver & Rio Grande R. R. Co.*, 203 U. S. 38; *Brimmer* v. *Rebman*, 138

U. S. 78, 83; *Postal Telegraph-Cable Co.* v. *Taylor,* 192 U. S. 64; *Patapsco Co.* v. *North Carolina,* 171 U. S. 345, 354; *Red "C" Oil Co.* v. *North Carolina,* 222 U. S. 380, 394; *Savage* v. *Jones,* 225 U. S. 501.

3. The unreasonableness of inspection fees may appear from the language of the act, as in *Foote* v. *Clagett,* 116 Maryland, 228, where a charge of two cents a bushel on oysters was collected, under a statute which provided that one-half was to be used for inspection and the other half was to be used for replacing shells on the natural beds for the purpose of increasing the oyster crop. That law was declared void by the Court of Appeals of Maryland, because of the provision that one-half of the inspection fee should be applied to other than the inspection purpose. The present statute contains language susceptible of the same construction, for it provides for an inspection fee of one cent per bushel to be "levied to help pay the salary of the inspectors and the other expenses of the State Fishery Force."

As the act itself makes a clear distinction between inspection expenses "and other expenses," the question at once arises as to whether the State did not provide for the collection of more than was "absolutely necessary for executing its inspection laws," thereby rendering the statute void because it included the cost of "something beyond legitimate inspection to determine quality and condition." *Brimmer* v. *Rebman,* 138 U. S. 83.

This objection, apparent on the face of the act, was sought to be answered by the suggestion that § 69, which levied the tax, was but "a part of an elaborate system of inspection running through the whole law, the enforcement of which was an inseparable part of the duty of the State Fishery Force," and that "the expense of such inspection is a component part of all the expenses of that force." 117 Maryland, 335. It was urged that, in addition to inspecting oysters as they were unloaded from ves-

sels, the Fishery Force performed other inspection duties such as preventing, what were known as, "buy-boats" from secretly carrying culls and other unmerchantable oysters beyond the limits of the State for consumption or transplanting. But even if it be conceded that these, or like services, could be classed as inspection within the meaning of the Constitution, they form only a part of the many and various duties imposed upon the Fishery Force. That organization is supplied with men and boats and required to patrol, day and night, the waters of Chesapeake Bay to prevent unlicensed boats from taking oysters and all boats from improper tonging or dredging and to see that shells and culls are returned to the natural beds—provisions intended for the preservation of the supply rather than determining the merchantable quality of oysters offered for sale. Other non-inspection duties might be named, but the foregoing will suffice to show that inspection, policing and business expenses are to be paid for out of inspection fees.

3. But the commingling of these various duties, paid for out of a fund raised for inspection, does not necessarily show that the fee is excessive. For the presumption of invalidity arising from such intermingling might be met by carrying the burden of showing that, while the statute required payment out of such joint fund, the collections were not sufficient, but only helped, to pay the definitely ascertained expenses of inspection. The question of reasonableness, therefore, may be considered in the light of the practical operation of the law with a view of determining, with reasonable certainty, the permanent relation between the amount collected and the cost of inspecting. The Court of Appeals of Maryland, following the intimation in *Turner* v. *Maryland*, 107 U. S. 38, declined to pass on the question, upon the ground that a court could not decide whether "a charge or duty under an inspection law is or is not excessive." That suggestion,

however, is opposed to the distinct rulings in *Brimmer* v. *Rebman*, 138 U. S. 83, and other cases above cited, which hold that it is the duty of the courts to pass upon the question, so as to protect the private citizen against the payment of inspection fees, larger than those authorized by the Constitution.

4. The Maryland statute provided for that kind of inspection that could be performed by 'looking at or measuring the thing to be inspected' (107 U. S. 62). It fixed the amount of salary to be paid the inspectors for such services, so that the cost was definitely known. The receipts, too, are reasonably certain in view of collections in the past.

The present statute is a reënactment of an old law levying the same charge of one cent per bushel. Under the operations of that law it appeared that about 4,000,000 bushels were inspected each year, producing a revenue of $40,000, one-third of which was sufficient to pay the salaries of the inspectors, the other two-thirds being appropriated to the "other expenses of the Fishery Force." The Comptroller in his Annual Reports called the attention of the legislature to the fact that, as required, this "excess" had been credited to the Oyster Fund. This fund was to be used—not for inspection purposes—but for "maintaining sufficient and proper police regulations for the protection of fish and oysters in Maryland waters and in the payment of the officers and men and keeping in repair and supplying the necessary means of sailing the boats and vessels of the State Fishery Force."

Even during the year following the enactment of the new statute and the failure of many to pay, pending the decision as to the validity of the tax, the collections were in excess of the cost of inspection. In the light of the operation of the previous act and the failure to show that the amount collected under the new, would not be more than was necessary for the expenses of inspection proper,

the present statute must be held to be void. The excess collected may have been valid as a tax on property in Maryland, but was a burden on interstate commerce when levied upon oysters coming from other States. This fact renders the whole tax void, because there is no claim that the intrastate commerce can be separated from the interstate shipments; or that the legislature would have taxed one and left the other untaxed.

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

GREAT NORTHERN RAILWAY COMPANY *v.* O'CONNOR.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 473. Submitted January 6, 1914.—Decided February 24, 1914.

The rule that carriers are not concerned with questions of title but must treat the forwarder as shipper and charge the applicable rates, *Int. Com. Comm.* v. *Del., Lack. & West. R. R. Co.*, 220 U. S. 235, applies also to accepting the forwarder's classification and valuation, without regard to any private instructions given by the actual shipper to the forwarder.

A shipper, whose forwarder has violated instructions as to valuation or classification to his damage, has his remedy against the forwarder but not against the carrier. He is bound by the acts of his agent.

A shipper has a remedy in direct proceedings before the Interstate Commerce Commission to attack the reasonableness of the tariff and if justified may obtain relief by a reparation order or suit in court after a finding of unreasonableness; but in a suit for damages before such a finding he cannot attack the filed tariff as unreasonable.

Where the filed tariff states alternative lower and higher rates based on

valuation the carrier is entitled to collect the rate applicable to the value declared and the shipper is liable for that valuation.

This result is not affected by the use of printed forms. The minds of the parties met and the value as well as the rate was fixed by the contract.

120 Minnesota, 359, reversed.

THE Boyd Transfer Company of Minneapolis in addition to its regular transfer business acted as a forwarder by railroad. By collecting from different shippers small lots of goods sufficient in the aggregate to fill a car, it secured carload rates and out of the difference between carload and less than carload rates it made a profit and at the same time was enabled to offer better rates to the small shipper. How this difference between the two rates was divided between owner and forwarder, does not appear in the record. At the time of the shipment referred to in this case, the Railroad Company had four rates on household goods (including Emigrant Movables), which vary, both according to the weight and value of the shipment, as follows:

Less than Carload Lots (value not stated)	$3.00 per cwt.
Less than Carload Lots (not to exceed $10 per cwt.)	2.00 " "
Carload Lots (value not stated)	1.60 " "
Carload Lots (value not to exceed $10)	1.00 " "

While these tariffs were in force, the Boyd Transfer Company was employed by the plaintiff, on terms not stated, to box, transfer and ship certain property which she desired to have sent to Portland, Oregon. The articles consisted of a typewriter, stationery, books, curtains, wearing apparel, jewelry and other personal effects. Some of them had been packed in a trunk and the balance were boxed by the Boyd Company and loaded by it into a car filled with household goods. The weight of the load was 22,000 lbs. The Boyd Company filled out a bill of lading, describing the shipment as "One car of Emigrant Mov-

ables." "Released to $10 per cwt." and naming "Boyd Transfer and Storage Company, shipper." The bill of lading on presentation was signed by the agent of the Railroad Company. The goods were lost en route and the plaintiff brought suit against the Railroad Company for $598.65, their full value. The Company filed a plea setting up that the property had been destroyed without its fault, and further contended that in view of the provisions of the tariff and the fact that the goods had been shipped on the $1 rate, the carrier could not be held liable beyond $10 per hundredweight.

At the trial the plaintiff testified she did not know that there had been any valuation of her goods, as the agent of the Boyd Company in soliciting the shipment had stated that it had a through car, but said nothing to her about shipping her effects as household goods, and she understood that they were to be shipped as a separate consignment. She testified that she had stated to the Transfer Company that her goods were new and as she had no insurance she was willing to pay the regular rates.

The defendant introduced the tariffs, and offered evidence to show that its agents had no knowledge of the contents of plaintiff's boxes which had been loaded into the car by the Transfer Company which also made out the bill of lading and endorsed thereon a statement that the car contained Emigrant Movables Released at $10 per cwt.

A number of auctioneers and dealers in second hand furniture were introduced as witnesses for the purpose of establishing the average value of second hand furniture and household goods. They testified that they were familiar with the value of household goods and second hand furniture; testified that only a few of such effects are sold by weight, but the value being ascertained, the articles could be weighed and the value per pound then

determined. This they illustrated by giving the cost, weight and value per pound of various articles, and gave their opinion as to the average value of shipments of household goods including furniture, carpets, wearing apparel and the like. One witness stated that the average value was about $4 per cwt., another $5 per cwt., another testified that, including a second-hand piano weighing 1500 lbs., the average value would be about $7 per cwt. There was no testimony in rebuttal, beyond the fact that the articles belonging to plaintiff were shown to be worth much more than $10 per cwt.

The court charged that if the Boyd Company was the agent of the plaintiff to make the shipment she was bound by its valuation, provided such valuation was not an arbitrary attempt to limit liability and left to the jury to determine whether there had been such an arbitrary attempt to limit liability. They returned a verdict for the amount claimed in the complaint. The defendant moved for a new trial because of errors in the charge and because the verdict was in excess of the sum for which the defendant could be held responsible under the tariffs filed with the Interstate Commerce Commission. The judge held that the carrier was not responsible for $62.50, the value of jewelry and silverware in the trunk, and the plaintiff having written off that amount, judgment was rendered against the defendant for $533.40, a sum much in excess of $10 per cwt. The case was then taken to the Supreme Court of Minnesota which affirmed the judgment. It held that the Railroad Company was charged with knowledge that a considerable portion of the amount received by shipping at reduced rates went to the Forwarding Company and not to the various owners of the goods packed in one car; and that the Railway Company must have known that the Boyd Company was ignorant of the value and contents of the boxes belonging to the different shippers. It ruled that the Boyd Company had no implied

authority to make an agreement as to the value of plaintiff's goods. It further held that whether there had been any *bona fide* attempt to fix value was a question of fact and as the jury by their verdict had found that there had been no such effort, the plaintiff under *Ostroot* v. *N. P. Ry. Co.*, 111 Minnesota, 504, was entitled to recover the full value of the goods shipped. It further held that the rule announced by it was not opposed to *Adams Express Company* v. *Croninger*, 226 U. S. 491; *Chicago &c. Ry.* v. *Miller*, 226 U. S. 513; *Chicago &c.* v. *Latta*, 226 U. S. 519. The defendant then sued out a writ of error.

Mr. E. C. Lindley and *Mr. M. L. Countryman* for plaintiff in error:

Under the Act to Regulate Commerce, defendant in error was bound by the released valuation declared by her agent, the Boyd Transfer and Storage Company, upon which valuation she obtained a lower rate of freight in accordance with the carrier's interstate tariff provisions. *Adams Exp. Co.* v. *Croninger*, 226 U. S. 491; *Kansas City &c. R. Co.* v. *Carl*, 227 U. S. 639; *Missouri, K. & T. R. Co.* v. *Harriman*, 227 U. S. 657; *Wells-Fargo & Co.* v. *Neiman-Marcus Co.*, 227 U. S. 469; *C., B. & Q. R. Co.* v. *Miller*, 226 U. S. 513; *C., St. P., M. & O. Ry. Co.* v. *Latta*, 226 U. S. 519.

Since this writ of error was sued out, the Minnesota Supreme Court has seen its error and has in effect overruled its decision in the case at bar. *Ford* v. *C., R. I. & P. Ry. Co.*, 143 N. W. Rep. 249.

Mr. C. D. O'Brien, Mr. James Mattimore and *Mr. T. P. McNamara* for defendant in error:

The manager of the Transfer Company had no authority to release the value of the goods of defendant in error. *Benson* v. *Oregon Short Line*, 99 Pac. Rep. 1072.

There was no valid contract releasing the value of the

goods in question, and the judgment of the state court should be sustained.

It has not been held in any of the cases cited by plaintiff in error that, under Federal legislation, a carrier may limit its liability for its own negligence without either a contract or acts constituting an estoppel. *Mo., Kans. & Tex. Ry. Co.* v. *Harriman*, 227 U. S. 657; *Released Rates*, 13 I. C. C. 550, 554, 555.

To entitle a shipper to the lower rate instead of the higher one, it must expressly appear that the value of the goods are "declared by the shipper not to exceed $10.00 per 100 lbs."

There was in this case no declared valuation by defendant in error or by the Boyd Transfer Company. On the contrary it appears that the Boyd Transfer Company attempted to release the value of the goods from their true valuation to a lower value.

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

The plaintiff owned personal effects weighing 545 lbs. and worth $598. She employed the Boyd Transfer Company which was also a Forwarder to box and ship the property from Minneapolis to Portland. The regular freight rate on such a shipment would have been $3 per cwt., but without express authority from her, the Company forwarded her boxes with others under the terms of a tariff which named $1 as the rate on carload shipments of household goods valued at less than $10 per cwt. The car and its contents were destroyed and the state Supreme Court held that the plaintiff was entitled to recover the full value of her property because (1) the railroad agents must have known that the Transfer Company was a Forwarder, without authority to value plaintiff's property, and because (2) there had been no *bona fide* effort to agree upon a valuation.

1. It is conceded that the carrier had no knowledge of the contents of the boxes which were loaded by the Transfer Company and forwarded under the low rate applicable to household goods worth less than $10 per cwt. In the absence of something to indicate that the Transfer Company was guilty of false billing, the carrier was not required to make special inquiry, but could rely on the statement that the car was loaded with goods of the character and value stated. For, although the Boyd Company was a Forwarder, engaged in collecting a number of small shipments from various persons in order to fill a car and obtain the lower rates applicable to carload shipments, yet the Railroad Company was obliged to treat the Forwarder as shipper, even though thereby the carrier lost the benefit of the higher rate which would have been applicable to separate and small shipments. This was the ruling in *Int. Com. Comm.* v. *Delaware, Lackawanna & Western R. R.*, 220 U. S. 235, where it was held that the carriers were not concerned with the question of title, but must treat the Forwarder as shipper and charge the rates applicable to the quantity of freight tendered regardless of who owned the separate articles. If the Forwarder was shipper for the purpose of securing carload rates, it was also shipper for the purpose of classifying and valuing, in order to determine which tariff rate was applicable.

2. The plaintiff contended, however, that she had expected her goods to be transported as a separate consignment. But the Transfer Company had been entrusted with goods to be shipped by railway, and, nothing to the contrary appearing, the carrier had the right to assume that the Transfer Company could agree upon the terms of the shipment, some of which were embodied in the tariff. The carrier was not bound by her private instructions or limitation on the authority of the Transfer Company, whether it be treated as agent or Forwarder. If there was any undervaluation, wrongful classification or

violation of her instructions, resulting in damage, the plaintiff has her remedy against that Company.

3. The plaintiff, however, claimed that, even if the Boyd Transfer Company is to be treated as her agent to agree upon the terms of shipment there had been no *bona fide* effort to agree on a valuation, and that she was therefore entitled to recover the full value of her goods. In order to meet this contention the defendant offered evidence to show that it had no knowledge of the contents of the boxes and was entitled to rely upon the entry on the bill of lading inasmuch as the fair average value of household goods was less than $10 per cwt. Under the decisions in *Kansas Southern Ry.* v. *Carl*, 227 U. S. 639, 655; *Missouri, Kans. & Tex. Ry.* v. *Harriman*, 227 U. S. 657, it was not necessary to offer evidence to sustain the reasonableness of rates, classification, or other terms in the tariff filed with the Commission. The shipper had the right, by appropriate proceedings, to attack the rate or the classification and if either or both were held to be unreasonable could secure appropriate relief either by Reparation Order, or by suit in court, after such finding of unreasonableness. But so long as the tariff rate, based on value, remained operative it was binding upon the shipper and carrier alike and was to be enforced by the courts in fixing the rights and liabilities of the parties. The tariffs are filed with the Commission and are open to inspection at every station. In view of the multitude of transactions, it is not necessary that there shall be an inquiry as to each article or a distinct agreement as to the value of each shipment. If no value is stated the tariff rate applicable to such a state of facts applies. If, on the other hand, there are alternative rates based on value and the shipper names a value to secure the lower rate, the carrier, in the absence of something to show rebating or false billing, is entitled to collect the rate which applies to goods of that class, and if sued for their loss it is liable only for the loss of

what the shipper had declared them to be in class and value.

4. Nor was the result changed because of the use of printed forms. This appears from the ruling in *Hart* v. *Pennsylvania R. R. Co.*, 112 U. S. 331, where it was claimed that the shipper had not been asked to state the value but had merely signed a printed contract naming a value. The court said (p. 338): "The valuation named was the 'agreed valuation,' the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further." The rule of the *Hart, Carl* and *Harriman cases* was not applied in the court below, and the judgment must be

Reversed and the case remanded for further proceedings not inconsistent with this opinion.

FARMERS AND MECHANICS SAVINGS BANK OF MINNEAPOLIS *v.* STATE OF MINNESOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 39. Argued May 8, 1913.—Decided February 24, 1914.

A question though novel itself may be solved by the application of principles long established.

The entire independence of the General Government from any control by the respective States is fundamental; and States may not tax agencies of the Federal Government. *M'Culloch* v. *Maryland*, 4 Wheat. 316.

Territories are instrumentalities established by Congress for the gov-

ernment of the people within their respective borders, with authority to subdelegate the governmental power to the municipal corporations therein, and the latter are therefore instrumentalities of the Federal Government.

A tax upon the exercise of the function of issuing bonds is a tax upon the operations of the municipal government; and to tax the bonds as property in the hands of the holder is in effect a tax upon the right of the municipality to issue them.

A tax to any extent on bonds issued by a government or subdivision thereof, however inconsiderable, is a burden on the operation of that government. If allowed at all it may be carried to an extent which shall entirely arrest such operations. *M'Culloch* v. *Maryland*, 4 Wheat. 316.

A State may not tax bonds issued by a municipality of a Territory of the United States. And so *held* as to an attempt by the State of Minnesota to tax bonds issued by municipalities of the Indian Territory and the Territory of Oklahoma held by corporations in Minnesota.

There is no provision of law that makes obligations of municipalities within the Indian Territory or the Territory of Oklahoma obligations of the Territory, nor were such obligations assumed by the State of Oklahoma on admission to Statehood.

Exemption from taxation is a material element in the obligation of a bond issued by a municipality, and it will not be presumed that Congress would enact legislation that would impair that obligation by eliminating the exemption without the clearest legislative language expressing it.

Where bonds are exempted from state taxation under the Federal Constitution they cannot be included as assets in ascertaining the surplus of the corporation owning them for the purpose of imposing a state property tax thereon.

When a state statute is attacked as denying equal protection of the law by one class of those excepted from its benefits, the question of constitutionality can be confined to the particular class attacking it, and if there is reasonable ground for the classification as to that class, it will be upheld to that extent without inquiring whether it is constitutional as to the other classes affected by it.

A provision in a state tax statute excepting from an exemption banks, savings banks and trust companies, is not unconstitutional under the Fourteenth Amendment as discriminating against savings banks as a class and denying them the equal protection of the law. The state court having held that there were reasonable grounds for the

classification, this court so holds in regard to the statute of Minnesota involved in this action.

114 Minnesota, 95, reversed in part.

THE facts, which involve the constitutionality of certain tax statutes of Minnesota as applied to bonds issued by municipalities in Indian Territory and the Territory of Oklahoma, are stated in the opinion.

Mr. William A. Lancaster, with whom *Mr. C. B. Leonard* and *Mr. Milton D. Purdy* were on the brief, for plaintiff in error:

The tax in question is a property tax. The general opinion of the profession has been in favor of non-taxability of bonds of territorial municipalities. Federal agencies and instrumentalities are non-taxable by the States. The Federal Government cannot tax the bonds of the municipalities of a State. That part of § 3, of c. 328, Laws of 1907, permitting taxation on bonds of territorial municipalities is unconstitutional.

In support of these contentions, see *A., T. & S. Fe Ry.* v. *Sowers*, 213 U. S. 55; *Bank of Commerce* v. *New York*, 2 Black, 620; *Banks* v. *Supervisors*, 7 Wall. 26; *Binns* v. *United States*, 194 U. S. 486; *Bonaparte* v. *Tax Court*, 104 U. S. 592; *Faribault* v. *Missner*, 20 Minnesota, 396; *Grether* v. *Wright*, 75 Fed. Rep. 742; *Hibernia Savings Society* v. *San Francisco*, 200 U. S. 310; *Home Savings Bank* v. *Des Moines*, 205 U. S. 503; *McCulloch* v. *Maryland*, 4 Wheat. 316; *Mercantile Bank* v. *New York*, 121 U. S. 138; *Mormon Church* v. *United States*, 136 U. S. 1; *Murphy* v. *Ramsey*, 114 U. S. 15; *National Bank* v. *Yankton*, 101 U. S. 129; *Noonan* v. *Stillwater*, 33 Minnesota, 198; *Plummer* v. *Coler*, 178 U. S. 115; *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429; *Snow* v. *United States*, 18 Wall. 317; *Society for Savings* v. *Coite*, 6 Wall. 594; *State* v. *Canda C. C. Co.*, 85 Minnesota, 457; *State* v. *Duluth Gas*

Co., 76 Minnesota, 96; *State* v. *Pioneer Savings Co.*, 63 Minnesota, 80; *State* v. *Weyerhauser*, 68 Minnesota, 353; *The Banks* v. *The Mayor*, 7 Wall. 16; *United States* v. *Railroad Company*, 17 Wall. 322; *Weston* v. *Charleston*, 2 Pet. 449, 468.

Mr. James Robertson and *Mr. Lyndon A. Smith*, Attorney General of the State of Minnesota, for defendant in error:

The bonds in question were not bonds of a territorial municipality on May 1, 1908. A territorial government is not responsible for the bonds issued by a municipal corporation thereof. The United States Government is not responsible for the liabilities incurred by a territorial government. A municipal corporation of a Territory of the United States is not such an agency of the Federal Government that its bonds are bonds or obligations of the United States.

Chapter 328, Minnesota Laws 1907, in excepting savings banks from the exemption of all other taxes allowed generally to other holders of real estate mortgages, paying the registry fee, does not unlawfully discriminate against such savings banks and does not violate the equality clause of the Fourteenth Amendment.

In support of these contentions, see: *A. & P. R. R.* v. *Le Seur*, 2 Arizona, 428; *Bells Gap R. R.* v. *Pennsylvania*, 134 U. S. 232; *Cent. Pac. R. R.* v. *California*, 162 U. S. 119; *Central Pac. R. R.* v. *California*, 162 U. S. 121; *Cotting* v. *Kansas Stock Yards*, 183 U. S. 79; *Connolly* v. *Sewer Pipe Co.*, 184 U. S. 540; 1 Cooley on Tax., 3d ed., §§ 389–397; *Del. R. R. Tax Cases*, 18 Wall. 206; *Duncan* v. *Missouri*, 152 U. S. 377; *Dyer* v. *Melrose*, 215 U. S. 594; *Elmira Sav. Bank* v. *Davis*, 125 N. Y. 595; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 108; *Gennette* v. *Brooklyn*, 99 N. Y. 296; Gray, Lim. on Taxing Power, § 1630; *Grether* v. *Wright*, 75 Fed. Rep. 742; *Hibernia Saving Society* v. *San Fran-*

cisco, 200 U. S. 314; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Kan. Pac. R. R. Co.* v. *A., T. & S. F. R. R.*, 112 U. S. 414; *Lane Co.* v. *Oregon*, 7 Wall. 77; *Merc. Natl. Bank* v. *Mayor*, 172 N. Y. 35; *Met. St. Ry. Co.* v. *New York*, 199 U. S. 1; *Moore* v. *Treasurer*, 7 Wyoming, 292; *Mutual Benefit Ins. Co.* v. *Martin Co.*, 104 Minnesota, 179; *M'Culloch* v. *Maryland*, 4 Wheat. 316; *McMillen* v. *Anderson*, 95 U. S. 37; *Nat. Bank* v. *Kentucky*, 9 Wall. 353; *Osborne* v. *Bank*, 9 Wheat. 738; *People* v. *Ronner*, 185 N. Y. 285; *Providence Bank* v. *Billings*, 4 Pet. 514; *Phœnix Fire Ins. Co.* v. *Tennessee*, 161 U. S. 174; *Railroad Co.* v. *Peniston*, 18 Wall. 5; *St. P. &c. Ry. Co.* v. *Todd*, 142 U. S. 242; *S. W. Oil Co.* v. *Texas*, 217 U. S. 122; *State* v. *Fitzgerald*, 117 Minnesota 192; *State Tax on Foreign Held Bonds*, 15 Wall. 300; *State* v. *West. Un. Tel. Co.*, 96 Minnesota, 22; *State* v. *West. Un. Tel. Co.*, 165 Missouri, 521; *Thompson* v. *N. P. Ry.*, 9 Wall. 579; *Van Brocklyn* v. *Kentucky*, 117 U. S. 151; *West. Un. Tel. Co.* v. *Atty. Gen.*, 125 U. S. 530; *West. Un. Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *West. Un. Tel. Co.* v. *Texas*, 105 U. S. 460; *West. Un. Tel. Co.* v. *Pac. R. R. Co.*, 120 Fed. Rep. 984; *Weston* v. *Charleston*, 2 Pet. 467; *Woodruff* v. *Oswego Starch Factory*, 177 N. Y. 23.

Mr. Justice Pitney delivered the opinion of the court.

This writ of error brings under review a judgment of the Supreme Court of Minnesota (114 Minnesota, 95) affirming the judgment of a lower court, in proceedings for the collection of taxes assessed against plaintiff in error for the year 1908. Plaintiff in error is a savings bank, having no capital stock, and was taxable under § 839, R. L. 1905, which provides for ascertaining the surplus remaining after deducting from its assets (other than real estate, which is separately assessed), the amount

of the deposits and of all other accounts payable; the surplus to be taxed as "credits." The Supreme Court of Minnesota held that this section imposes not a franchise but a property tax, and that the surplus of savings banks as thus determined is taxable property. This construction is not questioned here; perhaps is not open to question.

Two Federal questions are raised.

First, the Savings Bank insisted in the state courts, and here renews the insistence, that certain bonds issued by municipalities in Indian Territory and in the Territory of Oklahoma, held by the bank, amounting to about $700,000 in value, should have been omitted from the list of its personal assets, for the reason that bonds of this character are not taxable by the State.

This question, although novel, is to be solved by the application of principles long established.

It was laid down by Mr. Chief Justice Marshall, speaking for this court in *M'Culloch* v. *Maryland*, 4 Wheat. 316, 430, 436, that the State could not constitutionally impose taxation upon the operations of a local branch of the United States Bank, because the bank was an agency of the Federal Government, and the States had no power, by taxation or otherwise, to hamper the execution by that government of the powers conferred upon it by the people. The supremacy of the Federal Constitution and the laws made in pursuance thereof, and the entire independence of the General Government from any control by the respective States, were the fundamental grounds of the decision. The principle has never since been departed from, and has often been reasserted and applied. *Osborn* v. *U. S. Bank*, 9 Wheat. 738, 859; *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, 513; *Grether* v. *Wright*, 75 Fed. Rep. 742, 753.

State taxation of national bank shares, as permitted by the act of Congress, without regard to the fact that a

part or the whole of the capital of the bank is invested in national securities which are exempt from taxation (*Van Allen* v. *Assessors*, 3 Wall. 573, 583; *Bradley* v. *People*, 4 Wall. 459; *National Bank* v. *Commonwealth*, 9 Wall. 353, 359), is an apparent, not a real, exception. The same is true of taxes upon the mere property of agencies of the Federal Government. (*Thomson* v. *Pacific Railroad*, 9 Wall. 579, 589; *Railroad Co.* v. *Peniston*, 18 Wall. 5, 32, 34.) Indeed, these exceptions rest upon distinctions that were recognized in the decision of *M'Culloch* v. *Maryland*. Chief Justice Marshall said, in closing the discussion: "This opinion . . . does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional." For a fuller discussion of the *Van Allen Case*, see *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, 517.

The government of the respective Territories in question was that provided by the act of Congress of May 2, 1890 (26 Stat. 81, c. 182, pp. 81, 93), of which the first 28 sections created a temporary government for the Territory of Oklahoma; while § 29 (p. 93), and subsequent sections established laws for the government of what was thereafter to be known as the Indian Territory, but without conferring general powers of local self-government. To the territorial government of Oklahoma legislative power was granted (§ 6), extending to "all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." Municipal corporations were in contemplation. Sec. 7 provided that

the legislative assembly should not authorize the issuing of any bond or evidence of debt by any county, city, town, or township for the construction of any railroad; thus recognizing that the borrowing power might be employed for other purposes. By § 11, certain provisions of the Compiled Laws of Nebraska, in force November 1, 1889, so far as locally applicable, were extended to and put in force in the Territory until after the adjournment of the first session of its legislative assembly; among these being Chapter 14, entitled "Cities of the second class and villages," which contains provisions for the organization of municipal corporations, with power to borrow money for public purposes. The Indian Territory was not made an "organized Territory," but by § 31 certain general laws of the State of Arkansas, as published in Mansfield's Digest (1884), were put in force there until Congress should otherwise provide; among these, the chapter relating to municipal corporations (§§ 722–959).

It is not disputed that the municipal bonds now in question were lawfully authorized and are in every respect valid obligations of the respective municipalities. Except as such obligations they would hardly be treated as taxable property in the hands of the holder.

The relation of the organized Territories to the United States has been frequently adverted to. In *National Bank* v. *County of Yankton*, 101 U. S. 129, 133, which had to do with the organic act of the Territory of Dakota (12 Stat. 239), the court, speaking by Mr. Chief Justice Waite, said:

"All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may

legislate for them as a State does for its municipal organizations. . . . Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States."

The Territory of Oklahoma, therefore, was an instrumentality established by Congress for the government of the people within its borders, with authority to subdelegate the governmental power to the several municipal corporations therein. These corporations were established for public and governmental purposes only, and exercised their powers and performed their functions as agents of the central authority. With respect to Indian Territory, the situation under the act of 1890 was somewhat different, and the municipal corporations derived their authority directly from the act of Congress.

No doubt, as is usual in such cases, the people of the respective municipalities had a more immediate and direct interest than others in the local government, and in the local improvements that presumably may have been constructed with the proceeds of the municipal bonds. But this interest was that of citizens and taxpayers, not that of proprietors. And the policy of Congress, as manifested in its legislation upon the subject, had regard not merely, nor even chiefly, for the particular and immediate interests of the several municipalities. It looked to the promotion of the prosperity and welfare of the whole people of the United States, through the development of organized self-governing communities—afterwards to become States of the Union—throughout the whole of the public domain. With statehood as the ultimate aim and

purpose, the organic acts were consciously framed. They were frequently if not always entitled—"An act to provide a *temporary* government for the Territory," etc.; and so reads the title of the act of May 2, 1890.

In our opinion, therefore, the municipalities of the Territory of Oklahoma and of Indian Territory were instrumentalities and agencies of the Federal Government, with whose operations the States were not permitted to interfere by taxation or otherwise, and the issuing of municipal bonds was the performance of a governmental function, within the established doctrine. And we deem it immaterial that these bonds were not guaranteed by the United States, or even (in the case of the Oklahoma bonds) by the central government of the Territory.

The Supreme Court of Minnesota, conceding that the municipalities were Federal agencies in the performance of governmental functions, yet deemed that a material narrowing of the doctrine of *M'Culloch* v. *Maryland*, was to be inferred from an expression contained in the opinion of this court in *National Bank* v. *Commonwealth*, 9 Wall. 353, 362, where it was said: "The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal government are only exempted from state legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government." And from a like expression contained in the opinion in *Railroad Company* v. *Peniston*, 18 Wall. 5, 36: "It is, therefore, manifest that exemption of Federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to

serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers."

But we deem it entirely clear that a tax upon the exercise of the function of issuing municipal bonds is a tax upon the operations of the government, and not in any sense a tax upon the property of the municipality. And to tax the bonds as property in the hands of the holders is, in the last analysis, to impose a tax upon the right of the municipality to issue them. In *Weston* v. *City Council of Charleston*, 2 Pet. 449, 466, 468, which involved the right of the city, acting under the authority of the State of South Carolina, to ordain a tax upon United States stock in the hands of the owner, Mr. Chief Justice Marshall, speaking for the court, after reaffirming the principles settled in *M'Culloch* v. *Maryland*, said (p. 468): "The American people have conferred the power of borrowing money on their government, and by making that government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised. The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burthen on the operations of government. It may be carried to an extent which shall arrest them entirely."

It is on this ground that United States bonds have always been held exempt from taxation under authority of the States. By like reasoning it has come to be recognized

that bonds issued by the States are not taxable by the Federal Government, and it was upon this ground that this court held, in *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 584, that the income tax provisions of the act of August 15, 1894, were unconstitutional in that they imposed a tax upon the income derived from municipal bonds issued under the authority of the States.

It is contended by defendant in error that the situation was changed by the admission of Oklahoma as a State, combining both the Territory of Oklahoma and the Indian Territory. This was accomplished under the Enabling Act of June 16, 1906, 34 Stat. 267, c. 3335, and was evidenced by the proclamation of the President, issued November 16, 1907. By § 4 of Art. I of the Oklahoma constitution the debts and liabilities of the Territory of Oklahoma were assumed by the State.

The argument is that at the time of making the assessment for taxes against plaintiff in error, the Indian Territory and the Territory of Oklahoma had ceased to exist as such for nearly six months, and that the bonds of the municipalities of those Territories, being the obligations of the territorial government, were by the constitution assumed by the State. There seems to be no provision of law that constitutes the bonds of the municipalities obligations of the territorial governments, and so the argument falls to the ground at once.

But we are unwilling to intimate a concession that an assumption by the State of Oklahoma of the obligation to pay these bonds would operate to deprive the bondholders of the exemption from taxation, previously enjoyed. Presumably the municipal credit was enhanced and the terms of the municipal borrowing rendered more favorable, by the understanding that the bonds, being obligations of an agency of the Federal Government, would be exempt from taxation by the several States. The value of the bonds in the market was presumably thereby in-

creased. Indeed, the state court in the present case very plainly declares (114 Minnesota, 109) that bonds of the municipalities of the Territories, if not taxable by the State, command a higher price on the market than bonds of the municipalities of the States. To deprive bonds of the former description of their immunity from state taxation, and this because of the subsequent action of Congress in erecting the Territories into a State, with or without an assumption by the new State of the obligations of the former Federal agency, would be in effect to impair the obligation of the contract; and this is so inconsistent with the honor and dignity of the United States that such an intent should not be presumed without the clearest legislative language requiring it.

It is, however, further suggested that the judgment under review does not sustain a tax upon the bonds as property, but only a tax upon the surplus of the Savings Bank, computed by taking into the account all of its assets, amounting to about $12,000,000, of which the bonds were only about $700,000, and deducting therefrom its liabilities. But as the surplus is treated as property and taxed as such, it is obvious that some portion of the burden of the tax is attributable to the ownership of the municipal bonds. In *Bank of Commerce* v. *New York City*, 2 Black, 620, it was held that the State of New York in taxing the capital of banks according to its valuation must leave out of the calculation that portion of the capital invested in the stocks, bonds, or other securities of the United States not liable to taxation by the State. And see *Bank Tax Case*, 2 Wall. 200; *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, 509.

It results that the inclusion of the bonds now in question in the list of the assets of plaintiff in error, in ascertaining its surplus for the purpose of imposing a state property tax thereon, was repugnant to the Constitution of the United States.

The second Federal question arises out of the insistence of the Savings Bank that it was entitled to have omitted from the computation of its surplus for purposes of taxation certain notes held by it, amounting to about $161,000, and secured by mortgages upon Minnesota real estate, upon which mortgages a registry tax had been paid.

It appears that the Minnesota legislature, by Chap. 328, Laws of 1907, provided a registry tax upon debts secured by mortgages covering real property in the State, the amount of the tax being fifty cents upon each $100, payable at or before the filing of the mortgage for record or registration. By § 3 it was enacted that "All mortgages upon which such tax has been paid, with the debts or obligations secured thereby and the papers evidencing the same, shall be exempt from all other taxes; but nothing herein shall exempt such property from the operation of the laws relating to the taxation of gifts and inheritances, or those governing the taxation of banks, savings banks, or trust companies"; with a further proviso not now pertinent.

It was and is insisted that this section, in subjecting banks, savings banks, and trust companies to double taxation upon their mortgages covering real estate in the State of Minnesota, while at the same time relieving mortgages upon such real estate, when otherwise owned, from all taxation except the registration tax, is in contravention of the "equal protection" clause of the Fourteenth Amendment.

Although the clause limiting the exemption includes banks and trust companies, the Supreme Court of Minnesota declined to consider whether the classification was proper with respect to those institutions, and so declining dealt with the status of savings banks only. Holding that this class of institutions under other laws enjoyed privileges respecting taxation that were accorded to no other person or corporation subject to taxation, the court

held that savings banks might properly be treated as a class by themselves, and required to include such mortgages in the computation of their assets for purposes of taxation.

If there is no unconstitutional discrimination against savings banks, it is for present purposes unnecessary to inquire whether the act discriminates against other banks and trust companies. *Tyler* v. *Judges*, 179 U. S. 405, 409; *Hooker* v. *Burr*, 194 U. S. 415, 419; *Hatch* v. *Reardon*, 204 U. S. 152, 160; *Southern Railway Co.* v. *King*, 217 U. S. 524, 534; *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 550; *Rosenthal* v. *New York*, 226 U. S. 260, 271.

The Supreme Court of Minnesota lucidly summarized the state of the law which furnished, in its judgment, a sufficient reason for the classification, as follows: "Section 839, Rev. Laws 1905, treats of savings banks, for the purposes of taxation, in a special manner. They have no capital stock, yet their property is not taxed in the same way as the property of individuals or of other corporations. By section 838 the value of the stock of corporations having capital stock is ascertained by deducting the value of the real and personal property from the market or actual value of the stock, and the amount of the difference is taxed as stocks and bonds, and the real estate and personal property are taxed in the ordinary way. Section 839 places all banks without capital stock (except savings banks), brokers, and stockjobbers in one class, and savings banks in another class. The former are taxed by ascertaining the difference between the amount of money on hand or in transit, the amount of money in the hands of others subject to draft, the amount of checks or cash items, etc., the amount of bills receivable and other credits, and from the total of these amounts the deposits and accounts payable are deducted. The balance, if any, is assessed as money under Section 835. The bonds and stocks and personal and real property are assessed sep-

arately in the ordinary way. But in the case of savings banks no specific property is taxed separately except real property. Its money, checks, bills receivable, bonds, and stocks, and all personal property appertaining to the business, are listed for the purpose of ascertaining whether there is a surplus, and the surplus is found by deducting the total of the deposits and accounts payable from the total value of the assets." 114 Minnesota, 110.

For these and other reasons pointed out in the opinion, it seems to us the court was justified in holding that there were reasonable grounds for the discrimination so far as savings banks were concerned, and that plaintiff in error had therefore not been deprived of the equal protection of the laws. In lieu of further discussion we refer to the oft quoted language employed by Mr. Justice Bradley, speaking for this court, in *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U. S. 232, 237.

But because of the error in subjecting the bonds of the municipalities of the Territories to taxation, the judgment must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

PLYMOUTH COAL COMPANY *v.* COMMONWEALTH OF PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 102. Argued January 15, 1914.—Decided February 24, 1914.

The business of mining coal is so attended with danger as to render it the proper subject of police regulation by the State.

It is not an unreasonable exercise of the police power of the State to require owners of adjoining coal properties to cause boundary pillars

to be left of sufficient width to safeguard the employés of either mine in case the other should be abandoned and allowed to fill with water.

One attacking the constitutionality of a state statute must show that he is within the class whose constitutional rights are injuriously affected by the statute.

In determining whether the constitutional rights of a party have been affected by a state statute, the courts will presume, until the contrary is shown, that any administrative body to which power is delegated will act with reasonable regard to property rights.

Except in such cases as arise under the contract clause of the Constitution it is for the court of last resort of the State to construe the statutes of that State, and in exercising jurisdiction under § 237, Judicial Code, it is proper for this court to await the construction of the state court rather than to assume in advance that such court will so construe the statute as to render it obnoxious to the Federal Constitution.

If a statute be reasonably susceptible of two interpretations, one of which would render it unconstitutional and the other valid, the courts should adopt the latter, in view of the presumption that the lawmaking body intends to act within and not in excess of, its constitutional authority.

In the absence of clear language to the contrary, a provision for decision by a board in a public matter will be construed to the effect that a majority of such board shall act and decide. *Omaha* v. *Omaha Water Co.*, 218 U. S. 180.

In matters of police regulation where decisions on questions of public safety are delegated to an administrative board the right of appeal on other than constitutional grounds may be withheld by the legislature in its discretion without denying due process of law.

The statute of Pennsylvania requiring owners of adjoining coal properties to cause barrier pillars to be left of suitable width to safeguard employés is not unconstitutional either as depriving the owners of their property without due process of law or as denying them equal protection of the law, or because of the procedure and method prescribed for determining the width of such barrier or because it delegates the matter to an administrative board or does not provide for any appeal thereupon.

232 Pa. St. 141, affirmed.

THIS case involves the constitutionality of a section of the Anthracite Mine Laws of the State of Pennsylvania,

being § 10 of Art. III of the act of June 2, 1891 (Pub. Laws pp. 176, 183), which reads as follows:

"It shall be obligatory on the owners of adjoining coal properties to leave, or cause to be left, a pillar of coal in each seam or vein of coal worked by them, along the line of adjoining property, of such width, that taken in connection with the pillar to be left by the adjoining property owner, will be a sufficient barrier for the safety of the employés of either mine in case the other should be abandoned and allowed to fill with water; such width of pillar to be determined by the engineers of the adjoining property owners together with the inspector of the district in which the mine is situated, and the surveys of the face of the workings along such pillar shall be made in duplicate and must practically agree. A copy of such duplicate surveys, certified to, must be filed with the owners of the adjoining properties and with the inspector of the district in which the mine or property is situated."

Art. XVIII, under the head of "Definition of Terms," contains, *inter alia*, the following:

"The term 'owners' and 'operators' means any person or body corporate who is the immediate proprietor or lessee or occupier of any coal mine or colliery or any part thereof. The term 'owner' does not include a person or body corporate who merely receives a royalty, rent or fine from a coal mine or colliery or part thereof, or is merely the proprietor of the mine subject to any lease, grant or license for the working or operating thereof, or is merely the owner of the soil and not interested in the minerals of the mine or any part thereof. But any 'contractor' for the working of a mine or colliery or any part or district thereof, shall be subject to this act as an operator or owner, in like manner as if he were the owner."

The record shows that the Lehigh & Wilkes-Barre Coal Company and the Plymouth Coal Company are respectively the lessees or owners of adjoining coal properties

situate at Plymouth, in Luzerne County, Pennsylvania; that on August 31, 1909, Mr. Davis, the Inspector of Mines of the district in which the properties are located, wrote a letter to the president of the Plymouth Coal Company which reads as follows:

"Wilkes-Barre, Pa., Aug. 31, '09.

"John C. Haddock, Pres. Plymouth Coal Co.

Dear Sir: Kindly have your engineer report at my office Thursday morning Sept. 2nd at 10 o'clock at which time we can meet the engineer of the Lehigh & Wilkes-Barre Coal Company to decide as to thickness of barrier pillar to be left unmined between the properties of the Lehigh & Wilkes-Barre Coal Company and the Plymouth Coal Company, situated at Plymouth, Luz. Co., Pa., as per Article 3, Section 10 Anthracite Mine Laws of this Commonwealth, which reads as follows" [quoting the section *verbatim*].

[Signed] "D. T. Davis,
Inspector of Mines."

To this the following reply was made:

Wilkes-Barre, Pa.,
Sept. 1, 1909.

"Mr. D. T. Davis, Inspector, Ninth Anthracite Inspection District Wilkes-Barre, Pa.

Dear Sir: I am in receipt of yours of the 31st ult.

Allow me to say in reply that while it would give us great pleasure to meet you and the representatives of the Lehigh & Wilkes-Barre Coal Company at the suggested conference, to be held to-morrow, we cannot enter such a conference to even consider, much less conclude an agreement that may affect our rights and our duty to our lessors at the Dodson Colliery.

"I assume it is needless to assure you that we stand

ready at all times to comply with any reasonable request that may emanate from you or your office, but if I am advised correctly, this request or demand originated with the Lehigh & Wilkes-Barre Coal Company.

"This was their right to make as it is ours to decline.

Yours very truly,

[Signed] JOHN C. HADDOCK,

President The Plymouth Coal Co."

Thereupon, pursuant to Article XV of the above-mentioned statute, the Mine Inspector, acting in behalf of the Commonwealth, filed his bill of complaint against the Plymouth Coal Company in the Court of Common Pleas of Luzerne County, setting forth the above facts and averring that defendant refused to permit its engineer to meet with the Mine Inspector and the engineer of the adjoining property owner to determine the width of the barrier pillar, or to even consider the matter, and refused to leave or cause to be left a pillar that, taken in connection with the pillar to be left by the adjoining property owner, would be a sufficient barrier for the safety of the employés of either mine in case the other should be abandoned and allowed to fill with water; that defendant employed in its mine at least three hundred persons, and the Lehigh & Wilkes-Barre Coal Company employed in its mine at least seven hundred persons, and the refusal of the defendant endangered the lives and safety of the employés of both mines. There was a prayer for a preliminary and perpetual injunction to restrain defendant from working its mine without leaving a barrier pillar of coal of the thickness or width of at least 30 feet in each seam or vein worked by it along the line of the adjoining property. Defendant answered, admitting the truth of the averments of the bill without qualification, except that it denied that any barrier was necessary for the safety of the employés of either mine in case

the other mine should be abandoned. At the same time it averred that the act of June 2, 1891, upon which the bill was based "is confiscatory, unconstitutional and void." There was a preliminary injunction, restraining defendant from working its mine without leaving a barrier pillar at least 70 feet wide. This was continued until the final hearing, which resulted in a decree continuing the injunction, but without prejudice to defendant's right "to apply to the court for a dissolution or modification thereof, upon showing to the satisfaction of the court that the proper mine inspector and the engineers of the defendant company and the Lehigh and Wilkes-Barre Coal Company have, upon due investigation and consultation, determined that a barrier pillar of less width than that stated in the injunction (that is, less than seventy feet on defendant's property) is sufficient for the protection of the men employed in the mines of either company in case the mine of the other should be abandoned and allowed to fill with water, and have made duplicate surveys and filed copies of the same as required by law, or, upon such investigation and consultation shall have decided that no such barrier pillar is necessary to the safety of the employés of either company in the event aforesaid."

Upon appeal the Supreme Court of Pennsylvania affirmed the decree (232 Pa. St. 141), and the case comes here by virtue of § 237, Judicial Code, for adjudication under the "due process" clause of the Fourteenth Amendment to the Federal Constitution.

Mr. William C. Price and *Mr. John G. Johnson* for plaintiff in error:

The complaint of plaintiff in error is made solely on the ground that the manner and method of fixing the width of a barrier pillar between adjoining coal properties described in the act is unconstitutional, and if allowed to

stand, will be productive of much injustice and consequent litigation. It will be a very simple matter to prepare a barrier pillar act, providing for the safety of employés in mines, by requiring a barrier pillar, the width of which shall be fixed by a competent tribunal, wherein all parties interested may appear after proper notice, with their witnesses and experts, providing also for the right of appeal.

The legislature under the police power of the State may undoubtedly enact legislation requiring coal owners to work their property in such manner as to prevent injury to the property and employés of adjacent owners, but it cannot arbitrarily create a tribunal with power to deprive the coal owner of his property without right of appeal or providing for notice or a hearing or some legal method of procedure, and any legislation without such provisions would be a taking of property without due process of law.

Where any question of fact or liability is conclusively presumed against a party there is not due process of law. *Rutherford's Case*, 72 Pa. St. 82; *Philadelphia* v. *Scott*, 81 Pa. St. 80; *Hancock* v. *Wyoming*, 148 Pa. St. 635; 3 Words and Phrases, 2250; *Kuntz* v. *Sumption*, 2 L. R. A. 655.

A statute authorizing any debt or damage to be adjudged against a person upon purely *ex parte* proceedings, without a notice or any provision for defending, violates the Constitution and is void. *In re Empire Bank*, 18 N. Y. 199, 215; Cooley on Const. Limit., 7th ed. 582; *Stewart* v. *Palmer*, 74 N. Y. 183; *In re Jensen*, 59 N. Y. Supp. 653; *San Matteo* v. *So. Pac. R. Co.*, 13 Fed. Rep. 722. See also *In re Rosser*, 101 Fed. Rep. 562, 567; *Londoner* v. *Denver*, 210 U. S. 373.

Conceding that the right to insist upon barrier pillars being left, was within the police power, the real question in this case is, whether the manner of determination of their

thickness required by the act was by a proceeding which was due process of law.

There was no evidence offered in the court below, nor any determination by it, that such width of pillar was necessary.

The bill rested upon an averment of violation of the act in refusing to appoint an engineer to meet for the purpose of determining the width of the barrier pillar.

The coal ordered to be left unmined in the barrier pillar amounted to 734,147 tons, which could be mined at a net profit of about $300,000.

This prohibition against making use of some $300,000 worth of coal, amounts to a deprivation of property to that extent.

While the legislature may, in the exercise of its police power, compel the reservation of barrier pillars for the protection of life and property, it is not necessary to consider whether, in the exercise of such power, it may prescribe the exact width of the pillar. Sufficient for the present purpose to say that it has not attempted to make any such prescription. In the nature of things, it would have been impossible to do so, because the width of the pillar must, in each case, be determined with reference to the situation of each particular property.

While under certain contingencies certain designated officials may take immediate action required in conservation of health, the present case is not within that class.

While due process of law is not easy to define, no proceeding like the present has even been claimed, much less decided, to be due process. *Holden* v. *Hardy*, 169 U. S. 389; *Davidson* v. *New Orleans*, 96 U. S. 97; *Murray* v. *Hoboken*, 18 How. 276.

Under this act plaintiff in error has been deprived of the use of its property by a decree forbidding such use because of its failure to submit its legal rights to a tribunal unable to determine the same in due process of law.

Mr. John C. Bell, Attorney General of the State of Pennsylvania, with whom *Mr. B. R. Jones, Mr. Morris Wolf* and *Mr. William M. Hargest* were on the brief, for defendant in error.

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

The statute in question is entitled "An Act to provide for the health and safety of persons employed in and about the anthracite coal mines of Pennsylvania and for the protection and preservation of property connected therewith." It applies to every anthracite coal mine in the Commonwealth employing more than ten persons; divides the anthracite coal region into eight inspection districts, with a mine inspector for each district, who is appointed by the Governor of the Commonwealth upon the recommendation of a board of examiners composed of three reputable coal miners and two reputable mining engineers, all to be selected by judges of the county courts, and the inspector thus appointed must be a citizen of Pennsylvania, more than thirty years of age, having a knowledge of the different systems of working coal mines and at least five years practical experience in anthracite coal mines of Pennsylvania, including experience in mines where noxious and explosive gases are evolved. Each inspector is to reside in the district for which he is appointed, and is to give his whole time and attention to the duties of his office. He is to examine all the collieries in his district as often as may be required, see that every necessary precaution is taken to secure the safety of the workmen and that the provisions of the act are observed and obeyed, and is to keep the maps and plans of the mines and the records thereof with all the papers relating thereto. The act contains a multitude of provisions looking to the safety of the men employed in and about the

mines, and deals apparently with every branch of the work and every source of danger.

That the business of mining coal is attended with dangers that render it the proper subject of regulation by the States in the exercise of the police power is entirely settled. *Holden* v. *Hardy*, 169 U. S. 366, 393; *St. Louis Consolidated Coal Co.* v. *Illinois*, 185 U. S. 203, 207; *Barrett* v. *Indiana*, 229 U. S. 26, 29.

Legislation requiring the owners of adjoining coal properties to cause boundary pillars of coal to be left of sufficient width to safeguard the employés of either mine in case the other should be abandoned and allowed to fill with water cannot be deemed an unreasonable exercise of the power. In effect it requires a comparatively small portion of the valuable contents of the vein to be left in place, so long as may be required for the safety of the men employed in mining upon either property.

All of this is very frankly admitted by plaintiff in error, and the criticism upon § 10 of the act is confined to the single ground that the method of fixing the width of the barrier pillar is so crude, uncertain, and unjust as to constitute a taking of property without due process of law.

So far as the record discloses, this particular objection was not brought to the attention of the state courts as a ground for holding the section in question to be unconstitutional. The very general objection raised by plaintiff in error in its answer has been stated. The Court of Common Pleas in its opinion, not treating the mode of defining the pillar as having any bearing upon the constitutional question but dealing with it as a matter of interpretation, said:

"If the constitutionality of this provision be conceded for the purpose of discussion, and if the question of the necessity for any barrier pillar at all between these properties may be regarded as an open one, the decision of that question would seem to be committed by the statute

to the tribunal of experts thereby constituted, viz., the mine inspector and the engineers of the owners of the adjoining coal properties. The purpose of the enactment is to secure the safety of the workmen in the mines. The law declares that 'it shall be obligatory' on the mine owners to leave such a barrier pillar as the tribunal of mine experts referred to shall determine to be sufficient for that purpose. It is for them to fix its width. Until they say that none at all is needed for the safety of the men, the obligation imposed by the statute remains. . . . If, therefore, we may apply the maxim that the law does not require a vain thing, there is room for the construction that, in vesting in the inspector and engineers the power to determine how wide the barrier pillar should be to secure safety, the intent of the law-making power was to also empower them to say, if such be the fact, that the safety of the men does not require a barrier pillar of any width at all. But, be that as it may, it is evident that the act does not warrant a mine owner in refusing to permit his engineer to participate in determining the question of the width of, or the need for, a barrier pillar simply because he, the mine owner, does not consider one necessary. In our opinion, the law requires such a pillar to be left, unless the inspector and engineers, after due examination of the premises and consideration of the subject, determine that none is needed to secure the safety of the men employed in either mine in case the other should be abandoned and allowed to fill with water." 232 Pa. St. 143.

The same view was repeated in the "Conclusions of Law" at the close of the opinion, and evidently afforded the reason for inserting in the final decree a clause reserving to defendant the right to apply for a dissolution or modification of the injunction after action by the statutory tribunal. The Supreme Court affirmed the decree on the opinion of the Court of Common Pleas.

In a later case, *Curran* v. *Delano*, 235 Pa. St. 478, 485, it was held, in effect, that the tribunal created by the statute was to be composed of "two mining engineers and a mine inspector," or, as was said, "three mine experts"; that its jurisdiction was exclusive; and that even the act of one property owner in removing the coal from its mine up to the boundary line, could not deprive the statutory tribunal of its authority or confer jurisdiction upon a court of equity to determine the width of the boundary barrier. And see *Sterrick Creek Coal Co.* v. *Dolph Coal Co.*, 11 Lack. Jur. 219.

Although the act has been upon the statute book for over twenty years, the cases just cited are, it seems, the only ones wherein the state courts have placed an authoritative construction upon the pertinent section.

The objections of plaintiff in error to the method of fixing the width of the barrier pillar are based upon the supposed uncertainty and want of uniformity in the membership of the statutory tribunal, and upon the fact that the statute does not expressly provide for notice to the parties interested, that the procedure is not prescribed, and that there is no right of appeal.

The Legislature has not defined with precision the width of the pillar, and it is very properly admitted that in the nature of things this would have been impossible, because the width necessary in each case must be determined with reference to the situation of the particular property. From this it necessarily results that it was competent for the Legislature to lay down a general rule, and then establish an administrative tribunal with authority to fix the precise width or thickness of pillar that will suit the necessities of the particular situation, and constitute a compliance with the general rule. *United States* v. *Grimaud*, 220 U. S. 506, 517–522. Administrative bodies with authority not essentially different are a recognized governmental institution. Commissions for

the regulation of public service corporations are a familiar instance. *Interstate Com. Commission* v. *Railway Co.*, 167 U. S. 479, 495. And it has become entirely settled that powers and discretion of this character may be delegated to administrative bodies, or even to a single individual. *In re Kollock*, 165 U. S. 526, 536; *Wilson* v. *Eureka City*, 173 U. S. 32; *Gundling* v. *Chicago*, 177 U. S. 183, 186; *Fischer* v. *St. Louis*, 194 U. S. 361, 371, 372; *Jacobson* v. *Massachusetts*, 197 U. S. 11, 25; *Lieberman* v. *Van De Carr*, 199 U. S. 552, 560, 562.

But it is insisted that under the language of the act before us the tribunal lacks uniformity and there is uncertainty respecting the manner of its constitution. It is said that on one side of the property line there might be but a single owner, while on the other side there might be several owners, and the engineers representing the latter might outnumber and combine against the representative of the single owner and compel him to leave a barrier pillar of an unreasonable width. This objection is for present purposes sufficiently disposed of by the decisions of the Supreme Court of Pennsylvania which establish that the tribunal is composed of three, namely, the inspector and two engineers. We see no difficulty in working this out in practice. The owner on each side has a single engineer in the make-up of the body; and if there be a subdivision of the property on one side of the line there would no doubt be separate findings with respect to the frontage of each subdivision.

It is objected that the act presupposes a condition which does not always exist, viz., that the owners of coal properties have engineers in their employ; whereas it is insisted that there are many coal owners who employ no engineer, especially among the lessors of coal property. But it cannot be seriously doubted, the business under regulation being so dangerous, that it is within the power of the State to declare that coal mining shall not be conducted

without the employment of an engineer; and we deem it to be within the competency of the law-making power to require, also, that notice of such a proceeding be given to the lessee actually in charge of the mining operations, leaving the lessor's interest to be represented by him. It is the lessee whose conduct is to be controlled. The lessor's interest is not so directly involved, and for the purpose in hand is not opposed to that of the lessee. It is not a judicial but a *quasi* legislative proceeding. And if the lessor desires to participate, it is not to be supposed that he would have difficulty in obtaining a hearing.

A requirement of reasonable notice to the lessee seems to be implied in the language of the section. There is to be a "determination" by a tribunal of which the lessee's representative is a member. Assuming, as we do, that for constitutional reasons there must be a fair though summary hearing, it requires no very clear expression to justify such a construction of the section as will render notice obligatory. Certainly this court ought not to adopt a contrary construction in the absence of something in the state decisions to require it.

Respecting this and some of the other objections, it should be said that the difficulties suggested are hypothetical rather than practical. Plaintiff in error had actual notice in fact, and made no objection on the score of lack of sufficient notice. Its lessor is not objecting. Plaintiff in error presumably has an engineer competent to represent it, or could readily employ one. It refused to enter the conference for other reasons, and the refusal can be justified in law only upon the theory that the section is wholly void.

We may once more repeat, what has been so often said, that one who would strike down a state statute as violative of the Federal Constitution must show that he is within the class with respect to whom the act is unconstitutional, and must show that the alleged unconstitutional feature

injures him, and so operates as to deprive him of rights protected by the Federal Constitution. *Southern Railway Co.* v. *King*, 217 U. S. 524, 534; *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 550; *Rosenthal* v. *New York*, 226 U. S. 260, 271.

It is to be presumed, until the contrary appears, that the administrative body would have acted with reasonable regard to the property rights of plaintiff in error; and certainly if there had been any arbitrary exercise of its powers its determination would have been subject to judicial review. *Lieberman* v. *Van De Carr*, 199 U. S. 552, 562; *Bradley* v. *Richmond*, 227 U. S. 477, 483.

Indeed, the statute seems to contemplate some judicial control, for it prescribes no penalty for a violation of the findings of the engineers and inspector, nor any mode of enforcing their determination except by a suit for injunction under Art. XV of the act. In such a suit a party deeming himself aggrieved because of arbitrary action by the statutory tribunal may presumably have his opportunity to be heard with respect to this as well as other fundamental defences.

It is objected that the act does not state whether the tribunal must be unanimous in order to reach a determination, or what shall be done in case of disagreement; and it is argued that in case of such disagreement the solution of the question to be determined might be delayed for such a length of time as to embarrass the mining operations and throw the workmen out of employment. Here, again, plaintiff in error seems to be unnecessarily borrowing trouble, but we will deal with the point on its merits. This particular objection does not seem to be met by the decision of the state court, either in the present case, or in that of *Curran* v. *Delano*, 235 Pa. St. 478. They seem to hold simply that the tribunal is made up of three, without deciding what function is to be performed by the respective members, nor how a conclusion is to be reached. That

being so, it is not incumbent upon us to construe the statute in this regard; but rather, to say merely whether the section admits of any reasonable construction that will sustain its constitutionality.

For in cases other than such as arise under the contract clause of the Constitution, it is the appropriate function of the court of last resort of a State to determine the meaning of the local statutes. And in exercising the jurisdiction conferred by § 237, Judicial Code, it is proper for this court rather to wait until the state court has adopted a construction of the statute under attack than to assume in advance that a construction will be adopted such as to render the law obnoxious to the Federal Constitution. *Bachtel* v. *Wilson*, 204 U. S. 36, 40; *Adams* v. *Russell*, 229 U. S. 353, 360.

And, even aside from the consideration just adverted to, it is a general and fundamental rule that if a statute be reasonably susceptible of two interpretations, one of which would render it unconstitutional and the other valid, it is the duty of the courts to adopt that construction which will uphold its validity; there being a strong presumption that the law-making body has intended to act within, and not in excess of, its constitutional authority. *Sinking-Fund Cases*, 99 U. S. 700, 718; *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Knights Templars' Indemnity Co.* v. *Jarman*, 187 U. S. 197, 205; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407.

Approaching the subject from this point of view, we observe first the language of the section—"such width of pillar to be determined by the engineers of the adjoining property owners together with the inspector of the district in which the mine is situated." Attention has already been called to the qualifications of the inspector, and the safeguards surrounding the mode of his appointment. The statute confers upon him most important powers, and gives him access to complete information

respecting the problems that come before him. There is provision, also, for his removal if neglectful or incompetent, or if guilty of malfeasance in office.

In the clause in question, we think it is quite reasonable to interpret the words "together with the inspector of the district" as meaning that the inspector shall be of the quorum—shall participate in any determination that is made. But the matter is "to be determined by the engineers . . . together with the inspector." The phrase of course admits of the interpretation that if the engineers agree, the added approval of the inspector shall end the matter. We think it not an unreasonable construction that if the engineers disagree they shall submit their differences to the inspector, and that a determination agreed to by one of them in conjunction with the inspector shall fulfill the requirements of the act. It must be remembered that this tribunal is to settle, not a private property right, but a matter affecting the public safety; hence, in the absence of clear language to the contrary, the section is open to the construction that, as in other public matters, a majority of the referees or arbitrators may act. *Omaha* v. *Omaha Water Co.*, 218 U. S. 180, 192.

It is further objected that the statute provides for no appeal from the determination of the tribunal. But in such cases the right of appeal on other than constitutional grounds may be conferred or withheld, at the discretion of the Legislature. As already pointed out, an appeal on fundamental grounds in this instance seems to inhere in the very practice prescribed by the statute for the enforcement of the determination of the statutory tribunal. Were this not expressed in the act, it would none the less be implied, at least so far as pertains to any violation of rights guaranteed by the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370; *Lieberman* v. *Van De Carr*, 199 U. S. 552, 562.

Judgment affirmed.

ATLANTIC COAST LINE RAILROAD COMPANY *v.* CITY OF GOLDSBORO, NORTH CAROLINA.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 112. Argued December 10, 1913.—Decided February 24, 1914.

Whether a municipal ordinance is within the power conferred by the legislature upon the municipality is a question of state law.

A municipal ordinance within the power delegated by the legislature is a state law within the meaning of the Federal Constitution.

Any enactment, from whatever source originating, to which a State gives the force of law is a statute of the State within the pertinent clause of § 237, Judicial Code, conferring jurisdiction on this court.

A railroad charter may embody a contract within the protection of the Federal Constitution.

Although the state court may have held that there was a contract, but that it was subject to constitutional reserved power to alter and repeal, this court, in reviewing that judgment under § 237, Judicial Code, will determine for itself the existence or non-existence of the asserted contract and whether its obligation has been impaired.

While a railroad company which devotes a part of its right of way to public use inconsistent with railway purposes may not lose its property right therein, the State may in the exercise of its police power and for the protection of the public so using such property, require the company to so use its other property as not to endanger the public, applying the principle underlying the maxim *sic utere tuo ut alienum non lædas.*

Neither the "contract clause" nor the "due process clause" of the Federal Constitution overrides the power of the State to establish necessary and reasonable regulations under its police power, a power which can neither be abdicated nor bargained away and subject to which all property rights are held.

The enforcement of uncompensated obedience to a properly enacted police regulation for public health and safety is not an unconstitutional taking of property without compensation or without due process of law.

The constitutional validity of ordinances affecting public safety as affected by railroads must be considered not only in view of charter

and property rights but also of the consent and acquiescence of the owners of railroads.

Ordinances limiting speed of trains; requiring notice of their approach, fixing hours for shifting cars and periods of stoppage of cars, and requiring the adjustment of tracks to the established grade of the streets, in business sections of the municipality, are properly within the police power of the municipality, and when fairly designed to promote the public health and safety do not violate the contract clause or due process clause of the Federal Constitution.

Ordinances of the City of Goldsboro, North Carolina, regulating speed of trains, notice of their approach, periods for car shifting and length of time of car stoppages and requiring adjustment of grades of tracks to grades of streets in business section of the town, *held* proper and reasonably suited to the purposes they are intended to accomplish and therefore that they do not impair the obligation of the charter of a railroad occupying those streets, nor do they take any of its property without due process of law.

155 Nor. Car. 356, affirmed.

THE facts, which involve the constitutionality of a municipal ordinance regulating the operation of railroad trains and the standing of the cars in the street and requiring the tracks to conform to the street grade and to be filled in between the rails, are stated in the opinion.

Mr. Frederic D. McKenney, with whom *Mr. George B. Elliott* and *Mr. George M. Rose* were on the brief, for plaintiff in error:

The right of way of plaintiff in error is not a street. *Donahue* v. *State*, 112 N. Y. 142; *East Ala. Ry. Co.* v. *John Doe*, 114 U. S. 340; *Ga. R. & B. Co.* v. *Union Point*, 47 S. E. Rep. 183; *Muse* v. *Railroad*, 140 Nor. Car. 443; *Nor. Pac. Ry. Co.* v. *Townsend*, 190 U. S. 267; *Olive* v. *Railroad*, 142 Nor. Car. 257; Rev. Code Nor. Car., c. 65, § 23; *McLucas* v. *St. Jo. &c. R. Co.*, 93 N. W. Rep. 928; *Poulon* v. *A. C. L. R. R. Co.*, 51 S. E. Rep. 657.

The city of Goldsboro has not power to prevent the use of the franchise and property of the plaintiff in error, by ordinance. *A., T. & S. F. Ry. Co.* v. *Armstrong*, 80 Pac.

Rep. 978; *B. & P. R. R.* v. *Baptist Church*, 108 U. S. 317; *Chicago &c. Ry. Co.* v. *Joliet*, 79 Illinois, 25; *Drake* v. *R. R.*, 7 Barb. 508; *Morgan* v. *R. R.*, 98 Nor. Car. 247; *Moses* v. *R. R.*, 21 Illinois, 516; *New Orleans* v. *L'enfant*, 126 Louisiana, No. 17,995; *Railroad* v. *Applegate*, 8 Dana, 289; *Railway Co.* v. *Brand*, 4 Eng. & Ir. App. 171–196; *Taylor* v. *R. R.*, 145 Nor. Car. 400; *Thomasson* v. *R. R.*, 142 Nor. Car. 318; *Yates* v. *Milwaukee*, 10 Wall. 498.

This ordinance effects a taking of plaintiff's property and franchise without due process of law, and impairs the obligation of its contract with the State and the plaintiff in error is entitled to equitable relief. *Atlanta* v. *Gate City Gas Co.*, 71 Georgia, 106; *Broadway States Co.* v. *American Soc'y*, 15 Abb. Pr. (N. S.) 51; *Cleveland* v. *City Ry. Co.*, 194 U. S. 517; *Dobbins* v. *Los Angeles*, 195 U. S. 223; *Ex parte Young*, 209 U. S. 123; *Ga. R. & B. Co.* v. *Atlanta*, 118 Georgia, 486; *Mobile* v. *L. & N. Ry. Co.*, 84 Alabama, 115; *Paulk* v. *Syracuse*, 104 Georgia, 24; *Prentiss* v. *Atlantic Coast Line*, 214 U. S. 226; *Railroad* v. *Asheville*, 109 Nor. Car. 688; *Railroad* v. *Dunbar*, 97 Illinois, 571; *Rushville* v. *Gas Co.*, 132 Indiana, 575; *Smythe* v. *Ames*, 169 U. S. 466; *Sou. Ex. Co.* v. *Ensley*, 116 Fed. Rep. 756; *Water Works Co.* v. *Vicksburg*, 185 U. S. 65.

Mr. Robert W. Winston, with whom *Mr. J. Crawford Biggs*, *Mr. D. C. Humphrey*, *Mr. J. D. Langston* and *Mr. M. H. Allen* were on the brief, for defendant in error.

Mr. Justice Pitney delivered the opinion of the court.

The Atlantic Coast Line Railroad Company, plaintiff in error, has succeeded to the ownership of the property, franchises, and rights of the Wilmington & Raleigh Railroad Company, which was chartered by the General Assembly of North Carolina in the year 1833, and whose name was

afterwards changed to Wilmington & Weldon Railroad Company. Under its charter powers the original company constructed its railroad from Wilmington to and into Wayne County, North Carolina, passing through the place which later, and in the year 1847, became incorporated as the Town of Goldsboro, now the City of Goldsboro, defendant in error.

For the purposes of its railroad, the Wilmington & Raleigh Company acquired a strip of land 130 feet wide extending through Goldsboro from north to south, and constructed its road upon it before the incorporation of the town. The land was acquired in part under deeds conveying title in fee simple, in part by condemnation proceedings which conferred upon the Company, as is claimed, the equivalent of a fee simple. Afterwards, two other companies, designated respectively as the North Carolina Railroad Company and the Atlantic & North Carolina Railroad Company, with the consent and permission of the Wilmington & Raleigh, or Wilmington & Weldon, and under agreements with that company, constructed their railroad tracks upon the same "right of way."

The town naturally grew along the railroad, and the right of way, so far as not occupied by the tracks, was and still is used for the ordinary purposes of a street, without objection by plaintiff in error or its predecessors in title. In laying out the town, this right of way was designated as a street 130 feet wide; the portion lying east of the tracks being designated as East Center Street, the portion on the west of the tracks as West Center Street. Cross streets were laid out, designated successively (commencing at the north) as Holly, Beech, Vine, Oak, Ash, Mulberry, Walnut, Chestnut, Spruce, Pine, and Elm Streets. East and West Center Streets have become the principal business street of the town, and the portion between Ash and Spruce—four blocks—is the heart of the city.

During the years since the incorporation of Goldsboro numerous industries have been and are now located on East and West Center Streets, and the track of plaintiff in error, in addition to its use as a part of the main line, has been and is used by the Company in shifting cars into and out of these industries, and also for reaching the freight terminals of the other two railroads, which are in the northerly part of the town; the terminal of plaintiff in error being in the southerly part. A belt line has been built around the city, over which through passenger trains and some freight trains are moved, but the use of the old main line for connecting with the other terminals, for shifting cars into industries and loading tracks along the right of way, and for the passage of certain of its trains, is claimed by plaintiff in error to be still essential to its business.

The municipal corporation has for many years worked and maintained its streets and cross streets, including so much of the surface of East and West Center Streets as lies outside of the space actually occupied by the railroad tracks. More recently it has instituted a system of street grades and of drainage extending throughout the city, and has paved a considerable part of East and West Center Streets in conformity to the grade so established. From Chestnut Street north the railroad tracks are (or, at least, prior to the municipal action complained of they were), from 6 to 18 inches above the established street grade; the tracks south of Chestnut Street being in a cut from 1 to 8 feet deep.

In November, 1909, the Board of Aldermen passed an ordinance or ordinances containing the following provisions: Section 1 rendered it unlawful for any railroad company to run any freight or passenger train on East or West Center Streets at a rate of speed exceeding four miles per hour, and required the companies to have flagmen proceed fifty feet in front of every train to warn persons of its approach. Section 2 provided that the shifting

limits on East and West Center Streets should be from Spruce Street to the city limits on the south, and from Ash Street to the city limits on the north; thus excluding the four blocks between Spruce and Ash Streets. Section 3 declared it to be unlawful for any railroad company to do any shifting within those four blocks at any other time than between the hours of 6.30 and 8.30 a. m., and between 4.30 and 6.30 p. m. Section 4 rendered it unlawful for any railroad company to place any car and allow it to stand for a longer period than five minutes at any point on East and West Center Streets within the same four blocks. Section 5 required all railroad companies owning tracks on East and West Center Streets between Walnut and Vine (four blocks) to lower the tracks so as to make them conform to the grade line of the streets, and to fill in the tracks between the rails; the required lowering being specified as 6 inches from Walnut to Mulberry, 10 inches between Mulberry and Ash, and 18 inches between Ash and Vine Streets. Substantial penalties were prescribed for violations of these prohibitions.

Plaintiff in error began this action against the City of Goldsboro in the Superior Court of Wayne County, seeking to restrain the enforcement of the ordinances. A temporary restraining order was granted. At the hearing, the objection to the enforcement of § 1 was abandoned by plaintiff; as to the other sections the court vacated the restraining order. Upon appeal, the Supreme Court of North Carolina affirmed the judgment. 155 Nor. Car. 356. The present writ of error under § 709, Rev. Stat. (Judicial Code, § 237), is based upon the insistence, made in the state courts and there overruled, that the ordinances impair the obligation of the contract contained in the charter of the Company, in contravention of § 10 of Art. I of the Federal Constitution, and deprive the Company of its property without due process of law, in contravention of the Fourteenth Amendment.

The Supreme Court of the State construed the section forbidding shifting as having reference to the "cutting out and putting in" of cars in the making up of a train before it is dispatched upon its journey, and not as referring to the "transfer" of a train of cars, already made up by plaintiff in error, to another railroad company for transportation. In view of the fact that plaintiff in error has shifting yards farther from the center of the city, where its trains can be made up and at least the chief part of the necessary shifting done, the court held it to be a reasonable exercise of the police power to forbid car shifting, except within the limited hours specified, on the four blocks of the plaintiff's track that lie in the heart of the city; declaring this regulation to be necessary for the convenience and safety of the public at the crossings.

With reference to the section requiring the lowering of the tracks between Walnut and Vine Streets so as to make them conform to the grade lines of the streets, the court held that the Company took its charter subject to the right of the State to lay out new roads and streets and to require the Company to make such alterations as would prevent the public passage over its tracks from being impeded; and that there was no contract exempting the Railroad from changing its grade at crossings when required.

In this court, plaintiff in error abandons its attack upon the right of the City to require a change of grade at the street crossings. The controversy, therefore, is now limited to (a) the restrictions imposed by §§ 2 and 3 upon shifting operations on East and West Center Streets between Spruce and Ash Streets; (b) the prohibition of § 4 against the standing of cars for a longer period than five minutes within the same four blocks, and (c) the requirement under § 5 that the tracks from Walnut to Vine Streets shall conform to the grade of East and West Center Streets and shall be filled in between the rails, elsewhere

than at the crossing streets. Upon the argument, it was stated by counsel representing the City that plaintiff in error had complied with the decision of the state court as to § 5, at least to the extent of lowering its tracks. But there was no clear admission of the fact in behalf of plaintiff in error, and we shall therefore disregard the supposed compliance.

It is among other things contended by plaintiff in error that the ordinances are not within the powers conferred by the Legislature of North Carolina upon the municipal corporation. This is a question of state law, which for present purposes is conclusively settled by the decision of the Supreme Court of North Carolina in this case. *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461, 462, and cases cited; *Lombard* v. *West Chicago Park Com.*, 181 U. S. 33, 43.

A municipal by-law or ordinance, enacted by virtue of power for that purpose delegated by the legislature of the State, is a state law within the meaning of the Federal Constitution. *New Orleans Water Works* v. *Louisiana Sugar Co.*, 125 U. S. 18, 31; *Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S. 258, 266; *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 148; *Northern Pacific Railway* v. *Duluth*, 208 U. S. 583, 590; *Grand Trunk Ry.* v. *Indiana R. R. Comm.*, 221 U. S. 400, 403; *Ross* v. *Oregon*, 227 U. S. 150, 162.

And any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State, within the meaning of the pertinent clause of § 709, Rev. Stat.; Judicial Code, § 237; which confers jurisdiction on this court. *Williams* v. *Bruffy*, 96 U. S. 176, 183.

We must, therefore, treat the ordinances as legislation enacted by virtue of the law-making power of the State. They are manifestly an exertion of the police power, and the question is whether, viewed in that light, they run counter to the "contract" or "due process" clauses.

That a railroad charter may embody a contract, within the meaning of the Constitution, hardly needs to be stated. *Dartmouth College* v. *Woodward*, 4 Wheat. 518. In the present case the Supreme Court of North Carolina held that by the constitution of the State, the charter was subject to alteration or repeal at the legislative will. If the right of repeal was indeed thus reserved, the result is obvious. *Greenwood* v. *Freight Co.*, 105 U. S. 13, 21; *Knoxville Water Co.* v. *Knoxville*, 189 U. S. 434, 437. But when this court has under review the judgment of a state court by virtue of § 709, Rev. Stat., and the validity of a state law is challenged on the ground that it impairs the obligation of a contract, this court must determine for itself the existence or non-existence of the asserted contract, and whether its obligation has been impaired. *Douglas* v. *Kentucky*, 168 U. S. 488, 502; *Stearns* v. *Minnesota*, 179 U. S. 223, 233. We are not referred to and are unable to find, in the state constitution as it existed when the charter now in question was granted, any reservation of the right of repeal, and will assume for present purposes that the contract was not thus qualified, and deal only with the question whether it has been impaired.

Plaintiff in error lays more particular stress upon the insistence that its property rights in the street will be infringed by the enforcement of the ordinances. Because its predecessors acquired the strip of land in fee simple, and because the municipal corporation has never condemned it or made compensation for its use as a street, the contention is that the title of the railroad company remains until now, absolute and unqualified. Reference is made to Rev. Code of Nor. Car., c. 65, § 23. This section, it seems, became law in North Carolina in the year 1854, and has remained upon the statute books continuously until the present time, appearing now as § 388 of the Revisal of 1908; see also Code 1883, § 150. It provides that "No railroad, plank road, turnpike or canal company

shall be barred of, or presumed to have conveyed, any real estate, right of way, easement, leasehold, or other interest in the soil which may have been condemned, or otherwise obtained for its use, as a right of way, depot, station-house or place of landing, by any statute of limitation or by occupation of the same by any person whatever." Two cases, *Railroad* v. *Olive*, 142 Nor. Car. 257, 271, and *Muse* v. *Railroad*, 149 Nor. Car. 443, 446, are cited as supporting the proposition that under this statute a permissive user of any portion of the railroad right of way by others, or even by the public as a street, cannot impair the title of the company unless at least there be adverse user or possession for a sufficient period to satisfy the statutes on that subject; and it is insisted there has been none. But in both cases the question was as to the effect of the permissive user or possession upon merely private rights, and in the *Muse Case* it was expressly conceded (149 Nor. Car. 446) that the rights of the railroad company in that portion of its right of way that had been used as a street, were subject to the police power of the town. In the present case, likewise, the state court (155 Nor. Car. 363) treated the question of the ownership of the soil as not involved in the decision.

And we are not at present particularly concerned with either contract or property rights, except as they may serve to show the conditions under which the ordinances were adopted, and may bear upon the question of the reasonableness of those regulations. These have to do with the use and control of the property, rather than with its ownership; with the mode in which the franchise shall be enjoyed, rather than with its scope. Conceding, for argument's sake only, the utmost that may be claimed as to the charter and property rights of plaintiff in error, we still have yielded nothing that may defeat the exercise of the police power by the State, or by its authorized agency. Adopting the extreme assumption that the rail-

road company has still a complete and unqualified ownership of every portion of the strip of land that was originally acquired in fee simple, and as proprietor might lawfully exercise its dominion by excluding the public from it; yet it does not do this, but permits, and long has permitted, the public to use material portions of the strip for ordinary street purposes; it apparently excludes the public from no portion except as the existence of the tracks and the passage of trains may have such a tendency or effect. And thus the Company, at least for the time, devotes its property in part to public uses that are more or less inconsistent with the railroad uses, and under conditions such as to render the railroad operations necessarily a source of danger to the public while enjoying the permitted use. Under such circumstances the State, in the exercise of the police power, may legitimately extend the application of the principle that underlies the maxim *sic utere tuo ut alienum non lædas*, so far as may be requisite for the protection of the public.

For it is settled that neither the "contract" clause nor the "due process" clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. *Slaughter-House Cases*, 16 Wall. 36, 62; *Munn* v. *Illinois*, 94 U. S. 113, 125; *Beer Co.* v. *Massachusetts*, 97 U. S. 25, 33; *Mugler* v. *Kansas*, 123 U. S. 623, 665; *Crowley* v. *Christensen*, 137 U. S. 86, 89; *New York &c. R. R. Co.* v. *Bristol*, 151 U. S. 556, 567; *Texas &c. R. R. Co.* v. *Miller*, 221 U. S. 408, 414, 415. And the enforcement of uncompensated obedience to a regulation established under this power for the public health or safety is not an unconstitutional taking of property without compensation or without

due process of law. *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226, 255; *New Orleans Gas Co.* v. *Drainage Commissioners*, 197 U. S. 453, 462; *C., B. & Q. Ry.* v. *Drainage Commissioners*, 200 U. S. 561, 591, 592.

Of course, if it appear that the regulation under criticism is not in any way designed to promote the health, comfort, safety, or welfare of the community, or that the means employed have no real and substantial relation to the avowed or ostensible purpose, or that there is wanton or arbitrary interference with private rights, the question arises whether the law-making body has exceeded the legitimate bounds of the police power.

The ordinances now in question must be considered in view not only of the charter and property rights of plaintiff in error, but of the actual situation that has developed and now exists in Goldsboro, with the consent and long acquiescence of plaintiff in error and its predecessors in interest. A town of considerable size and importance has grown up along the line of the railroad. The strip of land 130 feet in width, so far as it is not occupied by the railroad tracks, for many years has been and still is used for the ordinary purposes of a street. The Supreme Court of North Carolina found, upon adequate evidence, that it is the main business street of the town, frequently crowded with pedestrians and vehicles; and that the operation of trains along it, notwithstanding the utmost care of the railroad company, tends to obstruct the crossings and is fraught with danger to life and property. There are, within the blocks covered by the ordinances, two main lines of railway besides that of plaintiff in error. These of course complicate the situation by narrowing the spaces available for ordinary travel north and south on East and West Center Streets, and must also enhance the dangers at the crossings.

It is very properly conceded that the company may be required to limit the speed of its trains and to have flag-

men precede them to warn persons of their approach; and that the company may be required to change its grade at the street crossings. In *New York &c. R. R. Co.* v. *Bristol,* 151 U. S. 556, 567, this court sustained a Connecticut statute directed to the extinction of grade crossings as a menace to public safety, and compelling this to be done at the expense of the companies, although the grade crossings had been long before established under legislative authority. In *Chicago, Burlington &c. R. R.* v. *Chicago,* 166 U. S. 226, 251, it was held that when the city opened a new street across the railroad it was not bound to take and pay for the fee in the land, but only to make compensation to the extent that the value of the company's right to use the land for railroad purposes was diminished by opening the street across it; and that the company was not entitled to have its compensation increased because of the fact that in order to safeguard the crossing it would thereafter be obliged to construct gates, and a tower for operating them, plank the crossing, fill in between the rails, and incur certain annual expenses for depreciation, maintenance, employment of gatemen, etc. To the same effect are *Wabash Railroad Co.* v. *Defiance,* 167 U. S. 88, 97; *Chicago &c. Railroad* v. *Nebraska,* 170 U. S. 57, 75; *Northern Pacific Ry.* v. *Duluth,* 208 U. S. 583, 597; *Cincinnati &c. Ry.* v. *Connersville,* 218 U. S. 336, 343; *Chicago, M. & St. P. Ry.* v. *Minneapolis,* decided this day, *ante,* p. 430. And see *Grand Trunk Western Ry.* v. *South Bend,* 227 U. S. 544, 554.

But manifestly the tracks cannot be brought to the street grade at the crossings without being lowered between the crossings as well. And if this is to be done, it follows that not merely the tracks but the surface adjacent to the tracks must be made to conform to the established grade of East and West Center Streets between the crossing streets; or else the street will be rendered materially less convenient for purposes of north-and-south travel,

and the drainage will be materially interfered with; or at least the municipal authorities might reasonably so determine. The establishment of a proper system of drainage for the City in the interest of the public health and general welfare is an object that legitimately invokes the exercise of the police power. *New Orleans Gas Co.* v. *Drainage Commission*, 197 U. S. 453, 460.

As to filling in between the rails, elsewhere than at the crossing streets, we have to do not merely with the necessities of drainage, but with the safety of persons crossing the railroad tracks midway of the respective street blocks. The power of the State to prescribe precautions with respect to the running of railroad trains so as to guard against injuries to the persons or property of others is not confined to the establishment of such precautions at highway crossings. State enactments requiring railroad corporations to maintain fences and cattle guards alongside the railroad have been repeatedly sustained. *Missouri Pacific Ry. Co.* v. *Humes*, 115 U. S. 512, 522; *Minneapolis Ry. Co.* v. *Beckwith*, 129 U. S. 26, 34; *Minneapolis & St. Louis Ry.* v. *Emmons*, 149 U. S. 364, 366. For the purposes of the argument it may be conceded that no person has the right as against the railroad company to pass over its tracks except at one of the street intersections; although this may not be entirely clear. But unless excluding fences be established adjacent to the railroad tracks (and this is not proposed nor even suggested as feasible), it is inevitable that many people, with or without right (children of tender years, among others), will cross at places other than the street intersections; and a police regulation intended to prevent injuries to persons thus crossing cannot be judicially denounced as arbitrary. Other grounds for sustaining § 5 might be mentioned; but we need not further particularize.

There remain only the limitation of car shifting and the prohibition of the standing of cars upon East and West

Center Streets in the four blocks that lie between Spruce and Ash Streets, in the heart of the City. As already pointed out, the state court construed "shifting" as applying only to the "cutting out and putting in" of cars in the making up of trains. This operation is not to be performed within the four blocks specified except during two hours in the morning and two hours in the afternoon of each day. The time limits were evidently adopted with regard to the necessities of the industries that are located along the railroad, and at the same time with a view to the necessities of general travel upon the streets. It was complained that the time allowed for shifting is inadequate; but there is nothing in the proof on this subject to overthrow the finding of the court that the ordinance is a reasonable exercise of the police power.

The prohibition against the standing of cars for a longer period than five minutes within the same four blocks is intended to prevent the loading and unloading of cars in the street, with the attendant use of wagons and drays for the purpose. In view of the obstruction to street travel that is naturally incident to such operations, the prohibition cannot be deemed wholly unreasonable. In effect it prevents ordinary travel upon the street from being thus obstructed, and requires that the loading and unloading of cars shall be done at the regular freight terminals.

The regulations in question are thus found to be fairly designed to promote the public health, safety, and welfare; the measures adopted appear to be reasonably suited to the purposes they are intended to accomplish; and we are unable to say that there is any unnecessary interference with the operations of the railroad, or with the property rights of plaintiff in error. Therefore, no violation of the "contract" or "due process" clause is shown.

Judgment affirmed.

WILSON, ALIAS CHARLES WILLARD, *v.* UNITED STATES.

WILSON, ALIAS ZOE WILLARD, *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Nos. 168, 169. Submitted October 23, 1913.—Decided February 24, 1914.

The White-Slave Act of June 25, 1910, has been sustained as constitutional. *Hoke* v. *United States*, 227 U. S. 308.

Although the constitutional question on which a case has been brought to this court on direct writ of error has been decided since the writ of error was sued out, this court must retain jurisdiction for the purpose of passing upon the other questions in the record.

Under the White-Slave Act the prohibition is not in terms confined to transportation by common carrier, nor need such a limitation be implied in order to sustain the constitutionality of the act.

The White-Slave Act has the quality of a police regulation although enacted in the exercise of the power to regulate interstate commerce, and it is wholly within the power of Congress to determine whether the prohibition should extend to transportation by others than common carriers.

The agency of one employed to bring prostitutes from one State to another without definite instructions includes power to decide upon the mode and route of transportation.

The cross-examination of a defendant in regard to taking morphine *held* in this case to be proper as it related not to general character, but to the condition of the witness at the moment.

Cross-examination as to the domestic difficulties of one of two defendants married to each other *held* in this case to have been material in order to corroborate the evidence of an accomplice and in other respects relevant to the testimony in chief.

Cross-examination of a defendant in a white slave case in regard to payments made to police officers *held* in this case to have been com-

petent and material to show the character of the house occupied by defendants.

In this case *held* that the charge of the trial court in regard to presumptions of innocence of the accused and their right to acquittal in case of reasonable doubt was sufficiently favorable to the accused.

The offense under the White-Slave Act is complete when the transportation in interstate commerce has been accomplished. There is no *locus pœnitentiæ* thereafter.

THE facts, which involve the validity of convictions and sentences under the White-Slave Act, are stated in the opinion.

Mr. Elijah N. Zoline for plaintiffs in error:

There was no evidence supporting allegations in the indictment. It was error to subject the defendant Catherine Wilson to the cross-examination as to whether she is addicted to the use of drugs. There was error in the cross-examination of same defendant as to her domestic relations. There was error in permitting cross-examination of the defendant Charles Wilson upon entries relating to payment of money to certain police officers. There was error in instructing the jury on presumption of innocence and reasonable doubt. There was error in excluding from charge to jury the principle of *locus pœnitentiæ*. There was error in instructing the jury as to the weight of the evidence.

In support of these contentions, see *Atwood* v. *Impson*, 20 N. J. Eq. 157; *Brown* v. *State*, 16 S. W. Rep. (Miss.) 202; *Bucklin* v. *State*, 20 Oh. St. 18; *Burt* v. *State*, 16 S. W. Rep. (Miss.) 342; *Burton* v. *United States*, 196 U. S. 283; *Coffin* v. *United States*, 156 U. S. 432; *Commonwealth* v. *Churchill*, 11 Met. 538; *Commonwealth* v. *Webster*, 5 Cush. 295; *Cox* v. *People*, 82 Illinois, 191; *Dimick* v. *Downs*, 82 Illinois, 570; *Frazier* v. *State*, 117 Tennessee, 430; *Gilchrist* v. *M'Kee*, 4 Watts, 380; *Hoke* v. *United States*, 227 U. S. 308; *Horner* v. *United States*, 143 U. S. 570; *Johnson* v. *State*,

16 So. Rep. (Miss.) 494; *Keek* v. *United States*, 172 U. S. 445; *Kolb* v. *Union Railroad Co.*, 54 L. R. A. 646; *Metze* v. *Tuteur*, 77 Wisconsin, 243; *Miles* v. *United States*, 113 U. S. 304; *Moore* v. *Moore*, 73 Texas, 382; *People* v. *Murray*, 14 California, 159; *People* v. *Undung*, 108 California, 83; *Pinkard* v. *State*, 30 Georgia, 757; *Railroad Co.* v. *Gower*, 85 Tennessee, 473; *Rudsdill* v. *Slingerland*, 18 Minnesota, 380; *Spears* v. *Forrest*, 15 Vermont, 437; *Stabler* v. *Commonwealth*, 95 Pa. St. 318; *State* v. *Butler*, 26 W. Va. 90; *State* v. *Carson*, 66 Maine, 116; *State* v. *Hurley*, 79 Vermont, 28; *State* v. *King*, 88 Minnesota, 175; *State* v. *Smith*, 7 Vermont, 141; *Stephens* v. *State*, 107 Indiana, 185; *Thompson* v. *People*, 96 Illinois, 158; *Williamson* v. *United States*, 207 U. S. 425; *United States* v. *Stephens*, 8 Sawy. 116; Rapalje on Witnesses, § 197; Thompson, Trials, §§ 524, 525; Wharton, Ev., 3d ed., § 541; Wharton, Crim. Law (9th ed.), § 187.

Mr. Assistant Attorney General Denison for the United States.

MR. JUSTICE PITNEY delivered the opinion of the court.

This case comes here upon two separate writs of error allowed upon the same record, to review judgments of the District Court imposing fine and imprisonment upon each of the plaintiffs in error, upon their conviction on an indictment founded upon the act of Congress of June 25, 1910, commonly known as the White-Slave Act (36 Stat. 825, c. 395).

The case was brought directly to this court, because the constitutionality of the statute was drawn in question. This question has since been settled adversely to plaintiffs in error. *Hoke* v. *United States*, 227 U. S. 308. Nevertheless, we must retain jurisdiction for the purpose of passing upon the other questions in the record. *Horner*

v. *United States*, 143 U. S. 570, 576; *Burton* v. *United States*, 196 U. S. 283, 295; *Williamson* v. *United States*, 207 U. S. 425, 432.

There were numerous counts in the indictment, and a general verdict of guilty. The substance of the charge was that defendants caused and procured two girls to be transported in interstate commerce from Milwaukee, Wisconsin, to Chicago, Illinois, for the purpose of prostitution. There was also a count charging a conspiracy to commit the same offense. The theory of the Government, sufficiently stated in the indictment and supported by evidence at the trial, was that in pursuance of an understanding between defendants and a man named Corder, they gave him eleven dollars in money, with instructions to proceed from Chicago to Milwaukee, induce one or both of the girls to return with him to Chicago, paying their transportation and other expenses out of the eleven dollars, and bring them to a house of prostitution in the latter city kept by the defendants; and that Corder carried out these instructions to the letter, bringing both girls over an interstate electric railway line and escorting them to defendants' house for the purpose of prostitution.

Of the questions of law that are raised, only the following seem to require mention:

1. It is insisted that the offense was not fully proved because there was nothing to show that defendants either directed or knew how the girls were to come from Milwaukee to Chicago, whether in a private vehicle or through the instrumentality of a common carrier. But, in our opinion, in order to constitute an offense under the act it is not essential that the transportation be by common carrier. The statute reads: "That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, . . . any woman or girl for the purpose of prostitution or debauchery, or

for any other immoral purpose, . . . or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, . . . in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, . . . whereby any such woman or girl shall be transported in interstate or foreign commerce, . . . shall be deemed guilty of a felony," etc.

The prohibition is not in terms confined to transportation by common carrier, nor need such a limitation be implied in order to sustain the constitutionality of the enactment. As has already been decided, it has the quality of a police regulation, although enacted in the exercise of the power to regulate interstate commerce (*Hoke* v. *United States*, 227 U. S. 308, 323; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 215); and since this power is complete in itself, it was discretionary with Congress whether the prohibition should be extended to transportation by others than common carriers.

The contention that defendants were not within the prohibition of the act because they did not control or instruct Corder in the choice of means of conveyance is not worthy of serious consideration. According to the Government's evidence, Corder was employed by defendants as their agent, and furnished by them with money sufficient for the expenses of the transportation, but without definite instructions as to what mode should be employed. A natural inference was that he should decide upon the mode and select the route; and that such selection was within the scope of his agency.

2. The female defendant offered herself as a witness, and in the course of her cross-examination was asked whether she was addicted to the use of morphine. Having

admitted this, and stated that she had last used it before coming into the court room that morning at ten o'clock, she was asked how often she used it, and whether she had with her the "implements" with which to "take the dose." She replied in the affirmative. This line of examination was excepted to, and is assigned for error on the ground that she had not put her character at issue. But as we read the record, the evidence was not offered or admitted for its bearing upon her character, but rather to show that she was so much addicted to the use of the drug that the question whether at the moment of testifying she was under its influence, or had recovered from the effects of its last administration, had a material bearing upon her reliability as a witness. It seems to us that in this aspect the evidence was admissible. *People* v. *Webster*, 139 N. Y. 73, 87; *State* v. *White*, 10 Washington, 611, 613.

3. Error is assigned upon certain rulings of the trial court permitting cross-examination of the same witness, tending to show that she and the other defendant lived unhappily as husband and wife, were occasionally separated, and (as is said) that they at times indulged in the use of pistols. No evidence was in fact offered or admitted tending to show that weapons had been used, if we except an obscure allusion to "pistols" in a letter that had been written by a person in New York City to the female defendant in Chicago. The use made of this letter was permissible for other reasons. The evidence as to the quarrels and separation was plainly admissible. The Government's case depended mainly upon the testimony of Corder. He appeared to have been an accomplice, hence circumstantial corroboration of his story was especially material. He had testified that Mrs. Wilson asked him to go to Milwaukee for the purpose of getting the two girls, and had mentioned as a circumstance that this conversation took place at the Union Depot in Chicago, where he had met Mrs. Wilson at her request

to aid her in a search for her husband. On her direct examination, she flatly denied this, saying: "I did not take him and he never accompanied me on any trip to hunt for Mr. Wilson; I always knew where Mr. Wilson was." The cross-examination under consideration was entirely relevant to this part of the testimony in chief.

4. It is assigned for error that the court permitted the Government to cross-examine the defendant, Charles Wilson, respecting entries made by him and his wife in their books of account, showing payments of money to certain police officers, and indicating friendly relations, if not coöperation, between defendants, as keepers of a house of prostitution, and members of the police force. This was not objected to as exceeding the limits of proper cross-examination, but only as being "incompetent, irrelevant and immaterial." We think it was admissible as tending to show the character of the house, and as tending to rebut evidence previously introduced by the defense to the effect that Mrs. Wilson had refused to harbor the girls for fear of police interference.

5. Error is assigned upon the instructions of the trial court to the jury respecting the presumption of innocence, and the definition of reasonable doubt. Counsel for defendants preferred no request upon either subject previous to the delivery of the charge. The court instructed the jury in substance that the arrest of defendants, their indictment by the grand jury, and their arraignment, were no evidence whatever of their guilt; that the presumption of innocence meant that at the beginning of the trial they were as innocent of the charges as any man in the jury-box; that this presumption continued to abide with the defendants as a complete protection, unless and until it gave way because inconsistent with the existence of a situation proved by the evidence in the case beyond all reasonable doubt; that by that [reasonable doubt] was meant, not the frame of mind of a man endeavoring to

find a way out for somebody accused of crime, not a mere capricious doubt, not a frame of mind suggested by something occurring in the trial of the case or in the argument of counsel not based on evidence in the case; but that "reasonable doubt is that frame of mind which forbids you to say, all the evidence considered and weighed, 'I have an abiding conviction of the defendants' guilt,' or as it has been expressed, 'I am convinced of the defendants' guilt to a moral certainty.' If you can say that you have such a conviction, then you have no reasonable doubt, and your verdict should be guilty. On the contrary, if that is your frame of mind, if you are in the frame of mind where if it was a matter of importance to you in your own affairs, away from here, you would pause and hesitate, before acting, then you have a reasonable doubt." At the conclusion of the charge counsel for defendants said: "I should like that the court say a little more on the reasonable doubt, as I believe it was limited only to a moral certainty. That is the only sentence I heard about that." The argument here is that the instruction as given is faulty, because the court did not tell the jury that the Government must prove its case against defendants beyond a reasonable doubt. As we read the charge, it meant nothing less than that, and was sufficiently favorable to defendants. *Miles* v. *United States*, 103 U. S. 304, 309, 312; *Hopt* v. *Utah*, 120 U. S. 430, 439, 440; *Dunbar* v. *United States*, 156 U. S. 185, 199; *Coffin* v. *United States*, 156 U. S. 432, 460; *Cochran* v. *United States*, 157 U. S. 286, 299; *Davis* v. *United States*, 160 U. S. 469, 487; *Allen* v. *United States*, 164 U. S. 492, 500; *Dunlop* v. *United States*, 165 U. S. 486, 502.

6. Error is assigned because the court refused to charge the jury, as requested, to the effect that if they should believe from the evidence that defendants, after the girls came to Chicago from Milwaukee, refused to accept them, and voluntarily abandoned their evil intention and re-

fused to carry out the illegal purpose, no offense against the laws of the United States was committed. It is argued that the end and object of the act is to prevent immorality and trafficking in girls, and not the mere act of transportation. But we think that by the plain language of the statute, the offense is complete when "any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia" as a result of any of the criminal acts previously described. The suggestion that the law contemplates a *locus pœnitentiæ* for defendant, after the journey is ended and the woman or girl has been brought to the intended destination within the walls of a house of prostitution, is obviously untenable.

We find no error in the record.

Judgments affirmed.

WEINMAN *v.* DE PALMA.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 173. Argued January 20, 1914.—Decided February 24, 1914.

Where the owner of demised premises makes a contract with an adjoining owner for construction of a party wall, which contract cannot be carried out according to its terms without entry upon the demised premises and undermining the tenant's wall, and the adjoining owner, or his servants, in performing the contract commit such a trespass upon the tenant's possession and undermine the wall, the contract is evidential of a command or approval of the trespass by the landlord, such as to render him liable severally, or jointly with the adjoining owner, in an action by the tenant for the resulting damages.

Where a trespass results in the destruction of a building with consequent interruption of a going business, the loss of future profits—

reasonably certain and proved with reasonable exactitude—is a proper element for consideration in awarding compensatory damages.

Where the contractor is required to follow instructions of the owner he is not such an independent contractor as to relieve the owner of liability for his acts.

The "independent contractor" doctrine does not apply where the work that the contractor does amounts in itself to a nuisance or necessarily operates to destroy the property of another.

16 New Mex. 302, affirmed.

THE facts are stated in the opinion.

Mr. Neill B. Field for plaintiffs in error.

Mr. F. E. Wood, with whom *Mr. Owen N. Marron* and *Mr. A. B. McMillen* were on the brief, for defendants in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

In November, 1901, Weinman, one of the plaintiffs in error, being the owner of a building and lot of land in Albuquerque, New Mexico, leased them to defendants in error for a term of two years, to commence in December, following. They entered into possession, and occupied and used the building in their business of prescription and retail druggists. Plaintiff in error Barnett was the owner of an adjoining lot and building. Some time in May or June, 1902, while the Weinman building was occupied by defendants in error, Barnett took down and removed his building, including the wall adjacent to the Weinman building. The east wall of the latter was an old adobe wall that stood close to, but perhaps a few inches away from, the easterly boundary line of the lot. In May, 1902, Weinman and Barnett entered into an agreement in writing, whereby Barnett was to construct a party wall,

to stand one-half of its full thickness upon each lot; the footing course to be 40 inches wide; the foundation wall to be 18 inches thick from the top of the footing to its full height, where it was to receive the first floor joists; the wall above that to be of less thickness. It was stipulated that Barnett should be permitted to take down any part of the east wall of the Weinman building as might be necessary in order to locate the new wall centrally over the property line, and if through his fault damage should be done to the Weinman building, he was to make it good. In the execution of this agreement, it was necessary to undermine the east wall of the Weinman building. Barnett made an agreement with one Grande, a general contractor, by which the latter was to do the excavation and stone work according to plans and specifications, and as directed by La Driere, a superintendent who was in Barnett's employ. Grande proceeded under La Driere's direction to do the work. It would seem that the purpose was to excavate for the party wall in sections, so that support for the Weinman building should not at any time be entirely lacking. On or about June 30, the contractor having excavated for a space about 5 feet in length along the line between the two lots at the northeast corner of the Weinman building, and extending under the east wall of that building for approximately 12 inches, the wall fell, damaging the stock-in-trade and fixtures of defendants in error, and rendering the building untenantable. They removed what remained of their stock and fixtures to another and less desirable location, and carried on their business there, up to the time their lease of the Weinman lot and building would have expired by its terms. After the wall fell, Weinman made demand for the rent payable by the lease for the month of July, 1902, and, defendants in error having refused to pay it, Weinman took possession.

Defendants in error brought suit against both Weinman

and Barnett in the district court of one of the counties of the then Territory of New Mexico. The action was in the nature of an action of trespass, and damages were claimed for the destruction of parts and injury to other parts of the stock-in-trade and fixtures, for the being compelled to remove to a less favorable location at considerable expense, and for the loss of profits in the business. (There was also a claim of damages for eviction and the loss of the leasehold, but this was afterwards abandoned.)

Answers were filed, and there were subsequent amendments to the pleadings, but it is not necessary to recite them.

The action has been at least three times tried by jury, and three times reviewed by the Supreme Court of New Mexico. Upon the first trial a verdict was directed in favor of defendants, and the Supreme Court reversed the judgment and remanded the cause for a new trial. 13 New Mex. 226. The second trial resulted in a verdict and judgment for plaintiffs, which was reversed because compensation for loss of profits and for goods injured was included without sufficient evidence to sustain this part of the recovery. 15 New Mex. 68. At the last trial, the proof was to some extent supplemented, and there was a judgment in favor of plaintiffs for $7,738, based upon the verdict of a jury for that amount. On appeal, the Supreme Court found error only with respect to the proof as to damaged goods, and required plaintiffs to elect whether they would file a *remittitur* of $770 on this account, or submit to a new trial. 16 New Mex. 302. They chose the former alternative, and the judgment was affirmed for the reduced amount. The present writ of error was then sued out.

The record is voluminous. In the territorial Supreme Court, 105 assignments of error were filed in behalf of Barnett and 68 in behalf of Weinman. In this court the assignments of error are 110 in number. We shall make no

effort to deal with them in detail. The points that seem to require mention are the following:

We agree with the Supreme Court of New Mexico that where the owner of demised premises makes a contract with an adjoining owner for the construction of a party wall, which contract cannot be carried out according to its terms without entry upon the demised premises and an undermining of the tenant's wall, and the adjoining owner or his servants in the performance of the contract do commit such a trespass upon the tenant's possession and undermine the wall, the contract is evidential of a command or approval of the trespass by the landlord, such as to render him liable severally, or jointly with the adjoining owner, in an action by the tenant for the resulting damages. *Lovejoy* v. *Murray*, 3 Wall. 1, 9; *Northern Trust Co.* v. *Palmer*, 171 Illinois, 383, 388; *Collins* v. *Lewis*, 53 Minnesota, 78, 83; *Snow* v. *Pulitzer*, 142 N. Y. 263, 268.

In our opinion, the court correctly held that where a trespass results in the destruction of a building, with consequent interruption of a going business, the loss of future profits (these being reasonably certain and proved with reasonable exactitude), forms a proper element for consideration in awarding compensatory damages. *Allison* v. *Chandler*, 11 Michigan, 543, 550; *Schile* v. *Brokhahus*, 80 N. Y. 614, 620; *Snow* v. *Pulitzer*, 142 N. Y. 263, 270; *Chapman* v. *Kirby*, 49 Illinois, 211, 219; *City of Terre Haute* v. *Hudnut*, 112 Indiana, 542, 552; *Fibre Co.* v. *Electric Co.*, 95 Maine, 318, 327. And see *Anvil Mining Co.* v. *Humble*, 153 U. S. 540, 549; *Brown* v. *Honiss*, 74 N. J. Law, 501, 514.

We agree also with the court below that upon the last trial there was legitimate evidence upon which to base an allowance of damages for loss of profits, and no substantial error in the rulings on evidence or in the instructions to the jury upon the subject.

It is contended that plaintiffs in error are not responsible

for what was done by Grande in building the party wall because he was an independent contractor.

But the evidence showed that he was required to follow the instructions of La Driere, who was Barnett's agent, and that La Driere was in fact in charge of the work. For this reason it was properly held that Grande was not an independent contractor. *Railroad Co.* v. *Hanning*, 15 Wall. 649, 657; *Singer Mfg. Co.* v. *Rahn*, 132 U. S. 518, 523.

Nor does the "independent contractor" doctrine apply where the work that the contractor is to do of itself amounts to a nuisance or necessarily operates to injure or destroy the property of plaintiff. *Chicago* v. *Robbins*, 2 Black, 418, 426; *Robbins* v. *Chicago*, 4 Wall. 657, 678.

The other points that are raised have been examined, and we find no material error. They have been sufficiently discussed in the court below, and require no particular mention here.

Judgment affirmed.

OHIO TAX CASES.

OHIO RIVER AND WESTERN RAILWAY COMPANY *v.* DITTEY ET AL., AS THE TAX COMMISSION OF OHIO.

MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY *v.* CREAMER ET AL., AS THE TAX COMMISSION OF OHIO.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Nos. 642, 643. Argued January 7, 1914.—Decided February 24, 1914.

Where the Federal jurisdiction does not depend upon diversity of citizenship but on Federal questions presented by the record, it extends to the determination of all questions presented irrespective of the disposition made of the Federal questions.

Where the statute specifically makes the tax a lien upon real estate and the bill alleges that enforcement of penalties would work irreparable injury, equity jurisdiction is properly invoked.

The Federal court may examine the opinion of the state court as well as the syllabus to ascertain the scope of the decision, notwithstanding the state rules of practice require the syllabus to be prepared by the judge preparing the opinion and to be confined to the points of law arising from the facts that have been determined.

The franchise of a railroad company is not necessarily to be regarded as valueless merely because its present earnings are not sufficient to pay more than high grade investments or even to pay operating expenses. *State Railroad Tax Cases*, 92 U. S. 575.

A state statute imposing a tax on railroads is not unconstitutional as denying equal protection of the law. The classification rests upon a reasonable and sufficient basis of distinction.

In the absence of a construction by the state court to that effect, the Federal court should not, if it can avoid doing so, place such a construction upon a state statute as would render it unconstitutional.

"Interstate," as used in a state tax statute, can fairly be construed as including all commerce other than "intrastate" when the evident purpose is to tax only the earnings subject to state taxation.

In a state statute imposing a tax on intrastate earnings, it is reasonable to suppose that the exclusion of interstate earnings from taxation extended to earnings from foreign commerce when another construction would render the statute unconstitutional.

The reasonableness of an excise or privilege tax, unless some Federal right is involved, is within the discretion of the state legislature.

Where a state statute does not on its face manifest a purpose to interfere with interstate commerce, this court cannot accept historical facts in connection with its enactment as evidence of a sinister purpose on the part of the legislature to evade obligations of the Federal Constitution, without a more substantial basis than appears in this case.

Double taxation does not exist in a legal sense unless the double tax is levied upon the same property within the same jurisdiction, and an excise tax measured on earnings from operating the property is not a double tax because the property itself is taxed.

These actions do not involve enforcement of penalties; and the penalty provisions of this statute if unconstitutional are severable by the express terms of the statute itself.

The Ohio statute of 1911 imposing an excise tax of four per cent. on gross intrastate earnings of railroad companies is not unconstitu-

tional, either as denying equal protection of the laws, or as depriving the railroads of their property without due process of law, or as interfering with interstate commerce, or as being an attempt to indirectly tax total gross receipts of the railroads, or as double taxation. 203 Fed. Rep. 537, affirmed.

THESE suits were brought in the United States District Court for the Southern District of Ohio (Eastern Division) by appellants, which are Ohio railroad corporations, to enjoin the certification and collection by appellees of a tax which the State was seeking to enforce upon the privilege of carrying on business in that State. This tax appellants claimed to be in violation of the due process and equal protection clauses of the Fourteenth Amendment and of the commerce clause of the Federal Constitution, and also of the preamble and sections two and nineteen of the Ohio constitution.

A restraining order was allowed by the District Court, and afterwards appellants' motions for temporary injunctions came on for hearing before three judges, of whom one was a circuit judge, pursuant to § 266 of the Judicial Code (36 Stat. 1162, c. 231), which went into effect shortly after the bills were filed. The two cases were argued and considered together, upon the facts averred in the bills, which were, for the purposes of the motions, conceded to be true by appellees, and, after consideration, the temporary injunctions were refused. 203 Fed. Rep. 537.

Appellants come direct to this court, under the same section of the Code.

The tax law in question, the validity of which is attacked generally, and also specially in its application to appellants, was enacted in its present form May 31, 1911. (102 Ohio Laws, 224.)

It created a tax commission, with defined powers, and prescribed various taxes, some upon property and others upon franchises and privileges, with sundry provisions, penal and otherwise, for the collection thereof. Some of

these taxes were new in Ohio law, others were carried over from previously existing statutes.

The tax here in question is limited in its operation to certain lines of quasi-public business, specifically named in the act and therein referred to as "public utilities," including railroads.

As applied to railroads, the act requires the filing with the Tax Commission, by each railroad doing business in the State, of a statement, on or before September 1, setting forth, among other things, its "entire gross earnings, including all sums earned or charged, whether actually received or not, for the year ending on the thirtieth day of June next preceding, from whatever source derived, for business done within this State, excluding therefrom all earnings derived wholly from interstate business or business done for the Federal Government. Such statement shall also contain the total gross earnings of such company for such period in this State from business done within this State." (Sections 81 and 83 of Act; §§ 5470 and 5472, General Code of Ohio.)

It is further provided that on the first Monday of October the Commission "shall ascertain and determine the gross earnings as herein provided, of each railroad company whose line is wholly or partially within this State, for the year ending on the thirtieth day of June next preceding, excluding therefrom all earnings derived wholly from interstate business or business done for the Federal Government. The amount so ascertained by the Commission shall be the gross earnings of such railroad company for such year." (Section 88 of Act; § 5477, Gen. Code.)

The act further provides that on the first Monday of November the Commission shall certify to the Auditor of State the amount of the "gross earnings so determined," (§ 93 of Act; § 5482, Gen. Code),—and that—"In the month of November, the Auditor of State shall charge for

collection, from each railroad company, a sum in the nature of an excise tax, for the privilege of carrying on its intrastate business, to be computed on the amount so fixed and reported to him by the Commission, as the gross earnings of such company on its intrastate business for the year . . . by taking four per cent. of all such gross earnings." (Section 97 of Act; § 5486, Gen. Code.). The tax is imposed equally and alike on corporations, partnerships, and individuals. (Section 39 of Act; § 5415, Gen. Code.)

Mr. Robert J. King and *Mr F. A. Durban* for appellants:

The Federal jurisdiction rests upon the presence of Federal questions.

The equity jurisdiction rests upon prevention of cloud upon real estate title, inadequacy of legal remedies, threatened irreparable damage and prevention of multiplicity of suits. Cooley on Taxation, p. 536; *Dows* v. *Chicago*, 11 Wall. 108, 112; *Shelton* v. *Platt*, 139 U. S. 591; *Ex parte Young*, 209 U. S. 123.

Under the constitution of Ohio, as construed by the Ohio Supreme Court in *Southern Gum Co.* v. *Laylin*, 66 Oh. St. 578, the legislature is without power to impose a privilege tax which is in excess of the value of the privilege taxed. Inasmuch as the admitted facts show the present tax upon appellants to wholly exceed such value, its exaction as to them violates the state constitution, and amounts to confiscation and a taking of their property without due process of law. *Adler* v. *Whitbeck*, 44 Oh. St. 539; *Barnes* v. *Brown*, 130 N. Y. 371; *Allegheny* v. *West. Penna. R. Co.*, 138 Pa. St. 375, 383; *Dillon* v. *Anderson*, 43 N. Y. 231; *Erickson* v. *Cass County*, 11 Nor. Dak. 494; *Galligher* v. *Jones*, 129 U. S. 193; *Gal., H. & S. A. R. Co.* v. *Texas*, 210 U. S. 223; Gray's Limitation of Taxing Power, §§ 47a, 1317; *Hagerty* v. *State*, 55 Oh. St. 613; *Hartford* v. *West Middle District*, 45 Connecticut, 462; *Martin* v. *Dist.*

of Col., 205 U. S. 135; *Nor. Pac. R. Co.* v. *Nor. Dak.*, 216 U. S. 579; *Norwood* v. *Baker*, 172 U. S. 269; *O'Brien* v. *Wheelock*, 184 U. S. 450; *Post. Tel. Co.* v. *Adams*, 155 U. S. 688, 697; *Shoemaker* v. *United States*, 147 U. S. 282; *Southern Gum Co.* v. *Laylin*, 66 Oh. St. 578; *State* v. *Guilbert*, 70 Oh. St. 229; *State* v. *Ferris*, 53 Oh. St. 314; *State Railroad Tax Cases*, 92 U. S. 575, 606; Sutherland on Damages, §§ 88, 89, 657, 692; *Walsh* v. *Barron*, 61 Oh. St. 15; *Warren* v. *Stoddart*, 105 U. S. 224; *West. Un. Tel. Co.* v. *Wright*, 185 Fed. Rep. 250, 257; *West. Un. Tel. Co.* v. *Mayer*, 28 Oh. St. 521; *Willcox* v. *Consol. Gas Co.*, 212 U. S. 19.

The tax in question is not a tax upon corporate franchises or privileges, as such, and cannot be saved on that theory. *Adler* v. *Whitbeck*, 44 Oh. St. 539; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107; *State* v. *Taylor*, 55 Oh. St. 61.

The tax is not an exercise of the police power for the purpose of meeting expenses incident to the regulation of railroads and other utilities. *Adler* v. *Whitbeck*, 44 Oh. St. 539; *Tennessee* v. *Whitworth*, 117 U. S. 129.

The value limitation, as laid down in the *Laylin* case, is for the protection of the individual and his property. Cooley's Const. Lim., 7th ed., p. 65; *Missouri Rate Cases*, 230 U. S. 474, 508; *Walsh* v. *Barron*, 61 Oh. St. 15.

There is an arbitrary and discriminatory classification. *Athens* v. *N. Y. &c. Tel. Co.*, 9 Pa. Dist. Rep. 253; *Barber* v. *Connolly*, 113 U. S. 27; *Beckett* v. *Mayor*, 118 Georgia, 58; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232; *Cache County* v. *Jensen*, 21 Utah, 207; *Clark* v. *Titusville*, 184 U. S. 329; *Findlay* v. *Frye*, 51 Oh. St. 390; *Gulf &c. Ry. Co.* v. *Ellis*, 165 U. S. 150, 165; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Jaeger* v. *Burr*, 36 Oh. St. 164; *Juniata Limestone Co.* v. *Gagley*, 187 Pa. St. 193; *Kentucky R. R. Tax Cases*, 115 U. S. 321; *Magoun* v. *Illinois Savings Bank*, 170 U. S. 283; *Minneapolis Ry. Co.* v. *Beckwith*, 129 U. S. 26; *Peoria* v. *Gugenheim*, 61 Ill. App. 374; *Railroad Co.* v. *Connelly*, 10 Oh. St. 159; *Railroad Co.* v. *Poland*, 10

Nisi Prius (N. S.) 617; *State* v. *Heinnan*, 65 N. H. 103; *State* v. *Moore*, 113 Nor. Car. 697; *State* v. *Whitcorn*, 122 Wisconsin, 110; *Uppington* v. *Oviatt*, 24 Oh. St. 232; *West. Un. Tel. Co.* v. *Wright*, 185 Fed. Rep. 250; *Wyatt* v. *Ashbrook*, 154 Missouri, 375; Wyman, §§ 39, 53, 97, 100, 106.

The four per cent. tax, in the case of railroads, was imposed because of their being extensively engaged in interstate commerce, and was intended to be and is a burden upon interstate commerce, in violation of the commerce clause of the Federal Constitution. *Brimmer* v. *Rebman*, 138 U. S. 78; *Galveston &c. Ry. Co.* v. *Texas*, 210 U. S. 217; *McCulloch* v. *Maryland*, 4 Wheat. 316; *Mugler* v. *Kansas*, 123 U. S. 623; *Express Co.* v. *Minnesota*, 223 U. S. 335, 341.

Should it be claimed that the privilege of carrying on the business has a value, if considered as property, sufficient to meet the requirements of the value limitation in the *Laylin Case*, the result is double taxation. *Adams Exp. Co.* v. *Ohio*, 165 U. S. 194; *S. C.*, 166 U. S. 185.

The tax is based upon all gross earnings, excepting only such as are derived wholly from interstate business and business for the Federal Government. The failure to exclude also earnings from foreign commerce, in which appellants are engaged, renders act invalid under commerce clause. *Eidman* v. *Martinez*, 184 U. S. 578; *Hepburn* v. *Ellzey*, 2 Cranch, 445; *Lord* v. *Steamship Co.*, 102 U. S. 541; *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298, 302; *Veazie* v. *Moor*, 14 How. 568, 573.

The act is unconstitutional because of its effort to prevent judicial inquiry and force obedience to its terms and to administrative acts thereunder, irrespective of their validity. It thereby denies due process and equal protection. *Davidson* v. *New Orleans*, 96 U. S. 97; *Goldberg* v. *Stablemen's Union*, 86 Pac. Rep. 806; *Jones* v. *Davis*, 35 Oh. St. 474; *Pierce* v. *Stablemen's Union*, 103 Pac. Rep. 324; *Southern Gum Co.* v. *Laylin*, 66 Oh. St. 578; *State* v. *Jones*, 51 Oh. St. 492, 516; *Ex parte Young*, 209 U. S. 123.

Mr. Frank Davis, Jr., and *Mr. Clarence D. Laylin*, with whom *Mr. Timothy S. Hogan*, Attorney General of the State of Ohio, was on the brief, for appellees:

It is necessary to examine into entire system of taxation of the State applicable to railroad companies in order to determine the validity and effect of the tax involved in the cases at bar. See *Gal., H. & S. An. R. R. Co.* v. *Texas*, 210 U. S. 217, 226; *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217; *U. S. Exp. Co.* v. *Minnesota*, 223 U. S. 323.

The contention is unfounded in law or in fact that under the constitution of Ohio, as construed by the Ohio Supreme Court, the legislature is without power to impose any privilege tax which is in excess of the value of the privilege taxed, and that inasmuch as the admitted facts show, it is alleged, the present tax upon appellants to wholly exceed such value, its exaction as to them violates the state constitution and amounts to confiscation and the taking of their property without due process of law. *Southern Gum Co.* v. *Laylin*, 66 Oh. St. 578; *Adler* v. *Whitbeck*, 44 Oh. St. 539; *Ashley* v. *Ryan*, 49 Oh. St. 504; 153 U. S. 436; *Express Company* v. *State*, 55 Oh. St. 69; *Hagerty* v. *State*, 55 Oh. St. 613; *State* v. *Ferris*, 53 Oh. St. 314; *Telegraph Company* v. *Mayer*, 28 Oh. St. 521.

For the nature of the privilege taxed by the law as involved in *Southern Gum Company* v. *Laylin*, and as to its being the privilege of corporate existence, as distinguished from the privilege of doing business as a corporation; and as to the tax being one on the franchise as distinguished from an excise occupation tax, see 1 Cooley on Taxation, 3d ed., pp. 31, 37; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107; *Southern Gum Co.* v. *Laylin*, 66 Oh. St. 578.

As to the element of natural monopoly, which is common to all the utilities taxed, and constitutes them such, see *Cin. Gas Light Co.* v. *State*, 18 Oh. St. 238, 243; *Munn* v. *Illinois*, 92 U. S. 113, 126; 1 Wyman on Pub. Serv. Corp. §§ 1, 50, 90; *Zanesville* v. *Gas Co.*, 47 Oh. St. 1, 33.

As to the burdens imposed upon the State and the public by the conduct of the business taxed see, *Adler* v. *Whitbeck*, 44 Oh. St. 539; *Express Co.* v. *Minnesota*, 223 U. S. 335; *Gal., H. & S. A. Ry. Co.* v. *Texas*, 210 U. S. 217.

As to corporate public utilities, the corporate franchise itself, see *Adams Exp. Co.* v. *Ohio*, 166 U. S. 185, 223; *Express Co.* v. *Minnesota*, 223 U. S. 335; *Gal., H. & S. A. Ry. Co.* v. *Texas*, 210 U. S. 217; *People* v. *Williams*, 200 N. Y. 93; *State* v. *C. & P. Ry. Co.*, 13 O. N. P. (N. S.) 671; *Ohio* v. *Traction Co.*, Franklin County Ct. of App., Dec. 6, 1913; *State* v. *Taylor*, 55 Oh. St. 61: *State Tax on Railway Gross Receipts*, 15 Wall. 284.

The so-called "value limitation" referred to in *Southern Gum Company* v. *Laylin*, 66 Oh. St. 578, was not intended to be and cannot be applied to the taxation of the privilege reached by the law involved in the cases at bar. *Adler* v. *Whitbeck*, 44 Oh. St. 539.

Even if the said "value limitation" could be applied generally to the imposition of the tax involved in the cases at bar, it cannot be invoked by an individual taxpayer to relieve him from the burden of the tax on a showing that his business is unprofitable. *Ashley* v. *Ryan*, 49 Oh. St. 504, 525, 526; *Baker* v. *Cincinnati*, 11 Oh. St. 549; *Cincinnati Gas Light Co.* v. *State*, 18 Oh. St. 238; Cooley's Const. Lim., 6th ed., 587, 588, 598, 606–613; 1 Cooley on Taxation, 3d ed., 3, 9, 31, 84, 181, 192, 225, 254, 390, 391, 684, 2 *Id.* 1153; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 108, 151; *Lander* v. *Burke*, 65 Oh. St. 532, 542; *Lewis* v. *State*, 69 Oh. St. 479; *Loan Asso.* v. *Topeka*, 20 Wall. 655, 664; *McCulloch* v. *Maryland*, 4 Wheat. 316, 428; *McNeil* v. *Hagerty*, 51 Oh. St. 255, 265; *Monnet* v. *State*, 45 Oh. St. 69; *Missouri Rate Cases*, 230 U. S. 474, 508; *Muller* v. *Oregon*, 208 U. S. 412; *Nor. Pac. R. R. Co.* v. *Nor. Dak.*, 216 U. S. 579; *Shotwell* v. *Moore*, 45 Oh. St. 646; *State* v. *Ferris*, 53 Oh. St. 314, 326; *State* v. *Guilbert*, 70 Oh. St.

253; *State Railroad Tax Cases*, 92 U. S. 575; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19.

Excise taxation in the pure sense is distinguished from taxation of franchises as such. See Century Dictionary; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 108, 151; *Missouri Rates Case*, 230 U. S. 474, 508; *Thomas* v. *United States*, 192 U. S. 372.

The Federal question sought to be raised by appellants depends upon their interpretation of *Southern Gum Company* v. *Laylin*, 66 Oh. St. 578; they do not and cannot claim under the Fourteenth Amendment to the Federal Constitution, independently of that decision. 1 Cooley on Taxation, 3d ed., 55; *Kelly* v. *Pittsburg*, 104 U. S. 78; *McCray* v. *United States*, 195 U. S. 27.

Equal protection of the laws of Ohio is not denied by the legislation involved in the cases at bar because of its alleged failure to apply to all "Public Utilities." *Am. Sugar Co.* v. *Louisiana*, 179 U. S. 89; *Armour Packing Co.* v. *Lacy*, 200 U. S. 226; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232; *Brown-Foreman Co.* v. *Kentucky*, 217 U. S. 563; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Kentucky R. R. Tax Cases*, 116 U. S. 321; *Magoun* v. *Illinois Savings Bank*, 170 U. S. 283; *Munn* v. *Illinois*, 94 U. S. 113; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114; *State ex rel.* v. *Ferris*, 53 Oh. St. 314, 341; *Cargill Co.* v. *Minnesota*, 180 U. S. 452.

The Ohio law does not deny the equal protection of the laws of the State because of the differences in the rates imposed by it upon different public utilities. *Kidd* v. *Alabama*, 188 U. S. 730; *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339; *Railroad Co.* v. *Poland*, 10 O. N. P. (N. S.) 617; *Savannah &c. I. Ry.* v. *Savannah*, 198 U. S. 392.

The act does not deny the equal protection of the laws of Ohio because of its failure to classify railroads for excise tax purposes according to any alleged notorious

differences among them. *Blackstone* v. *Miller*, 188 U. S. 189; 1 Cooley on Taxation, 3d ed., 390, 391; *Muller* v. *Oregon*, 208 U. S. 412.

The readjustment of rates of excise taxation made by the Ohio legislature following the decision in *Galveston, Harrisburg and San Antonio Railroad Company* v. *Texas*, 210 U. S. 217, does not disclose an intention indirectly to burden or to continue to burden interstate commerce as such. 1 Cooley on Taxation, 3d ed., 41, 411; *People* v. *Brooklyn*, 4 N. Y. 419, 426, 427; *Ratterman* v. *Telegraph Co.*, 127 U. S. 411.

The tax imposed by the Ohio law is not in effect an additional tax upon property. *Adler* v. *Whitbeck*, 44 Oh. St. 539; *Anderson* v. *Brewster*, 44 Oh. St. 576; *Ashley* v. *Ryan*, 49 Oh. St. 504; *Express Co.* v. *State*, 55 Oh. St. 69; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107; *State* v. *Ferris*, 53 Oh. St. 314; *Telegraph Co.* v. *Mayer*, 28 Oh. St. 521.

Foreign commerce is not burdened by the act. *Ratterman* v. *West. Un. Tel. Co.*, 127 U. S. 424, 425.

The alleged coercive sections of the Ohio law properly interpreted violate no constitutional limitation; but even if regarded as unconstitutional, their invalidity does not affect the substantive provisions of the act; nor can their validity be questioned in these cases. *Flint* v. *Stone-Tracy Co.*, 200 U. S. 177; *Minnesota Rate Cases*, 230 U. S. 352; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 53, 54; *Ex parte Young*, 209 U. S. 123.

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

These two cases depend upon practically identical facts, and present the same questions of law.

The Federal jurisdiction arose because of the Federal questions presented in the record, and did not depend upon diversity of citizenship; and it extends of course to

the determination of all the questions presented, irrespective of the disposition that may be made of the Federal questions. *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175, 191; *Michigan Central R. Co.* v. *Vreeland*, 227 U. S. 59, 63.

The right to invoke the equity jurisdiction is clear; for the Act specifically makes the tax a lien upon the real estate of appellants, from the cloud of which they sought to free it by the bringing of these actions (§ 117 of Act; § 5506, Gen. Code); and the bills alleged threatened irreparable injury through the enforcement of the penalties and coercive features of the Act. *Shelton* v. *Platt*, 139 U. S. 591, 598; *Ex parte Young*, 209 U. S. 123.

The following are the questions to be disposed of:

First, it is insisted by appellants that under the state constitution, as construed by the Ohio Supreme Court in *Southern Gum Co.* v. *Laylin*, 66 Oh. St. 578, the legislature is without power to impose a privilege tax which is in excess of the value of the privilege; that the admitted facts show the present tax upon appellants respectively to be in excess of such value; and that therefore as to them its exaction violates the state constitution, and amounts to confiscation, and a taking of property without due process of law.

As to the facts upon which this contention is based, the bill of complaint of the Marietta, Columbus & Cleveland Railroad Company shows that the tax charged against it for the year 1911 amounts to $2,301.24; that the capital of the company is all, or practically all, invested in its railroad; that this investment was and is a reasonable and proper one; that due care and prudence have been used in the construction, maintenance and operation of the property and the conduct of the business; that the greatest economy has been and is being practiced in the effort to make the railroad yield a fair return upon the investment; but that notwithstanding these efforts it has

never been able to earn, and is not now able to earn, from interstate or intrastate business, or both combined, after paying necessary and proper expenses, including taxes other than the excise tax, a return on the investment in its railroad, or on the value thereof, equal to the current rate of return on legitimate high-grade investments at all times readily available in the market; nor have its intrastate earnings, after deducting operating expenses properly attributable thereto, been sufficient to yield a return on that portion of its investment properly attributable to intrastate operations, equal to the current rate of return on legitimate high-grade investments; that, on the contrary, the gross earnings have not been and are not sufficient to pay actual operating expenses, and that this condition will continue to exist during the year which the excise tax is intended to cover.

The bill of complaint of the Ohio River and Western Railway Company contains similar averments, except as to its inability to pay actual operating expenses. Its tax amounts to $6,653.60.

The case referred to, *Southern Gum Co.* v. *Laylin*, 66 Oh. St. 578, dealt with an Act of April 11, 1902, known as the Willis Law. The court held it to be an excise or franchise tax, not a property tax, and therefore not subject to the express limitations imposed by the state constitution upon taxes of the latter kind, but only to such limitations as were to be implied from certain other provisions of the constitution, respecting which the court said (p. 594): "The constitution was established to 'promote our common welfare.' Preamble to the constitution. Government is instituted for the equal protection and benefit of the people. Section two of the bill of rights. Private property shall ever be held inviolate, but subservient to the public welfare. Section nineteen of the bill of rights. These provisions of the constitution are implied limitations upon the power of taxation of privileges

and franchises, and limit such taxation to the reasonable value of the privilege or franchise conferred originally, or to its continued value from year to year. *Ashley* v. *Ryan*, 49 Ohio St. 504; *State ex rel.* v. *Ferris*, 53 Ohio St. 314; and *Hagerty* v. *State*, 55 Ohio St. 613, are examples of taxing the privilege or franchise conferred; while *Telegraph Company* v. *Mayer*, 28 Ohio St. 521, and *Express Company* v. *State*, 55 Ohio St. 69, are examples of taxing the continued value of the existing privilege or franchise from year to year. These limitations prevent confiscation and oppression under the guise of taxation, and the power of such taxation cannot extend beyond what is for the common or public welfare, and the equal protection and benefit of the people; but the ascertaining and fixing of such values rests largely in the general assembly, but finally in the courts."

This proposition is carried into the syllabus, which, under the rules of practice of the Supreme Court, is to be prepared by the judge assigned to prepare the opinion, is to be confined to the points of law arising from the facts of the cause that have been determined by the court, is to be submitted to the judges concurring therein for revisal before its publication, and is to be inserted in the book of reports.

An examination of the state decisions cited in the *Laylin Case*, with others referred to in the opinion of the District Court and in the briefs of counsel, convinces us that the District Court was correct in its conclusion that the state court, in the *Laylin Case*, dealt with a general law and its operation on all corporations of given classes throughout the State, and not with its effect upon specific financially weak corporations; that it was not intended to hold that the courts as final arbiters might overthrow a law imposing a tax on privileges and franchises merely because in isolated cases such law might impose a hardship, but only that those excise laws whose general operation is confiscatory and oppressive are unconstitutional.

Nor do we think that from the facts of the present case it is to be inferred that the franchises of plaintiffs in error are valueless merely because it appears that the present earnings of the railroads are not sufficient to pay more than can be derived from legitimate high-grade investment securities that are readily available on the market, or (in the case of one of the roads), are not even sufficient to pay operating expenses. Upon this point we are content to refer to, without repeating, the language employed by Mr. Justice Miller, speaking for this court in *State Railroad Tax Cases*, 92 U. S. 575, 606.

Secondly, it is contended that the Act arbitrarily discriminates against plaintiffs in error and other railroad companies in that (a), it does not include all other public utilities carrying on business within the State; those omitted, as is said, being grain elevators, stock-yards, ferries, bridge companies, and inn-keepers; and (b), the law does not operate uniformly among the utilities that are taxed, since, on electric light, gas, natural gas, water works, telephone, messenger or signal, union depot, heating, coaling, and water transportation companies, the tax amounts to 1.2% of gross intrastate receipts, as to suburban and interurban railroads it is fixed at 1.2% of gross intrastate earnings, and on express and telegraph companies, it is 2%; while on railroads, including plaintiffs in error, it is 4% of such earnings, and the same on pipe line companies.

Both of these contentions turn upon the familiar question of classification, concerning which so much has been written. We agree with the court below that whether the question be considered in view of the uniformity and equality provisions of the Ohio constitution, or of the "equal protection" clause of the Fourteenth Amendment, the result is the same; it cannot be said that the classification rests upon no reasonable and sufficient basis of distinction. *State* v. *Guilbert*, 70 Oh. St. 229, 253; *Kentucky*

Railroad Tax Cases, 115 U. S. 321, 337; *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 293; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 121 *et seq.*

In the third place, it is insisted that the act, as applied to railroads, is a burden upon their foreign commerce.

This contention is rested in part upon the language of §§ 83 and 88, which in terms provide for ascertaining the earnings of the railroad "from whatever source derived, for business done within this State, excluding therefrom all earnings derived wholly from interstate business or business done for the Federal government." This, it is argued, has the effect of imposing a tax with respect to the gross receipts from foreign commerce, because such commerce is not expressly excepted. Section 97, however, indicates an intent to take into consideration for the purpose of measuring the excise tax only the earnings upon intrastate business, and it seems clear enough that in the former sections the word "interstate" was used as meaning "not intrastate," rather than in its technically correct signification. Certainly, in the absence of a construction by the state court of last resort to the effect that the receipts from foreign commerce are to be included, and without any attempt on the part of the taxing authorities to include them, the Federal courts ought not to place a construction upon the act that would render it unconstitutional.

Fourthly, it is contended that the history of the legislation upon the subject shows that the act of May 31, 1911, was really contrived to impose upon the railroad companies a franchise tax proportionate to their interstate commerce, and that such is its actual as well as intended effect.

It is said that the present act is a reënactment, without material change so far as present purposes are concerned, of an act of March 10, 1910; that prior to the latter act

a law known as the Cole Law was in force, under which each railroad was compelled to pay a tax equal to one per centum of its entire gross earnings, computed by multiplying the average gross earnings per mile over the entire system by the number of miles in Ohio; that this act was obnoxious to the "commerce clause" of the Federal Constitution, for the reasons that entered into the decision of this court in *Galveston, Harrisburg &c. Ry. Co.* v. *Texas*, 210 U. S. 217; that after the decision of this case in May, 1908, it was anticipated that the Cole Law would probably be held unconstitutional (as it has since been held by an inferior state court in Ohio), and so the Legislature contrived the act of March 10, 1910, for the purpose of imposing a tax upon the railroads as heavy as that imposed by the Cole Law, while avoiding the form of that enactment; and that for this reason the act of March 10, 1910, increased the percentages in accordance with which the taxes were to be severally determined as follows: Railroads and pipe line companies from 1 to 4 per cent.; express and telegraph companies from 1 to 2 per cent.; all other utilities from 1 to 1 1–5 per cent.; but that instead of taking all the gross earnings, the new percentages were to be applied only to intrastate earnings. It is contended that the increase in the percentages as to railroad and pipe line companies was due to the fact that it was conceived that about three-fourths of their business was interstate, and that therefore a tax of 4% on the intrastate earnings would be about equal to a tax of 1% on the total; in other words, that the tax rate was increased fourfold because such utilities were engaged in interstate commerce.

The tax is, however, in substance as well as in form, an excise or privilege tax. Its reasonableness, unless some Federal right be violated, is within the discretion of the state legislature. We have seen that the classification adopted cannot be deemed illusory; that is, there is no

apparent violation of the equality provisions of the state constitution or of the "equal protection" clause of the Fourteenth Amendment, although railroad and pipe line companies are required to pay at the rate of four per cent. of the annual intrastate earnings, while other public service corporations pay a less percentage. It is, of course, entirely settled that a State cannot, consistently with the Federal control of interstate commerce, lay such taxes, either upon property rights or upon franchises or privileges, as in effect to burden such commerce. But the line is not always easily drawn, as recent cases sufficiently show. *Galveston, Harrisburg &c. Ry. Co.* v. *Texas*, 210 U. S. 217, 225, 229; *United States Express Co.* v. *Minnesota*, 223 U. S. 335, 344; *Williams* v. *Talladega*, 226 U. S. 404, 416; *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 82.

The present act does not on its face manifest a purpose to interfere with interstate commerce, and we are unable to accept the historical facts alluded to as sufficient evidence of a sinister purpose, such as would justify this court in striking down the law. We could not do this without in effect denouncing the legislature of the State as guilty of a conscious attempt to evade the obligations of the Federal Constitution. Assuming the law was changed in 1910 because of a fear that the Cole Law would be held unconstitutional, the mere fact that, while excluding interstate earnings from the multiplicand, the multiplier was increased, is not of itself deemed sufficient evidence of an unlawful effort to burden a privilege that is not a proper subject of state taxation.

Fifthly, it is contended that the act is in effect a double tax upon property, and hence lacking in the uniformity required by the state constitution. But, as was pointed out by the District Court, the exaction of four per cent. of the gross intrastate earnings is not a property tax but an excise tax, whose amount is fixed and measured by such earnings; and double taxation in a legal sense does not

exist unless the double tax is levied upon the same property within the same jurisdiction. Plaintiffs in error pay one tax with respect to property, another with respect to the privilege or occupation; hence the taxation is not double. *Bradley* v. *Bauder*, 36 Oh. St. 28, 35; *Southern Gum Co.* v. *Laylin*, 66 Oh. St. 578, 596.

The so-called double tax is also laid hold of as a ground for the contention that there is a denial of equal protection within the meaning of the Fourteenth Amendment. This, however, is but another form of the objection to the classification, which has already been disposed of.

Finally, it is contended that the act is unconstitutional because of the severity of the penalties imposed for withholding the tax. But these actions do not involve any present attempt to enforce the penalties; and the act contains a section (160) which in terms declares: "The sections of this act, and every part of such sections, are hereby declared to be independent sections and parts of sections, and the holding of any section or part thereof to be void or ineffective shall not affect any other section or part thereof." The penalty clauses, if themselves unconstitutional, are severable, and there is therefore no present occasion to pass upon their validity. *Ex parte Young*, 209 U. S. 123; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53, 54; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 177; *Grand Trunk Ry.* v. *Michigan Ry. Comm.*, 231 U. S. 457, 473.

Decrees affirmed.

MR. JUSTICE DAY took no part in the decision of these cases.

PAINE *v.* COPPER BELLE MINING COMPANY OF ARIZONA.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 181. Submitted January 21, 1914.—Decided March 2, 1914.

The meaning of the arrangement between the parties having been matter for a finding and had the sanction of both courts below and the evidence not being reported, this court will not say that such finding was wrong.

13 Arizona, 406, affirmed.

THE facts are stated in the opinion.

Mr. Walter Bennett for appellant.

Mr. John B. Wright and *Mr. James F. Mack* for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action brought by the appellants upon a promissory note for $265,416.72 made by the appellee. The defence is want of consideration, and depends upon the question whether certain payments made by one Moneuse were made by way of loan or for the purchase of stock; the note having been issued as for a loan to the Company. The material facts are few. An earlier company, into the shoes of which the appellee has stepped, was in bankruptcy, and Moneuse, a stockholder, was suing certain others for the return to the Company of a large part of the stock. On June 4, 1903, a compromise was made, reciting as one ground that the Company owned mining claims which in the opinion of all the parties were of great value but which the Company was in great danger

of losing unless money was raised to work them. Moneuse agreed to 'provide and supply' enough money to 'pay off and discharge' the Company's debts and to work the Company's mines for not more than three years until they paid for working themselves. He was to get the Company out of bankruptcy and into possession of its property, subject to certain mortgages. The others were to get fifty per cent. of the authorized stock into the treasury and this amount, less what already was held by Moneuse, the Company was to issue and deliver to him 'in consideration of the advance by [him] of the moneys which are to be paid and advanced by him, as above provided for, and without further consideration whatsoever.' Moneuse also was to have control.

This agreement was carried out and the total disbursements of Moneuse were more than the amount of the note. Nine months after the compromise, a stockholder's meeting authorized a transfer of the Company's property to the appellee on the condition among others, that it should "assume and discharge the indebtedness of this Company to Elie J. Moneuse"; but on February 29, 1904, the characterization of the advance as a loan and the portion of the resolutions quoted were 'withdrawn and rescinded' at the suggestion and with the concurrence and vote of Moneuse. Afterwards on July 17, 1907, Moneuse being still in control of the Company, the note in suit was issued. The case was tried on behalf of intervening minority stockholders without a jury. The trial court found for the defendant, and the judgment was affirmed by the Supreme Court of the Territory. 13 Arizona, 406.

It cannot be said that the finding was wrong as matter of law. It is true that the agreement speaks of the money that was to be furnished by Moneuse as an 'advance' by him but it was an advance to pay off the Company's debts not merely to change the creditor. The clause that throws the clearest light upon the meaning is the recitation

that the Company's mining claims were of great value in the opinion of all the parties to the contract. That being so, it was natural that a stockholder who had the money should be willing to pay off certain debts (about $45,000), as a consideration for getting the greater part of the stock, and should be willing to work the mines for a time if he had the Company and the duration of the experiment under his control. It would seem to have been less natural for the other stockholders to part with the larger share in the rights they deemed so valuable simply as a bonus to induce Moneuse to take the former creditors' place and try his hand at the work. There are set forth in the statement some facts that we have not reproduced, because we think it unnecessary in view of the present position of the case. It is enough to say that in our opinion the appellants would not profit by a fuller consideration. The meaning of the arrangement, to which neither Company was a party, seems to have been matter for a finding. *Rankin* v. *Fidelity Insurance, Trust & Safe Deposit Co.*, 189 U. S. 242, 252, 253; *MacDonald* v. *Morrill*, 154 Massachusetts, 270, 272. The evidence is not reported, and the finding has the sanction of two courts. There is not enough before us to enable us to say that it was wrong.

Judgment affirmed.

UNITED STATES EX REL. BROWN *v.* LANE, SECRETARY OF THE INTERIOR.[1]

APPLICATION FOR ALLOWANCE OF WRIT OF ERROR.

No. . Submitted February 24, 1914.—Decided March 2, 1914.

Although, on the face of the record, this court may have jurisdiction to review a judgment, the right of review does not obtain where the formal questions presented by the record are absolutely frivolous and devoid of all merit. *Consolidated Turnpike Co.* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596.

The foregoing rule heretofore generally announced in regard to cases coming from state courts, applies to cases coming from the Court of Appeals of the District of Columbia under the third and fifth paragraphs of § 250, Judicial Code.

Vesting the Secretary of the Interior with power not only to appoint members of a tribal council of an Indian tribe but also with the power to remove such members for good cause to be by him determined, is not unconstitutional because it permits such removal without notice or hearing, nor does it deprive a member so removed of any property rights without due process of law in violation of the Fifth Amendment.

Under § 9 of the act of June 28, 1906, dividing the lands and funds of the Osage Indians and providing for the appointment by the Secretary of the Interior of a tribal council, the authority to remove members from such council for good cause to be by him determined is not qualified by necessity of notice or hearing to the members so removed.

Writ of error to review 40 App. D. C. 533, denied.

THE facts, which involve the jurisdiction of this court to review judgments of the Court of Appeals of the District of Columbia and the construction of the Osage Indian Act of 1906, are stated in the opinion.

Mr. Andrew Wilson, Mr. Albert L. Wilson and *Mr. James P. Schick* for plaintiff in error.

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[1] Original docket title United States *ex rel.* Brown *v.* Fisher, Secretary of the Interior.

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

The act of June 28, 1906, c. 3572, 34 Stat. 539, 545, entitled "An Act for the division of the lands and funds of the Osage Indians in Oklahoma Territory, and for other purposes" in its ninth section provided among other things for a tribal council composed of eight persons. The members of this council were to be chosen at an election whose date was fixed and which was to be conducted in the manner directed by the Commissioner of Indian Affairs, provision being made for the biennial recurrence of such election and consequently for a two years' term for the members of the council. The provision, however, creating the council contained this express qualification: "And the Secretary of the Interior is hereby authorized to remove from the council any member or members thereof for good cause, to be by him determined." On January 2, 1913, the Secretary of the Interior, in the exertion of the power thus conferred, by a formal order removed "each and every member of the council." It was declared in the order that the power exercised was exerted for good cause, and this statement was followed by a specification of various acts of misfeasance or nonfeasance, which it was deemed rendered the removal necessary. Among those who were thus removed, was A. H. Brown, the relator, who shortly after the action of the Secretary, that is, in February, 1913, commenced proceedings by mandamus to vacate the order on the ground that it had been made without previous notice and without affording an opportunity to be heard and to defend, and therefore was not authorized by the statute, and if it was authorized was void because repugnant to the due process clause of the Fifth Amendment.

The trial court denied the relief and the Court of

Appeals of the District in affirming such action held that the statute conferred upon the Secretary power to remove without necessity of notice or hearing and moreover that as so construed the statute was not in conflict with the Constitution (40 App. D. C. 533). This application for the allowance of a writ of error is before us because of the reference of the same to the court by the Chief Justice to whom it was primarily presented.

The asserted right to the writ is based upon the third, fifth and sixth paragraphs of § 250 of the Judicial Code: the third conferring the right to review "in cases involving the construction or application of the Constitution of the United States, or the constitutionality of any law of the United States"; the fifth giving such right "in cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question"; and the sixth also giving the right to review in cases "in which the construction of any law of the United States is drawn in question by the defendant." On the face of the record from a merely formal point of view it is apparent that the case as presented is embraced within both the third and fifth paragraphs. But it is elementary that where the jurisdiction depends upon the presence of controversies of a particular character or the existence of prescribed questions or conditions, substance and not mere form is the test of power and therefore even in a case where the requisite for jurisdiction formally exists the right to review does not obtain where it is evident that the formal questions as presented by the record are so wanting in substance as to cause them to be frivolous and devoid of all merit. *Consolidated Turnpike Co.* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 600, and cases cited. It is true that the doctrine has generally found expression in considering the right to review cases coming from state courts, but the principle is here directly and necessarily applicable

in consequence of the nature and character of the limitations imposed by the statute upon the right to review cases decided by the Court of Appeals of the District of Columbia. Coming to test the existence of jurisdiction to review the controversy and consequently to determine whether the writ prayed for should be allowed we are clear that the propositions upon which it is asserted jurisdiction to review exists are so wholly unsubstantial and frivolous and devoid of all merit as to afford no ground whatever for the exercise of jurisdiction and the consequent allowance of the writ.

This conclusion is reached because we are of the opinion that on the face of the statute it plainly vested the Secretary of the Interior with the power and discretion to remove without the necessity of giving notice or affording a hearing and because we are unable to perceive any basis whatever for the contention that if the statute gives such power it conflicts with the Fifth Amendment. The right to membership in the council which the statute created and the power to remove at discretion which it conferred on the Secretary of the Interior were indissolubly united, and it is impossible to admit the existence of the one without recognizing the other and therefore to adopt the premise upon which the proposition must rest would be but to destroy the right to continue in office which the proposition is urged to maintain, since the office may not be treated as existing free from the safeguards concerning the discharge of its duties which the statute provides. The argument is not strengthened by confounding the asserted right of the relator to continue to be a member of the tribal council with rights of property assumed to exist in favor of the members of the tribe, and upon the resulting confusion to urge that the assumed rights of property will be taken without due process if the authority of the Secretary to remove a member of the tribal council without notice and hearing be upheld. On the contrary, if the

possession of the asserted property rights be assumed, it must follow that the power to remove, given by the statute, must be sustained. Considering the context of the act, the limitation which it imposes upon the members of the tribe and the tribe itself to contract and the large administrative supervision over such subjects which the statute confers upon the Secretary, it is not disputable that the right to remove for "good cause to be by him determined" which the statute gives to the Secretary is but an appropriate means provided for the accomplishment of the duties cast upon him with reference to the subject-matters stated. Under these circumstances the proposition could not be maintained without holding that although the duty existed to protect by appropriate legislation the tribe and its members, such legislation if enacted, would be repugnant to the Constitution.

Writ denied.

YOUNG, ADMINISTRATRIX, *v.* CENTRAL RAILROAD COMPANY OF NEW JERSEY.

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

No. 389. Argued February 26, 1914.—Decided March 9, 1914.

The Circuit Court of Appeals having, pursuant to the state court practice in Pennsylvania, reversed a judgment in favor of the plaintiff and remanded to the trial court with instructions, not for new trial, but for judgment for defendant, *non obstante veredicto*, this court affirms the judgment of reversal so far as the case is remanded to the trial court, but reverses it as to the direction to enter judgment for defendant, and remands the case to the trial court for a new trial conformably with the provisions of the Seventh Amendment. *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364.

200 Fed. Rep. 359, modified and affirmed.

THE facts are stated in the opinion.

Mr. Ulysses S. Koons, with whom *Mr. Vedantus B. Edwards* was on the brief, for plaintiff in error.

Mr. Arthur G. Dickson, with whom *Mr. Arthur W. Rinke* was on the brief, for defendant in error.

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

As administratrix of the estate of her deceased husband, the plaintiff in error sued to recover for the loss occasioned by his death alleged to have resulted from the negligence of the defendant railroad company. Over the objection of the defendant the case was submitted by the trial court to the jury and from the judgment entered on the verdict rendered against the railroad company, error was by the company prosecuted from the Circuit Court of Appeals. On the hearing that court concluding that the evidence did not justify the submission of the case to the jury, reversed the judgment and in passing upon a motion made by the railroad company in the trial court, pursuant to the Pennsylvania practice for judgment in its favor *non obstante veredicto* it was held that the motion was well taken and the case was remanded to the trial court not for a new trial, but with directions to enter a judgment for the defendant. (200 Fed. Rep. 359.) As the case as made by the pleadings depended not merely upon diverse citizenship, but was expressly based on the Employers' Liability Act, error was prosecuted from this court.

We shall not undertake to analyze the evidence or review the grounds which led the court below to conclude that error was committed in submitting the case to the jury, because we think it is adequate to say that after a careful examination of the record we see no reason for holding that the court below erred in so deciding. As regards however, the ruling on the motion for judgment

non obstante veredicto, it is apparent in view of the recent decision in *Slocum* v. *Insurance Company*, 228 U. S. 364, that error was committed. It follows that our duty is to affirm and modify; that is, to affirm the judgment of reversal and to modify by reversing so much of the action of the court below as directed the entry of a judgment in favor of the defendant. Conformably to this conclusion it is ordered that the judgment of reversal be, and the same is hereby affirmed, and that the direction for entry of judgment in favor of defendant be reversed and the case is remanded to the trial court with directions to set aside its judgment and grant a new trial.

Affirmed and modified.

PRIEST *v.* TRUSTEES OF THE TOWN OF LAS VEGAS, NEW MEXICO.

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

No. 218. Submitted January 28, 1914.—Decided March 9, 1914.

A judgment in a suit to quiet title to real property in New Mexico is not binding on a person or corporation or trustees having an interest in the premises who could be definitely located and served with process and who were not joined by name. The court did not acquire jurisdiction over them.

The statutes of New Mexico which, in 1894, permitted unknown claimants to be joined as defendants as such and to be served by publication, did not relate to parties who could be definitely located and joined or who were confirmees of the grant including the property under the act of June 21, 1860.

In affirming a judgment, an appellate court is not confined to the grounds on which the court below based the judgment.

The full faith and credit clause and statutes enacted thereunder do not apply to judgments rendered by a court having no jurisdiction

of the parties or subject-matter or of the *res* in proceedings *in rem*. *Thompson* v. *Thompson*, 226 U. S. 551, distinguished.

A town in New Mexico and its inhabitants are substantial entities in fact, and in this case have been recognized by Congress as having rights to be authenticated by a patent. When a town is a patentee it represents not only individual, but collective, interests. *Maese* v. *Herman*, 183 U. S. 572.

Proceedings against some of the inhabitants of a town *held* in this case not to bind the other inhabitants individually, or collectively as a town, on the ground of privity.

16 New Mex. 692, affirmed.

THE facts, which involve the construction of statutes of New Mexico in regard to serving process in real estate action on unknown defendants and the effect of a judgment based on service by publication, are stated in the opinion.

Mr. John D. W. Veeder for appellants.

Mr. Charles A. Spiess and *Mr. S. B. Davis, Jr.*, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action for mandamus brought by appellants in the District Court of the county of San Miguel, then in the Territory of New Mexico, against appellees as trustees of the town of Las Vegas to require them to execute a deed or deeds to the property described in the petition. The appellees filed an answer to the petition and also a counter-claim. Those papers set out the history of the Las Vegas grant, preceding and subsequent to its confirmation by the act of Congress hereinafter referred to and the final patent to the town. Motions to strike them out were overruled, and demurrers to them were also overruled. An answer having been filed to the counter-claim by appellants, portions of which were struck out by the court

on motion of appellees, after hearing judgment was rendered dismissing the petition. The judgment was affirmed by the Supreme Court of the Territory.

The petition alleges appellants to be the owners in fee simple and holders of a perfect title to the land described therein and that it lies within the boundaries of "The Las Vegas Land Grant." That they acquired the title thereto between October 4, 1888, and July 1, 1894, by purchase from the then owners and occupants of the several portions comprising the tract and obtained deeds of conveyance therefor and afterwards instituted proceedings in the District Court of San Miguel County against certain named persons "and all the unknown claimants of interests in the lands and premises" adverse to appellants, to quiet their title to the lands, and that on September 15, 1894, a decree was duly entered in the cause confirming and establishing in them an estate in fee simple, absolute, against any and all and every adverse claim of all persons whomsoever, and quieting and setting at rest the title to the land against appellees. A copy of the decree is attached to the petition.

The petition also alleges that the Las Vegas grant was confirmed by act of Congress on June 21, 1860, to the town of Las Vegas and became thereby segregated from the public domain and the property of the grantee and its privies.

That Jefferson Reynolds, Eugenio Romero, Charles Ilfeld, Elisha V. Long, Isidor V. Gallegos, Felix Esquibel and F. H. Pierce are the trustees of the town, duly appointed by the District Court of San Miguel County under and by virtue of an act of the Legislative Assembly of the Territory of New Mexico entitled "An Act to Provide for the Management of the Las Vegas Grant, and for other purposes," approved March 12, 1903, and that it was made the duty of the board of trustees to make, execute and deliver deeds of conveyance to all persons who held a

title to any lands of the grant, which became or was perfect or entitled them to the possession thereof at the time of the acquisition of New Mexico, under the treaty of Guadalupe Hidalgo, or at any time subsequent thereto.

That appellants made application to the board of trustees to execute and deliver a deed to them of the tract of land described, the title to which had become perfected by the decree hereinbefore specified, but the board declined to recognize the title of appellants and to issue the deed of conveyance asked for.

Mandamus, directed to the board, was prayed.

The ground of appellants' petition, therefore, is that they possess a perfect title established by the suit and decree referred to which entitled them to a deed from the trustees under the act of the Legislative Assembly of March 12, 1903. Laws of New Mexico, 1903, 72. That act becomes a factor for consideration. By it the District Court of San Miguel County is vested with jurisdiction to manage, control and administer the land grant. In the exercise of such jurisdiction power is conferred to appoint a board of trustees from among the residents upon the grant. Provision is made for their organization, and the court is empowered to exercise the same control over their acts as courts of equity exercise over receivers. And it is provided that "this act shall not interfere with or prejudice any vested rights in and to any of the lands embraced within the boundaries of said Las Vegas Grant, or preclude a judicial examination or adjustment thereof, and it is hereby made the duty of said board of trustees to make, execute and deliver deeds of conveyance to any and all persons who hold a title to any such lands, which became or was perfect or entitled them to the possession thereof at the time of the acquisition of New Mexico, under the treaty of Guadalupe Hidalgo, or at any other time subsequent thereto." (§ 7.)

By § 9 the board has power, under the direction of the

court, to lease, sell or mortgage any part or parts of the grants, the proceeds to be used "for such purposes as said board and court may deem to be for the best interests of the community for the benefit of which said grant was made."

It will be seen, therefore, that the statute makes it the duty of the trustees, it may be under the direction of the court, to execute and deliver deeds of conveyance to any one having the kind of title described, that is, which had become or was perfect or entitled such person to land which he claimed at the time of the acquisition of New Mexico, under the treaty of Guadalupe Hidalgo, or at any other time subsequent thereto. Appellants rely upon such title, as we have seen, as established by the suit to quiet title and the decree rendered therein. A consideration of this suit and decree, therefore, becomes necessary.

The suit was brought in the District Court of San Miguel County, Territory of New Mexico, by appellants against certain named defendants and "all the unknown claimants of interests in the premises and lands" which were described. The complaint alleged that appellants were owners in fee simple and the occupants and possessors of the land, that it lay within the exterior boundaries of a grant of land made by the Mexican Government to certain named parties in the year 1835 "for the use and benefit of the inhabitants and settlers of the Town of Las Vegas"; that the grant was known in the archives of the Surveyor General of New Mexico as private land claim number 20 and, as such, on June 21, 1860, duly confirmed by act of Congress of the United States to the Town of Las Vegas, and thereby became segregated from the public domain. That the land described in the complaint as belonging to appellants was taken possession of by them and their grantors under and by virtue of the terms and provisions of the said Las Vegas grant, and the laws of the Territory of New Mexico applicable thereto, more than

ten years prior to the commencement of the suit, and that they and their grantors from whom they claim title and from whom they have deeds of conveyance have been in the actual, exclusive, open and uninterrupted adverse possession under claim of title and have therefore a good and indefeasible title in fee simple to the land and are entitled to occupy and hold possession thereof.

It was alleged that certain persons, naming them, made some claim adverse to the complainants in the suit (appellants here), but what the nature and extent of their claim was complainants were unable to state. And it was alleged that there were certain unknown successors of the Fairview Town Company who made some claim of interest in and title to the land, but the nature and extent of the claim was unknown.

Then the following was alleged: "That your orators are credibly informed and believe that certain unknown persons, designated in this bill as 'Unknown Claimants of interest in the premises adverse to your orators' also make some claim of interest and title in and to the said tract of land adverse to the estate of your orators, but what the nature and extent of the said claim of said unknown persons in and to the said tract of land is, is likewise to your orators unknown."

It was finally alleged that all of the claims and pretenses of the defendants in the suit, known and unknown, adverse to the estate of complainants were of no avail against their title and constituted a cloud upon it. It was prayed that the title of complainants be established against all of the defendants and that it be forever quieted and set at rest, and process was prayed.

An affidavit for publication of process was filed in which it was recited among other things "that the place of residence is unknown and the whereabouts cannot be discovered of any and all of the defendants designated as unknown claimants of interests in the premises and lands

described in the bill of complaint, who claim adversely to the complainants, George E. Priest, Melvin W. Quick and Charles M. Benjamin."

Publication was made. There was no appearance on the part of any of the defendants, and the bill of complaint was ordered to be taken as confessed; and it was decreed that all of the defendants were brought before the court by proper process and that the court had jurisdiction of them, whether known or unknown, and jurisdiction of the subject-matter of the suit; that the land lay within the exterior boundaries of the Las Vegas grant, as described, was confirmed by Congress as alleged, and that in consequence of the grant and confirmation the land was segregated from the public domain and became and was the private property of the grantees and their privies. That the complainants in the suit and their grantors from whom they claimed and from whom they had deeds of conveyance were in the adverse possession of the land as alleged and that as a consequence thereof complainants were entitled to the relief for which they prayed. And it was decreed that the right, title and interest of complainants was an estate in fee simple absolute and that the same be established in them and that the defendants be barred and estopped from having or claiming or asserting any right, title, or interest whatsoever adverse to the complainants or any of them and that their title to the land, and each and every part thereof, be forever quieted and set at rest.

It will be observed that the title set up by appellants in the suit to quiet title and sustained by the decree depended upon adverse possession—in other words, upon the statute of limitations; and the trial court in the case at bar considered that aspect of the case and decree only and found that the statute did not begin to run until after the passage of the act of 1903 and the appointment of the board of trustees and that possession of appellants

and their predecessors in title for a period of ten years prior to the act and the appointment of the trustees could not ripen any title against appellees.

The court, therefore, adjudged that the decree in favor of appellants of September 15, 1894, quieting title in them was not binding upon appellees and the petition herein was dismissed.

The Supreme Court, however, considered this position untenable, saying that if "the court had jurisdiction, as against defendants, to render the decree of 1894, all the findings upon which that decree proceeds are likewise conclusive against it and it avails nothing to inquire, as did the trial court, into whether such findings were as a matter of fact properly made," p. 694. And the court said, "The whole question, therefore, is whether the proceedings of 1894 bind the present defendants," the board of trustees of the town of Las Vegas.

The court answered the question in the negative, basing the answer on the provisions of the laws of the Territory. Sections 4010 and 4011 of the Compiled Laws of 1897 [1] of the Territory, the court said, provide for an action to quiet title to real property and permit the complainant to make parties, "by their names as near as the same can be ascertained," those who claim an interest adverse to him, the unknown heirs of any deceased person who made claim in his lifetime "and all unknown persons who may claim any interest or title adverse to plaintiff, . . . unknown heirs by the style of unknown heirs of such deceased person, and said unknown person who may claim an interest or title adverse to plaintiff by the name and style of unknown claimants of interests in the premises adverse to the plaintiff, and service of process on, and notice of said suit against, defendants, shall be made in the same manner as now provided by law in other civil

[1] Identic reënactment of §§ 1, 2, c. 6, act of April 2, 1884.

suits," p. 695. Service by publication, the court said, is provided by § 2964 [1] and may be ordered upon a sworn pleading or affidavit "showing that the defendant, or any one or more of them in said cause, resides, or has gone out of the Territory, has concealed himself within it, has avoided service of process on him, or is in any other manner so situated that process cannot be served upon him or them, or that his or their names, or place of residence, is unknown, or that his or their whereabouts cannot be discovered," p. 696.

The provisions of these sections, appellants contended, were pursued by them in their suit to quiet title, and, after citing them, as we have said, and the allegations of the bill of complaint therein, the court considered the effect of the decree therein upon the board of trustees of the town of Las Vegas, appellees herein, and said, "The Board was not *eo nomine* a party, nor, indeed, was it in existence in 1894. Any effect of the decree upon it must, therefore, result from its holding under some party to the cause. That it does not hold under any of the individuals named is conceded. That it is not affected by the futile provision of the decree quieting title against 'any person whatsoever' is evident. The only remaining alternative is that it is bound because of the fact that 'all the unknown claimants of interests in the premises adverse to complainants,' are named in the complaint, were cited in the publication and were decreed against in the court's disposition of the case and that this was a binding adjudication against defendant under Compiled Laws, 4011, above quoted. But, in 1894, were the owners of the Las Vegas grant, whom defendant now represents, unknown owners? The complainants certainly knew the exact status of the matter, for their complaint, as we have seen, in terms alleged that the premises were a part of the Las Vegas grant 'on June 21, 1860, duly confirmed by Act of Congress of the United States to the Town of Las Vegas.'"

[1] Based on § 1, c. 16, act of January 2, 1879.

"The complainants thus knew that the Town of Las Vegas was the confirmee of the grant and that if complainants' title had, by adverse possession, been wrested from any one it was from such confirmee. Knowing this, we are of the opinion that it was their duty to have made the Town of Las Vegas a party, and that the term 'unknown owners' could not be utilized to divest title from what the Act of Congress, no less than plaintiffs' conceded knowledge, told them was the true ownership of the property," p. 697. The court commented upon the abuse which may be made of statutes providing for constructive service and the necessity to so construe them as "to hold that where the real owner may be brought into court by name his property may not be taken by an advertisement against unknown owners" and that where, "as in this case, the locus of the title is definitely declared of record and such is confessedly known to the complainant, it is but an exaction of good faith that the holder of such title should be summoned by name in order that he may appear and defend. To exact less is to open the doors wide to insidious attacks upon property rights, and, indeed, to ignore the statute, which in terms provides, (Comp. Laws, § 4011) that persons claiming interests 'may be made parties defendant by their names, as near as the same can be ascertained,'" p. 698.

To the contention that the designation of ownership of the Las Vegas grant as "unknown claimants" was justified because the Town of Las Vegas, as used in the act of confirmation, was a mere aggregation of people without corporate organization, and that the suit became one practically against the individuals residing on the grant and that as to these the designation of unknown owners was necessary and proper, the court said it was not impressed, nor by the other contention that there was no officer upon whom process could have been served, and replied to the first contention, as it said it was replied in

Maese v. *Herman*, 183 U. S. 572, that 'the town and its inhabitants were certainly substantial entities in fact and were recognized by Congress as having rights and directed such rights to be authenticated by a patent of the United States.' To the second contention the obvious answer was that under § 2964, *supra*, then in force, service by publication could have been made, "since in that event the defendant 'was so situated that process could not otherwise be served upon it,'" p. 699.

We have quoted thus at length from the opinion of the Supreme Court because necessarily the contention of appellants that the town was properly impleaded and properly served under the designation of "unknown claimants of interests" depends upon the local statutes, to the construction of which by the Supreme Court we have repeatedly decided we defer. In this case the deference is the more justified, if indeed it is not compelled, by the subsequent construction of the statutes in the same way by the Supreme Court of the State in *Rodriguez* v. *La Cueva Ranch Co.*, 134 Pac. Rep. 228, in which case § 3181 of the Compiled Laws of New Mexico was considered. By that section it is provided that in suits for partition all persons interested in the premises "whose names are unknown, may be made parties to such partition by the name and description of unknown owners or proprietors of the premises, or as unknown heirs of any person who may have been interested in the same." Persons who were in actual possession had not been made parties by name, and the question was whether they were made parties under the designation of "unknown owners." The question was determined in the negative, the court holding "that it was not the intention of the Legislature to provide for the making of parties by the name of unknown owners, and for the service of process upon them by publication, when they in fact were in the open and notorious adverse possession of a part of the

premises," p. 230. The court further said that the complainants in the suit had the means and it was their duty to ascertain the names of all persons actually holding adverse possession, and that it was not the intention of the legislature to allow the rights of claimants to land in such circumstances "to be foreclosed of their rights by a proceeding in which they are not named, and in which the only service obtained upon them was by publication," p. 230. The court cited the decision in the case at bar in support of its conclusion, saying, after noting certain differences which strengthened that decision, "In principle we can see no difference between the two cases. In that case the court was construing the statutes of the Territory in regard to proceedings to quiet title, which are in substance and effect the same as the partition statute in regard to proceedings against unknown owners, and held that such statutes must be strictly construed, and that the decree in that case was unavailing as against the town of Las Vegas," p. 230. Other cases were cited, among them being *American Land Co.* v. *Zeiss*, 219 U. S. 47. It is not necessary to review them as the construction of the court of the local statute is that it requires the parties defendant in an action to quiet title to be designated "by their names, as near as they can be ascertained" and permits parties defendant to be designated as "unknown claimants" only when their names cannot be ascertained. In other words, requires them to be unknown in fact, not merely in designation. Any other conclusion would make the statute not a facility for removing clouds from titles but for putting clouds upon them, and the accommodation of the law of its process to an exceptional condition could be perverted, and rights divested by a semblance of notice of adverse claims to them.

It is contended, however, that the distinction which the Supreme Court of the Territory made between the findings of the trial court in the proceedings of 1894, as to

jurisdiction, and findings as to other matters in issue is without foundation, and that "the question of the jurisdiction of the defendants through service by publication having been adjudicated in the decree of 1894" is conclusive "and not subject to attack in this collateral proceeding, whether as a matter of fact it was in issue or not." To sustain the contention *Thompson* v. *Thompson*, 226 U. S. 551, is cited. The case was concerned with the faith and credit to be given to a decree of divorce rendered upon service by publication. The publication was attacked because based on an affidavit made on information and belief, and it was hence contended that the court had not acquired jurisdiction. The contention was held untenable, the court saying that if the affidavit could be regarded as defective it was not in the omission to state a material fact but in the degree of proof, and that therefore the resulting judgment could not be said to be void on its face. The principle was declared, however, to be established that the full faith and credit clause and the statute enacted thereunder do not apply to judgments rendered by a court having no jurisdiction of the parties or subject-matter, or of the *res* in proceedings *in rem*.

The case at bar is, therefore, clearly distinct from that case. The Town of Las Vegas at the time of the institution of the suit to quiet title and of the publication of process was, whether regarded as an entity separate from its inhabitants or collectively as composed of them, either not intended to be made a party under the designation "unknown claimants of interest" or the designation was untrue.

But it is further contended that service by publication was not an issue in this case, the pleadings and the decision of the trial court being based upon the view "that the status of the town was such that no rights by limitation could be adjudicated against it, because of the impossibility of serving it with *legal process;*" and that the Supreme Court having found against appellants on that

contention there was nothing left but to reverse the judgment of the trial court and remand the cause with instructions to grant the writ prayed for. The Supreme Court could not, it was further contended, go outside of the record and of its own motion raise the issue as to the sufficiency of the service upon the defendants, that issue being in express language excluded by appellees from the court's consideration. The answer is immediate. We know of no rule which precludes an appellate court deciding a case for other reasons than those expressed by the trial court, and the contention that the sufficiency of the service was withdrawn from the consideration of the court by appellees is not justified. It is based upon the averment of the town that neither at the time of the confirmation of the grant nor at any time subsequent thereto did it have a representative upon whom legal process could have been served, until the ninth of December, 1902, when the board of trustees was appointed.

The Supreme Court dealt with the fact, and, as we have seen, ascribed a different effect to it than that ascribed by the trial court. The Supreme Court said, there being no officer of the town upon whom process could have been served, service by publication could have been made "since in that event the defendant 'was so situated that process could not otherwise be served upon it.'" But the court was of the view, as we have seen, that such fact did not authorize the town to be made defendant under the name of "unknown claimants" or cited as such by publication, and the town having been so named, the decree of 1894 was not binding upon it.

The next contention of appellants is that the inhabitants of the town and appellees are privies in estate and are bound by the decree quieting title. In other words, that there was such identity of interest between the defendants in the suit to quiet title and the present appellees, the board of trustees, that the latter is bound by the decree,

The argument is that the town was the mere representative of the inhabitants and that the non-appointment of some one to represent it "cannot operate to suspend either the institution or prosecution of legal proceedings against the trust estate or to discharge either the trust estate or the beneficiaries from the effect of the judgment rendered, when the latter have been made parties and served with legal process." In other words, if we understand the contention, it is that the proceedings of 1894, being against some of the inhabitants of the town, bind all of the other inhabitants, considered as an entity or collectively. We need not pause to consider the soundness of the contention. If justified at all, it would seem to make unnecessary the present petition. It puts out of view besides the effect of the confirmation to the town. We said, in *Maese* v. *Herman*, *supra*, "The town and its inhabitants were certainly substantial entities in fact, and were recognized by Congress as having rights, and directed such rights to be authenticated by a patent of the United States." The town was the confirmee and represented, it may be, individual interests, but collective interests as well. It was because of the grant to the town that the act of March 12, 1903, *supra*, was enacted giving the District Court of San Miguel County "jurisdiction to manage, control and administer" the grant. It was in the execution of this jurisdiction that the appellees, trustees of the town, were appointed and given the power to make conveyances to individuals if they had the character of title described.

But the town also had rights, and, as we have seen, by § 9 of the act of March 12, 1903, the trustees were given power "to lease, sell or mortgage any part or parts of the grant." See as to rights which towns had under the Mexican law, *United States* v. *Pico*, 5 Wall. 536; *Townsend* v. *Greeley*, 5 Wall. 326; *United States* v. *Santa Fe*, 165 U. S. 675.

Judgment affirmed.

WILLIAMSON *v.* OSENTON.

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

No. 634. Submitted February 24, 1914.—Decided March 9, 1914.

The essential fact that raises change of abode to change of domicil is the absence of any intention to live elsewhere.

An ambiguous meaning will not be attributed to a phrase used in an agreed statement of facts on the assumption that the parties were by a quibble trying to get the better of each other; and so *held* that "an indefinite time" as applied to an intent to reside, referred to in such a statement, meant that no end to such time was then contemplated.

Where one changes his abode with no intention of returning to the former abode the motive is immaterial so far as change creates a citizenship enabling the party to sue in the Federal courts.

One's domicil is the technically preëminent headquarters that every person is compelled to have in order that his rights and duties that have attached to it by the law may be determined.

The identity of husband and wife is a fiction now vanishing.

In this country, a wife who has justifiably left her husband may acquire a different domicil from his, not only for the purpose of obtaining a divorce from him, *Haddock* v. *Haddock*, 201 U. S. 562, but for other purposes, including that of bringing an action for damages against persons other than her husband.

Quære, whether the same is the law in England.

THE facts, which involve the question whether a married woman may, under certain conditions, acquire a domicil different from that of her husband, are stated in the opinion.

Mr. W. E. Chilton, Mr. A. O. Bacon and *Mr. S. W. Walker* for Williamson:

All questions of jurisdiction must be determined by the status of the parties at the time of the institution of the

suit. A subsequent divorce will not aid defendant in error in maintaining jurisdiction in the Federal court. *Mansfield* v. *Swan*, 111 U. S. 379; *Metcalf* v. *Watertown*, 128 U. S. 586; *Stevens* v. *Nichols*, 130 U. S. 230; *Jackson* v. *Allen*, 132 U. S. 34; *Mattingly* v. *Railway*, 158 U. S. 53; *Insurance Co.* v. *Tempkins*, 41 C. C. A. 490; *Brizel* v. *Salt Co.*, 73 Fed. Rep. 13.

Even if husband and wife can have different citizenships in different States at the same time, the record does not show that the wife, in fact, gained a citizenship in Virginia prior to the institution of this suit.

A married woman cannot, even where she has grounds for leaving her husband, acquire another domicil, except for the purpose of bringing a suit directly involving the marriage relation.

At common law a wife could not have any existence separate from her husband, nor even civil rights, nor separate personal estate, and she could not have a separate domicil. The fact that she lived apart from her husband; that they had separated by agreement; or that the husband had been guilty of misconduct, such as would furnish a defense to a suit by him for restitution of conjugal rights, did not, in England, enable the wife to acquire a separate domicil. *Warrender* v. *Warrender*, 2 C. & F., H. L., 488; *Dolphin* v. *Robins*, 7 H. L., 390; *Yelverton* v. *Yelverton*, 1 Swab. & Trist. Probate, 574; 2 Bishop on Marriage and Divorce (4th ed., § 129).

In the United States it has been held that a divorce *a mensa et thoro* gives the wife all the rights to acquire a separate domicil for all purposes, and she can sue her husband in the Federal court as a citizen of another State than his. *Barber* v. *Barber*, 21 How. 482; *Bennett* v. *Bennett*, Deady, 299.

Even without judicial separation a woman can acquire a separate domicil for the purpose of an action against her husband if the husband commit acts that would

entitle her to a judicial separation or divorce. *Ditson* v. *Ditson*, 4 R. I. 87; *Hartean* v. *Hartean*, 14 Pick. 181.

Even that she can go to another State and acquire a domicil for purposes of such action is upheld. *Atherton* v. *Atherton*, 155 N. Y. 129; *Hunt* v. *Hunt*, 72 N. Y. 217; *White* v. *White*, 18 R. I. 292; *Smith* v. *Smith*, 43 Louisiana, 1140; *Irby* v. *Wilson*, 1 Dev. & B. Eq. 568, 582.

For the difference between a direct and a collateral application of the rule that the wife may acquire a new domicil, see *Barber* v. *Barber*, 21 How. 582; *Hartean* v. *Hartean*, 14 Pick. 181, 185; *Calvin* v. *Reed*, 55 Pa. St. 379.

Without the provocation of wrongful acts which entitle her to a divorce, or without a judicial separation, a wife cannot establish a domicil separate from that of her husband. *Anderson* v. *Watt*, 138 U. S. 694; *Cheely* v. *Clayton*, 110 U. S. 706; *Loker* v. *Gerald*, 157 Massachusetts, 42.

Even in a voluntary separation, that is without ground upon which a separation or a divorce could be maintained, the wife can acquire a domicil that would give the court of her residence jurisdiction to settle her estate despite the domicil of her husband being in another jurisdiction. *Matter of Florence*, 54 Hun (N. Y.), 328; *Rundle* v. *Van Innegan*, 9 Civ. Pro. Rep. (N. Y.) 330; *Lyon* v. *Lyon*, 30 Hun, 455; *Schute* v. *Sargent*, 67 N. H. 305; but see *Matter of Wickes*, 128 California, 270.

Thus, for divorce, the American courts have held that a wife can acquire a domicil separate from that of her husband, and even if separated without judicial decree, in New Hampshire and New York the courts of her actual residence can administer on her estate.

In the case under consideration it may be admitted from the fact that the plaintiff below subsequently obtained a divorce from her husband, that she had grounds to leave his domicil and acquire another for the purpose of suing him.

She did not, however, acquire another domicil in Virginia

for the purpose of obtaining a divorce, and if she had, she could not have sued for divorce in the Federal court, but would have been confined to the state courts.

As she had not been judicially separated from her husband when she instituted this suit, she could not, for the purpose of suing a third party for damages, claim her right to sue as a citizen of Virginia, because of wrongful acts committed by her husband. *Thompson* v. *Stolman*, 139 Fed. Rep. 93; *Nicholas* v. *Nicholas*, 92 Fed. Rep. 1.

The agreed facts establish the lack of jurisdiction in the Federal court as much by what they fail to show as by what they show. *Morris* v. *Gilmer*, 129 U. S. 328. This was a pretended change of domicil, and not an actual one; an ostensible removal to Virginia and not a permanent taking up of her residence in that State, *animo manendi*.

To show how careful this court has been to confine its jurisdiction in cases of this kind to those which arise between actual citizens of different States, see *Inhabitants* v. *Stebbins*, 109 U. S. 341; *Eberly* v. *Moore*, 24 How. 147; *Williams* v. *Nottawa*, 104 U. S. 209; *Hawes* v. *Contra. Co.*, 104 U. S. 450; *Detroit* v. *Dean*, 106 U. S. 537; *Hayden* v. *Manning*, 106 U. S. 586; *Farmington* v. *Pillsbury*, 114 U. S. 138; *Cashman* v. *Amador Co.*, 118 U. S. 58; *Little* v. *Giles*, 118 U. S. 596; *Quincy* v. *Steel*, 120 U. S. 241; *Morris* v. *Gilmer*, 129 U. S. 315; *Shreveport* v. *Cole*, 129 U. S. 36; *Nashua* v. *Boston*, 136 U. S. 356; *Lehigh* v. *Kelly*, 160 U. S. 327; *Lake County* v. *Dudley*, 173 U. S. 243; *Corbus* v. *Alaska Co.*, 187 U. S. 455; *Dawson* v. *Columbia Ave. Co.*, 197 U. S. 178; *Jones* v. *League*, 18 How. 76; *Anderson* v. *Watt*, 138 U. S. 694. *South Dakota* v. *North Carolina*, 192 U. S. 311, and the other cases cited by defendant in error, such as *Dickerson* v. *Northern Trust Co.*, 176 U. S. 181, have no application here.

While usually the court will not inquire into the motives of a party in doing an act such as making an assignment or

changing his domicil, the court will not hold that one is not a citizen of a State when, in fact, he is a citizen, solely because his purpose in becoming such a citizen was to enable him to bring a suit.

The authorities cited by defendant in error can be distinguished.

Mr. R. G. Linn, Mr. Connor Hall and *Mr. C. Beverley Broun* for Osenton.

Mr. Justice Holmes delivered the opinion of the court.

This case comes here upon the certified question whether the plaintiff, when she began this suit, was a citizen of Virginia in such sense as to be entitled to maintain her action in the District Court of the United States for the Southern District of West Virginia. The plaintiff, (the defendant in error), at that time was the wife of a citizen of West Virginia, but, in consequence of his adultery as she alleged, had separated from him and had gone to Virginia. Before bringing this action she had brought a suit in West Virginia for divorce, and pending the present proceeding obtained a divorce *a vinculo*. This action is for damages, alleging the defendant to have been a party to the adultery. The defendant pleaded to the jurisdiction setting up the plaintiff's marriage and the residence of her husband in West Virginia; in other words that the requisite diversity of citizenship did not exist. The plea seems to have been heard upon a written statement of facts in which it was agreed that the plaintiff went to Virginia "with the intention of making her home in that State for an indefinite time in order that she might institute this suit against the defendant in the United States Court," together with the facts already stated. The plea was overruled, there was a trial on the merits at which the

plaintiff got a verdict for $35,000, and thereupon the case was taken to the Circuit Court of Appeals, from which the certified question comes.

On these facts the question certified is divided into two by the argument: first, whether if able so to do the plaintiff had changed her domicil from West Virginia to Virginia in fact; and, second, supposing that she had changed it so far as to have enabled her to proceed against her husband in Virginia had she been so minded, whether for other purposes her domicil did not remain that of her husband until the divorce was obtained, which was after the beginning of the present suit. Premising that if the plaintiff was domiciled in Virginia when this suit was begun she was a citizen of that State within the meaning of the Constitution, Art. III, § 2, and the Judicial Code of March 3, 1911, c. 231, 36 Stat. 1087; *Gassies* v. *Ballon*, 6 Pet. 761; *Boyd* v. *Thayer*, 142 U. S. 135, 161; *Minor* v. *Happersett*, 21 Wall. 162; we will take these questions up in turn.

The essential fact that raises a change of abode to a change of domicil is the absence of any intention to live elsewhere, Story on Conflict of Laws, § 43—or, as Mr. Dicey puts it in his admirable book, 'the absence of any present intention of not residing permanently or indefinitely in' the new abode. Conflict of Laws, 2d ed. 111. We may admit that if this case had been before a jury on testimony merely that the plaintiff intended to live in Virginia for an indefinite time, it might have been argued that the motive assigned for the change, the bringing of this action, showed that the plaintiff, even if telling the literal truth, only meant that she could not tell when the law suit would end. It is to be noticed also that the divorce proceedings were carried through in West Virginia, though it is fair to assume that they were begun before the plaintiff moved. But the case was submitted to the court upon a written statement, upon which we presume both sides expected the court to rule. To give the supposed ambiguous

meaning to the words 'for an indefinite time' in that statement would be to assume that the parties were trying to get the better of each other by a quibble. We must take them to mean: for a time to which the plaintiff did not then contemplate an end. If that is their meaning, the motive for the change was immaterial; for, subject to the second question to be discussed, the plaintiff had a right to select her domicil for any reason that seemed good to her. With possible irrelevant exceptions the motive has a bearing only when there is an issue open on the intent. *Cheever* v. *Wilson*, 9 Wall. 108, 123. *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181, 191, 192. With that established as agreed there is no doubt that it was sufficient to work the change. *Mitchell* v. *United States*, 21 Wall. 350, 352. Dicey, Conflict of Laws, 2d ed. 108, 113, 114.

The second subdivision of the question may be answered with even less doubt than the first. The very meaning of domicil is the technically preëminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined. *Bergner & Engel Brewing Co.* v. *Dreyfus*, 172 Massachusetts, 154, 157. In its nature it is one, and if in any case two are recognized for different purposes it is a doubtful anomaly. Dicey, Conflict of Laws, 2d ed. 98. The only reason that could be offered for not recognizing the fact of the plaintiff's actual change, if justified, is the now vanishing fiction of identity of person. But if that fiction does not prevail over the fact in the relation for which the fiction was created there is no reason in the world why it should be given effect in any other. However it may be in England, that in this country a wife in the plaintiff's circumstances may get a different domicil from that of her husband for purposes of divorce is not disputed and is not open to dispute. *Haddock* v. *Haddock*, 201 U. S. 562, 571, 572. This she may do without necessity and simply from choice, as the cases

show, and the change that is good as against her husband ought to be good as against all. In the later decisions the right to change and the effect of the change are laid down in absolute terms. *Gordon* v. *Yost*, 140 Fed. Rep. 79. *Watertown* v. *Greaves*, 112 Fed. Rep. 183. *Shute* v. *Sargent*, 67 N. H. 305. *Buchholz* v. *Buchholz*, 115 Pac. Rep. 88. See *Haddock* v. *Haddock*, *sup.*, *Barber* v. *Barber*, 21 How. 582, 588, 597, 598. We see no reason why the wife who justifiably has left her husband should not have the same choice of domicil for an action for damages that she has against her husband for a divorce.

We answer the question, Yes.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *v.* KENNEDY.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

No. 246. Submitted March 9, 1914.—Decided March 16, 1914.

Chicago, Milwaukee & St. Paul Ry. Co. v. *Polt*, *ante*, p. 165, followed to the effect that the statute of South Dakota of 1907, c. 215, making railroad companies liable for double damages in case of failure to pay a claim or offer a sum equal to what the jury finds the claimant entitled to, is unconstitutional under the due process clause of the Fourteenth Amendment.

28 So. Dak. 94, reversed.

THE facts are stated in the opinion.

Mr. Burton Hanson, *Mr. William G. Porter* and *Mr. E. L. Grantham* for plaintiff in error.

No brief filed for defendant in error.

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

The ground upon which it is asserted in this case that the statute of the State of South Dakota, upon which the judgment of the court below here under review was based, is repugnant to the Constitution of the United States, was considered and held to be well taken in a case decided this term. (*Chicago, M. & St. P. Ry. Co.* v. *Polt, ante*, p. 165.) As that decision is conclusive upon all the issues here presented and establishes that the statute in question is inconsistent with the Constitution and void, it results that for the reasons stated in the case referred to, the judgment in this case must be reversed and the case remanded to the court below for further proceedings not inconsistent with this opinion.

Reversed.

PEOPLE OF PORTO RICO *v.* RAMOS.

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

No. 390. Submitted February 25, 1914.—Decided March 16, 1914.

Immunity of sovereignty from suit without consent does not permit the sovereign to reverse the action invoked by it so that it may come in and go out of court at will without the right of the other party to resist either step.

While Porto Rico may not in ordinary actions be sued without its consent, a voluntary appearance after due consideration and request to be made a party by the Attorney General on the ground of interest in the controversy, amounts to a consent, and thereafter Porto Rico cannot object to the jurisdiction on account of its immunity as a sovereign. *Porto Rico* v. *Rosaly*, 227 U. S. 270, distinguished.

Where the District Court of the United States for Porto Rico had jurisdiction of an action involving title to real estate brought by a citizen of Porto Rico against a foreign subject, the jurisdiction is not ousted because Porto Rico becomes, on the application of the Attorney General, the sole party defendant.

Quære, whether Porto Rico cannot be made a party defendant without its consent to an action involving title to real estate claimed to be an escheat.

THE facts, which involve the immunity of sovereignty from suit as applied to Porto Rico and the determination of what constitutes consent to be sued, are stated in the opinion.

Mr. Felix Frankfurter for plaintiff in error.

Mr. Frank Antonsanti and *Mr. Frederick S. Tyler* for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action in ejectment for certain described lands in Porto Rico brought by defendant in error, a citizen of Porto Rico, against Eduardo Wood, a subject of Great Britain.

Defendant in error alleged in his complaint that he was the owner, possessed and entitled to the possession of the lands and that Wood, claiming that the property belonged to the estate of Eliza Kortright, of which he was the duly appointed administrator, without right or title entered upon the lands and ejected defendant in error therefrom. Restitution of the lands was prayed and damages in the sum of $5000.

The complaint was filed November 12, 1909, and process duly issued thereon. On November 19, 1909, the defendant, Wood, filed a paper entitled "Motion to make the People of Porto Rico a party defendant and for an

extension of time to plead." It was alleged in the motion that the People of Porto Rico had been declared and adjudged to be the sole heir of Eliza Kortright by an order made by the District Court in and for the Judicial District of San Juan, she having died intestate and without leaving any legal heirs.

That the People of Porto Rico, by virtue of such declaration of heirship, have an interest in the result of the suit and ought to be joined as co-defendants.

That the defendant desired an extension of time to file a demurrer or answer to the complaint, as he might be advised, to the 2nd of December, 1909.

An order was prayed making the People of Porto Rico a party, for service upon them, and that time for pleading be extended.

Subsequently defendant filed an answer denying each and every material allegation of the complaint and prayed a dismissal of the action.

The case, by consent, was subsequently set for trial and a jury empaneled. Thereupon Harvey M. Hutchinson, representing the Attorney General of Porto Rico, petitioned the court for a continuance of the trial for time to enable him to ascertain if the People of Porto Rico should be made a party defendant to the cause. In pursuance of the petition the court continued the case. Upon the date to which the cause was continued Hutchinson again, as representing the Attorney General of Porto Rico, appeared in behalf of the People of Porto Rico and represented to the court that the People of Porto Rico were interested parties to the action. The court thereupon ordered the People of Porto Rico to be made a party. The jury was excused, the cause continued and the plaintiff (defendant in error) was "directed to amend his complaint so as to show the People of Porto Rico to be a party defendant."

An amended complaint was filed December 15, 1910.

It alleged the plaintiff to be a citizen of Porto Rico and the defendant "a body politic, created by the Congress of the United States being a citizen thereof." That plaintiff was the owner of a "rustic estate," describing it, and in possession thereof, and that one Eliza Kortright, since deceased, ejected plaintiff therefrom and continued in possession thereof up to her death. That, therefore, her estate was placed under judicial administration under the direction of Eduardo Wood, as judicial administrator, which judicial administration ceased during the month of November, 1910, and the administrator discharged. That, therefore, the defendant, The People of Porto Rico, was adjudged by the District Court of San Juan the only heir to the estate of Eliza Kortright, as she left no heirs. That The People of Porto Rico, as such heir continues to possess the land without right or title thereto, against the will of plaintiff, and to his damage in the sum of $6000, which sum was prayed as rents and profits, together with restitution of the land.

Upon motion of the Attorney General of Porto Rico his name was entered as counsel for The People of Porto Rico and leave granted to file a demurrer.

The demurrer recited that the Attorney General appeared specially for the sole purpose of challenging the jurisdiction of the court in the case and demurred to the amended complaint for the following reasons: (1) Because the suit was one between plaintiff, a citizen of Porto Rico, and The People of Porto Rico as sole defendant, and that both plaintiff and defendant being citizens of Porto Rico within the meaning of the act of Congress conferring jurisdiction on the court, the court had no jurisdiction. (2) Because The People of Porto Rico as a recognized entity, was so far a sovereign as to be exempt from suit at the instance of private individuals.

The demurrer was overruled and on the eleventh of January, 1911, an answer was filed in which defendant in-

sisted and pleaded that it "had such attributes of sovereignty" as exempted it from suit. The rest of the answer denied the allegations of the complaint and set up judgments obtained in two separate suits brought by Eliza Kortright against defendant in error in which it was adjudged against him that she was the owner of the lands sued for by plaintiff in the present action.

The action was tried to a jury which found for plaintiff (defendant in error) and assessed damages at $6000, in accordance with which judgment was entered. A new trial was moved and denied, and this writ of error granted.

But one contention is argued, that is, that the District Court had no jurisdiction to entertain the suit against Porto Rico "without its consent and against its active opposition." *Porto Rico* v. *Rosaly*, 227 U. S. 270, is cited to sustain the contention. It was said in that case that the government "established in Porto Rico is of such a nature as to come within the general rule exempting a government sovereign in its attributes from being sued without its consent." This case, however, is not within the rule. In that case Porto Rico was a defendant in the first instance. In this case it voluntarily petitioned to be made a party, asserting rights to the property in controversy, and, against the opposition of the plaintiff (defendant in error), it was made a party defendant. And this action was not improvident. Its Attorney General took time to consider. He applied for and obtained a continuance of the case to determine the best course to secure the interests of the People of Porto Rico, whether to assert its rights in the then litigation or attempt to keep them under the immunity of its sovereignty from attack. His decision had the support of substantial reasons. The property came to Porto Rico as an escheat, and came therefore as it was held by Eliza Kortright and Wood. If held in wrong by them, it was held in wrong by it, and the Attorney General may have considered it well worth

while to face the controversy rather than remit it to some other proceeding that the plaintiff might institute, fortified, perhaps, by a decision in his favor. *United States* v. *Lee*, 106 U. S. 196; *Stanley* v. *Schwalby*, 147 U. S. 508. But, whatever his reasons, he certainly asked for time, as we have seen, "to enable him to ascertain if the People of Porto Rico should be made a party defendant" in the cause, and, having been granted the time, he appeared again in the cause and represented to the court that Porto Rico was an interested party to the action, and the court, having heard the arguments of opposing counsel, ordered Porto Rico to be made a party and directed plaintiff to amend his complaint in execution of the order. Porto Rico, therefore, through its Attorney General, not only gave its consent to be a party to the cause but invoked and obtained the ruling of the court against the resistance of the plaintiff to make it a party to the cause.

The complaint having been amended as moved and directed and nearly a year having elapsed, there came a change of view, but the immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it and to come in and go out of court at its will, the other party having no right of resistance to either step.

In placing our decision upon the consent of Porto Rico to be made a party defendant under the circumstances presented by this case, we do not wish to imply that Porto Rico could not have been made a party without its consent, the property being an escheat. As to that we express no opinion.

There is an assignment of error based on the proposition that by the amendment of the complaint the plaintiff and Porto Rico became the sole parties to the action, and they being citizens of Porto Rico the court lost jurisdiction of it. The proposition is not urged by plaintiff in error in its brief, and if the proposition did not raise a question of

jurisdiction we might pass it without comment. It is, however, enough to say of it that the original defendant Wood was properly sued, he then being a subject of Great Britain and in possession of the land. Porto Rico subsequently becoming a party did not oust the jurisdiction. *Phelps* v. *Oaks*, 117 U. S. 236; *Hardenbergh* v. *Ray*, 151 U. S. 112.

Judgment affirmed.

CURRIDEN *v.* MIDDLETON.

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

No. 152. Submitted March 4, 1914.—Decided March 16, 1914.

The proper remedy for damages caused by fraud and deception is an action at law. *Buzard* v. *Houston*, 119 U. S. 347.

Mere complication of facts alone and difficulty of proof are not a basis for equity jurisdiction. *United States* v. *Bitter Root Development Co.*, 200 U. S. 451.

An action in the Supreme Court of the District of Columbia commenced on the equity side of the court cannot be transferred to the law side of that court under Equity Rule 22. That rule has no application.

37 App. D. C. 568, affirmed.

THE facts are stated in the opinion.

Mr. William E. Chandler, *Mr. Lorenzo A. Bailey* and *Mr. William L. Chambers* for appellant:

For authorities as to jurisdiction in equity in cases of complicated fraud see 1 Story's Eq. Jur., §§ 184 and 437 *et seq.*, 2 *Id.*, § 1265.

Suits in equity are allowed between all persons standing in fiduciary relations to each other. 1 Pomeroy, §§ 179, 186; 2 *Id.*, 955–963; *Smith* v. *Kay*, 7 H. L. Cas. 750.

The case is that through defendant's fraud the whole enterprise became his and the company was his one-man corporation. Plaintiff in error was only his dupe and therefore his agent and subordinate. See Harvard Law Review, Jan., 1904, p. 201; *Re Slobodinsky* (1903), 2 K. B. 517; Treasury Branch Div., 1889, pp. 612, 618, 624.

The details of fraud are not necessary to be stated in the bill. *Nesmith* v. *Calvert*, 1 Wood & M. 34; 1 Loveland, Forms of Federal Practice, p. 237.

For cases where the need of discovery is a ground of jurisdiction, see 1 Pomeroy, §§ 223, 299, 314; *Reynolds* v. *Burgess*, 71 N. H. 332.

For cases where jurisdiction is taken in order to secure an adequate accounting, see 1 Pomeroy, §§ 186, 319; 4 *Id.*, §§ 1420, 1421; *Badger* v. *McNamara*, 123 Massachusetts, 117.

Equity is not lost because only money relief is demanded. 1 Pomeroy, § 178; 4 *Id.*, § 416; 5 *Id.*, § 11.

The ordinary limitation of actions at law is given in § 1265, c. XLI, Code of Dist. Col., but in § 1640, c. LX, it is provided that nothing shall affect the operation or enforcement in the District of Columbia of the principles of equity. *Kirby* v. *Lake Shore R. R. Co.*, 120 U. S. 130; *Watlington* v. *Watlington*, Law Rep., Modern and Ancient, 270, Term. Mich., 3 Geo. II, 1729.

Tyler v. *Savage*, 143 U. S. 79, and *Buzard* v. *Houston*, 119 U. S. 347, on which the court below appears to base its opinion, are inapplicable to this case.

Nearly all the objections to permitting a suit in equity can be fairly met by simply saying that every one of the necessary or desirable conditions demanded can and naturally may and perhaps should come to appear in the

course of the present case as it stands on the averments in the existing bill in equity.

Any lack of present averments does not weaken the plaintiff's right to maintain his suit in equity on the ground that he has not a remedy at law, plain, adequate and complete. In due time all these methods of an equitable remedy are likely to be asked for.

After due proceedings there can be an adjusting of the remedy to the exact wrong done.

Mr. E. Hilton Jackson for appellees.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill in equity against the defendant Middleton and two others not served, to which Middleton demurred. The demurrer was sustained and the bill dismissed by the Supreme Court of the District and the decree was affirmed by the Court of Appeals. 37 App. D. C. 568. The allegations in brief are that Middleton was a patent lawyer and personal friend of the plaintiff, that he brought to the plaintiff's attention a patent fluid and apparatus representing them to be valuable, with details of fact confirming the statement, and representing that Middleton was acting as agent of the patentees; that the plaintiff relying upon the representations, paid money and incurred obligations, amounting in all to some forty thousand dollars, all he had, for purchase of the patent rights, with an agreement that a company should be formed to work them; that a company was formed, but that it turned out that the fluid and apparatus were worthless, that Middleton was interested in the patent, and that his representations were false. It is alleged further that Middleton got complete control of the company, that an arrangement was made with it by which the company was to assume and pay outstanding notes of the plaintiff but that it failed to do so and is now

hopelessly insolvent; that all Middleton's acts were parts of a conspiracy to defraud the plaintiff, and that Middleton has all the books and papers of the company needed to prove the fraud. The prayers are for discovery and a decree that the defendants "shall make due restitution [of his property] to the complainant by paying to him the amounts of money by him paid out as aforesaid," and for general relief.

As there is a prayer for final relief the prayer for discovery must stand or fall with that, at least in a case like the present; there is no need to consider whether or how far bills for discovery alone have been displaced by the powers now given in actions at law. The relief sought is simply a decree for damages—for a large part of the moneys paid and obligations incurred were paid and incurred to others than Middleton, so that although the word restitution is used there is no attempt to rescind, to follow a specific fund or to establish a trust. Being a suit for damages the proper remedy is an action at law, as was held below. *Buzard* v. *Houston*, 119 U. S. 347. It is said that the facts are complicated, but they are not so on the allegations of the bill, which merely disclose a series of acts alleged to have been parts of the plan to deceive, and further, mere complication of facts alone and difficulty of proof are not a basis of equity jurisdiction. See *United States* v. *Bitter Root Development Co.*, 200 U. S. 451, 472. It now is asked that if the suit cannot be maintained in equity it may be transferred to the law side and under Equity Rule 22; but that rule has no application to the case. Rev. Stat., § 913. D. C. Code, (act of March 3, 1901, c. 854), § 85. 31 Stat. 1189, 1202.

Decree affirmed.

HOLT *v.* HENLEY, TRUSTEE.

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

No. 229. Argued March 5, 1914.—Decided March 16, 1914.

The amendment to the Bankruptcy Act of June 25, 1910, giving the trustees, as to all property coming into the custody of the Bankruptcy Court, the rights of a creditor holding a lien, should not be construed to impair then existing rights.

Whether the power of Congress is limited in that respect or not, the usual interpretation of such statutes is to confine their effect to property rights subsequently established.

The right of one who had sold to the bankrupt under an agreement to retain title until payment, as it existed on June 25, 1910, was not affected by the amendment to the Bankruptcy Act of that date even if he did not comply with the statute of the State in regard to recording the agreement.

The goods in this case having been sold on conditional sale prior to the amendment of June 25, 1910, the seller had a better title than the trustee. *York Manufacturing Co.* v. *Cassell*, 201 U. S. 344.

Where the addition to the premises covered by the mortgage is not in its nature an essential indispensable part of the completed structure contemplated by that instrument, and its removal would not affect the integrity of that structure, the mortgagee takes just such interest in the addition as the mortgagor acquired, no more no less.

A sprinkler plant placed on mortgaged premises after the execution of that instrument and under an unrecorded conditional sale agreement *held* not to have attached to the freehold or to be covered by the after acquired property clause beyond the extent which the mortgagor had acquired.

193 Fed. Rep. 1020, reversed.

THE facts, which involve the relative rights of the trustee in bankruptcy, the mortgagee and the original owner of a sprinkling plant placed on the property of the bankrupt subsequent to the making of the mortgage

under an agreement of conditional sale, are stated in the opinion.

Mr. S. O. Bland, with whom *Mr. R. T. Armistead* was on the brief, for appellant.

Mr. Norvell L. Henley for the Peninsula Bank and Henley, trustee.

Mr. O. D. Batchelor for Phillips, Spencer and Cooke, trustees in bankruptcy.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition to the District Court sitting in Bankruptcy for leave to remove an automatic sprinkler system and equipment from the premises of the bankrupt, the Williamsburg Knitting Mill Company. It is opposed by the trustee of a mortgage of the plant of the Company and the holder of the mortgage notes, and by the trustees in bankruptcy, both of which parties claim the property. The referee, the District Court and the Circuit Court of Appeals decided in favor of the latter claims. 190 Fed. Rep. 871. 193 Fed. Rep. 1020, 113 C. C. A. 87. The petitioner, Holt, appeals. The facts are as follows: An agreement to install the sprinkler was signed by Holt on August 28, 1909 and by the bankrupt on October 14, 1909. The installation was begun about December 6, 1909 and finished in the latter part of March 1910, the equipment consisting of a fifty-thousand gallon tank on a steel tower bolted to a concrete foundation, pipes connecting the tank with the mill. By the agreement the system was to remain Holt's property until paid for and Holt was to have a right to enter and remove it upon a failure to pay as agreed. It also was to be personal property during the same time. A large part of the price has not been paid. But by the Code of Virginia, § 2462, unless registered as therein provided, which this was not, such sales are void

as to creditors (construed by the Virginia courts to mean lien creditors only), and as to purchasers for value without notice from the vendee. On November 23, 1909, the mortgage deed was executed, covering the plant on the premises and that 'which may be acquired and placed upon the said premises during the continuance of this trust.' The mortgagees claim the system by virtue of this clause and the fact that it had been attached to the soil. As bearing on this last it should be added that there now is a smaller tank on the same steel tower, that supplies the mill for domestic purposes, but this was not put there by Holt.

The trustees in bankruptcy join with Holt in disputing the claim of the mortgagees, but set up one of their own, which we will deal with before discussing that of the mortgagees. They rely upon the act of June 25, 1910, c. 412, § 8, 36 Stat. 838, 840, amending § 47a (2) of the Bankruptcy Act, and giving them, as to all property coming into the custody of the Bankruptcy Court, the rights of a creditor holding a lien. Before that amendment, Holt had a better title than the trustees would have got. *York Manufacturing Co.* v. *Cassell*, 201 U. S. 344. We are of opinion that the act should not be construed to impair it. We do not need to consider whether or how far in any event the constitutional power of Congress would have been limited. It is enough that the reasonable and usual interpretation of such statutes is to confine their effect, so far as may be, to property rights established after they were passed. If, as they sometimes do, the registry statute had fixed a time within which the registration must take place and the time had elapsed, we think it clear that the amendment would not be read as attempting to diminish Holt's rights. But the most obvious if not the only way of reaching that result would be by taking the amendment to affect subsequently established rights alone. That is a familiar and natural mode of interpretation, whereas it

would be highly artificial to say that it affected existing rights that still might be secured but not those for which the chance had been lost. Therefore we think it immaterial if true, that for a month or two after the amendment was passed Holt might have docketed a memorandum as provided by the Virginia act. The retention of title by him and his refraining from recording it both were perfectly lawful. His continuing title simply was postponed to purchasers without notice and creditors getting a lien. We are of opinion that it was not affected by the enactment of later date than the conditional sale. The opposite construction would not simply extend a remedy but would impute to the act of Congress an intent to take away rights lawfully retained, and unimpeachable at the moment when they took their start. We agree with the decision in *Arctic Ice Machine Co.* v. *Armstrong County Trust Co.*, 192 Fed. Rep. 114; 112 C. C. A. 458. *In re Schneider*, 203 Fed. Rep. 589. See also *Southwestern Coal & Improvement Co.* v. *McBride*, 185 U. S. 499, 503.

We turn now to the claim of the mortgagees. This is based upon the clause extending the mortgage to plant that may be acquired and placed upon the premises while the mortgage is in force, coupled with the subsequent attachment of the system to the freehold. But the foundation upon which all their rights depend is the Virginia statute giving priority to purchasers for value without notice over Holt's unrecorded reservation of title; and as the mortgage deed was executed before the sprinkler system was put in and the mortgagees made no advance on the faith of it, they were not purchasers for value as against Holt. *York Manufacturing Co.* v. *Cassell*, 201 U. S. 344, 351, 352. There are no special facts to give them a better position in that regard. But that being so, what reason can be given for not respecting Holt's title as against them? The system was attached to the freehold, but it could be removed without any serious harm for which complaint

could be made against Holt, other than the loss of the system itself. Removal would not affect the integrity of the structure on which the mortgagees advanced. To hold that the mere fact of annexing the system to the freehold overrode the agreement that it should remain personalty and still belong to Holt would be to give a mystic importance to attachment by bolts and screws. For as we have said, the mortgagees have no equity and do not bring themselves within the statutory provision. We believe the better rule in a case like this, and the one consistent with the Virginia decisions so far as they have gone, is that "the mortgagees take just such an interest in the property as the mortgagor acquired; no more no less." *Fosdick* v. *Schall*, 99 U. S. 235. *Meyer* v. *Western Car Co.*, 102 U. S. 1. *Monarch Laundry* v. *Westbrook*, 109 Virginia, 382, 384, 385. *Hurxthal* v. *Hurxthal*, 45 W. Va. 584. *Campbell* v. *Roddy*, 44 N. J. Eq. 244. *Davis* v. *Bliss*, 187 N. Y. 77. *Hendy* v. *Dinkerhoff*, 57 California, 3. *Binkley* v. *Forkner*, 117 Indiana, 176. *Cox* v. *New Bern Lighting & Fuel Co.*, 151 No. Car. 62. *Baldwin* v. *Young*, 47 La. Ann. 1466; *In re Sunflower State Refining Co.*, 195 Fed. Rep. 180, 187. The case is not like those in which the addition was in its nature an essential indispensable part of the completed structure contemplated by the mortgage. The system although useful and valuable can be removed and the works still go on.

Decree reversed.

GARLAND *v.* STATE OF WASHINGTON.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 226. Submitted January 29, 1914.—Decided March 16, 1914.

Due process of law does not require the State to adopt any particular form of procedure in criminal trials, so long as the accused has had sufficient notice of the accusation and adequate opportunity to defend. *Rogers* v. *Peck*, 199 U. S. 425.

The want of a formal arraignment to a second information of the same offense does not deprive the accused of any substantial right, and where the course of the trial, otherwise fair, was not in any manner affected to his prejudice, there is no denial of due process of law.

Technical objections, originating in the early period of English history when the accused was entitled to but few rights, are passing away and should not be allowed as to unimportant formalities where the rights of the accused have not been prejudiced.

This court is reluctant to overrule its former decisions, and it only does so in this case because it appears that the right sustained in a former case involving criminal procedure is no longer required for the protection of the accused. *Crain* v. *United States*, 162 U. S. 625, overruled so far as not in accord herewith.

65 Washington, 666, affirmed.

THE facts, which involve the validity, under the due process provisions of the Fourteenth Amendment, of a conviction and sentence, are stated in the opinion.

Mr. William H. Gorham, Mr. O. L. Willett and *Mr. Frank Oleson* for plaintiff in error:

It was not due process of law to try, convict and sentence plaintiff in error on an information on which he had never been arraigned and to which he had never pleaded. *Crain* v. *United States*, 162 U. S. 625.

The due process of law clause of the Fourteenth Amendment places the same inhibition on the States as does the

Fifth Amendment on the Federal Government. *Hibben* v. *Smith,* 191 U. S. 310.

The term "law of the land" is synonymous with the term "due process of law." *Missouri Pacific R. R. Co.* v. *Himes,* 115 U. S. 512.

It was neither due process of law nor the giving to the plaintiff in error of the equal protection of the law to file two informations against him in the same case charging substantially different crimes and put him on trial without any notice to him as to which charge he would be required to meet, and then sentence him on a general verdict of guilty. Section 75, Rem. & Ballr's Code.

There cannot legally be two informations in the same case at the same time. 22 Cyc. 275; *Rice* v. *State,* 15 Michigan, 9.

While there may not be any case in which this court has ever passed on these exact points, see *Hopt* v. *Utah,* 110 U. S. 574; *United States* v. *Cruikshank,* 92 U. S. 542.

Mr. Hugh M. Caldwell, Mr. John F. Murphy and *Mr. H. B. Butler* for defendant in error.

Mr. Justice Day delivered the opinion of the court.

The plaintiff in error was convicted in the Superior Court of King County, Washington, upon an information charging him with larceny of "a check payable for the sum of one thousand dollars in money." Upon appeal the conviction was affirmed by the Supreme Court of Washington (65 Washington, 666), and the case comes here upon writ of error.

It appears that a previous information had charged the accused with the larceny of "one thousand dollars ($1,000) in lawful money of the United States." Upon that information he was arraigned, entered a plea of not guilty, was tried and convicted. A new trial was awarded, and

thereafter the second information was filed, making the charge as above stated. Before trial the plaintiff in error filed a "motion directed to second information," containing a motion to quash, a motion to strike out and a motion to make more definite and certain, all of which were denied. No arraignment or plea was had upon that information. The case having been called for trial and the jury having been impaneled, the plaintiff in error by his counsel objected to the introduction of any evidence upon the ground that the State had no right to try the plaintiff in error on the information then before the court. This general objection was overruled. No specific objection was taken before the trial to the want of formal arraignment upon the second information. The jury, at the conclusion of the trial upon the second information, returned a verdict of guilty and sentence was passed upon the plaintiff in error.

It is apparent that the accused was tried and convicted upon an information charging an offense against the law; that he had a jury trial, with full opportunity to be heard, and that he was in fact deprived of no right or privilege in the making of his defense, unless such deprivation arises from the fact that he was not arraigned and required to plead to the second information before trial. The object of arraignment being to inform the accused of the charge against him and obtain an answer from him, was fully subserved in this case, for the accused had taken objections to the second information and was put to trial before a jury upon that information in all respects as though he had entered a formal plea of not guilty. In this view, the Supreme Court of Washington, following its former decisions, held that the failure to enter the plea had deprived the accused of no substantial right, and that having failed to make objection upon that ground before trial it was waived and could not be subsequently taken. This ruling, it is contended, deprived the plaintiff in error of his liberty

without due process of law within the meaning of the Fourteenth Amendment of the Constitution.

Due process of law, this court has held, does not require the State to adopt any particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution. *Rogers* v. *Peck*, 199 U. S. 425, 435, and previous cases in this court there cited. Tried by this test it cannot for a moment be maintained that the want of formal arraignment deprived the accused of any substantial right or in any wise changed the course of trial to his disadvantage. All requirements of due process of law in criminal trials in a State, as laid down in the repeated decisions of this court, were fully met by the proceedings had against the accused in the trial court. The objection was merely a formal one, was not included in the general language in which the objection to the introduction of evidence was interposed before the trial, and was evidently reserved with a view to the use which is now made of it, in an attempt to gain a new trial for want of compliance with what in this case could have been no more than a mere formality.

It is insisted, however, that this court in the case of *Crain* v. *United States*, 162 U. S. 625, held the contrary. In that case the question was specifically made as to the necessity of a plea before trial, duly entered of record. The learned Justice who spoke for the majority of the court announced its conclusion approving a number of early cases in the state courts which had held that such form of arraignment entered of record was essential to a legal trial and holding that in a Federal court no valid trial could be had without the requisite arraignment and plea and that such must be shown by the record of conviction. If a legal trial cannot be had without a plea to the indictment duly entered of record before trial, it would follow that such omission in the present case requires a reversal

of the judgment of conviction, because the prisoner has been deprived of due process of law.

Technical objections of this character were undoubtedly given much more weight formerly than they are now. Such rulings originated in that period of English history when the accused was entitled to few rights in the presentation of his defense, when he could not be represented by counsel, nor heard upon his own oath, and when the punishment of offenses, even of a trivial character, was of a severe and often of a shocking nature. Under that system the courts were disposed to require that the technical forms and methods of procedure should be fully complied with. But with improved methods of procedure and greater privileges to the accused, any reason for such strict adherence to the mere formalities of trial would seem to have passed away, and we think that the better opinion, when applied to a situation such as now confronts us, was expressed in the dissenting opinion of Mr. Justice Peckham, speaking for the minority of the court in the *Crain Case*, when he said (p. 649):

"Here the defendant could not have been injured by an inadvertence of that nature. He ought to be held to have waived that which under the circumstances would have been a wholly unimportant formality. A waiver ought to be conclusively implied where the parties had proceeded as if defendant had been duly arraigned, and a formal plea of not guilty had been interposed, and where there was no objection made on account of its absence until, as in this case, the record was brought to this court for review. It would be inconsistent with the due administration of justice to permit a defendant under such circumstances to lie by, say nothing as to such an objection, and then for the first time urge it in this court."

Holding this view, notwithstanding our reluctance to overrule former decisions of this court, we now are constrained to hold that the technical enforcement of formal

rights in criminal procedure sustained in the *Crain Case* is no longer required in the prosecution of offenses under present systems of law, and so far as that case is not in accord with the views herein expressed it is necessarily overruled.

The other objection to the procedure in the state court which it is alleged deprived the plaintiff in error of due process of law upon his trial, rests in the contention that he was put to trial upon two informations, containing different charges, without notice as to which charge he would be required to meet, and sentenced upon a general verdict of guilty. We think that the record discloses that there is nothing in this objection of substantial merit, and that it appears that the accused was put to trial and convicted upon the second information, with every opportunity to defend himself against the offense therein charged.

Judgment of the Supreme Court of Washington is accordingly

Affirmed.

GRANT BROTHERS CONSTRUCTION CO. *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 182. Argued January 21, 22, 1914.—Decided March 16, 1914.

Errors alleged to have been committed by the trial court which do not involve anything fundamental or jurisdictional must be regarded as waived if they were not presented to the Supreme Court of the Territory.

An action by the United States to recover penalties under the Alien Contract Labor Law is civil and attended with the usual incidents of a civil action. *United States* v. *Regan, ante*, p. 37.

Where an action for penalties was tried on the theory that the defend-

ant was not liable unless the violations were knowingly committed and the jury returns a verdict against the defendant after being charged that knowledge is an essential element of the cause of action, the petition, if omitting an allegation of knowledge, can be regarded as amended to conform to the facts, the defendants not being prejudiced thereby.

It is most unreasonable to reverse a judgment for a defect in pleading by which the defendant has been in no way prejudiced.

The trial court was right in refusing to suppress depositions because the notices in regard to taking them were defective in certain respects which could not and did not mislead the parties.

While, as a general rule, a judgment binds only the parties and their privies, a judgment in a prior action may be admissible against a stranger as *prima facie*, although not conclusive, proof of facts which may be shown by evidence of general reputation—such as alienage.

The decision of a board of special inquiry that certain persons were aliens was properly admitted in a suit by the United States to recover penalties for violations of the Alien Contract Labor Act, as *prima facie* evidence of the alienage of the persons before the board.

In this case, it appears from the evidence that there was proof other than of the acts of the professed agent to show his agency, and there was also sufficient testimony to make it a question for the jury to determine whether the instructions given by the defendant to its agent not to violate the Alien Contract Labor Act were given in good faith.

Under the Alien Contract Labor Act a separate penalty shall be assessed in respect of each alien; and this is so notwithstanding all the aliens for whose employment penalties are asked were brought into the United States at one time. *Missouri, Kansas & Texas Ry. Co.* v. *United States*, 231 U. S. 112.

There was no error in this case in rendering judgment against defendants for costs.

13 Arizona, 388, affirmed.

THE facts, which involve the validity of a judgment obtained by the United States for penalties for violation of the Alien Contract Labor Law, are stated in the opinion.

Mr. Isidore B. Dockweiler, with whom *Mr. A. C. Baker* and *Mr. Robert B. Murphey* were on the brief, for plaintiffs in error:

The statute is highly penal and must be strictly construed so as to bring within its condemnation only those

who are shown by direct and positive averments in the complaint to be embraced within the terms of the law.

Although this action is civil in form, it is in fact in the nature of a criminal proceeding in that it seeks to recover a penalty for the commission of a crime. *United States* v. *Edgar*, 45 Fed. Rep. 46; *United States* v. *M'Elroy*, 115 U. S. 252; *United States* v. *Gay*, 95 Fed. Rep. 226; *United States* v. *Tsokas*, 163 Fed. Rep. 129; *Regan* v. *United States*, 183 Fed. Rep. 293; *Lees* v. *United States*, 150 U. S. 476; *United States* v. *Hepner*, 213 U. S. 103; *United States* v. *Stevenson*, 215 U. S. 190.

For the distinction between remedial and penal statutes see *Huntington* v. *Attrill*, 146 U. S. 657; *Brady* v. *Daly*, 175 U. S. 153; 2 Bishop's New Crim. Law, par. 504; *Dunbar* v. *United States*, 156 U. S. 185; *United States* v. *Scott*, 74 Fed. Rep. 213; *United States* v. *Mitchell*, 141 Fed. Rep. 666; *State* v. *Williams*, 139 Indiana, 43; *State* v. *Waterbury*, 133 Iowa, 137; *State* v. *Root*, 94 App. Div. 84; *Rex* v. *Lawley*, 2 Stra. 904.

Knowingly, when applied to an act or thing done, imports knowledge of the act or thing so done, as well as an evil intent or bad purpose in doing such thing. *Rosen* v. *United States*, 161 U. S. 29; *Price* v. *United States*, 165 U. S. 311; *Verona Cheese Co.* v. *Murtaugh*, 50 N. Y. 314; *Driskill* v. *Parish*, 7 Fed. Cases, 1100; *Darnborough* v. *Benn*, 187 Fed. Rep. 580; *United States* v. *Craig*, 28 Fed. Rep. 795; *United States* v. *Borneman*, 41 Fed. Rep. 751; *Rex* v. *Hayes*, 23 Can. L. T. 88, 5 Ont. L. Rep. 198; *State* v. *Davis*, 14 R. I. 281; *Pettibone* v. *United States*, 148 U. S. 209; *United States* v. *Terry*, 42 Fed. Rep. 317, 318; *United States* v. *Kirby*, 7 Wall. 482; *United States* v. *Claypool*, 14 Fed. Rep. 127; *Dunbar* v. *United States*, 156 U. S. 185; *United States* v. *Koplik*, 155 Fed. Rep. 919; *United States* v. *Highleyman*, 26 Fed. Cas., No. 15,361; *United States* v. *Janke*, 183 Fed. Rep. 277; *Blakely Bank* v. *Davis*, 135 Georgia, 687; *Robinson* v. *State*, 6 Ga. App. 696;

State v. *Bridgewater*, 171 Indiana, 1; *State* v. *Smith*, 18 N. H. 91; *Gregory* v. *United States*, 17 Blatchf. 330; Clark & Marshall, Crimes, par. 55; *McDonald* v. *Williams*, 174 U. S. 397, 406; *Felton* v. *United States*, 96 U. S. 699; *Potter* v. *United States*, 155 U. S. 538; *Yates* v. *Jones' Natl. Bank*, 206 U. S. 158; *St. Louis & S. F. R. Co.* v. *United States*, 169 Fed. Rep. 69; *St. Joseph Stock Yards Co.* v. *United States*, 187 Fed. Rep. 104; *United States* v. *Beatty*, 24 Fed. Cas. 14,555; *State* v. *McBarron*, 66 N. J. L. 680; *Utley* v. *Hill*, 155 Missouri, 232; *State* v. *Smith*, 119 Tennessee, 521.

None of the forty-five counts of the complaint contains any allegation that the defendant knowingly assisted, encouraged or solicited the migration or importation to the United States of the person named in each count, or that the defendant knew at the time that such person was an "alien contract laborer" as defined by the statute. Cases *supra; Ledbetter* v. *United States*, 170 U. S. 606; *United States* v. *Cook*, 17 Wall. 168, 174; *United States* v. *Cruikshank*, 92 U. S. 542, 558; *United States* v. *Carll*, 105 U. S. 611; *United States* v. *Simmons*, 96 U. S. 360; *United States* v. *Hess*, 124 U. S. 483; *Evans* v. *United States*, 153 U. S. 584.

Failure to allege an essential element of a statutory offense is fatal, can be taken advantage of at any time, and is not cured by verdict. *Supreme Lodge* v. *McLennan*, 171 Illinois, 417.

This ground is not one which is waived even by failure to demur, so it is obvious that it was not waived by consent that it be overruled. *Evans* v. *Gerken*, 105 California, 311; *Morris* v. *Courtney*, 120 California, 63; *United States* v. *Carll*, 105 U. S. 611; 1 Bishop's New Crim. Pro., par. 123, sub. 3; *Teal* v. *Walker*, 111 U. S. 242; *Kentucky Ins. Co.* v. *Hamilton*, 63 Fed. Rep. 93.

It was error to admit the minutes of the Board of Special Inquiry showing that at a meeting of that board the la-

borers were excluded from admission to the United States as alien contract laborers.

Defendant was not a party to, or present, or represented at, and had no notice of, the *ex parte* hearing of the board whose summary order the Government seeks, in this case, to introduce against it. *United States* v. *Sing Tuck*, 194 U. S. 161. *United States* v. *Hills*, 124 Fed. Rep. 831, is not a valid authority in this case. See *Pearson* v. *Williams*, 202 U. S. 281; *Lee Sing* v. *United States*, 180 U. S. 488; *Leggate* v. *Clark*, 112 Massachusetts, 308.

The order of the special board of inquiry is not competent as a public record. *Naanes* v. *State*, 143 Indiana, 299; *Dewey* v. *Algire*, 37 Nebraska, 6.

For cases in which coroners' verdicts have been held to be incompetent, see *State* v. *Turner*, Wright, 20; *Wheeler* v. *State*, 34 Oh. St. 394, 398; *Colquit* v. *State*, 107 Tennessee, 381; *Memphis & C. R. Co.* v. *Wombach*, 84 Alabama, 149; *Hollister* v. *Cordero*, 76 California, 649; *Rowe* v. *Such*, 134 California, 573; *Germania Ins. Co.* v. *Ross-Lewin*, 24 Colorado, 43; *Central Railroad* v. *Moore*, 61 Georgia, 151, 152; *State* v. *Commissioners*, 54 Maryland, 426; *Supreme Council* v. *Brashears*, 89 Maryland, 624; *Wasey* v. *Insurance Co.*, 126 Michigan, 188; *Cox* v. *Royal Tribe*, 42 Oregon, 365.

The courts below erred in permitting evidence as to the making of offers and promises of employment to Mexicans in Mexico, and in permitting witnesses to testify to acts of assistance and encouragement rendered by them to the Mexicans in their migration from Mexico into the United States, and also in admitting the passes.

An agency, or the extent of an agency, or the authority of an agent, cannot be proven by the acts and declarations of the person professing authority to act as such agent. *United States* v. *Boyd*, 5 How. 29; *Regan* v. *United States*, 183 Fed. Rep. 293.

The *ex parte* depositions taken by the Government

should have been suppressed. A commission issued without notice having been served is void. *Harris* v. *Wall*, 7 How. 695; *Kline Bros.* v. *Insurance Co.*, 184 Fed. Rep. 969; *Knode* v. *Williamson*, 17 Wall. 587; *Buddicum* v. *Kirk*, 3 Cr. 293; *W. U. Tel. Co.* v. *Collins*, 45 Kansas, 94; *Garner* v. *Cutler*, 28 Texas, 183; *Indiana Pub. Co.* v. *Ayer*, 34 Ind. App. 284.

The use of depositions in an action to recover a penalty as a punishment for a criminal act was improper and infringed on defendant's constitutional right to be confronted by the witnesses, and the defendant was prejudiced thereby. *Rulofson* v. *Billings*, 140 California, 252.

Verdict for defendant should have been directed.

A trial court may direct a verdict for one party to an action whenever, upon all the evidence, a contrary verdict, if rendered by the jury, would have to be set aside as unjustified and unsupported by the evidence. *Ryder* v. *Wombwell*, L. R. 4 Exch. 39; *Giblin* v. *McMullen*, L. R. 2 P. C. Apps. 335; *Improvement Co.* v. *Munson*, 14 Wall. 448; *Parks* v. *Ross*, 11 How. 373; *Merch. Bk.* v. *State Bk.*, 10 Wall. 637; *Hickman* v. *Jones*, 9 Wall. 201; *Estate of Morey*, 147 California, 495.

The governing officers of the defendant, and they only, should be regarded as the corporation in determining whether the defendant corporation knowingly assisted, encouraged or solicited the migration or importation of any alien contract laborers. *Lake Shore R. Co.* v. *Prentice*, 147 U. S. 101; *Hollard* v. *Vinton*, 105 U. S. 7; *Hindman* v. *First National Bank*, 98 Fed. Rep. 562; *Denver & Rio Grande Ry. Co.* v. *Harris*, 122 U. S. 597; *Salt Lake City* v. *Hollister*, 118 U. S. 256; *Philadelphia, W. & B. R. R. Co.* v. *Quigley*, 21 How. 202; *United States* v. *Kelso*, 86 Fed. Rep. 304, 306; *State* v. *Morris E. R. Co.*, 23 N. J. L. 360; *Regina* v. *Gt. N. of Eng. Ry.*, 58 E. C. L. 315; *Commonwealth* v. *Proprs. of New Bedford Bridge*, 2 Gray, 339.

The distinction between the civil liability of a corpora-

tion for the acts of its servants and agents, and the criminal liability of a corporation for the criminal acts of its servants or agents is important in this case.

A master or principal is not liable criminally for the criminal acts of his servant or agent unless he directed, assented to or acquiesced in such illegal acts.

If the master does not aid or abet, countenance or approve, or have knowledge, of the act of his servants, it is the general rule that he cannot be punished criminally therefor. *Taylor* v. *Nixon* (1910), 2 I. R. 94; *Rex* v. *Huggins*, 2 Ld. Raym. 1574; 2 New Am. & Eng. Enc. Law & Pr. 834; 20 Am. & Eng. Ency. Law, 176 (2d ed.); 26 Cyc. 1545; 1 Clark & Marshall, Agency, 1140; Mechem, Agency, par. 746; 88 Am. St. Rep. 797; *Hoover* v. *Wise*, 91 U. S. 311; *Whitton* v. *State*, 37 Mississippi, 379; *Anderson* v. *State*, 22 Oh. St. 305; *Commonwealth* v. *Nichols*, 10 Met. 259; *Commonwealth* v. *Junkin*, 170 Pa. St. 194; *Cushing* v. *Dill*, 2 Scammon (Ill.), 460; *Cushman* v. *Oliver*, 81 Illinois, 444; *Satterfield* v. *West. Un. Tel. Co.*, 23 Ill. App. 446; *State* v. *Balti. & Ohio R. R. Co.*, 15 W. Va. 362; *Hall* v. *Nor. & West. R. Co.*, 44 W. Va. 36; *Williams* v. *Hendricks*, 115 Alabama, 277; *State* v. *Bacon*, 40 Vermont, 456; *Parks* v. *People*, 49 Michigan, 333; *Whitecraft* v. *Vanderver*, 12 Illinois, 235; *Nall* v. *State*, 40 Alabama, 262; *Seibert* v. *State*, 40 Alabama, 60; *Spokane* v. *Patterson*, 46 Washington, 93; *Hipp* v. *State*, 5 Blakf. (Ind.) 149.

In this case the guilty knowledge of the defendant company is an essential ingredient of the offense. The general rule applies that the master is not criminally responsible unless he participates in, authorizes or consents to the unlawful act. The exception to the rule in cases where knowledge is not an essential element of the offense has no application to the present case. *St. Louis & S. F. R. Co.* v. *United States*, 169 Fed. Rep. 69; *Felton* v. *United States*, 96 U. S. 699; *United States* v. *Beatty*, 24 Fed. Cas. 14,555; *Chisholm* v. *Doulton*, 22 Q. B. D. 736;

Verona Cheese Co. v. *Murtaugh*, 50 N. Y. 314; *Coubon* v. *Muldowney* (1904), 2 Irish Law Reports, 498; *State* v. *Smith*, 10 R. I. 258; *State* v. *Hayes*, 67 Iowa, 27; *Taylor* v. *Nixon* (1910), 2 I. R. 94; *Williams* v. *Hendricks*, 115 Alabama, 277; *Patterson* v. *State*, 21 Alabama, 571.

There is no evidence in the case at bar which can justify or support a verdict for the Government involving a finding that the defendant construction company knowingly induced, assisted, encouraged or solicited, or caused to be induced, assisted, encouraged or solicited, the migration or importation of any of the forty-five laborers named in the complaint.

The majority of laborers engaged in railroad construction work in Arizona are of Mexican descent.

It was proper and lawful for anyone to employ, in the United States, Mexican citizens who had migrated to the United States, whether of their own accord, or whether they had been unlawfully induced to come by the acts of others, not known to the employer.

There is no evidence that defendant's contract with Carney authorized or contemplated any violation whatever of the immigration act; the undisputed evidence shows that it gave strict orders not to assist, encourage or solicit the importation or migration of any laborers from Mexico, and not to even talk to laborers in Mexico.

The positive and specific instructions given to Carney were given in absolute good faith. There is no evidence to the contrary. This is the only conclusion which can be drawn from the evidence as a matter of law.

The knowledge contemplated by the statute, essential to be proven in the case at bar, is actual knowledge, and not constructive knowledge or notice of facts which, upon inquiry, would lead to actual knowledge.

There is no evidence that any of defendant's officers had any actual knowledge of the illegal acts of Carney and others acting under him.

There is no evidence that the defendant itself furnished conveyance or transportation, or paid any of the expenses of said laborers from Mexico to the United States.

Proof of the alienage of each and every of the forty-five laborers named in each of the forty-five counts respectively of the complaint was essential under the statute. There was no proof as to thirty-five. The mere fact that the laborers were of Mexican descent is no proof that they were born in Mexico.

As the act makes the offense a misdemeanor, the Government, even when proceeding for the penalty only, must furnish the degree of proof required in a criminal case. *United States* v. *Regan*, 203 Fed. Rep. 433; *Boyd* v. *United States*, 116 U. S. 616; *Lees* v. *United States*, 150 U. S. 476; *Huntington* v. *Attrill*, 146 U. S. 657; *Equitable Life Assur. Soc.* v. *Commonwealth*, 113 Kentucky, 126; *Coffey* v. *United States*, 116 U. S. 436; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265; *United States* v. *The Burdett*, 9 Pet. 682; *Gilbert* v. *Bone*, 79 Illinois, 341; *Atchison, T. & S. F. R. Co.* v. *People*, 227 Illinois, 270; *Riker* v. *Hooper*, 35 Vermont, 457; *White* v. *Comstock*, 6 Vermont, 405; *W. H. Small & Co.* v. *Commonwealth*, 134 Kentucky, 272.

The court erred in refusing to charge the jury that their verdict if for the Government could not exceed one thousand dollars. There was but one act done, one offense committed, and but one penalty incurred, and not forty-five offenses nor forty-five penalties.

Under the statute one shipment of laborers constitutes but one misdemeanor, and but one penalty is incurred. One act cannot be split or divided into many offenses and the penalties thereby multiplied. *Balt. & Ohio S. W. R. R. Co.* v. *United States*, 220 U. S. 94; *Standard Oil Co.* v. *United States*, 164 Fed. Rep. 376.

The mere inducing and soliciting of an alien laborer fixes the status of the person as an alien contract laborer, but does not authorize a verdict for the penalty.

The instruction authorized a verdict for the Government without any finding of knowledge by the defendant of the status of the person as an alien contract laborer.

The instruction is an attempt to extend the issues raised in the pleadings, and is therefore erroneous. 11 Ency. Pl. & Pr., p. 159.

One cannot be said to consent to an act of the commission of which he had no knowledge. *McDonald* v. *Williams*, 174 U. S. 397, 406.

It was error to award judgment for costs against the defendant. *Phillips* v. *Gaines*, 131 U. S. CLXIX, appx.

At common law costs are not recoverable against the opposite party. *United States* v. *Ringgold*, 8 Pet. 150; *Antoni* v. *Greenhow*, 107 U. S. 769; *United States* v. *Verdier*, 164 U. S. 213; *Pine River Co.* v. *United States*, 186 U. S. 279.

Mr. Assistant Attorney General Wallace for the United States.

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

In an action of debt, tried to the court and a jury, in one of the district courts of the Territory of Arizona, the United States recovered a judgment against the Grant Brothers Construction Company, a California corporation, for the prescribed penalty of $1,000 for each of forty-five alleged violations of § 4 of the Alien Immigration Act of February 20, 1907, c. 1134, 34 Stat. 898; and upon an appeal to the Supreme Court of the Territory, the judgment was affirmed. 13 Arizona, 388. The construction company and the surety upon its supersedeas bond then sued out this writ of error, claiming that divers errors had been committed by the trial court which should have been, but were not, corrected by the appellate court.

The portions of the statute upon which the action was founded are as follows:

"SEC. 2. That the following classes of aliens shall be excluded from admission into the United States: . . . persons hereinafter called contract laborers, who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled; . . . *And provided further*, That skilled labor may be imported if labor of like kind unemployed cannot be found in this country: *And provided further*, That the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants.

* * * * * * * *

"SEC. 4. That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this Act.

"SEC. 5. That for every violation of any of the provisions of section four of this Act the persons, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his

own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States."

The petition contained forty-five counts, each charging, with considerable detail, that the defendant, by offers and promises of employment and by providing transportation and paying expenses, assisted, encouraged and solicited the migration and importation into the United States from Mexico of a designated alien laborer who was not within the terms of either of the last two provisos in § 2 of the statute. A different alien laborer was named in each count, and the date of the offending act was given in all as October 29, 1909.

In a preliminary way, the evidence tended to show these facts: The construction company was building a line of railroad in southern Arizona, near Naco, a town on the international boundary. Laborers in large numbers were required for the work, and in August, 1909, the company employed one Carney to procure laborers for it and to take them to the vicinity of the work. For this he was to be paid one dollar in gold for each laborer secured and twenty cents for each meal provided while they were en route. It was contemplated that he would arrange with others to aid him, and he secured the assistance of Holler, Rupelius and Randall, who, like himself, were located at Nogales, another boundary town. Under this employment Carney procured, and the company accepted, prior to the transaction in question, about 450 laborers, 95 per cent. of whom were Mexicans. Many of these came across the line on their own initiative and were then engaged by Holler, but a substantial number were engaged in Mexico

by Rupelius and then brought into the United States at Nogales. Only a few days before the transaction in question, Rupelius gathered together 80 or 90 in Mexico and induced them to enter the United States at Nogales by promising that the construction company would employ them, which it did.

As respects the 45 laborers named in the petition there was evidence tending to show the following: These men were citizens of Mexico and were unskilled laborers who were not within the exemptions specified in the last two provisos in § 2 of the statute. They were secured at Hermosillo, Mexico, by Rupelius, October 28, 1909, were brought into the United States, at Naco, by Randall the next day, were there taken into custody by an immigration inspector, and were examined before a board of special inquiry. The board found that they were alien contract laborers, ordered that they be excluded, and notified them of the order and of their right to an appeal. After consulting with the Mexican Consul at Naco they waived that right, and most of them were returned to Mexico, a few being detained as witnesses. Rupelius had induced them to leave Hermosillo and come into the United States by offers and promises of employment by the construction company. They were brought to Naco upon a railroad pass procured by Carney and purporting to have been issued on account of the construction company, and their only meal en route was provided by Holler at Carney's suggestion. During the latter part of their journey they were in charge of Randall, who had been directed by Carney to deliver them to McDonald, an agent of the construction company, who was expected to be at Naco to receive them. McDonald was there, having come in from one of the company's camps that day. He endeavored to hasten the proceedings before the board of inquiry in order that he might get the men out to the camp that afternoon, and also provided a meal for them while the proceedings

were in progress. This was the first party of Mexicans that Carney had attempted to bring into the country at Naco. Others had been brought in at Nogales. According to his statement, the inspection officers at the latter place had been particularly liberal in admitting Mexican laborers procured for the construction company; and he suggested to the inspectors at Naco that like action on their part would be appreciated, but the suggestion did not find favor with them.

There were some direct contradictions in the evidence, different portions gave rise to opposing inferences, and parts of it were more or less improbable; but as it was the province of the jury to pass on such matters, which it did by the verdict, they require no other notice than they will receive presently.

As several of the alleged errors, not involving anything fundamental or jurisdictional, were not presented to the appellate court for consideration, they must be regarded as waived and will be passed without further notice. *Montana Railway Co.* v. *Warren*, 137 U. S. 348, 351; *Gila Valley Railway Co.* v. *Hall*, *ante*, pp. 94, 98.

It is complained that the trial court permitted the Government to read in evidence the depositions of absent witnesses, instructed the jury to return a verdict for the Government if the evidence reasonably preponderated in its favor, and in other ways treated the case as civil in substance as well as in form. But the trial court was right. An action such as this is civil and is attended with the usual incidents of a civil action. *United States* v. *Regan*, *ante*, p. 37.

The petition did not allege that the acts charged against the construction company were knowingly done, and it is said that this operated to render the recovery erroneous. No doubt the petition was defective. A right to the penalty arises only where § 4 is violated "by knowingly assisting, encouraging or soliciting the migration or impor-

tation" of an alien contract laborer into the United States. Knowledge being an element of what is penalized, it must be included in the statement of a cause of action for the penalty. But there are reasons why the defect did not render the recovery erroneous. The defect was not pointed out in the trial court. On the contrary, the case was tried as if the omitted allegation were in the petition. Both parties introduced evidence bearing upon the company's knowledge, both presented requests for instructions treating it as an essential factor in the case, and the jury was instructed upon that theory. In its charge the court said that before any verdict could be returned for the Government it must appear from the evidence that some representative of the defendant company, for whose act it would be responsible, "knowingly assisted or knowingly encouraged or knowingly solicited or knowingly caused others to assist or encourage or solicit the migration or importation of an alien Mexican contract laborer into the United States." And again: "Where knowledge is an essential ingredient of a cause of action, the existence of the knowledge becomes a question to be determined by the jury, upon a consideration of all the facts and circumstances in the case." It is therefore quite plain that the jury found from the evidence that the acts charged against the defendant were knowingly done, and the petition may well be treated as amended to conform to the facts. Ariz. Rev. Stat. 1901, §§ 1288, 1293; *Reynolds* v. *Stockton*, 140 U. S. 254, 266. The defendant was in no wise prejudiced by the defect, and to make it a ground for reversing the judgment, notwithstanding the theory upon which the trial proceeded, would be most unreasonable. *San Juan Light Co.* v. *Requena*, 224 U. S. 89, 96; *Campbell* v. *United States*, *Id.* 99, 106.

Complaint is made of the denial of a motion to suppress certain depositions, subsequently read in evidence, which the Government had taken under a commission issued by

the clerk. The only ground for the motion to which our attention is invited is that the preliminary notice described the case as pending in the second district when it was pending in the first. The case had been brought in the former, and was transferred to the latter at the defendant's instance. The notice and accompanying interrogatories were prepared before and served after the transfer. The purpose of the notice was to inform defendant's counsel of the intended application for a commission and of the proposed interrogatories and to give opportunity for filing cross-interrogatories. See Ariz. Rev. Stat. 1901, §§ 2507, 2513. No cross-interrogatories were filed in either district, and after the expiration of the time allowed for them the clerk of the district in which the case was pending issued the commission. Counsel for the defendant could not have been misled or confused by the error in the notice, for they were fully informed of the transfer, having perfected it the day before the notice was served. In these circumstances the trial court, as also the Supreme Court of the Territory, held that the error was inconsequential and did not require the suppression of the depositions. We perceive no reason for disturbing that conclusion. On the contrary, we think it was plainly correct.

Over the defendant's objection, the decision of the board of special inquiry was admitted in evidence as tending to prove that the 45 men were aliens, and it is said that this was error because the defendant was not a party to the proceeding. One of the questions committed by law to the board for decision, subject to an appeal to the Secretary of Commerce, was whether the men were aliens. The document admitted in evidence disclosed that, after a hearing, the board determined that question in the affirmative, and that the men acquiesced by waiving their right to an appeal. In that way their status as aliens was conclusively established as between themselves and the United States. It is true that the defendant was not a

party to that proceeding, and that as a general rule a judgment binds only the parties and their privies. But it is equally true that a judgment in a prior action is admissible, even against a stranger, as *prima facie*, but not conclusive, proof of a fact which may be shown by evidence of general reputation, such as custom, pedigree, race, death and the like, and this because the judgment is usually more persuasive than mere evidence of reputation. 1 Starkie Ev. 386; 1 Greenleaf Ev., §§ 139, 526, 555; *Patterson* v. *Gaines*, 6 How. 550, 599; *Pile* v. *McBratney*, 15 Illinois, 314, 319; *McCollum* v. *Fitzsimons*, 1 Rich. (So. Car.) 252. In principle, alienage is within the latter rule, and so the board's decision was properly admitted in evidence for the purpose stated.

Considerable evidence was admitted, over the defendant's objection, of the acts and declarations of Carney and his assistants while they were procuring laborers in Mexico and bringing them into the United States, and it is contended that this was violative of the rule that the acts and declarations of a professed agent are not admissible to prove the existence or extent of his agency. See *United States* v. *Boyd*, 5 How. 29, 50. But the contention rests upon a misconception of what the record discloses. This evidence was not admitted to establish the agency or its extent, but to show that the laborers came into the United States in circumstances which rendered their migration or importation unlawful. Whether the defendant was responsible for what was done was another question. The trial court recognized this and expressly ruled that the agency must be otherwise shown, and we agree with the territorial courts in thinking there was other evidence tending to prove the agency and that it embraced what was done.

The evidence disclosed that when the arrangement was made with Carney, and on one or two occasions thereafter, he was in terms instructed not to engage any laborer

in Mexico and not to induce or assist any laborer to migrate thence into the United States, and because of this it is said that the evidence afforded no basis for holding the defendant responsible for the acts of Carney and his assistants in inducing and aiding the migration or importation of the laborers named in the petition. In dealing with this point the courts below held that under the evidence as a whole it was an admissible conclusion that the instructions to Carney were not given in good faith or were in effect abrogated by acquiescence in their non-observance. An examination of the evidence as set forth in the record satisfies us that it afforded reasonable support for either of these conclusions and therefore that the question was properly one for the jury. And upon looking at the court's charge as incorporated into the record we find that the matter was fairly and adequately submitted.

Although conceding that there was evidence that ten of the men were citizens of Mexico, the company claims that there was no evidence of the alienage of the other thirty-five. It must be held otherwise. Not only did the decision of the board of inquiry constitute such evidence, but it was distinctly testified by some of the men, who became witnesses at the trial, that "they were all Mexicans," meaning thereby, as the context shows, that they were all citizens of Mexico.

Still another contention is that as all the men named in the petition were brought into the United States at one time there was but a single violation of the statute and only one penalty could be recovered. The statute declares that "separate suits may be brought for each alien thus promised labor or service," and this plainly means that a separate penalty shall be assessed in respect of each alien whose migration or importation is knowingly assisted, encouraged or solicited in contravention of the statute. See *Missouri, Kansas & Texas Ry. Co.* v. *United States*, 231 U. S. 112.

The action of the court in rendering judgment against the defendant for the costs is challenged, but this was so clearly right as to render discussion of it unnecessary. Ariz. Rev. Stat. 1901, §§ 1543, 2639; *Kittredge* v. *Race*, 92 U. S. 116, 121; *United States* v. *Verdier*, 164 U. S. 213, 219.

As we find no prejudicial error in the record, the judgment is

Affirmed.

STEWART v. PEOPLE OF THE STATE OF MICHIGAN.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 239. Argued March 6, 1914.—Decided March 23, 1914.

Crenshaw v. *Arkansas*, 227 U. S. 389, followed to effect that the negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce.

Where one has been convicted for violating a state statute which is unconstitutional as applied to the act committed, the conviction cannot be sustained because there was proof of another violation with which he was not charged, as conviction for the latter would be condemnation without hearing which would be denial of due process of law.

167 Michigan, 417, reversed.

THE facts, which involve the validity under the commerce clause of the Federal Constitution of a conviction under the peddling and hawking license act of Michigan, are stated in the opinion.

Mr. George M. Valentine and *Mr. G. W. Bridgman* for plaintiff in error, submitted:

Section 8 of Art. I and § 2 of Art. IV of the Constitu-

tion are to be liberally construed for the benefit of the States and their citizens.

The authority of Congress in this regard is exclusive, and no State, except in the exercise of the police power for the security of the lives, health, and comfort of persons and the protection of property, can make any law or regulation which will affect the free and unrestrained intercourse and trade between the States as the Federal Constitution left it, or which will impose any discriminating burden or tax upon the citizens or products of other States coming or brought within its jurisdiction.

The state court erred in holding the transactions to be domestic commerce, simply because plaintiff in error caused the goods for which he had taken orders to be consigned to himself in the State of Michigan, with no mark upon any of the goods to indicate that they were to fill any particular order or that they were for any particular person. See *Asher* v. *Texas*, 128 U. S. 129; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Brennan* v. *Titusville*, 153 U. S. 289; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Dozier* v. *Alabama*, 219 U. S. 124; *Crenshaw* v. *Arkansas*, 227 U. S. 389; Dillon on Mun. Corp., 5th ed., p. 2328, § 1356.

Importation of goods from outside the State as ordered by purchasers is an act of interstate commerce, although the goods are shipped to a general agent in the State, who re-packs them and sends them to subordinate agents, who deliver them to the purchasers. *Huntington* v. *Mahan*, 142 Indiana, 695; *Bloomington* v. *Bourland*, 137 Illinois, 534; *McLaughlin* v. *South Bend*, 126 Indiana, 471; *Martin* v. *Rosedale*, 130 Indiana, 109; *Carstairs* v. *O'Donnell*, 154 Massachusetts, 357; *People* v. *Bunker*, 128 Michigan, 160; *Stone* v. *State*, 117 Georgia, 292; *Turner* v. *State*, 41 Tex. Crim. Rep. 545; *In re Spain*, 47 Fed. Rep. 208; *South Bend* v. *Glasby*, 50 Washington, 598.

Mr. Grant Fellows, Attorney General of the State of Michigan, for defendant in error.

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

Plaintiff in error was tried and convicted in a Justice Court upon a criminal information which charged that "one David J. Stewart did travel from place to place within the County of Berrien, State of Michigan, for the purpose of taking orders for the purchase of goods, wares and merchandise, by sample, lists and catalogues, without having then and there obtained a license as a hawker and peddler as required and provided by chapter 136 of the compiled laws of Michigan, of 1897, as amended." From that judgment an appeal was taken to the county court where the cause was tried *de novo* by a jury, resulting again in a conviction, and that judgment was affirmed by the Supreme Court of the State (167 Michigan, 417). This writ of error was then prosecuted.

There are several assignments of error of a Federal nature, but the consideration of one—the asserted repugnancy of the statute upon which the warrant was based to the commerce clause of the Constitution of the United States—will enable us to dispose of the case. The statute provides:

"No person shall be authorized to travel from place to place within this state, for the purpose of carrying to sell or exposing to sale any goods, wares, or merchandise, or to take orders for the purchase of goods, wares, or merchandise, by sample list or catalogues, unless he shall have obtained a license as a hawker and peddler in the manner hereinafter directed."

Violation of the statute was made a misdemeanor punishable by fine or imprisonment.

Briefly stated, the material facts, which are uncontro-

verted, are as follows: The defendant resided in the City of Chicago where he was engaged in the general merchandise business, but much of his time was spent in the State of Michigan soliciting orders for groceries and other merchandise to be shipped from his Chicago store. Duplicates of the orders secured were mailed by him to his manager in Chicago, and goods corresponding to the orders were shipped in carload lots from the Chicago store consigned to the defendant at St. Joseph and other points in Berrien County, Michigan. Upon the arrival of the cars at St. Joseph the goods were delivered to the customers by draymen employed by the defendant, who filled the orders at the car by checking from the original orders, there being no identifying marks on the packages, except as to their contents. Customers living at a distance received notice by mail of the arrival of the cars and called or sent for their goods. If for any reason any orders were undelivered, the goods corresponding to such orders were returned to the Chicago store or placed in a storeroom which the defendant hired in Benton Harbor, Michigan, and there is some evidence tending to show that occasional sales were made by the defendant from the storeroom and from the car without previous solicitation.

Upon the above facts the trial court charged the jury as follows:

"In this case it is claimed by the defendant that he was engaged in interstate commerce and that he was protected by the Interstate Commerce Law.

"Now, it is true that a wholesale merchant or grocer, in the City of Chicago for instance, can solicit orders through an agent in this state and he can send an agent here to deliver the goods.

"The facts, however, in this case are different. The goods were shipped here in a car consigned to the defendant himself. The goods were never consigned to the man who made the order, and when they got here they were

not the goods of the man who made the order because if, any of those men who had made an order had gone down to the car they could not have claimed the goods that were there because they could not be identified. The packages were mixed promiscuously in boxes and there were no names on the packages. Moreover, those goods were not shipped according to the usual course of business, promptly, but there was a delay of some two or three months in the shipment of those wares.

"I hold, gentlemen, that there was no sale ever consummated until the goods were actually delivered by the drayman at the house. Ordinarily the sale is consummated at Chicago (where goods are ordered from Chicago) and the sale is consummated the moment they are shipped at the City of Chicago, directed to the consignee. In this case no sale was consummated whatever until the goods were actually delivered at the house.

"So I hold, practically, that the car was a mere warehouse or place of doing business by the defendant, and it was there that he distributed the goods as he pleased. For that reason, gentlemen, I hold that the defendant comes within the law and that he is what is called a hawker and peddler.

* * * * * * * *

"In this case, as it is only a matter of law, and there are no facts in dispute, it will be your duty of course, as a matter of form, to follow the direction of the court, I find, gentlemen of the jury, in this case that the defendant, under the evidence and the law, is guilty of the charge. . . ."

And the correctness of the charge thus given was in terms sustained by the Supreme Court of the State in its opinion.

The charge as thus given and affirmed is clearly in conflict with the rule announced in *Crenshaw* v. *Arkansas*, 227 U. S. 389, and the cases there reviewed. Indeed,

reference to authority is unnecessary, since it was admitted in the argument at bar that the judgment below in so far as it affirmed the action of the trial court in holding that there could be a conviction because of the deliveries of merchandise from the cars to fill orders previously solicited and obtained was erroneous because in conflict with the commerce clause of the Constitution. But it is said although there was manifestly reversible error from this point of view, nevertheless as from another point of view there was a ground adequate to sustain the judgment, there should be an affirmance. The court below it is said, not only placed its affirmance upon the erroneous ruling as to the sales made under orders, but also upon the ground that there was evidence showing some sales made from the car or store-room not under previous orders and as the latter sales were not within the shelter of the commerce clause, therefore the affirmance on that ground was an independent non-Federal conclusion sustaining the action of the court and calling for the duty of affirmance. But this proposition disregards the fact that the only charge made against the accused was for peddling and that the instructions of the court and the whole course of the trial conclusively established that the sales made from the car, as the result of the orders solicited, formed the sole basis for the prosecution, and the conviction therefore related to that and to that alone. If then it be admitted that the judgment below was placed upon two grounds, such admission would not establish that the judgment rested upon an independent state ground adequate to sustain it, since the first ground it is admitted was Federal and erroneous, and the second ground if upheld would amount to a condemnation without hearing and therefore constitute a denial of due process of law. Thus the proposition if sustained would require us to hold that an admitted violation of one constitutional right must be left uncorrected because at the same time another and equally

fundamental constitutional right was disregarded, a conclusion which would give effect to both wrongs obviously demonstrates our plain duty to reverse and remand for further proceedings not inconsistent with this opinion.

Reversed.

RILEY *v.* COMMONWEALTH OF MASSACHUSETTS.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 228. Argued March 4, 5, 1914.—Decided March 23, 1914.

A state statute limiting the hours of labor in factories for women, if otherwise valid, is not unconstitutional as depriving the employer or employé of property without due process of law by limiting the right to buy and sell labor and infringing the liberty of contract in that respect. *Muller* v. *Oregon*, 208 U. S. 412.

It being competent for the State to restrict the hours of employment of a class of laborers, it is also competent for the State to provide administrative means against evasion of such restrictions. *C., B. & Q. Ry.* v. *McGuire*, 219 U. S. 549.

The wisdom and legality of the means adopted by the legislature to enforce proper restrictions on employment of labor cannot be judged by extreme instances of their operation.

Section 48 of the Labor Act of 1909 of Massachusetts, regulating the hours of labor of women in factories, is not an unconstitutional denial of due process of law because it provides for the posting of a schedule of hours and requires the hours to be stipulated in advance and followed until a change is made. The provision is reasonable and not arbitrary.

A provision in a state statute that the form of notice in which employés' hours of labor are scheduled shall be approved by the Attorney General of the State, does not deny equal protection of the law if the approval is confined to the form of notice and not to the schedules which might provide for different hours in different cases.

In this case the conviction by the state court, of one in whose factory in Massachusetts women were permitted to work during the period scheduled as dinner hour, under § 48 of the Labor Act of 1909 of Massachusetts, sustained; and *held* that such statute is not unconstitutional under either the due process or equal protection provision of the Fourteenth Amendment.

210 Massachusetts, 387, affirmed.

THE facts, which involve the constitutionality, under the due process and equal protection of the law provisions of the Fourteenth Amendment, of the Woman's Labor Act of Massachusetts, are stated in the opinion.

Mr. Andrew J. Jennings, with whom *Mr. Israel Brayton* and *Mr. Edward T. Fenwick* were on the brief, for plaintiff in error:

Section 48 is in violation of the Fourteenth Amendment as it goes beyond the power of the State to restrict the employment of labor. *Holden* v. *Hardy*, 169 U. S. 366; *Lochner* v. *New York*, 198 U. S. 45; *Allgeyer* v. *Louisiana*, 165 U. S. 579, p. 589; *Muller* v. *Oregon*, 208 U. S. 412.

Section 48 denies the equal protection of the laws.

The state legislature virtually admits in the statute itself that it does not deem it necessary for a woman's health to limit her employment in laboring to ten hours a day, and it gives to every different employer the right by posting a printed notice, to employ a woman in laboring eleven hours a day on five days in the week provided he employs the woman such a number of hours on the sixth day as not to exceed fifty-six hours in the whole week.

Even if such a notice must first be approved by the Attorney General of the State, the statute only says the form shall be approved; but if it is held that the Attorney General is to approve the number of hours and that the Attorney General may say what the number of hours shall be, then he could approve or disapprove different notices stat-

ing different numbers of hours of employment by different employers. See *Yick Wo* v. *Hopkins*, 118 U. S. 356, p. 369.

The law is to be judged not by what may be done but by what can be done, under it. *Curtin* v. *Benson*, 222 U. S. 78.

The state statute is not only a denial of the equal protection of the laws, but it is unreasonable and arbitrary in forbidding the employment of women more than ten hours in any one day or fifty-six hours a week in any mechanical and manufacturing establishment. See *Muller* v. *Oregon*, *supra*.

Section 17 of Chap. 541, defining a manufacturing establishment as any premises, room or place used for the purpose of making, altering, repairing, ornamenting or finishing or adapting for sale any article or part of an article, includes any room or place regardless of the kind of work or the sanitary conditions under which the work is performed.

This court must hold unconstitutional a law which forbids such employments as these last mentioned, unless it is prepared to hold that the State under its police powers has the right to forbid the employment of women in doing any sort of labor for more than ten hours a day. *People* v. *Williams*, 116 N. Y. App. Div. 379.

Even if the statute be held constitutional as to the employment of women more than ten hours in a day or fifty-six hours in a week, that is not the crime of which the plaintiff was charged and convicted.

Under § 48, as now amended, the employment of a woman at a time other than as stated in the printed notice, is a violation of the act. This is clearly unconstitutional and may be so declared without affecting the two prohibitions of the statute forbidding the employment of women more than ten hours a day and more than fifty-six hours a week. *Edwards* v. *Bruorton*, 184 Massachusetts, 529; *Hunt-*

ington v. *Worthen*, 120 U. S. 97, p. 101; *Field* v. *Clark*, 143 U. S. 649, p. 696.

An employer is no longer to be punished only in case he endangers a woman's health by employing her in laboring in any one day more than ten hours or for a longer time than as stated in the notice, or more than fifty-six hours in a week, but he is now to be adjudged a criminal and punished if he employs her for one minute other than as stated in the notice.

In construing such a law it will not be sustained unless it is reasonable and not arbitrary.

If the court cannot construe the law as a reasonable and proper exercise of the police power of the State, it must declare it unconstitutional.

The court will give the law a constitutional construction if possible. *Newburyport* v. *Comrs. of Essex*, 12 Met. (Mass.) 211; *Commonwealth* v. *Anthes*, 5 Gray, 185 (Mass.); *Opinion of Justices*, 207 Massachusetts, 601, p. 604; *Holden* v. *Hardy*, 169 U. S. 366; *Lochner* v. *New York*, 198 U. S. 45; *Muller* v. *Oregon*, 208 U. S. 412; *Bailey* v. *Alabama*, 219 U. S. 219.

The said clause unreasonably and arbitrarily deprives the said plaintiff and others of liberty of person and property, especially freedom of contract, without due process of law and denies to him and them the equal protection of the laws.

It has made it a crime to employ a woman in laboring not only for a longer time than ten hours, but even for five minutes.

Under it a man is held guilty of a crime for doing what is not even forbidden in the law, except inferentially by the words "shall be deemed a violation of the provisions of this Section."

Certainly such an act violates no other provision of the section. Can the state legislature make an otherwise innocent act a crime by simply saying that it is one? The

act forbidden by the clause was not dangerous to the health, safety, morals or welfare either of the woman or the public.

The clause is arbitrary and unreasonable in that it requires the employer to post a notice in a room in which women and minors are permanently employed in laboring only six hours a day and makes it a crime if such a person is allowed to work for five minutes at any time other than as stated in the notice.

Such a clause can only be justified on the ground that it is a reasonable health regulation to protect the health of women and thereby promote the public welfare. It does neither. *People* v. *Williams*, 116 N. Y. App. Div. 379.

The clause if regarded as evidential, is an unjustifiable exercise of the police power of the State, which cannot do indirectly what it cannot do directly. *Huntington* v. *Worthern*, 120 U. S. 97, p. 101.

A State has no right to make an act innocent in itself and protected by the Fourteenth Amendment conclusive evidence of another fact, properly forbidden or required, in another part of the statute. *Bailey* v. *Alabama*, 219 U. S. 238.

While the court will hold that the statute is constitutional unless clearly otherwise, we submit it will not hesitate to declare it unconstitutional if it finds it clearly unreasonable and arbitrary. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61.

The general right to make a contract in relation to his business is part of the liberty protected by the Fourteenth Amendment, and this includes the right to purchase and sell labor, except as controlled by the State in the legitimate exercise of its police power. *Lochner* v. *New York*, *supra*.

Section 48 in its entirety is not a reasonable regulation under the police power of the State, because:

By the approval of different schedules by the Attorney General the law may operate unequally in different employments, and

The prohibition against employing women more than ten hours in any one day or fifty-six hours a week in any manufacturing or mechanical establishment is not restricted to times and places which relate to and naturally and logically affect a woman's health, safety or morals or the welfare of herself or the public.

That part of section 48 of the act which provides that the employment of a woman at a time other than as stated in said printed notice shall be deemed a violation of the provisions of this section, is the crime of which the plaintiff was convicted, is separable from the rest of the section and is clearly unconstitutional.

Mr. James M. Swift, with whom *Mr. Thomas J. Boynton,* Attorney General of the Commonwealth of Massachusetts, was on the brief, for defendant in error:

In the exercise of the police power, the State may limit the right of contract or the use of private property within reasonable limits.

The mere failure to include within the operation of an act certain persons or classes to whom it might have applied will not render the legislation invalid as discriminatory. The classification of employment of women and children confined to manufacturing and mechanical establishments, such as a cotton factory, as here, is within the legislative power.

Whether or not the present law and the classification thereby designated, as construed by the state court, are reasonable, must be determined by facts of common knowledge, of which the court will take judicial notice.

The construction and interpretation of the Massachusetts court, as applicable to the facts in this case, conclusively establish that—

The legislation is purely a police regulation intended to establish the rights of children and women, who are treated as in a certain sense dependent and under an industrial disadvantage by reason of age and sex, to regular hours of employment for limited and designated periods of time, with fixed intervals for rest and refreshment, and to protect them in the enjoyment of the rights thus established, to the end that the health and endurance of the individual may be insured and the ultimate strength and virility of the race be preserved.

The classes of occupations designated in the act do not disclose an arbitrary discrimination.

When the constitutionality of the statute is settled, the means by which the aim of the statute may be forwarded within reasonable bounds are matters of legislative determination. The means provided by this statute cannot be said to be unreasonable or arbitrary, and are, therefore, within the power of the legislature and are not obnoxious to the Constitution.

It is not an impairment of the freedom of contract of a citizen to require that certain terms of a contract shall be posted in such form as not to be subject to mistake or dispute, which is in substance the entire requirement of the act. The statute requires only that the hours of labor be stipulated in advance and then be followed until some change is made. The parties are left free to establish any schedule of hours desired. The employer is only required to observe the table of hours of labor which he himself has chosen to post in any room.

In support of these contentions see, *Assaria State Bank* v. *Dolley*, 219 U. S. 121; *Barrett* v. *Indiana*, 229 U. S. 26; *Commonwealth* v. *Hamilton Mfg. Co.*, 120 Massachusetts, 383; *Chicago, R. I. & P. Ry.* v. *Arkansas*, 219 U. S. 453; *Commonwealth* v. *Riley*, 210 Massachusetts, 387; *Griffith* v. *Connecticut*, 218 U. S. 563; *Hamilton Co.* v. *Massachusetts*, 6 Wall. 632; *Holden* v. *Hardy*, 169 U. S. 366; *Howard* v.

Kentucky, 200 U. S. 164; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61; *Muller* v. *Oregon*, 208 U. S. 412; *Osborne* v. *Florida*, 164 U. S. 650; *Stockard* v. *Morgan*, 185 U. S. 27; *Schmidinger* v. *Chicago*, 226 U. S. 578; *Twining* v. *New Jersey*, 211 U. S. 90; *Williams* v. *Arkansas*, 217 U. S. 79.

Mr. Justice McKenna delivered the opinion of the court.

Criminal complaint brought against plaintiff in error in the Superior Court within and for the county of Bristol charging him with the violation of a statute of the State [1] in that he, being superintendent of the Davol Mills, a corporation duly established by law and conducting a mill for the manufacture of cotton goods in which establishment women were employed, employed two women by the names of Annie Manning and Nora Callahan at a time other than the time which the statute required to be posted in a conspicuous place in the mill where women were required to work in laboring. The specific charge is that the women were employed at five minutes of one o'clock (12.55 p. m.) on the twenty-fourth of February, 1910, in a room wherein was posted a notice in which it was stated that the time of commencing work was 6:50 a. m. and of stopping work was 6 p. m., and that the time allowed for dinner began at 12 m. and ended at 1 p. m.

A demurrer and motion to quash were filed, alleging the unconstitutionality of the statute.

The charge was dismissed as to Annie Manning, and plaintiff in error was convicted as to the charge in regard to Nora Callahan, and sentenced to pay a fine of $50.00. The sentence was affirmed by the Supreme Judicial Court, and its rescript having been sent to the trial court, this writ of error was sued out.

[1] Chapter 514, Acts of 1909 entitled "An Act to Codify the laws relating to labor."

The statute of the State which is assailed provides that no child or woman shall be employed in laboring in any manufacturing or mechanical establishment more than ten hours in any one day, except as hereinafter provided in this section, unless a different apportionment of the hours of labor is made for the sole purpose of making a shorter day's work for one day of the week, and in no case shall the hours of labor exceed fifty-six in a week. It is provided, "Every employer shall post in a conspicuous place in every room in which such persons are employed a printed notice stating the number of hours' work required of them on each day of the week, the hours of commencing and stopping work, and the hours when the time allowed for meals begins and ends. . . . The employment of such person at any time other than as stated in said printed notice shall be deemed a violation of the provisions of this section," punishable by a fine of not less than $50 nor more than $100.

The first contention of plaintiff in error is that the statute restricts the right to sell and buy labor, and therein infringes the liberty of contract assured by Art. XIV of the amendments to the Constitution of the United States. The contention is untenable expressed in this generality. In *Muller* v. *Oregon*, 208 U. S. 412, against a similar contention, a statute of Oregon was sustained which prohibited the employment of women in mechanical factories or laundries working more than ten hours during any one day, with power, as in the Massachusetts statute, to apportion the hours through the day.

But special objections are made which, it is contended, make *Muller* v. *Oregon* inapplicable. The prohibition of the statute under review, it is said, "is not restricted to times and places which relate to and naturally and logically affect a woman's health, safety or morals or the welfare of herself or the public." Such are the conditions necessary to the validity of a statute, restricting employ-

ment, it is contended, and that those conditions are not satisfied by the statute. Section 48, it is urged, not only prohibits the employment of women more than ten hours a day, but that (quoting the section) "the employment of such person [woman] at a time other than as stated in said printed notice shall be deemed a violation of the provisions of this section."

The provision is arbitrary and unreasonable, it is insisted, in that it requires the employer to post a notice in a room in which women and minors are permanently employed in laboring only six hours a day and makes it a crime if such person is allowed to work for five minutes at a time other than as stated in the notice. But if we might imagine that an employer would so enlarge the restrictions of the statute or be charged with violating it if he did, we yet must remember that as it was competent for the State to restrict the hours of employment it is also competent for the State to provide administrative means against evasion of the restriction. *Chicago, B. & Q. R. R. Co.* v. *McGuire*, 219 U. S. 549; *St. John* v. *New York*, 201 U. S. 633. Neither the wisdom nor the legality of such means can be judged by extreme instances of their operation. The provision of § 48 cannot be pronounced arbitrary. As said by the Supreme Judicial Court, the statute "requires the hours of labor to be stipulated in advance, and then to be followed until a change is made. It does not by its terms establish a schedule of hours. This is left to the free action of the parties. Nor does it in the sections now under consideration restrict the right to labor to any particular hours. See *People* v. *Williams*, 189 N. Y. 131. It simply makes imperative strict observance of any one table of hours of labor while it remains posted.

"The end of the statute is the protection of women within constitutional limits, and the requirement that the hours posted in the notice shall be followed is a means to

effectuate the attainment of that end (p. 394)." In other words, the purpose of the posting of the hours of labor is to secure certainty in the observance of the law and to prevent the defeat or circumvention of its purpose by artful practices.

There is a contention somewhat tentatively made by plaintiff in error that the statute offends the equal protection clause of the Fourteenth Amendment. It will be observed that § 48 provides that the printed form of the "notice shall be provided by the chief of the district police, after approval by the attorney general." And counsel say, "If it be claimed that such a notice must first be approved by the Attorney General of the State, our reply is that the statute says the *form* shall be approved; but if it is held that the Attorney General is to approve the number of hours and that the Attorney General may say what the number of hours shall be, then he could approve or disapprove different notices stating different numbers of hours of employment by different employers. This seems to us to be a violation of the Fourteenth Amendment as denying equal protection of the laws."

And again counsel say, as a specification of the unreasonableness of the statute as an exercise of the police power of the State, "By approval of different schedules by the Attorney General, the law may operate unequally in different employments." This supposition is based on the other, that is, that something else than the form of notice is to be prescribed by the Attorney General. But counsel assert that it is the form only which the Attorney General is to approve, and the assertion is not denied. There is, therefore, nothing tangible in the contention. Besides, it has no justification in the opinion of the Supreme Judicial Court.

Judgment affirmed.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY *v.* WEST.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 696. Motion to dismiss or affirm. Submitted January 5, 1914.—Decided March 23, 1914.

Whether the injured person was or was not an employé of the railway company causing the injury, is a question of fact, and if there is a finding supported by the record that he was not, this court cannot review the judgment of the state court under § 237, Judicial Code, as being invalid because the case was not tried under the Employers' Liability Act. *St. Louis & Iron Mtn. Ry.* v. *McWhirter*, 229 U. S. 265; *St. Louis & San Francisco Ry.* v. *Seale*, 229 U. S. 156, distinguished.

The decision of the state court, based on substantial ground, being that the injured person was the employé of the express company and not the railway company, although performing certain duties for the latter, there is no denial of a Federal right in the refusal of the state court to apply the Federal Employers' Liability Act, and this court must dismiss the writ of error and it is not necessary to notice other errors assigned.

THE facts, which involve the jurisdiction of this court under § 237, Judicial Code, to review a judgment of the state court of Oklahoma against a railroad company for damages for death of an express messenger and the application of the Federal Employers' Liability Act to such a case, are stated in the opinion.

Mr. Thomas D. O'Brien, Mr. Benjamin Martin, Jr., Mr. S. Grant Harris and *Mr. Charles H. Taylor* for defendant in error, in support of motion.

Mr. Joseph M. Bryson, Mr. C. L. Jackson and *Mr. W. R. Allen* for plaintiffs in error, in opposition to motion.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action for damages brought by defendant in error against plaintiff in error (herein called the railway company) for the death of William B. West, husband of the defendant in error, caused by the collision of two trains of the railway company. The case was tried to a jury and resulted in a verdict and judgment for defendant in error in the sum of $15,000. The judgment was affirmed by the Supreme Court of the State, and error was prosecuted from this court.

There is no dispute about the collision, the cause of it, or that it resulted in the death of the deceased. He and the plaintiff below were residents of Kansas and she brought the suit, as she alleged in her complaint, as his widow and for the benefit of herself as such widow and their three minor children. No personal representative of his estate was appointed.

She alleged that the deceased at the time of his death was employed by the American Express Company as express messenger upon the express cars operated by the railway company over its line of railroad from Parsons, Kansas, through the State of Oklahoma, to points in the State of Texas. That in addition to his duties as express messenger he was also engaged in handling passenger baggage upon the express cars of the railway company. The plaintiff then alleged the deceased came to his death in the course of his employment while riding in the express car, by reason of a head-on collision of the train with a freight train between certain stations in Oklahoma.

A demurrer was filed which attacked the legal capacity of the plaintiff to sue for her minor children and the sufficiency of the complaint, and alleged as well that there was a defect of parties. The demurrer was overruled, and the case put at final issue by a third amended answer

(amended again at the trial) filed by the railway company. It denied negligence on its part and alleged negligence on the part of the deceased and that it was engaged in moving interstate commerce. It alleged also that the deceased had made application to the American Express Company at Parsons, Kansas, for a position as a driver of one of its wagons and was engaged by the express company in pursuance of a written application (copy of which was attached to the answer), that he was employed by the express company (a copy of the contract being attached to the answer), and in consideration of his employment he assumed all risk of accident and injury which he should meet with or sustain in the course of his employment, whether occasioned by or resulting from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel or vehicle, or of any employé of any such corporation or person, or otherwise, and whether resulting in his death or otherwise. That in case of injury he would at once and without demand execute and deliver a good and sufficient release of all claims, demands and causes of action arising out of such injury or connected with or resulting therefrom. That by the terms of his contract he ratified all agreements made by the express company and any such corporation or person that its employés should have no cause of action for injuries sustained in the course of their employment, and agreed to be bound by such agreements as though he were a party thereto, and authorized the express company to contract for him that neither he nor any of his personal representatives, nor any person claiming under him, should claim compensation because of injury sustained by him, whether resulting from gross or other negligence of such corporations, persons, or employés. That such contract should enure to the benefit of any corporation or person over whose railroads or steamboat lines the express company should forward merchan-

dise, and this in consideration of his employment by the express company. That in pursuance of his contract of employment by the express company he was in the express car of the railway company and that he was barred from maintaining the action.

The answer concluded with the following paragraph:

"Further answering, defendant admits that at and prior to the death of the said William B. West, deceased, he was employed by the American Express Company as express messenger upon the express cars operated by the defendant railway company over its line of railroad . . . and admits that the deceased, William B. West, in addition to his employment as express messenger by the said American Express Company, was also engaged in handling passenger baggage upon the express car of the said defendant railway company, and . . . in performing said duties in handling said baggage, was doing so under and by virtue of his said employment by the said American Express Company, and that such handling of such baggage by said West was for and in behalf of and under the direction of said railway company."

Defendant in error filed a reply to the answer in which she affirmed the allegations of her complaint and denied those of the answer and alleged besides that at the time the contracts set out in the answer were made and ever since the statutes of Kansas provided as follows:

"That railroads in this State shall be liable for all damages done to persons or property when done in consequence of any neglect on the part of the railroad company. . . .

"Every railroad company organized and doing business in the State of Kansas shall be liable for all damages done to any employé of such company in consequence of any negligence of its agents or by any mismanagement of its engineers or other employés, to any person sustaining such damage. Provided that notice in writing that an injury

has been sustained stating the time and place thereof shall have been given by or on behalf of the person injured to such railroad company within eight months after the occurrence of the injury."

A demurrer to the reply was overruled.

The simple question which is presented here is whether the deceased was employed at the time of his death by the railway company or by the American Express Company. On those alternates depends the jurisdiction of this court; and defendant in error, asserting that such employment was a question of fact decided by the state courts against the railway company, makes a motion to dismiss the writ of error.

There were two opinions delivered by the Supreme Court of the State. In its first opinion the court said that the railway company contended that the defendant's liability was controlled by the "Employers' Liability Act," but the court, after quoting its provisions, decided that the pleadings and evidence demonstrated that the deceased was in the employment of the American Express Company at the time of his death and that therefore the National act did not apply. The court also noticed the other rulings which were called to its attention, among others, one based on the action of the trial court refusing to admit in evidence the contracts attached to the answer. The court declined to consider the latter ruling, holding that under the practice of the court the error was not properly before it for review, and for the further reason that in the brief and argument of the railway company the ruling was "not attempted to be insisted upon or urged as error," citing *Noble State Bank* v. *Haskell*, 22 Oklahoma, 48. And the court said the omission could not be cured by a reply brief when the same was not predicated upon a specification of error, permission not having been first obtained for the purpose of amending the specifications of error.

The court was also of opinion that the contract of the deceased by which, it was contended, he assumed the risk of injuries and released all rights of action for them was "void as against public policy, on account of being in contravention of the laws of the State of Kansas and against the public policy" of Oklahoma.

The second opinion was delivered upon a petition for rehearing in which the railway company earnestly combated the conclusions of the court expressed in the first opinion, repeated its contentions and insisted that the case was tried on the theory that the issue made by the pleadings was whether the deceased was an employé of the railway company and that the evidence showed that he was such employé. The court rejected the contentions and decided that the pleadings alleged, and the evidence was consistent with the allegation, that West was employed by the express company.

There is, therefore, a sharp antagonism between the views of the court and of the railway company, and yet there is not much dispute over the elements of the controversy, but rather in the inferences from them.

The essential facts pleaded we have given. The allegation of the complaint is that West, "at and prior to the time" of his death, "was employed by the American Express Company as express messenger upon the express cars operated by said defendant company," and "that in addition to his duties and employment as messenger" he was "also engaged in handling passenger baggage upon" such cars, and "in the course of his employment . . . was riding in one of the express cars" of the railway company. The direct averment, therefore, is that West was employed by the express company and that he handled baggage and was riding in the express cars in the course of this employment and as part of its duties. A relation with the railway company is, it is true, averred. He handled its baggage and rode in its cars. But this did not

make him its employé. If he was, such is not disclosed by the complaint, nor is it alleged in the answer of the railway company. Indeed, his employment by the express company is emphasized by the contracts attached to the answer, and a defence is based upon them. It is averred that West, by these contracts, assumed all the risks of his employment by the express company, ratified the contracts of the latter, authorized it in his name to release any demand he might have for injuries, agreed to be bound by whatever covenants the company should make, and that neither he nor any of his personal representatives would claim compensation for injuries, whether resulting from negligence or otherwise. These contracts are explicitly averred, as constituting the consideration for West's "employment by said Express Company," and it is alleged that he was "being transported by this defendant . . . in pursuance of said contract hereinbefore referred to as 'Exhibit B'" and "that plaintiff is, therefore, now barred from maintaining this action."

These allegations do not deny but rather aver the employment of West by the express company and were intended as a security to that company and through it to any transportation company or person. Their basis distinctly is that injury might result to West in his employment and they were intended to prevent legal liability for it. Whether they had that effect is not a Federal question.

The railway company, however, contends that the evidence conclusively shows that the deceased was an employé of the railway company, and that certainty of proof is no doubt asserted for it to countervail the combined judgments of the jury and of the trial and Supreme Courts. The latter court in its second opinion, however, considering the effect of the contracts between the express company and the deceased and the oral evidence upon which the railway company relied, said, "We therefore find with the court below that the pleadings and the evidence con-

clusively show that the deceased suffered the injuries that resulted in his death while he was employed by the express company, and not while he was employed by the railway company in interstate commerce within the meaning of the Federal Employers' Liability Act." The court hence decided that the action was governed by the statutes of Oklahoma.

What the pleadings alleged and what the contracts showed we have already adverted to. The testimony relied on is that of one of the superintendents of the express company who, in testifying as to the relation between the deceased and the railway company, said that the deceased was, "agent, messenger and baggageman," and by this was meant that he "worked for both companies," and that the proportion of payment by the companies was an "equal division." That his duties were that he "received the baggage at the stations, made a record of it, and put it off at its destination in the same manner any baggageman did." The witness further said that the deceased knew that he was to handle the baggage of the railway company and act as joint employé of it and the express company and was "told to post himself in the work of both companies." On cross-examination, however, the witness testified that all of the salary of the deceased "came from the express company." The railway company "paid us one-half of his salary; we drew a bill against them in his name and the other baggagemen."

Counsel for the railway company urge that the strength of this testimony is such that it needs no reinforcement from argument, and they say that it has confirmation besides in a circular letter addressed by the superintendent of the express company to all of the messengers of the company. The letter, however, was not admitted in evidence and no error was assigned in the Supreme Court upon the ruling. We are unable, therefore, to consider it, notwithstanding counsel's plaint—often repeated—that

they were deceived by their conception, justified it is insisted, that the case was tried upon the theory that the deceased was an employé of the railway company.

This theory the railway company makes a great deal of. It constituted the basis of the petition for rehearing, and, by disregarding it, it was contended and is contended, the court was led into error. The court, however, rejected the theory, deciding that it was not justified by the pleadings, complaint or answer, nor by the evidence in the case.

The court grouped the contentions of the railway company under four heads: (1) Plaintiff in the action (defendant in error here) was not the proper party to maintain the action; (2) error in instructions; (3) error in excluding the three written contracts attached to the answer; (4) amount of damages.

The first contention is the determining one, as we have already said. Upon it depends the Federal question, that is, whether the laws of Oklahoma controlled the action or the Employers' Liability Act. And this turns necessarily upon the other question, whether the deceased was employed by the railway company or by the express company,—a question of fact found in the first instance by the jury against the present contention of the railway company and sustained by the trial court on motion for a new trial, and the Supreme Court in two opinions.

The finding having support in the record, it is contended that this court cannot question it, and that therefore the writ of error should be dismissed. The railway company cites in resistance the case of *St. Louis & Iron Mountain Ry. Co.* v. *McWhirter*, 229 U. S. 265, and *St. Louis & S. F. Ry. Co.* v. *Seale*, 229 U. S. 156. The cited cases are not like the case at bar. In the *McWhirter Case* the action was in express terms based on a statute of the United States, the Hours of Service Act of 1907. It was contended that the pleadings embraced as well an action at common law and that such cause of action was sustained and was

broad enough to support the judgment, irrespective of what may have been decided concerning the statute of the United States, and a motion to dismiss was made. The contention was rejected and the motion was denied. It was recognized that the case coming from a state court, the power to review was controlled by Revised Statutes, § 709, but it was said, however (229 U. S. 277), that "where in a controversy of a purely Federal character the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law."

In the *Seale Case* the question was whether the plaintiff in error in the case (the railway company) was engaged in interstate commerce. There was no question of the employment by the railway company. The state court decided the question in the negative, holding that the evidence did not bring the case within the Employers' Liability Act. The case was brought here by writ of error and jurisdiction entertained against a motion to dismiss, and, after examining the evidence, we reversed the ruling of the state court.

In the case under review the pleadings state a cause of action under the state law and there is no question of the character of the commerce in which the railway company was engaged; the only question is whether the deceased was its employé or that of the express company. If the answer to the question depended upon evidence it might be said that the cited cases are the same in principle, both the fact of interstate commerce and the fact of employment by the railway company of the deceased being conditions which would bring the case under the Federal enactment; or that such employment was one of those subsidiary or connecting facts into which this court will inquire as determining its jurisdiction, of which there are examples. *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*,

223 U. S. 573; *Cedar Rapids Gas Co.* v. *Cedar Rapids*, 223 U. S. 655; *Brinkmeier* v. *Missouri Pacific Ry. Co.*, 224 U. S. 268; *Criswell* v. *Knights of Pythias*, 225 U. S. 246. At any rate, we might, if the fact turned on the evidence, say that the Federal question asserted was not manifestly lacking in color of merit and follow, therefore, the ruling in *Swafford* v. *Templeton*, 185 U. S. 487.

But the Supreme Court of the State rested its decision upon the allegation of fact of employment of the deceased by the express company and the admission of the fact in the answer of the railway company, and held that there was nothing in the course of the trial which obviated the effect of the allegations and admissions of the pleadings. The court, after quoting the paragraph of the answer which we have given above, said that its "admissions are in entire harmony with the balance of the answer, which contains allegation after allegation positively stating that the deceased was employed by the express company continuously for a great many years prior to his death, and the contracts of employment between the express company and the deceased are attached to the answer and made a part thereof, and certain waivers contained therein are relied upon as a defense." And, further, "From the pleadings alone it is clear that the deceased suffered the injuries which resulted in his death while he was employed by the express company, and not while he was employed by the railway company; and that the parties did not attempt to join an issue of fact upon that question." The expression in the opinion was that if the evidence disclosed a case different from that alleged in the pleadings, the Federal statute would control and *St. Louis & S. F. Ry. Co.* v. *Seale*, 229 U. S. 156, would be applicable. But the court said that the testimony of Adams, the superintendent of the express company, relied on by the railway company, was "in no way inconsistent with the allegations of the petition and the admissions of the answer," because

"the witness merely drew erroneous conclusions from admitted facts, and that his testimony as a whole supplemented the allegations of the petition and the admissions of the answer by more fully disclosing the relations existing between the express company and the deceased, and the express company and the railway company, and made it more clearly apparent that the decedent was rightfully on the train."

The court, therefore, considered the case distinguishable from the cases cited by the railway company (*M., K. & T. Ry. Co.* v. *Reasor* (Tex.), 68 S. W. Rep. 332; *Vary* v. *C. B. R. & M. Ry. Co.*, 42 Iowa, 246; *Oliver* v. *Northern Pac. Ry. Co.*, 196 Fed. Rep. 432) and made no comment upon them except to say that they in no way conflicted with the conclusion reached.

The state court having decided, with substantial grounds for the decision, that the pleadings and evidence show an action under the employment by the express company, no denial of Federal right is involved, and, therefore, motion to dismiss must be granted. And, as the action was brought under the state law and not under the Federal law, it becomes unnecessary to notice errors assigned by the railway company, including that based on the instruction of the trial court that a verdict could be rendered by three-fourths of the jury.

Dismissed.

SANTA FE CENTRAL RAILWAY COMPANY *v.* FRIDAY.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 230. Submitted March 5, 1914.—Decided March 23, 1914.

A statute of a Territory cannot withdraw from the courts established by the United States authority expressly conferred upon them by Congress by the Organic Act and other statutes. *The City of Panama*, 101 U. S. 453.

The District Court of the United States for New Mexico has jurisdiction of a case arising under the Employers' Liability Act of 1906.

This court will not decide against the local understanding as expressed by the decisions of the Supreme Court of a Territory in construing a jurisdictional statute affecting a matter of local concern unless those decisions are clearly wrong. *Phœnix Ry. Co.* v. *Landis*, 231 U. S. 578.

16 New Mex. 434, affirmed.

THE facts, which involve the jurisdiction of the courts of a Territory of the United States over actions brought under the Employers' Liability Act of 1906, are stated in the opinion.

Mr. E. W. Dobson for plaintiffs in error:

The Organic Act, the acts of Congress and the legislative acts must all be considered and construed in determining the question. See § 10 Organic Act of September 30, 1850; § 880, Comp. Laws New Mex. 1897, passed January 3, 1852; § 1040 *Id.*, passed July 12, 1851; § 900 *Id.*, passed September 22, 1846; § 901 *Id.*, passed January 26, 1859; § 904 *Id.*; § 905 *Id.*, passed January 20, 1859; § 2950 *Id.*, passed January 7, 1876; Kearny Code, September 22, 1846, § 18; §§ 1874, 1910, Rev. Stats. U. S., passed June 14, 1858.

There are, therefore, provisions for District Courts of

the Territory and District Courts for each of the various counties and a territorial law giving the District Courts in the counties exclusive original jurisdiction in all civil actions and fixing the forum where they must be brought or commenced.

The courts in the various counties having been established by territorial legislation previous to the enactment of § 1874, Rev. Stat., or which were by law established subsequent to that time, in the counties of the Territory for the trial of all civil causes, except those in which the United States was a party, the jurisdiction of the so-called United States District Courts existing previous to the enactment of said § 1874, vested in and passed to the District Courts of the various counties, and out of the so-called United States courts, except in causes where the United States is a party. *Schofield* v. *Stephens*, 7 New Mex. 619.

Congress did not define the jurisdiction of the District Courts except as Federal courts, but as courts of the Territory they have such jurisdiction as the territorial legislature might prescribe. The territorial legislature provided that the District Courts should have original jurisdiction in all cases, civil and criminal, in which the jurisdiction is not especially delegated to some other court.

While the Employers' Liability Act was created by Congress and has now been held to be valid so far as the Territories are concerned, it is different from the Anti-Trust Law, the Meat Inspection Law, the Pure Food Law, the Interstate Commerce Laws and the Safety Appliance Law, because under the acts relative to the above subjects the power is given the United States to bring suits for the purpose of regulating the same, and they would be considered as arising under the Constitution and laws of the United States and in which the United States is a party.

See *Hornbuckle* v. *Toombs*, 18 Wall. 648, for difference between jurisdiction under § 1868 and § 1910; *Clough* v.

Curtis, 131 U. S. 361; *McAllister* v. *United States*, 141 U. S. 174.

The territorial judicial District Courts exercising Federal jurisdiction sit at one place in the district under a Federal law and their business is kept separate from the business transacted in the District Courts held in the county. *Thiede* v. *Utah Territory*, 159 U. S. 570; *Simms* v. *Simms*, 175 U. S. 162; *Ferris* v. *Higley*, 20 Wall. 375; *Benner* v. *Porter*, 9 How. 125; *Mining Co.* v. *District Court*, 7 New Mex. 486.

As to the Employers' Liability Act, approved June 11, 1906, and the act of April 22, 1908, the latter did not give any life or validity to the act already declared void by the highest judicial tribunal. Congress did not reënact the statute, but only provided that this act "shall not affect any pending action." The act of 1906 was then void and of no effect.

The act of 1908 was prospective and not retroactive. *Winfree* v. *Nor. Pac. Ry. Co.*, 164 Fed. Rep. 898; Thornton on Employers' Liability, § 109b; *Osborn* v. *Detroit*, 32 Fed. Rep. 36; *Eastman* v. *County of Clackamas*, 32 Fed. Rep. 24; *Humboldt Co.* v. *Christopherson*, 73 Fed. Rep. 239; *Wright* v. *Southern Ry. Co.*, 80 Fed. Rep. 260; *Plummer* v. *Northern Pac. Ry.*, 152 Fed. Rep. 206; *Hall* v. *Chicago &c. Ry. Co.*, 149 Fed. Rep. 564. *El Paso &c. Ry. Co.* v. *Gutierrez*, 215 U. S. 87, distinguished as merely holding that the Employers' Liability Act so far as it applied to the District of Columbia and the Territories is valid.

Mr. T. B. Catron, with whom *Mr. George W. Prichard* was on the brief, for defendant in error:

This suit was brought under the Employers' Liability Act of Congress approved June 11, 1906, and as a pending case was prosecuted to a final judgment after the passage of the act of Congress approved April 22, 1908.

Suit was brought in the First Judicial District Court, or in other words, in the territorial or Federal court as distinguished from the County District Court, because the act under which it was brought was a Federal act.

That court was the proper court in which to bring the suit under § 1910, Rev. Stat., and other United States statutes and decisions thereunder.

In the District or Federal Courts of the Territories is vested the same jurisdiction as is vested in the Circuit and District Courts of the United States "in all cases arising under the Constitution and laws of the United States." *Reynolds* v. *United States*, 98 U. S. 154; *Insurance Co.* v. *Canter*, 1 Pet. 511; *Benners* v. *Porter*, 9 How. 235; *Clinton* v. *Englebucht*, 13 Wall. 434; *N. P. R. R. Co.* v. *Carland*, 3 Pac. Rep. 134; *Hughes* v. *N. P. R. R. Co.*, 18 Fed. Rep. 106; *Murphy* v. *Murphy*, 85 N. W. Rep. 806; *Chouteau* v. *Rice*, 1 Minnesota, 192; *United States* v. *Jones*, 5 Utah, 556; *Johnson* v. *United States*, 6 Utah, 403; *United States* v. *Haskers*, 3 Sawyer (U. S.), 262; *United States* v. *Pridgeon*, 153 U. S. 48; *Berry* v. *United States*, 3 Colorado, 186; *Clough* v. *Curtis*, 131 U. S. 361; *McAllister* v. *United States*, 141 U. S. 174.

For cases upholding the jurisdiction of the Federal, or Judicial District Courts of the Territories, to try causes arising under the laws of the United States where the United States is not a party, both before and since the passage of § 1874, Rev. Stat., see *American Ins. Co.* v. *Canter*, 1 Pet. 511; *Benner* v. *Porter*, 9 How. 265; *City of Panama* v. *Phelps*, 101 U. S. 453.

For instances in which such jurisdiction has been exercised by the territorial District Courts under such acts, see *The Cutler* v. *The Columbia*, 1 Oregon, 101; *Price* v. *Frankel*, 1 Wash. Terr. 43; *Meigs* v. *The Northerner*, 1 Wash. Terr. 91; *Griwn* v. *Nichols*, 1 Wash. Terr. 375.

It is immaterial who the parties are, whether both the plaintiff and defendants are individuals, or whether one

or both are corporations, or whether the United States is a party, the rule is the same so long as the suit arises under an act of Congress.

Sections 880, 900, 901, 905, 1040 and 2950, Compiled Laws of 1897 of this Territory have no application to the case at bar. The territorial legislature has no power to restrain or control the Judicial District Court or Federal court in the exercise of their power and jurisdiction in any case arising under the laws of the United States. *United States* v. *Jones*, 5 Utah, 553.

Schofield v. *Stephens*, 7 New Mex. 819, distinguished, and see Thornton on Employers' Liability, p. 132.

The proceedings in the trial court were regular and the final judgment thereunder is valid. *Winfree* v. *Nor. Pac. Ry. Co.*, 164 Fed. Rep. 698, distinguished, and see *El Paso &c. Ry. Co.* v. *Gutierrez*, 215 U. S. 87.

No inchoate rights arising under the act of 1906 in the Territory of New Mexico have been destroyed by any subsequent legislation.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for personal injuries brought by the defendant in error against the Railway Company under the act of June 11, 1906, c. 3073, 34 Stat. 232, held valid for the Territories in *El Paso & Northeastern Ry. Co.* v. *Gutierrez*, 215 U. S. 87. The plaintiff got a verdict and judgment which the Supreme Court of the Territory affirmed. 16 New Mex. 434.

The only argument addressed to us is an attack upon the jurisdiction of the court that tried the case. That court was the District Court sitting for the trial of causes arising under the Constitution and laws of the United States in the First Judicial District in the Territory of New Mexico. The Organic Act of September 9, 1850, c. 49, 9 Stat. 446, provided in § 10 for three judicial districts, and for a District Court to be held in each by a Jus-

tice of the Supreme Court as should be prescribed by law. It further enacted that the jurisdiction of the several courts therein provided for "shall be as limited by law"; that "each of the said District Courts shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States;" and that the first six days of every term or so much of them as necessary "shall be appropriated to the trial of causes arising under the said Constitution and laws." See also Rev. Stat., § 1910. The court where the trial was held was one of these District Courts provided for by the Organic Act and the case was one arising under the laws of the United States.

But it is said that the jurisdiction of these courts was to be 'as limited by law,' that that means by territorial legislation, and that a territorial statute provided for the holding of District Courts in the counties, and enacted that the District Courts in the counties should have "exclusive original jurisdiction in all civil cases which shall not be cognizable before probate judges and justices of the peace." Compiled Laws, 1897, § 900. By a later territorial act the District Courts in the various counties were given 'jurisdiction in all civil causes in said counties which according to law belong to the District Courts,' *id.*, § 901. And this was in pursuance not only of the Organic Act but of another act of Congress of June 14, 1858, c. 166, 11 Stat. 366, afterwards Rev. Stat., § 1874, by which the judges of the Supreme Court were "authorized to hold court within their respective districts, in the counties wherein, by the laws of the Territory, courts have been or may be established, for the purpose of hearing and determining all matters and causes, except those in which the United States is a party." Thus, it is argued, exclusive jurisdiction of cases like the present was transferred to the County District Courts.

But it has been held for many years that the purpose and effect of these statutes was to give the judges of the Supreme Court sitting in the County District Courts authority to hear cases arising under territorial laws, and to make the jurisdiction over such cases exclusive in those courts. *Lincoln-Lucky & Lee Mining Co.* v. *District Court*, 7 New Mex. 486, 499–501. *Murphy* v. *Murphy*, 25 N. W. Rep. 806. The statutes, we believe, have not been understood to attempt to withdraw from the courts of the larger districts the authority expressly conferred upon them by the Revised Statutes and the Organic Act, a thing that of course territorial statutes could not do. See *The City of Panama*, 101 U. S. 453. We should not decide against the local understanding of a matter of purely local concern unless we thought it clearly wrong, instead of thinking it, as we do, plainly right. *Phœnix Ry. Co.* v. *Landis*, 231 U. S. 578, 579.

Judgment affirmed.

EBERLE *v.* PEOPLE OF THE STATE OF MICHIGAN.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 164. Argued January 16, 19, 1914.—Decided March 23, 1914.

The validity of a local option law adopted after amendments is not affected by the fact that the amendments are subsequently declared to be unconstitutional.

Unconstitutional amendments to a constitutional statute are mere nullities.

Whether the adoption by a district of a local option statute is affected by the subsequent determination by the courts that certain features of the act were unconstitutional, is not a Federal question and is for the state court to determine.

On writ of error under § 237, Judicial Code, this court cannot inquire

into motives or arguments which influenced electors to vote for or against a measure, or reverse the action of the state court on the ground that the electors voted under misapprehension.

A State may prohibit the sale of liquor absolutely or conditionally; may prohibit the sale as a beverage and permit it for medicinal purposes; may prohibit the sale by merchants and permit it by licensed druggists; and so *held*, that the Michigan Local Option Act of 1889 is not unconstitutional under the equal protection provision of the Fourteenth Amendment on account of discrimination in making certain specific exceptions to the general prohibition.

While a liquor law which prohibited the sale of property existing at the time of its enactment might be confiscatory (*Bartemeyer* v. *Iowa*, 18 Wall. 129), the prohibition of manufacturing liquor after the enactment is not confiscatory even as applied to liquor manufactured for the purpose of giving value to a product existing but unfinished when the act was passed.

Liquor laws are enacted by virtue of the police power to protect the health, morals and welfare of the public; and, while such laws may operate to depreciate the value of property used in the manufacture of liquor, such depreciation is not the taking of property without due process of law as prohibited by the Fourteenth Amendment, and so *held* as to the Michigan Local Option Act of 1889. *Mugler* v. *Kansas*, 123 U. S. 623.

Nothing in the record in this case indicates that the Michigan Local Option Act of 1889 in any way interferes with or is a burden upon interstate commerce.

167 Michigan, 477, affirmed.

THE facts, which involve the constitutionality of the Michigan Local Option Act of 1889 under the commerce, due process and equal protection clauses of the Federal Constitution, are stated in the opinion.

Mr. Richard Price for plaintiffs in error:

The Local Option Act is repugnant to the Constitution of the United States.

It is an arbitrary and unfair discrimination against home manufacturers.

The act protects certain traffic.

The invalidity of the wine and cider clause invalidates

entire act. *Atty. Gen'l* v. *Detroit*, 29 Michigan, 108; *Bartemeyer* v. *Iowa*, 18 Wall. 129, *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25; Cooley's Const. Limitations (7th ed.), pp. 246, 247, 249; *Eubank* v. *Richmond*, 226 U. S. 137; *Giozza* v. *Tiernan*, 148 U. S. 655; *Kidd* v. *Pearson*, 138 U. S. 1; *Mugler* v. *Kansas*, 123 U. S. 623; *People* v. *Michigan Central R. Co.*, 145 Michigan, 140; *Walling* v. *Michigan*, 116 U. S. 446. See also *Herman* v. *State*, 8 Indiana, 545; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *Butchers' Union* v. *Crescent City*, 111 U. S. 746, 766.

Mr. Grant Fellows, Attorney General of the State of Michigan, for defendant in error:

The Michigan Local Option Act is not unconstitutional under either the commerce clause, the Fourth Amendment or the Fourteenth Amendment. *Barron* v. *Baltimore*, 7 Pet. 243; *Delamater* v. *South Dakota*, 205 U. S. 93; *Eilenbecker* v. *Plymouth Co.*, 134 U. S. 31; *Feek* v. *Bloomingdale*, 82 Michigan, 393; *Friesner* v. *Charlotte*, 91 Michigan, 504; *Kidd* v. *Pearson*, 128 U. S. 1; *Mugler* v. *Kansas*, 123 U. S. 623; *Lloyds* v. *Dollison*, 194 U. S. 445; *People* v. *Eberle*, 167 Michigan, 477; *Presser* v. *Illinois*, 116 U. S. 252; *Ripley* v. *Texas*, 193 U. S. 504; *Tiernan* v. *Rinker*, 102 U. S. 123.

Mr. Justice Lamar delivered the opinion of the court.

The Michigan Local Option Law of 1889 (Pub. Acts, No. 207), makes it unlawful to manufacture or sell malt, vinous, spirituous or intoxicating liquors in any county where a majority of the electors vote in favor of prohibition.

The provisions of the law, however, do not (§ 1) apply to druggists selling such liquors in compliance with the restrictions imposed upon them by the general laws of this State. It was also provided (§ 15) that "nothing in this act shall be so construed as to prohibit the sale of wine for sacramental purposes, nor shall anything herein con-

tained prohibit druggists or registered pharmacists from selling or furnishing pure alcohol for medicinal, art, scientific and mechanical purposes;" Public Acts of Michigan for 1889, pp. 287, 293.

By amendments passed in 1899 and 1903 (acts of 1899, p. 280; acts of 1903, p. 229), it was further provided that the act should not be construed to "prohibit the sale of wine or cider made from home grown fruit in quantities of not less than five gallons, nor . . . to prohibit the manufacture of wine or cider, nor . . . to prohibit the sale at wholesale of wine or cider manufactured in said [dry] county to parties who reside outside of said county."

As a result of an election held April 13, 1909, the law became operative in Jackson County on May 1st, 1909. The defendants, who were officers of a brewing company, were charged with having thereafter manufactured beer in that county, in violation of the statute. They moved to quash the Information, upon the ground that the act was void because it interfered with interstate commerce, took property without due process of law, and so discriminated against them and other manufacturers residing in dry counties as to deny them the equal protection of the law. These defenses were overruled. On the trial they offered evidence tending to show that the beer which they had manufactured had not been made for sale, but to be used in causing re-fermentation of 1600 barrels of beer worth $5 a barrel, which was on hand at the date of the election, with a view of making it salable, and thereby save themselves against loss. Under the charge of the court, the jury returned a verdict of guilty. The case was then taken to the Supreme Court of Michigan, which held (167 Michigan, 477) that the amendments of 1899 and 1903 (permitting the manufacture and sale of wine and cider in dry counties), were void as an unlawful discrimination against the products and citizens of other States and

a violation of the equal protection clause of the Constitution. The court, however, sustained the conviction and sentence of defendants upon the ground that the original Local Option Act was constitutional and had not been rendered invalid by the void amendments of 1899 and 1903. The case was then brought here where, in addition to the errors previously assigned, the plaintiffs in error—defendants in the trial court—insisted that the court erred in holding that the act could be valid if the amendments relative to wine and cider were stricken—said provisions "being a part of the Act at the time the Local Option Law was adopted in Jackson County, where defendants reside, and operating, together with the other provisions of the Act, to bring about such adoption."

1. The argument here was principally directed to a discussion of this assignment of error—the defendants contending that the discriminatory wine-and-cider amendments formed an integral part of the law (Endlich on Statutes, §§ 94, 294) which had been submitted to the voters and which, when adopted, it was claimed, was adopted as a whole. It was insisted that the provisions permitting the manufacture and sale of wine and cider induced many to vote for the law as amended, and it was, in effect, argued that these amendments could not be treated as a part of the statute for the purpose of carrying the election and then be held void in order to save the law from being set aside as discriminatory. In support of this contention, defendants relied on *State ex rel. Huston* v. *Commissioners*, 5 Oh. St. 497, where the court was considering a local option statute, one section of which provided for an election to determine whether a county seat should be removed, and another (§ 5) contained unconstitutional provisions which were such "as would naturally influence the vote upon the adoption or rejection of the first and main section." It was held that: "The provisions of both sections are made equally to depend upon

the result of the election; they were submitted by the legislature collectively to the voters, and could only be passed upon as a whole; and . . . must, therefore, stand or fall together." But in that case the valid and invalid provisions formed an inseparable part of a single act which was void as a whole, whether treated as having been adopted by the legislature or the people. On the other hand in the case at bar the original Local Option Law of 1889 had been held to be constitutional as a whole, and its validity could not be impaired by the subsequent adoption of what were in form amendments but, in legal effect, were mere nullities.

2. It is true that the fact that these amendments were on the statute book may have influenced electors. Some may have voted for the law because of the supposed permission to make wine. Others may have opposed its adoption because of the supposed exemption of wine from the operation of the act. But in either event these void amendments were not a part of the law but extraneous inducements which may or may not have determined the result. The attack, therefore, goes rather to the regularity of the adoption than to the constitutionality of the statute after it had been adopted for Jackson County. But it was for the state court to determine that matter and to decide whether the election was void because the question apparently submitted was the adoption of the law and amendments, when, in reality, only the law itself was submitted. This court, on writ of error from a state court cannot inquire into the motives or arguments which influence men to vote for or against a measure. Neither can we reverse the decision of the state court, and declare the act inoperative in Jackson County because the electors thereof may have voted under a misapprehension as to the matter submitted, any more than we could set aside a statute because it had been enacted contrary to parliamentary rules relating to the introduction, debate and

passage of a bill. The original Local Option statute had been held to be constitutional, and prohibited, without discrimination, the manufacture of all liquors. That valid act the defendants violated and their conviction cannot be set aside on the ground that some or all of the electors voted to make the law operative in Jackson County under the supposition that as wine could be manufactured, the equal protection clause of the Constitution would make it likewise lawful to manufacture beer and other liquors.

3. Nor can the judgment be reversed because the original act, while prohibiting liquor to be sold by merchants permitted it to be sold by druggists for medicinal, mechanical or scientific purposes. The contention that this was an unlawful discrimination is answered by *Kidd* v. *Pearson*, 128 U. S. 1; *Rippey* v. *Texas*, 193 U. S. 504; *Lloyd* v. *Dollison*, 194 U. S. 445. Those cases show that the State may prohibit the sale of liquor absolutely or conditionally; may prohibit the sale as a beverage and permit the sale for medicinal and like purpose; that it may prohibit the sale by merchants and permit the sale by licensed druggists.

4. It was further contended that the act takes property without due process of law because it made no provision for the sale of liquor on hand at the time the law became operative. But the record does not call for a decision of that question, nor does it bring the case within the principle, suggested in *Bartemeyer* v. *Iowa*, 18 Wall. 129, 133, that a statute absolutely prohibiting the sale of property in existence at the time of the passage of the law would amount to confiscation and be void as depriving the owner of his property without due process of law. The defendants were not charged with selling property which was in their possession when the law went into effect in May, 1909, but with manufacturing beer in September, 1909, several months after its adoption. The fact that such beer may have been made for use in starting re-fermentation of

other beer that was on hand when the law became operative, does not bring the case within the principle for which the decision is cited. For the right to manufacture beer to be utilized in giving value to an unfinished brew is no more protected by the Constitution than the right to manufacture beer in order to utilize the brewery and thereby preserve the value of the plant as a going concern.

Liquor laws are enacted by virtue of the police power to protect the health, morals and welfare of the public. Such laws may operate to depreciate the principal value of distilleries, breweries and other property, in use and on hand when the law is passed, but it has been held in many cases that such depreciation is not the taking of property prohibited by the Constitution. *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Mugler* v. *Kansas*, 123 U. S. 623. There is nothing in the record calling for a discussion of the assignment of error relating to interstate commerce. The judgment must be

Affirmed.

SCHUYLER *v.* LITTLEFIELD, TRUSTEE OF BROWN & CO.

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

No. 213. Argued January 29, 1914.—Decided March 23, 1914.

Where one has deposited trust funds in his individual bank account and the mingled fund is at any time wholly depleted, the trust fund is thereby dissipated and cannot be treated as reappearing in sums subsequently deposited to the credit of the same account.

One seeking to charge a fund in the hands of a trustee for the benefit of all creditors as being the proceeds of his property and therefore a special trust fund for him, has the burden of proof; and if he is un-

able to identify the fund as representing the proceeds of his property, his claim must fail as all doubt must be resolved in favor of the trustee who represents all creditors.

193 Fed. Rep. 24, affirmed.

THE facts, which involve determining the relative rights to the bank balance of a bankrupt stockbroker, of the trustee and of a customer whose securities the bankrupt had sold, are stated in the opinion.

Mr. W. Benton Crisp, with whom *Mr. Theodore M. Crisp* was on the brief, for appellants:

The bankrupts wrongfully and fraudulently converted the property of the appellants. This was found by both courts below.

The bankrupts commingled the proceeds of appellants' property with that of their own, and the combined or commingled funds having been traced into the Hanover National Bank funds, a part of which are now in the hands of the trustee, so long as any portion of said funds remained, the appellants are entitled to have their money paid out of them and if said funds were used to release collateral in the bank, which collateral, or the proceeds of which collateral, went into the hands of the trustee, they should be impressed with a lien in favor of the appellants. *Gorman* v. *Littlefield*, 229 U. S. 19; *Peters* v. *Bain*, 133 U. S. 670; *Frelinghuysen* v. *Nugent*, 36 Fed. Rep. 229, 239; *In re Marsh*, 116 Fed. Rep. 396; *Erie Railroad Co.* v. *Dial*, 140 Fed. Rep. 689; *In re Royea*, 143 Fed. Rep. 182; *Smith* v. *Motley*, 150 Fed. Rep. 266; *Smith* v. *Township*, 150 Fed. Rep. 257; *In re Stewart*, 178 Fed. Rep. 463, 470; *National Bank* v. *Insurance Co.*, 104 U. S. 54; *Cavin* v. *Gleason*, 105 N. Y. 256; *Knatchbull* v. *Hallet*, L. R. 13 Ch. Div. 696.

All equities are in favor of the appellants. They have been fraudulently deprived of their property and if they are unable to obtain it in this proceeding, the general

creditors of the bankrupts will profit by the fraudulent acts of the latter. This is not in keeping with the policy of the Bankruptcy Law. *Hurley* v. *Atchison &c. Ry. Co.*, 213 U. S. 126, 134; *In re Chase*, 124 Fed. Rep. 753.

Mr. Edwin D. Hays, with whom *Mr. Daniel P. Hays* and *Mr. Ralph Wolf* were on the brief, for appellee:

The burden was on the appellants to show that their property, or the proceeds thereof, came into the hands of the trustee. *First National Bank* v. *Littlefield*, 226 U. S. 110; *In re McIntyre*, 181 Fed. Rep. 960; *American Can Co.* v. *Williams*, 178 Fed. Rep. 420; *Matter of Hicks*, 170 N. Y. 195.

All trust funds deposited by the bankrupts in the Hanover National Bank prior to the certification on August 25 of the check for $146,600 to Coombs & Co. were dissipated by the certification of said check, and no funds so deposited came into the hands of the receiver or trustee.

The cases in appellants' brief do not conflict with the position taken by the appellee on this appeal.

It is undoubtedly the law that if trust moneys or property are mingled with other moneys or property by a trustee, they may be followed by *cestui que trust*, so long as the fund into which they go is not dissipated. This is true even if the trust money or property loses its identity by reason of the mingling provided the fund into which it went is still in existence. *First National Bank* v. *Littlefield*, *supra*.

If trust money is wrongfully placed by the trustee in his general bank account and mingled with other moneys of the trustee, the claimant may still follow them so long as he can show a balance remained continuously in the account from the time of the deposit equal to the amount claimed, but if the account is entirely depleted as was the bankrupts' account in the case at bar by the certification of the Coombs checks, the trust moneys become dissipated and no longer traceable.

MR. JUSTICE LAMAR delivered the opinion of the court.

This record presents for determination another of the many questions arising out of the tangled and complicated affairs of Brown & Co., stockbrokers of New York City, who made an assignment on August 25, 1908, and who were subsequently adjudged bankrupts. The proceeding is by Schuyler, Chadwick & Burnham, to recover trust funds which they claim to have traced into the possession of Brown & Company's Trustee in bankruptcy. The case involves an application of the rule that where one has deposited trust funds in his individual bank account and the mingled fund is at any time wholly depleted the trust fund is thereby dissipated, and cannot be treated as reappearing in sums subsequently deposited to the credit of the same account. *Knatchbull* v. *Hallett*, L. R. 13 Ch. Div. 696; *Peters* v. *Bain*, 133 U. S. 671 (1), 693; *Board of Com'rs* v. *Strawn*, 157 Fed. Rep. 49, 54.

There is no controversy about the law, but a complete disagreement about matters of fact where it is necessary to decide with certainty, on the one hand, the exact time and order in which a series of checks were deposited; and, on the other, to determine, with equal certainty, the exact order in which a series of checks drawn on that account were paid and what use was made of the money so drawn. As the bankruptcy occurred on August 25, 1908, and as the testimony was taken several months later, it is not surprising that the witnesses were not able to establish definitely the order in which these transactions took place, nor that the Referee, District Judge and Court of Appeals each differed from the other as to what had been proved. The Referee found that Schuyler, Chadwick & Burnham had traced their funds into the hands of the Trustee and were therefore entitled to recover. The District Judge agreed with the Referee in this conclusion but disagreed with him as to some of the findings of fact

on which that conclusion was based. The Circuit Court of Appeals disagreed with both and held that the trust fund had not been traced into the hands of the Trustee and thereupon dismissed the complaint. The appeal from that decree involves a consideration of the facts, which may be thus briefly stated:

Brown & Co. were brokers in New York City, and on August 24th, 1908, by false representations of solvency obtained from Schuyler, Chadwick & Burnham, 300 shares of Interborough stock (worth $32 per share) agreeing at once to send in payment a check for $9,600, capable of certification. This was not done and in spite of repeated demands the check was not delivered until after banking hours on August 24th and too late to have it certified that day. In the meantime Brown & Co. sold to Miller the

300 shares Interborough, for	$ 9,600
1000 shares Northern Pacific	143,000
1000 shares Great Northern	137,000
Total	$289,600

Miller thereupon gave Brown & Co. a check for $266,600, which was deposited in the Hanover National Bank on August 24. Miller retained the balance of $23,000 on some claim which was not admitted by Brown & Co. They later that day obtained from Miller a check for $23,000, which was deposited in the bank the next morning, but after the Bank had refused to pay or certify the Schuyler, Chadwick & Burnham check for $9,600.

It thus appeared that the stock fraudulently obtained by Brown & Co. had been sold by them, with other stock, to Miller who paid for the whole in two checks—one for $266,600 deposited to Brown & Co.'s account in the Hanover National Bank on August 24th, and another for $23,000 deposited in the same bank on August 25th.

1. If the trust fund of $9,600 was included in the check

for $266,600, then it was dissipated except to the extent of $6,180.17, which was the sum left to Brown & Co.'s credit at the close of business on August 24th. And inasmuch as all of that balance was paid out early the next day, the trust fund was thereby wholly dissipated so far as the bank account was concerned.

If, however, the trust fund of $9,600 is to be treated as having been included in Miller's check for $23,000, then a similar result follows, though on this point the evidence of the witnesses and the findings of the two courts are in conflict. The controlling question was whether the $23,000 had been deposited before or after the payment of a check for $146,000 which absorbed the whole amount then in bank. We see no reason to disturb the finding of the Circuit Court of Appeals that the check for $23,000 was deposited soon after the Bank opened on August 25th, and that it, with other money deposited during the morning, was used at about 11.30 A. M. to pay this check for $146,000 given by Brown & Co. to Coombs & Co. The payment of this large sum depleted the account and dissipated the trust fund in bank.

2. The appellants, however, presented their case in a double aspect. They contended that even if the trust fund of $9,600 was checked out of the bank they are able to trace the fund into stocks that subsequently came into the hands of the Trustee in Bankruptcy. This was based on the claim that out of the proceeds of the Miller checks, Brown & Co. had paid notes due to the bank and thereby released collateral which ultimately came into the possession of the Trustee.

But the record fails to show when the $266,600 was deposited and it also fails to show with the requisite certainty the particular use made by Brown & Co. of that money. The banking transactions on August 24th involved several millions of dollars. Money was deposited by Brown & Co. in the bank and money was borrowed by

Brown & Co. from the bank. Part of the loans were deposited to their bank account and a part, represented by cashier's checks, did not appear in that account. Money was paid by Brown & Co. to outsiders and to the bank. Payments to the bank were made on accounts of notes, some of which represented loans appearing in the deposit account, and others represented loans which had not been so entered. Some of the loans were secured and others were unsecured, and whether the money received from Miller (which included the trust fund of $9,600), was used to pay the secured or unsecured loans does not appear with certainty.

It would serve no useful purpose to make a detailed statement of the testimony. The evidence has been fully discussed by the Court of Appeals (193 Fed. Rep. 24–33) in considering this claim of appellants along with that of several other parties seeking, on somewhat similar facts, to trace trust funds into the bank and thence into collateral which ultimately came into the hands of the Trustee. All these claims were disallowed because of the failure to make the requisite proof. Our investigation of the facts leads us to the same conclusion so far as concerns the appellants' claim. They were practically asserting title to $9,600 said to have been traced into stock in the possession of the Trustee. Like all other persons similarly situated, they were under the burden of proving their title. If they were unable to carry the burden of identifying the fund as representing the proceeds of their Interborough stock their claim must fail. If their evidence left the matter of identification in doubt the doubt must be resolved in favor of the Trustee, who represents all of the creditors of Brown & Co., some of whom appear to have suffered in the same way. Like them, the appellants must be remitted to the general fund.

The decree is affirmed.

OPINIONS PER CURIAM, ETC., FROM JANUARY 6, 1914, TO MARCH 23, 1914.

No. 776. Star Chronicle Publishing Company, Plaintiff in Error, *v.* United Press Associations. In error to the United States Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss or affirm and for damages. Submitted January 5, 1914. Decided January 12, 1914. *Per Curiam.* Dismissed for want of jurisdiction. *Omaha Railroad Company* v. *Omaha*, 230 U. S. 123; *Shulthis* v. *McDougal*, 225 U. S. 561; *Chicago Junction Railway Company* v. *King*, 222 U. S. 223; *In re Metropolitan Railway Receivership*, 208 U. S. 109. *Mr. Shepard Barclay* for the plaintiff in error. *Mr. Campbell Cummings* for the defendant in error.

No. 356. Leon Cardenas Martinez, Plaintiff in Error, *v.* The State of Texas. In error to the Court of Criminal Appeals of the State of Texas. Motion to dismiss submitted December 15, 1913. Decided January 12, 1914. *Per Curiam.* Dismissed for want of jurisdiction. *Ex parte Siebold*, 100 U. S. 371, 375; *Ex parte Crouch*, 112 U. S. 178; *Andrews* v. *Swartz*, 156 U. S. 272; *Barrington* v. *Missouri*, 205 U. S. 483; *Leeper* v. *Texas*, 139 U. S. 462; *Fullerton* v. *Texas*, 196 U. S. 192; *McCorquodale* v. *Texas*, 211 U. S. 432. *Mr. B. F. Looney* for the defendant in error. No appearance for the plaintiff in error.

No. 4. Charles Maibaum, Appellant, *v.* The United States. Appeal from the District Court of the United States for the Northern District of Illinois. Submitted

January 13, 1914. Decided January 19, 1914. *Per Curiam.* Decree affirmed on the authority of *Johannessen* v. *United States*, 225 U. S. 227, and *Luria* v. *United States*, 231 U. S. 9. *Mr. Elijah N. Zoline* and *Mr. James Hamilton Lewis* for the appellant. *The Attorney General* and *Mr. Assistant Attorney General Harr* for the appellee.

No. 149. F. O. Norris et al., Appellants, *v.* J. E. Johnson et al. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. Motion to dismiss submitted January 12, 1914. Decided January 19, 1914. *Per Curiam.* Dismissed for want of jurisdiction. *Holden* v. *Stratton*, 191 U. S. 115; *First National Bank* v. *Title & Trust Company*, 198 U. S. 280, 288; *Hatch* v. *Ketchum, Trustee*, 198 U. S. 580; *Duryea Power Company* v. *Sternberger*, 218 U. S. 299, 301. *Mr. Thomas M. Kennerly* for the appellants. *Mr. Henry F. Ring* for the appellees.

No. 680. Fred W. Lake and H. H. Snow, Plaintiffs in Error, *v.* Mary A. Bonynge and W. A. Bonynge. In error to the Supreme Court of the State of California. Motion to dismiss or affirm submitted December 22, 1913. Decided January 19, 1914. *Per Curiam.* Dismissed for want of jurisdiction, upon the authority of: First. *Pomeroy's Lessee* v. *State Bank of Indiana*, 1 Wall. 592, 597; *New Orleans & Northeastern R. R. Co.* v. *Jopes*, 142 U. S. 18, 22; *Ward* v. *Joslin*, 186 U. S. 142, 153; *Holt* v. *United States*, 218 U. S. 245. Second. *Arkansas Southern R. R. Co.* v. *German National Bank*, 207 U. S. 270; *Waters-Pierce Oil Co.* v. *State of Texas*, 212 U. S. 112. *Mr. James F. Peck* and *Mr. Charles C. Boynton* for the plaintiffs in error. *Mr. William J. Hunsaker, Mr. E. W. Britt* and *Mr. Frank H. Short* for the defendants in error.

No. 681. Fred W. Lake et al., Plaintiffs in Error, *v.* The Superior Court of the State of California in and for the County of Kern. In error to the Supreme Court of the State of California. Motion to dismiss or affirm submitted December 22, 1913. Decided January 19, 1914. *Per Curiam.* Dismissed for want of jurisdiction, upon the authority of No. 680, just decided, and authorities there cited. *Mr. James F. Peck* and *Mr. Charles C. Boynton* for the plaintiffs in error. *Mr. William J. Hunsaker, Mr. E. W. Britt, Mr. Frank H. Short* and *Mr. D. S. Ewing* for the defendant in error.

No. 154. Woodward Cotton Company, Appellant, *v.* The City of Woodward et al. Appeal from the Circuit Court of the United States for the Western District of Oklahoma. Argued and submitted January 16, 1914. Decided January 26, 1914. *Per Curiam.* Affirmed on the authority of *Madera Water Works Company* v. *Madera,* 228 U. S. 454; *Memphis* v. *Cumberland Telephone & Telegraph Company,* 218 U. S. 624; *Knoxville Water Company* v. *City of Knoxville,* 200 U. S. 22, and *Bienville Water Works Company* v. *City of Mobile,* 175 U. S. 109, and cause remanded to the District Court of the United States for the Western District of Oklahoma. *Mr. John Devereux* for the appellant. *Mr. Webster Ballinger* and *Mr. Charles A. Loomis* for the appellees.

No. 174. The District of Columbia, Plaintiff in Error, *v.* Philadelphia, Baltimore & Washington Railroad Company. In error to the Court of Appeals of the District of Columbia. Argued January 19, 1914.

Decided January 26, 1914. *Per Curiam.* Dismissed for want of jurisdiction. *American Security & Trust Company* v. *Commissioners of the District of Columbia,* 224 U. S. 491. The petition for a writ of certiorari is denied. *Mr. F. H. Stephens* and *Mr. Conrad H. Syme* for the plaintiff in error. *Mr. Frederic D. McKenney, Mr. John Spalding Flannery* and *Mr. William Hitz* for the defendant in error.

No. 196. J. E. ARNOTT ET AL., PLAINTIFFS IN ERROR, *v.* SOUTHERN RAILWAY COMPANY. In error to the Supreme Court of the State of Tennessee. Argued January 26, 1914. Decided February 2, 1914. *Per Curiam.* Dismissed for want of jurisdiction. *Hammond* v. *Johnston,* 142 U. S. 73; *New Orleans* v. *N. O. Water Works Co.,* 142 U. S. 79; *Arkansas Southern R. R.* v. *German Bank,* 207 U. S. 270; *Waters-Pierce Oil Co.* v. *Texas,* 212 U. S. 112; *Rogers* v. *Jones,* 214 U. S. 196. *Mr. C. J. St. John* for the plaintiffs in error. *Mr. L. E. Jeffries* for the defendant in error.

No. 316. S. W. WASHINGTON ET AL., SURVIVING TRUSTEES, ETC., APPELLANTS, *v.* JOSEPH F. TEARNEY ET AL., SURVIVING EXECUTORS, ETC. Appeal from the United States Circuit Court of Appeals for the Fourth Circuit. Motion to dismiss or affirm submitted January 26, 1914. Decided February 2, 1914. *Per Curiam.* Dismissed for want of jurisdiction. *Chapman* v. *Bowen,* 207 U. S. 89; *Kenney* v. *Craven,* 215 U. S. 125; *Blake* v. *Openhym,* 216 U. S. 322; *J. W. Calnan Co.* v. *Doherty,* 224 U. S. 145. *Mr. James M. Mason, Jr.,* for the appellants. *Mr. Forrest W. Brown* and *Mr. R. T. Barton* for the appellee.

No. 214. City of Blackwell, Plaintiff in Error, *v.* City of Newkirk et al. In error to the Supreme Court of the State of Oklahoma. Submitted January 29, 1914. Decided February 2, 1914. *Per Curiam.* Dismissed for want of jurisdiction. *Millingar* v. *Hartupee*, 6 Wall. 258; *Hamblin* v. *Western Land Co.*, 147 U. S. 531; *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 336; *Sawyer* v. *Piper*, 189 U. S. 154; *Delmar Jockey Club* v. *Missouri*, 210 U. S. 324. *Mr. A. G. C. Bierer*, *Mr. Frank Dale* and *Mr. Joseph W. Bailey* for the plaintiff in error. *Mr. C. L. Pinkham* and *Mr. J. F. King* for the defendants in error.

No. 217. Anna Hawley, Plaintiff in Error, *v.* Joseph W. Walker, Constable, etc. In error to the Supreme Court of the State of Ohio. Argued January 30, 1914. Decided February 24, 1914. *Per Curiam.* Judgment affirmed with costs upon the authority of *Muller* v. *Oregon*, 208 U. S. 412; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78, 79. *Mr. J. M. Sheets* for the plaintiff in error. *Mr. Louis D. Brandeis*, *Mr. Timothy S. Hogan*, *Mr. Frank Davis, Jr.*, and *Mr. Clarence D. Laylin* for the defendant in error.

No. 200. The Commonwealth of Pennsylvania, Appellant, *v.* The York Silk Manufacturing Company, Bankrupt. Appeal from the United States Circuit Court of Appeals for the Third Circuit. Submitted January 27, 1914. Decided March 2, 1914. *Per Curiam.* Dismissed for want of jurisdiction. *Holden* v. *Stratton*, 191 U. S. 115. *Mr. Jackson H. Ralston* and *Mr. William E. Richardson* for the appellant. *Mr. Henry C. Niles* for the appellee.

No. 557. Louis Elie Joseph Henry de Galard de Brassac de Bearn, Count and Prince of Bearn and Chalais, Plaintiff in Error, *v.* Ross R. Winans and Ferdinand C. Latrobe, Trustees, et al. In error to the Court of Appeals of the State of Maryland. Motion to dismiss submitted February 24, 1914. Decided March 9, 1914. *Per Curiam.* Dismissed for want of jurisdiction. *First National Bank* v. *Estherville,* 215 U. S. 341, 346; *Rogers* v. *Clark Iron Co.,* 217 U. S. 589—see *Louis Elie Joseph Henry de Galard de Brassac de Bearn* v. *Francois de Bearn,* 225 U. S. 695; *same* v. *Pierre de Bearn,* decided at this term, 231 U. S. 742. *Mr. Maurice Leon* for the plaintiff in error. *Mr. J. Kemp Bartlett, Mr. Edgar Allan Poe, Mr. Shirley Carter, Mr. Albert C. Ritchie* and *Mr. Edward Duffy* for the defendants in error.

No. 581. C. H. Albers Commission Company, Plaintiff in Error, *v.* Mary E. Spencer and Harlow B. Spencer, Executrix and Executor of the Estate of Corwin H. Spencer, Deceased, et al. In error to the Supreme Court of the State of Missouri. Motion to dismiss submitted March 2, 1914. Decided March 9, 1914. *Per Curiam.* Dismissed for want of jurisdiction. *Kansas City Star Company* v. *Julian,* 215 U. S. 589, 590; *Wood* v. *Chesborough,* 228 U. S. 672. *Mr. Shepard Barclay* for the plaintiff in error. *Mr. Frederick N. Judson* and *Mr. John F. Green* for the defendants in error.

No. 817. J. F. Shultz, Plaintiff in Error, *v.* Fred W. Ritterbusch, County Treasurer, etc., et al. In error to the Supreme Court of the State of Oklahoma. Motion to dismiss or affirm or place on summary docket,

submitted February 24, 1914. Decided March 9, 1914. *Per Curiam.* Dismissed for want of jurisdiction. (1) *Consolidated Turnpike Company* v. *Norfolk & Ocean View Railroad Co.*, 228 U. S. 596, 600, and cases cited. (2) *Louisville & N. R. R. Co.* v. *Barber Asphalt Paving Company*, 197 U. S. 430, 434, and cases cited. *Mr. Milton Brown* for the plaintiff in error. *Mr. D. C. Westenhaver* for the defendants in error.

No. 243. W. Schneider Wholesale Wine & Liquor Company, Appellant, *v.* August Diederich. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Argued March 12, 1914. Decided March 16, 1914. *Per Curiam.* Dismissed for want of jurisdiction. *Street & Smith* v. *Atlas Mfg. Co.*, decided this term, 231 U. S. 348. *Mr. James Love Hopkins* and *Mr. Alphonso Howe* for the appellant. *Mr. James A. Carr* for the appellee.

No. 262. Thomas May, Jr., et al., Plaintiffs in Error, *v.* The People of the State of Illinois for the use of Edward Gobin, etc. In error to the Supreme Court of the State of Illinois. Argued March 10, 1914. Decided March 16, 1914. *Per Curiam.* Dismissed for want of jurisdiction. *Rogers* v. *Clark Iron Co.*, 217 U. S. 589; *Preston* v. *Chicago*, 226 U. S. 447, 450. *Mr. Fred B. Merrills* for the plaintiffs in error. *Mr. Charles H. Burton* and *Mr. James M. Graham* for the defendant in error.

No. 341. Mrs. Carmelite Pons, Wife of George A. Louque, Plaintiff in Error, *v.* Yazoo & Mississippi Valley Railroad Company et al. In error to the

Supreme Court of the State of Louisiana. Motion to dismiss submitted March 9, 1914. Decided March 16, 1914. *Per Curiam.* Dismissed for want of jurisdiction. *Louisiana Navigation Co.* v. *Oyster Commission of La.*, 226 U. S. 99; *United States* v. *Beatty*, decided this term, *ante*, p. 463. *Mr. Henry L. Lazarus* and *Mr. Edgar H. Farrar* for the plaintiff in error. *Mr. Blewett Lee, Mr. Charles N. Burch, Mr. Hunter C. Leake, Mr. Gustave Lemle* and *Mr. H. D. Minor* for the defendants in error.

No. —, Original. *Ex parte:* IN THE MATTER OF ADOLPH GRIMSINGER, PETITIONER. Submitted March 9, 1914. Decided March 16, 1914. Motion for leave to file amended petition for writ of habeas corpus denied. *Mr. George F. Curtis* for the petitioner. *The Attorney General* and *The Solicitor General* opposing.

Decisions on Petitions for Writs of Certiorari, from January 6, 1914, to March 23, 1914.

No. 776. STAR CHRONICLE PUBLISHING COMPANY, PETITIONER, *v.* THE UNITED PRESS ASSOCIATIONS. January 12, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Shepard Barclay* for the petitioner. *Mr. Campbell Cummings* for the respondent.

No. 791. PROVIDENCE WASHINGTON INSURANCE COMPANY, PETITIONER, *v.* HARVEY GRANGER AND CHARLES E.

LEWIS. January 12, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Howard S. Harrington* for the petitioner. *Mr. Nelson Zabriskie* for the respondents.

No. 820. JEHEIL ROSEN, PETITIONER, *v.* WILLIAM WILLIAMS, COMMISSIONER OF IMMIGRATION. January 12, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William S. Bennet* for the petitioner. *The Attorney General, The Solicitor General,* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 846. TOWN OF AURORA, PETITIONER, *v.* MARTHA L. GATES; and

No. 847. TOWN OF AURORA, PETITIONER, *v.* ROBERT P. WILDER. January 12, 1914. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William A. Bryans* for the petitioner. *Mr. Edward P. Costigan* for the respondents.

No. 840. THE STEAMSHIP "GEORGE W. ELDER," ETC., ET AL., CLAIMANTS, PETITIONERS, *v.* THE PORT OF PORTLAND. January 19, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Arthur A. Birney* for the petitioners. *Mr. C. E. S. Wood* for the respondent.

No. 819. JOHN S. TALBOTT, PETITIONER, *v.* THE UNITED STATES. January 26, 1914. Petition for a writ

of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Joseph U. Sweeney* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 860. AMERICAN NATIONAL BANK OF MACON, GA., ET AL., PETITIONERS, *v.* S. H. STILL ET AL. January 26, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. George S. Jones, Mr. James Simms, Mr. Julian Mitchell, Mr. W. H. Townsend, Mr. William H. Fleming* and *Mr. Orville A. Park* for the petitioners. *Mr. Stanwix G. Mayfield, Mr. Charles Carroll Simms* and *Mr. Alexander Akerman* for the respondents.

No. 348. F. O. NORRIS ET AL., TRUSTEES, ETC., PETITIONERS, *v.* J. E. JOHNSON ET AL. February 2, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Thomas M. Kennerly* and *Mr. Charles T. Butler* for the petitioners. *Mr. Henry F. Ring* for the respondents.

No. 844. HOUSTON OIL COMPANY OF TEXAS ET AL., PETITIONERS, *v.* CAROLINE C. MIDDLESWORTH ET AL. February 2, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Thomas M. Kennerly* and *Mr. Charles T. Butler* for the petitioners. *Mr. Thomas N. Hill* for the respondents.

No. 790. E. I. DU PONT DE NEMOURS POWDER COMPANY, PETITIONER, *v.* THE STEAMSHIP "CHARLTON HALL,"

ETC. February 24, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Howard S. Harrington* for the petitioner. *Mr. Charles C. Burlingham* for the respondent.

No. 881. THOMAS S. NOWELL ET AL., PETITIONERS, *v.* INTERNATIONAL TRUST COMPANY ET AL. February 24, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John P. Hartman* and *Mr. George M. Nowell* for the petitioners. *Mr. L. P. Shackelford, Mr. A. B. Browne, Mr. Alexander Britton* and *Mr. Evans Browne* for the respondents.

No. 618. STREET & SMITH, A COPARTNERSHIP, APPELLANT, *v.* THE ATLAS MANUFACTURING COMPANY ET AL. March 2, 1914. Second petition for a writ of certiorari herein denied. *Mr. Hugh K. Wagner* for the appellant, in support of the petition. No one opposing.

No. 200. THE COMMONWEALTH OF PENNSYLVANIA, APPELLANT, *v.* THE YORK SILK MANUFACTURING COMPANY, BANKRUPT. March 2, 1914. Petition for a writ of certiorari herein denied. *Mr. Jackson H. Ralston* and *Mr. William E. Richardson* for the appellant in support of the petition. *Mr. Henry C. Niles* for the appellee opposing.

No. 869. WALTHAM WATCH COMPANY, PETITIONER, *v.* CHARLES A. KEENE. March 2, 1914. Petition for a writ

of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Nathan Matthews* and *Mr. Romney Spring* for the petitioner. No appearance for the respondent.

No. 884. KERSHAW OIL MILL ET AL., PETITIONERS, *v.* NATIONAL BANK OF SAVANNAH. March 2, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Thomas J. Kirkland, Mr. E. D. Blakeney* and *Mr. Thomas Ruffin* for the petitioners. *Mr. Willian Garrard* and *Mr. Joseph A. McCullough* for the respondent.

No. 895. DAVID A. NEASE, PETITIONER, *v.* COAL & COKE RAILWAY COMPANY ET AL. March 2, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Charles D. Merrick* and *Mr. William E. Chilton* for the petitioner. *Mr. B. M. Ambler* for the respondents.

No. 906. ROBERT MOODY & SON, A COPARTNERSHIP, ETC., APPELLANT, *v.* CENTURY SAVINGS BANK. March 2, 1914. Petition for a writ of certiorari herein denied. *Mr. S. F. Prouty* for the appellant in support of the petition. *Mr. Horatio F. Dale* and *Mr. William G. Harvison* for the appellee opposing.

No. 880. CITY OF CAMDEN, PETITIONER, *v.* ARMSTRONG CORK COMPANY. March 9, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals

for the Third Circuit denied. *Mr. Edwin G. C. Bleakly* and *Mr. Henry F. Stockwell* for the petitioner. *Mr. Norman Grey* and *Mr. F. Morse Archer* for the respondent.

No. 882. FRANK H. RYAN ET AL., PETITIONERS, *v.* THE UNITED STATES. March 9, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Chester H. Krum* and *Mr. Elijah N. Zoline* for the petitioners. *The Attorney General* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 919. GODFREY M. HYAMS, PETITIONER, *v.* OLD DOMINION COMPANY. March 9, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Edward M. Colie* for the petitioner. *Mr. Louis D. Brandeis* and *Mr. Edward F. McClennen* for the respondent.

No. 243. W. SCHNEIDER WHOLESALE WINE & LIQUOR COMPANY, APPELLANT, *v.* AUGUST DIEDERICH. March 10, 1914. Petition for a writ of certiorari herein denied. *Mr. James Love Hopkins* for the appellant in support of the petition. No one opposing.

No. 868. GEORGE W. NORTON, AS EXECUTOR, ETC., APPELLANT, *v.* ROBERT B. WHITESIDE ET AL. March 16, 1914. Petition for a writ of certiorari herein denied.

Mr. Jed L. Washburn for the appellant in support of the petition. *Mr. Theodore T. Hudson, Mr. Luther C. Harris, Mr. J. B. Richards* and *Mr. Alfred Jaques* for the appellees opposing.

No. 912. WILLIAM R. HOPKINS ET AL., PETITIONERS, *v.* A. LOUISA M. GILBERT ET AL., ETC. March 16, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

No. 913. W. R. HOPKINS, PETITIONER, *v.* A. LOUISA M. GILBERT ET AL., ETC. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Wade H. Ellis, Mr. C. B. Matthews, Mr. F. A. Sondley* and *Mr. Theodore F. Davidson* for the petitioners. *Mr. James H. Merrimon* and *Mr. Thomas S. Rollins* for the respondents.

No. 915. COMPAGNIE GENERALE TRANSATLANTIQUE, PETITIONER, *v.* LAURA RIVERS. March 16, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph P. Nolan* for the petitioner. *Mr. Charles H. Tuttle* for the respondent.

No. 917. VICTOR AMERICAN FUEL COMPANY, PETITIONER, *v.* FRANK PECCARICH. March 16, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Caldwell Yeaman* for the petitioner. *Mr. George S. Klock* for the respondent.

No. 931. SMITH INCANDESCENT LIGHT COMPANY, PETITIONER, *v.* WELSBACH GAS LAMP COMPANY. March 23, 1914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Timothy D. Merwin* for the petitioner. *Mr. C. P. Byrnes* for the respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM JANUARY 6, 1914, TO MARCH 23, 1914.

No. 477. JULIAN MUNSURI, APPELLANT, *v.* C. O. LORD, TRUSTEE, ETC. On writ of certiorari to the District Court of the United States for Porto Rico. January 7, 1914. Dismissed without costs to either party, per stipulation. *Mr. Frederic R. Coudert* and *Mr. Howard Thayer Kingsbury* for the appellant. *Mr. N. B. K. Pettingill* and *Mr. William H. Hawkins* for the appellee.

No. 183. FREEMAN H. TILLOTSON, PLAINTIFF IN ERROR, *v.* THE STATE OF KANSAS. In error to the Supreme Court of the State of Kansas. January 20, 1914. Dismissed with costs, pursuant to the tenth rule. *Mr. W. L. Sturdevant* and *Mr. Clinton A. Welsh* for the plaintiff in error. No appearance for the defendant in error.

No. 193. JAMES P. ALLEN, PLAINTIFF IN ERROR, *v.* H. H. OLIVER. In error to the Supreme Court of the State of Oklahoma. January 21, 1914. Dismissed with

costs, pursuant to the tenth rule. *Mr. S. T. Bledsoe* for the plaintiff in error. No appearance for the defendant in error.

No. 194. EDWARD A. ROEHRIG ET AL., PLAINTIFFS IN ERROR, *v.* FORD SMITH. In error to the Supreme Court of the State of Nebraska. January 22, 1914. Dismissed with costs, pursuant to the tenth rule. *Mr. Alfred G. Ellick* and *Mr. Harrison C. Brome* for the plaintiffs in error. No appearance for the defendant in error.

No. 197. NOEL CONSTRUCTION COMPANY, PLAINTIFF IN ERROR, *v.* GEORGE W. SMITH AND COMPANY, INCORPORATED. In error to the District Court of the United States for the District of Maryland. January 22, 1914. Dismissed with costs, pursuant to the tenth rule. *Mr. J. Kemp Bartlett* and *Mr. Edgar Allan Poe* for the plaintiff in error. No appearance for the defendant in error.

No. 205. REPUBLIC IRON & STEEL COMPANY, PLAINTIFF IN ERROR, *v.* HOWARD CARLTON. In error to the District Court of the United States for the District of Maryland. January 26, 1914. Dismissed with costs, pursuant to the tenth rule. *Mr. J. Kemp Bartlett* for the plaintiff in error. No appearance for the defendant in error.

No. 211. CALDWELL & DRAKE, A FIRM, ETC., PLAINTIFFS IN ERROR, *v.* JOHN R. JOBE, AUDITOR, ETC. In error to the Supreme Court of the State of Arkansas.

January 27, 1914. Dismissed with costs, pursuant to the tenth rule. *Mr. J. W. Blackwood* for the plaintiffs in error. No appearance for the defendant in error.

No. 201. THE TEXAS & PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* JOHN JACKSON ET AL. IN error to the United States Circuit Court of Appeals for the Fifth Circuit. January 27, 1914. Dismissed per stipulation. *Mr. Charles Payne Fenner* for the plaintiff in error. *Mr. W. P. Hall* and *Mr. George Whitfield Jack* for the defendants in error.

No. 277. ST. PAUL CITY RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* STATE OF MINNESOTA EX REL. CITY OF ST. PAUL. In error to the Supreme Court of the State of Minnesota. February 24, 1914. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. N. M. Thygeson* for the plaintiff in error. No appearance for the defendant in error.

No. 312. MAJESTIC THEATER COMPANY ET AL., PLAINTIFFS IN ERROR, *v.* CITY OF CEDAR RAPIDS ET AL. In error to the Supreme Court of the State of Iowa. February 24, 1914. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. James H. Trewin* for the plaintiffs in error. No appearance for the defendants in error.

No. 371. ADAMS EXPRESS COMPANY, PLAINTIFF IN ERROR, *v.* ANNIE P. MELLICHAMP. In error to the Court

of Appeals of the State of Georgia. February 24, 1914. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Robert C. Alston* for the plaintiff in error. No appearance for the defendant in error.

No. 388. HELENE MAREQUA, APPELLANT, *v.* SAMUEL W. BACKUS, COMMISSIONER OF IMMIGRATION, ETC. Appeal from the District Court of the United States for the Northern District of California. February 24, 1914. Dismissed with costs, on motion of counsel for the appellant. *Mr. Corry M. Stadden* for the appellant. *The Attorney General* for the appellee.

No. 800. CLARENCE B. WOOD, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the United States Circuit Court of Appeals for the Fourth Circuit. February 24, 1914. Dismissed, pursuant to the tenth rule. *Mr. G. A. Hanson* for the plaintiff in error. *The Attorney General* for the defendant in error.

No. 504. BEAUMONT RICE MILLS, A CORPORATION, ETC., ET AL., PLAINTIFFS IN ERROR, *v.* PORT ARTHUR RICE MILLING COMPANY. In error to the Supreme Court of the State of Texas. February 26, 1914. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. A. D. Lipscomb* and *Mr. Hannis Taylor* for the plaintiffs in error. *Mr. T. N. Hill* for the defendant in error.

No. 248. THE UNITED STATES, APPELLANT, *v.* JANE LEECY. Appeal from the United States Circuit Court of

Appeals for the Eighth Circuit. March 2, 1914. Dismissed, on motion of *Mr. Solicitor General Davis* for the appellant. *The Attorney General* for the appellant. *Mr. George B. Edgerton* for the appellee.

No. 648. THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* O. S. BURHO. In error to the Supreme Court of the State of Minnesota. March 2, 1914. Dismissed with costs, per stipulation. *Mr. William H. Bremner* and *Mr. F. M. Miner* for the plaintiff in error. *Mr. W. R. Duxbury* and *Mr. N. M. Thygeson* for the defendant in error.

No. 708. SOUTHERN RAILWAY COMPANY, APPELLANT, *v.* EPHRAIM SIMON. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. March 3, 1914. Dismissed with costs, on motion of counsel for the appellant. *Mr. John K. Graves* and *Mr. J. Blanc Monroe* for the appellant. No appearance for the appellee.

No. 235. KANSAS CITY GUNNING ADVERTISING COMPANY, PLAINTIFF IN ERROR, *v.* KANSAS CITY, MISSOURI, ET AL. In error to the Supreme Court of the State of Missouri. March 5, 1914. Dismissed with costs, pursuant to the tenth rule. *Mr. John T. Harding* for the plaintiff in error. No appearance for the defendants in error.

No. 236. KANSAS CITY GUNNING ADVERTISING COMPANY, PLAINTIFF IN ERROR, *v.* KANSAS CITY, MISSOURI,

ET AL. In error to the Supreme Court of the State of Missouri. March 5, 1914. Dismissed with costs, pursuant to the tenth rule. *Mr. John T. Harding* for the plaintiff in error. No appearance for the defendants in error.

No. 237. R. A. AITON, APPELLANT, *v.* THE BOARD OF MEDICAL EXAMINERS OF ARIZONA. Appeal from the Supreme Court of the Territory of Arizona. March 5, 1914. Dismissed with costs, pursuant to the tenth rule. *Mr. Charles F. Ainsworth* for the appellant. No appearance for the appellee.

No. 238. SUE M. ROGERS, AS EXECUTRIX, ETC., APPELLANT, *v.* THE OSAGE NATION OF INDIANS. Appeal from the Court of Claims. March 5, 1914. Dismissed pursuant to the tenth rule. *Mr. John J. Hemphill* for the appellant. *Mr. Charles J. Kappler, Mr. Charles H. Merillat* and *Mr. Preston A. Shinn* for the appellee.

No. 240. EDWARD A. MANN, APPELLANT, *v.* THE TERRITORY OF NEW MEXICO EX REL. GEORGE S. KLOCK. Appeal from the Supreme Court of the Territory of New Mexico. March 6, 1914. Dismissed with costs, pursuant to the tenth rule. *Mr. Edward W. Dobson* for the appellant. *Mr. George S. Klock* for the appellee.

No. 366. THE BELT LINE RAILWAY COMPANY, APPELLANT, *v.* THE CITY OF MONTGOMERY ET AL. Appeal from the District Court of the United States for the Middle

District of Alabama. March 9, 1914. Decree reversed with costs upon confession of error, and cause remanded for further proceedings. *Mr. Alexander Hamilton* for the appellant. *Mr. W. A. Gunter* for the appellees.

No. 258. HENRY MEYER, PLAINTIFF IN ERROR, *v.* THE STATE OF KANSAS. In error to the Supreme Court of the State of Kansas. March 10, 1914. Dismissed with costs, pursuant to the tenth rule. *Mr. John W. Yerkes* for the plaintiff in error. *Mr. John S. Dawson* for the defendant in error.

No. 321. W. S. RHEA, APPELLANT, *v.* JAMES A. PITCOCK, WARDEN, ETC. Appeal from the District Court of the United States for the Eastern District of Arkansas. March 12, 1914. Dismissed with costs, on motion of counsel for the appellant. *Mr. Baldy Vinson* for the appellant. No appearance for the appellee.

No. 283. J. FRANKLIN CUNNINGHAM ET AL., PLAINTIFFS IN ERROR, *v.* THE STATE OF LOUISIANA. In error to the Supreme Court of the State of Louisiana. March 12, 1914. Dismissed with costs, pursuant to the tenth rule. *Mr. Taliaferro Alexander* for the plaintiffs in error. *Mr. R. G. Pleasant* for the defendant in error.

No. 287. YEE TING WOH, APPELLANT, *v.* A. J. HIRSTIUS, SHERIFF. Appeal from the District Court of the United States for the Northern District of Ohio. March 13,

1914. Dismissed with costs, pursuant to the tenth rule. *Mr. Francis J. Wing* for the appellant. No appearance for the appellee.

No. 856. CHOY GUM, ALIAS LO KING, APPELLANT, *v.* SAMUEL W. BACKUS, COMMISSIONER, ETC. Appeal from the District Court of the United States for the Northern District of California. March 16, 1914. Dismissed with costs, on motion of counsel for the appellant. *Mr. Corry M. Stadden* for the appellant. *The Attorney General* for the appellee.

No. 857. LEONG TOE, APPELLANT, *v.* SAMUEL W. BACKUS, COMMISSIONER, ETC. Appeal from the District Court of the United States for the Northern District of California. March 16, 1914. Dismissed with costs, on motion of counsel for the appellant. *Mr. Corry M. Stadden* for the appellant. *The Attorney General* for the appellee.

No. 296. BLUEFIELDS STEAMSHIP COMPANY, LIMITED, ET AL., APPELLANTS, *v.* FREDERICK M. STEELE ET AL. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. March 16, 1914. Dismissed with costs, on motion of counsel for the appellants. *Mr. Charles Payne Fenner, Mr. Edgar H. Farrar, Mr. H. Generes Dufour,* and *Mr. W. B. Spencer* for the appellants. *Mr. William Lee Hughes* for the appellees.

No. 300. HYMAN, HILLER & COMPANY, LIMITED, PLAINTIFF IN ERROR, *v.* PHILIP VEITH. In error to the Supreme

Court of the State of Louisiana. March 16, 1914. Dismissed with costs, pursuant to the tenth rule. *Mr. E. D. Saunders* and *Mr. Edgar H. Farrar* for the plaintiff in error. *Mr. Benjamin Rice Forman* for the defendant in error.

No. 811. MARGUERITA OYANGUREN, HEIR, ETC., APPELLANT, *v.* ANA LOUISA AND ANA TERESA ORAMA, ETC., ET AL. Appeal from the Supreme Court of Porto Rico. March 16, 1914. Dismissed with costs, on motion of counsel for the appellant. *Mr. Charles F. Carusi* for the appellant. No appearance for the appellees.

No. 318. THE SOUTHERN PACIFIC COMPANY ET AL., APPELLANTS, *v.* THE UNITED STATES ET AL. In error to the United States Commerce Court. March 17, 1914. Dismissed on motion of *Mr. A. A. Hoehling, Jr.*, for the appellants. *Mr. Maxwell Evarts, Mr. H. A. Scandrett, Mr. Joseph Paxton Blair, Mr. Fred H. Wood,* and *Mr. A. A. Hoehling, Jr.*, for the appellants. *The Attorney General* and *Mr. P. J. Farrell* for the appellees.

No. 310. CHARLES R. FAHRINGER, PLAINTIFF IN ERROR, *v.* THE STATE OF WISCONSIN. In error to the Supreme Court of the State of Wisconsin. March 17, 1914. Dismissed with costs, pursuant to the tenth rule. *Mr. E. M. McVicker* for the plaintiff in error. No appearance for the defendant in error.

No. 315. FRANK D. BARTLETT, APPELLANT, *v.* W. A. ARNOLD, SHERIFF, ETC. Appeal from the District Court of

the United States for the Eastern District of Wisconsin. March 18, 1914. Dismissed with costs, pursuant to the tenth rule. *Mr. Horace B. Walmsley* for the appellant. No appearance for the appellee.

No. 317. LOUISVILLE & NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* OHIO VALLEY TIE COMPANY. In error to the Court of Appeals of the State of Kentucky. March 18, 1914. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Helm Bruce* for the plaintiff in error. *Mr. Edward W. Hines* for the defendant in error.

No. 737. LYTLE LOGGING & MERCANTILE COMPANY, PLAINTIFF IN ERROR, *v.* C. O. SANDBERG. In error to the Supreme Court of the State of Washington. March 23, 1914. Dismissed per stipulation. *Mr. W. H. Abel* for the plaintiff in error. *Mr. C. O. Sandberg, pro se.*

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In this case *held* that parties promised for a consideration a definite portion of a contingent fee if earned had a lien thereon when received by the promisor that they could follow and enforce. *Ib.*

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Where parties have a lien on a fund they can follow it, as soon as identified, into the hands of others than the person originally receiving it. On this point this court follows the territorial court. *Ib.*

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This court will not condemn honest transactions growing out of the recognized necessities of a lawful business; and so *held*, that the established practice of the distillery business to issue warehouse receipts for whiskey deposited in the distillery warehouse and pledge such receipts as security for loans is not one opposed to public policy. *Taney* v. *Penn National Bank*, 174.

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2. *Same.*

Where the District Court of the United States for Porto Rico had jurisdiction of an action involving title to real estate brought by a citizen of Porto Rico against a foreign subject, the jurisdiction is not ousted because Porto Rico becomes, on the application of the Attorney General, the sole party defendant. *Ib.*

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4. *Homesteads; validity of entry; invasion of rights.*

One who forces a qualified entryman who has acquired, in compliance with the Homestead Law, an inceptive homestead right on public land open to entry although erroneously shown on the plat as a lake, wrongfully invades the possessory right of the homesteader. *Gauthier* v. *Morrison*, 452.

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6. *Patent for; plat of survey as part of.*

Where public lands are patented "according to the official plat of the survey returned to the General Land Office by the Surveyor General," the notes, lines, landmarks and other particulars appearing upon the plat become as much a part of the patent, and are as much to be considered in determining what it is intended to include, as if they were set forth in it. *Chapman & Dewey Lumber Co.* v. *St. Francis Levee District*, 186.

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A patent for "the whole" of a township "according to the official plat of the survey" is here construed, in view of what appeared upon the plat and of the acreage specified in the patent, as embracing the whole of the surveyed lands in the township, but not an unsurveyed area, approximating 8,000 acres, which was represented upon the plat as a meandered body of water. *Ib.*

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