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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1913

CHARLES HENRY BUTLER

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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. He was on the bench from April 6, until the adjournment of the Term June 22. He died during vacation on July 12, 1914, at Atlantic City, New Jersey. Further reference to Mr. Justice Lurton and the proceedings on his death will appear in a later volume.

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.

MILLER *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 178. Argued January 19, 20, 1914.—Decided April 6, 1914.

The postal contract involved in this action conferred authority on the United States to discontinue its performance and gave the Post Office authorities power after the discontinuance to deal with the mail routes which the contract previously embraced in such manner as was found necessary to subserve the public interest.

The averments of the bill did not show such a state of facts as would justify the conclusion that the action of the Post Office authorities in exerting the lawful power of discontinuance was so impelled by bad faith as to cause the exertion of the otherwise lawful power to be invalid and void.

In determining rights thereunder, this court must be governed by the contract, and cannot first destroy it in part and then enforce that which remains.

The difficulties in performing a postal contract are presumably in the minds of the contracting parties, and the Government cannot be deprived of the protection of the reserved powers of cancellation in case of the failure of the contractor to perform by reason of such difficulties.

Where the hardships endured by a postal route contractor are the results of his own mistake in making an improvident contract, relief can only be obtained at the hands of Congress.

47 Ct. Cl. 146, affirmed.

THE facts, which involve the authority of the Postmaster General to cancel postal contracts and the rights of a contractor for a mail route in Alaska in that respect, are stated in the opinion.

Mr. Louis T. Michener, with whom *Mr. Perry G. Michener* was on the brief, for appellant:

In the construction of the contract, or any particular clause or part of it, the court is to examine the entire contract, consider the relations of the parties, their connection with the subject-matter, the circumstances under which it was signed, the state of things existing at the time it was made, the nature of the obligations between the parties, and is to look carefully to the substance of the agreement as contra-distinguished from its mere form, in order to give it a fair and just construction, and ascertain the substantial intent of the parties. *Canal Co.* v. *Hill*, 15 Wall. 94, 99–101; *Rock Island Ry.* v. *Rio Grande R. R. Co.*, 143 U. S. 596, 609; *Winona Land Co.* v. *Minnesota*, 159 U. S. 526, 531; *United States* v. *Utah &c. Stage Co.*, 199 U. S. 414, 423.

The discontinuance stipulation should be so construed as not to apply to a case in which the payment of one month's extra pay would be grossly inadequate as indemnity or compensation to the contractor. *United States* v. *Utah &c. Stage Co.*, 199 U. S. 414; *Serralles' Succession* v. *Esbri*, 200 U. S. 103, 113; *Schuylkill Nav. Co.* v. *Moore*, 2 Whart. 491.

A stipulation could be so written as to be a complete and lawful ascertainment and liquidation of damages. *Sun Printing & Pub. Assn.* v. *Moore*, 183 U. S. 642.

This contract is not to be so construed as to give the

officer the power to do arbitrary, capricious, oppressive, or unreasonable things, to the cost or damage of the contractor, for it is implied that the officer will do nothing of the kind. *United States* v. *N. A. Com. Co.*, 74 Fed. Rep. 145, 149; *Lewman's Case*, 41 Ct. Cls. 470, 478; *Ripley* v. *United States*, 223 U. S. 695, 701; *Griffith's Case*, 22 Ct. Cls. 165, 193; *C., M. & St. P. Ry. Co.* v. *Hoyt*, 149 U. S. 1, 15. And see *Slavens* v. *United States*, 196 U. S. 229, distinguished.

The contractor was entitled to fair play, and the officer could have given it to him, for there was neither law nor contract to forbid. *Garfielde* v. *United States*, 93 U. S. 242, distinguished as turning on the power of the Postmaster General to discontinue the service under the regulations, and this court holding that he had that power.

The long existing regulations are of importance here because their substance was incorporated in the contract.

"Annul" and "discontinue" are not equivalent or synonymous terms.

The damages here include loss of profits and loss of property. A contractor may recover the amount of profits lost. *Hinckley* v. *Pittsburgh Steel Co.*, 121 U. S. 264, 275; *Anvil Min. Co.* v. *Humble*, 153 U. S. 540, 549; *Boehm* v. *Horst*, 178 U. S. 1, 15.

An injured contractor is entitled to be made whole. In the application of this rule, damages are allowed for his personal property lost. *Figh's Case*, 8 Ct. Cls. 319, 324, 325; *Roetinger's Case*, 26 Ct. Cls. 391, 398, 408.

On the state of facts in this case appellant had the legal right, indeed it was his legal duty, to perform the contract, and upon such performance he became entitled to recover in his own name for the losses and damages incurred. *United States* v. *Hitchcock*, 164 U. S. 227; *United States* v. *Behan*, 110 U. S. 338; *Salisbury* v. *United States*, 28 Ct. Cls. 52.

It was not necessary to charge the Postmaster General

with bad faith in order to state a cause of action. If the Postmaster General acted beyond his rights and powers under the contract and the law, and damages resulted therefrom to the appellant, the right of action exists, and this is true no matter what the motives of the official may have been. *Robertson* v. *Frank Bros. Co.*, 132 U. S. 17, 24; *Lewis* v. *Chicago &c. R. R.*, 49 Fed. Rep. 708; *Lyons* v. *United States*, 30 Ct. Cls. 352, 365.

The averments in the petition concerning expenditures, values, and damages are sufficient. They are in harmony with 2 Chitty on Plead., 16th Am. ed., 37, 38. See *District of Columbia* v. *Barnes*, 197 U. S. 146, 154, citing *United States* v. *Burns*, 12 Wall. 246, 254; *United States* v. *Behan*, 110 U. S. 338, 347.

In proving damages it will be necessary for claimant to comply strictly with the rules of evidence, and it will be incumbent on the court below to make clear and specific findings on the subject. Should it be found desirable the Government may file a motion to make the petition more specific. The demurrer cannot be made to take the place of such a motion.

Mr. Assistant Attorney General Thompson for the United States:

The terms of the contract gave the Postmaster General authority to terminate it.

The regulations of the Post Office Department applying to this route gave the Postmaster General authority to discontinue the contract.

The petition does not allege facts upon which damages may be assessed.

In support of these contentions, see *Garfielde* v. *United States*, 93 U. S. 242; *Gleason* v. *United States*, 175 U. S. 588; *Kihlberg* v. *United States*, 97 U. S. 398; *Lord* v. *Pomona Land Co.*, 153 U. S. 576; *McLaughlin* v. *United States*, 37 Ct. Cls. 150; *Railroad Co.* v. *March*, 114 U. S. 549;

Railroad Co. v. *Price*, 138 U. S. 185; *Slavens* v. *United States*, 196 U. S. 229; *United States* v. *Behan*, 110 U. S. 338; *United States* v. *Utah &c. Stage Co.*, 199 U. S. 414; *Wreford* v. *United States*, 32 Ct. Cls. 415; Postal Laws and Regulations, §§ 817, 1261; Rev. Stat., § 1277.

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

The petition claimed $51,736.00 because of an alleged violation of a contract to carry the mails over a mentioned route in Alaska. The United States demurred on the ground that no cause of action was stated, and the court having sustained the demurrer and dismissed the petition, 47 Ct. Cl. 146, the case is here. The text of the petition therefore is the matter we are called upon to consider. It covers sixteen pages of the printed record. We shall seek to rearrange its contents so as to enable us with accuracy and yet with brevity to state the substance of the petition in order to determine whether a cause of action was stated.

It was alleged that on September 15, 1905, the United States advertised for proposals to carry the mails over a route in Alaska from Valdez to Eagle, a distance of 428 miles, and back. The advertisement conveyed information concerning the route and the duty which would rest upon the contractor, and contained the following:

"The Postmaster General may order an increase of service on a route by allowing therefor not to exceed a pro rata increase on the contract pay. He may change schedules of departures and arrivals in all cases, and particularly to make them conform to connections with railroads, without increase of pay, provided the running time be not abridged. The Postmaster General may also discontinue, change, or curtail the service in order to place on the route superior service, or whenever the public

interest, in his judgment, shall require such discontinuance, change, or curtailment for any other cause, he allowing as full indemnity to contractor one month's extra pay on the amount of service dispensed with, and not to exceed pro rata compensation for the amount of service retained and continued; but the Postmaster General reserves the right to rescind any acceptance of a proposal at any time before the signing on behalf of the United States of the formal contract, without the allowance of any indemnity to the accepted bidder."

Under this proposal the bid of John B. Crittenden to do the called for work at $46,000.00 per annum was accepted, and on the first of February, 1906, a contract was entered into between the Government and Crittenden and his sureties, John Miller and Charles H. Cramer, for performing the service for the sum of the bid for the period of four years from the first of July, 1906 to June 30, 1910. The written contract contained specifications as to the character of the work, its requirements and the mode of its performance which it is not here necessary to detail. Besides a full stipulation giving the Postmaster General authority to enforce the contract and all its provisions by imposing penalties and forfeitures and by discontinuing the contract in case of non-performance, as embodied by the provisions which are reproduced in the margin,[1] the contract contained the following:

[1] And it is hereby further stipulated and agreed by the said contractor and his sureties that the Postmaster General may annul the contract or impose forfeitures in his discretion for repeated failures or for failure to perform service according to contract; for violating the postal laws or regulations; for disobeying the instructions of the Post Office Department; for refusing to discharge a carrier, or any other person having charge of the mail by the contractor's direction, when required by the Department; for subletting service without the consent of the Postmaster General, or assigning or transferring this contract; for combining to prevent others from bidding for the performance of postal service; for transmitting commercial intelligence or matter

"It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster General may discontinue or extend this contract, change the schedule and termini of the route, and alter, increase, decrease, or extend the service, in accordance with law, by allowing not to exceed a pro rata increase of compensation for any additional service thereby required; and, in case of decrease, curtailment, or discontinuance of service, as a full indemnity to said contractor, one month's extra pay on the amount of service dispensed with, and not to exceed a pro rata compensation for the service retained; but no increase of compensation shall be allowed for a change of service not amounting to an increase, nor indemnity of month's extra pay for any change of service not involving a decrease of service."

In addition the statutory provisions governing the subject and the Post Office regulations having the force of law which had been stated in the advertisement for proposals were by reference incorporated and made a part of the contract by the following provision:

"That this contract is further to be subject to all the conditions imposed by law, and by the several acts of Congress relating to post offices and post roads, and to the conditions stated in the pamphlet advertisement of September 15, 1905."

It was averred that shortly after the making of the contract Miller, the petitioner, who was one of the sureties of

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which should go by mail, contrary to the stipulations herein; for transporting persons so engaged as aforesaid; or for the failure of the contractor to give his personal supervision to the performance of the service, and to reside upon or contiguous to the route; that the Postmaster General may annul the contract, whenever the contractor shall become a postmaster, assistant Postmaster, or member of Congress, or otherwise legally incompetent to be concerned in such contract: and whenever, in the opinion of the Postmaster General, the service can not be safely continued, the revenues collected, or the laws maintained on the road or roads herein.

Crittenden, found that he was not able to supply the capital needed for the performance of the contract and therefore he, Miller, as surety, was obliged to and did expend the moneys needed to buy "harness, sleds, horse feed, horses and dogs to carry the mails" under the contract, so that by the first of July, 1906, the contractor was ready to perform and did commence the performance of his duties under the contract and continued to perform them until the time when subsequently the contract was discontinued by the Postmaster General. It was averred that after thus advancing the money as surety of Crittenden, Miller, finding that further advances were necessary to enable Crittenden to go on with his work, formed a partnership with him and under this partnership advanced large sums of money to meet the heavy expenses which were required, and continued to do so, during a period of nearly two years, that is up to or on or about the first of May, 1908, when he was compelled, in order to protect himself, and the United States, to take a transfer of the contract from Crittenden, that is, to become the sub-lessee of the contract, his written agreement dated the first of May, 1908, with Crittenden to that effect having been approved by the Post Office authorities, indeed it was alleged that such agreement was written by those authorities. This sub-letting contract which was set out in full in the petition bound Miller, the subcontractor, by all the obligations of the original contract, made him liable for all fines, forfeitures, etc., imposed under the original contract, and expressly subjected him to the risk of the power to change, increase, modify or discontinue the service as provided in the original contract, the clauses covering these two latter subjects being in the margin.[1]

[1] And it is hereby further agreed that liability for all fines and deductions imposed upon a party of the first part by the Postmaster General, for failures and delinquencies in the performance of service under his contract shall be assumed and borne by the party of the second part,

It was alleged that the petitioner as subcontractor performed the contract as long as he was permitted to do so by the United States; that on August 11, 1908, the Postmaster General issued an order discontinuing the contract service over the route which the contract embraced, to take effect on September 30, 1908, and this order was enforced at the time mentioned and an indemnity allowance of pay for one month only was made the contractor. The petition alleged that for many years "the regulations adopted and enforced by the Post Office Department have authorized the Postmaster General to discontinue or curtail the service, in whole or in part, in order to secure 'a better degree of service' or 'superior service,' or whenever the public interest, in his judgment, should require such discontinuance or curtailment for any other cause; he allowing, as a full indemnity to the contractor, one month's extra pay on the amount of service dispensed with, and pro rata compensation for the amount of service retained and continued." The continuance of this regulation was alleged and the various changes in the mere form in which it was expressed up to and including the time when the regulation then existing found statement in the contract and in the proposals subject to which, as we have seen, the contract was made. The petition however averred as follows:

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and, if necessary, the Auditor for the Post Office Department may enforce this agreement by proper deductions from any compensation due the party of the second part for service performed under this subcontract.

And it is hereby further agreed that for any additional service required by the Postmaster General, and not hereinbefore expressly stipulated, the party of the second part shall be allowed not to exceed a pro rata increase of compensation; and, in case of decrease, curtailment, or discontinuance of service, as full indemnity, a pro rata of the one month's extra pay allowed by the United States to the party of the first part, and, unless previously herein stipulated, not to exceed a pro rata compensation for the service retained.

"The regulation, whatever its language or its number, was not drawn and promulgated with reference to the conditions existing in Alaska on Route No. 78108 during the period covered by the contract sued on, but it was drawn and promulgated with reference to conditions existing within the limits of the United States and exclusive of that route in Alaska, and particularly without reference to the hereafter described conditions existing in that part of Alaska covered by the contract sued on.

"In the preparation of the forms of advertisement, proposal and contract in suit, the government officials adopted the regulation in force, and such advertisement, proposal and contract were drawn and printed for general use, and the proposal and contract were presented for execution, without particular regard to the physical, climatic, or other conditions then existing or that might exist along the line of that route during the contract period of four years. At the execution of the proposal and contract, and of the subsequent contract of subletting, Crittenden and petitioner did not think or believe that the contract in suit would be discontinued or terminated in any manner or form, but on the contrary, they believed that the contract in suit would be in full force and effect during the whole contract period, and they named the amount of annual compensation in that belief. They expected that they would encounter losses of profits in a portion of the contract period, but would earn good profits before the contract period ended and for the whole contract period. Had Crittenden and the petitioner believed otherwise than as above stated, they would not have executed either of the contracts for that annual compensation, nor would petitioner have made the arrangements and expenditures in the early part of *1903*, [1908] hereinafter described. On the contrary, petitioner made such arrangements and expenditures in the belief that the contract would be in force for the full contract period. Peti-

tioner avers that if the government had asked bids for a two year contract on that route Crittenden would not have submitted a bid at all, and petitioner would not have become surety on any contract for less than $92,000 per annum, because the conditions were such that the expenses of carrying the mails on the route would be far heavier for carrying them in 1906 than in 1907, and in 1907 than in 1908, and in 1908 than in 1909. As an illustration, the petitioner avers that it cost, to-wit: $151,169.55 to perform the contract until it was discontinued by order of the Postmaster General, that amount being to-wit: $48,595.08 more than the total sum received from the government, but it would only have cost him, to wit: $43,390 to perform the contract for the remaining twenty-two months of the contract period, during which time he would have received, to-wit: $84,326.00 for carrying the mails, a profit of, to wit: $40,936."

The petition moreover alleged that the conditions which existed at the time the contract was made in the region covered by the mail route which it embraced, caused it to be extremely difficult and hazardous to human life and property to carry the mails over the route described and within the time specified in the contract. In many places it was averred, the government trails were not fit to be used because of their bad condition, and it became necessary to build new ones. With much amplitude, the petition described the almost insurmountable difficulties with which the performance of the contract was environed: the cutting of trails, the building or repairing of bridges, the erecting of sheds, the transporting at an enormous expense along the route of the means to sustain men and horses, the struggle in doing so in winter through ice and snow, and in spring and summer, the overcoming of obstacles resulting from flood and many other causes. Indeed, the facts detailed, being taken as true, establish that the performance of the contract was surrounded by difficulty of the

gravest character to overcome which called for the manifestation on the part of the contractor of courage, the exertion of great energy and a willingness to make sacrifices in order to discharge the duties imposed by the contract. It was alleged that the making of the strenuous exertion and the incurring of the hazards to life and property which, as we have stated, the petition described, were necessary "as the Government did not make allowance for delays, whether caused by snows, storms, blizzards, the freeze-up in the Fall, the break-up in the Spring, or any other consideration, but fines were charged at every opportunity."

It was alleged that counting on the fact that the contract would be allowed to go to its termination, after the petitioner became the sub-lessee he spent a large amount of money in putting the route in fair condition, in provisioning the same by shipping food for men and horses at freight rates which were enormous, all of which he would not have done had he been informed of the intention of the Government to discontinue the contract before the end of the contract period. That upon the same reliance, as a means of utilizing his equipment, he bought out the rights and assumed the obligations of a contract which had been made by a firm known as Scott & Frase for carrying the mails from a point known as Tanana Crossing to Eagle, the place where the contract of which the petitioner was the sub-contractor terminated.

It was alleged that although in September, 1908, the Government discontinued the contract of petitioner, it did not discontinue the mail service, to which that contract related, but only restricted it, that is cut out about 190 of the 428 miles between Valdez and Eagle and in the balance had the mails carried by contracts exacting a less onerous and less frequent service, these contracts having been made as emergency contracts, without advertisement, without affording the petitioner any opportunity to bid

for them or to take them under the prior contract which was discontinued by the order of 1908. The sum which was claimed was the alleged loss resulting from having been obliged to discontinue the contract, the calculation in effect on the subject charging the amount spent under the contract as well as $41,129.52 as the result of the purchase of the Scott & Frase contract, and crediting the total amount received from the Government.

These being the averments of the petition, it is obvious, the questions are as follows: First, did the contract confer the authority on the United States to discontinue its performance, and, if so, did it give power to the Post Office authorities after the contract was discontinued to deal with the mail routes which the contract had previously embraced in such a manner as was found necessary to subserve the public interest; second, if yes, did the averments of the bill show such a state of facts as would justify the conclusion that the action of the Post Office authorities in exerting the lawful power of discontinuance was so impelled by bad faith as to cause the exertion of the otherwise lawful power to be invalid and void?

That in explicit terms the express authority was given to the United States to discontinue the execution of the contract is so plainly the result of the proposal which led up to the contract, of the text of the contract itself, of the Post Office rules and regulations which by the text were incorporated in and made a part of the contract, as to leave no room for discussion. Indeed this result was in terms admitted by the allegations of the petition to which we have referred, and the challenge of the power to discontinue therein made, conceded that the terms of the contract gave the power, but relied only upon the assertion that such terms, although express and positive, should be read out of the contract as inapplicable to the situation to which the contract related, that is, the carriage of the mail over the designated route in Alaska.

But we must be governed by the contract and cannot, as we are asked to do, first destroy it in part and then enforce that which would remain, which would be the result of holding that the stipulations of the contract conferring power upon the Government may be obliterated and the contract with those stipulations wiped out be enforced as against the Government for the benefit of the petitioner. And the absolutely conclusive force of this view, when considered as a general proposition, is at once additionally demonstrated by a particular consideration of the case in hand, since the reserve power on the part of the Government to discontinue the contract which is here in question, found its place in the proposal and contract in consequence of the postal regulations having the effect of law which had prevailed for many years and which therefore, caused the contract with the reservation of the right to discontinue to be but the expression of a rule of public policy limiting in the public interest the power to contract, a limitation sanctioned over and over again at least by an unerring implication by statutory approval. Of course under this condition of things, the suggestion that the contractor would not have bound himself to the Government if he had considered that the unambiguous words of the contract would be enforced can be of no avail. And it is equally manifest that it is impossible to give any effect to the suggestion that the terms of the contract did not apply because of the place where the work covered by the contract was to be performed. The presumption is that whatever may have been the difficulties of performance, they were in the minds of the contracting parties and were elements entering into the offer by the contractor to do the work for a stated compensation and also constituted elements of danger against which the Government protected itself by the express reservation of the right to discontinuance which was explicitly exerted. While it is not necessary to do so, we observe in passing that the aver-

ments of the petition itself give rise to inferences sustaining this very natural conclusion.

That the power to discontinue the contract left the Government free after such discontinuance to make such contracts as were deemed best, is also the unambiguous result of the proposals submitted by the Government, of the text of the contract itself, and of the context of the postal rules and regulations which by reference were incorporated into the contract. In fact, while the context establishes this result so clearly and so obviously as to leave no room for extraneous reasoning, if such were not the case, and purpose and intent required to be looked at, it is manifest that to deny that such power existed would be to set aside and frustrate the public policy upon which the right to discontinue rests. It would render the exertion of the power futile—or cause it to be inadequate to protect the public interest since it would deprive of means of remedying the evil to cure which the right to discontinue was exerted. The irresistible force of the contract itself on the subject has been previously pointed out by this court in a case which was cited by the court below in its clear opinion. *Slavens* v. *United States*, 196 U. S. 229, 233, 236.

Making the assumption for the sake of the argument only that the existence of a fraudulent motive or of bad faith impelling the exercise by the Postmaster General of the authority conferred upon him to discontinue, be a factor in determining whether an otherwise valid power had been lawfully exerted, such concession could have no possible reference to this case, since it is expressly conceded in the argument at bar that no such charge was made in the petition and none is relied upon, the only claim being that a power not conferred was exerted or that if one which was given was exercised, the circumstances disclosed were of such a character as to justify the legal conclusion that it was so grossly inequitable to bring

the power into play that its exertion ought not to receive judicial sanction. But this simply calls upon us to substitute judicial discretion for the discretion lodged by the law and the contract in the Postmaster General, a power which of course it is beyond our competency to exercise. Let it be conceded that if the truth be admitted of all the facts as to the unforeseen difficulties, the stress of storm and blizzard and snow and ice and freshet, which prevailed as averred over the trackless wilderness through which the mail route extended, a case of great hardship would be established, the very truth of the averments referred to also naturally suggests the reasons which in the exercise of a wise discretion may have called into play the exertion of the power to discontinue the contract in the public interest and for the public benefit. As under the conditions stated the hardships alleged were but the result of a mistake of the petitioner in making an improvident contract, relief can only be obtained at the hands of Congress.

Affirmed.

BROWNING *v.* CITY OF WAYCROSS.

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

No. 259. Argued March 11, 1914.—Decided April 6, 1914.

A State may not burden, by taxation or otherwise, the taking of orders in one State for goods to be shipped from another, or the shipment of such goods in the channel of interstate commerce up to and including the consummation by delivery of the goods at the point of destination.

The business of erecting in one State lightning rods shipped from another State, under the circumstances of this case, was within the regulating power of the former State and not the subject of interstate commerce. *Caldwell* v. *North Carolina*, 187 U. S. 622; *Rearick*

v. *Pennsylvania*, 203 U. S. 507; *Dozier* v. *Alabama*, 218 U. S. 124, distinguished.

Parties may not by the form of a non-essential contract convert an exclusively local business subject to state control into an interstate commerce business protected by the commerce clause so as to remove it from the taxing power of the State.

Quære, whether interstate commerce may not under some conditions continue to apply to an article shipped from one State to another after delivery and up to and including the time when the article is put together and made operative in the place of destination.

11 Ga. App. 46, affirmed.

THE facts, which involve the constitutionality under the commerce clause of the Federal Constitution of a municipal occupation tax on lightning rod agents and dealers, are stated in the opinion.

Mr. Richard A. Jones, with whom *Mr. J. L. Sweat* and *Mr. Nathan Frank* were on the brief, for plaintiff in error:

The sale and purchase of lightning rods located in another State, to be transported in pursuance thereof in interstate traffic to the place of delivery in the State of Georgia, fixed under the terms of such contract of purchase, was an interstate transaction. *Crenshaw* v. *Arkansas*, 227 U. S. 389; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Rearick* v. *Pennsylvania*, 203 U. S. 507.

The erection of lightning rods by the plaintiff in error was in pursuance of and as a part of sale transactions constituting interstate commerce and a necessary incident thereof, and the tax sought to be collected from him for the exercise of such function is within the prohibition against burdening commerce among the States by licenses, tax, or any system of state regulation. *Crutcher* v. *Kentucky*, 141 U. S. 47, 62; *Caldwell* v. *North Carolina*, 187 U. S. 622, 628; *Barrett* v. *New York*, 232 U. S. 14.

Aside from such as may properly be put in effect in the exercise of its police power, any regulation or enactment of a State or political subdivision thereof, which tends to

materially interfere with, hinder, or obstruct the making or performance of contracts for commerce among the States, or anything reasonably incident thereto, is a burden upon such commerce which may not be laid other than by authority of the National Government.

The character of the incidents allowed to constitute parts of such contracts within the protection of the commerce clause of the Constitution and of the acts which have been held to constitute unwarranted interference therewith are illustrated by the following cases: *Dozier* v. *Alabama*, 218 U. S. 124; *Barrett* v. *New York*, 232 U. S. 14; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *International Text Book Co.* v. *Pigg*, 217 U. S. 91; *Brown* v. *Maryland*, 12 Wheat. 436, 444.

It was necessary for the employer of plaintiff in error, in order to carry on the business in which it was engaged—the manufacture and sale of lightning rods—to, in connection with such sales, erect through one of its skilled employés the rods upon the buildings for which intended.

The consideration for and a part of such contract of sale was this agreement to deliver the rods placed upon the structure for which purchased. Until so attached the delivery was not complete or contract fulfilled. Plaintiff in error was not in any respect engaged in erecting or putting up lightning rods except in so far as he performed such service for his employer in connection with the transactions described.

This tax directly burdens commence among the States in the character of commodities involved.

The ordinance is, as applied to the subject-matter herein involved, in violation of the commerce clause of the Federal Constitution.

Mr. Thomas S. Felder, Attorney General of the State of Georgia and *Mr. W. W. Lambdin*, for defendant in error, submitted.

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

The plaintiff in error was charged in a municipal court with violating an ordinance which imposed an annual occupation tax of $25 upon "lightning rod agents or dealers engaged in putting up or erecting lightning rods within the corporate limits" of the City of Waycross. Although admitting that he had carried on the business he pleaded not guilty and defended upon the ground that he had done so as the agent of a St. Louis corporation on whose behalf he had solicited orders for the sale of lightning rods; had received the rods when shipped on such orders from St. Louis and had erected them for the corporation, the price paid for the rods to the corporation including the duty to erect them without further charge. This it was asserted constituted the carrying on of interstate commerce which the city could not tax without violating the Constitution of the United States. Although the facts alleged were established without dispute, there was a conviction and sentence and the same result followed from a trial *de novo* in the Superior Court of Ware County where the case was carried by certiorari. On error to the Court of Appeals that judgment was affirmed, the court stating its reasons for doing so in a careful and discriminating opinion reviewing and adversely passing upon the defense under the Constitution of the United States (11 Ga. App. 46). From that judgment this writ of error is prosecuted because of the constitutional question and because under the law of Georgia the Court of Appeals had final authority to conclude the issue.

The general principles by which it has been so frequently determined that a State may not burden by taxation or otherwise the taking of orders in one State for goods to be shipped from another or the shipment of such goods in the channels of interstate commerce up

to and including the consummation by delivery of the goods at the point of shipment have been so often stated as to cause them to be elementary and as to now require nothing but a mere outline of the principle. The sole question, therefore, here is whether carrying on the business of erecting lightning rods in the State under the conditions established, was interstate commerce beyond the power of the State to regulate or directly burden. The solution of the inquiry will, we think, be most readily reached by briefly reviewing a few of the more recently decided cases which are relied upon to establish that although the interstate transit of the lightning rods had terminated and they had been delivered at the point of destination to the agent of the seller, the business of subsequently attaching them to the houses, for which they were intended, constituted the carrying on of interstate commerce. The cases relied on are *Caldwell* v. *North Carolina*, 187 U. S. 622; *Rearick* v. *Pennsylvania*, 203 U. S. 507 and *Dozier* v. *Alabama*, 218 U. S. 124.

Caldwell v. *North Carolina* concerned the validity of an ordinance of the village of Greensboro, imposing a tax upon the business of selling or delivering picture frames, photographs, etc. The question was whether Caldwell, the agent of an Illinois corporation, was liable for this tax because in Greensboro he had taken from a railroad freight office certain packages of frames and pictures which were awaiting delivery and which had been shipped to Greensboro by the selling corporation to its own order for the purpose of filling orders previously obtained by its agents in North Carolina. After the packages of frames and pictures were received by Caldwell, in a room in a hotel, the pictures and frames were fitted together and were delivered to those who had ordered them. The assertion that there was liability for the tax was based on the contention that the act of Caldwell in receiving the pictures and frames and bringing them together was not under the

protection of the commerce clause, but was the transaction of local business after the termination of interstate commerce, especially because the pictures and frames had been shipped from Chicago in separate packages and, because the pictures and frames were incomplete on their arrival, and were made complete in the State by the union accomplished after the end of their movement in interstate commerce. Both of these propositions were decided to be unsound and it was adjudged that as both the pictures and frames had been ordered from another State and their shipment was the fulfillment of an interstate commerce transaction, the mere fact that they were shipped in separate packages and brought together at the termination of the transit, did not amount to the transaction of business within North Carolina which the State could tax without placing a direct burden upon interstate commerce. In *Rearick* v. *Pennsylvania*, where the right to levy a tax was decided not to exist because to sustain it would be a direct burden upon interstate commerce, the only question was whether the form in which certain shipments of goods were made from Ohio into Pennsylvania to fill orders was of such a character as to cause the act of the agent of the shipper, who opened the packages for the purpose of distributing the goods to those for whom they were intended, to amount to the carrying on of business in the State of Pennsylvania. *Dozier* v. *Alabama* in substance concerned the principles applied in the two previous cases with the modification that it was there held that because there was no binding obligation on a purchaser to accept the frame which was to accompany a picture ordered from another State and transmitted through interstate commerce, did not take the case out of the previous ruling.

It is evident that these cases when rightly considered, instead of sustaining, serve to refute, the claim of protection under the interstate commerce clause which is here

relied upon since the cases were concerned only with merchandise which had moved in interstate commerce and where the transactions which it was asserted amounted to the doing of local business consisted only of acts concerning interstate commerce goods, dissociated from any attempt to connect them with or make them a part in the State of property which had not and could not have been the subject of interstate commerce. Thus, in *Caldwell* v. *North Carolina*, the court laid emphasis upon the fact that the shipment of the pictures in interstate commerce in one package and the frames in another was not essential but accidental for the two could have been united at the point of shipment before interstate commerce began as well as be brought together after delivery at the point of destination. And this was also the condition in the *Rearick Case*. Indeed, it is apparent in all three cases that there was not the slightest purpose to enlarge the scope of interstate commerce so as to cause it to embrace acts and transactions theretofore confessedly local, but simply to prevent the recognized local limitations from being used to put the conceded interstate commerce power in a straight-jacket so as to destroy the possibilities of its being adapted to meet mere changes in the form by which business of an inherently interstate commerce character could be carried on.

We are of the opinion that the court below was right in holding that the business of erecting lightning rods under the circumstances disclosed, was within the regulating power of the State and not the subject of interstate commerce for the following reasons: (a) Because the affixing of lightning rods to houses, was the carrying on of a business of a strictly local character, peculiarly within the exclusive control of state authority. (b) Because, besides, such business was wholly separate from interstate commerce, involved no question of the delivery of property shipped in interstate commerce or of the right to complete

an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated. It is true, that it was shown that the contract under which the rods were shipped bound the seller, at his own expense, to attach the rods to the houses of the persons who ordered rods, but it was not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause. It is manifest that if the right here asserted were recognized or the power to accomplish by contract what is here claimed, were to be upheld, all lines of demarkation between National and state authority would become obliterated, since it would necessarily follow that every kind or form of material shipped from one State to the other and intended to be used after delivery in the construction of buildings or in the making of improvements in any form would or could be made interstate commerce.

Of course we are not called upon here to consider how far interstate commerce might be held to continue to apply to an article shipped from one State to another, after delivery and up to and including the time when the article was put together or made operative in the place of destination in a case where because of some intrinsic and peculiar quality or inherent complexity of the article, the making of such agreement was essential to the accomplishment of the interstate transaction. In saying this we are not unmindful of the fact that some suggestion is here made that the putting up of the lightning rods after delivery by the agent of the seller was so vital and so essential as to render it impossible to contract without an agreement to that effect, a suggestion however which we deem it unnecessary to do more than mention in order to refute it.

Affirmed.

DE BEARN *v.* SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE.

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

No. 301. Argued March 17, 18, 1914.—Decided April 6, 1914.

This court takes judicial notice of its own records; and, if not *res judicata*, may, on the principles of *stare decisis*, examine and consider decisions in former cases affecting the consideration of one under advisement, *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212. It may take judicial notice of its own records in regard to proceedings formerly had by a party to a proceeding before it. *Dimmick* v. *Tompkins*, 194 U. S. 194.

It appearing from the records of this court that the constitutional questions alleged as the sole basis for a direct review of the judgment of the District Court, have been heretofore decided to be so wanting in merit as not to afford ground for jurisdiction, the appeal in this case is dismissed.

It is in the interest of the Republic that litigation should come to an end.

In this case the state court has sustained attachments as authorized by state law.

It is within the power of the State to authorize a foreign creditor to attach bonds within the State deposited under directions of the state court in the exercise of its lawful powers, and which cannot be removed from the State without the authority of the state court.

Even though such bonds may have been registered by a prior order of the state court, it may be the duty of that court under the state law to remove such registry in order to protect attaching creditors.

An owner of bonds deposited in a safe deposit vault under an order of the state court, *held*, in this case, not to have been deprived of his property without due process of law by the attachment of such bonds under process issued by the state court in accordance with the law of the State as determined by its highest court.

THE facts, which involve the jurisdiction of this court of direct appeals from the District Court on constitutional questions, are stated in the opinion.

Mr. George C. Holt and *Mr. Maurice Leon* for appellant:

Appellant was entitled to show in the Federal court below that a state court sitting in the same State had not acquired jurisdiction of the bonds although the sheriff had filed a return stating that they had been seized. *Cooper* v. *Newell*, 173 U. S. 555.

Upon the conceded facts the state court had not acquired prior jurisdiction over the bonds. *Bates* v. *N. O., J. & G. N. R. Co.*, 4 Abb. Pr. 72; *S. C.*, 13 How. Pr. 516; *Smith* v. *Kennebec &c. Co.*, 45 Maine, 547; *Bowker* v. *Hill*, 60 Maine, 172; *Buck* v. *Beach*, 206 U. S. 392; *Tweedy* v. *Bogart*, 56 Connecticut, 15; *Ward* v. *Boyce*, 152 N. Y. 191; *Simpson* v. *Jersey City Contracting Co.*, 165 N. Y. 193.

Treating the bonds as property capable of transfer by manual delivery, it is nevertheless clear that as they were not seized, the state court did not gain jurisdiction over them. *Cooper* v. *Reynolds*, 10 Wall. 308; *Pelham* v. *Rose*, 9 Wall. 103.

No lien was acquired by a seizure which consisted merely in the filing of a return in the state court without caption of the bonds or anything amounting to physical taking into custody. *Pennoyer* v. *Neff*, 95 U. S. 714, 730.

The Federal court, having acquired prior jurisdiction by process served *in personam* on the lessor and on the nominal lessees of the box as parties defendant in an original suit to determine the status of the leasehold of the safe deposit box should protect its jurisdiction to render a decree by preventing interference with the *res*. Section 265, Judicial Code; *Freeman* v. *Howe*, 24 How. 450, 461; *Ricker Land Co.* v. *Miller & Lux*, 218 U. S. 258; *Helm* v. *Zarecor*, 222 U. S. 32.

The appellant is deprived of his property by a decree giving effect to state court proceedings which are not supported by jurisdiction acquired either *in rem* or *in personam* according to the settled rules of jurisprudence and which, under the decisions of this court, do not constitute "due process of law."

Mr. Charles McH. Howard, with whom *Mr. Albert C. Ritchie* and *Mr. Edward Duffy* were on the brief, for appellees:

At the time of the filing of the bill these bonds were all subject to several attachments, issued out of the Superior Court of Baltimore City in suits instituted against the plaintiff by his creditors; shortly after filing the bill in this case judgments were rendered in those attachment suits, condemning these bonds. Those judgments are now final.

There are two cardinal principles in law which apply to this case and render the bill demurrable: One, that indispensable parties to a decree (in this case the attaching creditors) must be made parties; Foster, Fed. Pr. (4th ed.), §§ 53, 60; the other, that where a state court has first acquired jurisdiction, the United States court will not act. *Id.*, § 9.

Mr. Chief Justice White delivered the opinion of the court.

In this case the court below sustained a demurrer to the complaint and this direct appeal was then taken on the theory that rights under the Constitution of the United States were involved. To determine whether there is a constitutional question, and, if so, to decide it, requires a statement of the averments of the complaint.

The complainant was the appellant and the defendants were the Safe Deposit & Trust Company of Baltimore, American Bonding Company of Baltimore, Alexander Brown & Sons, a commercial firm established in Baltimore and Theodore P. Weis, sheriff of the city of Baltimore. It was alleged that the complainant was the owner of coupon bonds of $29,000 issued by the New York Central & Hudson River R. R. and of $156,000 of bonds issued by the Chicago, St. Paul, Minneapolis & Omaha Railway Com-

pany, a specified amount of the bonds being registered in the name of a minor son and a stated amount being likewise registered in the name of a minor daughter of the complainant. It was averred that the bonds were in a safe deposit box in the vault of the defendant Safe Deposit & Trust Company, "where your orator, by means of a guardianship proceeding in the Orphans' Court of Baltimore which has since been declared illegal and void, was induced to place said bonds, said box being rented and standing recorded on the books of the said safe deposit Company in the joint names of Messrs. Alexander Brown & Sons and the American Bonding Company; that for the purposes of such guardianship proceeding your orator had in the year 1908 been required by the said American Bonding Company as surety on your orator's bond in said guardianship proceeding to agree not to remove the said bonds without the consent of said surety; and had further been required by said surety to consent that said surety and said Alexander Brown and Sons should only have joint access to said bonds and the same for the sole purpose of enabling said Alexander Brown and Sons to remove interest warrants from said bonds during the said guardianship and forward the same for payment to the City of New York as they became due.

"That in December 1909, the Court of Appeals of Maryland by a decree founded upon personal jurisdiction over all the parties to said guardianship proceeding declared the said guardianship and certain releases given by your orator in connection therewith null and void; that by said adjudication, the said suretyship of the said American Bonding Company of Baltimore was extinguished and that neither said Bonding Company nor said Alexander Brown and Sons have since said adjudication had any right of access to or other right or control whatsoever in, over or as to said safe deposit box and the contents of the same and said adjudication has established the

lack of jurisdiction over said property on the part of the Courts which had so undertaken to deal therewith.

"That your orator is entitled to the immediate possession of the said evidences of debt, to wit: registered bonds for all purposes and is in urgent need of them for the purpose of causing said debts to be transferred upon the books of the debtor corporations in the State of New York to the name of your orator or at his option of surrendering said bonds to the said corporations respectively in exchange for the issuance to your orator of other evidences of said debts, to take the place of said bonds now so registered, as he would have done in the year 1908 but for the illegal guardianship proceeding already referred to.

"That your orator has been since the month of October 1908, and still is the true lessee of said box the rental of which has been paid with funds furnished by your orator and as above shown at all times owner of the contents thereof; that said Alexander Brown and Sons have not been and are not in any manner responsible either for said box or for the custody of the contents of the same or in or for any matter growing out of the arrangement under which said box was rented and said registered bonds placed therein; that as to the American Bonding Company, it has had no connection with or interest in the rental of said box or the custody of the contents of the same except as surety of your orator upon his bond as guardian, which said suretyship was undertaken in the aforesaid illegal guardianship proceeding which has been declared void and set aside."

After reciting the provisions of a memorandum agreement between the plaintiff and defendant Brown & Sons and the Bonding Company by which the joint access to the box in which the bonds were deposited should be had for the purpose of cutting the coupons from the bonds and turning them over to the complainant, it was averred that neither the American Bonding Company nor Brown &

Sons set up any interest antagonistic to the complainant but that he was unable to get access to the box where the bonds were deposited without a decree authorizing him to do so and that such a decree was necessary for the protection of Brown and Sons and the Safe Deposit & Trust Company. It was then averred that the defendant sheriff of Baltimore County "has filed in the Superior Court of Baltimore, a Court of law of the State of Maryland, returns to certain writs of attachment stating that he has seized the aforesaid particular debts under such writs issued out of said Court in five suits brought by divers non-residents of the State of Maryland against your orator upon the ground of your orator's non-residence in said State to recover upon divers claims alleged to have arisen out of said State; that the said proceedings of the said defendant Sheriff under said writs purporting under color of the attachment statutes of Maryland and of said writs to seize said debts which are owned by your orator in the State of New York, are illegal and void; that your orator has not been personally served with process in said suits; that said debts have not and cannot be seized under said writs not being property in the State of Maryland; that the defendant sheriff by his said proceedings under said writs has attempted and is attempting to interfere with said box and its contents and to encumber your orator's title to said particular debts and has sought and is seeking to deprive your orator of his property and of the effective control thereof and of the use thereof without due process of law and to deprive your orator of the equal protection of the laws in violation of the Constitution of the United States and particularly of Section I of the fourteenth amendment thereto; that said Superior Court of Baltimore City has no personal jurisdiction over your orator and has not gained jurisdiction over the aforesaid box or its contents or over the debts owned by your orator in the State of New York, and the said defendant Sheriff

has no lawful authority to impede or seek to impede or hinder your orator in the premises nor to do any act tending to defeat your orator's control of the said debts or the evidences thereof or to prevent your orator from securing the relief applied for herein, and which this Court has jurisdiction to grant your orator, and that the said unlawful proceedings of the said Sheriff under color of said writs will, if persisted in, constitute an unlawful interference with the jurisdiction of this Court in the premises."

The prayer was that the complainant be decreed to be the lessee of the safe deposit box and entitled to access to the same and to withdraw the contents and that the sheriff be enjoined from in any way interfering with the accomplishment of these results.

The demurrers which were filed to this bill by the respective defendants were based first upon the absence of necessary parties, that is, those in whose behalf the attachments had been issued as referred to in the bill and second because, as the bill disclosed that the bonds referred to in the bill were under levy by attachment issued out of the state court, there was no power in the United States court to interfere. The court below rested its decree sustaining the demurrer and dismissing the bill on both these grounds. In disposing of the latter the court said: "This Court may not take anything, be it safe deposit boxes, bonds, evidences of debt or what not, out of the custody of a state Court. The complainant does not question the general rule. He claims that it is not here applicable. He says that while the Superior Court has jurisdiction to issue writs of non-resident attachment, the things which its officer has sought to attach in this case are not attachable. It follows, he argues, that this Court may and must when properly applied to altogether ignore such void proceedings.

"The Court of Appeals of Maryland has expressly de-

cided that a Court of Equity may not assume to declare such attachments altogether nugatory. *de Bearn* v. *Winans*, 115 Maryland, 139.

"See also: *de Bearn* v. *Winans*, 115 Maryland, 604; *de Bearn* v. *de Bearn*, 115 Maryland, 668; *de Bearn* v. *de Bearn*, 115 Maryland, 685.

"It was there decided that such evidences of debt or bonds as are involved in the pending case may be attached in Maryland.

"Neither the Superior Court of Baltimore City nor this Court have any control over the other. If it should be here held that the things in question were not attachable, that Court would be under no obligation to subordinate its judgment to that of this Court. A conflict of jurisdiction would follow. The rule that one Court of concurrent jurisdiction may not attempt to exercise control over anything which has previously come into and still is in the control of the other Court is intended to render such unseemly controversies impossible. The facts of this case bring it within both the letter and spirit of that rule."

After further pointing out that ample remedy would be afforded the complainant by asserting his constitutional rights, if any, in the state court where the attachments were pending, and, if such Federal rights were denied, by prosecuting error to this court, the court observed: "Technically, as this is a hearing upon demurrer, this Court may not be entitled to take judicial notice of the fact that to all the cases in 111 and 115 Maryland cited in this opinion the complainant was a party. The conclusions herein stated have been reached, therefore, without considering whether the question as to whether a court of equity may interfere with these attachment proceedings and whether the evidences of debt are under the circumstances of this case attachable have been decided contrary to the contention of the complainant in a case to which he was a party and which had reference to the very attach-

ment proceedings which he seeks here to have declared invalid."

We are not constrained by the limitations which the lower court considered prevented it from taking notice of the judicial proceedings in the courts of Maryland in which the attachments issued. We say this because, as was declared in *Bienville Water Supply Company* v. *Mobile*, 186 U. S. 212, 217: "We take judicial notice of our own records, and, if not *res judicata*, we may, on the principle of *stare decisis*, rightfully examine and consider the decision in the former case as affecting the consideration of this;" and again, as further declared in *Dimmick* v. *Tompkins*, 194 U. S. 540, 548: "The court has the right to examine its own records and take judicial notice thereof in regard to proceedings formerly had therein by one of the parties to the proceedings now before it." Availing of this power and making reference to the records of this court, it appears that the controversy as to the validity of the attachments with which the appeal before us is concerned has on three different occasions been here considered. *de Bearn* v. *de Bearn*, 225 U. S. 695; *de Bearn* v. *de Bearn*, 231 U. S. 741; *de Bearn* v. *Winans*, 232 U. S. 719. In the first, an attempt to bring a controversy on the subject here was dismissed because of its prematurity. In the other two cases it appears that at the time the bill in this case was filed, the complainant was engaged in litigating in the courts of the State of Maryland the very grounds of opposition to the attachments which were made the basis of the bill in this case and that after filing such bill he continued such litigation in the state courts, and when, after a full consideration of his grounds of complaint, both state and Federal in the court of last resort of Maryland there were decisions against him, error was prosecuted from this court because of the asserted existence of the Federal rights which were alleged in the bill now before us. The records disclose that in both cases motions to dismiss

for want of jurisdiction were sustained by *per curiam* opinions, reference being made in the one case (231 U. S. 741) to authorities upholding the doctrine that no power to review exists in a case where although there is a Federal question, the conclusion of the court below rests upon a non-Federal or state ground completely adequate to sustain it, and in the other case (232 U. S. 719) the motion to dismiss was sustained by authorities to the same effect and additionally upon authorities establishing the rule that a wholly frivolous and unsubstantial Federal question was not adequate to give jurisdiction.

Indeed, the record in the case last cited establishes that in that proceeding the appellant filed a pleading in which he expressly set up the pendency of the bill in the United States court which is now before us and urged the supposed Federal rights upon which the bill was rested as a basis for relief.

From these considerations it obviously comes to pass that the supposed constitutional questions upon which our right to directly review the action of the court below can alone rest, have been already here twice decided to be so wanting in merit as not to afford ground for jurisdiction. It is true that the cases referred to involved the jurisdiction to review the judgments of the court of last resort of the State of Maryland under § 237 of the Judicial Code, but that difference affords no reason for distinguishing this case from the previous cases, since it is impossible to conceive that the assertion of an alleged constitutional right which was decided to be so unsubstantial and frivolous as to afford no ground to review the action of the state court of Maryland concerning the attachments should yet now be held to be of sufficient merit to give jurisdiction to directly review the action of the court below in refusing to interfere with the same attachments. Applying the previous cases, therefore, it plainly follows that we have no jurisdiction on this writ of error, and therefore

our duty is to dismiss. Before, however, discharging that duty without going into the labyrinth of pleadings, of motions, of supplementary papers, etc., etc., with which this and the previous records before us abound and by the use of which this case has been taken many times to the court of last resort of Maryland and is here now for the fourth time, as it is in the "interest of the Republic that litigation should come to an end," we pause to say that considering again the whole field and weighing every Federal right asserted, we see no ground for doubting the correctness of the conclusions which constrained us to hold that the controversies presented in the previous cases were beyond our cognizance. Briefly speaking, it is to be observed that the error which in this and the previous cases underlies all the assumptions of Federal right arises from disregarding the distinction between a controversy as to whether the attachments were authorized by the law of the State and the contention as to the power in the State to have given authority to its courts to issue such attachments. The two are widely different, the one being concerned with what state action has been taken and the other with the power of the State to confer authority to take such action. *Castillo* v. *McConnico,* 168 U. S. 674. As to the first, there is no room for controversy, since the decisions of the Maryland court of last resort have explicitly declared not only that the attachments were authorized by the state law, but that as the result of the authority to issue them there was imposed upon the state courts the duty under the facts disclosed by the record to exert their authority to the full extent required to protect the rights of the attaching creditors by seeing to it that the property attached which was in the custody of the court and subject to its control be not permitted to be removed or taken out of the reach of that authority for the purpose of frustrating the rights arising from the attachments. The second, the question of power of the

State of Maryland to authorize its courts to perform the duty thus cast upon them, would seem to be free from all possible doubt in view of the following facts, (a) that the coupon bonds were in the State deposited under the directions of the state court in the exercise of admittedly lawful powers, (b), that in that situation it was impossible to remove them from the State without obtaining the authority of the state courts, an authority which was unaffected by the fact that the bonds were registered, since they were so registered, solely because of the previous action of the state court, an action which the court of last resort of Maryland decided was no obstacle to the attachments of the bonds, since the effect of the state law empowering the attachments was to impose upon the court the duty of seeing to it that this registry should be removed to the extent necessary to protect the rights of attaching creditors. And the force of these suggestions is illustrated by bearing in mind that the denial of all judicial power by the State over the bonds by way of attachment is asserted by the appellant in a proceeding in which he is the actor invoking the exertion of the state judicial power for the purpose of enabling him to obtain possession of the bonds and do away with the effect of the previous state decree concerning the deposit and registry of the same.

Dismissed for want of jurisdiction.

METZGER MOTOR CAR COMPANY *v.* PARROTT.

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

No. 309. Argued March 18, 19, 1914.—Decided April 6, 1914.

Where, since the judgment of the United States District Court was obtained the highest court of the State has declared the state statute on which the case was brought to be unconstitutional under the state constitution, and there is no right to recover in the absence of statute, it is the obvious duty of this court to reverse the judgment.

While this court must decide for itself whether a state statute is repugnant to the Federal Constitution, it must accept the ruling of the state court as to the repugnancy of that statute to the state constitution.

This court cannot treat as existing a state statute which the court of last resort of that State has held cannot be enforced compatibly with the state constitution.

The highest court of Michigan having, since the judgment herein was rendered below held the provisions of the Vehicle Law of that State on which this action was based void under the state constitution, this court must regard such law as non-existent and reverse the judgment which was based solely thereon.

THE facts are stated in the opinion.

Mr. Henry L. Lyster, with whom *Mr. John C. Donnelly* was on the brief, for plaintiff in error:

Subd. 3 of § 10 of Act No. 318 of the Public Acts of 1909 of Michigan has been held to be in contravention of the Fourteenth Amendment by the court of last resort in Michigan; therefore the case at bar must be considered as though this act had never been passed by the legislature. *Barry* v. *Metzger Motor Car Co.*, 141 N. W. Rep. 529; *Daugherty* v. *Thomas*, 174 Michigan, 371, citing *Camp* v. *Rogers*, 44 Connecticut, 291; *Ives* v. *Railway Co.*, 201 N. Y. 271; *Ohio &c., Railroad Co.* v. *Lackey*, 78

Illinois, 55; *State* v. *Redmon*, 134 Wisconsin, 89; *Lawton* v. *Steele*, 152 U. S. 137, and see also *Loehr* v. *Abell*, 174 Michigan, 590.

The automobile is not an inherently dangerous machine, and cannot be classified with dynamite and vicious animals. Huddy on Automobiles, p. 29; *Lewis* v. *Amorous*, 3 Ga. App. Rep. 50; *Jones* v. *Hoge*, 47 Washington, 663; *Cunningham* v. *Castle*, 127 N. Y. App. Div. 580; *Colwell* v. *Aetna Bottle & Stopper Co.*, 33 R. I. 531; *Steffens* v. *McNaughton*, 142 Wisconsin, 49.

In order to hold the master for the negligent acts of a servant it must be shown that these acts are within the scope of the servant's employment, and that they were done in conducting the business of the master. *St. L. S. W. Ry.* v. *Harvey*, 144 Fed. Rep. 806; *Bowen* v. *Ill. Cent. R. R. Co.*, 136 Fed. Rep. 306; 3 Elliott on Railroads, p. 1009; *Patterson* v. *Kates*, 152 Fed. Rep. 481; *Danforth* v. *Fisher*, 75 N. H. 111. See also *Stuart* v. *Barouch*, 103 N. Y. App. Div. 577; *Reynolds* v. *Buck*, 127 Iowa, 601; *Hartley* v. *Miller*, 165 Michigan, 115; *Riley* v. *Roach*, 168 Michigan, 294.

In *Barry* v. *Metzger Motor Car Co.*, 141 N. W. Rep. (Mich.) 529, the facts are the same as in the case at bar, the cause of action arising out of the same accident, and the company was held not to be liable. See also *Slater* v. *Advance Thresher Co.*, 97 Minnesota, 305; *Evans* v. *Dyke Automobile Co.*, 121 Mo. App. 266; *Lotz* v. *Hanlon*, 217 Pa. St. 339; *Loehr* v. *Abell*, 174 Michigan, 590.

The master is not liable for the negligence of his servant who takes and uses his automobile without his knowledge or permission, and uses it for his own personal business or pleasure, even though he was not a competent and careful operator. *Jones* v. *Hoge*, 47 Washington, 663; see also *Walton* v. *N. Y. Cent. Co.*, 139 Massachusetts, 556; *McCarthy* v. *Timmins*, 178 Massachusetts, 378; *Way* v. *Powers*, 57 Vermont, 135; *Fiske* v. *Enders*, 73 Connecticut,

338; *Louis. & Nash. R. R. Co.* v. *Gillen*, 156 Indiana, 321; *Morier* v. *St. Paul &c. Ry.*, 31 Minnesota, 351; *Clark* v. *Buckmobile Co.*, 107 N. Y. App. Div. 120; *Northup* v. *Robinson*, 33 R. I. 496; *Colwell* v. *Aetna Bottle Co.*, 33 R. I. 531; *Doran* v. *Thomsen*, 74 N. J. Law, 445.

The act having been held invalid, defendant in error has no statutory right of action; and the servant of plaintiff in error, who was operating the car having acted outside the scope of his authority, defendant in error has no common law right of action.

Mr. Silas B. Spier for defendant in error:

As to the extent to which plaintiff in error, a New York corporation, can claim the protection of the Fourteenth Amendment in this court, to invalidate the judgment rendered against it in the court below, see *Selover, Bates & Co.* v. *Walsh*, 226 U. S. 113; *Western Turf Assn.* v. *Greenberg*, 204 U. S. 359, both of which refute its contentions.

Notwithstanding the second and reversing decision of the Michigan court in *Daugherty* v. *Thomas*, 174 Michigan, 371, the Michigan Motor Vehicle Law, in its entirety, is constitutional.

The law is not unreasonable. It merely tries to protect human life, and for that purpose requires that the owner of an automobile must so care for and keep it, that it cannot be used by any person on the public highway in violation of the law, and if so used the owner must respond by payment of the actual damages done by his machine when thus illegally used, except said automobile be stolen. The effect of this police regulation has been beneficial and has saved lives and prevented injury to personal property. Owners of automobiles have protected themselves by insurance. See Cooley's Const. Lim., pp. 164, 572; *People* v. *Schneider*, 139 Michigan, 673; *Mattei* v. *Gillies*, 12 Am. & Eng. A. C., p. 970; Huddy's Law of

Automobiles, 263, 313; *Sonsmith* v. *Pere Marquette R. R. Co.*, 138 N. W. Rep. 347; *Holmes* v. *Murray*, 207 Missouri, 413.

The owner of personal property can be made liable for damages done by it without his negligence. *Shipley* v. *Colclough*, 81 Michigan, 624; *People* v. *Eberle*, 133 N. W. Rep. 519.

The law is a valid police regulation and constitutional in all respects except the provision making the automobile's owner responsible for damages done by it. The act only makes the owner responsible when his automobile, his personal property, is used illegally on the public streets or highways. He can prevent its illegal use and for the benefit of human life and the safety of property should be willing so to do.

As to the power of the legislature to enact laws under the exercise of the police power vested therein, see *Chicago* v. *Sturges*, 222 U. S. 310; *Kidd* v. *Musselman Co.*, 217 U. S. 459; *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 305; *Commonwealth* v. *Kingsbury*, 85 N. E. Rep. 848 (Mass.); *Brown* v. *Kent County*, 140 N. W. Rep. 642, citing *Detroit* v. *Inspectors*, 139 Michigan, 557; *N. Y. Life Ins. Co.* v. *Hamburg*, 140 N. W. Rep. 510.

The provisions of the first section of the Fourteenth Amendment do not guarantee to the individual citizen the unqualified right to do as he chooses with his property, regardless of the rights of others; but such rights are subject to such reasonable restraint, under the police power of the State, as the law-making power may prescribe for the benefit of all the people. *Crowley* v. *Christensen*, 137 U. S. 86, 89, 90, *Corfield* v. *Coryell*, 4 Wash. C. C. 381, Fed. Cas. No. 3,230; *Slaughter House Cases*, 16 Wall. 36, 76; Cooley, Const. Lim. 6th ed. 739–743; *Pool* v. *Trexler*, 76 Nor. Car. 297; *State* v. *Heinemann*, 80 Wisconsin, 256; *Porter* v. *Ritch*, 70 Connecticut, 254; *Commonwealth* v. *Alger*, 7 Cush. 85; *Boston Beer Co.* v. *Mas-*

sachusetts, 97 U. S. 25, 32; *Mugler* v. *Kansas*, 123 U. S. 623, 655; *Ward* v. *Farwell*, 97 Illinois, 609; *St. Louis & S. F. R. Co.* v. *Matthews*, 165 U. S. 1, 23; *Jacobson* v. *Massachusetts*, 197 U. S. 11, 27.

The unreasonableness of a law is not a subject for judicial cognizance. *Mo. Pac. R. Co.* v. *Mackey*, 127 U. S. 205; *Mo. Pac. R. Co.* v. *Humes*, 115 U. S. 512, 520; *Mugler* v. *Kansas*, 123 U. S. 632, 660; *Powell* v. *Pennsylvania*, 127 U. S. 678, 686; *People* v. *Snowberger*, 113 Michigan, 86; *People* v. *Worden Grocer Co.*, 118 Michigan, 608; *Barton* v. *McWhinney*, 85 Indiana, 488; *Bertholf* v. *O'Reilly*, 74 N. Y. 516; *Reeves* v. *Corning*, 51 Fed. Rep. 787; *McMahon* v. *O'Connor*, 5 Dakota, 412.

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

This action, brought in the state court to recover for personal injuries and other damages, was removed by the defendant to the Circuit Court of the United States on the ground of diverse citizenship, and there tried, resulting in a verdict and judgment for the plaintiff. Direct error is prosecuted to that court (now the District Court) because of the asserted repugnancy of the following statute of the State upon which the recovery was based, to the due process clause of the Fourteenth Amendment:

"The owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation by any person of such motor vehicle, whether such negligence consists in violations of the provisions of a statute of this State or in the failure to observe such ordinary care in such operation as the rules of the common law require; but such owner shall not be so liable in case such motor vehicle shall have been stolen." (Act No. 318, Pub. Acts 1909, subd. 3, § 10.)

The injuries complained of, were caused by the negli-

gence of a chauffeur in operating an automobile owned by the defendant company, resulting in a collision on the highway with plaintiff's horses and the cart in which he with two others were riding. Although the driver of the automobile was in the employ of the defendant company as a car tester and chauffeur, he was not at the time of the accident (about midnight) engaged in the company's business, but had taken the car without the knowledge or consent of the company and in violation of its rules for the purpose of pleasure-riding with his friends. Under these facts, aside from the statute, the court below charged the jury, and it is not here disputed, that the plaintiff could not recover under the law of Michigan for the injuries suffered, and hence that his right to recover, if any, was exclusively under the statute.

The duty of considering the contention here urged, the unconstitutionality of the statute, is rendered unnecessary by decisions of the Supreme Court of the State since the trial of this case in which the statute was held void because in conflict with both the state and the United States constitutions. *Daughtery* v. *Thomas*, 174 Michigan, 371; *Barry* v. *Metzger Motor Car Company*, 175 Michigan, 466. We say this because while it is undoubtedly our duty to decide for ourselves whether the statute is repugnant to the Constitution of the United States, we must accept the ruling of the state court as to the repugnancy of the statute to the state constitution. As the effect of the state decision on that subject is to determine that *ab initio* the statute was void, and as there was admittedly no right to recover in the absence of a valid statute, the obvious duty to reverse results.

There is a suggestion in the argument that prior to the decisions of the state court to which we have referred which expressly held the statute to be unconstitutional there had been a ruling of that court deciding it not to be repugnant to the state constitution. *Johnson* v. *Sergeant*,

134 N. W. Rep. 468. But it is to be observed that as to that ruling the court in the *Daugherty Case* declared that the statement as to the constitutionality of the statute made in the *Johnson Case* was merely *obiter*. Even however, if this were not the case, we cannot now treat as existing, a statute which the court of last resort of the State declares cannot be enforced compatibly with the state constitution. And as here there is no claim of rights acquired under contract in the light of a settled rule of state interpretation of a state law or constitution, there is no foundation whatever for upholding assumed rights which can alone rest upon the existence of a state statute when the state court of last resort has held there is no valid statute to sustain them.

Reversed.

GRAND TRUNK WESTERN RAILWAY COMPANY *v.* LINDSAY.

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

No. 425. Argued February 27, 1914.—Decided April 6, 1914.

The operation and effect of the Employers' Liability Act upon the rights of the parties is involved in an action for negligence where the complaint alleges and the proof establishes that the employé was engaged in, and the injury occurred in the course of, interstate commerce even though the act was not referred to in the pleadings or pressed at the trial. *Seaboard Air Line* v. *Duvall*, 225 U. S. 477.

Although § 3 of the Employers' Liability Act establishes a system of comparative negligence, and diminution of damages by reason of the employé's contributory negligence, the proviso to that section expressly provides that contributory negligence does not operate to diminish the recovery if the injury has been occasioned in part by the failure of the carrier to comply with Safety Appliance Acts.

It does not appear that any reversible error was committed by the court below concerning instructions asked and refused in regard to testimony of a car inspector and the weight attributable thereto. 201 Fed. Rep. 836, affirmed.

THE facts, which involve the construction of the Employers' Liability Act of 1908 and the validity of a judgment for personal injuries obtained thereunder, are stated in the opinion.

Mr. George W. Kretzinger, Jr., for plaintiff in error:

The Circuit Court of Appeals erred in affirming the judgment below upon a theory other and different from that upon which the case was tried. The Circuit Court of Appeals apparently conceded that upon the theory upon which the judgment was obtained it was erroneous and should be reversed.

Under either the theory adopted by the trial court or the Circuit Court of Appeals upon rehearing, the refusal to give the instruction requested by defendant in reference to the "come-ahead" signal by plaintiff was erroneous.

The Circuit Court of Appeals erred in sustaining the trial court in refusing the fifth instruction requested by plaintiff. It also erred in refusing to sustain each and every error assigned upon the record and urged by defendant in court.

In support of these contentions, see *American R. R. Co.* v. *Birch*, 224 U. S. 557; *Atchison &c. Ry. Co.* v. *Calhoun*, 213 U. S. 1; *Beutler* v. *Railway Co.*, 224 U. S. 85; *Caswell* v. *Worth*, 5 Ellis & Bl. 848; *Chicago &c. Ry. Co.* v. *McKean*, 40 Illinois, 229; *Chicago &c. Ry. Co.* v. *Brown*, 229 U. S. 317; *Chicago &c. Ry. Co.* v. *King*, 222 U. S. 222; *Cincinnati &c. Ry. Co.* v. *Mealer*, 50 Fed. Rep. 725; Cooley on Torts, 99; *Delk* v. *Railway Co.*, 220 U. S. 580; *Hatcher* v. *Insurance Co.*, 184 Fed. Rep. 23; *Indianapolis &c. Ry. Co.* v. *Blackman*, 63 Illinois, 121; *Louis. & Nash.*

Ry. Co. v. *Kelly*, 63 Fed. Rep. 407; *Mobile &c. Ry. Co.* v. *Wilson*, 176 Fed. Rep. 127; *New York R. R. Co.* v. *Estill*, 147 U. S. 592; *Miner* v. *McNamara*, 72 Atl. Rep. 138; *Norfolk Ry. Co.* v. *United States*, 177 Fed. Rep. 630; *Schafer* v. *Railroad Co.*, 105 U. S. 249; *St. Louis &c. Ry. Co.* v. *Hesterly*, 228 U. S. 702; *San Juan Co.* v. *Requena*, 224 U. S. 97; *Schlemner* v. *Railway Co.*, 220 U. S. 590; Thornton on Fed. Emp. Liability Act, 104; *Union Pacific Ry. Co.* v. *Callaghan*, 56 Fed. Rep. 988; *Yazoo &c. Ry.* v. *Greenwood Co.*, 227 U. S. 1.

Mr. James C. McShane for defendant in error, submitted.

Mr. Chief Justice White delivered the opinion of the court.

The right of the plaintiff who is defendant in error here to recover for an alleged personal injury, was stated in two counts. In both, the wrong was alleged to have been occasioned by the negligence of the railway company, while it was engaged in carrying on interstate commerce and while the plaintiff was employed by it in such commerce. In the first count, however, the act of Congress known as the Safety Appliance Act was expressly declared on. For the purposes of the writ of error which was prosecuted by the railroad company from the Circuit Court of Appeals, numerous assignments of error were made and were all disposed of by the court in a full opinion. (201 Fed. Rep. 836.) In view of the complexion of the case as here presented we need address ourselves to only one of such assignments and to state the facts only so far as essential to its consideration.

The proof showed that the plaintiff was one of a crew working a switch engine, and that in a yard near Chicago such engine coupled with four loaded freight cars moving

in interstate commerce were held in order to make a coupling with a number of other loaded freight cars moving in interstate commerce to the end that an interstate train bound eastward might be made up and depart. When by impact it was attempted to make the coupling, the cars failed to couple automatically and after several efforts to cause them to do so, the plaintiff as switchman walked along beside the end of the car as it approached again the point of coupling, signaled to the engineer to stand fast and entered between the cars for the purpose of ascertaining and remedying if possible the cause of the trouble. While between the cars and engaged in handling the coupler, the cars were pushed up and he was caught and his arm crushed. There was some proof tending to show that the switchman stepped in before the moving cars had entirely stopped and some that he gave a signal to come-ahead as he stepped in; but there was evidence tending to show to the contrary and to support the inference that the act of the engineer in moving up, was the result of a signal with a lantern, for it was dark, mistakenly given by some other employé in the vicinity, or a mistake of the engineer in misconceiving the movement of a lantern in the hands of some of those who were standing around. There was evidence tending to show that the coupler had been inspected shortly before the accident and no defect was observed by the inspector, but it was shown without dispute, that it was defective at the time of the accident, and would not couple automatically because of a bent pin.

Among the errors assigned in the court below was the refusal of the trial court to give an instruction relating to the action of the switchman in entering between the cars and his supposed giving of the come-ahead signal. This instruction, while leaving to the jury the determination of whether the switchman in going between the cars to examine the coupling mechanism gave a come-ahead signal,

nevertheless asked the court to instruct as a matter of law that if he had done so, his act was the proximate cause of his injury, and therefore he could not recover. Instead of giving this instruction the court modified it by leaving it to the jury to determine whether under all the circumstances the action of the switchman had been reasonably careful. The court in its general charge on this subject said:

"If after he started to go between the cars he has done something which was carelessly done or which you can say from a preponderance of the evidence contributed approximately to the accident, then he cannot recover. . . . If there be contributory negligence at all, it depends not upon his assuming the risk under the circumstances in evidence in this case but upon the care with which he acted while in the performance of the work which he assumed.

"You are further instructed that if you believe from the preponderance of the evidence, that the plaintiff gave a 'come-ahead' signal to the switchman or engineer,—one or both—and after that went between the cars and was injured, then you have a right to consider whether the giving of the 'come-ahead' signal by the plaintiff was the proximate cause of the injury as distinguished from the condition of the coupler, and if you find that under the circumstances the 'come-ahead' signal was the proximate cause of the injury, then your verdict must be for the defendant.

"You are also instructed that where there is a safe and a dangerous way of doing an act, and the servant uses a dangerous way and is injured thereby, he is charged with negligence on his part and may not recover."

The court below disposed of the refusal of the trial court to charge as a matter of law that there was no right to recover if the proof showed that the switchman had given the 'come-ahead' signal, upon the ground that there

was no foundation for giving it as there was no evidence whatever tending to show that such signal was given by the switchman. A petition for rehearing was however granted and after a reargument, the particular objection concerning the charge referred to, as well as other matters, were disposed of in an additional opinion. As to the charge referred to, the court held that a mistake had been committed in the first opinion in saying that there was not any evidence tending to show that the switchman had given the 'come-ahead' signal as he entered, and therefore the ground upon which the previous ruling had been based was inadequate. It was nevertheless held that the ruling as previously made was right because the request to charge as a matter of law that the plaintiff was not entitled to recover if it was found that he had given the 'come-ahead' signal as he entered to examine the mechanism was incompatible with the rule of comparative negligence established by the Employers' Liability Act. On this subject the court said, 201 Fed. Rep. p. 844:

"If, under the Employers' Liability Act, plaintiff's negligence, contributing with defendant's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendant's negligence, the statute would be nullified by calling plaintiff's act the proximate cause, and then defeating him, when he could not be defeated by calling his act contributory negligence. For his act was the same act, by whatever name it be called. It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act."

As in the argument at bar reliance is solely placed except in one particular, upon error which is assumed to have arisen from the refusal of the trial court to give the charge previously referred to and the judgment of the court

below in approving this action of the trial court upon the theory that it was right in view of the provisions of the Employers' Liability Act, we come to consider this subject.

(a) In the trial court it is insisted the operation and effect of the Employers' Liability Act upon the rights of the parties was not involved because that act was not in express terms referred to in the pleadings or pressed at the trial and was hence not considered by the court in acting upon the requested charge and therefore it is urged it was error in the reviewing court to test the correctness of the ruling of the trial court by the provisions of the Employers' Liability Act instead of confining the subject exclusively to the Safety Appliance Law and the rules of the common law governing negligence. But the want of foundation for this contention becomes apparent when it is considered that in the complaint it was expressly alleged and in the proof it was clearly established that the injury complained of was suffered in the course of the operation of interstate commerce, thus bringing the case within the Employers' Liability Act. It is true that to avoid the irresistible consequences arising from this situation it is insisted in argument that as no express claim was made under the Employers' Liability Act, therefore there was no right in the plaintiff to avail of the benefits of its provisions or in the court to apply them to the case before it. But this simply amounts to saying that the Employers' Liability Act may not be applied to a situation which is within its provisions unless in express terms the provisions of the act be formally invoked. Aside from its manifest unsoundness considered as an original proposition the contention is not open as it was expressly foreclosed in *Seaboard Air Line Ry. Co.* v. *Duvall*, 225 U. S. 477, 482.

(b) Coming to consider the proposition that although the case be governed by the Employers' Liability Act error

was nevertheless committed in sustaining the action of the trial court in refusing to give the requested instruction, we think that even if for the sake of the argument it be assumed that the proof brought the case within the principle of comparative negligence established by the Employers' Liability Act, the correctness of the ruling of the court below is clearly made manifest by the reasoning given by the court for its conclusion. But having regard to the state of the proof as to the defect in the coupling mechanism, its failure to automatically work by impact after several efforts to bring about that result, all of which preceded the act of the switchman in going between the cars, in the view most favorable to the railroad, the case was one of concurring negligence, that is, was one where the injury complained of was caused both by the failure of the railway company to comply with the Safety Appliance Act and by the contributing negligence of the switchman in going between the cars. Under this condition of things it is manifest that the charge of the court was greatly more favorable to the defendant company than was authorized by the statute for the following reasons: Although by the third section of the Employers' Liability Act a recovery is not prevented in a case of contributory negligence since the statute substitutes for it a system of comparative negligence whereby the damages are to be diminished in the proportion which his negligence bears to the combined negligence of himself and the carrier, in other words, the carrier is to be exonerated from a proportional part of the damages corresponding to the amount of negligence attributable to the employé (*Norfolk & Western Railway Co.* v. *Earnest*, 229 U. S. 114, 122), nevertheless under the terms of a proviso to the section contributory negligence on the part of the employé does not operate even to diminish the recovery where the injury has been occasioned in part by the failure of the carrier to comply with the exactions of an act of Congress

enacted to promote the safety of employés. In that contingency the statute abolishes the defense of contributory negligence not only as a bar to recovery but for all purposes. The proviso reads, act of April 22, 1908, c. 149, § 3, 35 Stat. 65, 66:

"Provided, That no such employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé."

The only other objection pressed in the argument at bar concerns an instruction asked and refused by the trial court with reference to the weight to be attributed to the testimony of a car inspector who inspected the coupler in question before the accident. The subject of this asserted error was evidently carefully considered by the trial court and was adversely disposed of by the court below, both in its original and in the opinion on the rehearing. Under these circumstances without going into detail in view of the doctrine to be applied to cases of this character as announced in *Chicago Junction Ry. Co.* v. *King*, 222 U. S. 222; *Chicago, R. I. & P. Ry. Co.* v. *Brown*, 229 U. S. 317, we are of the opinion that we need do no more than say that after a careful examination of the subject we are of the opinion that no reversible error was committed by the court below, and its judgment is therefore affirmed.

Affirmed.

CARLESI *v.* PEOPLE OF THE STATE OF NEW YORK

ERROR TO THE COURT OF GENERAL SESSIONS OF THE PEACE IN AND FOR THE COUNTY OF NEW YORK, STATE OF NEW YORK.

No. 679. Argued March 2, 1914.—Decided April 6, 1914.

In testing the repugnancy of a state statute to the Federal Constitution, this court must accept the construction given to the statute by the state courts.

A State may not directly or indirectly restrict the National Government in the exertion of its legitimate powers, nor can a State in any way punish a crime after the President of the United States has pardoned the offender.

Taking into consideration the fact that a person convicted of a crime against the State had previously committed the same crime against the United States is not a punishment of the former crime and does not deprive the person convicted of any Federal rights under a pardon of the President of the United States of the first offense.

McDonald v. *Massachusetts*, 180 U. S. 311, and *Graham* v. *West Virginia*, 224 U. S. 616, followed to the effect that the state statute involved in this case, and which imposed heavier penalties for second offenses, whether the first offense was committed in the same or in another jurisdiction, does not impose additional punishment for the first offense but only imposes a punishment on the crime for which the person convicted is tried.

The granting of a pardon by the President for a crime committed against the United States does not operate to restrict the power of a State to punish crimes thereafter committed against its authority and to prescribe such penalties as it deems appropriate in view of the nature of the offense and the character of the offender taking in view his past conduct; and so *held* that the second offense provisions of the Penal Code of New York are not unconstitutional as applied to a person convicted of the same crime of which he had been previously convicted by the United States and pardoned by the President.

Quære, whether a State may not provide that the fact of the commission of an offense after a pardon of a prior offense by it or another sov-

ereignty should be regarded as an increased element of aggravation to the second offense to be considered in adding to the punishment therefor.

Judgment based on 208 N. Y. 547, affirmed.

THE facts, which involve the construction and constitutionality of the second offense statute of New York and the effect of a pardon of the accused by the President of the United States for the first offense, are stated in the opinion.

Mr. Almuth C. Vandiver, with whom *Mr. George Gordon Battle*, *Mr. John Caldwell Myers*, *Mr. James E. Brande*, *Mr. Joseph Weber* and *Mr. J. Joseph Lilly* were on the brief, for plaintiff in error:

The New York state court passed judgment upon plaintiff in error, after verdict of conviction of an alleged crime non-existent in New York; and the failure of the state court to recognize and give full force and effect to the President's pardon, denied to plaintiff in error the privilege, immunity and liberty guaranteed to him by § 1 of the Fourteenth Amendment.

Plaintiff in error was convicted of the alleged crime of forgery in the second degree, as a second offense. There is no such crime known to the penal law of the State of New York. See §§ 887, 888, Penal Law of New York.

The pardon granted by the President of the United States reaches both the punishment prescribed for the offense and the guilt of the offender and releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. *Ex parte Garland*, 4 Wall. 380.

Plaintiff in error would also have been entitled to the court's clemency in suspending judgment if the court was so moved to do. Section 2189 of the Penal Law of New York is a substantial right, privilege and immunity from punishment for crime.

The first offense was so completely annihilated by the pardon that it could not be considered in law as having ever existed or been committed. De Villeneuve & Carrette, Vol. 1825, 1827, Part 1, p. 135; *Knote* v. *United States*, 95 U. S. 153; *United States* v. *Kirby*, 7 Wall. 482.

The President's pardon obliterated the first offense, so that the plaintiff in error could not thereafter be prosecuted as a second offender. *United States* v. *Wilson*, 7 Pet. 150, 159; *Ex parte Garland*, 4 Wall. 380, 381; 24 Am. & Eng. Ency., 2nd ed., p. 584. See also *United States* v. *Klein*, 13 Wall. 147; *Carlisle* v. *United States*, 16 Wall. 151; *In re Monroe*, 46 Fed. Rep. 52; *United States* v. *Armory*, 35 Georgia, 362; 2 Abb. (U. S.) 150; Fed. Cas. No. 14473; *People* v. *Pease*, 3 Johns. Cases (N. Y.), 333; *Locklin* v. *State*, 75 S. W. Rep. 305.

It is of the very essence of a pardon that it releases the offender from the consequences of his offense. *Osborn* v. *United States*, 91 U. S. 474, 477; 29 Cyc. 1566, 1567; *Territory* v. *Richardson*, 9 Oklahoma, 579; *Territory* v. *Richardson*, 10 Oklahoma, 17; *Knapp* v. *Thomas*, 39 Oh. St. 377, 381; *Diehl* v. *Rogers*, 169 Pa. St. 316; *Fite* v. *State*, 114 Tennessee, 646, 656; *Parground* v. *United States*, 13 Wall. 156; *United States* v. *Padleford*, 9 Wall. 513; *Boyd* v. *United States*, 142 U. S. 450; 1 Bishop's New Crim. Law, § 919.

For decisions of state courts in regard to the effect of pardons on second offenses, see *Edwards* v. *Commonwealth*, 78 Virginia, 39; *Puryear* v. *Commonwealth*, 83 Virginia, 51; *State* v. *Martin*, 59 Oh. St. 212; *State* v. *Anderson*, 7 Oh. N. P. 562; *S. C.*, 5 Ohio S. & C. P. Decisions, 548; *State* v. *Williams*, 7 Ohio, 562.

Mount v. *Commonwealth*, 2 Duvall (Ky.), 93; *Stewart* v. *Commonwealth*, 2 Ky. Law Rep. 386, and *Herndon* v. *Commonwealth*, 105 Kentucky, 197, are unsound, as is the reasoning upon which they are based; and see *Easterwood* v. *State*, 34 Tex. Crim. 400, 410; *Jones* v. *Alcorn County*,

56 Mississippi, 736; *Perkins* v. *Stevens*, 24 Pick. 277; *In re Deming*, 2 Johns. (N. Y.), 233, 483; 24 Amer. & Eng. Ency., 2d ed., 589; *Coddington* v. *Wilkins*, Hob. 81; *Leyman* v. *Lattimer*, 3 Exch. Div. 15, 352. See, however, *Baum* v. *Close*, 5 Hill (N. Y.), 196. As to the English rule, see 33 and 34 Victoria, c. 29, § 14, and under it *Hay* v. *Justice of London*, 24 Q. B. D. 561.

No matter what the purpose of the pardon was, and no matter what the reason was for issuing it, it restored the civil rights of plaintiff in error, was full, absolute and unconditional. *Boyd* v. *United States*, 142 U. S. 450; *Bowles* v. *Haberman*, 95 N. Y. 247.

The pardon should be liberally construed. *Ex parte Hunt*, 10 Arkansas, 284, 286; 24 Amer. & Eng. Ency. 574; 11 Ops. Atty. Gen. 230; *People* v. *Pease*, 3 Johns. (N. Y.) 333; *Osborn* v. *United States*, 91 U. S. 474.

The pardon obliterated the former conviction, though it was granted after the completion of the term of imprisonment. See Laughlin, J.'s, concurring opinion 154 App. Div. 487, 488; 24 Amer. & Eng. Ency., 2d ed., p. 594; *United States* v. *Jones*, 2 Wheeler Crim. (N. Y.), 451; 9 Op. Attorney General, 478; *Singleton* v. *State*, 38 Florida, 297; *State* v. *Baptiste*, 26 La. Ann. 134; *Satton* v. *McIlhany*, 1 Oh. Dec. 235; *Stetler's Case*, 2 Phila. (Pa.), 302; 9 Legal Int. 38; *Boyd* v. *United States*, 142 U. S. 450.

This court should follow the rule originally laid down in the *Wilson Case*, 7 Peters, 160, and followed in cases *supra*, and *Armstrong* v. *United States*, 13 Wall. 154; *United States* v. *Hart*, 118 U. S. 67; *Ill. Cent. R. R.* v. *Bosworth*, 133 U. S. 103; *United States* v. *Brown*, 161 U. S. 601; *Graham* v. *West Virginia*, 224 U. S. 616.

The New York legislature by expressly repealing the second offense statute specifically including recipients of pardons, intended to, and did, exempt such persons from the operation of the present law. Section 1941, Penal Law; § 688, old Penal Code; Laws 1881, c. 676, § 688;

Laws 1886, c. 593, § 1, par. 4; § 8, Pt. 4, c. I, title 7, Rev. Stat. New York; § 10, Pt. 4, c. I, title 7, Rev. Stat. New York; *Rich* v. *Keyser*, 54 Pa. St. 86.

The Federal question of the effect of the President's pardon was properly raised in the state court, and this court has jurisdiction to hear this appeal. Judicial Code, § 237; *Straus* v. *Amer. Publishers' Assn.*, 231 U. S. 222.

Mr. Robert S. Johnstone, with whom *Mr. Charles S. Whitman* and *Mr. Stanley L. Richter* were on the brief, for defendant in error.

Mr. Chief Justice White delivered the opinion of the court.

The plaintiff in error was accused of the crime "of forgery in the second degree as a second offense." The indictment contained a recital of the prior offense relied on, that is, a conviction in the Circuit Court of the United States for the Southern District of New York, and a sentence for three and one-half years in the penitentiary for the crime of selling and having in possession counterfeit coin. The statute of the State of New York, which was the authority for referring to the prior conviction was as follows:

"A person, who, after having been convicted within this State, of a felony, or an attempt to commit a felony, or of petit larceny, or, under the laws of any other State, government, or country, of a crime which, if committed within this State, would be a felony, commits any crime, within this State, is punishable upon conviction of such second offense, as follows:

"1. If the subsequent crime is such that, upon a first conviction, the offender might be punished, in the discretion of the court, by imprisonment for life, he must be sentenced to imprisonment in a state prison for life;

"2. If the subsequent crime is such that, upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life, then such person must be sentenced to imprisonment for a term not less than the longest term, nor more than twice the longest term, prescribed upon a first conviction." (Penal Law, § 1941.)

The accused pleaded not guilty and while admitting the truth of the recitals in the indictment as to his prior conviction, sentence and service of time in the penitentiary, moved to strike from the indictment all reference to those subjects and insisted on his right to be tried without at all considering or in any manner referring to the prior conviction and sentence on the ground of a pardon granted to him by the President of the United States after he had completed his term of service under the prior conviction. The pardon relied upon was offered in evidence. On the trial which followed the refusal of the court to grant the motion to strike out or to rule as requested, the alleged Federal right based upon the pardon was further urged upon the court in every conceivable form and was adversely acted upon, and after conviction was also pressed and adversely passed upon in both the Appellate Division (154 App. Div. 481) and in the Court of Appeals of New York (208 N. Y. 547). And it is the adverse ruling of the Court of Appeals concerning such asserted Federal right which forms the sole basis for this writ of error, addressed to the trial court because of the action of the Court of Appeals in remitting the entire record to that court.

The arguments at bar cover a wider field than is essential to be considered in order to pass upon the question for decision. As the state courts held that the statute directed the consideration of the prior conviction despite the pardon, we must treat the case as if the statute so expressly commanded and test its repugnancy to the Constitution

of the United States upon that assumption. The issue is a narrow one and involves not the determination of the operation and effect of a pardon within the jurisdiction of the sovereignty granting it, but simply requires it to be decided how far a pardon granted as to an offense committed against the United States operates so to speak extra-territorially as a limitation upon the States excluding them from considering the conviction of a prior and pardoned offense against the United States in a prosecution for a subsequent state offense. It may not be questioned that the States are without right directly or indirectly to restrict the National Government in the exertion of its legitimate powers. It is therefore to be conceded that if the act of the State in taking into consideration a prior conviction of an offense committed by the same offender against the laws of the United States despite a pardon was in any just sense a punishment for such prior crime, that the act of the State would be void because destroying or circumscribing the effect of the pardon granted under the Constitution and laws of the United States. And of course, conversely, it must be conceded that if it be that the act of the State in taking into consideration a prior offense committed against the United States after pardon under the circumstances stated was not in any degree a punishment for the prior crime but was simply an exercise by the State of a local power within its exclusive cognizance, there could be no violation of the Constitution of the United States. The whole controversy therefore is to be resolved by fixing the nature and character of the action of the State under the circumstances for the purpose of deciding under which of these two categories it is to be classed. When the issue is thus defined and limited its solution is free from difficulty as it has been repeatedly and conclusively foreclosed by the prior adjudications of this court.

In *McDonald* v. *Massachusetts*, 180 U. S. 311, the court

considered and adversely disposed of a contention that a statute of the State of Massachusetts was repugnant to the Constitution of the United States because it provided for a punishment as an habitual criminal of any person convicted of a felony in Massachusetts who was found to have been "twice convicted of crime, sentenced and committed to prison, in this or any other State, or once in this and once at least in any other State, . . ." In holding that the statute was not in conflict with the Constitution, the court said, pp. 312, 313:

"The fundamental mistake of the plaintiff in error is his assumption that the judgment below imposes an additional punishment on crimes for which he had already been convicted and punished in Massachusetts and New Hampshire.

"But it does no such thing. The statute under which it was rendered is aimed at habitual criminals; and simply imposes a heavy penalty upon conviction of a felony committed in Massachusetts since its passage, by one who had been twice convicted and imprisoned for crime for not less than three years, in this, or in another State, or once in each. The punishment is for the new crime only, but is the heavier if he is an habitual criminal. . . . It is within the discretion of the legislature of the State to treat former imprisonment in another State, as having the like effect as imprisonment in Massachusetts, to show that the man is an habitual criminal. . . . The statute, imposing a punishment on none but future crimes, is not *ex post facto*. It affects alike all persons similarly situated, and therefore does not deprive any one of the equal protection of the laws. *Moore* v. *Missouri*, 159 U. S. 673; *Ross's Case*, 2 Pick. 165; *Commonwealth* v. *Graves*, 155 Massachusetts, 163; *Sturtevant* v. *Commonwealth*, 158 Massachusetts, 598; *Commonwealth* v. *Richardson*, 175 Massachusetts, 202.

"The statute does not impair the right of trial by jury,

or put the accused twice in jeopardy for the same offense, or impose a cruel or unusual punishment." The subject again came under consideration in *Graham* v. *West Virginia*, 224 U. S. 616, and was reëxamined in all its aspects and after a full reference to the English and American authorities, the doctrine announced in the *McDonald Case* was reëxpounded and re-applied so as to now leave no room for any further controversy whatsoever on the subject. Applying the principles thus settled, the case before us clearly comes within the second category which we have stated and therefore the contention as to the effect of the pardon here pressed is devoid of all merit and the court below was right in so holding.

Determining as we do only the case before us, that is, whether the granting of a pardon by the President for a crime committed against the United States operates to restrict and limit the power of the State of New York to punish crimes thereafter committed against its authority and in so doing to prescribe such penalties as may be deemed appropriate in view of the nature of the offense and the character of the offender taking in view his past conduct, we must not be understood as in the slightest degree intimating that a pardon would operate to limit the power of the United States in punishing crimes against its authority to provide for taking into consideration past offenses committed by the accused as a circumstance of aggravation even although for such past offenses there had been a pardon granted.

Indeed, we must not be understood as intimating that it would be beyond the legislative competency to provide that the fact of the commission of an offense after a pardon of a prior offense, should be considered as adding an increased element of aggravation to that which would otherwise result alone from the commission of the prior offense.

Affirmed.

ARCHER *v.* GREENVILLE SAND AND GRAVEL COMPANY.

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

No. 271. Argued March 13, 1914.—Decided April 6, 1914.

Equity has jurisdiction of an action to enjoin a continuing trespass even if the injunctive remedy is only asked after final adjudication and although the trespass may have been discontinued before that time.

There is no loss of rights or remedies because a plaintiff does not ask for immediate relief but endures the wrong pending the litigation and until final adjudication.

To constantly dredge gravel from the bed of a stream is a continuing trespass and wrong that entitles the owner to injunctive relief in equity and for which he has no adequate remedy at law.

In Mississippi the common law prevails as to riparian rights, and he who owns the bank owns to the middle of a navigable river subject to the easement of navigation.

It is a question of local law whether the title to the bed of the navigable rivers of the United States is in the State in which the rivers are situated or in the owners of the land bordering on such rivers.

An owner of the upland, who, under the law of the State, owns to the middle of a navigable river, has such an interest in the bed of the stream that, even though he cannot remove gravel therefrom without the consent of the Secretary of War, he can maintain an action to prevent others from doing so.

One sued for removing gravel from the bed of a navigable stream by the owner of the upland cannot demur on the ground that the complaint fails to show that he has not obtained a permit from the Secretary of War. It will not be presumed that the Secretary of War will authorize such removal, and the existence of such a permit must be pleaded.

THE facts, which involve the ownership of sand in the bed of the Mississippi river within the boundaries of the State of Mississippi, are stated in the opinion.

Mr. Percy Bell and *Mr. T. M. Miller* for petitioner.

Mr. John W. Yerkes, with whom *Mr. George E. Hamilton* and *Mr. John J. Hamilton* were on the brief, for respondents:

This suit cannot be sustained in equity.

Even if equitable jurisdiction exist, plaintiff has not such title to the sand and gravel dredged in the bed of the Mississippi River as will sustain the action.

Plaintiff had a plain, adequate, and complete remedy at law, and there is no ground for equitable relief.

Parties to a suit at law can now be summoned into court and examined by opposing party. Bills of discovery are no longer necessary, and jurisdiction in equity for this purpose (if it has not absolutely ceased as unwarranted) has become inoperative and obsolete.

The bill does not present facts sufficient to support an accounting, and there is no necessity for discovery.

As a preliminary injunction was not asked and the injunction sought is to be part of final decree after title has been decided in plaintiff's favor, the acts complained of, the dredging done, might have ceased long before the final hearing, and unless the cause, for other and recognized reasons, falls properly within equitable jurisdiction, the prayer for such an injunction will not draw equitable jurisdiction to the action.

Plaintiff has no title to, or ownership of, the sand and gravel dredged in the bed of the Mississippi River by defendants.

The two state decisions relied upon to sustain plaintiff's title to the bed of the stream decide one proposition only, that the riparian proprietor on the Mississippi owns at least to low-water mark.

Right of property in the bank of the Mississippi River, between high and low water marks, is not dependent upon,

and does not rest upon, ownership to the thread of the channel.

Riparian rights proper rest upon title to the bank and not upon title to the soil under the water; and riparian proprietors, irrespective of ownership of the bed of a stream, have the right to construct suitable landings for the convenience of themselves and others, subject to public use of the stream and the paramount right of the Federal Government with regard to navigation.

The lands owned by petitioner were originally public lands, and grants by the Government of lands on navigable streams extend only to the limits of high water and as an incident of ownership a riparian proprietor will be limited, according to law of the State, either to low or high water mark, or the middle of the stream.

The bill is too indefinite to show such riparian ownership in plaintiff as will carry with it even qualified or technical ownership of the bed of the stream.

The Mississippi River is a public highway, and rights of adjoining landowners are subject to Federal control regulating commerce and to Federal laws in connection therewith.

Under Federal statutes, it is unlawful for any person to excavate or in any manner alter or modify the course, condition or capacity of the channel of the Mississippi River, unless authorized by the Secretary of War, and if the dredging and removal of sand and gravel were done under this authority, it would not be in law a trespass upon the property of plaintiff.

The court will not assume that extensive, continued work of this kind in the channel of the river would be undertaken and done by defendants without this proper authorization and authority.

In support of these contentions, see *Bardes* v. *Hawarden Bank*, 178 U. S. 524; *Barney* v. *Keokuk*, 94 U. S. 324; *Ex parte Boyd*, 105 U. S. 647; *Brown* v. *Swann*, 10 Peters, 497;

Bullock v. *Wilson*, 2 Porter's Reports (Ala.), 436; *Carroll* v. *Carroll*, 16 How. 275; *Delaplaine* v. *Chicago &c. Ry. Co.*, 42 Wisconsin, 214; *Diedrich* v. *R. R. Co.*, 42 Wisconsin, 248; *Drexel* v. *Berney*, 14 Fed. Rep. 268; *Ellis* v. *Davis*, 109 U. S. 485; *Fowle* v. *Lawrason*, 5 Peters, 495; *The Genesee Chief*, 12 How. 443; *Indianapolis Water Co.* v. *American Co.*, 53 Fed. Rep. 970; Judicial Code, § 267, Rev. Stat., § 723; *Lyon* v. *Fishmongers Co.*, L. R. 1 App. Cas. 662; *McCormick Machine Co.* v. *Aultman*, 169 U. S. 606; *Magnolia* v. *Marshall*, 39 Mississippi, 113; Mississippi Code, § 1003; *Morgan* v. *Reading*, 3 S. & M. 366 (Miss.); *Packer* v. *Bird*, 137 U. S. 661; *Railroad Co.* v. *Schurmier*, 7 Wall. 272; Rev. Stat. § 723; *Rindskopf* v. *Platto*, 29 Fed. Rep. 130; *Root* v. *Railroad Co.*, 105 U. S. 189; *Scranton* v. *Wheeler*, 179 U. S. 141; *United States* v. *Chandler Co.*, 229 U. S. 53; *United States* v. *Clark County*, 96 U. S. 211; 26 Stat. 454; *Yates* v. *Milwaukee*, 10 Wall. 497.

Mr. Justice McKenna delivered the opinion of the court.

Bill in equity to restrain respondent, herein called the Gravel Company, from trespassing upon the lands of petitioner, herein called plaintiff, and from taking sand and gravel therefrom. The bill also prayed for discovery of the amount of gravel which had been taken and an accounting therefor.

The bill alleges the ownership of the lands by plaintiff and describes them by section, range and township and as "lying west of the levee along the river front . . . and fronting on the said Mississippi River," excepting therefrom two strips 100 feet wide each. That lying in the bed of the river in front of the lands and between the bank of the stream and the thread of the river are valuable deposits of sand and gravel which, under the laws of

Mississippi are on the lands of plaintiff, her right and title extending to the lands under the river to the thread of the stream.

That the Gravel Company entered into a contract with the Yazoo & Mississippi Valley Railroad Company to supply sand and gravel for the purpose of grading and raising the line of the railroad and that the Gravel Company employed the E. A. Voight Company to dredge from the bed of the river in front of the lands of plaintiff, and between the river bank and the thread of the stream, the sand and gravel required by it. That the Voight Company is dredging the same over the protest of plaintiff and has taken therefrom large quantities of sand and gravel which it has delivered to the Gravel Company, and the latter company is selling the same to the public and to the railroad company.

That the Gravel Company has refused to cease dredging or to make compensation therefor. That petitioner does not know how much of such material has been taken, but great quantities thereof have been taken, the amounts of which are peculiarly within the knowledge of the Gravel Company.

That the dredging constitutes a continuing trespass upon the lands and property of plaintiff and she is entitled to have the same restrained and to an injunction and accounting and that she is remediless except in a court of equity. She prayed for such relief.

The deeds constituting her title were attached to the bill. The deed conveying title to her, after describing the lands and stating they consisted of 1300 acres, contained the expression, "excepting such parts thereof as have been washed away by the river."

The suit, on the petition of the Gravel Company, was removed to the United States Circuit Court for the Southern District, Western Division, of the State of Mississippi, in which court the Gravel Company filed a demurrer

under nine specifications, alleging want of equity in the bill because of an adequate remedy at law, and want of substance in it because petitioner was not the owner of the sand and gravel in the bed of the river.

The demurrer was sustained and as plaintiff declined to amend her bill, a decree was entered dismissing it. The decree was affirmed by the Circuit Court of Appeals without opinion. A petition for rehearing was made, which was denied without comment, and we are without knowledge of the views of the lower courts or of the grounds upon which their judgments were based except that counsel for plaintiff asserts the Circuit Court sustained the demurrer "solely on the ground of the jurisdiction of the court."

The grounds of demurrer, we think, and the contentions of the parties present two propositions—(1) the right of plaintiff to relief in equity and (2) that she does not show ownership of the property in question as a matter of law. In the latter is involved the question whether a grant of lands bounded by the waters of the Mississippi River, a navigable stream above tidewater, extends to the thread of the channel.

The first proposition is easily disposed of, and, passing by the prayer for discovery and an accounting, we think the bill shows a continuing trespass of such nature and of such character of injury that remedies at law by actions for damages would be inadequate and would, besides, entail repeated litigation. *Mills* v. *N. O. Seed Co.*, 65 Mississippi, 391. Nor is this conclusion disturbed by the fact urged by the Gravel Company, that plaintiff prays for an injunction to be granted only after the hearing of the cause, and although then the rights of the contestants may be finally adjudicated in her favor or the dredging might cease before that time. The contention is somewhat strange. A plaintiff's right of suit cannot be defeated by a mere supposition that he or she may be successful or that

the defendant may cease to offend against the right asserted. It is in the hope of one or the other of such results that the suit is brought against a present or threatened violation of rights. If wrongs are endured in the meantime, there is no loss of rights or remedies.

We are, therefore, brought to the second proposition, Is plaintiff the owner of the sand and the gravel in the bed of the river?

The law of Mississippi is an element in the case. It first found elaborate discussion and decision in *Morgan & Harrison* v. *Reading*, 11 Mississippi (3 Smedes & Marshall, Rep. 366, 404, and it was held that the common law was adopted for the government of the Mississippi Territory, and that the line of the Territory was the middle of the Mississippi River and that it hence followed that the rights of riparian owners on the east shore must be determined in the State of Mississippi by the common law, and that it was a principle of that law "that he who owns the bank, owns to the middle of the river, subject to the easement of navigation." 3 Kent's Com. (5th ed.) 427, and notes were cited.

The case involved the right of the owner of the bank of the river to charge for mooring purposes on the river above low water mark. The right was sustained upon the principle which we have stated above.

The same principle was announced in *The Steamboat Magnolia* v. *Marshall*, 39 Mississippi, 109. The case was said by the court to be identical in its facts with *Morgan & Harrison* v. *Reading*. The opinion is too long to review or to quote from at any length. It left no case or authority unreviewed nor any consideration untouched, and carefully distinguished the public and private interest in the Mississippi River, the court saying, p. 122, "There is no inconsistency, but, on the contrary, as before suggested, perfect harmony between the *jus privatum* of riparian ownership in public fresh water streams, to the middle of

the river, and the *jus publicum* of free navigation thereof. The *soil* is granted to the riparian proprietor, subject to this public easement." And, again, in criticism of what the court considered an untenable view expressed by the court of another State, it said, p. 124: "This general doctrine is as old as the Year-books, that, *prima facie*, every proprietor on each bank of a river is entitled to the *land* covered with water to the middle of the stream." This being declared to be the law of the State, judgment was entered for charges for the use by the Magnolia of a landing on the river.

But it is said by the Gravel Company that according to the agreed facts there was no 'use or occupation' of the lands of the plaintiff in the case 'beyond high-water mark; the only portion used and occupied being the bank of the river between high and low-water mark,' and that the court identifying the facts with those in the *Morgan Case*, said: "What are the rights of the riparian owners, and what the *jus publicum* incident to the free navigation of the Mississippi, are questions there presented, and are the main questions here again presented." This statement, it is hence contended, limits the binding authority of the opinions "as judicial determinations to a decision of what are the rights of a riparian owner between high and low-water marks as connected with the rights of the public in using the Mississippi River as a public highway and navigable stream." And it is further contended that that "question is in no way connected with the ownership of the bed of the stream or ownership of the gravel and sand in the channel of the stream." It is, therefore, insisted that "the case called for nothing more than a decision as to these bank rights, and if more was intended by the judge who delivered the opinion, it was purely *obiter*."

We cannot concur in this view. The court deduced the right to charge for the occupation of the water between high and low-water marks from the ownership of the soil

to the middle thread of the stream. The elaborate reasoning and research of the opinion were directed to demonstrate that under the common law of the State, riparian ownership extends *ad filum*, and, as a consequence, embraces the right to charge for the use of the water between high and low-water marks for landing purposes, although not for purposes of transit. The case is cited as having that purport in 3 Kent's Comm. 14th ed., star paging 427, where the doctrine of riparian rights as they obtain in the States of the Union is considered and the cases collected. In the sixth edition of Kent the *Magnolia Case* is commended as "a frank and manly support of the binding force of the common law, on which American jurisprudence essentially rests." See also *Shively* v. *Bowlby*, 152 U. S. 1, for a discussion by this court of riparian rights.

The *Morgan* and *Magnolia Cases* were cited in *New Orleans, M. & C. R. R. Co.* v. *Frederic*, 46 Mississippi, 1, 9, 10, to sustain "the right of the owner of the land on the bank of the river to the thread of the stream, subject only to a right of passage thereon as a highway when the stream admits it."

It is further urged that the argument in the *Morgan Case* "in support of the common law doctrine as to the ebb and flow of the tide constituting a navigable stream is in direct opposition and antagonism to the reasoning and opinion of this court in the frequently cited and approved case of the *Genesee Chief*, 12 How. 443, decided in 1851, nine years before the opinion of the State Court was handed down." Other cases are also cited in which it is decided that riparian rights pertain to the bank and distinguish as it is asserted, between rights admittedly riparian and rights of ownership of or to the bed of the river. We need not enter into a discussion of those cases, or assign their exact authority. This court has decided that it is a question of local law whether the title to the beds of the navigable rivers of the United States is in the

State in which the rivers are situated or in the owners of the land bordering upon such rivers. *Packer* v. *Bird*, 137 U. S. 661; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *Kaukauna Water Power Co.* v. *Canal Co.*, 142 U. S. 254; *St. Louis* v. *Rutz*, 138 U. S. 226; *Shively* v. *Bowlby*, 152 U. S. 1; *Hardin* v. *Jordan*, 140 U. S. 371; *Jones* v. *Soulard*, 24 How. 41.

Plaintiff owning the land to the middle of the stream, it would seem to follow that she must have such property in its soil as to resist a trespasser upon it, such as the bill alleges the Gravel Company to be. The right, however, is denied, and it is said that she is powerless to prevent the Gravel Company from dredging in front of her land because under the laws of the United States she herself could not do so without permission from the Secretary of War. For this, § 7 of the Rivers and Harbors Appropriation Act of September 19, 1890, c. 907, 26 Stat. 426, 454, is cited as making it unlawful for any person to excavate or fill, or in any manner to alter or modify, the course, location, condition or capacity of the channel of said navigable water of the United States unless approved and authorized by the Secretary of War. Whether if she took gravel from the front of her land she would incur the condemnation of this act it is not necessary to decide. She certainly had such an interest in the conditions to prevent one without right from disturbing them. We cannot help observing that the Gravel Company by its conduct has given an interpretation of the act against its contention, unless indeed it wishes to confess itself a violator of public law in order to escape responsibility for a private injury.

The Gravel Company tries to avoid this situation, saying, that a violation of the law cannot be imputed to it because it cannot be assumed that the "extensive and continued dredging, as alleged in the bill, affecting necessarily the channel of the river, would be undertaken without proper authorization and authority, or that

the proper officers of the Government would have allowed these operations to continue." The supposition is easily answered. There is no scheme of improvement of navigation suggested by the bill and it cannot be supposed that the Secretary of War would authorize the Gravel Company to take material from the river for commercial purpose, and the bill alleges such to be the purpose. Besides, if the Gravel Company had authority from the Secretary of War, it is a matter of defence to be pleaded.

The Gravel Company further charges that considering the allegations of the bill and the muniments of title attached to it there is exhibited a possible failure to plead such title in plaintiff as would carry with it even a qualified ownership in the bed of the stream. We do not think so. At any rate, the bill is sufficient against a general demurrer

Judgment reversed.

HERBERT *v.* BICKNELL.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 269. Submitted March 12, 1914.—Decided April 6, 1914.

The Hawaiian Supreme Court having held that leaving a copy of the summons at the place where defendant last had stopped amounted to leaving it at his usual abode within § 2114, Rev. Laws of Hawaii, this court will not disturb the judgment.

The law assumes that property is always in the possession of its owner in person or by agent, and proceeds on the theory that its seizure will inform him not only that it has been taken into custody but that he must look to any proceeding authorized by law upon such seizure for its condemnation and sale; and so *held* that an attachment and judgment under § 2114, Rev. Stat. Hawaii, does not on account of its provisions for service of the summons by leaving it at his last known place of abode deprive a non-resident of any rights guaranteed by the Fifth Amendment. *Pennoyer* v. *Neff*, 95 U. S. 714.

The existence of a garnishment statute is notice to the owner of claims that he must be ready to be represented in case the debt is attached.

In this case, as the defendant whose property was attached under § 2114, Rev. Stat. Hawaii, had knowledge of the attachment and judgment before the time for writ of error to the Supreme Court of the Territory had expired, he should have pursued that remedy and not suffered default and attempted to quash on the ground of want of due process in the service.

20 Hawaii, 132, affirmed.

THE facts, which involve the validity of a judgment rendered by the courts of Hawaii and based on service of process under § 2114, Rev. Law of Hawaii, are stated in the opinion.

Mr. William R. Castle, Mr. David L. Withington, Mr. W. A. Greenwell and *Mr. Alfred L. Castle* for plaintiff in error:

The District Court of Honolulu was without jurisdiction. It is a court of special and limited jurisdiction, and there is no presumption in favor of that jurisdiction. Organic Act, April 30, 1900, § 81; Rev. Laws, 1905, §§ 125, 1662–1666; *Hang Lung Kee* v. *Bickerton*, 4 Hawaii, 584.

Not having acquired jurisdiction either by personal service or by seizure of property, there was no jurisdiction to render judgment against the defendant. Rev. Laws, §§ 2251–2255, 2256.

The existence of property of the defendant within the jurisdiction, in a case like this, is essentially necessary to the exertion of the power of the court to render a binding decree. *Pennoyer* v. *Neff*, 95 U. S. 714; *Chase* v. *Wetzler*, 225 U. S. 79.

The Hawaiian statute as construed by the Supreme Court of Hawaii does not provide for due process of law.

It is only in proceedings strictly *in rem* that the constructive notice resulting from the seizure is sufficient. *Hollingsworth* v. *Barbour*, 4 Pet. 466.

The defendant in garnishment must be notified in time to protect his rights by personal service or some form of substituted service. *Chicago, R. I. & P. R. Co.* v. *Sturm*, 174 U. S. 710.

The proper publication must be made. *Harris* v. *Balk*, 198 U. S. 215; 20 Cyc. 1033, 1048, 1054.

A fundamental condition under the Fifth and Fourteenth Amendments is that there shall be notice and opportunity for hearing given the parties. *Twining* v. *New Jersey*, 211 U. S. 78, 111; *Earle* v. *McVeigh*, 91 U. S. 503.

A lodging house where the defendant is temporarily stopping is not a last and usual place of abode, within the meaning of the statute. *Fitzgerald* v. *Salentine*, 10 Met. 436; *White* v. *Primm*, 36 Illinois, 416; *Hennings* v. *Cunningham* (N. J.), 59 Atl. Rep. 12; *Zacharie* v. *Richards*, 6 Mart. (N. S.) 467; *Wright* v. *Oakley*, 5 Met. 400; *Craig* v. *Gisborne*, 13 Gray, 270; *Missouri Trust Co.* v. *Norris*, 61 Minnesota, 256; 63 N. W. Rep. 634; *Sturgis* v. *Fay*, 16 Indiana, 429; 79 Am. Dec. 440; *Honeycutt* v. *Nyquist*, 12 Wyoming, 183.

Section 2114 is misquoted by the court. The language of the law is that unless the defendant be an inhabitant of this Territory, or has some time resided there, and then a like copy shall be served personally upon him, or left at his last and usual place of abode. *Earle* v. *McVeigh*, *supra*.

Notice by service on the same day does not fulfill the constitutional requirement. *United States* v. *Fisher*, 222 U. S. 204; *Roller* v. *Holly*, 176 U. S. 399.

No brief was filed for defendants in error.

Mr. Justice Holmes delivered the opinion of the court.

This is an action of assumpsit begun on June 30, 1909, in the District Court of Honolulu, by garnishment and leaving a copy of the summons at a place which according to the return was the defendant's last and usual place of abode, he being absent from the Territory. The defendant did not appear and the plaintiff got judgment against the fund on July 2, 1909. No appeal or writ of error was

taken, but on December 31, 1909, the time for suing out a writ of error not having expired, the defendant appeared specially and moved to quash the service and set aside the judgment on the ground that the record showed that there was not sufficient service upon him to comply with the Fourteenth Amendment and the laws of Hawaii. The motion was accompanied by an affidavit to the effect that the defendant had changed his domicil to Australia before the beginning of this suit, that he had returned and lived for a month in January and February, 1909, at the place where the summons was left, and then had gone back to Australia; and that his last and usual place of abode (before his change of domicil, as we understand it), was at Waikiki. The District Court overruled the motion and its judgment was affirmed by the Supreme Court.

The argument for the plaintiff in error assumes a wider range than is open upon this motion. The Supreme Court says that the question whether the evidence was sufficient to support the judgment cannot be raised in this way, and we should follow the decision even if it seemed less obviously reasonable than it does. *Montoya* v. *Gonzales*, 232 U. S. 375, 376. Moreover, the only errors assigned here are in holding that the service prescribed by § 2114, Rev. Laws of Hawaii as construed by the court, and that leaving a copy of the summons as above stated after garnishment of a debt due to the defendant, were sufficient to meet the requirements of the Fifth Amendment; (the court having assumed that the defendant referred to the Fifth when he mentioned the Fourteenth in his motion below).

The Supreme Court was of opinion that, if the question was open, leaving a copy of the summons at the place where the defendant last had stopped was leaving it at his last and usual place of abode within § 2114. On that point we see no sufficient reason for disturbing the judgment. *Phœnix Ry. Co.* v. *Landis*, 231 U. S. 578, 579. Really the only matter before us that calls for a word is

the decision that a judgment appropriating property within the jurisdiction to payment of the owner's debt, which would be good if the property itself were the defendant, is not made bad by the short and somewhat illusory notice to the owner. Upon this point the court below relied upon the above § 2114 and *Pennoyer* v. *Neff*, 95 U. S. 714, 727: "The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that the seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceeding authorized by law upon such seizure for its condemnation and sale." It has been said from of old that seizure is notice to the owner. *Scott* v. *Shearman*, 2 W. Bl. 977, 979. *Mankin* v. *Chandler*, 2 Brock. 125, 127. See *Cooper* v. *Reynolds*, 10 Wall. 308, 317.

Summons of the defendant's debtor by garnishment is given like effect in express terms by § 2114. "Such notice [i. e. service on the garnishee] shall be sufficient notice to the defendant to enable the plaintiff to bring his action to trial unless the defendant be an inhabitant of this Territory, or has some time resided therein, and then a like copy shall be served personally upon him, or left at his last and usual place of abode." This statute was in force, no doubt, before the debt garnisheed was contracted and gave the defendant notice that he must be ready to be represented in order to save a default if the debt was attached. If he had appeared, nothing shows that proper time would not have been allowed to produce evidence at the trial. The District Court has jurisdiction over small debts only. Rev. Laws of Hawaii, § 1662. Its proceedings naturally are somewhat summary. It appears that the defendant had knowledge of the action before the time for a writ of error had expired and when it may be that it still would have been possible to set aside the judgment and to retry the case. He did not adopt the course that

would have opened effective ground of attack even as the record stood. We cannot discover that he has suffered any injustice—still less that he has been subjected to an unconstitutional wrong.

Judgment affirmed.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* KAW VALLEY DRAINAGE DISTRICT.

KANSAS CITY TERMINAL RAILWAY COMPANY *v.* SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Nos. 313, 314. Argued March 19, 20, 1914.—Decided April 6, 1914.

This court will read pleadings as alleging what they fairly would convey to an ordinarily intelligent lawyer by a fairly exact use of English speech. *Swift & Co.* v. *United States*, 196 U. S. 375.

This court must take the judgment under review as it stands and if it is absolute and not conditional it cannot be qualified by speculation as to what may in fact happen.

An out and out order of a state court to remove a bridge that is a necessary part of a line of interstate commerce is an interference with such commerce and with a matter that is under the exclusive control of Congress.

Interstate commerce is not a matter that is left to the control of the States until further action by Congress; nor is the freedom of that commerce from interference by the States confined to laws only; it extends to interference by any ultimate organ.

A direct interference by the State with interstate commerce cannot be justified by the police power; and so *held* that the destruction of a bridge across which an interstate railroad line necessarily passes cannot be justified by the fact that it helps the drainage of a district.

Quære, whether a consent by a Drainage District to the construction of a railroad bridge is not to be regarded as a license rather than an abdication of the continuing powers of the District to require subsequent elevation of the bridge.

87 Kansas, 272, affirmed.

THE facts, which involve the construction and validity,

under the commerce clause of the Federal Constitution, of orders of the state courts of Kansas directing railroad companies to remove bridges on lines of interstate commerce, are stated in the opinion.

Mr. Samuel W. Moore, with whom *Mr. Samuel W. Sawyer* and *Mr. James M. Souby* were on the brief, for plaintiffs in error.

Mr. Thomas A. Pollock for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

These cases arise upon petitions for mandamus filed by the defendant in error, the Kaw Valley Drainage District. The allegations are that the Kansas River flows through the District, is a navigable stream, and in 1903 overflowed its banks, flooded a large part of Kansas City, Kansas, and caused great loss; that the harbor lines established by the United States and the lines for a levee along the banks established by the plaintiff substantially coincide; that the defendants respectively own bridges across the river which at their present elevation cause it to overflow; and that the plaintiff in pursuance of the power given to it by the State has ordered the defendants respectively to raise these bridges to specified heights and to remove the old ones, which the defendants have refused to do. On these petitions alternative writs issued, and thereupon the defendants made return, each making a general denial and setting up that its railway tracks across the bridge were used in commerce among the States and that such commerce would be cut off and destroyed by enforcement of the order, and claiming the protection of the Constitution, Art. I, § 8, (cl. 3). They each alleged also that to raise the bridges would require a raising of the grades of the streets for the approaches, and that the right to raise them depended on the consent of Kansas City, which the city refused to give; that the raising would cut in two inter-

secting tracks of other roads, that this could not be done without the consent of such roads, which they also refused; that the raising would do permanent damage to private property abutting on the streets that would have to be raised, and that the plaintiff had taken no steps to compensate the owners; that the damage to the defendant would exceed large sums mentioned; and that the plans for the new bridges have not been approved by the Secretary of War. Act of March 3, 1899, c. 425, § 9. 30 Stat. 1121, 1151. Each defendant relies upon the Fourteenth Amendment. The Terminal Company also alleged a contract with the Drainage District which was thought to preclude its present requirement, and to be protected by the Constitution, Art. I, § 10. The cases were heard on the alternative writs and the returns, and the Supreme Court of the State issued peremptory writs requiring the defendants to clear the channel to specified heights. 87 Kansas, 272.

Motions to dismiss were presented at the last term but were denied, as the record shows not only that rights under the Constitution and laws of the United States were specially set up and claimed, but that the questions concerning them are not of a kind to be dismissed.

The Supreme Court recognized that it could not order the bridges to be raised to the required height without the authority of the Secretary of War. Therefore we may lay on one side the somewhat surprising answer made to the allegations that the consent of the city and other railroads was necessary and was refused—the suggestion, namely, that if the defendants wanted to do it they would find some way of reaching their end. See *Louisville & Nashville R. R. Co.* v. *Central Stock Yarks Co.*, 212 U. S. 132, 144. It was not suggested that the railroads had the power to reach the result by eminent domain. See *Atlantic Coast Line R. R. Co.* v. *North Carolina Corporation Commission*, 206 U. S. 1, 27. We lay on one side also various

over-refined objections to the defendants' pleadings made in the argument here, saying only that we read them as alleging what they fairly would convey to an ordinarily intelligent lawyer by a fairly exact use of English speech. *Swift & Co.* v. *United States*, 196 U. S. 375, 395. But the court went on, on the assumption that it would lead to the elevation of the bridges and seemingly for the purpose of accomplishing indirectly what it admitted that it could not do directly, to make an unqualified absolute order, as we have said, that the defendants should clear the channel of all obstructions on their lines up to the specified heights—in other words to remove the bridges as they stand.

These judgments must be taken as they read upon their face. They are not conditional orders to raise the bridge if the defendants can obtain the consent of parties not before the court and of one authority at least not subject to its control. They cannot be qualified by speculation as to what is likely to happen in fact. They are out and out orders to remove bridges that are a necessary part of lines of commerce by rail among the States. But that subject-matter is under the exclusive control of Congress and is not one that it has left to the States until there shall be further action on its part. The freedom from interference on the part of the States is not confined to a simple prohibition of laws impairing it, but extends to interference by any ultimate organ. It was held that under the permissive statute authorizing telegraph companies to maintain lines on the post roads of the United States a State could not stop the operation of the lines by an injunction for failure to pay taxes. *Western Union Telegraph Co.* v. *Attorney General of Massachusetts*, 125 U. S. 530. *Williams* v. *Talladega*, 226 U. S. 404, 415, 416. It would seem that the same principle applies to railroads under the commerce clause of the Constitution, especially if taken in connection with the somewhat similar statute now Rev.

Stats., § 5258. And so it is held. *Atlantic Coast Line R. R. Co.* v. *Wharton*, 207 U. S. 328, 334. *Mississippi R. R. Commission* v. *Illinois Central R. R. Co.*, 203 U. S. 335.

The decisions also show that a State cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power. It repeatedly has been said or implied that a direct interference with commerce among the States could not be justified in this way. "The state can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic." *Illinois Central R. R. Co.* v. *Illinois*, 163 U. S. 142, 154. *Austin* v. *Tennessee*, 179 U. S. 343, 349. *Atlantic Coast Line R. R. Co.* v. *Wharton*, 207 U. S. 328, 334. To destroy the bridges across which these railroad lines necessarily pass is at least as direct an interference with such commerce as to prohibit the importation of cattle or oleomargarine, or the export of natural gas. *Hannibal & St. Joseph R. R. Co.* v. *Husen*, 95 U. S. 465. *Schollenberger* v. *Pennsylvania*, 171 U. S. 1. *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 262. Furthermore in the present case it is not pretended that local welfare needs the removal of the defendants' bridges at the expense of the dominant requirements of commerce with other States, but merely that it would be helped by raising them. The fact that the court cannot order them to be raised does not justify a judgment that they be destroyed even in the avowed expectation that what it wants but cannot command is all that will come to pass.

A strong argument was made for the plaintiffs in error that they never had been allowed their day in court, as matters put in issue by them, such as the necessity of the change, were assumed against them. It was urged with seeming justice that, granting that, as was said by the court, the order of the Drainage District was *prima facie* correct, still when that order was challenged in the pleadings, it could not be assumed to be valid at a hearing upon

the writs and returns. But we express no opinion upon this point or upon claims under the Fourteenth Amendment, as what we have said sufficiently decides the cases. The argument of the Terminal Company upon the contract with the Drainage District does not impress us. By way of compromise the Terminal Company's predecessor agreed to build a permanent bridge according to a plan, and the Drainage District "hereby consents to the construction of said permanent bridge . . . and declares that the same when constructed shall constitute a lawful structure . . . not waiving any right . . . to require the construction of an additional span." This coming from a board created to exercise police power not unnaturally would be construed rather as a license than as an abdication of a continuing duty, on which we are asked to take notice that new light had been shed by a subsequent flood that has given rise to cases before this court. But for the reasons that we have given the judgments must be reversed.

Judgments reversed.

SOUTHERN RAILWAY–CAROLINA DIVISION *v.* BENNETT, ADMINISTRATRIX.

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

No. 796. Argued March 2, 1914.—Decided April 6, 1914.

Quære, whether ordinary questions of negligence are open in this court in a case coming from the state court based on the Federal Employers' Liability Act.

An isolated phrase in the charge in a case involving the fall of an engine, which did not amount to *res ipsa loquitur*, but was to the effect that proof of a defect in the appliances that the master was bound to use care to keep in order and which usually would be in order if due care

was taken was *prima facie* evidence of neglect, *held*, in this case, not to be reversible error, no attention having been called to the expression at the time.

Whether upon the evidence the verdict is excessive is a matter for the trial court and not to be reëxamined on writ of error. *Herencia* v. *Guzman*, 219 U. S. 44.

Even though the verdict may seem large to this court, it cannot reverse on that ground in the absence of error which warrants imputing to judge and jury a connivance in escaping the limits of the law.

79 So. Rep., 710, affirmed.

THE facts, which involve the construction of the Federal Employers' Liability Act and the validity of a verdict and judgment thereunder, are stated in the opinion.

Mr. J. E. McDonald, with whom *Mr. L. E. Jeffries* and *Mr. B. L. Abney* were on the brief, for plaintiffs in error:

Under the Federal Employers' Liability Act there is no presumption of negligence entering into the obligation, and it was the duty of the plaintiff, in an action brought by the servant against the master, to show affirmatively that improper appliances were used and that the defects insisted upon caused the accident through the negligence of the master. *Tex. & Pac. Ry. Co.* v. *Barrett*, 166 U. S. 617; *Patton* v. *Tex. & Pac. Ry. Co.*, 179 U. S. 658; *Looney* v. *Metropolitan R. Co.*, 202 U. S. 480; *Chicago & N. W. R. Co.* v. *O'Brien*, 132 Fed. Rep. 593; *Shandrew* v. *Chicago &c. Ry. Co.*, 142 Fed. Rep. 320; *Mex. Cent. Ry. Co.* v. *Townsend*, 114 Fed. Rep. 737; *Pierce* v. *Kyle*, 80 Fed. Rep. 865.

The charge that where it appears that the servant is injured by and through defective instrumentalities, machinery or places, and things of that kind, it is *prima facie* evidence of negligence on the part of the master, and the master assumes the burden of showing that he exercised due care in furnishing places, means, instrumentalities and matters of that kind was error. *Nor. Pac. R. Co.* v. *Dixon*, 139 Fed. Rep. 737; *Shankweiler* v. *Balt. & Ohio R. Co.*, 138 Fed. Rep. 195; *Rogers* v. *L. R. R. Co.*,

88 Fed. Rep. 462; *Garrett* v. *Phœnix Bridge Co.*, 98 Fed. Rep. 192.

In all actions by the servant against the master brought in the Federal courts for injuries sustained through negligence on account of defective machinery, the plaintiff must show affirmatively throughout the entire case that the master was negligent. See cases *supra.*

The law having placed the positive duty upon the master to furnish reasonably safe appliances, the presumption of law is that the master has discharged his duty, and there is also another presumption, that if they were defective the master did not know of it. 4 Thompson on Negligence, § 3864.

It is not sufficient merely to prove that the servant was injured through defective machinery or appliances, but it must be shown that the master knew of the defects, or by reasonable care ought to have known of them. 1 Labatt on M. & S., §§ 119–21, 128–133, 832–8; 2 Thompson on Neg., § 1053; 4 *Id.* 4362; 6 *Id.* 4362, 7528–9; 3 Elliott on Evidence, § 2519, Note 6, L. R. A. (N. S.), p. 345; Note 41, L. R. A., p. 47–8, 52; *Patton* v. *Railroad Co.*, 175 U. S. 658; *Railway Co.* v. *Barrett*, 166 U. S. 617; *Mountain Copper Co.* v. *Van Buren*, 133 Fed. Rep. 61; *Re California Navigation Co.*, 110 Fed. Rep. 670, 674; *Looney* v. *Met. Ry. Co.*, 200 U. S. 480.

It was error of law on the part of the Circuit Judge, affirmed by the Supreme Court of South Carolina, not to grant a new trial or to reduce it to conform to the true measure of damages provided for by the act of Congress upon the ground that the verdict was so excessive under the undisputed facts, as well as the charge of the court, that it deprived the plaintiffs in error of their rights under the Federal Employers' Liability Act.

Any compensation for pecuniary loss sustained by the beneficiaries by reason of the loss of the earnings of the intestate could not be given for a longer period than that

of his expectancy, thirty years, because it cannot be fairly said that the defendants would be responsible for such loss beyond that period. *Duval* v. *Hunt*, 15 So. Rep. (Fla.) 876; *Louis. & Nash. R. R. Co.* v. *Trammell*, 9 So. Rep. (Ala.) 870; *Reiter Conley Mfg. Co.* v. *Hamlin*, 40 So. Rep. 280.

As to the measure of damages under the Employers' Liability Act, see *Michigan Cent. R. R. Co.* v. *Vreeland*, 227 U. S. 192; *Am. R. R. Co.* v. *Didricksen*, 227 U. S. 225; *Gulf &c. Co.* v. *McGinnis*, 228 U. S. 173.

The true rule in measuring damages for pecuniary loss in cases like the present, is to ascertain the present net income by deducting the cost of living and expenditures from the gross income, and no more should be allowed than the present value of the accumulation arising from such net income, based upon the expectancy of the life of the deceased, or for such length of time as the beneficiaries would have been entitled to receive support or benefits from him. *Alabama Mineral Ry. Co.* v. *Jones*, 62 Am. St. Rep. 132; *English* v. *Southern Pacific Co.*, 13 Utah, 407; *Pickett* v. *Wilmington &c. R. R. Co.*, 117 No. Car. 616; *Louisville &c. R. R. Co.* v. *Markee*, 103 Alabama, 000; *Mattise* v. *Consumers Ice Mfg. Co.*, 46 La. Ann. 1535; *Louisville &c. Ry. Co.* v. *Goodykoontz*, 12 Am. St. Rep. 380; *Mansfield, &c. Co.* v. *McEnery*, 91 Pa. St. 185. Evidence that the deceased was in the line of promotion at the time of his death is not admissible for the purpose of increasing the measure of damages. *Brown* v. *Chicago &c. Ry. Co.*, 64 Iowa, 652.

This court will examine the entire evidence and the action of the state trial court and of the state Supreme Court and if it is manifest from such evidence that a verdict should not be sustained, as not in conformity with the measure of damages laid down by this court as provided in such statute, such failure is error of law upon the face of the record, and this court has jurisdiction.

In such case this court will examine the evidence. *Mackey* v. *Dillon*, 4 How. 421; *Republican River Bridge Co.* v. *K. P. R. Co.*, 92 U. S. 315; *Domer* v. *Richards*, 151 U. S. 658; *Lang* v. *Rigney*, 160 U. S. 531; *Schlemmer* v. *Buffalo &c. Ry. Co.*, 205 U. S. 1; *K. C. S. R. Co.* v. *Albers Com. Co.*, 223 U. S. 573; *Water Co.* v. *Cedar Rapids*, 223 U. S. 655.

Mr. W. Boyd Evans, with whom *Mr. Edwin C. Brandenburg*, *Mr. F. Walter Brandenburg*, *Mr. E. J. Best*, *Mr. G. W. Ragsdale* and *Mr. P. A. McMaster* were on the brief, for defendant in error:

The judgment is not reviewable on the ground of being excessive; there was proof of negligence; the error, if any, was cured by the charge; the exceptions were not taken at trial; no Federal question is involved; the judgment should be affirmed.

In support of these contentions, see *Baltimore & P. R. Co.* v. *Mackey*, 157 U. S. 72; *Bank of Old Dominion* v. *McVeigh*, 98 U. S. 332; *Chicago & Alton R. Co.* v. *Ferry Co.*, 119 U. S. 615; *Chicago &c. R. R. Co.* v. *Whitton*, 13 Wall. 270; *Choctaw, O. & G. R. Co.* v. *Tennessee*, 191 U. S. 326; *San Francisco* v. *Scott*, 111 U. S. 768; *Columbia Realty Co.* v. *Rudolph*, 217 U. S. 547; *Congress Spring Co.* v. *Edgar*, 99 U. S. 645; *Dugger* v. *Bocock*, 104 U. S. 596; *Gamache* v. *Piquignot*, 16 How. 451; *Garrard* v. *Reynolds*, 4 How. 123; *Gila Valley R. Co.* v. *Lyon*, 203 U. S 465; *Heinemann* v. *Heard*, 62 N. Y. 448; *Herencia* v. *Guzman*, 219 U. S. 44; *Humes* v. *United States*, 170 U. S. 210; *Lincoln* v. *Power*, 151 U. S. 436; *McDermott* v. *Severe*, 202 U. S. 600; *N. Y. Cent. R. R. Co.* v. *Fraloff*, 100 U. S. 24; *N. Y., L. E. & W. R. Co.* v. *Winter*, 143 U. S. 60; *N. Y., L. E. & W. R. Co.* v. *Estill*, 147 U. S. 591; *N. Y. Life Ins. Co.* v. *Hendren*, 92 U. S. 286; *Nor. Pac. R. R. Co.* v. *Babcock*, 154 U. S. 190; *Nor. Pac. R. R. Co.* v. *Herbert*, 116 U. S. 642; *Rockhold* v. *Rockhold*, 92 U. S. 129; *St Clair* v. *United States*, 154 U. S. 134; *Stewart* v. *Wyoming Ranch Co.*, 128 U. S. 383;

Tucker v. *United States*, 151 U. S. 164; *United States* v. *Conklin*, 1 Wall. 644; *United States* v. *Denver & R. G. R. Co.*, 191 U. S. 84; *Evanston* v. *Gunn*, 99 U. S. 660; *Wash. & Geo. R. R. Co.* v. *Gladmon*, 15 Wall. 401; *Western Mass. Ins. Co.* v. *Transportation Co.*, 12 Wall. 201.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action under the Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, for causing the death of the plaintiff's intestate. The plaintiff got a verdict for $25,000, on which the court ordered judgment upon the plaintiffs remitting $5000. Exceptions were taken but the judgment was affirmed by the Supreme Court of the State. 79 S. E. Rep. 710. The exceptions related to the instructions of the court on the matter of liability and to the entering of judgment upon a verdict alleged to be excessive. As to rulings of the former class we have indicated that when the statute is made a ground for bringing up ordinary questions of negligence we shall deal with them in a summary way and usually content ourselves with stating results. Whether such questions are open in a case coming from a state court we need not decide, as, if open, they can be disposed of in a few words.

The defendant was killed by the falling of his engine through a burning trestle bridge. There was evidence tending to show that the trestle was more or less rotten, that the fire was caused by the dropping of coals from an earlier train and that the engine might have been stopped had a proper lookout been kept. The first complaint is against an instruction to the effect that, if a servant is injured through defective instrumentalities, it is *prima facie* evidence of the master's negligence and that the master 'assumes the burden' of showing that he exercised due care in furnishing them. Of course the burden of

proving negligence in a strict sense is on the plaintiff throughout, as was recognized and stated later in the charge. The phrase picked out for criticism did not controvert that proposition but merely expressed in an untechnical way that if the death was due to a defective instrumentality and no explanation was given, the plaintiff had sustained the burden. The instruction is criticised further as if the judge had said *res ipsa loquitur*—which would have been right or wrong according to the *res* referred to. The Judge did not say that the fall of the engine was enough, but that proof of a defect in appliances which the Company was bound to use care to keep in order and which usually would be in order if due care was taken, was *prima facie* evidence of neglect. The instruction concerned conditions likely to have existed for some time (defective ash pan or damper on the engine and rotten wood likely to take fire), about which the company had better means of information than the plaintiff, and concerning which it offered precise evidence, which, however, did not satisfy the jury. We should not reverse the judgment on this ground, even if an objection was open to an isolated phrase to which no attention was called at the time.

The supposed error most insisted upon is the entering of judgment upon a verdict said to be manifestly excessive. It is admitted that the judge charged the jury correctly, according to principles established by *Michigan Central R. R. Co.* v. *Vreeland*, 227 U. S. 59, but it is thought to be apparent as matter of law that the jury found more than the charge or the law allowed. The argument is this. The deceased was making not more than $900 a year and the only visible ground of increase was the possibility that he might be promoted from fireman to engineer, with what pay was not shown. He could not have given more than $700 a year to his family. His expectation of life was about thirty years by the tables of mortality. Therefore at the legal rate of interest the income from $10,000

for thirty years was all that the plaintiff was entitled to, whereas she was given the principal of $20,000 out and out. It may be admitted that if it were true that the excess appeared as matter of law; that if, for instance, the statute fixed a maximum and the verdict exceeded it, a question might arise for this court. But a case of mere excess upon the evidence is a matter to be dealt with by the trial court. It does not present a question for reëxamination here upon a writ of error. *Lincoln* v. *Power*, 151 U. S. 436. *Herencia* v. *Guzman*, 219 U. S. 44, 45. The premises of the argument for the plaintiff in error were not conclusive upon the jury, and although the verdict may seem to us too large, no such error appears as to warrant our imputing to judge and jury a connivance in escaping the limits of the law.

Judgment affirmed.

TERRITORY OF ARIZONA AT THE RELATION OF GAINES, TAX COLLECTOR OF COCHISE COUNTY, *v.* COPPER QUEEN CONSOLIDATED MINING COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 89. Argued March 3, 4, 1914.—Decided April 6, 1914.

Where the Supreme Court of a Territory has made a statement of facts in the nature of a special verdict, this court must consider the case when it comes here on appeal upon that finding.

In exercising appellate jurisdiction over the territorial courts in cases involving construction of a statute by the Territory, this court will not, in the absence of manifest error, reverse the action of the territorial court in regard to such construction; and so *held* as to the construction placed by the Supreme Court of Arizona on the statutes of that Territory defining the powers and duties of the Board of Equalization.

In this case *held* that payments of taxes made under an attempted compromise agreement did not operate to estop the taxpayer from contesting the legality of the action of the taxing authorities in increasing the assessments on the property.

In this case this court affirms the judgment of the Supreme Court of the Territory of Arizona that the Board of Equalization had no power under the statute of the Territory to raise the separate assessed valuation of certain mining claims of groups which had originally been assessed *en masse*.

13 Arizona, 198, affirmed.

THE facts, which involve the construction of the statutes of Arizona regarding valuation assessments for taxation, are stated in the opinion.

Mr. Elias S. Clark and *Mr. George P. Bullard*, Attorney General of Arizona, with whom *Mr. William G. Gilmore* and *Mr. William C. Prentiss* were on the brief, for appellant.

Mr. Frederick N. Judson, with whom *Mr. E. E. Ellinwood* and *Mr. John F. Green* were on the brief, for appellee.

MR. JUSTICE DAY delivered the opinion of the court.

This was a special statutory proceeding (Laws of Territory of Arizona, 1903, Act No. 92, p. 148) brought in the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise to enforce the lien of the Territory for the payment of taxes for the year 1901 assessed against certain patented mining claims in the County of Cochise, amounting to $120,039.35, the tax being assessed upon the increased valuation of the mining claims of the Company made by the Board of Supervisors of Cochise County. In the trial court judgment was rendered for the defendant. Upon appeal to the Supreme Court of the Territory of Arizona the judgment was affirmed (13 Arizona, 198). An appeal was prosecuted to this court under the statute regulating appeals from territorial courts (18 Stat. 27).

The Supreme Court of the Territory of Arizona made a statement of facts in the nature of a special verdict, and upon that finding this court must consider the case on this appeal. *Eagle Mining Co.* v. *Hamilton*, 218 U. S. 513, 515; *Zeckendorf* v. *Steinfeld*, 225 U. S. 445, 449. From the facts thus found the following appears:

The appellee, a corporation doing business and owning real and personal property in Cochise County, Arizona, listed and returned for assessment in 1901 sixty-five mining claims belonging to it, by name, but as one tract, said to contain 636 acres and valued at $3,180, with improvements valued at $55,431.76. Some of the claims are not contiguous to the others.

On July 17, 1901, the County Board of Supervisors, sitting as the Board of Equalization for Cochise County, after notice to the Company and hearing at which appellee's superintendent and agent appeared, raised the assessment upon eight of the sixty-five claims originally assessed *en masse*, in amounts varying from $50,000 to $1,000,000.

Prior to September, 1901, the appellee brought suit in the District Court of Cochise County to enjoin the collection of the tax, alleging that the increase had been fraudulently made and the property overvalued. It tendered the sum of $14,133.12, being the amount of the tax upon all of its property before the increase. The District Court found that the increase was not based upon information or evidence but was made arbitrarily and capriciously for the purpose of imposing an unjust share of the burden of taxation upon the appellee, and granted the injunction, upon condition, however, that the appellee pay the $14,133.12 into court and also the further sum of $9,589.20, the tax upon the increase in valuation of certain personal property, which the District Court found to be valid. The $14,133.12 was accepted by the County Treasurer, who was *ex officio* tax collector, "on account of any

moneys which might ultimately be determined as due from said company for its taxes for said year." The Supreme Court, upon appeal, reversed the case and remanded it for new trial (*County of Cochise* v. *Copper Queen Co.*, 8 Arizona, 221). Subsequently, an agreement of compromise was made, under authority of a resolution of the Board of Supervisors, the appellee paying the further sum of $5,661.44 in full settlement of taxes for the year 1901 and the injunction suit being dismissed. This last amount has been retained by the County.

Thereafter a mandamus suit was instituted to compel the tax collector to commence suit against the appellee for the balance of the 1901 tax, upon the ground that the compromise was void. The Supreme Court held that the Board of Supervisors had no authority to compromise the tax and granted the writ (*Territory* v. *Gaines*, 11 Arizona, 270), in pursuance of which the present action was instituted.

The uncontradicted testimony showed that the raise in the assessment of the eight claims was not based upon evidence as to value and that it was in fact arbitrary, and also that some of the claims were assessed far in excess of their full cash value. The duplicate assessment roll made out by the assessor contained the increase made by the Board of Equalization, the eight claims which were raised being separately itemized by name, with the amounts of the respective increases set opposite the names, but with no statement of their original valuation or the total valuation of them or any of them.

On the third Monday of December, 1901, the tax being unpaid, the tax collector turned in the delinquent list, certified by the Board, giving the property of the defendant as shown in the assessment returned by the appellee, with the increases as they appeared on the duplicate assessment roll.

Under the 1903 law delinquent property was carried

into the back-tax book of that year, and this suit was brought to foreclose the Territory's lien upon the pieces of property therein appearing. That book, which was put in evidence, gave the appellee's property, its total valuation, total tax, amount paid on account and balance due. In enumerating the several tracts remaining unredeemed it showed sixty-five mining claims, containing 636 acres, valued *en masse*, at $3,180 with improvements at $55,431, and named sixty-four claims; the number of acres, and all other valuations for real estate and improvements were the same as in the other lists; and the list of increased valuations of the several claims and improvements were shown, but no total valuation of such separate pieces of property after the addition of the increase was given.

The discrepancies in description of the claims between the complaint and the tax documents are stated, and mention is made that in none of the latter is the total assessed valuation of any individual piece of real estate or the amount of taxes due on any of the separate claims disclosed. And it is said that the testimony of the assessor showed that there were 280 patented mining claims in Cochise County at the time the 1901 assessment was made, and that they were and had been assessed at a uniform rate of $5.00 per acre as a rule.

In its opinion the Supreme Court stated that the most important question raised upon the record was the validity of the action of the Board of Supervisors, sitting as a Board of Equalization, in raising the assessment upon eight of the group of sixty-five claims originally assessed *en masse*. After stating the minutes of the Board's action the court quotes § 2654 of the Revised Statutes of 1887 (p. 209):

". . . The board of equalization shall have power to determine whether the assessed value of any property is too small or too great, and may change and correct any valuation, either by adding thereto or deducting there-

from, if the sum fixed in the assessment-roll be too small or too great, whether said sum was fixed by the owner or the assessor; . . . and the clerk of the board of equalization shall note upon the assessment-roll all changes made by the board. During the session of the board of equalization the assessor shall be present, and also any deputy whose testimony may be required by the parties appealing to the board, and they shall have the right to make any statement touching such assessment, and producing evidence relating to questions before the board, and the board of equalization shall make use of all other information that they can gain otherwise, in equalizing the assessment-roll of the county, and may require the assessor to enter upon such assessment-roll any other property, which has not been assessed; and the assessment and equalization so made shall have the same force and effect as if made by the assessor before the delivery of the assessment-roll to (by) him by (to) the clerk of the board of equalization. . ."

The court said (p. 212):

"It is apparent from an examination of this roll [the duplicate assessment roll] that there are in effect two assessments for the same year against each of the eight claims raised. One, an assessment, commingles with that of sixty-four other claims, *en bloc;* the other, separate and distinct. This is no mere irregularity. The legality of the original assessment as an entirety has been sustained solely upon the ground that the property was so returned by the taxpayer. The board disregarded such return, and the validity of its action must be determined under the statute alone. It might be argued successfully that had the board of supervisors raised the assessment upon the group, such a raise would have been valid. But the board segregated from the group certain claims, and imposed thereon an additional assessment. It is a fundamental rule of taxation in this territory that a taxpayer may pay

upon any one of parcels separately assessed, discharging the lien thereon, without paying upon the remainder. Rev. Stats., 1887, par. 2676.

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"By the action of which complaint is made here, the board deprived the appellee of this right. Upon the raise being made it had the legal right to determine upon which, if any, of the claims so raised it would pay. If it determined to pay upon none, it was nevertheless obliged to pay a portion of the tax thereon if it exercised its right to pay upon the fifty-seven claims remaining, for the tax collector, under paragraph 2676, *supra* (reënacted, paragraph 3900, Revised Statutes of 1901), could not receive the tax upon less than the entire sixty-five claims, that being the least subdivision appearing on the assessment-roll. If it determined to pay upon one or more of the eight so raised, and to abandon the remainder, it would have to pay the tax upon the raise, together with the tax upon the entire sixty-five claims as originally assessed. The undisputed testimony discloses that these claims were non-contiguous, in instances which would have invalidated an original assessment, except for the return. The board in raising this assessment disregarded the original classification, which has been held good as against the appellee solely by reason of its return. The board of supervisors, sitting as a board of equalization, had no power under paragraph 2654 of the Revised Statutes of 1887 to segregate, from a tract of land returned and assessed as one parcel, a portion thereof and impose thereon an additional assessment, without first determining that such tract was improperly assessed as a whole, and causing such tract to be re-assessed and raised in subdivisions in such manner as to preserve the right of the taxpayer to discharge the lien of taxes upon such of the several separate tracts as he might elect."

It is evident that in reaching this conclusion the Su-

preme Court based its decision upon its construction of the statute in this respect. In exercising appellate jurisdiction over the territorial courts, where the construction placed upon a statute of the Territory by the highest court thereof is brought in question, this court has frequently held that it will not reverse the action of the territorial court except in cases where manifest error in such construction appears. *Straus* v. *Foxworth*, 231 U. S. 162; *Phœnix Railway Co.* v. *Landis*, 231 U. S. 578; *Work* v. *United Globe Mines*, 231 U. S. 595. Applying this rule we are not prepared to say that there was manifest error in the conclusion reached by the Supreme Court in construing the statute. Indeed, the appellant in its brief filed in this case extracts from its motion for rehearing in the court below and prints as a part of its argument a statement to the effect that it is convinced that the board could not lawfully segregate the eight claims from the mass and raise the valuation separately, there being no separate assessment originally; but it contends that the value of the whole tract is equal to all its parts, so that when the value of a part is raised it merely increases the aggregate value of the whole tract. We are not prepared to say that the Arizona Supreme Court erred in its conclusion concerning what the Board actually did. The original assessment as the finding shows, contains a return of sixty-five mining claims, naming them as 636 acres of land. There was no separate statement of the amount of acreage in any one claim. The claims were not described except by name, and that as a part of the 636 acres returned as a whole. The Supreme Court found, and we think correctly, that the reassessment picked out eight claims by name and raised the valuation of each by a given sum.

It is further contended by the appellant that certain things have happened as set forth in the findings which amount to an estoppel upon the appellee from denying

the right to have a lien charged, as claimed in this proceeding, upon specific property and to have the lien enforced by the sale of the specific lot or tract covered by it. The statute (part of which is quoted in the margin [1]) is a peculiar one and is said to have been adopted from the statutes of Missouri. It provides for a civil action against the owners of the property, to the end that a lien be charged upon land the taxes on which have become delinquent and that such lien be foreclosed. In Missouri it has been decided that no personal judgment shall be rendered in the proceedings against the owner of the property, nor any execution issue except upon the property charged with the tax. *State ex rel. Rosenblatt* v. *Sargeant*, 76 Missouri, 557; *State ex rel. Hayes* v. *Snyder*, 139 Missouri, 549. And the Supreme Court of the Territory of Arizona held that the construction of the statute by the court of last resort of Missouri was binding upon it.

In such a proceeding it is difficult to see how the principles of estoppel because of the description of the land made by the owner in returning the property or the payment of taxes, as appears from the finding in this case, could have application. Estoppel ordinarily proceeds upon principles which prevent one from denying the truth of statements upon which others have acted where the denial would have the effect to mislead them to their prejudice. In this case the Territory is undertaking to

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[1] The judgment, if against the defendant, shall describe the land upon which the taxes are found to be due, shall state the amount of taxes and interest found to be due upon each tract or lot, and the year or years for which the same are due, up to the rendition thereof, and shall decree that the lien of the Territory be enforced, and that the real estate, or so much thereof as may be necessary to satisfy such judgment, interest and costs, be sold, and execution shall be issued thereon, which shall be executed as in other cases of judgment and execution, and said judgment shall be a first lien upon said land. Laws of 1903, pp. 148, 153, Act No. 92, § 88.

collect its revenues by certain statutory proceedings duly provided for that purpose, and it would seem to be elementary that such enforcement of collection must depend upon a valid assessment as its basis, and this again was the holding in Missouri. *City of Hannibal ex rel. Bassen* v. *Bowman*, 98 Mo. App. 103; *State ex rel. Morris* v. *Cunningham*, 153 Missouri, 642. The fact that the taxpayer furnished the list of mining claims which included those upon which increased assessments had been made and thereby acknowledged the ownership of the property by the description stated, would not permit the Board, if authority was wanting, to increase the assessment upon a part of the property by picking out certain claims only, as was done in this case. If for such action the assessment was void, the description furnished by the property owner could not supply the defect. *State ex rel. Flentge* v. *Burrough*, 174 Missouri, 700, 707. Nor do we think there is substance in the claim that the payment made by the appellee estopped it from contesting the lien sought to be imposed in this case. The finding of facts sets forth specifically the payment of the sum of $14,133.12 and of the further sum of $9,589.20 as a condition for granting the injunction in the original suit brought by the appellee in the District Court; and the finding shows that the payment of the sum of $14,133.12 was "on account of any moneys which might ultimately be determined as due from said company for its tax for said year," and that the sum of $5,661.44 was paid on the attempted compromise which was subsequently held to be invalid. We do not find anything in these payments which upon principles of estoppel, or as an affirmation of the validity of the assessment, would prevent the appellee from contending against the legality of the action here in question

In the decision as made in the Supreme Court it was not found necessary to rule upon the attempted defenses based upon the arbitrary character of the assessment, nor

the fact that it was in excess of the cash value of the property. The conclusion which we have reached renders it unnecessary for us to pass upon the findings in this respect, which, notwithstanding the decision in the court below, are placed in the special findings upon which the case is sent here.

Nor do we need to pass upon the alleged violation of the equality protection of the Constitution in the finding that other patented mining claims in Cochise County at the time of the assessment in 1901 were assessed as a rule at the uniform rate of $5.00 per acre. Nor need we consider the ground upon which the Supreme Court of Arizona seems to have acted in part that the assessment rolls and tax book varied from the complaint in the description of the property.

It follows that the judgment of the Supreme Court of the Territory of Arizona must be affirmed.

BOSTON AND MAINE RAILROAD *v.* HOOKER.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 121. Argued December 10, 11, 1913.—Decided April 6, 1914.

Congress, by the Hepburn Act and the Carmack amendment in 1906, has regulated the subject of interstate transportation of property by Federal law to the exclusion of the States to control it by their own policy or legislation. *Pennsylvania* v. *Hughes*, 191 U. S. 477, distinguished, having been decided prior to the passage of the Hepburn Act.

Knowledge of the shipper that the rate is based on value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Interstate Commerce Commission, and the effect of so filing the schedules makes the published rates binding upon shipper and carrier alike.

The limitation of liability of carriers for passengers' baggage is covered by the Interstate Commerce Act and the Carmack amendment to the Hepburn Act applies thereto as well as to liability for shipments of freight.

Under § 6 of the Interstate Commerce Act carriers must include in the schedules of rates filed regulations affecting passengers' baggage and the limitations of liability.

A provision in a tariff schedule that the passenger must declare the value of his baggage and pay stated excess charges for excess liability over the stated value to be carried free, is a regulation within the meaning of §§ 6 and 22 of the Interstate Commerce Act and as such is sufficient to give the shipper notice of the limitation.

In construing a statute, the practical interpretation given to it by the administrative body charged with its enforcement is entitled to weight.

The effect of permitting the carrier to file regulations as to passengers' baggage which limit its liability except on payment of specified rates is not to change the common law rule that the carrier is an insurer against its own negligence but simply that the carrier shall obtain commensurate compensation for the responsibility assumed.

Where charges for full liability as specified in the published tariff are unreasonable, they can only be attacked before the Interstate Commerce Commission.

Congress is familar with the customs of travelers including that of checking baggage; and so *held* that a baggage check is sufficient compliance as to passengers' baggage with the provision in the Carmack amendment for issuing a receipt or bill of lading for the shipment.

If the subject needs regulation it is within the power of the Interstate Commerce Commission, under §§ 1 and 15 of the Act of June 18, 1910, to make requirements as to checks or receipts to be given for baggage by common carriers.

209 Massachusetts, 598, reversed.

THE facts, which involve the construction of the Car-

mack Amendment to the Hepburn Act and the right of a common carrier which has filed schedules containing regulations as to passengers' baggage to limit its liability for loss of such baggage caused by its own negligence to the extent and in the manner specified in the schedules, are stated in the opinion.

Mr. Frederick N. Wier, with whom *Mr. Edgar J. Rich* was on the brief, for plaintiff in error:

Congress has assumed exclusive jurisdiction of the subject-matter in issue thereby making the determination of the effect and validity of the baggage regulations of the plaintiff in error a Federal question.

Rates, parts of rates, and regulations affecting or determining rates, fares, and charges, or the value of the service rendered, have the force of law and therefore enter into and become a part of all contracts for interstate transportation.

The regulations contained in the schedules of the railroad company providing for carrying 150 pounds of personal baggage not exceeding $100 in value free for each passenger on presentation of a full ticket and specifying rates for excess value, have the force of law.

Such regulations are not void as being contrary to the common law or as against public policy or in violation of any Federal statute.

The reasonableness of the regulations is not in issue.

The regulations do not offend any principle of common law or public policy.

The regulations are not in violation of any Federal statute.

Such regulations are a part of the rates, and are regulations affecting or determining rates, fares, and charges, or the value of the service rendered, and when contained in

the schedules of the plaintiff in error had the force of law and entered into and became a part of the contract with defendant in error.

The regulations affected and determined rates, fares, and charges.

The regulations affected and determined the value of the service rendered.

Upon the ground of estoppel the limit of liability is $100 and would be even if the regulations of the railroad company were confined to the first paragraph.

In support of these contentions, see *Adams Ex. Co.* v. *Croninger*, 226 U. S. 491; *Andrews* v. *Andrews*, 188 U. S. 14; *Alair* v. *North Pacific R. R.*, 53 Minnesota, 160; *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Bernard* v. *Adams Exp. Co.*, 205 Massachusetts, 254; *Blumantle* v. *Fitchburg R. R.*, 127 Massachusetts, 322; *Chicago & Alton Ry. Co.* v. *Kirby*, 225 U. S. 155; *Fourth Nat. Bank* v. *Olney*, 63 Michigan, 58; *Hammond* v. *Whittredge*, 204 U. S. 538; *Hart* v. *Penn. R. R. Co.*, 112 U. S. 331; *Hoeger* v. *Chi., Mil. & St. P. Ry. Co.*, 63 Wisconsin, 100; *Re Released Rates*, 13 I. C. C. 550; *Jordan* v. *Massachusetts*, 225 U. S. 167; *Kansas City Ry. Co.* v. *Carl*, 227 U. S. 639; *Louis. & Nash. Ry.* v. *Motley*, 219 U. S. 467; *Mo., Kan. & Tex. Ry. Co.* v. *Harriman*, 227 U. S. 657; *N. Y. C. & H. R. R. R. Co.* v. *Fraloff*, 100 U. S. 531; *N. Y., N. H. & H. R. R.* v. *Int. Com. Comm.*, 200 U. S. 361; *Polleys* v. *Black River Imp. Co.*, 113 U. S. 81; *Squire* v. *N. Y. C. R. R. Co.*, 98 Massachusetts, 239; *Stanley* v. *Schwalby*, 162 U. S. 255; *Tex. & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Tex. & Pac. Ry. Co.* v. *Mugg*, 202 U. S. 242; *Wells, Fargo & Co.* v. *Neiman-Marcus Co.*, 227 U. S. 469; *York Co.* v. *Central R. R.*, 3 Wall. 107.

Mr. Samuel Williston for defendant in error:

The carrier and its agents, having received possession of the goods, were charged with the duty of delivering them

or explaining why that had not been done. *Galveston Ry. Co.* v. *Wallace*, 223 U. S. 481, 492.

There is no question involved of the limits of Federal and state laws.

By the rule of the common law a limitation of liability was invalid unless a special contract was made by which the shipper agreed thereto, or unless the shipper was estopped by misrepresentation. *Brown* v. *Eastern R. R.*, 11 Cush. 97; *Malone* v. *Boston & Worcester R. R.*, 12 Gray, 388; *Graves* v. *Adams Exp. Co.*, 176 Massachusetts, 280; *John Hood Co.* v. *Am. Pneumatic Co.*, 191 Massachusetts, 27; *The Majestic*, 166 U. S. 375; *Henderson* v. *Stevenson*, L. R. 2 H. L. (Sc.) 470, 481.

There can be no limitation of liability without the assent of the shipper. *Cau* v. *Texas & Pacific Ry. Co.*, 194 U. S. 427, 431; *N. J. Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 344.

The law in the absence of special contract fixes the degree of care and diligence due from the railroad company to persons carried on its trains. *York Co.* v. *Central Railroad*, 3 Wall. 107; *Railroad Co.* v. *Lockwood*, 17 Wall. 357; *Hart* v. *Pennsylvania R. R.*, 112 U. S. 331, 343; *Liverpool Steam Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397, 441, 442; *Saunders* v. *Southern Railway*, 128 Fed. Rep. 15.

Similar decisions have been made in recent years in precisely the same manner as before the passage of the Interstate Commerce Acts. *Williams* v. *Central R. R. Co.*, 183 N. Y. 518; *S. C.*, 93 N. Y. App. Div. 582; *Martin* v. *Central R. R. Co.*, 121 N. Y. App. Div. 552; *Homer* v. *Oregon Short Line*, 128 Pac. Rep. 522; *Black* v. *Atlantic Coast Line*, 82 So. Car. 478; Elliott on Railroads (4th ed.), § 1510; Hutchinson on Carriers (3d ed.), §§ 401, 405; *Pennsylvania R. R.* v. *Hughes*, 191 U. S. 477; *Adams Express Co.* v. *Green*, 112 Virginia, 527.

A few States have upheld to its full extent a contract of valuation or limiting liability, but have also held that

no merely formal assent can be inferred from accepting a bill of lading or a receipt without actual knowledge of its contents, and without the shipper's attention being called by the carrier to the limitation, though an agreement made with full knowledge of the situation would bind the shipper. See Hutchinson, Carriers (3d ed.), § 410; *Plaff* v. *Pacific Exp. Co.*, 251 Illinois, 243; *Hill* v. *Adams Exp. Co.*, 82 N. J. L. 373; *Wichern* v. *U. S. Exp. Co.*, 83 N. J. L. 241.

The ground upon which the validity of a limitation upon a recovery for loss or damage due to negligence depends is that of estoppel. *Wells, Fargo & Co.* v. *Neiman-Marcus Co.*, 227 U. S. 469, 476; *Kansas City So. Ry. Co.* v. *Carl*, 227 U. S. 639, 651. *Adams Express Co.* v. *Croninger*, 226 U. S. 491, distinguished.

While in Massachusetts it has been the law that the acceptance of a document binds one who receives it, though he may not choose to read it, as held in *Grace* v. *Adams*, 100 Massachusetts, 505; *Grinnell* v. *West. Un. Tel. Co.*, 113 Massachusetts, 299; *Hoadley* v. *Nor. Transp. Co.*, 115 Massachusetts, 304; *Clement* v. *West. Un. Tel. Co.*, 137 Massachusetts, 463; *Graves* v. *Adams Exp. Co.*, 176 Massachusetts, 280, and see *Cau* v. *Tex. & Pac. Ry. Co.*, 194 U. S. 427, 431, it has also been the law both of this court and of the Massachusetts court that a public notice of an asserted limitation by the carrier, even though the shipper was aware of it (which was not the fact in the case at bar), does not have the effect of an agreement or representation. Some actual assent is necessary. *N. J. Steam Nav. Co.* v. *Merchants' Bank*, 6 Howard, 344, 382; *Railroad Co.* v. *Manufacturing Co.*, 16 Wall. 318, 328; *Judson* v. *West. R. R. Corp.*, 6 Allen, 486, 491; *Buckland* v. *Adams Exp. Co.*, 97 Massachusetts, 124, 131. See also 1 Hutchinson on Carriers, 3d ed., § 406; *Henderson* v. *Stevenson*, L. R. 2 H. L. (Sc.) 470; *Richardson* v. *Rowntree* (1894), A. C. 217; *Parker* v. *Southeastern Ry. Co.*, 2 C. P. D. 416.

A limitation of liability is not a rate. It is a limitation or diminution of the service, agreed to generally in order to secure a lower rate. The carrier's reward ought to be proportionate to the risk. *Kansas City So. Ry. Co.* v. *Carl*, 227 U. S. 639, 650; *Railroad Co.* v. *Fraloff*, 100 U. S. 24, 27.

The *Carl Case* is not to be understood as meaning that a limitation of liability or the valuation on which such a limitation is based is literally part of the rate itself. *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 509; *Bernard* v. *Adams Exp. Co.*, 205 Massachusetts, 254, 259.

It is a contract as to what the property is in reference to its value. The only ground upon which the limitation can stand is that it was filed as part of the rate. Estoppel can in no way enlarge or diminish or in any way affect a filed rate. *Wells, Fargo & Co.* v. *Neiman-Marcus Co.*, 227 U. S. 469, 475; *Kansas City So. Ry. Co.* v. *Carl*, 227 U. S. 639, 651.

The amendments to the Interstate Commerce Act in 1906 did not change the law either as to what a rate is or what the effect is of a rate duly filed. Whatever is now binding as a rate upon a shipper was binding before 1906. *The Majestic*, 166 U. S. 375; *Cau* v. *Tex. & Pac. Ry. Co.*, 194 U. S. 427, 431; *Saunders* v. *Southern Ry.*, 128 Fed. Rep. 15; *Chi., Mil. &c. Ry. Co.* v. *Solan*, 169 U. S. 133; *Pennsylvania R. R.* v. *Hughes*, 191 U. S. 477.

A limitation of liability in any form except by contract or a representation by the shipper has never been permitted by the law. The attempt to escape from this rule of the common law is as ineffectual as the attempt to escape the statutory liability cast upon an initial carrier by the Carmack Amendment, which was held futile in *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186; *Galveston &c. Ry. Co.* v. *Wallace*, 223 U. S. 481; *Norf. & West. Ry. Co.* v. *Dixie Tobacco Co.*, 228 U. S. 593.

A limitation of liability is not within the meaning of the

words "Rule, Regulation, or Practice." *Curry* v. *Marvin*, 2 Florida, 411, 415; *In re Leasing of State Lands*, 18 Colorado, 359; *Martin* v. *Cent. R. R. Co.*, 121 N. Y. App. Div. 552, 553. *Railroad Company* v. *Fraloff*, 100 U. S. 24, 27, distinguished.

A regulation which needs the assent of the person who is to be regulated as a condition of its efficacy is not properly called a regulation. It is not even an offer, until brought to the knowledge of the person to whom it is addressed.

There is no provision for the filing of contracts with shippers and no method of making them public defined in the statute. *Armour Packing Co.* v. *United States*, 209 U. S. 56, 81; *Louis. & Nash. Ry.* v. *Mottley*, 219 U. S. 467, 479.

The fact that a proposed limitation of a carrier's liability must be filed as part of the tariff does not involve the conclusion that all shippers thereupon become bound by the limitation. *Wehmann* v. *Minneapolis Ry. Co.*, 58 Minnesota, 22, 29; *Mannheim Ins. Co.* v. *Erie &c. Transp. Co.*, 72 Minnesota, 357.

The passenger was not chargeable with constructive assent to the asserted limitation of liability.

A law or a statute is binding, whether persons subject to the law are aware of it or not. A rate duly filed is unquestionably equally binding; but shippers are not conclusively presumed to know it. *Kansas City So. Ry. Co.* v. *Carl*, 227 U. S. 639, 652; *Pennsylvania R. R. Co.* v. *Int. Coal Co.*, 230 U. S. 184, 197; *Potter* v. *United States*, 155 U. S. 438; *Standard Oil Co.* v. *United States*, 164 Fed. Rep. 376; *Standard Oil Co.* v. *United States*, 179 Fed. Rep. 614; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 85.

There is no estoppel barring defendant in error from showing the value of her baggage. *Kansas City So. Ry. Co.* v. *Carl*, 227 U. S. 639, 651; *Matter of Released Rates*, 13 I. C. C. 550

Judicial decisions do not support the construction of the statute contended for by the plaintiff in error.

Although a shipper has no redress because a rate is unreasonable, except by the direct proceedings allowed by the act, *Tex. & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Robinson* v. *Balt. & Ohio R. Co.*, 222 U. S. 506; *Pennsylvania R. R. Co.* v. *Int. Coal Co.*, 230 U. S. 184; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247, and the unreasonableness of a rule, regulation, or practice of a carrier must be objected to in the same way, *Balt. & Ohio R. R.* v. *United States*, 215 U. S. 481; *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304, an assertion contained in the tariff, even if made in terms (as it was not), that the passenger does make such an agreement, still less an assertion that liability is limited, unless a contract is made, is neither a rate, a rule, a regulation, or a practice, and the question of its reasonableness can be raised in the courts. *Adams Exp. Co.* v. *Croninger*, 226 U. S. 491; *Chi., B. & Q. Ry. Co.* v. *Miller*, 226 U. S. 513; *Chicago, St. Paul &c. Ry. Co.* v. *Latta*, 226 U. S. 519; *Wells, Fargo & Co.* v. *Neiman-Marcus Co.*, 227 U. S. 469; *Kansas City Ry. Co.* v. *Carl*, 227 U. S. 639; *Mo., Kans. & Tex. Ry. Co.* v. *Harriman*, 227 U. S. 657, do not conflict with this; and see *Bernard* v. *Adams Exp. Co.*, 205 Massachusetts, 254; *Greenwald* v. *Barrett*, 199 N. Y. 170.

There is no discrimination between different travellers involved in the decision of the Massachusetts court. *Chicago & Alton R. R.* v. *Kirby*, 225 U. S. 155; *Kansas City So. Ry. Co.* v. *Carl*, 227 U. S. 639, 653. *Tex. & Pac. R. R. Co.* v. *Mugg*, 202 U. S. 242; *Gulf &c. R. R. Co.* v. *Hefley*, 158 U. S. 98, distinguished. And see *Merchants Press Co.* v. *Insurance Co.*, 151 U. S. 368, 388; *Judge* v. *Nor. Pac. Ry. Co.*, 189 Fed. Rep. 1014.

The consequences of upholding the contention of the plaintiff in error show that the contention must be erroneous. *Matter of Released Rates*, 13 I. C. C. 550.

The schedules filed make the defendant in error liable for the excess charge for value and the railroad liable for the full value of the baggage. *Matter of Released Rates*, 13 I. C. C. 550; *Kansas City So. Ry. Co.* v. *Carl*, 227 U. S. 639, 650.

There is no hardship upon the carrier in the decision below. The obligation imposed by that decision is no greater than that which everywhere existed prior to the passage of the Interstate Commerce Acts, and still exists as to intrastate shipments. *York County* v. *Central Railroad*, 3 Wall. 107, 113; *Squire* v. *N. Y. Central R. R.*, 98 Massachusetts, 239, 248; *Hill* v. *Boston &c. Railroad Co.*, 144 Massachusetts, 284.

The rule of the common law has not been changed in regard to such a case as the present. *Adams Exp. Co.* v. *Croninger*, 226 U. S. 491, 511; *Greenwald* v. *Barrett*, 199 N. Y. 170, 175; *Bernard* v. *Adams Exp. Co.*, 205 Massachusetts, 254, 259.

The statute does not diminish the liability for negligence imposed on the carrier by the common law. Such liability may be enforced in the state courts. *Louis. & Nash. R. R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70.

Mr. Justice Day delivered the opinion of the court.

Katharine Hooker brought an action in the Superior Court of Middlesex County, Massachusetts, to recover from the Boston & Maine Railroad as a common carrier on account of the loss of certain baggage belonging to her, which had been transported by the defendant in interstate commerce from Boston, Massachusetts, to Sunapee Lake station, New Hampshire, on September 15, 1908. The plaintiff recovered a judgment for the value of the baggage lost with interest. The case was taken to the Supreme Judicial Court of Massachusetts upon exceptions of the defendant, and upon its rescript, returned to the

Superior Court overruling the exceptions (209 Massachusetts, 598), judgment was there entered for the plaintiff for $2,253.77.

The defendant insists that the recovery of the plaintiff should have been limited to the sum of $100, in view of certain requirements made by it concerning the transportation of baggage and filed with the Interstate Commerce Commission. From the findings of fact it appears that the baggage was checked upon a first class ticket purchased for the plaintiff (although not used by her, she traveling upon another similar ticket purchased by herself); that at the time the baggage was checked the plaintiff had no notice of the regulations hereinafter referred to limiting the liability of the defendant (further than such notice is to be presumed from the schedules filed and posted as hereinafter stated); that no inquiry was made by the defendant on receiving the plaintiff's baggage as to its value; that there was no evidence that any more expensive or different mode of transportation was adopted for baggage the value of which was declared to exceed $100 than for other baggage; that any reasonable person would infer from the outward appearance of the plaintiff's baggage when tendered to the defendant for transportation that the value largely exceeded $100, and that the loss of plaintiff's baggage was due to the negligence of defendant.

The court further found that previous to and during September, 1908, the defendant had published and kept open for inspection and filed with the Interstate Commerce Commission, in accordance with the act of Congress relating to interstate commerce and amendments thereto and the orders and regulations of the Commission, schedules giving the rates, fares and charges for transportation between different points, including Boston and Sunapee Lake station, all terminal, storage and other charges required by the Commission, all privileges and facilities granted or allowed, and all rules or regulations

which in any way affected or determined such rates, fares and charges or the value of the service rendered to passengers; that during the same time, in accordance with an order of the Commission of June 2, 1908, making comprehensive regulations as to rate and fare schedules, the defendant had placed with its agent in Boston all rate and fare schedules and the terminal and other charges applicable to that station, and had enabled and required him to keep in accessible form a file of such schedules, and had instructed him to give information contained therein to all seeking it and to afford to inquirers opportunity to examine the schedules, and that the defendant in the manner shown and in all other ways conformed to the acts of Congress and the orders and regulations of the Commission with reference to such schedules. The court also found that the schedules contained provisions limiting the free transportation of baggage to a certain weight and the liability of the defendant to $100, followed by a table of charges for excess weight, and also contained the following provision:

"For excess value the rate will be one-half of the current excess baggage rate per one hundred pounds for each one hundred dollars, or fraction thereof, of increased value declared. The minimum charge for excess value will be 15 cents.

"Baggage liability is limited to personal baggage not to exceed one hundred dollars in value for a passenger presenting a full ticket and fifty dollars in value for a half ticket, unless a greater value is declared and stipulated by the owner and excess charges thereon paid at time of taking the baggage" (p. 600); that the excess charge for transporting baggage valued at $1,904.50 which was the value of the baggage lost, from Boston to Sunapee Lake station during September, 1908, according to the schedules, was $4.75; that notices were posted at or near the offices where passengers' tickets were sold in the Boston

station stating that tariffs naming the rates on interstate traffic were on file with the agent and would be furnished for inspection upon application, and that notices were posted in the baggage room of that station, in a conspicuous place and in sight of persons using the room for checking baggage, reading that personal baggage not exceeding $100 in value would be checked free for each passenger on presentation of a first class ticket and containing information with reference to excess weight. And the court further found that the plaintiff did not declare at the time her baggage was checked that it exceeded $100 in value and did not pay any charges for valuation in excess of that amount.

It is to be borne in mind that the action as tried and decided in the state court was not for negligence of the Railroad Company as a warehouseman for the loss of the baggage after its delivery at Sunapee Lake station, but was solely upon the contract of carriage in interstate commerce.

The Supreme Judicial Court of Massachusetts, in deciding the case, held that the Interstate Commerce Act did not in any wise change the common law rule, applicable in Massachusetts, that regulations of this character, limiting the amount of recovery for baggage lost, must be brought home to the knowledge of the shipper and assented to or circumstances shown from which assent might be implied. In reaching this conclusion that learned court relied upon the case of *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477, in which case it was held that a State might apply its local law and policy to recovery for the loss of a horse shipped in interstate commerce from Albany, New York, to Cynwyd, in the State of Pennsylvania, and injured by the negligence of a carrier in the latter State, notwithstanding the bill of lading contained an express condition that the carrier assumed liability to the extent only of the agreed valuation in event of loss.

It was further held in the *Hughes Case* that the Interstate Commerce Act, in the respect then under consideration, had not enacted an exclusive rule upon which recovery might be had governing responsibility for loss, and that as the law then stood the State might enforce its own regulations authorized by statute or judicial decision as to responsibility for such negligence.

Since the decision in the *Hughes Case* the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, has been passed, and this court has held that by virtue of that act (particularly § 20, the Carmack Amendment) the subject of interstate transportation of property has been regulated by Federal law to the exclusion of the power of the States to control in such respect by their own policy or legislation. In this connection we may refer to the cases of *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Wells, Fargo & Co.* v. *Neiman-Marcus Co.*, 227 U. S. 469; *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639; *Missouri, Kansas & Texas Ry. Co.* v. *Harriman*, 227 U. S. 657.

The cases in 226 and 227 U. S., it is true, involved liability for express or freight shipments made upon express receipts, bills of lading or separate contracts, showing on their face or by reference to tariffs the opportunity for valuation for the purpose of fixing the rate and liability, and the limitation appearing in such form of contract was declared to be valid and effectual to relieve the carrier from a greater liability than that therein expressed. But the court did not stop there: In *Adams Express Co.* v. *Croninger*, *supra*, p. 509, it said: "The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission." In *Kansas City Southern Ry. Co.* v. *Carl*, *supra*, p. 652, this court said: "The valuation the shipper declares determines the legal rate where there are two rates based upon valuation. He must take notice of the rate applicable,

and actual want of knowledge is no excuse. The rate when made out and filed, is notice, and the effect is not lost, although it is not actually posted in the station. *Texas & Pacific Railway* v. *Mugg*, 202 U. S. 242; *Chicago & Alton Ry.* v. *Kirby*, 225 U. S. 155. It would open a wide door to fraud and destroy the uniform operation of the published tariff rate sheets. When there are two published rates, based upon difference in value, the legal rate automatically attaches itself to the declared or agreed value. Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. . . (p. 654). To the extent that such limitations of liability are not forbidden by law, they become, when filed, a part of the rate." And in *Missouri, K. & T. R. Co.* v. *Harriman, supra*, this court said that the shipper was compelled to take notice of the rate sheets contained in tariff schedules, (p. 669), "not only because referred to in the contract signed by them, but because they had been lawfully filed and published. . . (p. 671) When the carrier graduates its rates by value and has filed its tariffs showing two rates applicable to a particular commodity or class of articles, based upon a difference in valuation, the shipper must take notice, for the valuation automatically determines which of the rates is the lawful rate." In *Chicago, R. I. & P. Ry. Co.* v. *Cramer*, 232 U. S. 490, this court said, p. 493: "That rule of liability [the uniform rule established by the Hepburn Act] 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." And in *Great Northern Ry. Co.* v. *O'Connor*, 232

U. S. 508, this court said: "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."

Before these cases were decided this court had held that the effect of filing schedules of rates with the Interstate Commerce Commission was to make the published rates binding upon shipper and carrier alike, thus making effectual the purpose of the act to have but one rate, open to all alike and from which there could be no departure. *Gulf, Colorado and Santa Fe Ry.* v. *Hefley*, 158 U. S. 98; *Texas & Pac. Ry. Co.* v. *Mugg*, 202 U. S. 242; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 81; *Louis. & Nash. R. R.* v. *Mottley*, 219 U. S. 467, 476. This principle it will be perceived was fully recognized in the series of cases decided since the passage of the Hepburn Act, beginning with the case of *Adams Express Co.* v. *Croninger*, *supra*. It is true that the Carmack Amendment requires a receipt or bill of lading to be issued concerning shipments of property in interstate commerce and that in the cases construing that amendment a bill of lading was issued, and according to the circumstances of the case the bill of lading and its effect are discussed in each of these, but the

effect of filing the schedule is not lost sight of and the doctrine of the previous cases as to the purpose of filing and the necessity of adherence to such schedule is uniformly recognized.

The court below, after conceding that the subject-matter of passenger's baggage in interstate travel is within the control of Congress, and saying that there was no specific regulation respecting it, said (p. 602):

"The precise position of the defendant is that as the limitation of liability for baggage was filed and posted as a part of its schedules for passenger tariff, the limitation thereby became and was an essential part of its rate, from which under the interstate commerce law it could not deviate, and by which the plaintiff was bound, regardless of her knowledge of or assent to it. If the premise is sound, then the conclusion follows, for the public are held inexorably to the rate published, regardless of knowledge, assent or even misrepresentation. *Gulf, Colorado & Santa Fe Railway* v. *Hefley*, 158 U. S. 98. *Texas & Pacific Railway* v. *Mugg*, 202 U. S. 242. *Melody* v. *Great Northern Railway*, 25 So. Dak. 606."

It follows therefore, from the previous decisions in this court, that if it be found that the limitation of liability for baggage is required to be filed in the carrier's tariffs, the plaintiff was bound by such limitation. Having the notice which follows from the filed and published regulations, as required by the statute and the order of the Interstate Commerce Commission, she might have declared the value of her luggage, paid the excess tariff rate and thus secured the liability of the carrier to the full amount of the value of her baggage, or she might, for the purpose of transportation, have valued it at $100 and received free transportation and liability to that extent only, or, as she did, she might have made no valuation of her baggage, in which event the rate and the corresponding liability would have automatically attached. As to the finding

that the plaintiff's baggage was apparently worth more than $100, as above set forth, it appears that the contents of the two trunks and suit case were not disclosed or known to the carrier, and the finding in this respect, necessarily based on the appearance of the baggage, cannot be said to show a procurement of transportation in violation of the requirements of the filed schedules at a rate disproportionate to its known value.

Let us now turn to the Interstate Commerce Act and see whether the matter of the limitation of baggage liability is covered by that act. Section 6 provides (as amended by § 2 of the Hepburn Act, June 29, 1906, c. 3591, 34 Stat. 584, 586):

"That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or

consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

* * * * * * * *

"No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. . . ."

It is to be observed that the schedules are required to state, among other things, in naming certain charges, "all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee." The question then is did the limitation as to liability for baggage based

upon the requirement to declare its value when more than $100 was to be recovered come within that provision.

It seems to us that the ordinary signification of the terms used in the act would cover such requirements as are here made for the amount of recovery for baggage lost by the carrier. It is a regulation which fixes and determines the amount to be charged for the carriage in view of the responsibility assumed, and it also affects the value of the service rendered to the passenger. Such requirements are spoken of, in decisions dealing with them, as regulations; as, a common carrier "may prescribe *regulations* to protect himself against imposition and fraud, and fix a rate of charges proportionate to the magnitude of the risks he may have to encounter." *York Co.* v. *Central R. R.*, 3 Wall. 107, 112. "It is undoubtedly competent for carriers of passengers, by specific *regulations*, distinctly brought to the knowledge of the passenger, which are reasonable in their character and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk. And in order that such *regulations* may be practically effective and the carrier advised of the full extent of its responsibility, and, consequently, of the degree of precaution necessary upon its part, it may rightfully require, as a condition precedent to any contract for the transportation of baggage, information from the passenger as to its value; and if the value thus disclosed exceeds that which the passenger may reasonably demand to be transported as baggage without extra compensation, the carrier, at its option, can make such additional charge as the risk fairly justifies." *Railroad Co.* v. *Fraloff*, 100 U. S. 24, 27.

Mr. Justice Brewer, sitting in the Circuit Court, in *Ames* v. *Union Pac. Ry. Co.*, 64 Fed. Rep. 165, 178, thus defined the term regulation: "Within the term 'regulation'

are embraced two ideas: One is the mere control of the operation of the roads, prescribing the rules for the management thereof,—matters which affect the convenience of the public in their use. Regulation, in this sense, may be considered as purely public in its character, and in no manner trespassing upon the rights of the owners of railroads. But within the scope of the word 'regulation,' as commonly used, is embraced the idea of fixing the compensation which the owners of railroad property shall receive for the use thereof; and when regulation, in this sense, is attempted, it necessarily affects the property interests of the railroad owners; and it is 'regulation' in this sense of the term."

Turning to the act itself we think the conclusion that this limitation is a regulation required to be filed by the act is strengthened by section 22 [1] which provides: ". . . But before any common carrier, subject to the provisions of this act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, *together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this act.*" This section would indicate that Congress thought that § 6 of the act had to do with specifications of the amount of baggage which would be carried free and that such regulations should be filed under the requirement of § 6 to which it referred.

This conclusion is further strengthened by the action of the Interstate Commerce Commission, in requiring by its Tariff Circular No. 15–A, entitled "Regulations Governing the Construction and Filing of Freight Tariffs and Classi-

[1] As amended by the Act of Feb. 8, 1895, c. 61, 28 Stat. 643.

fication and Passenger Fare Schedules," effective April 15, 1908, and in force at the time of the loss here in question, that:

"34. Tariffs shall contain, in the order named

"(g) Rules and regulations which govern the tariff, the title of each rule or regulation to be shown in bold type. Under this head all of the rules, regulations, or conditions which in any way affect the fares named in the tariff shall be entered. . . . These rules shall include . . . the general baggage regulations, and also schedule of excess-baggage rates, unless such excess-baggage rates are shown in tariff in connection with the fares."

This requirement is a practical interpretation of the law by the administrative body having its enforcement in charge, and is entitled to weight in construing the act.

The act of June 18, 1910 (c. 309, 36 Stat. 539, 546), defining, in § 1, the duties of carriers to make just and reasonable regulations affecting, among other things, the carrying of personal, sample and excess baggage, may be noted in passing. This statute was before the Commission in a case involving such regulations. Regulations Restricting the Dimensions of Baggage, 26 I. C. C. 292. Concerning it the Commission, by Clark, Chairman, said (p. 293):

"Prior to June 18, 1910, the act to regulate commerce contained no specific provision relating to the interstate transportation of baggage, except in connection with the issuance of joint interchangeable mileage tickets. The Commission had, however, under authority of section 6, required carriers to publish and file their general baggage regulations and their schedules of excess-baggage rates. Section 1 was amended on the date named, the amendment, in so far as it is material, reading as follows:

"It is hereby made the duty of all common carriers subject to the provisions of this act to establish, observe,

and enforce . . . just and reasonable regulations and practices affecting classifications, . . . the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, . . . the carrying of personal, sample, and excess baggage.'"

And it is to be observed that the Commission considers its requirement with reference to including baggage regulations in the tariff schedules, quoted above, as adequate, for the same provisions appear in its current circular.

We are therefore of the opinion that the requirement published concerning the amount of the liability of the defendant based upon additional payment where baggage was declared to exceed $100 in value was determinative of the rate to be charged and did affect the service to be rendered to the passenger, as it fixed the price to be paid for the service rendered in the particular case, and was, therefore, a regulation within the meaning of the statute.

By requiring the baggage regulations, including the excess valuation rate, to be filed and become part of the tariff schedules, the rule of the common law that the carrier becomes an insurer of the safety of baggage against accidents not the act of God or the public enemy or the fault of the passenger (the rule established in this country, 3 Hutchinson on Carriers, § 1241) was not changed. The effect of such filing is to permit the carrier by such regulations to obtain commensurate compensation for the responsibility assumed for the safety of the passenger's baggage, and to require the passenger whose knowledge of the character and value of his baggage is peculiarly his own to declare its value and pay for the excess amount. There is no question of the reasonableness or propriety of making such regulations, which would be binding upon the passenger if brought to his knowledge in such wise as

to make an agreement or what is tantamount thereto. This much is conceded by the learned counsel for the plaintiff in error. The liability of a carrier under the Interstate Commerce Act was said, in the *Croninger Case* (226 U. S. p. 511), to be (aside from the responsibility for the default of a connecting carrier) "not beyond the liability imposed by the common law as that body of law applicable to carriers has been interpreted by this court as well as many courts of the States." And in that case (p. 509) it was laid down as the established rule of common law "as declared by this court in many cases that such a carrier may by a fair, open, just and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk." And see the previous cases in this court there cited. But the effect of the regulations, filed as required, giving notice of rates based upon value when the baggage to be transported was of a higher value than $100, and the delivery and acceptance of the baggage without declaration of value or notice to the carrier of such higher value, charges the carrier with liability to the extent of $100 only.

The language of the regulation filed, reads: Baggage liability is limited to personal baggage not to exceed $100 in value, etc., unless a greater value is declared, etc. We have said that this limitation does not relieve from the insurer's liability when the loss occurs otherwise than by negligence, and we think applies equally when negligence of the carrier is the cause of loss, as is found in this case. The effect of the filing gives the regulation as to baggage the force of a contract determining "Baggage liability." In *Hart* v. *Pennsylvania R. R.*, 112 U. S. 331, 341, followed in the later cases in this court, it was held that a recovery may not be had above the amount stipulated though the loss results from the carrier's negligence. "The carrier

must respond for negligence up to that value." The discussion and conclusion reached in the *Croninger* and *Carl Cases*, *supra*, leave nothing to be said on this point. This rule is recognized in New York, *Tewes* v. *North German Lloyd S. S. Co.*, 186 N. Y. 151; *Gardiner* v. *N. Y. Central & H. R. R. R.*, 201 N. Y. 387.

If the charges filed were unreasonable, the only attack that could be made upon such regulation would be by proceedings contesting their reasonableness before the Interstate Commerce Commission. While they were in force they were equally binding upon the railroad company and all passengers whose baggage was transported by carriers in interstate commerce. This being the fact, we think the limitation of liability to $100 fixed the amount which the plaintiff could recover in this case, and there was error in affirming the recovery for the full value of the baggage, in the absence of a declaration of such value and payment of the additional amount required to secure liability in the greater sum.

We do not think the requirement of the Carmack Amendment, that a railway company receiving property for transportation in interstate commerce shall issue a receipt or bill of lading therefor, required other receipts than baggage checks, which it is shown were issued when the baggage was received in this case. When the Amendment was passed Congress well knew that baggage was not carried upon bills of lading, and that carriers had been accustomed to issue checks upon receipt of baggage. We do not think it was intended to require a departure from this practice when the matter was placed under regulation by schedules filed and subject to change for unreasonableness upon application to the Commission. Such checks are receipts, and there is no special requirement in the statute as to their form. It is doubtless in the power of the Interstate Commerce Commission to make requirements as to the checks or receipts to be given for baggage if that

subject needs regulation. Act of June 18, 1910, §§ 1 and 15, c. 309, 36 Stat. 539.

Reversed and remanded to the Superior Court of Massachusetts for further proceedings not inconsistent with this opinion.

MR. JUSTICE PITNEY, dissenting.

I have been unable to find a previous instance where any court, in this country at least, in an action by shipper or passenger against common carrier for loss of freight or baggage occasioned by the negligence of the carrier or its employés, has held the recovery to be limited to an arbitrary sum unrelated to the value of the goods lost, and this without any previous valuation or agreement assented to by the shipper or passenger, without any representation of value made by him, and without even notice brought home to him of any rule or regulation upon which the limitation of liability is based. The effect given by the present decision to a "regulation" prescribed by the carrier, that while formally promulgated was in fact unknown to the passenger, seems to me an entire departure from the principles governing the duties and responsibilities of common carriers as heretofore recognized by this court and by the courts of the States generally, as laid down in the text-books and cyclopedias of law, and as reiterated and applied by this court in a recent series of notable decisions.

We are referred to the "Act to Regulate Commerce" of February 4, 1887, c. 104, 24 Stat. 379, as amended June 29, 1906 by the Hepburn Act, c. 3591, 34 Stat. 584, with citation of the provision in § 6 of the act respecting the filing and publication of schedules showing the rates, fares, and charges for transportation, etc., and with particular emphasis upon the so-called Carmack Amendment. I do not find in either of these any phrase or expression that manifests a legislative intent to lessen or limit in any way

the carrier's liability as *quasi*-insurer, much less its responsibility for losses due to its own negligence or that of its employés. Neither enactment in terms imposes any duty or burden upon the shipper or passenger affecting the question at issue; and the Carmack Amendment, at least, contains a clear expression of the legislative purpose to enforce the carrier's responsibility for losses of property caused by it, without regard to any rule or regulation exempting it.

The result reached in the present case—which seems so contrary to all previous adjudications and to the apparent meaning of the acts of Congress—is based (if I understand the opinion), not upon any legislation directly addressed to the particular subject, but upon inferences deduced by indirect reasoning from the assumed policy of the law. The reasoning, as I am constrained to believe, disregards familiar principles established by repeated decisions of this court, in the light of which Congress undoubtedly legislated; and it has the effect of placing honest but unskilled shippers and passengers at a serious disadvantage in dealing with common carriers, enabling the latter, by "regulations" never called to the attention of the former, to obtain practical immunity from responsibility for losses due to their own negligence.

The consequences are so serious that I have been unable to convince myself that I should acquiesce in silence.

The salient facts are mentioned in the opinion, but some are not noticed, and it is proper to state that plaintiff traveled, in September, 1908, as an interstate passenger upon defendant's train from Boston, Massachusetts, to Sunapee Lake, New Hampshire, having in fact paid two first-class fares, one ticket being used for the checking of her baggage, the other for her personal transportation. Defendant's schedules, filed with the Interstate Commerce Commission and published in the mode prescribed by the act of Congress, showed the rates of fares between

these places, and contained a provision stating that "One hundred and fifty pounds of personal baggage, not exceeding one hundred dollars in value will be checked free for each passenger on presentation of a full ticket. . . . For excess weight, charge will be made as follows [here was inserted a table of charges for excess weights, and at the foot of it the following]: For excess value, the rate will be one-half of the current excess baggage rate per one hundred pounds for each one hundred dollars, or fraction thereof, of increased value declared. The minimum charge for excess value will be 15 cents. Baggage liability is limited to personal baggage not to exceed one hundred dollars in value for a passenger presenting a full ticket . . . unless a greater value is declared and stipulated by the owner and excess charges thereon paid at time of checking the baggage." Plaintiff's baggage consisted of three pieces, of the value of $1,904.50, and the charge on this valuation for transportation from Boston to Sunapee Lake, according to the schedules, would have been 25c for each excess $100 or fraction thereof, or $4.75 in all. Plaintiff did not declare and stipulate at the time the baggage was checked that it exceeded $100 in value, and did not pay any charge for valuation in excess of that amount. Defendant's agents did not request any such declaration, and made no inquiry respecting value; but it is found as a fact that from the outward appearance of the baggage when tendered to defendant for transportation any reasonable person would have inferred that its value largely exceeded $100. There was nothing to show that any more expensive or different mode of transportation was adopted for baggage whose value was declared to exceed $100 than for other baggage. Nor was there anything to show that plaintiff, or her agent who attended to the checking of the baggage for her, had notice of defendant's regulations for limiting its liability. In the Boston passenger station notices were posted that "Freight

and passenger tariffs naming rates on interstate traffic are on file with the agent, and will be furnished for inspection upon application;" and in the baggage room was a notice that "One hundred and fifty pounds of personal baggage not exceeding one hundred dollars in value will be checked free for each passenger on presentation of a full ticket." There was nothing in either of these notices to call attention to any charge for excess value, nor any statement in terms that the baggage liability was limited to one hundred dollars. Nor was it shown that the notices themselves were ever seen by plaintiff or her agent. It appears, however, that because the weight of her baggage exceeded by forty-five pounds the weight allowable under the company's rules, a payment of twenty-three cents was made for checking the baggage. Ordinary numbered baggage checks appear to have been delivered to plaintiff's agent, but nothing else in the form of a receipt or bill of lading. The baggage was not lost in transit, but was destroyed by fire while in defendant's charge, more than twenty-six hours after its arrival at defendant's Sunapee Lake Station. It was distinctly found as a fact than the loss was due to defendant's negligence.

In the trial court, plaintiff relied wholly upon a count of her declaration which, after reciting the status of defendant as a common carrier and the contract of carriage in interstate commerce, averred as ground of recovery the neglect and refusal of defendant to deliver the baggage to plaintiff at Sunapee Lake upon demand made, accompanied with a tender of the checks. But the course of the trial shows that negligence was a principal issue, if not the only vital issue; both parties requested findings upon the question, and findings were made in response to their respective requests; and upon review the state Supreme Court treated negligence as the asserted ground of liability, saying (209 Massachusetts, 599): "The plaintiff, an interstate passenger of the defendant, claims

damages in excess of $2,000 for loss of her baggage occurring through the negligence of the defendant."

Although, according to the well known Massachusetts doctrine, the railroad company's responsibility strictly as carrier would seem to have terminated with the completion of the transit and the safe deposit of the baggage in the railroad station, its responsibility thereafter being that of warehouseman, (*Thomas* v. *Boston & Providence Railroad Corp.*, 10 Met. 472, 477; *Norway Plains Co.* v. *Boston & Maine Railroad*, 1 Gray, 263, 273; *Barron* v. *Eldredge*, 100 Massachusetts, 455, 459; *Lane* v. *Boston & Albany Railroad Co.*, 112 Massachusetts, 455, 462; *Stowe* v. *New York &c. Railroad Co.*, 113 Massachusetts, 521, 523; *Rice* v. *Hart*, 118 Massachusetts, 201, 207); the distinction appears to have been ignored by the Massachusetts court in discussing the case, perhaps because it does not affect the responsibility for a loss of goods attributable to negligence; there being in this respect no difference between a carrier and a warehouseman. But it might affect the question whether defendant's responsibility is to be determined in the light of the Interstate Commerce Act; and I concede that it is.

It is of course true that in *Adams Express Co.* v. *Croninger*, 226 U. S. 491, this court held that by the Carmack Amendment (34 Stat. 595, set forth in the margin,[1]) the

[1] "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

subject-matter of the liability of railroads under bills of lading issued for interstate freight is placed under Federal regulation so as to supersede the local law and policy of the several States, whether evidenced by judicial decision, by statute, or by state constitution.

And I concede that the Supreme Court of Massachusetts erred if it intended to hold that the carrier's responsibility for interstate passengers' baggage is not likewise within the sweep of the Amendment.

The concrete question, therefore, is whether under the Interstate Commerce Act and the Carmack Amendment this defendant's liability to plaintiff, upon the facts stated, is properly to be limited to one hundred dollars.

My views, in brief, are:

(a) That the baggage regulation limiting the liability to the amount named (if construed as operative without the knowledge or consent of the passenger, and in the absence of an actual valuation of the goods, assented to by the passenger), is not authorized or sanctioned by the Commerce Act, and is invalid because contrary to the established policy of the law governing the common carrier in the performance of its public duties, and because contrary to the letter and spirit of the Carmack Amendment.

(b) That the regulation had not received the approval of the Interstate Commerce Commission, but on the contrary was covered by an adverse administrative ruling made by the commission a few months before the occurrences that gave rise to this action.

(c) That, being invalid *per se*, the regulation derived no legal force or vitality from being included in the filed and published schedules.

(d) That the filing of the regulation cannot give it the force of a contract, because (1) plaintiff was ignorant of the regulation in fact; (2) to make it a part of her contract without her knowledge would render it a contract limiting

the carrier's liability for negligence to an arbitrary sum, without any agreement or representation of value on the part of plaintiff, and therefore void as being contrary to established public policy; and (3) the law will not raise by implication an agreement that is contrary to the policy of the law.

(e) That plaintiff is not estopped to recover the full value of her goods, for she was entirely free from blame in the matter, made no representation as to value and sought no special advantage.

(f) That even were the contract of carriage as actually made, invalid, this would not render the bailment unlawful, and (at least) the carrier would be responsible for the loss of the goods through negligence, irrespective of the contract.

(g) That by the terms of the Carmack Amendment the railroad company in this case is precluded from setting up a limitation of liability, (1) because the limitation, as asserted against a passenger who was ignorant of the regulation and had made no contract under it, amounts to a rule or regulation for exempting the carrier from liability for a loss of property caused by the carrier's negligence, contrary to the terms of the Amendment; and (2) because the carrier waived any benefit of the regulation (if that were valid) by failing to deliver to plaintiff a receipt or bill of lading embodying the terms of the contract as required by the same enactment.

The importance of the subject seems to warrant a somewhat extended discussion.

(1.) Reference is made to § 6 of the Commerce Act as amended by the Hepburn Act; the portion relied upon being that which requires the filed and published schedules to state "any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or con-

signee." In this respect the act has remained substantially unchanged since the amendment of March 2, 1889, c. 382, 25 Stat. 855, quoted in the margin.[1]

It is important to observe that § 6, either before or since the Hepburn act, *does not prescribe what the rules and regulations shall be.* Neither this section nor any other section of the act confers upon the carrier any authority over the subject. It is implied that there may be, indeed must be, rules and regulations for carrying on the business of a common carrier, in order to secure system, efficiency and a just performance of its public duties; and § 6, recognizing this, prescribes—and, as I think, only prescribes—that whatever rules and regulations may be duly established which "in any wise change, affect, or determine the rates, fares, and charges, or the value of the

[1] "SEC. 6 (as amended by § 1 of the act of March 2, 1889, c. 382, 25 Stat. 855). That every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing *the rates and fares and charges for the transportation of passengers and property* which any such common carrier has established and which are in force at the time upon its route. *The schedules* printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and *shall contain* the classification of freight in force, and shall also state separately the terminal charges and *any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges.* Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places, in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. . . . And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force."

service rendered," shall be included in the filed and published schedules. But does it follow from this that the carrier may make any rules and regulations it chooses? Is the carrier to be a law unto itself? And, if not, what are the limitations upon its power? The answer, I think, is plain. The authority to establish rules and regulations, unless it arise from express legislative authority, is derived by implication from the necessities of the case, in view of the nature of the business, and is plainly subject to the limitation that the rules and regulations shall not be such as to contravene the letter or the policy of the law, nor such as to evade responsibility for the due performance of the public duties of the carrier.

This is a principle universally recognized from an early day by the courts of this country, and it lies at the foundation of the rule everywhere prevalent (differing, in this regard, from the rule that prevailed in England for a time prior to the Railway & Canal Traffic Act, 1854, 17 and 18 Vict., c. 31, § 7), that the carrier cannot limit his liability by any general regulation or published notice.

It is for this reason, primarily, that the regulation here in question,—"Baggage liability is limited to personal baggage not to exceed one hundred dollars in value . . . unless a greater value is declared," etc., if treated as intended to be effective without the knowledge or assent of the passenger, seems to me to be a regulation entirely beyond the power of the carrier to establish. The state reports are full of cases recognizing the principle, and applying and enforcing it with respect to the particular subject-matter now under consideration. It is not necessary, however, to go outside of our own reports, for this court from the beginning until now has constantly recognized and steadfastly enforced this limitation of the authority of the common carrier with respect to regulations of the same essential character as the one now in question.

Thus, in *New Jersey Steam Navigation Co.* v. *Merchants Bank*, 6 How. 344, the court held that the carrier could not by published notices seeking to limit its responsibility exonerate itself from the duties which the law annexed to its employment. And, dealing with an express stipulation, the court, by Mr. Justice Nelson (p. 382) said: "But admitting the right thus to restrict his obligation, it by no means follows that he can do so by any act of his own. *He is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to.* He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. And we agree with the court in the case of *Hollister* v. *Nowlen* [19 Wend. 234, 247], that, if any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights, and the duties of the carrier, as it is that he assented to their qualification. The burden of proof lies on the carrier, and *nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment.*"

In *York Co.* v. *Central Railroad*, 3 Wall. 107, 112, the court, speaking by Mr. Justice Field, said: "The law prescribes the duties and responsibilities of the common carrier. He exercises, in one sense, a public employment, and has duties to the public to perform. Though he may . . . prescribe regulations to protect himself against imposition and fraud, and fix a rate of charges proportionate to the magnitude of the risks he may have to encounter, he can make no discrimination between persons, or vary his charges for their condition or charac-

ter. He is bound to accept all goods offered within the course of his employment, and is liable to an action in case of refusal. He is chargeable for all losses except such as may be occasioned by the act of God or the public enemy. He insures against all accidents which result from human agency, although occurring without any fault or neglect on his part; and *he cannot, by any mere act of his own avoid the responsibility which the law thus imposes. He cannot screen himself from liability by any general or special notice, nor can he coerce the owner to yield assent to a limitation of responsibility by making exorbitant charges when such assent is refused.* The owner of the goods may rely upon this responsibility imposed by the common law, which *can only be restricted and qualified when he expressly stipulates for the restriction and qualification.* But when such stipulation is made, and it does not cover losses from negligence or misconduct, we can perceive no just reason for refusing its recognition and enforcement."

In *Railroad Co.* v. *Manufacturing Co.*, 16 Wall. 318, 329, the court, after repeating the language I have quoted from the opinion in 6 How., proceeded to say: "These considerations against the relaxation of the common law responsibility by public advertisements, *apply with equal force to notices having the same object,* attached to receipts given by carriers on taking the property of those who employ them into their possession for transportation. Both are attempts to obtain, by indirection, exemption from burdens imposed in the interests of trade upon this particular business. *It is not only against the policy of the law, but a serious injury to commerce to allow the carrier to say that the shipper of merchandise assents to the terms proposed in a notice, whether it be general to the public or special to a particular person, merely because he does not expressly dissent from them.* If the parties were on an equality in their dealings with each other there might be some show of reason for assuming acquiescence from silence, but in

the nature of the case this equality does not exist, and, therefore, every intendment should be made in favor of the shipper when he takes a receipt for his property, with restrictive conditions annexed, and says nothing, that he intends to rely upon the law for the security of his rights. *It can readily be seen, if the carrier can reduce his liability in the way proposed, he can transact business on any terms he chooses to prescribe. . . . The law, in conceding to carriers the ability to obtain any reasonable qualification of their responsibility by express contract, has gone as far in this direction as public policy will allow.*"

So in *Railroad Co.* v. *Fraloff*, 100 U. S. 24, 27, the court said: "It is undoubtedly competent for carriers of passengers, by *specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character and not inconsistent with any statute or their duties to the public*, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk. And in order that such regulations may be practically effective, and the carrier advised of the full extent of its responsibility, and, consequently, of the degree of precaution necessary upon its part, *it may rightfully require, as a condition precedent to any contract for the transportation of baggage, information from the passenger as to its value;* and if the value thus disclosed exceeds that which the passenger may reasonably demand to be transported as baggage without extra compensation, the carrier, at its option, can make such additional charge as the risk fairly justifies."

(2.) And if it is against the policy of the law for a common carrier to limit its "common law liability"—that of *quasi*-insurer of goods—by general regulation or published notice not assented to by the passenger or shipper, this is more emphatically true with respect to its responsibility for losses due to the negligence of the carrier or of its servants; for, even by express contract, upon whatever

consideration, the carrier is not permitted to obtain exemption from liability for negligence. *New Jersey Steam Navigation Co.* v. *Merchants Bank*, 6 How. 344, 383; *York Co.* v. *Central Railroad*, 3 Wall. 107, 113; *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 375, 384; *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174, 183.

The rule admits of but one exception, and that is hedged with important qualifications. It is, that where a contract of carriage is fairly made between shipper and carrier agreeing upon a valuation of the property carried, or based upon a valuation declared by the shipper and relied on by the carrier, with a rate of freight based upon a condition limiting the carrier's liability to the amount of the agreed or declared valuation, and the valuation is in good faith relied upon by the carrier and is not a mere cover for an attempt by the carrier to escape liability for negligence, the contract will be recognized as a proper mode of securing a due proportion between the amount for which the carrier is responsible and the freight he receives, and the shipper will be estopped from claiming more than the agreed or declared valuation, even in case of a loss due to negligence. So it was laid down by this court in *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331, 338, and the grounds of decision were expressed in the opinion of the court (by Mr. Justice Blatchford) in terms so clear that besides being uniformly followed by this court until now, they have been adopted generally by States that adhere to the common law rules of liability. To quote from the opinion (112 U. S. 340): "As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them.

If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed [Citing cases]. This qualification of the liability of the carrier is reasonable, and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum that that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract. The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. *The shipper is estopped from saying that the value is greater.*"

(3.) Such was the state of the common law of this country, as universally recognized, when the Interstate Commerce Act was passed, and I am unable to see in § 6, or elsewhere in that act, any purpose to change it. During the entire time that intervened between the passage of the act and the passage of the Hepburn Act (including the Carmack Amendment) in 1906, the courts of the States

(except in the few States that adopted a policy less favorable to the carrier), and the Federal courts generally, administered the law as before, and without a suggestion, so far as I have observed, that § 6, in requiring that all rules and regulations having a bearing upon rates should be filed and published, had in any way authorized common carriers by any mere rule or regulation, although properly promulgated, to limit the liability for damages by negligence in the absence of an express agreement as to value assented to by the shipper, or some representation of value made by him.

Indeed, this court, in the recent case of *Pennsylvania Railroad* v. *Hughes*, 191 U. S. 477, 488, held that § 6, as it stood after the amendment of March 2, 1889, and before the Hepburn Act, did not amount to a regulation of the matter of a limitation of the carrier's liability to a particular sum in consideration of lower freight rates for transportation. To quote from the opinion (pp. 487, 488): "It may be assumed that under the broad power conferred upon Congress over interstate commerce as defined in repeated decisions of this court, it would be lawful for that body to make provision as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation. But upon examination of the terms of the law relied upon we fail to find any such provision therein. The sections of the interstate commerce law relied upon by the learned counsel for plaintiff in error, 24 Stat. 379, 382; 25 Stat. 855, provide for equal facilities to shippers for the interchange of traffic; for non-discrimination in freight rates; *for keeping schedules of rates open to public inspection; for posting the same in public places, with certain particulars as to charges, rules and regulations;* . . . giving remedies for the enforcement of the foregoing provisions, and providing penalties for their violation. . . . While under these provisions it may be said that Congress

has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carriers from obstructing continuous shipments on interstate lines, *we look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valuations*, and, until Congress shall legislate upon it, is there any valid objection to the State enforcing its own regulations upon the subject, although it may to this extent indirectly affect interstate commerce contracts of carriage?"

This query was by the decision answered in the negative. And as a result, notwithstanding § 6 of the Commerce Act, the courts of Pennsylvania were left free to disregard the rule laid down in *Hart* v. *Pennsylvania Railroad* and to follow their own declared doctrine denying the right of a common carrier to limit its liability for losses due to negligence, even by a special agreement including a valuation assented to by the shipper. In this respect the situation was changed by the Carmack Amendment to the Hepburn Act, but not (so far as I can see) by any of the changes made in § 6 by that act.

(4.) And I had supposed that since as before the Carmack Amendment, under the decisions of this court in *Adams Express Co.* v. *Croninger*, 226 U. S. 491, and the other cases that have followed it along the same line, the general rules of law that disabled the common carrier from establishing regulations for limiting its liability by general notice not brought home to the shipper, and debarred the carrier from limiting its liability for losses due to negligence except by a special agreement including a fair valuation assented to by the shipper, had remained in full force and vigor, and indeed by the effect of the Amendment had been made the exclusive rule of conduct for interstate carriers by rail. For the *Croninger Case* not only held (negatively) that the Amendment superseded state laws upon the subject, but (affirmatively)

that in matters not covered by its own express terms it had the effect of establishing the common law rules respecting the carrier's liability, as laid down in previous decisions of this court, and adopted generally by the Federal courts. To quote from the opinion (p. 504): "Prior to that amendment the rule of carrier's liability, for an interstate shipment of property, as enforced in both Federal and state courts, was either that of the general common law as declared by this court and enforced in the Federal courts throughout the United States, *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331; or that determined by the supposed public policy of a particular State, *Pennsylvania Railroad* v. *Hughes*, 191 U. S. 477; or that prescribed by statute law of a particular State, *Chicago &c. Railroad* v. *Solan*, 169 U. S. 133. Neither uniformity of obligation nor of liability was possible until Congress should deal with the subject. . . ." (Page 505): "That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. . . ." (Page 507): "But it has been argued that the non-exclusive character of this regulation is manifested by the proviso of the section, and that state legislation upon the same subject is not superseded, and that the holder of any such bill of lading may resort to any right of action against such a carrier conferred by existing state law. This view is untenable. It would result in the nullification of the regulation of a national subject and operate to maintain the confusion of the diverse regulation which it was the purpose of Congress

to put an end to. . . . *To construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing Federal law at the time of his action, gives to it a more rational interpretation* than one which would preserve rights and remedies under existing state laws, for the latter view would cause the proviso to destroy the act itself."

It was upon this construction of the act that we proceeded to determine the validity of the provision in the receipt or bill of lading there in question, which limited the liability of the carrier to the agreed value of $50; and we applied thereto the familiar rules to which I have already referred. Thus (p. 509): "That a common carrier cannot exempt himself from liability for his own negligence or that of his servants is elementary. *York Mfg. Co.* v. *Illinois Central Railroad,* 3 Wall. 107; *Railroad Co.* v. *Lockwood,* 17 Wall. 357; *Bank of Kentucky* v. *Adams Express Co.,* 93 U. S. 174; *Hart* v. *Pennsylvania Railroad,* 112 U. S. 331, 338. The rule of the common law did not limit his liability to loss and damage due to his own negligence, or that of his servants. That rule went beyond this and he was liable for any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. *But the rigor of this liability might be modified through any fair, reasonable and just agreement with the shipper which did not include exemption against the negligence of the carrier or his servants.* The inherent right to receive a compensation commensurate with the risk involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported. It has therefore become *an established rule of the common law as declared by this court in many cases that such a carrier may by a fair, open, just and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the*

purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk."

The other decisions that have followed the *Croninger Case* (*C., B. & Q. Railway* v. *Miller*, 226 U. S. 513; *Chicago, St. P. &c. Ry.* v. *Latta*, 226 U. S. 519; *Wells, Fargo & Co.* v. *Neiman-Marcus Co.*, 227 U. S. 469; *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639; *Mo., Kans. & Tex. Ry. Co.* v. *Harriman*, 227 U. S. 657; *Chicago, R. I. & Pac. Ry. Co.* v. *Cramer*, 232 U. S. 490; *Great Northern Railway* v. *O'Connor*, 232 U. S. 508), have simply applied the doctrine therein laid down, under varying circumstances.

In each of these cases there was a special contract, held by the court to have been fairly made, and to amount to a valuation by the shipper of the goods in question for the purposes of the shipment. In short, the court in each instance applied the rule of liability laid down in *Hart* v. *Pennsylvania Railroad, supra.*

(5.) Because of this firmly established policy of the law respecting the carrier's responsibility for the consequences of his negligence, I should have construed the "regulation" in question, limiting the baggage liability to $100, in subordination to that policy. According to the canon uniformly applied in construing statutes, that of giving them no meaning beyond that which the legislature may constitutionally enact, I should have construed the baggage regulation as a formula for standardizing the contracts proposed to be made by the carrier with the assent of passengers; not that the formula of itself constituted a substitute for a contract, or was intended to become binding upon the passenger until directly brought to his notice and in some way consciously assented to by him.

But my brethren construe it as binding in the absence of any knowledge or assent on the part of the passenger. So considered, I deem it void as being a regulation that was beyond the power of the common carrier to adopt. And if I am right about this, the fact that it was included

in the filed and published schedules does not in the least add to its efficacy.

It is not a question of mere unreasonableness. A carrier may resort to practices that are so clearly unwarranted by law as to require no preliminary application to the Commission, and that not even the sanction of the Commission could validate. I think the attempt to enforce, *ex parte*, such a limitation of liability is in that category.

(6). But, in fact, the Commission had distinctly ruled against the validity of the regulation in question, construed as the court now construes it; and had done this prior to the time this action arose.

I find nothing savoring of approval in Paragraph 34(g) of Tariff Circular No. 15A, effective April 15, 1908. The reference to "Excess-baggage rates" is to charges for excess weight, as I think sufficiently appears from 26 I. C. C. 292. But, if intended to apply to excess value, it does not suggest that a limitation of liability for losses attributable to negligence, effective without the knowledge or consent of the passenger, is to be made a part of such regulations.

And in *Matter of Released Rates*, 13 I. C. C. 550, decided May 14, 1908, the Commission, after full hearing and consideration, made an administrative interpretation of the Carmack Amendment, holding distinctly that it did not abrogate the law of the *Lockwood Case*, 17 Wall. 357, and the *Hart Case*, 112 U. S. 331. Among other rules laid down (Mr. Commissioner Lane writing), were these (p. 553): "(b) When the shipper has placed upon his goods a specific value, the carrier accepting the same in good faith as their real value, the rate of freight being fixed in accordance therewith, the shipper cannot recover an amount in excess of the value he has disclosed, even when loss is caused by the carrier's negligence," [citing the *Hart Case*, and quoting in italics from the opinion to the effect that under the circumstances disclosed "*the shipper is estopped*

from saying that the value is greater"]. And again (p. 554): "The same principle is applicable when the shipper has in some other way concealed the nature or the value of his goods in order to secure a lower rate of freight. . . . It does not appear that this principle is in any respect in derogation of the provisions of § 20 [meaning the Carmack Amendment]. The carrier is made liable 'for any loss, damage, or injury,' and 'no contract, receipt, rule, or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed.' But it is of the highest importance to note that this limitation is not secured by contract or notice—the contract has no validity *per se*. It is only right that a carrier who has acted in good faith should be protected against the frauds and misrepresentations of the shipper, and the law accomplishes this through the operation of the principle of estoppel. The shipper is estopped from recovering an amount in excess of the declared value, and the rule is in perfect harmony with the law as it stands to-day. 6 Cyc. of Law & Proc., title "Carriers," p. 401, note 5. (c) *If the specified amount does not purport to be an agreed valuation, but represents an attempt on the part of the carrier to limit the amount of recovery to a fixed sum, irrespective of the actual value, the stipulation is void as against loss due to the carrier's negligence or other misconduct.* Much confusion has arisen from failure to distinguish between this situation and the situation comprehended in *Hart* v. *Pennsylvania Railroad Co., supra.* That decision was expressly predicated upon the principle of estoppel; the shipper had misrepresented the value of his property, and had thereby secured the benefit of a lower rate than he was properly entitled to by virtue of the real value. He was estopped by his fraudulent conduct from recovering an amount in excess of the value he had declared. In the case we are now considering, the requisites of estoppel are wanting. An estoppel cannot

arise unless the party invoking it has been the victim of misrepresentation, and has himself acted in good faith. Can it possibly be argued that when a carrier has arbitrarily placed in its bill of lading a stipulation limiting the amount of its liability, regardless of the actual value of the property, it may claim the benefit of an estoppel? Obviously not; it has not acted in good faith, neither has it been the victim of misrepresentation." And again, (p. 556): "(d) *If the specified amount, while purporting to be an agreed valuation, is in fact purely fictitious, and represents an attempt to limit the carrier's liability to an arbitrary amount, liability for the full value cannot be escaped in event of loss due to negligence.* This situation is substantially identical with that just considered—the difference is one in form only."

(7.) In the *Hart Case,* 112 U. S. 331, the fundamental ground of decision, as appears from what has been quoted from the opinion, was that since the shipper had entered into a special agreement for the purpose of cheapening the freight *he was estopped from saying that the value of the goods was greater than the value represented by him for the purposes of the agreement.* So, also, in the *Croninger Case,* and the other recent cases referred to, *estoppel was the ground of decision,* as the opinions clearly show (226 U. S. p. 510, bottom; 227 U. S. p. 476, top; 227 U. S. p. 651, top; 227 U. S. p. 668, bottom). When participating in these decisions, I, for one, so understood them. In each case the principle of estoppel is essential to the reasoning. In the *Carl Case* (227 U. S. p. 651), it was said: "When a shipper delivers a package for shipment and declares a value, either upon request or voluntarily, and the carrier makes a rate accordingly, the shipper is estopped upon plain principles of justice from recovering, in case of loss or damage, any greater amount. The same principle applies if the value be declared in the form of a contract. If such a valuation be made in good faith for

the purpose of obtaining the lower rate applicable to a shipment of the declared value, there is no exemption from carrier liability due to negligence forbidden by the statute when the shipper is limited to a recovery of the value so declared. The ground upon which such a declared or agreed value is upheld is that of estoppel." [Citing the *Hart Case* upon this precise point.] And in the *Harriman Case* (227 U. S. p. 668), the topic is summed up as follows: "The ground upon which the shipper is limited to the valuation declared is that of estoppel, and presupposes the valuation to be one made for the purpose of applying the lower of two rates based upon the value of the cattle. This whole matter has been so fully considered in *Adams Express Co.* v. *Croninger*, 226 U. S. 491, and *Kansas City Southern Railway* v. *Carl*, just decided, that we only need to refer to the opinions in those cases without further elaboration."

That these decisions are inconsistent with the theory that the mere act of including the regulations upon the subject in the filed schedules would operate to limit the liability of the carrier, without any representation or agreement as to value, assented to by the shipper, seems to me equally clear. Although in each case the relation of the rate differential to the question of valuation was brought home to the shipper, so that it appeared that the shipper had actual notice of the regulation upon the subject contained in the filed and published schedules, it was not suggested that the mere existence of such a regulation, coupled with the fact that the shipment was made at the more advantageous freight rate, had the effect of limiting the liability of the carrier in the event of a loss attributable to negligence. On the contrary, while the relation of the rate differential to the valuation was discussed, it was treated as merely showing that there was consideration for the agreement made by the shipper limiting the responsibility of the carrier, and as showing

the reasonableness of that agreement and the grounds of the estoppel that grew out of it. It was in each case plainly implied, if not expressed, that some representation or valuation, consciously assented to by the shipper, was essential to the limitation of the carrier's liability.

In the present case there is no ground for an estoppel against the plaintiff. She made no representation of any kind, her silence being attributable to her ignorance of the existence of the baggage regulation. No estoppel arises where the conduct of the party sought to be estopped is due to ignorance founded upon an innocent mistake; and the same is more evidently true when the innocent party is silent because not asked to speak and unaware that there is occasion—much less, duty—to speak. There is, I think, no support in reason or authority for holding that a person acting in good faith but in ignorance of his rights or of the rights of the other party, should be estopped on the ground of knowledge imputed to him by a mere fiction of the law. It is only when good faith requires one to speak that silence estops him; and in the findings of fact in this case there is not the slightest ground to attribute to the plaintiff any want of good faith. Estoppel *in pais* presupposes an actual fault or a culpable silence. *Merchants Bank* v. *State Bank*, 10 Wall. 604, 605; *Morgan* v. *Railroad Co.*, 96 U. S. 716, 720.

And it seems sufficiently obvious that the railroad company did not in any wise rely upon plaintiff's silence to its disadvantage. There would, I think, be more reason for holding the company itself estopped, because it, and not the plaintiff, had knowledge of the baggage regulation; and, according to the findings, it was charged with notice that the baggage was worth much more than one hundred dollars; and the circumstances appearing from the facts as found, clearly indicate that plaintiff, through her agent, in effect tendered herself ready and willing to pay for her fare and baggage charges whatever was proper under the

circumstances; and the company set its own price for the service it was to render.

When the carrier was thus applied to by one of the traveling public for the performance of a transportation service in the line of its public duty, without any intimation that anything less than the full measure of the carrier's responsibility would be accepted, it was the carrier's duty, I think, according to principles hitherto recognized, to quote a rate commensurate with the service demanded, including an unlimited responsibility where nothing less was mentioned. If the law required it to charge a higher rate for unlimited than for limited responsibility, it was its duty to quote such higher rate. Having failed to do this, it ought not afterwards to be permitted to take advantage of its own wrong. In view of the Commerce Act, I do not think the carrier, under such circumstances, is estopped from afterwards claiming the additional compensation that it ought to have exacted when quoting the rate. But I do think it ought to be held estopped from setting up any limitation of its responsibility, when no such limitation was in the contemplation of the patron on demanding the service.

(8.) As I read the Interstate Commerce Act, it expresses in its own terms the extent of the prohibition of special contracts of carriage. As has often been said, the main purpose of the act was to prevent discrimination, and the filing of the schedules is the principal means to that end. Section 6, as amended in 1906 (34 Stat. 587, c. 3591), prohibits the carrier from transporting passengers or property unless the rates, fares, and charges upon which the same are transported have been filed and published in accordance with the act; from charging or collecting a different compensation for such transportation or for any service in connection with it than as specified in the tariff; and from refunding or remitting in any manner or by any device any portion of the specified rates, or ex-

tending to any shipper or person any privileges or facilities except such as are specified in the tariff. When, therefore, a carrier has established and promulgated its tariff, with regulations as to service such as it has a lawful right to establish, the effect of § 6 is to render unlawful any special contract of carriage made in contravention of the rates and regulations thus standardized in accordance with the law. Such is the effect of § 6 of the act, and it was held to have that effect before the passage of the Hepburn Act. *Gulf, Colorado &c. Ry.* v. *Hefley* (1895), 158 U. S. 98; *Texas & Pacific Ry.* v. *Mugg* (1906), 202 U. S. 242; *Chicago & Alton R. Co.* v. *Kirby*, 225 U. S. 155. All of these cases arose before the Hepburn Act, and the decisions were based upon § 6 of the act of February 4, 1887, c. 104, 24 Stat. 379, as amended by act of March 2, 1889, c. 382, 25 Stat. 855 (set forth above in the margin), which required the carrier to print and publicly post at each station for the inspection and information of the public the schedules of fares and rates for carriage of passengers and property, and provided that it should be unlawful for the carrier to depart from the published schedules; and upon the third section of the original act, which made it unlawful to give any undue or unreasonable preference or advantage to any particular shipper. In the *Hefley Case* the question decided was simply that a statute of Texas imposing a penalty for a failure to deliver goods on tender of the rate named in the bill of lading was not applicable to interstate shipments. But the effect of the decision was to declare that one who had obtained from a common carrier transportation of goods from one State to another at a rate specified in the bill of lading, but less than the published schedule of rates filed with and approved by the Interstate Commerce Commission and in force at the time, whether he did or did not know that the rate obtained was less than the scheduled rate, was not entitled to recover the goods upon the tender of payment

of the amount of charges named in the bill of lading, or of any sum less than the scheduled rates; in other words, that a special contract inconsistent with the published tariff could not avail. This principle was adopted as the ground of decision in the *Mugg Case*. And in the *Kirby Case*, likewise, it was held that as the broad purpose of the act was to compel the establishment of reasonable rates and their uniform application, a special contract by which advantage was given to a particular shipper could not be enforced. The distinction between a ground of action based upon the breach of such a special contract and one based upon the carrier's liability for negligence was clearly recognized in the opinion (225 U. S. p. 166), and the latter ground of liability rejected because not presented by the record. To the same effect is *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467, 476, which arose after the Hepburn Act.

These cases rest fundamentally upon the ground that to allow the shipper to have the benefit of a special agreement for lower rates or for better service than the standard rates and service prescribed by the published schedules would in effect compel the carrier to violate the provisions of the act. In this sense, and to this extent, all shippers are "bound" by the provisions of the act that bind the carrier. But to say that because of this a shipper or a passenger who has made no special contract at all, and claims the benefit of none, shall be conclusively deemed to have made a special contract, involving terms and conditions of which he was wholly ignorant, strikes me as a manifest *non sequitur*. And to hold that a passenger whose rights rest not upon any contract of shipment, but upon the negligence of the carrier, shall be barred from recovering full redress for the consequences of that negligence, upon the theory that he has unconsciously attempted to make a special contract in contravention of the act, is, I submit with respect, equally illogical. It seems also a

complete reversal of the *Hart Case* and the *Croninger Case*,—which declare that a carrier's liability for negligence can only be limited by such a contract or representation as shall estop the shipper,—to now hold that without any express contract or representation by the shipper the liability is limited, on the theory that he is legally charged with notice of requirements of which he was in fact ignorant.

It is true that in the case at bar, the Supreme Court of Massachusetts (209 Massachusetts, at p. 602) unnecessarily, and, as I think, erroneously, conceded that if the regulation limiting the baggage liability to one hundred dollars in value was so related to the rates of transportation of passengers as to be a part of such rate, the plaintiff was "bound," regardless of her knowledge or assent, and therefore her recovery in this action would be limited accordingly. The error, as it seems to me, arose from a misconception of the effect of the decisions in the *Hefley* and *Mugg Cases*. The fallacy, if I am correct in deeming it to be such, lies in the double sense of the word "bound." I respectfully suggest that this court, in a matter of such far-reaching importance, ought not to accept the concession without testing its soundness.

If it were said that because she did not know of, and therefore did not assent to, a limitation of liability to $100, she remained still liable to pay to the railroad company the amount of money properly chargeable for the excess of valuation, and that the company had a lien upon the baggage for this amount on its arrival at destination, I could see the force of the suggestion. This would, perhaps, be within the doctrine of the *Hefley* and *Mugg Cases*. (Of course, I do not mean to say that the lien would survive after the goods were lost through the company's negligence.) But I can find nothing in any of the cases referred to that lends support to the view that a railroad company can limit its liability by limiting the rate charged,

without according to the shipper or passenger any voice in the matter.

The expressions employed in the *Carl Case* (227 U. S. p. 652), that "The valuation the shipper declares determines the legal rate where there are two rates based upon valuation," and that "When there are two published rates, based upon difference in value, the legal rate automatically attaches itself to the declared or agreed value," had reference to the effect of a voluntary declaration made by a shipper who fixes the valuation of his goods for the purposes of the shipment, knowing that the valuation determines the rate that must be charged, although perhaps unaware what the precise rate may be. The same is true of similar language used in the *Harriman Case* (227 U. S. at p. 669), the *Cramer Case* (232 U. S. at p. 493), and the *O'Connor Case* (232 U. S. at p. 515). I am unable to see that the reasoning applies to the case of a shipper or passenger who has declared no valuation, has exercised no choice, and is unaware that a choice is open.

To say that constructive notice of the filed regulation, of which plaintiff was in fact ignorant, gave her an actual opportunity to declare the value of her baggage, pay the excess tariff rate, and thus secure the liability of the carrier to the full amount of her baggage, is to say that a fiction is the same as a fact.

(9.) In the *Croninger Case*, and the others of the same class, the shipper consciously accepted a benefit in the form of a reduced freight charge as the consideration of an agreement voluntarily made valuing the goods for the purposes of the shipment. But here the plaintiff did nothing of the kind. She paid the full price asked by the carrier for transportation of herself and her baggage, unaware of any regulation of the carrier that would require the payment of an additional charge for an unlimited liability for baggage. If she were setting up and relying upon any special contract made in violation of the law,

the doctrine of the *Hefley, Mugg* and *Kirby Cases* would apply. But her cause of action is complete without resort to any contract, special or general; and the contract of which her passage tickets and the baggage checks were the tokens, was merely the medium by which the carrier became possessed of her baggage. Having that baggage in its possession, the responsibility of the carrier for the exercise by itself and its employés of reasonable care for the safety of the goods arose under general principles of law independent of the contract; and those general principles as administered in the Federal courts (the same as in the courts of Massachusetts), entitled her to compensation upon the basis of the actual value of the goods lost, in the absence of a special agreement or of some representation of value made by her, limiting that liability.

Conceding, for argument's sake, that the contract of carriage as made between plaintiff and defendant, if deemed to import responsibility for the entire value of the baggage, was invalid because not made in accordance with the regulations filed and published in connection with the rate schedules, and because of the provisions of the Interstate Commerce Act that in effect forbid the making of contracts otherwise than in accord with those schedules,—even so, the plaintiff was in no wise at fault. She was unaware that she was at liberty to exercise any option, to say nothing of being under an obligation to do so. The fault was wholly with defendant, for it made no inquiry respecting the value of her baggage, and gave her no notice of any limitation of liability, although itself charged with notice from the very appearance of the baggage that it must have been worth more than $100. And her present action is based upon the carrier's negligence, and not upon an affirmance of the contract.

Irrespective of the contract, the carrier, like any other bailee for hire, was bound to take reasonable care to preserve the property ready for delivery to its owner. I can

find nothing in the letter or the spirit of the Commerce Act that forfeits her property or any part of its value because of her violation of the act, supposing her to have violated it. And since, through the carrier's negligence, the property was lost, it follows, on general principles, that her right of action, upon grounds independent of the contract, remains; it being based upon the general obligation of the bailee to do justice. The principle is fundamental and familiar, and has been applied in a great variety of cases. *Planters Bank* v. *Union Bank*, 16 Wall. 483, 500; *Philadelphia, W. & B. R. Co.* v. *Philadelphia Towboat Co.*, 23 How. 209, 217; *Spring Co.* v. *Knowlton*, 103 U. S. 49, 58; *Armstrong* v. *American Exchange Bank*, 133 U. S. 433, 466; *Logan County Bank* v. *Townsend*, 139 U. S. 67, 75; *Pullman's Car Co.* v. *Transportation Co.*, 171 U. S. 138, 151. And see *Newbury* v. *Luke*, 68 N. J. Law, 189, 191; *Dunlop* v. *Mercer*, 156 Fed. Rep. 545, 555; *In re Bunch Co.*, 180 Fed. Rep. 519, 527.

In *Merchants Cotton Press Co.* v. *N. A. Insurance Co.*, 151 U. S. 368, 388, this court held that while an agreement for special rates, rebates, or drawbacks was void under the Interstate Commerce Act, the law did not make the contract of affreightment otherwise void, nor prevent liability on the part of the carrier for the freight received; that such a construction would encourage rather than discourage unlawful agreements for rebates, since the carrier might prefer them to a liability for the freight; and that although the contract for rebate was void and unenforceable, the shipper could nevertheless recover for loss of his freight through the carrier's negligence. This decision has never been overruled or qualified, and it seems to me quite decisive of the present question.

(10.) Thus far I have treated the case as one arising under the common law rules respecting the carrier's liability, as laid down in the decisions of this court and adopted generally by the Federal courts. I have en-

deavored to show that a limitation of the carrier's liability is not permitted except it result from some actual representation or contract consciously assented to by the shipper, valuing the goods for the purposes of the shipment; that the sole ground for limiting the responsibility to this extent is that the shipper is estopped by his contract or his representations; that no different result is to be derived by any implication from the provisions of § 6 of the Interstate Commerce Act, which merely prevents the making of a special agreement inconsistent with the schedules, and does not compel the assumption (contrary to the fact) that a special agreement was made in conformity to them; that an agreement inconsistent with the schedules, even if void in itself, does not make the contract of affreightment otherwise void, nor prevent liability on the part of the carrier for loss of the goods attributable to its negligence; and that a shipper who has acted in good faith is not to be estopped upon the theory that a fiction or presumption of knowledge is equivalent to actual knowledge, or amounts to the same as conscious misrepresentation. I have hitherto refrained from attributing any special force to the Carmack amendment as regulative of the subject-matter.

But let us now consider the specific force of that amendment (34 Stat. 584, p. 595, c. 3591, § 7, quoted in full in the marginal note, *ante*, p. 126). It declares (*inter alia*) that a railroad company receiving property for interstate transportation "shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it . . . , and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed." It was concerning this provision that the court said in the *Croninger Case*, speaking by Mr. Justice Lurton, 226 U. S. p. 505: "That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It em-

braces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract." This was equivalent to saying that because the carrier was obliged to issue to the shipper a receipt or bill of lading for the goods, and because the terms of the contract of carriage and rules and regulations pertaining thereto are presumably embodied in the receipt or bill of lading, therefore the act must be deemed an exercise by Congress of its general and exclusive power over the subject-matter.

And the language of the enactment shows that it was framed in view of the general and familiar practice of embodying in the receipt or bill of lading all the terms of the contract, including the valuation of the goods and the rules and regulations for limiting the liability of the carrier. Is it not perfectly manifest that when Congress declared that the carrier "shall issue a receipt or bill of lading" it intended that this document should embody the "contract, receipt, rule, or regulation" that are mentioned in the same clause? Is it possible, without twisting the words from their plain meaning, to read this so that the duty of the carrier shall be performed if it issues a receipt or bill of lading that does not evidence the contract between the parties, and the whole of that contract?

But in the present case there was no receipt or bill of lading within the meaning of the Carmack amendment as thus interpreted. There was nothing but three baggage checks, each bearing an identifying number, but, so far as the case shows, nothing else. I cannot agree that the statute leaves the carrier free to give a mere identifying token, instead of a "receipt or bill of lading." But, if I am wrong in this, it seems too clear for argument that so far as the carrier intends that any of its rules or regulations respecting its responsibility for the baggage are to be imported into the contract, it is incumbent upon it to set

them forth plainly in a bill of lading delivered to the shipper or passenger. If the act admits of the construction that a mere identifying token or check can be used in the place of a formal receipt or bill of lading, it for that reason must require the construction that the carrier may, and that he does thereby, waive the benefit and protection of the rules and regulations. For I cannot believe that the Carmack amendment is open to the construction that the shipper shall be bound by special terms or conditions respecting anything pertaining to the contract of carriage and the carrier's responsibility, while the shipper is in fact ignorant of them. This would leave the carrier free to set a trap for the innocent shipper or passenger. Nor can I agree that the act requires any affirmative regulation by the Interstate Commerce Commission prescribing the form of receipts to be given for baggage. I concede the Commission may regulate the matter, so long as it does so in conformity to the letter and spirit of the statute; but not that the act remains without vitality until the Commission breathes into it the breath of life. In my view, the railroad company in the present case, having failed to give such a receipt or bill of lading as the statute contemplates, cannot be heard to set up any limitation of its liability for the value of the goods, for it would thereby in effect claim a benefit from its own violation of the law.

I submit that the Hepburn Act, like the original act and its other amendments, is intended to impose duties upon the carrier—the public servant—not upon the shipper or passenger. There is nothing in the letter or the policy of the acts to absolve the carrier from its long-recognized duty to treat all shippers and passengers fairly, and to give them an actual opportunity to make a choice, where a choice is legally open to them. A carrier may not absolve himself in whole or in part from his responsibilities by any *ex parte* action. And where the rate schedules and accompanying regulations are designed to give an option

to the shipper, it is, I submit, incumbent upon the carrier to see that the option is in good faith tendered, or else abide by the more onerous of the alternatives. The Carmack amendment means this, at least, if it means nothing more. Therefore, the failure to deliver a bill of lading evidencing the limitation of liability should impose upon the carrier the highest responsibility, not the least, that the regulations admit of; that is to say, an unlimited responsibility for the goods.

(11.) The serious consequences of the present decision are sufficiently manifest. Heretofore, shippers and passengers have been entitled to rest in the assurance that a common carrier who accepted their goods for transportation in the ordinary course of a carrier's public employment, became responsible, without any express contract upon the subject, for the full value of the goods, in case of their destruction through any negligence of the carrier or its agents, unless there was a distinct understanding to the contrary, participated in by the shipper or passenger. Hereafter, so far as interstate shipments by rail are concerned, the traveler or shipper cannot rest upon any such assurance, and will not be safe in dealing with a railroad company without being authoritatively instructed respecting the latest regulations filed by the carrier with the Interstate Commerce Commission at Washington. He cannot rely upon finding the regulations posted in the railroad station, for this is not essential to the efficacy of the schedules (*Texas & Pac. Ry.* v. *Cisco Oil Mill*, 204 U. S. 449). He cannot rely upon public notices that may be in fact posted in the station, for these may be misleading, as they were in the present case. He cannot rely upon receiving information from the company's local agents, for this may be withheld, as it was in this case. Unless he is possessed of a copy of the tariff schedules as filed, with time enough to scrutinize them, and skill enough to comprehend them, he must perforce accept

whatever terms the railroad company may see fit to offer, and may not hope to be furnished with even a scrap of paper to indicate what those terms are.

I can find no support for the result thus reached, either in the statute or in any previous decision.

UNITED STATES EX REL. TEXAS PORTLAND CEMENT COMPANY *v.* McCORD.

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

No. 234. Argued March 6, 1914.—Decided April 6, 1914.

When the purpose of Congress is stated in such plain terms that there is no uncertainty, and no construction is required, it is unnecessary to inquire into the motives which induced the legislation. The only province of the courts in such a case is to enforce the statute in accordance with its terms.

Limitations specified in the statute creating a new liability are a part of the right conferred and compliance therewith is essential to the assertion of the right conferred by the statute.

An amendment dates back to the filing of the petition and is to supply defects in the petition with reference to the cause of action then existing, or at most to bring into the suit grounds of action which did exist at the beginning of the case.

Under the act of August 13, 1894, as amended by the act of February 24, 1905, a materialman or laborer may not bring suit on the contractor's bond in the Federal court in the name of the United States for his use and benefit, within six months from completion and settlement, even though the United States has not asserted any, and has no, claim against the contractor or his sureties.

Where the original bill was prematurely filed, an intervention after the six month, and before the twelve month, period is not effectual as such or as an original bill.

An amended bill filed more than one year after completion of the work and settlement, if treated as an original bill, is filed too late.

THE facts, which involve the construction of the materialman's act of February 24, 1905, and the rights of contractors thereunder, are stated in the opinion.

Mr. Francis Marion Etheridge, with whom *Mr. Joseph Manson McCormick* was on the brief, for the relators, Texas Portland Cement Company *et al.*

Mr. Charles W. Starling, with whom *Mr. W. F. Robertson* was on the brief, for McCord and National Surety Company of New York.

Mr. Justice Day delivered the opinion of the court.

This case is here upon a certificate from the United States Circuit Court of Appeals for the Fifth Circuit. The pertinent facts certified are:

The United States upon the relation and for the use and benefit of the Texas Portland Cement Company and others brought suit in the United States Circuit Court for the Northern District of Texas, on January 3, 1910, against D. C. McCord, as the principal, and the National Surety Company of New York, as surety, on a certain bond dated March 19, 1906, given in conformity to the act of February 24, 1905 (c. 778, 33 Stat. 811), for the performance by McCord of a contract for the erection of certain public works for which they had furnished labor and material. The petition was filed after the completion of the contract and final settlement between the contractor and the United States, and it was alleged that the United States had no claim or cause of action against the defendants and would not bring suit within six months from the completion and settlement of the contract, nor at any other time. An appropriate order for service and publication was had. Many creditors intervened in the case, among others W. Illingsworth, who on May 25, 1910 (more than six and less than twelve months after final completion and settlement) filed an intervention in accordance with the act, which constituted a complete bill, purporting to be also for the benefit of the plaintiffs in the

original suit and others intervening in the cause, and in which he prayed, if the recovery on the bond should be inadequate to pay all claims in full, for a *pro rata* judgment.

Subsequently, on January 9, 1911, the original plaintiffs filed an amended original petition, elaborating the allegations of their original petition and averring among other things that the Government had no claim against the defendants and therefore had not within six months from the completion and settlement of the contract, brought suit against them, and did not have the legal right to maintain such suit, except upon the relation of a creditor. Illingsworth dismissed his intervention on February 2, 1911, and thereafter the court ordered that his petition and petition in intervention be dismissed.

The allegations of the petition were sustained by proof, and a plea in abatement filed by the Surety Company was heard upon an agreement and statement in open court to the effect that the contract was completed on October 12, 1909, and settlement was made on November 11, 1909, and that the Government thereafter neither had nor asserted any claim, demand or cause of action against the defendants on the contract or bond. The Circuit Court thereupon dismissed the suit, and the case was taken to the Circuit Court of Appeals upon error.

The questions certified are:

"First. Under the provisions of the Act of August 13, 1894 (28 Stat. 278), as amended by the Act of February 24, 1905 (33 Stat. 811), may persons, who furnish material and perform labor in the construction of governmental works, bring suit, on the bond of the contractor in the Federal Court in the name of the United States for their use and benefit, within six months from the completion of the works and final settlement of the contract, where it appears of record and was agreed by the parties in open court, that after performance and settlement of the contract, the United States neither had nor asserted any

claims, demands or cause of action either against the contractor or the sureties on his bond?

"Second. If the original bill was prematurely filed, was a right of action saved to the parties, so filing the same, by the intervention of Illingsworth, which was filed after the six months but before the expiration of the twelve months' period, and the amended bill, filed more than one year after the completion and settlement of the contract between the Government and the contractor?"

The differences in the act of February 24, 1905, and the former statute of August 13, 1894, c. 280, 28 Stat. 278, were pointed out by this court in the case of *Mankin* v. *Ludowici-Celadon Co.*, 215 U. S. 533, and need not be repeated here. The act of 1905 [1] provides that the persons

[1] That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed *pro rata* among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the Department under the direction of which said work has been prosecuted that labor or materials for the prosecution of

named as beneficiaries under the bond may intervene and have their rights adjudicated in an action instituted by the United States in which priority of claim is to be given to the United States for any judgment recovered in the case. It is also provided that, "if no suit should be brought by the United States within six months from the completion and final settlement of said contract," then the persons supply-

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such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action and shall be, and are hereby, authorized to bring suit in the name of the United States in the circuit court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: Provided, That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: And provided further, That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor *pro rata* of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: Provided further, That in all suits instituted under the provisions of this Act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.

ing labor, etc., upon taking certain steps to get a certified copy of the bond, "are hereby authorized to bring suit in the name of the United States," etc., provided that suits by creditors of the contractor "shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later." And it is further provided "that where suit is so instituted by a creditor or creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later." It is further provided that in all suits instituted under the act such personal notice of the pendency of the suit shall be given as the court may order, informing known creditors of their right to intervene, and newspaper publication, to serve as notice of pendency of the suit to other creditors, shall also be made.

By this statute a right of action upon the bond is created in favor of certain creditors of the contractor. The cause of action did not exist before and is the creature of the statute. The act does not place a limitation upon a cause of action theretofore existing, but creates a new one upon the terms named in the statute. The right of action given to creditors is specifically conditioned upon the fact that no suit shall be brought by the United States within the six months named, for it is only in that event that the creditors shall have a right of action and may bring a suit in the manner provided. The statute thus creates a new liability and gives a special remedy for it, and upon well settled principles the limitations upon such liability become a part of the right conferred and compliance with them is made essential to the assertion and benefit of the liability itself. *Pollard* v. *Bailey*, 20 Wall. 520, 526–7; *Bank* v. *Francklyn*, 120 U. S. 747, 756; *Globe Newspaper Co.* v. *Walker*, 210 U. S. 356; *United States* v. *Boomer*, 183

Fed. Rep. 726 (Circuit Court of Appeals for the Eighth Circuit).

The purpose of Congress to give the United States the exclusive right to bring suit within six months is stated in terms too plain to be mistaken or to require construction, because of any possible uncertainty in their meaning. When this is so it becomes unnecessary to inquire into the reasons which induced the legislation. It may be that Congress wished to give the Government six months in which to test the work and fully ascertain its character and whether it fulfilled the contract or not. Whatever the motive, the language used clearly expresses the legislative intention and admits of no doubt as to its meaning. This being so, it is only the province of the courts to enforce the statute in accordance with its terms. *Lake County* v. *Rollins*, 130 U. S. 662, 670; *United States* v. *Lexington Mill Co.*, 232 U. S. 399, 409.

We think, therefore, that the action was prematurely brought, in view of the facts stated in the certificate. This view of the statute was also taken in a well considered opinion in the Circuit Court of Appeals for the Third Circuit. *Stitzer* v. *United States*, 182 Fed. Rep. 513.

As to the intervention of Illingsworth, in which, it is claimed, other creditors' claims were incorporated: without passing upon the effect of the dismissal of Illingsworth's intervention, we fail to see that this mends the matter. The right to intervene is given in the statute when the action is brought by the United States, and the creditors may have their rights adjudicated in such action. And in the case of an action begun by a creditor in accordance with the statute, the right to file a claim is given to creditors. These rights to intervene and to file a claim, conferred by the statute, presuppose an action duly brought under its terms. In this case the cause of action had not accrued to the creditors who undertook to bring the suit originally. The intervention could not cure this vice in the

original suit. Nor do we think that the intervention could be treated as an original suit. No service was made or attempted to be had upon it, as required by the statute when original actions are begun by creditors. As we read the certificate, the intervention was what it purported to be, an appearance in the original suit, already brought, and in our view must abide the fate of that suit.

As to the effect of the filing of the amendment by the original plaintiffs on January 9, 1911, it is elementary that an amendment dates back to the filing of the petition and is to supply defects in the cause of action then existing, or at most to bring into the suit grounds of action which existed at the beginning of the case. In this case there was no cause of action to amend. Nor was the amendment of January 9, 1911, the introduction of a new cause of action existing at the beginning of the suit. See in this connection, *American Bonding & Trust Co.* v. *Gibson County*, 145 Fed. Rep. 871 (Circuit Court of Appeals for the Sixth Circuit, opinion by Mr. Justice Lurton). If this amended petition can be regarded as an intervention in a pending suit, and it is contended that it may be, it was too late, as it was filed more than a year after the final settlement under the contract to which time such rights of action are limited by the statute. *Eberhart* v. *United States*, 204 Fed. Rep. 884. The same objection would lie if the amended petition could be regarded as the bringing of an original suit. See *Baker Contract Co.* v. *United States*, 204 Fed. Rep. 390.

It follows that both questions certified must be answered in the negative.

HOLLERBACH *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 250. Argued March 9, 1914.—Decided April 6, 1914.

A Government contract should be interpreted as are contracts between individuals and with a view of ascertaining the intention of the parties and to give it effect accordingly if that can be done consistently with its terms.

A positive statement in a contract as to present conditions of the work must be taken as true and binding upon the Government, and loss resulting from a mistaken representation of an essential condition should fall upon it rather than on the contractor, even though there are provisions in other paragraphs of the contract requiring the contractor to make independent investigation of facts.

47 Ct. Cls. 236, reversed.

THE facts, which involve the construction of a Government contract for public work and the rights of the contractor thereunder, are stated in the opinion.

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

Paragraph 33 contains a warranty. This was admitted by the Court of Claims and is supported by authority.

As to the effect of pars. 20 and 70, there is no real contradiction and the special provisions control the general ones. There was no assignment of contract.

In support of these contentions, see *Atlantic Dredging Co.* v. *United States*, 35 Ct. Cls. 463; *Bock* v. *Perkins*, 139 U. S. 628; *New York* v. *Am. Traffic Co.*, 121 N. Y. Supp. 221; *Delafield* v. *Westfield*, 41 N. Y. App. Div. 24; *S. C.*, 169 N. Y. 582; *Hobbs* v. *McLean*, 117 U. S. 567; *Hoffman* v. *Eastern Wis. R. Co.*, 134 Wisconsin, 603; *Horgan* v. *The Mayor*, 160 N. Y. 516; *Lauman* v. *Young*, 31 Pa. St. 306;

Miller v. *Wagenhauser*, 18 Mo. App. 11; *Munro* v. *Alaire*, 2 Caines, 327; *Newport Water Works* v. *Taylor*, 34 R. I. 478; *Richmond Ice Co.* v. *Crystal Ice Co.*, 99 Virginia, 239; *Scudder* v. *Perce*, 159 California, 429; *Simpson* v. *United States*, 172 U. S. 372; *Stout* v. *United States*, 27 Ct. Cls. 385; *United States* v. *Stage Co.*, 199 U. S. 414.

Mr. Assistant Attorney General Thompson for the United States, submitted:

Paragraph 33 is modified by paragraphs 20 and 70 and contains no warranty.

Cases quoted from by appellants to support their contention that they were warranted in relying upon representation of Government in provision 33 can be distinguished from case at bar.

The rule as to general provisions being limited by special words does not apply to this case.

The contract must be considered as a whole and the authorities cited by appellants are distinguishable from this case. See *Atlantic Dredging Co.* v. *United States*, 35 Ct. Cls. 463; *Bock* v. *Perkins*, 139 U. S. 628; *Burgwyn* v. *United States*, 34 Ct. Cls. 348; *Delafield* v. *Westfield*, 28 N. Y. Supp. 440; *S. C.*, 169 N. Y. 582; Elliott on Contracts, § 3665; *Grieffen* v. *United States*, 43 Ct. Cls. 107; *Horgan* v. *Mayor*, 160 N. Y. 516; *Hoffman* v. *Eastern Wisconsin R. R. Co.*, 134 Wisconsin, 603; *Huse* v. *United States*, 44 Ct. Cls. 19, 32; *S. C.*, 222 U. S. 496; *Lewman* v. *United States*, 41 Ct. Cls. 486; *Lindeke* v. *Associate Realty Co.*, 146 Fed. Rep. 630; *Newport Water Works* v. *Taylor*, 34 R. I. 478; Page on Contracts, § 1113; *Richmond Ice Co.* v. *Crystal Ice Co.*, 99 Virginia, 239; *Scudder* v. *Perce*, 159 California, 429; *Shappirio* v. *Goldberg*, 192 U. S. 232; *Simpson* v. *United States*, 172 U. S. 372; *S. C.*, 31 Ct. Cls. 217; *Smith* v. *Curran*, 138 Fed. Rep. 150; Sutherland on Stat. Const., § 279; *United States* v. *Stage Co.*, 199 U. S. 414; *United States* v. *Mescall*, 215 U. S. 26.

MR. JUSTICE DAY delivered the opinion of the court.

This suit was brought to recover upon a contract between the appellants, doing business as Hollerbach & May, and the United States for the repair of Dam No. 1, Green River, Kentucky. In the aspect in which it is now presented the question involved concerns the right of the claimants to recover because of certain damages alleged to have been suffered by them which would not have accrued had the dam been backed with broken stone, sawdust and sediment, as was stated in paragraph 33 of the specifications attached to the contract.

The determination of this controversy requires reference to certain parts of the contract and the findings of the Court of Claims. The specifications provide, among other things:

"20. It is understood and agreed that the quantities given are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders, or their authorized agents, are expected to examine the maps and drawings in this office, which are open to their inspection, to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies.

* * * * * * * *

"33. Work to be done. . . . The present dam, a wooden crib structure, is 528 feet long between abutments and about 52 feet wide at its base. The expected depth of concrete work is shown on the blue prints, but it may be made greater, as the condition of the old timber may render it necessary. The work shall be carried out in sections, generally from 50 to 100 feet long, and no more of the old work shall be torn out than can be rebuilt in a few days in

case of necessity. All the exterior surfaces of the concrete shall be faced with the facing described in paragraph 59, which shall be placed before the concrete below has set, and shall be smoothly finished off. The dam is now backed for about 50 feet with broken stone, sawdust, and sediment to a height of within 2 or 3 feet of the crest, and it is expected that a cofferdam can be constructed with this stone, after which it can be backed with sawdust or other material. The excavation behind the dam will be required to go to the bottom, and it is thought that a slope of 1 horizontal to 1.2 vertical will give ample room.

* * * * * * * *

"60. Blueprints. Blueprint drawings showing the method of construction may be seen at this office; they shall form a part of these specifications and shall not be departed from except as may be found necessary by the condition of the old timber encountered.

* * * * * * * *

"70. Investigation. It is expected that each bidder will visit the site of this work, the office of the lockmaster, and the office of the local engineer and ascertain the nature of the work, the general character of the river as to floods and low water, and obtain the information necessary to enable him to make an intelligent proposal."

The Court of Claims found as a matter of fact, among other things:

"As the contractors proceeded with the work of removing the material behind the dam it was found that said dam was not backed with broken stone, sawdust, and sediment as stated in paragraph 33 of the specifications, but that said backing was composed of a soft slushy sediment from a height of about 2 feet from the crest to an average depth of 7 feet, and below that to the bottom of the required excavation said dam was backed by cribwork of an average height of 4.3 feet consisting of sound logs filled with stones." (47 Ct. Cls. p. 238.)

The Court of Claims refused to enter judgment for the damages suffered by reason of the difference in the backing of the dam as found by the court, but estimated the damages for the matters in dispute in that respect to aggregate $6,549.23 (47 Ct. Cls. 236).

In the course of its opinion the court below said that if paragraph 33 stood alone it would be a warranty of the material backing the dam. "It was," said the court, "a positive and material representation as to a condition presumably within the knowledge of the Government, and upon which, in the absence of any other provision or warranty the plaintiffs had a right to rely." But the court held that the cautionary provisions of paragraphs 20 and 70 required the claimants to inform themselves of the condition of the backing of the dam and that when those paragraphs were read with paragraph 33 the statements and representations of the last named paragraph could not be regarded as a warranty upon which the claimants had the right to rely, and the court reached this conclusion upon the authority of certain cases of its own and *Simpson* v. *United States*, 172 U. S. 372.

In *Simpson* v. *United States*, *supra*, suit was brought upon a contract for the construction of a dry dock at the Brooklyn Navy Yard. It was discovered that the foundations upon which the dry dock rested contained quicksands which were unknown and which were not shown in the drawings and plans inspected by the contractors before the making of the contract and upon the strength of which the contractors had made their bid. This court held that the written contract merged all previous negotiations and must be presumed in law to express the final understanding of the parties. Of the contract itself the court said that it was clear that there was nothing in its terms which supported, even by remote implication, the premise upon which the claimants rested their right of recovery; that the contract contained no statement or

agreement or even intimation of a warranty, express or implied, concerning the character of the underlying soil at the place where the dock was to be built; that the only word in the contract which supported the contention of warranty was that the dock was to be built in the navy yard upon a site which was "available," and that the word "available" did not warrant against the quicksands which were found, and it certainly did appear that the site was available for the dock was constructed upon it. It is therefore apparent that this case is entirely different from the one now under consideration, in the contents of the contract and specifications made part thereof, and that in the *Simpson Case* the claimants relied upon previous negotiations and information as to the site for the dock, developed in the plans showing the result of an examination made by Government officers upon a portion of the yard, and did not depend, as here, upon the terms of the contract.

In this case the claimants rely upon the contract, read in the light of the findings of the Court of Claims. Turning to paragraphs 20 and 70 the Court of Claims justified its conclusion in that part of paragraph 20 which provides that "quantities given are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders, or their authorized agents, are expected . . . to visit the locality of the work, and to make their own estimates," etc.; and in that part of paragraph 70 which reads, "it is expected that each bidder will visit the site of this work, . . . and ascertain the nature of the work," etc. The term "quantities" as used in paragraph 20 may doubtless refer to estimates of the amount of different kinds of work which are specified in the contract. We do not see how it could control the statement of paragraph 33, definitely made, as to the character of the material back of the dam. Pertinent parts of the paragraphs

referred to would seem to be those which required bidders or their authorized agents to investigate for themselves and to visit the locality of the work to ascertain its nature and make their own estimates thereof. The specifications attached to the contract set forth the work to be performed in great detail, as to its nature and character, and many particulars as to manner and extent of the work to be done, the removal of old timber and material, etc., the general character of the river as to floods and low water, etc., and the difficulties attending the execution of the contract, and as to all these things the bidder was required by paragraphs 20 and 70 to make examination for himself and at his own peril.

In paragraph 33 the Government sets forth with particularity a description of the old dam, its length and width, and it was there added: "The dam is now backed for about 50 feet with broken stone, sawdust and sediment to a height of within 2 or 3 feet of the crest," etc. The specifications provided that the excavations behind the dam must be to the bottom. In the light of this specification, turn to the finding of fact, and we learn that the claimants, as they proceeded with the work, found that the dam "was not backed with broken stone, sawdust and sediment as stated in paragraph 33 of the specifications," and below seven feet from the top to the bottom there was a backing of cribbing of an average height of 4.3 feet of sound logs filled with stone. Obviously, this made it much more expensive to do the work than if the representation inserted by the Government in the specifications of its own preparation had been true and only the character of material had been found which the specification unequivocally asserted was there.

A Government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms

of the instrument. In paragraph 33 the specifications spoke with certainty as to a part of the conditions to be encountered by the claimants. True the claimants might have penetrated the seven feet of soft slushy sediment by means which would have discovered the log crib work filled with stones which was concealed below, but the specifications assured them of the character of the material, a matter concerning which the Government might be presumed to speak with knowledge and authority. We think this positive statement of the specifications must be taken as true and binding upon the Government, and that upon it rather than upon the claimants must fall the loss resulting from such mistaken representations. We think it would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of facts which the specifications furnished by the Government as a basis of the contract left in no doubt. If the Government wished to leave the matter open to the independent investigation of the claimants it might easily have omitted the specification as to the character of the filling back of the dam. In its positive assertion of the nature of this much of the work it made a representation upon which the claimants had a right to rely without an investigation to prove its falsity. See *United States* v. *Stage Co.*, 199 U. S. 414, 424.

It follows that the judgment of the Court of Claims must be reversed and the case remanded to that court with directions to enter judgment for the claimants for the damages incurred because of the different character of material found behind the dam than that described in the specifications.

Reversed.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY *v.* ROBINSON.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 450. Argued February 26, 1914.—Decided April 6, 1914.

Where the state court by its ruling denies the carrier the benefit of the Interstate Commerce Act, a compliance wherewith was set up in the pleadings and supported by testimony, this court has jurisdiction to review under § 237, Judicial Code.

The effect of the Carmack Amendment was to give to Federal jurisdiction control over interstate commerce and to make Federal legislation regulating liability for property transported by common carriers in interstate commerce exclusive.

The shipper, as well as the carrier, is bound to take notice of the filed tariff rates, and so long as they remain operative they are, in the absence of attempts at rebating or false billing, conclusive as to the rights of the parties. *Great Northern Ry.* v. *O'Connor*, 232 U. S. 508.

An oral agreement cannot be given a prevailing effect which will be contrary to the filed schedules. To do so would open the door to special contracts and defeat the primary purpose of the Interstate Commerce Act to require equal treatment of all shippers and the charging to all of but one rate, and that the rate filed as required by the act.

36 Oklahoma, 435, reversed.

THE facts, which involve the construction of the Hepburn Act and of the Carmack Amendment, are stated in the opinion.

Mr. S. T. Bledsoe, with whom *Mr. J. R. Cottingham* and *Mr. George M. Green* were on the brief, for plaintiff in error:

A Federal question was raised by the answer and the amended answer.

The freight was paid on basis of a limited liability contract.

The classification and tariff were binding on shipper.

The shipper was charged with notice of provision of tariff.

There was error in the instructions given by the court.

In support of these contentions, see *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *C., B. & Q. Ry. Co.* v. *Miller*, 226 U. S. 513; *Chicago & Alton Ry. Co.* v. *Kirby*, 225 U. S. 155; *C., St. P., M. & O. Ry. Co.* v. *Latta*, 226 U. S. 519; *Dower* v. *Richards*, 151 U. S. 658; *K. C. So. Ry. Co.* v. *Albers Comm. Co.*, 223 U. S. 575; *K. C. So. Ry. Co.* v. *Carl*, 227 U. S. 639; *M., K. & T. Ry. Co.* v. *Harriman*, 227 U. S. 657; *Mackey* v. *Dillon*, 4 How. 421–427; *Stanley* v. *Schwalby*, 162 U. S. 255; *T. & P. Ry. Co.* v. *Mugg*, 202 U. S. 242; *Wells, Fargo & Co.* v. *Neiman-Marcus*, 227 U. S. 469; *St. L. & S. F. Ry. Co.* v. *Ladd*, 33 Oklahoma, 160; *Commonwealth* v. *Clearfield Coal Co.*, 129 Pa. St. 461.

Mr. John B. Daish, with whom *Mr. H. H. Smith* and *Mr. J. W. Beller* were on the brief, for defendant in error:

The shipment moved upon an oral agreement, which was a breach of the railway company's obligation to carry safely, and within a reasonable time. The horses were not weighed and, according to the Supreme Court of Missouri, this is conclusive that the alleged written contract was not in good faith. See *Leas* v. *Quincy Ry. Co.*, 136 S. W. Rep. 963; *Burns* v. *C. R. I. & P. Ry. Co.*, 132 S. W. Rep. 1; *Grant* v. *C., R. I. & P. Ry. Co.*, 132 S. W. Rep. 311.

While this court has decided several times that the signing of the contract was conclusive on the shipper as to the terms contained, it also clearly says that if any deceit or fraud, of whatever kind and nature, is practiced on the shipper, these facts of fraud or deceit may be shown in the case, and the jury are the rightful judges of the probative value of the same, and the contract in that class of cases would not be binding.

The facts found by the Supreme Court of Oklahoma are conclusive on this court.

This court will not inquire into the facts, but depends upon the findings of the state court. *Hilton* v. *Dickman*, 6 Cranch, 165; *United States* v. *Burchard*, 125 U. S. 178. See rule 4 of this court, par. 2.

Where the jurisdiction of this court is doubtful, a writ of error will not be awarded. *N. Y. & N. E. Ry. Co.* v. *Bristol*, 151 U. S. 555; *So. Ry. Co.* v. *Carson*, 194 U. S. 136.

The Interstate Commerce Act does not contemplate either a written or an oral contract, and neither has been legislated about by Congress, and until Congress exercises authority over these contracts, they will be regulated by the law of the place where they are made. An oral contract is valid in Missouri, in reference to an interstate shipment, so long as its terms do not contravene the provisions of the act. *Railroad Co.* v. *Abilene Cotton Co.*, 204 U. S. 426; *Merchants Press Co.* v. *Insurance Co.*, 151 U. S. 368.

This court will not take jurisdiction of a case decided on a theory not necessary to determine a Federal question. *Case Mfg. Co.* v. *Soxman*, 138 U. S. 431; *Atlantic Coast Line* v. *Riverside Mill Co.*, 219 U. S. 186; *Hammond* v. *Whittredge*, 204 U. S. 547; *Forbes* v. *Virginia State Council*, 216 U. S. 399; *Rogers* v. *Jones*, 214 U. S. 204; *Leathe* v. *Thomas*, 207 U. S. 93; *California Powder Works* v. *Davis*, 151 U. S. 393; *Gaar, Scott & Co.* v. *Shannon*, 223 U. S. 468.

Questions of fact found by state courts are conclusive on the Supreme Court of the United States. *King* v. *West Virginia*, 216 U. S. 100; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 97; *Chrisman* v. *Miller*, 197 U. S. 319.

The cases cited by counsel for plaintiff in error are not applicable, because, in all of the cases cited, the question presented was that the shipment moved upon the written contract, but there was no *bona fide* valuation.

The implied agreement of the common carrier is to carry safely, and deliver at destination within a reasonable time. It is otherwise when the action is for a breach of a contract to carry within a particular time, etc. *Railway Co.* v. *Kirby*, 226 U. S. 155.

The submission, as a question of fact, as to whether the shipment moved by oral contract, or the written contract, was a question of practice in this jurisdiction, and is not reviewable by this court.

Matters of practice in inferior courts do not constitute subjects upon which error can be assigned in the appellate courts. *Parsons* v. *Bedford*, 3 Pet. 433; *Earnshaw* v. *United States*, 146 U. S. 60; *The Francis Wright*, 105 U. S. 381; *Mining Co.* v. *Boggs*, 3 Wall. 304.

If the case was decided upon some ground where it was not necessary to bring the Federal statute into controversy, then no Federal question is presented, and the Supreme Court of the United States has no jurisdiction. *Lawler* v. *Walker*, 14 How. 149. See, *The Victory*, 6 Wall. 382.

It must appear that the state court could not have reached its judgment without expressly deciding the Federal matter. *Bachtel* v. *Wilson*, 204 U. S. 36.

If the statute is only collaterally involved, this court has no jurisdiction. *Candee* v. *York*, 168 U. S. 642; *Williams* v. *Oliver*, 12 Wall. 111.

If the case is disposed of upon non-Federal grounds, the Supreme Court has no jurisdiction. *Harrison* v. *Morton*, 171 U. S. 38; *Klinger* v. *Missouri*, 13 Wall. 257; *Chicago Railway Co.* v. *Illinois*, 200 U. S. 561.

Mr. Justice Day delivered the opinion of the court.

The defendant in error, plaintiff below and herein so designated, brought suit in the District Court of Lincoln County, Oklahoma, to recover for damages to a race horse, the property of the plaintiff, which was shipped with

other race horses from Kansas City, Missouri, to Lawrence, Kansas. Upon verdict in favor of the plaintiff, judgment was entered accordingly, which was affirmed by the Supreme Court of Oklahoma (36 Oklahoma, 435).

The plaintiff alleged that the contract of consignment was a verbal one, made by calling up the agent of the Railway Company at Kansas City by telephone on the day the shipment was made, advising him that the plaintiff had race horses which he desired to ship to Lawrence in time for the races next day; that he was informed by the agent that such shipment could be made and that if the horses could be loaded between four and six o'clock of that afternoon they would be carried by the fast freight known as the "Red Ball," making no stops for local freight and reaching Lawrence about twelve o'clock that night; that it was agreed between them that the shipment should be made by that train; that the plaintiff was instructed where to bring the horses and informed that a car would be placed to receive them; and that the horses were taken to the place designated by the agent, loaded into a car between five and six o'clock in the afternoon, the car being closed and labeled "Red Ball," meaning that it should go with the "Red Ball" train on that evening. The car was not taken out that night, and there was testimony tending to show that it was switched about in the yard and on the next morning was started with local freight to Lawrence, arriving there about two o'clock next day, too late for the races. And there was evidence that the horse of the plaintiff had been badly injured through the negligence of the defendant.

By an amended answer the Railway Company set up the fact that the shipment was in interstate commerce and the filing and approval by the Interstate Commerce Commission of certain tariff rates duly posted, as required by the act, wherein it was provided:

"(A) Rates named in section two apply on shipments

of ordinary live stock, where contracts are executed by shippers on blanks furnished by these companies, and are based on the declared valuation by the shipper at time contract is signed, not to exceed the following:

"Each horse or pony (gelding, mare, stallion), mule or jack, $100.00. Each ox, bull or steer, $50.00. Each cow, $30.00. Each calf, $10.00. Each hog, $10.00. Each sheep or goat, $3.00.

"(B) Where the declared value exceeds the above an addition of twenty-five per cent. will be added to the rate for each one hundred per cent. or fractional part thereof of additional declared valuation per head. Animals exceeding in value $800.00 per head will be taken only by special arrangement.

"(C) Table of rates named will be charged on shipments of live stock made with limitation of company's liability at common law, and under this status shippers will have the choice of executing or accepting contracts for shipments of live stock with or without limitation of liability and rates accordingly";

and alleged that the shipper obtained the benefit of the reduced rate applicable to the value fixed in the written contract governing the shipment of horses; that the shipment was made under the tariffs so filed with the Interstate Commerce Commission, and that the rates and liability of the Company were governed by the act of Congress. The plaintiff contended that the complete contract was made in the oral arrangement without reference to or mention of any particular rate or the value of the stock other than that it was a race horse. Taking the most favorable view of the testimony for the plaintiff, it tended to show that after the car had started from the place of loading an agent of the company presented to the plaintiff a printed contract made in conformity to the schedules filed with the Interstate Commerce Commission, but without calling his attention to its provisions, without

informing him of its contents and without procuring his assent to the terms therein stated, although he admitted executing the contract.

The trial court charged the jury over the exception of the Railway Company that if they found that at the time of the shipment the contract was entered into by the plaintiff and the defendant and that the plaintiff represented to the defendant that the horse did not exceed $100 in value and that the defendant relied upon the representation and gave a rate less than the regular one for that class of shipment and was misled by such misrepresentation and induced to fix a lower rate than the regular one, and if they found the defendant guilty of negligence, they were limited in their findings to the sum of $100; but that if they found that the representation was not made by the plaintiff but was arbitrarily inserted by defendant or printed in its contract when signed, then the plaintiff was not bound by the limitation and they should find his actual damages. The jury rendered a verdict in favor of the plaintiff for $1500.

Upon writ of error to the Supreme Court of Oklahoma that court affirmed the judgment rendered in the District Court and held:

"Where a shipment of live stock is made under a verbal contract, and where every move made, every step taken toward a shipment, up to and including a complete consignment and surrender of control by the shipper, the starting in transit of the shipment and the assumption of liability for negligence by the carrier, is all under and pursuant to such parol agreement, and after this a printed shipping contract is presented to the shipper to sign, he has the right to assume that it embodies the terms of the verbal agreement, and the carrier will not be permitted to escape liabilities accruing to the shipper under the verbal agreement by reason of certain provisions in the written contract at variance with the parol contract,

unless the shipper's attention has been called to such provisions and fair opportunity given him to assent to same."

It is thus seen that the defendant specially set up a defense under the Interstate Commerce Act, a Federal statute, which, if denied to him, was an adverse ruling of Federal right which would warrant the bringing of the case to this court from the highest court of a State under former § 709 of the Revised Statutes of the United States, now § 237 of the Judicial Code. It is apparent from the foregoing statement that the Federal question now presented involves the ruling of the state court denying to the carrier the benefit of the Interstate Commerce Act, a compliance with which was set up in the amended answer and supported by testimony tending to show the truth of the allegations thereof.

That the effect of the Carmack Amendment to the Hepburn Act, § 20, act of June 29, 1906, c. 3591, 34 Stat. 584, 593, was to give to the Federal jurisdiction control over interstate commerce and to make supreme the Federal legislation regulating liability for property transported by common carriers in interstate commerce has been so recently and repeatedly decided in this court as to require now little more than a reference to some of the cases. *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639; *Missouri, Kansas & Texas Ry. Co.* v. *Harriman*, 227 U. S. 657; *Chicago, Rock Island & Pacific Ry. Co.* v. *Cramer*, 232 U. S. 490; *Great Northern Ry. Co.* v. *O'Connor*, 232 U. S. 508. We regard these cases as settling the proposition that the shipper as well as the carrier is bound to take notice of the filed tariff rates and that so long as they remain operative they are conclusive as to the rights of the parties, in the absence of facts or circumstances showing an attempt at rebating or false billing. *Great Northern Ry. Co.* v. *O'Connor*, *supra*. To give to the oral agreement upon which the suit was brought, the prevailing

effect allowed in this case by the charge in the trial court, affirmed by the judgment of the Supreme Court of the State, would be to allow a special contract to have binding force and effect though made in violation of the filed schedules which were to be equally observed by the shipper and carrier. If oral agreements of this character can be sustained then the door is open to all manner of special contracts, departing from the schedules and rates filed with the Commission. *Kansas City Southern Ry. Co.* v. *Carl, supra,* p. 652. To maintain the supremacy of such oral agreements would defeat the primary purposes of the Interstate Commerce Act, so often affirmed in the decisions of this court, which are to require equal treatment of all shippers and the charging of but one rate to all, and that the one filed as required by the act.

The Supreme Court of the State in this case affirmed the instruction of the trial court upon which the case was given to the jury and held that the oral contract was binding unless it was affirmatively shown that the written agreement, based upon the filed schedules, was brought to the knowledge of the shipper and its terms assented to by him. This ruling ignored the terms of shipment set forth in the schedules and permitted recovery upon the contract made in violation thereof in a case where there was no proof that there was an attempt to violate the published rates by a fraudulent agreement showing rebating or false billing of the property, and no circumstances which would take the case out of the rulings heretofore made by this court as to the binding effect of such filed schedules and the duty of the shipper to take notice of the terms of such rates and the obligation to be bound thereby in the absence of the exceptional circumstances to which we have referred.

It follows that the ruling of the state court affirmed in the Supreme Court deprived the plaintiff in error of rights secured by the Federal statute, when properly

construed, which were set up and claimed in the state court.

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

MR. JUSTICE PITNEY dissents.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY *v.* MOORE.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 451. Argued February 26, 1914.—Decided April 6, 1914.

Decided on authority of the preceding case.

THE facts are stated in the opinion.

Mr. S. T. Bledsoe, with whom *Mr. J. R. Cottingham* and *Mr. George M. Green* were on the brief, for plaintiff in error.[1]

Mr. John B. Daish, with whom *Mr. H. H. Smith* and *Mr. J. W. Beller* were on the brief, for defendant in error.[1]

MR. JUSTICE DAY delivered the opinion of the court.

The defendants in error brought suit in the District Court of Lincoln County, Oklahoma, against the plaintiff in error for damages, alleging that they were the owners of a certain race horse which had been shipped by

[1] Argued simultaneously with *Atchison, Topeka and Santa Fe Ry. Co.* v. *Robinson;* for abstracts of arguments, see *ante,* p. 173.

them over the railroad of the plaintiff in error from Kansas City, Missouri, to Lawrence, Kansas, and which had been injured in transit. There was a verdict and judgment for the defendants in error, which was affirmed by the Supreme Court of Oklahoma (36 Oklahoma, 433).

It appears that the horse, for the injury to which this suit was brought, was a part of the shipment under which the horse in the previous case of *Atchison, Topeka & Santa Fe Ry. Co.* v. *Robinson*, just decided, *ante*, p. 173, was carried as therein stated, and that the facts relating to the shipment and cause of injury set forth in the present case are the same as those in the *Robinson Case*. The Supreme Court of Oklahoma, after noticing the fact that, except as to the value of the animals, the extent of their injuries and the resulting damages, the two cases were identical in every material feature, followed the *Robinson Case*.

The present case therefore is controlled by the decision in the *Robinson Case*, and from what we have there said it follows that the judgment here under review must be reversed.

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

MR. JUSTICE PITNEY dissents.

MYERS *v.* PITTSBURGH COAL COMPANY.

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

No. 816. Argued February 27, 1914.—Decided April 6, 1914.

The duty of the master to use reasonable diligence to provide a safe place for the employés to work is a continuing one which is discharged only when he provides and maintains a place of that character.

Where workmen are engaged in a hazardous occupation, such as underground mining, it is the duty of the master to exercise reasonable care for their safety, and not to expose them to injury by use of dangerous appliances or unsafe places to work, when such appliances and places can, by the exercise of due care, be made reasonably safe.

Where, on the evidence, reasonable men might well find that a man, found in a mangled and dying condition in a mine on a track beneath an overhead wire, was killed by negligence, and it cannot be said that no such conclusion could be reached on the testimony, it is not error to submit the question to the jury; and where, as in this case, the testimony can fairly support the verdict, it should not be set aside.

Where the court clearly instructed the jury that the defendant mine-owner was not liable in case the haulage system alleged to have caused the accident was in charge of a person for whose conduct the owner was not responsible under the law, and that the owner was only liable in case that system was under charge of a person for whose conduct the owner was responsible, the charge in this respect is not unfavorable to the owner and affords no ground for reversal.

It is not error for the court to refuse to affirm a particular and immaterial point in regard to the alleged negligence of the defendant when it would only serve to possibly confuse the jury and the point has already been covered by the charge.

Where the court was not requested to charge that the employé had assumed the risk of want of proper appliances, and no exception was taken to the failure to charge as to assumption of risk, the appellate court is not called on to consider that question.

The trial court having entered judgment on a verdict for plaintiff and the Circuit Court of Appeals having reversed, and without remanding or directing a new trial, ordered judgment for defend-

ant, this court, finding there was no reversible error in the conduct of the trial, reverses the judgment of the Circuit Court of Appeals and affirms the judgment of the trial court and remands the case to the District Court which has succeeded to the jurisdiction of the Circuit Court which tried the case.

203 Fed. Rep. 221, reversed.

THE facts, which involve the validity of a verdict for death of an employé claimed to have been occasioned by the negligence of the master, are stated in the opinion.

Mr. Charles K. Robinson, with whom *Mr. Edward C. Goodwin* and *Mr. Frank H. Kennedy* were on the brief, for petitioner.

Mr. Don Rose, with whom *Mr. Charles Marshall Johnston* was on the brief, for respondent:

There was no evidence from which the jury should be permitted to find what caused Myers' death.

There was no negligence on the part of defendant. There was not failure to provide adequate light at a dangerous place. It was not a customary or usual practice in the business to have lights at switches at the time of the accident in any mine.

The employer is bound to furnish machinery, appliances and equipment that are of ordinary character and reasonable safety, and the fact that they are of ordinary character is the conclusive test of their reasonable safety. *Titus* v. *Railroad Co.,* 136 Pa. St. 618, 626; *Kehler* v. *Schwenk,* 144 Pa. St. 348; *Reese* v. *Hershey,* 163 Pa. St. 253, 257; *Keenan* v. *Waters,* 181 Pa. St. 247; *Higgins* v. *Fanning & Co.,* 195 Pa. St. 599, 602; *Service* v. *Shoneman,* 196 Pa. St. 63; *McCarthy* v. *Shoneman,* 198 Pa. St. 568; *Boop* v. *Lumber Co.,* 212 Pa. St. 525; *Fick* v. *Jackson,* 3 Pa. Sup. Ct. 378; *Washington &c. R. R.* v. *McDade,* 135 U. S. 554; *Southern Pac. Ry.* v. *Seley,* 152 U. S. 145, 151; *Kilpatrick* v. *Railroad,* 121 Fed. Rep. 11; *Law* v.

Telegraph Co., 140 Fed. Rep. 558. See also *Keats* v. *Machine Co.*, 65 Fed. Rep. 940; *Crawley* v. *The Edwin*, 87 Fed. Rep. 540; *Donegan* v. *R. R.*, 165 Fed. Rep. 869.

The burden was upon the plaintiff to introduce evidence from which the jury could fairly find that it was the general, usual, and ordinary custom adopted by those in the business of mining to have a light at switches, and that defendant below had failed to comply with such general, usual, and ordinary custom.

While defendant admits the motor was being operated substantially without a headlight, this was not its negligence, as the operation of the haulage system was under the jurisdiction of the mine foreman. *Durkin* v. *Kingston Coal Co.*, 171 Pa. St. 193. See Pennsylvania Anthracite Mining Law of 1891, Pub. Law 176.

This ruling has been applied to the Pennsylvania Bituminous Coal Mining Law of May 15, 1893, Pub. Law 52. *Wolcott* v. *Erie Coal Co.*, 226 Pa. St. 210.

As to a matter entirely under the jurisdiction of the mine foreman, the operator is not liable in Pennsylvania, whatever may be the rule of law in other States. *Hall* v. *Simpson*, 203 Pa. St. 146; *Golden* v. *Mt. Jessup Coal Co.*, 225 Pa. St. 164; *D'Jorko* v. *Berwind-White Co.*, 231 Pa. St. 164, 170; *Rafferty* v. *National Mining Co.*, 234 Pa. St. 66; *Pittsburgh-Buffalo Co.* v. *Cheko*, 204 Fed. Rep. 353.

The burden was upon the plaintiff to show negligence on the part of the defendant. This burden was not sustained. There was no evidence showing negligence of defendant in permitting an exposed live trolley wire to cross a main track at an insufficient height.

Even if the trolley pole failed to automatically throw the automatic switch, and the motorman was compelled to throw it by hand, the failure of a device to work is not evidence that it is out of repair or defective, nor is it evidence of negligence on the part of the master. *Railway Co.* v. *Carr*, 153 Fed. Rep. 106, 110; *Patton* v. *Railroad*,

179 U. S. 658, 663; *Ash* v. *Verlenden Brothers*, 154 Pa. St. 246; *Brunner* v. *Blaisdell*, 170 Pa. St. 25; *Snodgrass* v. *Steel Co.*, 173 Pa. St. 228, 233; *Spees* v. *Boggs*, 198 Pa. St. 112, 116; *Surles* v. *Kistler*, 202 Pa. St. 289; *Bauman* v. *Best Mfg. Co.*, 234 Pa. St. 416; *Shandrew* v. *Railway Co.*, 142 Fed. Rep. 320.

If there was negligence it was the negligence of the duly certified mine foreman under the Pennsylvania Bituminous Coal Mining Law. Even if the alleged negligence existed, plaintiff failed to show that it was the proximate cause of the accident.

The jury cannot be permitted to guess as to the proximate cause, and the trial judge did permit them to guess as to what caused Myers' death. *Alexander* v. *Pennsylvania Water Co.*, 201 Pa. St. 252; *Marsh* v. *Lehigh Valley Railroad*, 206 Pa. St. 558; *Allen* v. *Kingston Coal Co.*, 212 Pa. St. 54.

Negligence, contributory or other, is not to be presumed, but must be shown by evidence. *Snodgrass* v. *Carnegie Steel Co.*, 173 Pa. St. 228; *Welsh* v. *Railroad Co.*, 181 Pa. St. 461; *Ziegler* v. *Simplex Foundry Co.*, 228 Pa. St. 64; *Ault* v. *Cowan*, 20 Pa. Sup. Ct. 616; *Bube* v. *Weatherly Borough*, 25 Pa. Sup. Ct. 88; *Cawley* v. *Balto. & Ohio R. Co.*, 44 Pa. Sup. Ct. 340; *Eigenbrodt* v. *Williamsport*, 44 Pa. Sup. Ct. 437; *Fahey* v. *Steel Foundry Co.*, 19 Pa. Dist. Rep. 314; *Rodgers* v. *L. & N. R. R.*, 88 Fed. Rep. 462; *Electric Co.* v. *Cronon*, 166 Fed. Rep. 651, 658; *Clare* v. *Railroad Co.*, 167 Massachusetts, 39; *Leary* v. *Fitchburg Ry. Co.*, 173 Massachusetts, 373; *Warner* v. *S. L. M. R. Co.*, 178 Missouri, 125; *Owen* v. *Ill. Cent. R. R.*, 77 Mississippi, 142; *Kenneson* v. *Railroad Co.*, 168 Massachusetts, 1.

The doctrine of assumption of risk rules this case. The employé assumes the usual dangers and risks of his employment, not only those which exist at the time he enters into his employment, but also the open and patent

dangers and risks that arise during his continuance therein, unless he makes complaint to his employer of such dangers arising, and is induced by his employer to continue in his employment by promises of change or repair. Master and Servant, 26 Cyc. 1205; *Rummell* v. *Dilworth*, 111 Pa. St. 343, 349; *New York &c. R. R.* v. *Lyons*, 119 Pa. St. 324, 335; *Bermisch* v. *Roberts*, 143 Pa. St. 1, 5; *Powell* v. *Tin Plate Co.*, 215 Pa. St. 618, 621; *Jones* v. *Burnham*, 217 Pa. St. 286.

The employé who continues in an employment, which by reason of defective machinery or appliances he knows to be dangerous, assumes the risk of any accident that may result therefrom. *Talbot* v. *Sims*, 213 Pa. St. 1, 3; *Wannamaker* v. *Burke*, 111 Pa. St. 423; *Brossman* v. *Railroad Co.*, 113 Pa. St. 490; *Railroad Co.* v. *Hughes*, 119 Pa. St. 301; *Boyd* v. *Harris*, 176 Pa. St. 484; *McCarthy* v. *Shoneman*, 198 Pa. St. 568; *Wilkinson* v. *Johns Mfg. Co.*, 198 Pa. St. 634; *Nelson* v. *Railway Co.*, 207 Pa. St. 363; *Lindberg* v. *Tube Co.*, 213 Pa. St. 545; *Danisch* v. *Amer*, 214 Pa. St. 105; *Sandt* v. *Foundry Co.*, 214 Pa. St. 215; *Schneider* v. *Quartz Co.*, 220 Pa. St. 548; *Fick* v. *Jackson*, 3 Pa. Sup. Ct. 378; *Auburn* v. *Tube Works*, 14 Pa. Sup. Ct. 568; *Choctaw &c. R. R.* v. *McDade*, 191 U. S. 64; *Butler* v. *Frazee*, 211 U. S. 459; *St. Louis Cordage Co.* v. *Miller*, 126 Fed. Rep. 495; *Burke* v. *Union Coal Co.*, 157 Fed. Rep. 178, 181; *M., K. & T. R. Co.* v. *Wilhoit*, 160 Fed. Rep. 440, 444; *Haines* v. *Spencer*, 167 Fed. Rep. 266, 269.

If the defect is so clearly observable that the employé must be presumed to know of it, and he continues in the master's employ without objection, he is taken to have made his election to continue in the employ notwithstanding this defect, and in such case cannot recover.

Cases *supra* and *Texas R. R. Co.* v. *Archibald*, 170 U. S. 665; *Gulf, &c. R. R.* v. *Jackson*, 65 Fed. Rep. 48; *Am. Dredging Co.* v. *Walls*, 84 Fed. Rep. 428; *Detroit Oil Co.* v. *Grable*, 94 Fed. Rep. 73; *Mining Co.* v. *Kettleson*, 121 Fed.

Rep. 529; *Chicago R. Co.* v. *Benton*, 132 Fed. Rep. 460; *Lake* v. *Shenango*, 160 Fed. Rep. 887; *Wollington* v. *Railroad Co.*, 161 Fed. Rep. 713; *Am. S. & T. P. Co.* v. *Urbanski*, 162 Fed. Rep. 91; *Solt* v. *Cenney*, 162 Fed. Rep. 660; *Southern Ry. Co.* v. *Lyons*, 169 Fed. Rep. 557; *Errico* v. *Company*, 170 Fed. Rep. 852; *Troxell* v. *Railroad Co.*, 180 Fed. Rep. 871.

MR. JUSTICE DAY delivered the opinion of the court.

Annie Myers brought an action in the United States Circuit Court for the Western District of Pennsylvania to recover for the death of her husband, John Myers, alleged to have been caused by the negligence of the defendant, the Pittsburgh Coal Company. Under the law of Pennsylvania she might bring this action for the benefit of herself and minor children. A verdict was rendered against the Coal Company; on writ of error the case was reversed by the Circuit Court of Appeals for the Third Circuit (203 Fed. Rep. 221), and it was brought here on writ of certiorari to that court.

The Circuit Court of Appeals was of the opinion that upon the facts shown the plaintiff had not made out the right to recover and the judgment was reversed without directing a new trial and without sending the case back to the District Court, which had succeeded to the jurisdiction of the Circuit Court, for that purpose. This was error within the doctrine of *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364; *Pedersen* v. *Del., Lack. & West. R. R. Co.*, 229 U. S. 146, 153. It is further contended that apart from the question just noticed, the Circuit Court of Appeals erred in reversing the judgment of the Circuit Court, as it did, upon the ground that there was not sufficient testimony in the case to show that the deceased came to his death by the negligence charged in the petition. To determine this question involves a brief consideration of the facts in the case.

John Myers, at the time of his death, was, and for several months had been in the employ of the Coal Company as "snapper" or brakeman in underground operations, taking part in the movement of cars in and about the mine. It appears that on the morning of the injury, a train of empty coal cars, some thirty or forty in number, was being taken down the main entry and then further down a side entry into the mine where the cars were to be subsequently distributed in the work. The manner of operation was that empty cars were hauled by a large electric motor car down the main entry to a side entry where a flying switch was made by which the motor car continued in the main entry beyond the junction of the side entry and the cars ran down the side entry for a considerable distance, then, upon signal from Myers, whose duty it was to ride upon the rear car of the train, by the waving of his cap, which contained a lamp, or by the movement of his head with cap on, the motor car followed on down the entry, the purpose being to overtake the empty cars and distribute them in the mine. Down the side entry about 157 feet from the main entry was an automatic switch, which would turn the current into the trolley wire and permit the motor car to proceed farther into the mine. It was not working properly, and the motorman alighted and turned the switch by hand, returned to the motor car and proceeded. Up to the time the motor car reached the automatic switch Myers had been seen signalling for the motor car to come on. Some distance further there was a branch of the trolley system running into another entry, and the trolley wire passed over the tracks in the side entry at a distance of about five feet seven and one-half inches above the rail, making it necessary for one of ordinary height to remain seated in the car or to stoop down. The roof of the entry was about nine feet above the rail at this point. There was no light at this switch, nor was the wire guarded in any

way. It also appears that because of ineffective carbons the headlight on the motor car was not burning, and had not been burning for several days; that requisition had been made upon the superintendent of the mine for new carbons but that there were none at the mine. The motorman testified that when the headlight was burning he could see objects on the track clearly at a distance of twenty-five or thirty yards, and that he could stop his car in about thirteen feet. Continuing on from the switch, as we have said, the motor car suddenly ran upon something, was stopped, and it was found that Myers had been run over. He was lying in the middle of the track with his head toward the motor and his cap, upright, with the light still burning, was lying beside the track. Myers' body was badly torn and mangled before the motor car could be stopped. His tongue was found to be moving, but he shortly died from his injuries. It was also shown that Myers was a man of unusual strength and vigor, twenty-nine years of age, and to all appearances in full health and strength shortly before the injury.

The trial court submitted the case to the jury to determine whether the defendant had failed to discharge its duty of using reasonable care to provide a proper and safe place for Myers to work, that is, in failing to provide adequate lights at a dangerous place and permitting the motor car to be operated without the headlight, and also in permitting an exposed live trolley wire to cross the main track at insufficient elevation. An inspection of the record satisfies us that there was testimony enough in the case to carry these questions to the jury under the instructions which were given. The duty of the master to use reasonable diligence to provide a safe place for the employés to work, to carry on the occupation in which they are employed, is too well settled to require much consideration now. This duty is a continuing one and discharged only when the master provides and maintains a place of that

character. *Baltimore & Potomac R. R. Co.* v. *Mackey*, 157 U. S. 72, 87; *Union Pacific Ry. Co.* v. *O'Brien*, 161 U. S. 451; *Choctaw, Oklahoma &c. R. R. Co.* v. *McDade*, 191 U. S. 64; *Kreigh* v. *Westinghouse & Co.*, 214 U. S. 249, 255. Under the case made, the jury might well have found that the overhead wire was hung too low for the safety of the men; that there was want of adequate light at this place, and that it was negligence to run the motor car into such a place without the light which it was its duty to provide. Where workmen are engaged in such mines in occupations more or less hazardous, it is the duty of the master to exercise reasonable care for their safety and not to expose them to injury by use of dangerous appliances or unsafe places to work, when the exercise of due skill and care will make the appliances and places reasonably safe. *Choctaw, Oklahoma &c. R. R. Co.* v. *McDade, supra*, 66; *Kreigh* v. *Westinghouse & Co., supra*, 256.

The opinion of the Circuit Court of Appeals placed the reversal largely upon the want of definite proof as to the manner in which Myers came to his death, whether by contact with the wire, or, if so, whether that merely disabled him or he was only injured or stunned by the fall, was seized with vertigo or other sudden sickness and fell from the car for that reason, or lost his footing by some unexpected movement of the train or voluntarily got off the car and stumbled and fell upon the track, or became bewildered in the dark and mistakenly supposed himself to be in a place of safety. The court held that all these situations were more or less probable, and, in the absence of some more accurate means of ascertaining the true condition in this regard, no recovery could be had for the wrongful causing of his death, and that an examination of the testimony brought the court to the conclusion that the jury should not have been permitted to guess as to the proximate cause of death. This question, however, was submitted to the jury and found against the defendant in

the trial court. Unless the testimony was such that no recovery can be had upon the facts shown in any view which can be properly taken of them the verdict and judgment of the District Court must be affirmed.

That there was ample testimony to carry the question of negligence to the jury we have already said, and in any case it cannot be said as a matter of law that there was no evidence tending to show that Myers came to his death by the negligence of defendant in one or more of the ways charged in the petition. Considering the testimony, as it must be considered in determining questions of this character in appellate courts, in its most favorable aspect to the plaintiff below, we think the jury might well have found, in view of the place at which the body of Myers was found near to the wire, with his cap gone from his head, that he came in contact with that wire and was thrown to the ground, and that he survived from contact with the wire, carrying the voltage which it did, and while in this situation was run over and killed by the approaching motor car, the operator being unable to see his body upon the track because of the want of efficient light in the entry or in the motor car. We think reasonable men considering the testimony adduced might well have come to this conclusion, and that it was error in the appellate court to set aside the verdict for entire absence of testimony upon this subject. In our opinion, the trial court properly left the question to the jury upon testimony which when fairly considered might sustain the verdict. See *Humes* v. *United States*, 170 U. S. 210.

As to the contention that the trial court erred in refusing to give the instruction requested by the Coal Company to the effect that the equipment and operation of the electric haulage plant and all persons employed in the mine were in charge and subject to the orders and direction of a duly qualified mine foreman, and that, if decedent's death occurred by reason of negligence, such negligence

was that of the mine foreman and the Coal Company could not be held liable: The record shows that there was testimony tending to show that the electrical system was in charge of the electrician of the Coal Company employed as Superintendent of Electrical Equipment, who had charge of the purchase, installation, care, operation and maintenance of the electrical equipment used by the Company and who was not subject to the mine foreman. The court submitted to the jury the question whether the Coal Company had committed to the mine foreman the electric system of hauling in the interior of the mine or whether such system was in charge of an electrical engineer not accountable to the mine foreman, distinctly telling the jury that if the mine foreman was in charge in this respect the company would not be responsible, but if they found that the Coal Company had excluded from the control of the mine foreman the electric haulage system and that the negligence of the Coal Company was the direct and proximate cause of the death of the plaintiff's husband, there must be a recovery. The charge in this respect was as favorable as the company was entitled to have given.

As to the objection that the court erred in failing to give the instruction requested by the defendant concerning the operation of the automatic switch, to the effect that if it did not work on the trip on which the decedent was run over and even if it was out of order those conditions would not contribute to the running over of the decedent by the motor car or to his death, it is sufficient to say that the court in its charge to the jury did not submit a question of negligence specifically concerning this automatic switch and its effect if out of repair, and to have affirmed this point by giving it to the jury would only have served to possibly confuse the jury upon a point immaterial to the plaintiff's recovery in view of the manner in which the case was given in charge to the jury.

We have examined the charge and the exceptions thereto and requests for instructions and are of opinion that the trial court fairly submitted the questions involved to the jury in a charge to which there was no substantial objection.

As to the suggestion that the deceased had assumed the risk of the want of proper appliances and the defective character of the light at the place in which he worked and was injured, we do not find that the court was requested to make any charge upon that subject or that any exception was taken to the court's failure to charge as to assumption of risk. In that state of the record, the appellate court was not called upon to consider that question. See *Humes* v. *United States, supra.* The Circuit Court of Appeals reversed the case for the reason, which we have stated, that there was an entire failure of adequate testimony to show that Myers came to his death by the negligence of the company in the manner charged. As we have said, we think that was an erroneous conclusion.

It follows that the judgment of the Circuit Court of Appeals must be reversed and the judgment of the Circuit Court affirmed and the case remanded to the District Court.

RUSSELL *v.* SEBASTIAN.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 415. Argued January 6, 1914.—Decided April 6, 1914.

In determining the question of impairment under the contract clause of the Constitution it is the duty of this court to determine for itself the nature and extent of rights acquired under prior legislative or constitutional action.

The state court having construed a statutory or constitutional provi-

sion, which gave specified privileges in regard to public utilities in a certain class of municipalities under specified conditions without specifying the persons or corporations who could avail thereof or the method of acceptance, to the effect that the grant became effective in any municipality within the designated class by the party accepting it as if it had been made specially to the accepting party, this court follows such construction in regard to § 19 of art. XI of the constitution of 1879 of California as amended in 1884.

When the State declares that it is bound if its offer to grant a privilege, which plainly contemplates the establishment of a plant and the assumption of a duty to perform the services incident to a public utility, is accepted, the grant resulting from the acceptance constitutes a contract and vests a property right in the accepting party which is within the protection of the contract clause of the Federal Constitution.

The rule that public grants are to be construed strictly in favor of the public, and ambiguities are to be resolved against the grantee, is a salutary one to frustrate efforts through skilful wording of the grant by interested parties; but the rule does not deny to public offers a fair and reasonable interpretation or justify withholding that which the grant was intended to convey.

An offer of the State to allow parties, ready to serve municipalities with gas or water, provisions for conveying the gas or water, is to be given a practical common-sense construction; and the breadth of the offer is commensurate with the requirements of the undertaking invited.

Where the constitution of the State does not forbid, the State may determine the policy of making direct grants for franchises in municipalities and may determine their terms and scope.

A grant to lay pipes and conduits in the streets of a municipality, dependent only upon acceptance, is not to be regarded as accepted foot by foot as pipes are laid, but in an entirety for all the streets of the municipality; and after acceptance and preparation for compliance with the offer the grant cannot be withdrawn as to the streets in which pipes have not been laid. Such action would impair the contract.

The duty of a public service corporation to extend its service to meet reasonable demands of the community is correlative to the obligation of the municipality to allow the service to be extended as required by the public needs.

In this case the public service corporation having, by accepting the offer of the State and making the investment, committed itself irrevocably to the undertaking, it was entitled to continue to lay pipes

in the streets wherever necessary to extend its service, and it could not be prevented from doing so by subsequent legislation impairing the grant.

The amendment of 1911 to § 19 of art. XI of the California constitution of 1879 as amended in 1884 and municipal ordinances of Los Angeles adopted in pursuance thereof, were ineffectual under the contract clause of the Federal Constitution to deprive a corporation which had accepted the offer of the State, contained in § 19 before the amendment, of its right to continue to lay pipes in the streets of Los Angeles in accordance with the general regulations of the municipality in regard to such work.

163 California, 668, reversed.

THE facts, which involve the construction and constitutionality under the contract clause of the Federal Constitution of provisions of the constitution of California in regard to right of gas and water companies to excavate streets in municipalities for their mains, and the application of such provisions to such corporations in the City of Los Angeles, are stated in the opinion.

Mr. Garret W. McEnerney and *Mr. Oscar A. Trippet*, with whom *Mr. Warren Gregory*, *Mr. H. H. Trowbridge* and *Mr. W. H. Chickering* were on the brief, for plaintiff in error.

Mr. Ray E. Nimmo and *Mr. Albert Lee Stephens*, with whom *Mr. John W. Shenk* and *Mr. William J. Carr* were on the brief, for defendant in error.

By leave of the court, *Mr. Charles S. Wheeler* and *Mr. John F. Bowie* filed a brief as *amici curiæ*.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is a writ of error to review a judgment in a *habeas corpus* proceeding. 163 California, 668.

The plaintiff in error was arrested, on or about Febru-

ary 27, 1912, upon the charge of excavating in a street of Los Angeles in violation of a municipal ordinance. He was acting on behalf of the Economic Gas Company, a corporation supplying inhabitants of the city with gas, and was engaged in preparing to lay its pipes in a street which it had not previously used. The company was proceeding under a claim of right based upon § 19 of art. XI of the state constitution of 1879, as amended in 1884, which was as follows:

"SEC. 19. In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants, either with gaslight, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

On October 10, 1911, this section of the constitution was amended by the substitution of the following provision:

"SEC. 19. Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate

works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; *provided*, that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance."

Thereupon, by ordinance approved October 26, 1911, the city of Los Angeles provided that no one should exercise any franchise or privilege to lay or maintain pipes or conduits in the streets for conveying gas, water, etc., without having obtained a grant from the city in accordance with the city's charter and the procedure prescribed by the ordinance, unless such person (or corporation) might be "entitled to do so by direct and unlimited authority of the constitution of the State of California, or of the constitution or laws of the United States." Another ordinance, approved February 21, 1912, declared that it should be unlawful to make any excavation in a street for any purpose without written permission from the board of public works, and that before issuing the permit the board should require the applicant to show legal authority to use the streets for the purpose specified.

It was under the last-mentioned ordinance that the charge was laid against the plaintiff in error. A writ of *habeas corpus* was sued out upon the ground that the municipal legislation, and the constitutional amendment upon which it rested, so far as they interfered with the extension by the company of its lighting system within the city, impaired the obligation of the company's contract with the State in violation of Art. I, § 10, of the Federal Constitution, and also deprived it of its property

without due process of law, and denied to it the equal protection of the laws, contrary to the Fourteenth Amendment. The writ was returnable before the Supreme Court of the State.

It appeared that the Economic Gaslight Company was organized in 1909 and thereupon undertook to manufacture and distribute gas within the city for lighting purposes. As there were no gas works owned and controlled by the city, the constitutional provision (as it stood before the amendment of 1911) applied. Having acquired an existing plant, which had been established under the authority of that provision, the company had extended its system so that, prior to October 10, 1911, it had many miles of mains and was serving upwards of 3500 customers. Its plant had been established with a view to an increased demand for its service. Its situation, as disclosed by the petition, which was not traversed, was thus described by the state court: The petitioner "shows that the works of said company were established and operated with the intent to supply gas in every section of the city and to lay pipes in every street, if necessary for that purpose, that to this end it constructed works of a size sufficient to supply gas to a much larger territory than it was supplying prior to October 10, 1911, and had expended in so doing $100,000 more than would have been required for works to supply only the territory reached by its pipes at that date, that it had laid and maintained its pipes in many streets of the city and had supplied gas thereby to the inhabitants in such streets for more than two years before said date, that prior to said date, said company had made contracts with many of the inhabitants of the city to supply gas to them, that said contracts were still in force, and that, in order to perform them, it must extend its mains into streets not before used by it. All its works before that date were constructed in accordance with the provisions of the constitution existing

prior to said amendment and in compliance with existing regulations and directions of the city authorities." The petition also sets forth that by reason of the increased expense of construction of its plant, as above stated, it could not supply at a profit the territory contiguous to the streets actually used by it at the date of the amendment, and that to confine its service to that territory would entail upon the company a constant loss of more than $2,000 a month.

It was further averred that on February 23, 1912, the company had applied to the board of public works for permission to excavate in the designated street, not theretofore occupied by it, for the purpose of extending its distributing system in accordance with the former provision of the constitution, offering to comply with the general regulations of the city with respect to damages and indemnity for damages. The board informed the company that there were no general regulations on the subject with which it had not complied, but that the company would not be permitted to open the street, or to lay its pipes therein, unless it first sought and obtained a franchise by purchase in accordance with the ordinance of October 26, 1911. Thereupon, the company notified the board that it would extend its mains at the time and place stated and requested the board to direct and superintend the work. It was proceeding accordingly to open a trench for its mains when it was stopped by the arrest of the plaintiff in error.

The Supreme Court of the State held that the constitutional amendment authorized the city to enact the ordinances in question and thus to prescribe the terms and conditions upon which franchises of the character described might thereafter be obtained and exercised. It was further decided that the grant under the former constitutional provision took effect only upon acceptance; that the only means whereby an effectual manifestation

of acceptance could be made was the act of taking possession and occupying the street for the purpose allowed; and hence that the vested right of the Economic Gas Company, at the time the constitution was changed, went only so far as its actual occupancy and use of the streets then extended. Concluding, upon this ground, that the company had no authority to lay pipes in the new street in order to extend its service into new territory within the city, the petitioner was remanded to custody. 163 California, 677, 678, 681.

It is at once apparent that the question thus raised does not concern the power of the city to supervise the execution of the work. That, as well as the authority to regulate rates, was expressly secured by the constitutional provision upon which the claim is founded. Nor does that provision permit the assertion of an exclusive franchise. The city may not only authorize others to compete, but it may compete itself. *Madera Water Works* v. *Madera*, 228 U. S. 454.

Within these recognized limits, the question remains as to the nature and extent of the right acquired by the company prior to the constitutional amendment,—a question which, in view of the appeal to the clause of the Federal Constitution prohibiting state legislation impairing the obligation of contracts, it is the duty of this court to determine for itself. *Douglas* v. *Kentucky*, 168 U. S. 488, 502; *Northern Pacific Railway* v. *Duluth*, 208 U. S. 583, 590; *Grand Trunk Western Railway* v. *South Bend*, 227 U. S. 544, 551; *Atlantic Coast Line R. R. Co.* v. *City of Goldsboro*, 232 U. S. 548, 556.

1. Before the constitution of 1879, the right to lay pipes in streets rested in grant from the legislature. It could delegate to the municipality, or itself exercise, the power. Experience had produced the conviction that this authority was abused; that favoritism had fostered monopolies and restrained the competition that was then thought to be desirable. In order to terminate these

evils, the unique plan was decided upon of making street franchises, for the purpose of supplying water and artificial light, the subject of direct grant by the constitution itself without requiring any action on the part of the legislature to give it force. That this was the purpose and effect of § 19 of art. XI of the constitution of 1879 was decided by the Supreme Court of California in *People* v. *Stephens*, 62 California, 209, shortly after that constitution was adopted. See also *Pereria* v. *Wallace*, 129 California, 397; *In re Johnston*, 137 California, 115; *Denninger* v. *Recorder's Court*, 145 California, 629; *Stockton Gas & Electric Co.* v. *San Joaquin County*, 148 California, 313; *South Pasadena* v. *Pasadena Land & Water Co.*, 152 California, 579.

It is pointed out that the language of the provision was general both with respect to persons and to places; that it embraced all the cities in the State; and that it did not provide for any formal or written acceptance of the offer. But the lack of a requirement of an acceptance of a formal character did not preclude acceptance in fact. Nor did the generality of the provision with respect to all persons and cities make it impossible for particular persons to acquire rights thereunder in particular cities. It is clear that the offer was to be taken distributively with respect to municipalities. It referred to "any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light;" and when as to such a city the offer was accepted, the grant became as effective as if it had been made specially to the accepting individual or corporation. (See *Stanislaus County* v. *San Joaquin Co.*, 192 U. S. 201, 206.)

In the case of *In re Johnston*, *supra*, the court said (p. 119): "In *People* v. *Stephens*, 62 California, 209, the above section" (referring to § 19 of art. XI) "was construed by this court to be a direct grant from the people to the persons therein designated of the right to lay pipes in the

streets of a city for the purpose specified, without waiting for legislative authority, or being subject to any restrictions from that branch of the government. . . . The only limitations upon this privilege are those contained in the language in which it is granted,—viz., that the work shall be done 'under the direction of the superintendent of streets, or other officer in control thereof,' and 'under such general regulations as the municipality may prescribe for damages and indemnity for damages.'" As it was succinctly stated in *Clark* v. *Los Angeles*, 160 California, 30, 39, "The express grant made by section 19 is of the privilege, franchise, or easement to place in the public streets of a city the conduits necessary or convenient for the business of supplying light or power to the city and its inhabitants. It may be accepted by any person, or by any company duly incorporated to engage in that business."

When the voice of the State declares that it is bound if its offer is accepted, and the question simply is with respect to the scope of the obligation, we should be slow to conclude that only a revocable license was intended. Moreover the provision plainly contemplated the establishment of a plant devoted to the described public service and an assumption of the duty to perform that service. That the grant, resulting from an acceptance of the State's offer, constituted a contract, and vested in the accepting individual or corporation a property right, protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this court. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 660; *New Orleans Water Works Co.* v. *Rivers*, 115 U. S. 674, 680, 681; *Walla Walla* v. *Walla Walla Co.*, 172 U. S. 1, 9; *Louisville* v. *Cumberland Telephone Co.*, 224 U. S. 649, 663, 664; *Grand Trunk Rwy. Co.* v. *South Bend*, 227 U. S. 544, 552; *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58, 65; *Boise Water Co.* v. *Boise City*, 230 U. S. 84, 90, 91. Dillon on Municipal Corporations, 5th ed., § 1242.

2. The controversy in the present case relates to the extent to which the grant had become effective through acceptance. It is not contended that the change in the constitution could disturb the company's rights in the streets used previous to the amendment; but it is insisted that such actual user measured the range of the acceptance of the grant and hence defined the limits of its operation.

In support of this view, the established and salutary rule is invoked that public grants are to be construed strictly in favor of the public; that ambiguities are to be resolved against the grantee. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 546, 549; *Slidell* v. *Grand Jean*, 111 U. S. 412, 437; *Detroit Citizens' Rwy. Co.* v. *Detroit Railway*, 171 U. S. 48, 54; *Knoxville Water Co.* v. *Knoxville*, 200 U. S. 22, 34; *Blair* v. *Chicago*, 201 U. S. 400, 471. It has often been stated, as one of the reasons for the rule, that statutes and ordinances embodying such grants are usually drawn by interested parties and that it serves to frustrate efforts through the skillful use of words to accomplish purposes which are not apparent upon the face of the enactment. *Dubuque & Pacific R. R. Co.* v. *Litchfield*, 23 How. 66, 88; *Slidell* v. *Grand Jean, supra; Blair* v. *Chicago, supra.* But it must also be recognized that this principle of construction does not deny to public offers a fair and reasonable interpretation, or justify the withholding of that which it satisfactorily appears the grant was intended to convey. *Winona & St. Peter R. R. Co.* v. *Barney*, 113 U. S. 618, 625; *United States* v. *D. & R. G. Rwy. Co.*, 150 U. S. 1, 14; *Minneapolis* v. *Street Rwy. Co.*, 215 U. S. 417, 427. Here, the provision was presented by a constitutional convention for adoption by the people as the deliberate expression of the policy of the State in order to secure the benefits of competition in public service, and it will not be questioned that it must receive, as the state court said in *People* v. *Stephens* (62 California, p. 233), "a practical, common-sense construction."

There is no ambiguity as to the scope of the offer. It was not simply of a privilege to maintain pipes actually laid, but to lay pipes so far as they might be required in order to effect an adequate distribution. The privilege was defined as that "of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

The breadth of the offer was commensurate with the requirements of the undertaking which was invited. The service to which the provision referred was a community service. It was the supply of a municipality—which had no municipal works—with water or light. This would involve, in the case of water-works, the securing of sources of supply, the provision of conduits for conveying the water to the municipality, and the permanent investment in the construction of reservoirs with suitable storage capacity; and, in the case of gas-works, the establishment of a manufacturing plant on a scale large enough to meet the demands that could reasonably be anticipated. But water-works and gas-works constructed to furnish a municipality with water or light would, of course, be useless without distributing systems; and the right of laying in the streets the mains needed to carry the water or gas to the inhabitants of the community was absolutely essential to the undertaking as a practical enterprise. This, the constitutional provision recognized. It was clearly designed to stop favoritism in granting such rights, not to withhold them. It is not to be supposed that it was expected that water-works and gas-works of the character required to supply cities would be erected without grants of franchises to use the streets for laying the necessary

distributing pipes. *Boise Water Co.* v. *Boise City,* 230 U. S. 84, 91. The scheme of the constitutional provision was not to make it impossible to secure such grants, or to restrict the street rights to be acquired, but, as already stated, to end the existing abuses by making these grants directly through the constitution itself instead of permitting them to be made by the legislature or by municipalities acting under legislative authority. *People* v. *Stephens,* 62 California, 209.

In deciding upon the policy of making these direct grants it was for the State to determine their terms and their scope; it could have imposed whatever conditions it saw fit to impose. But it did not attempt to confine the privilege to particular streets or areas, or to make the laying of the necessary pipes conditional upon the renewal of the offer street by street, or foot by foot, as the pipes were put in the ground. The people of the State decided that local superintendence of the execution of the work, regulations and indemnity with respect to damages, and the continuing authority of the municipality to regulate rates, would be adequate protection. It was upon this basis that the State offered the privilege of laying pipes in the streets so far as might "be necessary for introducing into and supplying such city and its inhabitants" either with water or light as the case might be. The individual or corporation undertaking to supply the city with water or light was put in the same position as though such individual or corporation had received a special grant of the described street rights in the city which was to be served. Such a grant would not be one of several distinct and separate franchises. When accepted and acted upon it would become binding—not foot by foot, as pipes were laid—but as an entirety, in accordance with its purpose and express language. *Grand Trunk Rwy. Co.* v. *South Bend,* 227 U. S. 544, 555, 556.

It is urged that, in the absence of any provision for

formal or written acceptance, the only way the offer could be accepted was by use of the streets, and that for this reason the rights of the company could not extend beyond the length of its pipes in place. But this is to say that the offer as made could not be accepted at all; that the right to *lay* pipes could not in any event be acquired. It is to assume, despite the explicit statement of the constitutional provision, that the investment in extensive plants—in the construction of reservoirs, and in the building of manufacturing works—was invited without any assurance that the laying of the distributing system could be completed or that it could even be extended far enough to afford any chance of profit. It would be to deny the right offered, although essential to the efficacy of the enterprise, and in its place to give a restricted and inadequate right, which was unexpressed.

In view of the nature of the undertaking in contemplation, and of the terms of the offer, we find no ground for the conclusion that each act of laying pipe was to constitute an acceptance *pro tanto*. We think that the offer was intended to be accepted in its entirety as made, and that acceptance lay in conduct committing the person accepting to the described service. The offer was made to the individual or corporation undertaking to serve the municipality, and when that service was entered upon and the individual or corporation had changed its position beyond recall, we cannot doubt that the offer was accepted. *City Railway Co.* v. *Citizens R. R. Co.*, 166 U. S. 557, 568; *Grand Trunk Rwy. Co.* v. *South Bend, supra.* In this view, the grant embraced the right to lay the extensions that were needed in furnishing the supply within the city.

This construction of the constitutional provision is the only one that is compatible with the existence of the duty which it was intended, as it seems to us, that the recipient of the State's grant should assume. The service, as has been said, was a community service. Incident to the

undertaking in response to the State's offer was the obligation to provide facilities that were reasonably adequate. *Lumbard* v. *Stearns*, 4 Cush. 60; *Cumberland Tel. Co.* v. *Kelly*, 160 Fed. Rep. 316, 324; *Atlantic Coast Line R. R. Co.* v. *North Carolina Corp. Com'n*, 206 U. S. 1, 27; *People ex rel. Woodhaven Gas Co.* v. *Deehan*, 153 N. Y. 528, 533; Morawetz on Corporations, § 1129. It would not be said that either a water company or a gas company, establishing its service under the constitutional grant, could stop its mains at its pleasure and withhold its supply by refusing to extend its distributing conduits so as to meet the reasonable requirements of the community. But this duty and the right to serve, embracing the right under the granted privilege to install the means of service, were correlative.

In *People ex rel. Woodhaven Gas Co.* v. *Deehan*, *supra* (approved in *Illinois Central R. R. Co.* v. *Chicago*, 176 U. S. 646, 666) a grant of authority to lay conduits for conveying gas through the streets of a town, so as to render service to the people of the town, was held to extend as a property right not only to the streets then existing, but to those subsequently opened. The court said (p. 533): "It is well known that business enterprises such as the relator is engaged in are based upon calculations of future growth and expansion. A franchise for supplying gas not only confers a privilege, but imposes an obligation, upon the corporation to serve the public in a reasonable way. The relator is bound to supply gas to the people of the town upon certain conditions and under certain circumstances, and it would be most unjust to give such a construction to the consent as to disable it from performing its obligations. It cannot reasonably be contended that the relator is obliged to apply for a new grant whenever a new street is opened or an old one extended, as would be the case if the consent applied only to the situation existing when made. When the right to use the streets has been

once granted in general terms to a corporation engaged in supplying gas for public and private use, such grant necessarily contemplates that new streets are to be opened and old ones extended from time to time, and so the privilege may be exercised in the new streets as well as in the old."

As to the question of fact, the present case presents no controversy. It was averred, and not denied, that the works of the gas company were established and operated with the intent to furnish gas throughout the city, wherever needed, and that this enterprise had been diligently prosecuted; that a large investment had been made in a plant which was adequate to supply a much greater territory than that reached by the distributing mains when the amendment of 1911 was adopted; that the expense of this installation made it impossible to supply at a profit the limited territory contiguous to the streets then actually occupied by the company; and that if it were confined in its service to that territory it would sustain a constant loss. The company, by its investment, had irrevocably committed itself to the undertaking and its acceptance of the offer of the right to lay its pipes, so far as necessary to serve the municipality, was complete.

We conclude that the constitutional amendment of 1911, and the municipal ordinances adopted in pursuance thereof, were ineffectual to impair this right, and that the company was entitled to extend its mains for the purpose of distributing its supply to the inhabitants of the city subject to the conditions set forth in the constitutional provision as it stood before the amendment.

The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

UNION LIME COMPANY *v.* CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 529. Argued March 2, 1914.—Decided April 6, 1914.

In determining its constitutionality a state statute must be read in the light of the construction given to it by the state court; and if the state court has held a described use for which property may be taken thereunder to be a public one, this court will accept its judgment unless it is clearly without ground.

Even though a spur track at the outset may lead only to a single industry, it may constitute a part of the transportation facilities of the common carrier operated under obligations of public service, and as such open to all and devoted to a public use.

There is a clear distinction between spurs operated as a part of the system of a common carrier under public obligation and mere private sidings. The former are limited to public use and may be the basis for exercise of eminent domain.

It is within the power of the State to invest railway corporations with power of eminent domain to acquire land for a spur track necessary for its transportation business and subject to regulation and open alike to all, even though such track at the outset may serve only a single industry which is to defray the cost thereof subject to reimbursement by others subsequently availing of it; and so *held* as to § 1797–11m, Wisconsin Statutes, providing for construction of spur tracks under conditions specified therein.

152 Wisconsin, 633, affirmed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of a statute of Wisconsin permitting condemnation of right-of-way for spur tracks, are stated in the opinion.

Mr. George Lines, with whom *Mr. Willet M. Spooner*, *Mr. Fred C. Ellis* and *Mr. Louis Quarles* were on the brief, for plaintiff in error:

The record presents a Federal question.

The taking by a State of the private property of one

person or corporation without the owner's consent for the private use of another under the power of eminent domain, or of taxation, or the police power, or any other power, is not due process of law, and is a violation of the Fourteenth Amendment. *Wilkinson* v. *Leland*, 2 Pet. 627, 658; *Murray* v. *Hoboken Co.*, 18 How. 272, 276; *Loan Assn.* v. *Topeka*, 20 Wall. 655; *Davidson* v. *New Orleans*, 96 U. S. 97–102; *Cole* v. *La Grange*, 113 U. S. 1; *Fallbrook District* v. *Bradley*, 164 U. S. 112, 158; *Railway Co.* v. *Nebraska*, 164 U. S. 403, 417; *Insurance Co.* v. *Railway Co.*, 175 U. S. 91; *Railway Co.* v. *Nebraska*, 217 U. S. 196; *Eubank* v. *Richmond*, 226 U. S. 137; *Traction Co.* v. *Mining Co.*, 196 U. S. 239, 251.

The judgment under review is a final one. *Wis. Cent. Ry. Co.* v. *Cornell University*, 49 Wisconsin, 162; *Railroad Co.* v. *Strange*, 63 Wisconsin, 178; *Gill* v. *Railroad Co.*, 76 Wisconsin, 293; *Railway Co.* v. *Railroad Co.*, 100 Wisconsin, 538; *Miller* v. *Railway Co.*, 34 Wisconsin, 533; *Bridge Co.* v. *Bridge Co.*, 138 U. S. 287.

The statute is unconstitutional because it authorizes the taking of private property for private use.

Except under exceptional circumstances private property cannot be taken under the power of eminent domain for the promotion of private enterprises on the ground that such enterprises will promote the general advantage and prosperity.

The statute is invalid because it does not declare in terms or by necessary implication that the use for which it authorizes the taking of private property is a public one. Lewis Em. Domain (3d ed.), § 251; 3 Dillon Mun. Corp. (5th ed.), § 1039; *Hairston* v. *Railroad Co.*, 208 U. S. 598.

Whether the power be exercised directly by the legislature or mediately through municipal corporations or other public agencies, the purpose or use for which private property is authorized to be appropriated should be specified by the legislature, and the power will not be enlarged by

doubtful construction. 1 Lewis Em. Dom., §§ 371 *et seq.;* 3 Dillon Mun. Corp. (5th ed.), § 1039.

Whenever private property is authorized to be taken or affected under the power of eminent domain or of taxation or the police power, the law itself must save the owner's rights and not leave them to the discretion of the courts as such. *Railroad Co.* v. *Stock Yards Co.*, 212 U. S. 132–144; *Security Co.* v. *Lexington*, 203 U. S. 323–333; *Nickey* v. *Stearns Ranchos Co.*, 126 California, 150; *Reeves* v. *Wood Co.*, 8 Oh. St. 333; *Gifford Drainage Dist.* v. *Shroer*, 145 Indiana, 572; *Fleming* v. *Hull*, 73 Iowa, 598; *Matter of Tuthill*, 163 N. Y. 133; *Attorney General* v. *Eau Claire*, 37 Wisconsin, 437; *Matter of Theresa Drainage District*, 90 Wisconsin, 304, 305.

All condemnation statutes are to be strictly construed in favor of the property owner and the public use must clearly appear. 1 Lewis Em. Domain (3d ed.), § 388; *Eubank* v. *Richmond*, 226 U. S. 137; *Union Lime Co.* v. *Railroad Commission*, 144 Wisconsin, 523.

While the Federal courts are bound by the decision of a state court as to the proper construction or meaning of a state statute or constitution, they are not bound by the decision of the court as to the statute's purpose or effect. A decision involving the latter invokes general reasoning and applies general principles and is not a local question. *Olcott* v. *Fond du Lac Co.*, 16 Wall. 678; *Pana* v. *Bowler*, 107 U. S. 529; *Great Southern Co.* v. *Jones*, 193 U. S. 532; *Scott* v. *McNeal*, 154 U. S. 34; *Venice* v. *Murdock*, 92 U. S. 494.

Providing facilities, however indispensable, for the conduct of private business generally is not a public use. *Hairston* v. *Railway Co.*, 208 U. S. 598; *Railroad Co.* v. *Porter*, 43 Minnesota, 527; *Ulmer* v. *Lime Rock Co.*, 98 Maine, 579; *Railway Co.* v. *Morehouse*, 112 Wisconsin, 1; *Railway Co.* v. *Petty*, 57 Arkansas, 359; *Railway Co.* v. *Dix*, 109 Illinois, 237; *Quarry Co.* v. *Railway Co.*, 175

Indiana, 303; *Railroad Co.* v. *Moss*, 23 California, 323; *De Camp* v. *Railroad Co.*, 47 N. J. L. 43, can all be distinguished as having no bearing upon the question involved in this case. So also as to cases arising under special statutes declaring the furtherance of certain branches or kinds of industry to be a public use for which the power of eminent domain may be exercised, such as *Fallbrook Dist.* v. *Bradley*, 164 U. S. 112; *Clark* v. *Nash*, 198 U. S. 361; *Strickley* v. *Mining Co.*, 200 U. S. 527. So also as to statutes approved having reference to the development of agriculture or mining or water powers or the draining of swamp lands, and which relate to some particular industry or industries which so affect the community as a whole that their successful prosecution is fundamentally necessary to the common welfare and which are so surrounded by exceptional circumstances as to require the intervention of the State for their prosecution or development, such as *Bankhead* v. *Brown*, 25 Iowa, 540; *Coal Co.* v. *Coal Co.*, 37 Maryland, 537; *Phillips* v. *Watson*, 63 Iowa, 28; *Chesapeake Co.* v. *Moreland*, 31 Ky. L. Rep., 1075; *Kipp* v. *Copper Co.*, 41 Montana, 509; *Zircle* v. *Railroad Co.*, 102 Virginia, 17; *Strickley* v. *Mining Co.*, *supra.*

This court has denied the right to take property under the power of eminent domain or of taxation for the promotion of industrial enterprise or the development of natural resources except under unusual circumstances. *Loan Association* v. *Topeka*, 20 Wall. 655; *Cole* v. *La Grange*, 113 U. S. 1.

A State cannot take property under the power of eminent domain for the purpose of creating a water power to be leased for manufacturing purposes. *Kaukauna Co.* v. *Canal Co.*, 142 U. S. 254, 273. See also *Railway Co.* v. *Nebraska*, 164 U. S. 403; *Railway Co.* v. *Nebraska*, 217 U. S. 196; Lewis on Em. Dom., 3d ed., §§ 256–258; Cooley's Const. Lim., 6th ed., p. 655.

Under the Wisconsin statutes the duty of the railroad to build a side track and its right to condemn right of way therefor are not limited to any particular class of industries and are not made to depend upon the relation of such industries to the public welfare, but extend to all industries and enterprises alike, great and small, and depend only upon their necessities. This under the authorities above cited is not a proper basis upon which to rest the exercise of governmental power, and in all of the cases involving statutes which made private interest the test those statutes have been declared invalid. *Matter of Tuthill*, 163 N. Y. 133; *Apex Co.* v. *Garbade*, 32 Oregon, 582; *Healty Lumber Co.* v. *Morris*, 33 Washington, 490; *Railroad Co.* v. *Gypsum Co.*, 154 Michigan, 290; *Ryerson* v. *Brown*, 35 Michigan, 333; *Water Co.* v. *Judge*, 133 Michigan, 48; *Oil Co.* v. *Hawkins*, 30 Ind. App. 557; *Welton* v. *Dickson*, 38 Nebraska, 767; *Fleming* v. *Hull*, 73 Iowa, 598; *Phosphate Co.* v. *Phosphate Co.*, 120 Tennessee, 260; *Donnelly* v. *Decker*, 58 Wisconsin, 461; *Priewe* v. *Wisconsin Imp't Co.*, 93 Wisconsin, 534; *Maginnis* v. *Ice Co.*, 112 Wisconsin, 385; *Huber* v. *Merkel*, 117 Wisconsin, 355.

The findings of fact in the present case show a taking for private use.

It is essential to the validity of proceedings for the taking of land for spur track purposes that the track, when built, will in fact be accessible to the public. The mere theoretical right of the public to use it is not sufficient. *Hairston* v. *Railway Company*, 208 U. S. 598; *De Camp* v. *Railroad Co.*, 47 New Jersey Law, 43; *Wallman* v. *Connor Co.*, 115 Wisconsin, 617.

The Wisconsin statute shows on its face that the use for which it authorizes property to be taken under the power of eminent domain is a private and not a public one.

Its history and place in the legislation of Wisconsin show that it was intended to enable private parties to

procure side-track facilities when their necessities required, whether needed for public use or not.

The record shows that the proposed side track, if built, will be for the exclusive use of a single industry and will not be accessible to or capable of use by the public.

Mr. Edward M. Smart, with whom *Mr. Edward M. Hyzer* was on the brief, for defendant in error, Chicago & Northwestern Railway Company.

Mr. Walter Drew, with whom *Mr. L. E. Lurvey* was on the brief, for defendant in error, Eden Independent Lime and Stone Company.

By leave of the court, *Mr. W. C. Owen*, Attorney General of the State of Wisconsin, and *Mr. Walter Drew*, filed a brief as *amici curiæ*.

Mr. Justice Hughes delivered the opinion of the court.

This proceeding was instituted by the Chicago and Northwestern Railway Company to take land for a spur, the construction of which had been ordered by the Railroad Commission of the State. The land was owned by the Union Lime Company, the plaintiff in error, and the application was resisted upon the ground that it was sought to be taken for a private, and not a public, use and therefore that its taking would operate as a deprivation of the property of the plaintiff in error without due process of law and a denial to it of the equal protection of the laws contrary to the Fourteenth Amendment. This contention was overruled by the Supreme Court of the State which affirmed the judgment in condemnation (152 Wisconsin, 633), and this writ of error was sued out.

The proposed track was to form an extension of an

existing spur, owned and operated by the Railway Company, which leads from its main line to the quarries and kilns of two lime companies; one of these companies is the plaintiff in error at whose works the spur now terminates. Beyond these works lie those of the Eden Independent Lime and Stone Company which applied to the Railroad Commission for an order requiring the Railway Company to extend the spur to its plant. It is provided by § 1797–11m of the Wisconsin Statutes that every railroad shall acquire the necessary right-of-way and shall construct and operate a "reasonably adequate and suitable spur track" whenever it does not necessarily exceed three miles in length, is "practically indispensable to the successful operation" of any existing or proposed manufacturing establishment, and is not "unusually unsafe" or "unreasonably harmful." The railroad may require the person, firm, or corporation primarily to be served thereby to pay the legitimate cost of acquiring, by condemnation or purchase, the necessary right-of-way for the spur and of its construction, as determined by the Railroad Commission. By § 1797–12n, the Commission is authorized to receive complaints, in case of the failure or refusal of railroads to perform the prescribed duty, and to make appropriate orders.[1] Acting under these sections, the

[1] These sections, enacted by Chapter 352 of the Laws of 1907, as amended by Chapter 481 of the Laws of 1909 and Chapters 193 and 663, § 342 of the Laws of 1911, are as follows:

"Section 1797–11m. 1. Every railroad shall acquire the necessary rights of way for, and shall construct, connect, maintain, and operate a reasonably adequate and suitable spur track, whenever such spur track does not necessarily exceed three miles in length, is practically indispensable to the successful operation of any existing or proposed mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock, or other industry or enterprise, and its construction and operation is not unusually unsafe and dangerous, and is not unreasonably harmful to public interest.

"2. Such railroad may require the person or persons, firm, corpora-

Commission directed the Railway Company to extend the spur as desired by the Eden Company and thereupon this proceeding was brought to condemn the land for the right-of-way.

The assignments of error come to the single point,—as to the character of the use. The State through its highest court declares the use to be a public one, and we should accept its judgment unless it is clearly without ground.

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tion or association primarily to be served thereby, to pay the legitimate cost and expense of acquiring, by condemnation or purchase, the necessary rights of way for such spur track, and of constructing the same, as shall be determined in separate items by the commission, in which case the total estimated cost thereof shall be deposited with the railroad before the railroad shall be required to incur any expense whatever therefor; provided, however, that when any such person, firm, corporation or association, shall be required by the commission to deposit with the railroad, the total estimated cost, as herein provided, such person, firm, corporation or association, may offer or cause to be offered, a proposition in writing to such railroad, to construct such spur track, such proposition to be accompanied by a surety company bond, running to such railroad, and conditioned upon the construction of such spur track in a good and workmanlike manner, according to the plans and specifications provided by such railroad, and approved by the commission, and deposit with such railroad the estimated cost of the necessary right of way for such spur track; and whenever such proposition and security company bond shall be offered the person, firm, corporation, or association primarily to be served thereby, shall not be required to deposit as herein provided, as the total estimated cost of such construction, an amount in excess of the estimated cost of the right of way, and the total amount stated in such written proposition. Provided further that before the railroad shall be required to incur any expense whatever in the construction of said spur track, the person, firm, corporation, or association primarily to be served thereby, shall give the railroad a bond to be approved by the commission as to form, amount and surety, securing the railroad against loss on account of any expenses incurred beyond the amount so deposited with the railroad.

"3. Whenever such spur track is so connected with the main line, as herein provided, at the expense of the owner of such proposed or existing mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock, or other indus-

Fallbrook Irrigation District v. *Bradley*, 164 U. S. 112, 160; *Clark* v. *Nash*, 198 U. S. 361, 369; *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527, 531; *Offield* v. *N. Y., N. H. & H. R. R. Co.*, 203 U. S. 372, 377; *Hairston* v. *Danville & Western Rwy. Co.*, 208 U. S. 598, 607. The general authority to exercise the power of eminent domain for the construction of spurs is found in § 1831–a, Stats. (Wis.), which provides: "Every railway company . . . may build, maintain and operate branches and spur tracks from its road or any branch thereof to and upon the grounds of any mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock or other industry or enterprise, . . . ; and every such company may acquire by purchase or condemnation in the manner provided in this chapter for the acquisition of real estate for railway purposes, other than for its main track, all necessary roadways and rights

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try or enterprise, and any person, firm, corporation, or association shall desire a connection with such spur track, application therefor shall be made to the commission, and such person, firm, corporation, or association shall be required to pay to the person, firm, corporation, or association that shall have paid or contributed to the primary cost and expense of acquiring the right of way for such original spur track, and of constructing the same, an equitable proportion thereof, to be determined by the commission, upon such application and notice, to the persons, firms, corporations, or associations that have paid or contributed toward the original cost and expense of acquiring the right of way and constructing the same.

"Section 1797–12n. In case of the failure or refusal of any railroad to comply with any of the provisions of sections 1797–11m and 1797–12n, the person or persons, firm, corporation or association aggrieved thereby may file a complaint with the railroad commission setting forth the facts, and the said commission shall investigate and determine the matter in controversy, in accordance with the provisions of sections 1797–1 to 1797–38, inclusive, and any order it shall make in said proceeding shall have the same force and effect as an order in any other proceeding properly begun under and by virtue of the provisions of said sections."

of way for such branches, spur tracks," etc. The Supreme Court of the State sustained the validity of this provision in *Chicago & Northwestern Rwy.* v. *Morehouse*, 112 Wisconsin, 1, holding (p. 11) that "the fact that a spur track may run to a single industry does not militate against the devotion of the property thereto being a public use thereof, so long as the purpose of maintaining the track is to serve all persons who may desire it, and all can demand, as a right, to be served, without discrimination."

In *Union Lime Company* v. *Railroad Commission*, 144 Wisconsin, 523, the court had under review an earlier order of the Commission requiring the railroad to build the spur extension now in question and, while that order was set aside because a proper hearing had not been afforded, it was held that the spur would not be a private track, but would be devoted to a public use. In the view that the tracks contemplated would be of this character, the court sustained the statutes (§§ 1797–11m and 1797–12n), under which the Commission was proceeding, against the same objections that are now raised. The court said (*id.* pp. 533–534): "Such track when built becomes a portion of the trackage of the railroad. The fact that its initial cost is borne by the party primarily to be served, with provisions for subsequent equitable division of such cost, does not make it a private track nor change the nature of its use. Over it the products of the industry find their way into the markets of the world, and every consumer is directly interested in the lessened cost of such products resulting from the building and operation thereof. That these products are supplied by a single owner, or by a limited number of owners, affects the extent and not the nature of its use—the track is none the less a part of the avenue through which the commodities reach the public. Subject to the equitable division of initial cost, the track is at the service of the public as much as any other, and it constitutes an integral part of the railroad system. The

duty to maintain and operate it rests upon the railroad. Except that it is relieved of the initial cost of right of way and construction, the track stands in the same relation to it that any other portion of its track does. The owner of the industry obtains no interest in or control over it beyond that of being served by it equally with any one else who may desire to use it." This decision was followed in the present case. 152 Wisconsin, 633, 637.

Assailing this ruling, the plaintiff in error insists that the statute itself (referring to §§ 1797–11m and 1797–12n) authorizes the taking of property for private use, and that, being unconstitutional on its face, it cannot form the basis of any valid proceeding. It is said, in the first place, that the statute does not declare in terms or by necessary implication that the use for which the property is to be taken is a public use. But this contention is plainly without merit as the statute must be read in the light of the construction placed upon it by the state court which has held the described use to be a public one. The judgment of the State so far as it is competent to determine the matter has thus been fully expressed.

It is urged, further, that the statute is necessarily invalid because it establishes as the criterion of the Commission's action the exigency of a private business. This objection, however, fails to take account of the distinction between the requirements of industry and trade which may warrant the building of a branch track and the nature of the use to which it is devoted when built. A spur may, at the outset, lead only to a single industry or establishment; it may be constructed to furnish an outlet for the products of a particular plant; its cost may be defrayed by those in special need of its service at the time. But none the less, by virtue of the conditions under which it is provided, the spur may constitute at all times a part of the transportation facilities of the carrier which are operated under the obligations of public service and are

subject to the regulation of public authority. As was said by this court in *Hairston* v. *Danville & Western Rwy. Co.*, *supra* (p. 608): "The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost." There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings. See *De Camp* v. *Hibernia R. R. Co.*, 47 N. J. Law, 43; *Chicago &c. R. R. Co.* v. *Porter*, 43 Minnesota, 527; *Ulmer* v. *Lime Rock R. R. Co.*, 98 Maine, 579; *Railway Company* v. *Petty*, 57 Arkansas, 359; *Dietrich* v. *Murdock*, 42 Missouri, 279; *Bedford Quarries Co.* v. *Chicago &c. R. R. Co.*, 175 Indiana, 303.

While common carriers may not be compelled to make unreasonable outlays (*Missouri Pacific Rwy. Co.* v. *Nebraska*, 217 U. S. 196), it is competent for the State, acting within the sphere of its jurisdiction, to provide for an extension of their transportation facilities, under reasonable conditions, so as to meet the demands of trade; and it may impress upon these extensions of the carriers' lines, thus furnished under the direction or authority of the State, a public character regardless of the number served at the beginning. The branch or spur comes into existence as a public utility and as such is always available as localities change and communities grow. The Supreme Court of Wisconsin has left no doubt with respect to the public obligations imposed upon the carrier in relation to the spurs and branches to be provided under the statute in question, and we find no ground for the conclusion that this enactment was beyond the state power.

It is also contended by the plaintiff in error that the finding by the state court that the use in the present case is a public one is not supported by the facts. But this

criticism of the court's finding is in substance a repetition of the argument that is urged against the validity of the statute and what has been said upon that point is applicable.

The judgment is affirmed.

Affirmed.

UNITED STATES *v.* BIRDSALL.

UNITED STATES *v.* BRENTS.

UNITED STATES *v.* VAN WERT.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

Nos. 727, 728, 729. Submitted and argued January 8, 9, 1914.—Restored to docket for reargument January 19, 1914.—Reargued February 25, 1914.—Decided April 6, 1914.

Where the District Court holds that the acts charged do not fall within the condemnation of the statute on which the indictment is based, it necessarily construes that statute and this court has jurisdiction under the Criminal Appeals Act of 1907.

Sections 39 and 117, Criminal Code, 35 Stat. 1109, defining and punishing the giving and accepting of bribes, cover every action within the range of official duty.

It is not necessary in order to constitute an act of an officer of the United States official action that it be prescribed by statute; it is sufficient if it is governed by a lawful requirement, whether written or established by custom, of the Department under whose authority the officer is acting.

The office of Commissioner of Indian Affairs was established to create an administrative agency with adequate powers to execute the policy of the Government towards the Indians, and one of the important duties of the Indian Office is the enforcement of liquor prohibition.

The action of the Commissioner of Indian Affairs in advising the

President of the United States whether or not clemency should be granted to one convicted of violating liquor laws in the Indian country is official action, and it is within the competency of the office to establish regulations requiring from all persons connected with the office true and disinterested reports to the Commissioner on which to base such advice.

The powers of the Indian Office to aid in suppressing the liquor traffic in Indian country extend to every matter to which such aid is appropriate; and the giving of recommendations to a Federal judge or attorney as to sentences of those convicted of violating the liquor laws is an official duty within the meaning of §§ 39 and 117, Criminal Code, and the giving of gifts to, and acceptance thereof by, officers in that department to influence their reports and recommendations constitute bribery under, and are punishable by, such sections.

206 Fed. Rep. 818, reversed.

THE facts, which involve the validity of indictments under §§ 39 and 117, Criminal Code, for giving and accepting bribes, are stated in the opinion.

The Solicitor General, Mr. Assistant Attorney General Denison and *Mr. Assistant Attorney General Wallace* for the United States, submitted:

The Commissioner may get facts and recommendations through subordinates. He may prescribe duties by regulation under §§ 161, 463, Rev. Stat.

There is no identity between a question to be decided by the judge and action by special officer.

That an executive officer advises a judicial officer or *vice versa* does not rob the primary decision or action of its official character.

A recommendation is action within the meaning of the statute.

The definition of bribery is as broad as the duties of officials.

There are two alternatives provided for by the act. If the words "may at any time" reach the future then this case is reached by the first alternative. "May be brought"

deals with the future. "By law" means "lawfully" or pursuant to law.

Section 39 read with § 117 leads to this conclusion.

The contention that every official duty must be specifically declared by act of Congress is absurd. Defendants' interpretation leaves a large field of official action unprotected. *Yee Gee* v. *United States*, 83 Fed. Rep. 146–147; *United States* v. *Gibson*, 47 Fed. Rep. 833; *United States* v. *Boyer*, 85 Fed. Rep. 425; *Vernon* v. *United States*, 146 Fed. Rep. 121; *United States* v. *George*, 228 U. S. 14, 22, cited by defendant are not in point.

In support of the Government's contentions, see *Benson* v. *Henkel*, 198 U. S. 1, 11; *Crawford* v. *United States*, 212 U. S. 189, 191; *Elkins* v. *Wolfe*, 44 Ill. App. 376, 380; *In re Miller's Estate*, 22 Atl. Rep. 1044; *In re Naegle*, 39 Fed. Rep. 833, 860; *Leonard* v. *Lennox*, 181 Fed. Rep. 760; *Lewis Publishing Co.* v. *Wyman*, 182 Fed. Rep. 13, 16; *Lindsley & Phelps Co.* v. *Mueller*, 176 U. S. 126, 136–137; *People* v. *Markham*, 30 Pac. Rep. 621; *Raymond* v. *Wathen*, 142 Indiana, 367; 41 N. E. Rep. 815, 816; *Sanford* v. *Sanford*, 28 Connecticut, 6, 20; *Schroeder* v. *Gemeiner*, 10 Nevada, 355, 361; *Sharp* v. *United States*, 138 Fed. Rep. 878; *State* v. *Butler*, 77 S. W. Rep. 572; *United States* v. *Bailey*, 9 Pet. 251, 253–255; *United States* v. *McDaniel*, 7 Pet. 14–15; *Wentworth* v. *Farmington*, 48 N. H. 207, 210.

Mr. Charles W. Mullan, with whom *Mr. H. B. Boies* was on the brief, for defendant in error in No. 727:

The demurrer only admits the allegations of the indictment which are well pleaded; it does not admit conclusions of law. *United States* v. *Ames*, 99 U. S. 35, 45; *Interstate Land Co.* v. *Maxwell Land Co.*, 139 U. S. 569, 578; *Commonwealth* v. *Trimmer*, 84 Pa. St. 65.

The power conferred upon the Secretary of the Interior to prescribe regulations for the government of his department, under § 161, Rev. Stat., is administrative only,

and is confined strictly to the transaction of business within his department. No power is conferred by any act of Congress which authorizes the Secretary of the Interior to establish any rule or regulations which can have any force outside of the Department of the Interior, or which does not relate directly to the administration of the business of the department. *United States* v. *George*, 228 U. S. 14, 20.

The power of the Secretary of the Interior to establish any rule or regulation, the violation of which may become the basis of a criminal charge, is not a power which can be implied, and, unless expressly given, does not exist.

Haas v. *Henkel*, 216 U. S. 462, does not control this case.

If the contention of the Government is upheld, there is no limit to the power of the head of a department of the Government to require his subordinates or the employés of his department, to interfere with the transaction of the business of the other departments of the Government.

Interference by the head of one department of the Government with the business of another department was never contemplated by Congress when § 161 was enacted, and the language of that section confines the power of the heads of the departments of the Government strictly to the business within such departments.

No rule, regulation, or usage can be promulgated or established by the Secretary of the Interior, under which he would have authority to advise an officer of another department of the Government, or the President of the United States, in relation to any matter pending in another department, or before the President.

This court has no jurisdiction under the act of March 2, 1907, to review the judgment of the court below.

The decision of the District Judge was not based upon the invalidity of any statute of the United States upon which the indictment is founded, nor did the decision involve any construction of the statute and its validity.

United States v. *Keitel*, 211 U. S. 371, 398–399; *United States* v. *Stevenson*, 215 U. S. 190, 195.

Any advice or suggestion, made by Van Wert, to any superior officer, or to any judge, as to the action or decision of such judge, in imposing sentence upon, or extending judicial clemency to, persons found guilty of violating the laws of the United States relating to the sale of intoxicating liquors to Indians, would simply be the suggestion or advice of a private individual and not that of an officer of the Government. *United States* v. *Gibson*, 47 Fed. Rep. 833; *In re Yee Gee*, 83 Fed. Rep. 185; *United States* v. *Boyero*, 85 Fed. Rep. 485; *United States* v. *George*, 228 U. S. 14; *Vernon* v. *United States*, 146 Fed. Rep. 121.

The cases cited by the Government do not control this case.

No appearance or briefs filed for defendants in error in Nos. 728 and 729.

Mr. Justice Hughes delivered the opinion of the court.

Separate indictments were found against the several defendants. There were two indictments against the defendant Birdsall (which were consolidated) charging him with having given to Brents and Van Wert, respectively, a bribe in violation of § 39 of the Criminal Code. The indictments against Brents and Van Wert were for accepting the bribes in violation of § 117. Demurrer to each indictment, upon the ground that it charged no offense, was sustained by the District Court. 206 Fed. Rep. 818. The cases are brought here under the Criminal Appeals Act. March 2, 1907, c. 2564, 34 Stat. 1246.

In view of the nature of the question presented, it is not necessary to consider the indictments separately. According to the allegations, Birdsall was attorney for certain persons who, on indictment for unlawfully selling

liquor to Indians, had pleaded guilty and had been sentenced at the April term, 1910. Application had then been made to the judge of the court for a reduction or suspension of the sentences and it was also stated that an effort would be made to obtain a commutation by executive action. Brents and Van Wert were special officers, duly appointed by the Commissioner of Indian Affairs, under the authority of the Secretary of the Interior, for the suppression of the liquor traffic among the Indians. It was averred that by the regulations and established requirements of the Department of the Interior they were charged with the duty of informing and advising the Commissioner of Indian Affairs, either directly or through other subordinates, concerning all matters connected with the conviction and punishment of persons violating the laws of the United States in reference to the liquor traffic affecting the Indians, and particularly "to inform the said Commissioner whether or not the effective suppression of the liquor traffic with and among Indians would be furthered or prejudiced by executive or judicial clemency in any particular case."

After referring to the conviction and sentence of the persons named, and to the application then made to the judge for a reduction or suspension of sentence, each indictment continued as follows:

"That then and there the judge of the said court announced that he would not change or reduce or suspend the said sentences or any part thereof, unless a recommendation to that effect was made to him by the said Commissioner of Indian Affairs; and the United States attorney in the aforesaid district announced that he would not recommend a commutation or other executive clemency unless a recommendation to that effect was made to him by the said Commissioner of Indian Affairs.

"That then and there, and during all the dates and times herein mentioned, it was and long had been the

settled usage and practice for the United States judges in determining upon sentences and upon the applications for changes, reductions, or suspensions thereof to consult the United States attorney, and either directly or through him the administrative officer charged with the enforcement of the laws in question, including laws for the suppression of the liquor traffic with and among the Indians, the said Commissioner of Indian Affairs; and likewise it had been and was the settled usage and practice of the President, in the exercise of his power of extending executive clemency, to consult the Attorney General; and likewise it had been and was the settled usage and practice of the Attorney General, for the purpose of advising the President on the said subject, to consult with the United States attorney or other officer by whom the prosecution had been conducted. . . .

"That then and there, and that at all the times herein mentioned, the Commissioner of Indian Affairs, in the performance of his official duty, as provided by the rules and regulations and established usages and practices and requirements of the said Department of the Interior, and as provided by law, was charged with the duties of assisting in the enforcement of the laws of the United States in reference to the liquor traffic affecting Indians, and particularly with the duty, when requested so to do, of advising and making recommendations to any judge before whom any prosecutions on the said subject may have been tried, and the United States attorney or other officer by whom the said prosecution had been conducted, concerning the effect upon the enforcement of the said law, of any proposed leniency or clemency in connection with the punishment of the persons found guilty of offenses thereunder."

The indictments against Birdsall charged him with having given money to Brents and Van Wert with intent to influence their official action so that they would advise the Commissioner of Indian Affairs, contrary to the truth,

that upon facts officially known to them leniency should be granted to the persons who had been convicted and sentenced, as stated, and that in the interest of the enforcement of the laws the Commissioner should so recommend to the judge, the United States attorney, the Secretary of the Interior, the Attorney General, or the President. The indictments against Brents and Van Wert charged that they had received the money from Birdsall with the intent that their official action should be thus influenced.

As the District Court held that the acts charged did not fall within the condemnation of the statute, the court necessarily construed the statute and the cases are properly here. *United States* v. *Patten*, 226 U. S. 525, 535.

Section 117 of the Criminal Code (35 Stat. p. 1109), with respect to the acceptance of bribes, provides that "whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof" accepts money, etc., "with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby" shall be punished as stated. Section 39 (*id.* p. 1096), as to bribe giving, uses similar language in defining the official relation of the recipient and the character of the action intended to be influenced; adding the words—"with intent to influence him to commit . . . any fraud . . . on the United States, or to induce him to do or omit to do any act in violation of his lawful duty."

Every action that is within the range of official duty comes within the purview of these sections. There was thus a legislative basis (*United States* v. *George*, 228 U. S. 14, 22) for the charge in the present cases, if the action sought to be influenced was official action. To constitute

it official action, it was not necessary that it should be prescribed by statute; it was sufficient that it was governed by a lawful requirement of the department under whose authority the officer was acting. Rev. Stat., § 161; *Benson* v. *Henkel*, 198 U. S. 1, 12; *Haas* v. *Henkel*, 216 U. S. 462, 480. Nor was it necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the department and fixed the duties of those engaged in its activities. *United States* v. *Macdaniel*, 7 Pet. 1, 14. In numerous instances, duties not completely defined by written rules are clearly established by settled practice, and action taken in the course of their performance must be regarded as within the provisions of the above-mentioned statutes against bribery. *Haas* v. *Henkel*, *supra*.

We must assume, in view of the decision below, that the indictment sufficiently charged that the action of Brents and Van Wert, which it was sought to influence, was action in the course of duty so far as the regulations and usages of the department could establish that duty.

The question is whether the department had authority to establish it. The District Court held that it had no such power and hence that the indictments charged no offense. The ruling was that there was "no act of Congress conferring upon the Interior Department, or the Bureau of Indian Affairs, any duty whatever in regard to recommending to the executive or judicial departments of the Government whether or not executive or judicial clemency shall be extended to, or withheld from, any person who may be charged with, or convicted of, selling intoxicating liquors to Indians, or of any other offense against the United States." 206 Fed. Rep. 818, 821.

The Commissioner of Indian Affairs, "under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe," is

charged with "the management of all Indian affairs, and of all matters arising out of Indian relations" (Rev. Stat., § 463). The object of the establishment of the office was to create an administrative agency with broad powers adequate to the execution of the policy of the Government, as determined by the acts of Congress, with respect to the Indians under its guardianship. From an early day, Congress has prohibited the liquor traffic among the Indians, and it has been one of the important duties of the Indian Office to aid in the enforcement of this legislation. See act of June 30, 1834, c. 161, § 20, 4 Stat. 729, 732; Rev. Stat., §§ 2139, 2140, 2141; act of July 23, 1892, c. 234, 27 Stat. 260; act of January 30, 1897, c. 109, 29 Stat. 506. It has furnished such aid by the detection of violations, by the collection of evidence, and by appropriate steps to secure the conviction and punishment of offenders. The regulations of the office, adopted under statutory authority (Rev. Stat., §§ 465, 2058), have been explicit as to the duties of Indian agents in this respect.[1] In recent years, Congress has

[1] These regulations are as follows:

"574. Having therefore the power to break up to a great extent this demoralizing traffic," (the liquor traffic) "agents are expected to use the utmost vigilance in enforcing the penalties of the law against all persons who engage in it with the Indians under their charge, whether this is done on or off the reservation.

"575. When persons are detected in a violation of the law their cases should be placed in the hands of the district attorney for the district wherein the crime was committed, in order that they may be promptly arrested, tried, and punished; and agents will coöperate with that officer in his efforts to convict the guilty parties, furnishing him with the requisite evidence and all the facts that they may be able to obtain for the purpose indicated. Indians are competent witnesses in these cases.

"576. It is also the duty of agents to strictly carry out the provisions of sections 2140 and 2141 of the Revised Statutes of the United States respecting the searching for concealed liquors within their agencies and respecting the destruction of distilleries set up or continued in Indian country." *Regulations of the Indian Office* (1904).

made special appropriations "to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to take action to suppress the traffic of intoxicating liquors among Indians," (34 Stat. 328, 1017; 35 Stat. 72, 782; 36 Stat. 271, 1059; 37 Stat. 519) and an organization of special officers and deputies, serving in various states, has been created in the department. Through these efforts numerous convictions have been obtained. The results have been reported to Congress annually by the Commissioner [1] and the appropriations for the continuance of the service have been increased.[2]

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[1] H. Doc. Vol. 27, 60th Cong. 1st Sess. pp. 26–31; H. Doc. Vol. 43, 60th Cong. 2d Sess. pp. 34–40; H. Doc. Vol. 44, 61st Cong. 2d Sess. pp. 12–15; H. Doc. Vol. 32, 61st Cong. 3d Sess. pp. 12–13; H. Doc. Vol. 41, 62d Cong. 2d Sess. pp. 32–33.

[2] The nature and extent of this authorized service of the department are shown by the following extract from the Commissioner's report for the fiscal year ending June 30, 1912: "Until 1906 . . . enforcement of these statutes and subsequent enactments" (as to the liquor traffic) "was left to Indian agents and superintendents and their Indian police, assisted so far as might be by local peace officers and by representatives of the Department of Justice. In 1906 criminal dockets in Indian Territory became so crowded and the possibility of early trial so remote that disregard of the statutes forbidding introduction of intoxicants assumed large importance. To meet the emergency Congress, in the act of June 21, 1906, appropriated $25,000 to be used to suppress the traffic in intoxicating liquors among Indians, and in August, 1906, a special officer was commissioned and sent to Oklahoma, that he and his subordinates might, through detective operations, supplement the efforts of superintendents in charge of reservations. In the fiscal year 1909, when the appropriation had grown to $40,000, this service began to operate throughout all States where Indians needed protection. In 1911 the service had grown until it had an appropriation of $70,000 and an organization including 1 chief special officer, 1 assistant chief, 2 constables, 12 special officers, and 143 local deputies stationed in 21 States. The increasing success of the service appears in the fact that in 1909, 561 cases which the service secured came to issue in court, resulting in 548 convictions, whereas in 1911, 1,202 cases came to issue, 1,168 defendants were convicted, and

This being the character of the Department's work, it cannot be doubted that when persons who are convicted apply for executive clemency the President is entitled to avail himself of the recommendations of the Secretary of the Interior and of the Commissioner. The information obtained by the Indian Office and its advice are always at his command. The President is entitled to know whether in the judgment of the Secretary, or the Commissioner, the granting of clemency will tend to promote or hinder the efforts of the Department. The action of these officers in thus advising the President plainly would be official action; but in so acting they would necessarily rely largely upon the reports and advice of subordinates in the department who were more directly acquainted with the existing conditions, the records of offenders and the facts and circumstances of particular cases. For this reason, if for no other, it was within the competency of the office to establish regulations, and practices having the force of regulations, that all persons employed in its work should render to the Commissioner whenever requested true reports and give disinterested and honest advice upon the facts known to them with respect to the advisability of showing leniency to convicted violators of the law.

Nor is there any ground for the conclusion that the President is limited to obtaining direct reports to himself in such matters. By virtue of his relation to the Department he may require the reports to be made to the Attorney General, who by the direction of the President may be intrusted with the duty of securing the information and recommendations which the President should have in order properly to pass upon applications for clemency; and for these purposes the Department could require

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but 34 defendants were acquitted by juries. In 1911 fines imposed amounted to $80,463, or more than the appropriation for the service." H. Doc. No. 933, 62d Cong. 3d Sess. pp. 11, 12.

the necessary reports from those engaged in its service.

Further, there can be no question that the authority of the Department in its undertaking to suppress the forbidden traffic extended to every matter in which its aid was appropriate. That was the clear import of the legislation broadly defining its powers and of the action of Congress in supporting its work. Whenever it could afford assistance in the course of proceedings to secure the punishment of offenders it was fully empowered to give it. If a judge in fixing the sentence to be imposed upon those found guilty, or in determining whether the sentence as imposed should be suspended or reduced, desired to be advised of the recommendation of the Commissioner of Indian Affairs, in view of his knowledge of the conditions attending the enforcement of the law, the Commissioner was not lacking in authority to comply with the request. It is not enough to say that there is no mandatory requirement imposing the obligation to give the recommendation. In executing the powers of the Indian Office there is necessarily a wide range for administrative discretion and in determining the scope of official action regard must be had to the authority conferred; and this, as we have seen, embraces every action which may properly constitute an aid in the enforcement of the law.

The Commissioner was entitled to give his recommendations to the judge or to the United States attorney upon request and he had complete power under the direction of the Secretary of the Interior to establish rules and usages in the Department by which he could secure correct information and uncorrupted advice from every one of his subordinates. None of these officers could properly say that in reporting with respect to the effect of leniency in particular cases he was acting outside the sphere of official conduct, and the giving and acceptance of bribes to influence their reports and recommendations

was within the statutes under which these indictments were laid.

The judgment of the District Court, in each case, is reversed, and the cases are remanded for further proceedings in conformity with this opinion.

It is so ordered.

DIAMOND COAL AND COKE CO. *v.* UNITED STATES.

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

No. 192. Argued January 28, 29, 1914.—Decided April 6, 1914.

A patent for mineral lands secured under a non-mineral-land law by fraudulently and falsely representing them to be non-mineral, although not void or open to collateral attack, is voidable and may be annulled in a suit by the Government against the patentee or a purchaser with notice of the fraud.

In a suit by the Government to annul a patent, issued under a non-mineral-land law, on the ground that the patent was fraudulently procured for lands known to be mineral, the burden of proof rests upon the Government and must be sustained by that class of evidence which commands respect and that amount of it which produces conviction.

To justify the annulment of a patent issued under a non-mineral-land law as wrongfully covering mineral lands, it must appear that at the time of the proceedings in the land department resulting in the patent the lands were known to be valuable for mineral, for no subsequent discovery of mineral can affect the patent.

In this case the evidence shows with requisite certainty that at the time of the proceedings in the land department resulting in the patents sought to be annulled, the lands were known to be valuable for coal and were sought for that reason.

Where an agent, at the instance and for the benefit of his principal, fraudulently secures patents under a non-mineral-land law for lands

known to be valuable for mineral and then transfers the lands to his principal, the latter is not a *bona fide* purchaser, and the patents may be annulled in a suit by the Government.

There is no fixed rule that lands become valuable for coal only through its actual discovery within their boundaries. On the contrary, they may, and often do, become so through adjacent disclosures and other surrounding or external conditions; and when that question arises, any evidence logically relevant to the issue is admissible, due regard being had to the time to which it must relate. *Colorado Coal & Iron Co.* v. *United States*, 123 U. S. 307, distinguished.

191 Fed. Rep. 786, affirmed.

THE facts, which involve the validity of certain patents for lands entered as non-mineral, but which were known to be chiefly valuable for mineral when entered, and the right of the Government to have the same annulled as having been fraudulently obtained, are stated in the opinion.

Mr. Cornelius F. Kelley and *Mr. L. O. Evans*, with whom *Mr. B. M. Ausherman* was on the brief, for appellant.

The Solicitor General, with whom *Mr. Karl W. Kirchwey* was on the brief, for the United States.

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

This was a suit by the United States, against an incorporated company engaged in coal mining, to regain the title to about 2,840 acres of land in Uinta County, Wyoming, theretofore patented to Thomas Sneddon and Daniel F. Harrison and by them conveyed to the coal company. The patents, thirty-four in number, were issued under the homestead law upon what are called soldiers' additional entries. The applications for the entries were made at various dates beginning with May 1, 1899, and each application was accompanied by an affidavit, by either Sneddon or Harrison, stating that he was

well acquainted with the land, had passed over it frequently and could testify understandingly about it; that there was not, to his knowledge, any deposit of coal or other valuable mineral within its limits; that it was essentially non-mineral, and that the application was made with the object of securing it for agricultural purposes and not of fraudulently obtaining title to mineral land. Mineral lands, including coal lands, are not subject to acquisition under the homestead law (Rev. Stat., §§ 2302, 2318, 2319, 2347–2351), and these affidavits were made and submitted as proof that the character of the lands applied for was such that they properly could be acquired under that law. The land officers accepted the affidavits and the statements therein as true, and allowed the entries and issued the patents.

The bill charged that the affidavits were false and that the entries and patents were procured in the execution of a fraudulent scheme to acquire known coal lands under soldiers' additional homestead entries; and the decisive issues in the case were, first, whether the lands were known to be valuable for coal when the applications for the entries were made, and, second, if they were, whether the coal company was a *bona fide* purchaser from the patentees. At the hearing the Circuit Court answered the first of these questions in the negative and gave a decree for the coal company; but upon an appeal to the Circuit Court of Appeals that court answered the first question in the affirmative and the second in the negative, and reversed the action of the Circuit Court, with a direction that a decree for the Government be entered. 191 Fed. Rep. 786. The present appeal was then taken by the coal company.

As the arguments of counsel have taken a wide range and in some respects have departed from the settled rules of decision applicable in cases like this, it will be appropriate to restate those rules before turning to the evidence. They are:

1. Questions of fact arising in the administration of the public-land laws, such as whether lands sought to be entered are mineral or non-mineral, are committed to the land officers for determination; and as their decision must rest largely or entirely upon proofs outside the official records, it is possible in *ex parte* proceedings, as was the case here, for applicants, by submitting false proofs, to impose upon those officers and secure entries and patents under one law, when if truthful proofs were submitted the lands could not be acquired under that law but only under another imposing different restrictions upon their disposal. A patent secured by such fraudulent practices, although not void or open to collateral attack, is nevertheless voidable and may be annulled in a suit by the Government against the patentee or a purchaser with notice of the fraud. *Smelting Company* v. *Kemp*, 104 U. S. 636, 640; *United States* v. *Minor*, 114 U. S. 233, 240; *Colorado Coal & Iron Co.* v. *United States*, 123 U. S. 307, 313; *Burfenning* v. *Chicago &c. Railway Co.*, 163 U. S. 321, 323.

2. The respect due to a patent, the presumption that all the preceding steps required by law were duly observed, and the obvious necessity for stability in titles resting upon these official instruments require that in suits to annul them the Government shall bear the burden of proof and shall sustain it by that class of evidence which commands respect and that amount of it which produces conviction. *Maxwell Land Grant Case*, 121 U. S. 325, 379–381; *United States* v. *Iron Silver Mining Co.*, 128 U. S. 673, 676; *United States* v. *Stinson*, 197 U. S. 200, 204–205; *United States* v. *Clark*, 200 U. S. 601, 608.

3. To justify the annulment of a homestead patent as wrongfully covering mineral land, it must appear that at the time of the proceedings which resulted in the patent the land was known to be valuable for mineral; that is to say, it must appear that the known conditions at the time

of those proceedings were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end. If at that time the land was not thus known to be valuable for mineral, subsequent discoveries will not affect the patent. The inquiry must be directed to the situation at that time, as were the applicant's proofs and the finding of the land officers. If the proofs were not false then, they cannot be condemned, nor the good faith of the applicant impugned, by reason of any subsequent change in the conditions. "We say 'land *known* at the time to be *valuable* for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral' in the sense of the statute is applicable. . . . We also say lands *known* at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the Government under the preëmption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We, therefore, use the term *known* to be valuable at the time of sale, to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued." *Deffeback* v. *Hawke*, 115 U. S. 392, 404; *Colorado Coal & Iron Co.* v. *United States*, 123 U. S. 307, 328; *United States* v. *Iron Silver Mining Co.*, 128 U. S. 673, 683; *Davis* v. *Weibbold*, 139 U. S. 507, 519; *Dower* v. *Richards*, 151 U. S. 658, 663;

Shaw v. *Kellogg*, 170 U. S. 312, 332; *United States* v. *Plowman*, 216 U. S. 372, 374.

As a further preliminary to considering the evidence, it should be observed that these lands, if purchased under the coal-land law, would have cost $20 an acre, and also that the coal company could not have purchased directly, or indirectly through others, more than 320 acres, unless it expended $5,000 in opening and improving a mine, in which event the maximum would have been 640 acres. Rev. Stat., §§ 2348, 2350; *United States* v. *Trinidad Coal Co.*, 137 U. S. 160; *United States* v. *Keitel*, 211 U. S. 370. As before said, the entries here in question embraced about 2,840 acres.

Coming to the evidence, we find it voluminous, unreasonably so. Part of it sheds no light upon the issues and was taken in disregard of the last of the rules just stated. That which properly may be considered very clearly establishes the following facts:

The proceedings in the land office began in May, 1899. Most of the applications were filed during that year and passed to patent in 1901. The others were presented and acted upon in succeeding years. The patents were all secured by means of affidavits and proofs, as before indicated, declaring that the lands were essentially nonmineral, were not known to contain any deposit of coal, and were sought for agricultural purposes and not as mineral land. For many years the district in which the lands were situate had been known to contain coal. They were surveyed in 1874, and the surveyor reported one of the sections as coal land, the others being contiguous to lands similarly reported. This was shown in the field notes and upon the official plats. The lands were in a valley, three or four miles in width, bounded on the east and west by foot-hills. A thick bed of coal was disclosed in the eastern face of the western hills, but its quality was not such as to make it of commercial value. Along

the western base of the eastern hills was the outcrop of another coal bed. This outcrop had been weathered down and in some places covered by the wash from above, but it could be traced upon the surface for several miles. It had been opened up at different places, and the openings disclosed a coal bed, from six to fourteen feet in thickness, dipping to the west at an angle of from fifteen to twenty-five degrees from the horizontal, as did the Cretaceous rocks with which it was interstratified. This coal was of superior quality and recognized commercial value, and the rocks containing it were the coal-bearing strata of that region. The lands in controversy were west of the outcrop, in the direction of the dip. Some were near the outcrop and the east line of the farthest section was about a mile and a half away. There was nothing upon their surface showing the presence of coal beneath, nor anything indicating that the bed outcropping on the east and dipping to the west did not pass through them. Unless valuable for coal, they were not worth to exceed a dollar and a quarter an acre. They were arid sagebrush lands, about 7,000 feet above sea level, and afforded very limited pasturage. Without irrigation they were not susceptible of cultivation, and the cost of securing water for that purpose was prohibitive.

Attracted by this outcrop, the coal company opened a mine thereon, in the vicinity of these lands, in 1894. In the beginning the output of the mine was small, but it reached 183,750 tons for 1897, 259,608 tons for 1898, and 441,277 tons for 1899.

An attempt was made by the coal company to acquire a part of the lands in controversy in 1898 by inducing some of its employés and others to make ordinary homestead entries of them under an agreement whereby the company was to bear the expense, compensate the entrymen for the exercise of their homestead rights, and receive the title when perfected. The arrangement was fraudulent

and in direct violation of the homestead law, independently of the character of the lands. 26 Stat. 1095, 1097, c. 561, § 5. Sneddon was in charge of the attempt. He was acquainted with the lands and all their surroundings and was well informed upon the subject of coal mining. With the aid of a surveyor he identified the subdivisions to be entered, and afterwards selected the men who were to make the entries and directed all that was done, indicating, in that connection, that the lands were coal lands and were to be taken for that reason, and also to prevent another coal concern from getting them. The entries were made in 160-acre tracts, and to give them apparent support cheap cabins were put upon the lands, at the company's expense, but the law was not even colorably complied with in other respects. The next year this plan was abandoned and that of using soldiers' additional rights was adopted. These rights were assignable, and in their exercise no residence, improvement or cultivation was required. See Rev. Stat., § 2306; *Webster* v. *Luther*, 163 U. S. 331. At the company's request the prior entries were relinquished and the entrymen were severally paid $500 for what they had done, the payment to one being $600. When the relinquishments were filed, Sneddon and Harrison immediately applied to enter the lands with soldiers' additional rights. A few of the relinquished subdivisions were not reëntered, and several tracts not covered by the prior entries were included in the new ones, but all of the latter were made with soldiers' additional rights purchased and supplied by the company and were made for its benefit. The price paid by the company for these additional rights was from six to thirteen dollars an acre. After the entries were obtained the lands were conveyed to the company, and Sneddon was paid $1,000 for this service, although otherwise regularly employed by the company at the time.

In 1898, shortly before the dummy entries were made,

Sneddon had filed in the land office a sworn declaration of his intention to purchase, under the coal-land law (Rev. Stat., §§ 2347–2349), one of the tracts in controversy, which he then described as containing "a valuable vein of coal." The tract was about a quarter of a mile from the outcrop. At the time of making the soldiers' additional entries he relinquished the coal filing and included the tract in two of them.

In 1899, about the time of the additional entries, James Lees purchased from the Government, under the coal-land law, and sold to the company for $3,400, a quarter section upon which earlier exploration had disclosed good coal, eight feet in thickness. This sale was in execution of a prior arrangement and the price paid to Lees was $200 in excess of that paid to the Government. The tract was within a half mile in each of three directions from lands here in controversy.

As indicative of the weight and importance which men having a practical knowledge of coal mining attached to the outcrop at the time, the Government proved by an experienced mine foreman, who had been in charge of large mines, known as the Cumberland, adjacent to a portion of the lands in controversy, that those mines were opened in 1900 by reason of what was found on the outcrop; that there was no precedent drilling of the adjacent lands; and that in advising the opening of the mines he was guided by what an examination of the outcrop in 1889 disclosed. True, he said that he could not take "a solemn oath" or "be positive" that unexplored lands in the vicinity of the outcrop and in the direction of the dip contained valuable coal, but his testimony was plainly to the effect that the outcrop, the direction and inclination of the dip, and other conditions in 1899 and 1900 afforded reasonable ground for believing that a considerable territory lying west of the outcrop could be mined profitably.

There was much expert testimony by geologists concerning the outcrop and other known geological data bearing upon the character of these lands. In the main the witnesses were agreed respecting the existence of these physical indicia, but differed as to the conclusions to be drawn from them, the expert for the Government maintaining that they afforded convincing reasons for concluding that the lands were coal lands and the experts for the coal company controverting that view. But the divergence was not so pronounced as it would seem, for it was partly due to a difference as to what, in legal contemplation, are coal lands.

The expert for the Government proceeded upon the theory that when the known surroundings are such that practical coal men would invest in particular lands for coal mining, or advise others to do so, those lands are to be deemed coal lands, even though coal has not as yet actually been disclosed within their limits. And having in mind the outcropping coal bed, the direction and inclination of its dip, the character of the rocks with which it was interstratified, the quality and thickness of the coal at the outcrop, the proximity of the lands to the outcrop, and the topographical and structural features of the vicinity, he gave it as his opinion that the coal bed extended into and through the lands in question and that practical coal men would regard the lands as valuable for coal and invest in them as such. He accordingly pronounced them coal lands within his acceptation of that term. This conclusion had substantial support, not only in the facts already recited, but also in the fact that the company's maps, made three years before the suit was begun, showed that it was intending to project its mining operations westward from the outcrop a mile and a half and had designated the intervening lands, which included some of those in controversy, as coal lands, and in the further fact that the company had returned lands extending west-

ward a similar distance, likewise including some now in controversy, as exempt from direct taxation by reason of a local statute substituting an output tax upon coal mines. Laws Wyo. 1903, c. 81, p. 101. The return for the year in which the maps were made claimed an exemption of substantially six sections, in two tiers of three sections each, although the work of developing the mine (No. 4), as shown by the maps, was still within the east half of the middle section in the eastern tier.

The experts for the coal company proceeded largely, but not entirely, upon the theory that lands cannot be regarded as coal lands unless coal in quantity and of quality to render its extraction profitable is actually disclosed within their boundaries. One testified that even if a slope were driven from the outcrop to within five feet of the vertical boundary of one of the sections in question, and in good coal all the way (a fact proved but not to be considered here, because in the nature of a discovery subsequent to the entries), it would not show that the section approached was coal land, there being no actual exposure of coal within its limits. And he added that it would be the same if the distance were three inches instead of five feet, but that "the moment you cross the line, then it commences to be coal land." Special emphasis was laid upon the uncertainties incident to coal mining in the Cretaceous areas of the West by reason of the occurrence of faults, wants, thinning and the like, and this, it was said, required that actual exposure of coal within the land, by an outcropping at the surface or an excavation, be accepted as the true and only test. But even such a test was largely discredited by statements that "a good outcrop at the surface may represent a want below, or a want at the surface may represent a coal below," and that in following a good discovery a fault or thinning, as well as a want, may be encountered at any moment. It was conceded, however, that the coal horizon—meaning the coal-

bearing strata shown at the outcrop, but not necessarily the coal—passed through the lands in controversy, and one expert, while declaring that he could not make an affidavit that they were coal lands in the sense of "strictly containing deposits of coal," candidly added: "But I would be prepared to make an affidavit that I believe them to contain coal." Another, although pronouncing the showing at the outcrop and elsewhere insufficient to render the lands valuable for coal mining, said: "I am not prepared, personally, to either affirm or deny that this land does or does not contain coal. I contend that it is beyond the capacity of any man to say that something exists or does not exist upon which he has no absolute testimony."

It is of some significance that Sneddon—who had long been in the company's service, had been the central figure in the acquisition of these lands, was familiar with them and the purpose for which they were sought and acquired, was the company's superintendent when the evidence was taken before the master, and was present during a part, at least, of the time when it was being taken—was not called by the company as a witness, and that statements, declarations and acts attributed to him and which made against the company were permitted to go undenied and unexplained.

We think the evidence, rightly considered, shows with the requisite certainty that at the time of the proceedings in the land office the lands were known to be valuable for coal. Otherwise they had only a nominal value, not to exceed one dollar and a quarter an acre, and yet easily ten times that amount was voluntarily expended by the company in acquiring them. It was hardly intending to make an aimless or grossly excessive expenditure. It was a practical concern, operated by practical men. It had located a mine upon the outcrop five years before, and in the meantime had proved the wisdom of the undertak-

ing by its mining operations. They had disclosed the existence of an extensive bed of valuable coal dipping to the west under the valley, and in that way had supplemented the evidence afforded by the outcrop and its surroundings. Without any doubt these considerations induced the company to believe, and rightly so, that the lands in controversy possessed a value for coal mining greatly in excess of their value for any other purpose. This explains the expenditure and the persistency of the company's efforts to acquire them; and the fact that the earlier effort was obviously fraudulent and unlawful, independently of the character of the lands, serves in no small degree to explain the kindred practices employed in the later effort. In short, the company, without care as to the means, sought and acquired the lands because it regarded them as valuable for coal. Its view and purpose were also reflected by its maps and tax returns. Of course, it was not a *bona fide* purchaser from Sneddon and Harrison, for they were mere agents representing it as an undisclosed principal.

An exposure to the eye of coal upon the particular lands was not essential to give them a then present value for coal mining. They were all adjacent to the outcrop and above the plane of the coal-bearing strata dipping under the valley. In alternate even-numbered sections they substantially paralleled the outcrop for seven miles, and in two places were separated from it by only a few rods. Those to the north were opposite the company's developed mine (No. 4), and those to the south were opposite the tract acquired through Lees, upon which good coal was disclosed. The outcrop, the disclosures in the vicinity, and the geological formation pointed with convincing force to a workable bed of merchantable coal extending under the valley and penetrating these lands. These conditions were open to common observation, and were such as would appeal to practical men and be relied upon by

them in making investments for coal mining. They did so appeal to the Cumberland people, as well as this company, both large concerns represented by men of experience, understanding the uncertainties and hazards of the business as well as its rewards. No doubt it has its uncertainties and hazards, but the evidence shows that they are not so pronounced as indicated by the company's experts.

There is no fixed rule that lands become valuable for coal only through its actual discovery within their boundaries. On the contrary, they may, and often do, become so through adjacent disclosures and other surrounding or external conditions; and when that question arises in cases such as this, any evidence logically relevant to the issue is admissible, due regard being had to the time to which it must relate.

The case of *Colorado Coal & Iron Co.* v. *United States*, 123 U. S. 307, relied upon by the coal company, is essentially different from this in that there the court was dealing with a statute excepting from entry lands on which there were "mines" at the time, a matter particularly noticed in the opinion (p. 328), while here the exception is of "mineral lands" and "lands valuable for minerals." Rev. Stat., §§ 2302, 2318.

It will be perceived that we are not here concerned with a mere outcropping of coal with nothing pointing persuasively to its quality, extent or value; neither are we considering other minerals whose mode of deposition and situation in the earth are so irregular or otherwise unlike coal as to require that they be dealt with along other lines.

Decree affirmed.

EL PASO BRICK COMPANY, APPELLANT, *v.* JOHN H. McKNIGHT.

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

No. 185. Argued January 22, 23, 1914.—Decided April 6, 1914.

Locators of mining claims have the exclusive right of possession of all the surface so long as they make the improvements or do the annual assessment work required by Rev. Stat., § 2324. To convert this defeasible possessory right into a fee simple the locator must comply with the provisions of Rev. Stat., §§ 2325, 2333.

The entry by the local land officer issuing the final receipt to a locator is in the nature of a judgment *in rem* and determines the validity of locations, completion of assessment work and absence of adverse claims.

The holder of a final receipt is in possession under an equitable title, and until it is lawfully canceled is to be treated as though the patent had been delivered to him. *Dahl* v. *Raunheim*, 132 U. S. 260.

While the General Land Office has power of supervision over acts of local officers and can annul entries obtained by fraud or made without authority of law, it may not arbitrarily exercise this power; and if a cancellation is made on mistake of law it is subject to judicial review when properly drawn in question in judicial proceedings.

Under the policy of the land laws the United States is not an ordinary proprietor selling land and seeking the highest price, but offers liberal terms to encourage the citizen and develop the country.

Where there has been compliance with the substantial requirements of the land laws, irregularities are waived or permission given to cure them; and so *held* that, under the circumstances of this case, as there had been proper posting under Rev. Stat., §§ 2325 and 2333, the fact that the original affidavit of posting was made before an officer residing outside the district and not within the district as required by § 2335, did not render the entry void. The defect was curable and cancellation of entry for that defect alone was improper.

The yielding of a locator holding a final receipt to an erroneous ruling does not destroy the rights with which he has become vested by full compliance with the requirements of Rev. Stat., § 2325.

Quære, whether § 2135, Comp. Laws New Mexico, imposing upon a

locator of mineral lands the burden of proving that he has performed the annual assessment work, is void as in conflict with the Federal statutes. See *Hammer* v. *Garfield*, 130 U. S. 29.

Quære, whether an affidavit of work offered for one purpose by an adverse claimant can be used for another purpose by the locator as substantive evidence in the case.

A locator acquires no rights by locating on property that had previously been, and then was, segregated from the public domain.

16 New Mex. 721, reversed.

In proceedings brought by McKnight to try the right of possession to conflicting mining locations, it appeared that the defendant, the El Paso Brick Company, was in possession of the Aluminum International and Hortense claims, constituting what was known as the Aluminum group of placer mines. It held under locations made prior to January, 1903. In 1905 the company decided to apply for a patent to the land which embraced about 411 acres. Accordingly, on August 2, 1905, it filed with the Register of the land office at Las Cruces, Dona Ana County, New Mexico, an application for a patent together with an affidavit (executed before an officer residing outside of the mining district) that notice of the application had been posted on the land. These papers were filed with the Register who gave the further notice required by statute. No protest or adverse claim was filed by any person. The Brick Company paid $1027.50, being the purchase price fixed by Rev. Stat., § 2333, and on October 23, 1905, the land officers allowed an entry on which the Receiver issued a final receipt—the material portions of which were as follows:

"United States Land Office at Las Cruces, N. Mexico,
"October 23, 1905.

"Received from The El Paso Brick Company, El Paso, Texas, the sum of Ten hundred and twenty-seven and 50–100 dollars, the same being payment in full for the area embraced in that Mining Claim known as the 'Alum-

inum Placer Group' unsurveyed . . . embracing 410.90 acres in the Brickland Mining District, in the County of Dona Ana and Territory of New Mexico, as shown by the survey thereof.

"$1027.50. Henry D. Bowman, Receiver."

The entry and this final receipt *prima facie* entitled the Company to a patent, which however was not issued because various parties filed protests with the Land Commissioner in which it was asserted that the Brick Company's locations were originally void, or if valid, had been forfeited. It was also contended that the Company was not entitled to a patent because the affidavit showing the posting of the notice on the land had not been signed before an officer residing within the land district as provided in Rev. Stat., § 2335, which declares that "all affidavits required to be made under this chapter [mining laws] may be verified before any officer authorized to administer oaths within the land district where the claims may be situated."

Notice of these protests was given to the Brick Company which was allowed 60 days within which to show cause why the entry should not be cancelled. "In response numerous affidavits and exhibits designed to overcome the objections were filed on behalf of the Company," among which was a "supplementary affidavit with reference to such posting and such claim which was in compliance with the laws of the United States and was verified before a proper officer."

On September 4, 1906, the Commissioner ruled that the entry was fatally defective because the original affidavit as to posting had not been executed before an officer residing in the land district. From that ruling the Brick Company appealed.

There was a hearing before the Assistant Secretary of the Interior, who, on September 9, 1908, rendered a decision, 37 L. D. 155, in which,—after discussing the pro-

visions of Rev. Stat., §§ 2325, 2335, and quoting from various rulings of the Land Department and courts,—he held that the fact that the affidavit of posting had been signed before an officer residing outside of the district, was a fatal defect, which invalidated the entire proceeding. Among other things, he said (p. 159): "The defect is not a mere irregularity which may be cured by the subsequent filing of a properly verified affidavit. The statutory provisions involved are mandatory. Their observance is among the essentials to the jurisdiction of the local officers to entertain the patent proceedings. The requisite statutory proof as to posting not having been theretofore filed, the Register was without authority to direct the publication of the notice or otherwise proceed; and the notice, although in fact published and posted, being without the necessary legal basis, was a nullity and ineffectual for any purpose. The patent proceedings therefore fall and the entry will be canceled."

The record further recites that on November 24, 1908, the Brick Company waived its right to petition for a review of such decision and "thereupon such decision and the cancellation of said entry became final and said entry was cancelled on the records of the Land Office." On the next day, November 25, 1908, the Brick Company filed at the local land office a second application for patent. McKnight thereupon filed an adverse claim in which he set up that the land described in the Brick Company's application embraced within its limits the Lulu and Agnes claims which had been located by him in April, 1905, and relocated in May, 1906, at which time he also located the Tip Top, Lynch and Aurora claims. The patent proceedings in the Local Land Office were stayed in order that McKnight might, as provided in Rev. Stat., § 2326, bring a suit in a court of competent jurisdiction to try the right of possession.

On January 2, 1909, McKnight brought such suit in the

District of Dona Ana County, New Mexico. It was tried November 8, 1909, before a judge without a jury. At the hearing McKnight introduced the certificates of the locations described in his complaint and evidence tending to show that he had done the required assessment work on his five claims. In support of his contention that the Brick Company had forfeited its rights, by failing to do the annual assessment work, the record recites that he offered "certified copies of proof filed by the Brick Company in June, 1905, and December, 1906, for the purpose of showing, in connection with the testimony of the witness [the keeper of the county records] that there had been no satisfactory proof of labor filed for any year previous to 1906." These certified copies consisted of affidavits by the President of the Brick Company that it had done more than $5,000 worth of work on its locations during each of the years 1903, 1904 and 1906. There was no ruling by the court limiting the effect of the affidavits as evidence, but it appears that McKnight contended that, as the names of the persons actually doing the work were not stated in the affidavit and as the first of the affidavits was made in April, 1905, the burden of showing that the work had actually been done for 1903 and 1904 was cast on the Brick Company by virtue of the provisions of § 2315 of the Compiled Laws of New Mexico.[1] The Brick Company, on

[1] "SEC. 2315. The owner or owners of any unpatented mining claim in this Territory, located under the laws of the United States and of this Territory, shall, within sixty days from and after the time within which the assessment work required by law to be done upon such claim should have been done and performed, cause to be filed with the recorder of the county in which such mining claim is situated, an affidavit setting forth the time when such work was done, and the amount, character, and actual cost thereof, together with the name or names of the person or persons who performed such work; and such affidavit, when made and filed as herein provided, shall be *prima facie* evidence of the facts therein stated. The failure to make and file such affidavit as herein provided shall, in any contest, suit or proceedings touching

the other hand, appears to have contended that this territorial statute was not only void as being in conflict with the Federal statutes, but that the affidavits offered by plaintiff showed on their face that many times the amount of assessment work required had been done in 1903, 1904 and 1906, thus segregating the land from the public domain and rendering McKnight's subsequent locations nugatory.

At the conclusion of the evidence the court took the case under advisement and on December 17, 1909, rendered a judgment for McKnight which was affirmed (16 New Mex. 721) by the Supreme Court of New Mexico. The case was then brought here on appeal.

Mr. Francis W. Clements, with whom *Mr. Aldis B. Browne*, *Mr. Alexander Britton*, *Mr. Evans Browne*, *Mr. W. A. Hawkins* and *Mr. John Franklin* were on the brief, for appellant.

Mr. Eugene S. Ives for appellee.

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

McKnight brought suit against the El Paso Brick Company to try the right of possession to conflicting mining locations. In his complaint he asserted his own title and attacked that of the Defendant under locations older in date but which he claimed had been forfeited by failure to do the annual assessment work for 1903 and 1904, thereby leaving the land open to the locations made by McKnight in 1905 and 1906. The Brick Company, while insisting that the plaintiff's own evidence proved that the assess-

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the title to such claim, throw the burden of proof upon the owner or owners of such claim to show that such work has been done according to law."

ment work had in fact been fully performed, relied on the legal effect of the company's application for a Patent to the land and the final receipt issued to it by the Receiver of the Local Land Office in October, 1905. To this the plaintiff replied that the entry, on which the receipt issued, had been cancelled on the ground that the patent proceedings were absolutely void because the statutory affidavit of posting had not been filed.

1. Locators of mining claims have the exclusive right of possession of all the surface included within the exterior limits of their claims so long as they make the improvements or do the annual assessment work required by the Revised Statutes, § 2324. The law, however, provides (Rev. Stats., §§ 2325, 2333) a means by which the locator can pay the purchase price fixed by statute and convert the defeasible possessory title into a fee simple. Sixty days' notice must be given in order that all persons having any adverse claim may be heard in opposition to the issue of a patent. That notice is threefold. It must be given by publication in the nearest newspaper, by posting in the Land Office, and by posting on the land itself, and it is provided in the statute that this latter fact may be proved by the affidavit of two persons before an officer residing within the land district (Rev. Stat., § 2335). All persons having adverse claims under the mining laws may be heard in objection to the issuance of a patent. But (§ 2325) "if no adverse claim shall have been filed . . . it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third persons to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter" [relating to mineral lands].

2. In the present case the Brick Company's application for a patent was filed, each of the several forms of notice

required by statute was given, no adverse claim was filed, the purchase price was paid to the Government, and a final receipt was issued by the local land office. The entry by the local land officer issuing the final receipt was in the nature of a judgment *in rem* (*Wight* v. *Dubois*, 21 Fed. Rep. 693) and determined that the Brick Company's original locations were valid and that everything necessary to keep them in force, including the annual assessment work, had been done. It also adjudicated that no adverse claim existed and that the Brick Company was entitled to a patent.

From that date, and until the entry was lawfully cancelled, the Brick Company was in possession under an equitable title, and to be treated as "though the patent had been delivered to" it. *Dahl* v. *Raunheim*, 132 U. S. 260, 262. And, when McKnight instituted possessory proceedings against the Brick Company, the latter was entitled to a judgment in its favor when it produced that final receipt as proof that it was entitled to a patent and to the corresponding right of an owner.

Nor should the result have been different when the record showed that the entry and final receipt, properly issued, had been improperly cancelled. It is true that the order of the Department was a denial of the patent, but it was not a conclusive adjudication that the Brick Company was not entitled to a patent, nor could such an order deprive the Brick Company of rights vested in it by law. For while the General Land Office had power of supervision over the acts of the local officers, and could annul entries obtained by fraud or made without authority of law, yet if the Department's cancellation was based upon a mistake of law, its ruling was subject to judicial review when properly drawn in question in judicial proceedings, inasmuch as the power of the Land Office is not unlimited nor can it be arbitrarily exercised so as to deprive any person of land lawfully entered and paid for. *Cornelius* v.

Kessel, 128 U. S. 456, 461; *Parsons* v. *Venzke*, 164 U. S. 89.

3. So that the case involves a determination of the single question as to whether the patent was properly refused by the Land Department because of the objection that the Brick Company had failed to comply with the terms of the law relating to Mineral Land. Rev. Stat., § 2325. That can be determined by an inspection of the record, in which the order appears. It shows that the cancellation of the entry was not based on the Brick Company's failure to do the annual assessment work, or to give the proper notice, or to pay the statutory price, but solely for the reason that the affidavit of posting was executed before an officer who resided outside of the land district.

That decision (37 L. D. 155), though supported by some Departmental rulings of comparatively recent date, was in conflict with the established practice of the Land Department, and was expressly and by name overruled, on July 29, 1911, in *Ex parte Stock Oil Company*, 40 L. D. 198, which reaffirmed prior decisions to the effect that irregularities in proof, including the execution of affidavits before other than the designated officers, might be supplied, even on appeal.

These and similar rulings, previously followed in the Department, are manifestly correct. They accord with the policy of the land laws, under which the United States does not act as an ordinary proprietor seeking to sell real estate at the highest possible price, but offers it on liberal terms to encourage the citizen and to develop the country. The Government does not deal at arm's length with the settler or locator and whenever it appears that there has been a compliance with the substantial requirements of the law, irregularities are waived or permission is given, even on appeal, to cure them by supplemental proofs. *United States* v. *Marshall Mining Co.*, 129 U. S. 579, 587. In

the present case such proof by supplemental affidavits, properly executed, showed that the land had been properly posted. But that fact was not allowed to have any effect because of the mistaken view that, as the original affidavit of posting had been signed before an officer residing outside of the land district, the patent proceedings were absolutely void. This confused service by proper posting—which was jurisdictional,—with defective proof of such service which—like the defective return of an officer,—could be corrected. Under the law, jurisdiction depended upon giving notice by publication in a newspaper, by posting in the land office, and by posting on the land itself,—the statute directing how the giving of such notice should be proved. But irregularities in complying with such directory provision could be cured, and when cured, as it was here, the patent should have been issued. The cancellation of the entry was based on a plain error of law, and though there was no appeal in fact, and no right of appeal to the courts, the ruling did not operate to deprive the Brick Company of its property in the mines. The fact that the Brick Company, perforce, yielded to the erroneous ruling, and instituted new proceedings in order to secure a patent, as evidence of its title, did not destroy the rights with which the Company had become invested by full compliance with the requirements of Rev. Stat., § 2325. When, therefore, in the suit to try the right of possession the plaintiff asked that proper effect be given to the final receipt and the entry on which it was based as a judgment *in rem*, it was not making, as is contended, a collateral attack on the order of the Land Department, but was merely relying on the valid entry and asking the court to decline to give effect to the erroneous cancellation.

4. This conclusion makes it unnecessary to decide the question as to whether the territorial statute, imposing upon the locator the burden of proving that he has performed the annual assessment work, is void as being in

conflict with the Federal statutes, which require no such annual proof, raise no presumption of abandonment and as construed in *Hammer* v. *Garfield*, 130 U. S. 291, demand clear and convincing proof that work has not been done before a forfeiture can be declared. It also makes it unnecessary to determine whether the affidavit of work being offered for one purpose by McKnight could be used for another purpose by the Brick Company as substantive evidence in the case.

Many pages of the briefs are devoted to a discussion of these questions, but if any of them were decided in favor of the Brick Company it could not increase its rights. If the legal propositions involved could be decided in favor of McKnight that could not overcome the fact that the issuance of the final receipt to the Brick Company on October 23, 1905, was an adjudication not only that the Brick Company was entitled to a patent, but that McKnight then had no adverse claim to the land. Of course he acquired none in May, 1906, by locating on property that had previously been and then was segregated from the public domain.

The judgment of the Supreme Court of the Territory of New Mexico is reversed and the case is remanded to the Supreme Court of the State of New Mexico for further proceedings not inconsistent with this opinion.

Reversed.

AMERICAN IRON AND STEEL MANUFACTURING CO. *v.* SEABOARD AIR LINE RAILWAY.

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

No. 233. Argued March 6, 1914.—Decided April 6, 1914.

Whatever may have been the English and early American rule, the present tendency in this country is to allow interest on contracts to pay money from the date the debt becomes due; and so *held* as to goods sold in Virginia on a credit of thirty days.

The acceptance of goods sold on a credit of a specified number of days is equivalent to a promise to pay the money on that day, *Atlantic Phosphate Co.* v. *Grafflin*, 114 U. S. 492, and interest accrues as an incident of the debt and not merely as damages.

The general rule that interest is not allowed after property of the insolvent is in *custodia legis*, is not based on loss of interest-bearing quality, but is a necessary and enforced rule incident to equality of distribution between creditors of assets which, in most cases, are insufficient to pay all debts in full.

On the facts certified in this case, *held* that interest was recoverable on a debt for goods sold on a thirty day credit at the legal rate of interest from the expiration of the credit until payment, including the period that the assets of the debtor were in the hands of a receiver in a suit to foreclose a mortgage.

UNDER the provisions of § 6 of the act of March 3, 1891, c. 517, 26 Stat. 826, 828, the Circuit Court of Appeals of the Fourth Circuit certified to this court a question on which it desired instruction, and in that connection made the following Statement of Facts:

"Upon a bill filed by a railway company alleging its insolvency and consequent inability to maintain itself as a going concern, except through the medium of a receivership, receivers were appointed. The bill alleged that a receivership would enable the property of the Railway Company to be preserved and maintained as a whole,

and the sums due and to become due to the bondholders and creditors to be secured and ultimately paid in full.

"The trustee in the first mortgage answered the bill admitting its allegations, and afterwards filed a cross bill again admitting the allegations of the bill in regard to the insolvency of the company. The suit was not a creditors' suit. The trustee subsequently filed a bill in the same court to foreclose the mortgage, seeking a sale of the equity of redemption, and the two suits were consolidated. No prior encumbrancers were made parties to either suit. Prior to the receivership the claimant furnished supplies to the railway company, for which, shortly after the receivers were appointed, a lien was duly perfected under the statute of Virginia known as the Labor and Supply Lien Statute, Code of Va., § 2485. The supplies were sold on a credit of '30 days, one per cent. discount allowed for payment in 10 days.' Claimant filed its claim before the Special Master in the receivership proceedings, relying upon a statutory lien under the statute above mentioned. The Special Master reported against the allowance of interest on the claim, to which report in that particular claimant excepted.

"Subsequently, on the petition of the railway company, a decree was entered approving 'a plan of adjustment' of the finances of the company, and providing for turning back to the company its property, and for ending the receivership at a certain time. From time to time during the receivership and at the ratification of the plan of adjustment, and as a part thereof, all interest due at the time of the appointment of the receivers and accruing during the receivership on all the funded and many of the floating obligations of the Railway Company were paid in full. The amount so paid for interest aggregated some millions of dollars.

"The decree approving the plan of adjustment provided that the company should pay in due course of business all

its obligations, liabilities and indebtedness, and reserved the right, in the event of default in that regard, to any claimant aggrieved by such default, to present his petition to the Court to have his claim enforced 'to the same extent as though the receivership had continued.'

"After the receivership had been thus terminated, claimant filed its petition in the Court praying that its exceptions to the Special Master's report should be sustained and for the enforcement of its claims, including interest thereon during the period of the receivership, and seeking to enforce it not upon the doctrine of an equitable lien, but as a statutory lien. The Circuit Court refused to allow interest for the period of the receivership, and from that ruling an appeal was taken."

QUESTION

Is interest recoverable on such a claim for the period of the receivership?

Mr. George Wayne Anderson, with whom *Mr. Henry R. Pollard* was on the brief, for the American Iron and Steel Manufacturing Co.

Mr. L. L. Lewis for the Seaboard Air Line Railway *et al.*

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

The statement of facts made by the Circuit Court of Appeals of the Fourth Circuit, shows that supplies were sold to a railway company on 30 days' credit. Before the credit period expired the road, alleged to be insolvent, was, on its own application placed in the hands of Receivers, their appointment being subsequently continued under a Bill for foreclosure filed by mortgage trustees. The

Railway Company succeeded in making a readjustment of its bonded indebtedness and the property was returned to the owners. The court, however, retained jurisdiction for the purpose of passing upon the claims of creditors aggrieved by the Company's default in paying its obligations. Among those presented was the American Iron and Steel Manufacturing Company's claim for supplies secured by a lien which by statute took priority over mortgages. The matter was referred to a Master on pleadings not before us. He made a report (not in the record) and on exceptions thereto the Circuit Court refused to allow interest. From that statement, in connection with the briefs and arguments, of both counsel, we infer that the Railway was directed to pay the principal of the claim. The case was then taken to the Circuit Court of Appeals for the Fourth Circuit which certifies to this court the question, "Is interest recoverable on such a claim for the period of the Receivership?"

Both parties agree that the matter is controlled by the law in Virginia, but no light is thrown on the subject by the statute of the State which merely declares that legal interest shall continue to be at the rate of six per cent. Pollard's Code, § 2817. No Virginia case directly in point is cited in either of the briefs and there is a complete disagreement between counsel as to the bearing of the state decisions on the question here involved.

On the part of the Railway Company it is contended that interest could not have been recovered on this claim even in an action at law. On the authority of *Calton* v. *Bragg*, 15 East, 223; *Newton* v. *Wilson*, 3 Hen. & M. 470; *Quincy* v. *Humphreys*, 145 U. S. 82, and other like cases, it is argued that the right to interest is a matter of agreement and can be recovered, as a part of the debt, only where it has been reserved in the contract or where a promise is implied from the character of the note or instrument evidencing the debt. The Railway therefore

insists that as the Intervenor sold the supplies, without taking a note and without securing a promise to pay interest, there was no right to recover interest as an incident of the debt, although a jury, as a matter of discretion, might have allowed it by way of damages for unreasonable delay in making payment.

On the other hand, counsel for the Iron & Steel Company contend that as these supplies were sold on a credit of 30 days a promise was implied to pay interest after that date as an incident of the debt itself. From *Chapman* v. *Shepherd*, 24 Gratt. 377, 383; *Craufurd* v. *Smith*, 93 Virginia, 623 (2); *Tidball* v. *Shenandoah Bank*, 100 Virginia, 741; *Butler Co.* v. *Virginia Railway Co.*, 113 Virginia, 28 (7); *Roberts* v. *Cocke*, 28 Gratt. 207, and *Cooper* v. *Coates*, 21 Wall. 105, 111, we reach the conclusion that whatever may have been the English and early American rule, the tendency in Virginia, as elsewhere in this country, is to allow interest on contracts to pay money from the date that the debt becomes due. 2 Minor's Institute, 381. The sale here of supplies on 30 days' credit was not, as argued, a mere agreement for the benefit of the buyer that it should not be sued before the expiration of that time, but was the fixing of a definite date for payment of the purchase money. The acceptance of the supplies, sold on those terms, was equivalent to a promise to pay the money on that day. *Atlantic Phosphate Co.* v. *Grafflin*, 114 U. S. 492, 500. As payment was not then made, the Railway Company was in default and interest began to accrue as an incident of the debt, recoverable as such and not merely as damages to be allowed in the discretion of court or jury. This appears to have been the view of the Circuit Court of Appeals since the interest-bearing quality of the debt seems to be assumed in the question—"Is interest recoverable on such a claim for the period of the Receivership?"

In the discussion as to the answer which should be

given that question, the Railway Company insists that, whether treated as part of the debt or allowed as damages, interest can only be charged against the Railway because of delay due to its own fault, while here the failure to pay was due to the act of the law in taking its property into custody and operating the same by Receivers in order to prevent the disruption of a great public utility. And it is true, as held in *Tredegar Co.* v. *Seaboard Ry.*, 183 Fed. Rep. 289, 290, that as a general rule, after property of an insolvent is in *custodia legis* interest thereafter accruing is not allowed on debts payable out of the fund realized by a sale of the property. But that is not because the claims had lost their interest-bearing quality during that period, but is a necessary and enforced rule of distribution, due to the fact that in case of receiverships the assets are generally insufficient to pay debts in full. If all claims were of equal dignity and all bore the same rate of interest, from the date of the receivership to the date of final distribution, it would be immaterial whether the dividend was calculated on the basis of the principal alone or of principal and interest combined. But some of the debts might carry a high rate and some a low rate, and hence inequality would result in the payment of interest which accrued during the delay incident to collecting and distributing the funds. As this delay was the act of the law, no one should thereby gain an advantage or suffer a loss. For that and like reasons, in case funds are not sufficient to pay claims of equal dignity, the distribution is made only on the basis of the principal of the debt. But that rule did not prevent the running of interest during the Receivership; and if as a result of good fortune or good management, the estate proved sufficient to discharge the claims in full, interest as well as principal should be paid. Even in bankruptcy, and in the face of the argument that the debtor's liability on the debt and its incidents terminated at the date of adjudication and as a fixed liability

was transferred to the fund, it has been held, in the rare instances where the assets ultimately proved sufficient for the purpose, that creditors were entitled to interest accruing after adjudication. 2 Blackstone's Comm. 488; Cf. *Johnson* v. *Norris*, 190 Fed. Rep. 459, 460 (5).

The principle is not limited to cases of technical bankruptcy, where the assets ultimately prove sufficient to pay all debts in full but principal as well as interest, accruing during a receivership, is paid on debts of the highest dignity, even though what remains is not sufficient to pay claims of a lower rank in full. *Central Co.* v. *Condon*, 67 Fed. Rep. 84; *Richmond &c. Co.* v. *Richmond R. Co.*, 68 Fed. Rep. 105, 116; *First National Bank* v. *Ewing*, 103 Fed. Rep. 168, 190.

The Railway Company relies on the statement in *Thomas* v. *Western Car Co.*, 149 U. S. 95, 116, that "as a general rule, after property of an insolvent passes into the hands of a receiver, interest is not allowed on claims against the funds." The court there refused to allow interest on car rentals, accruing during the receivership, under an old contract, because the funds were not sufficient to pay the bonds, saying (117): "We see no reason in departing from this [general] rule in a case like the present, where such a claim [for car rentals] would be paid out of moneys that fall far short of paying the mortgage debt." But here, interest was paid on mortgage bonds and should therefore have been paid on a claim which by statute was given priority over the bonds. This was specially true where the property was in the hands of a Receiver on the application of the debtor and of the mortgage trustees. For, manifestly, the law does not contemplate that either the debtor or the trustees can, by securing the appointment of Receiver, stop the running of interest on claims of the highest dignity.

In the brief for the Railway Company attention is called to the fact that the road was not in *custodia legis*

under a creditors' suit, but in a proceeding to foreclose the equity of redemption. In view of that fact it is argued that the Iron and Steel Company should be remitted to its action at law against the Company which is now in possession of the property. But this seems to involve matters not within the question certified by the Circuit Court of Appeals. The property was returned to the Railway Company on condition that any creditor aggrieved by the failure to pay his claim might present his petition to the court and have it enforced "to the same extent as though the receivership had continued." As a fact interest was paid on the floating indebtedness, out of earnings made by the Receivers appointed first under a bill which asked that the property be taken in charge by the court so that ultimately all creditors would be paid in full. We must assume that the court had the right to make these payments and if so it had a like right in the case of the claim for railway supplies. No question is raised as to the power of the court to require payment of the principal of appellant's debt, and if the court could require a payment of the principal, it could also enforce the payment of the interest which was but an incident of that debt. If the property had remained in the hands of the Receiver the Lienor might have been permitted to intervene and share in the fund realized by the sale of property in the hands of receivers appointed, first, on the application of the Railway, in the interest of all creditors, and continued by an order entered in the bill to foreclose the mortgage.

It is, however, not necessary to discuss that matter further than to say that on the facts stated, interest was recoverable on the American Iron and Steel Company's claim for the period of receivership.

The question certified by the Circuit Court of Appeals is answered in the affirmative.

FRANKLIN *v.* LYNCH.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 553. Submitted February 25, 1914.—Decided April 6, 1914.

The act of April 21, 1904, c. 1402, 33 Stat. 189, 204, removing restrictions on alienation of lands of non-Indian allottees of the Five Civilized Tribes, did not authorize members of the tribes to sell future acquired property.

Under Rev. Stat., § 2116, no conveyance of an Indian tribe shall be valid except as authorized by treaty, and individual members cannot sell future allotments, as, prior to allotment, there is no individual interest in tribal lands or vendible interest in any particular tract. *Gritts* v. *Fisher*, 224 U. S. 640.

While the act of April 21, 1904, removed some restrictions, it did not permit either members of the tribes or non-Indians to sell mere floats or expectancy.

One who has applied for and been admitted to membership in an Indian tribe by intermarriage cannot thereafter claim the rights of an Indian as to receiving allotment and the rights of a white non-Indian as to alienation; and all parties dealing with such a person do so with knowledge of the restrictions on alienation imposed by the act of 1902.

As § 642 of Mansfield's Digest, providing that title to subsequently acquired property conveyed shall inure to the benefit of the grantee, was only extended to Indian Territory so far as applicable and not inconsistent with any law of Congress; it has no effect on titles to allotments which, under the act of 1902, cannot be affected by conveyance before patent.

37 Oklahoma, 60, affirmed.

THE facts, which involve the effect of the deed of an intermarried Choctaw to an allotment to be subsequently acquired, and the construction of acts of Congress affecting the right of allottees to convey, are stated in the opinion.

Mr. H. A. Ledbetter for plaintiff in error.

Mr. S. T. Bledsoe for defendants in error.

Mr. Justice Lamar delivered the opinion of the court.

Emmer Sisney, a white woman and widow of a Choctaw Indian, applied in 1899 to be admitted as a member of the tribe by intermarriage. Her application not having been granted she employed Franklin & Apple, attorneys at law, to secure her enrollment. As compensation for their services she, on October 16, 1905, by warranty deed conveyed to them her "entire interest in any and all lands, exclusive of homestead, which might finally be allotted to her by the Commissioners of the Five Civilized Tribes." This deed was duly recorded together with an instrument by which she agreed to make conveyance when the land was actually allotted. Thereafter, on November 26, 1906, Emmer Sisney was enrolled as an intermarried citizen of the Choctaw Nation. She promptly made her selection and on December 12, 1906, received a patent to land, all of which, except the homestead, she, on December 14, 1906, sold for value to Lynch & Simmons. Thereupon Franklin, who had acquired Apple's interest under the deed of 1905, brought this suit to have the deed to Lynch & Simmons cancelled as a cloud on his title. The District Court of Oklahoma entered a decree in his favor. That judgment was reversed by the Supreme Court, 37 Oklahoma, 60, and the case is here on a writ of error to review that ruling.

Both parties claim title to land allotted in December, 1906, to a white member of the Choctaw Tribe. The plaintiff has the older warranty deed, but the defendants contend that as it was signed before allotment, the deed was void by virtue of the provisions in the Supplemental Agreement of July 1, 1902 (23 Stat. 641, 642, §§ 15 and 16),

that "lands allotted to members and freedmen [of the Choctaw and Chickasaw Tribes] shall not be affected . . . by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this Act, nor shall said lands be sold except . . . (§ 16) after issuance of patent."

To this the plaintiff replies that, as Emmer Sisney was a white woman, this prohibition against sale by her had been repealed by the act of April 21, 1904 (c. 1402, 33 Stat. 189, 204) which provides that "all restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood . . ., are, . . . hereby removed."

That statute did not authorize white *members* of the tribe to sell future acquired property, but did permit non-Indian *allottees* to sell what had been actually assigned to them in severalty. (Cf. 34 Stat., § 19, p. 144.) The distinction between a member and an allottee is not verbal but was made in recognition of a definite policy in reference to these lands. The Revised Statutes (§ 2116) declare that no conveyance from an Indian tribe shall be of any validity in law or in equity unless authorized by treaty. As the tribe could not sell, neither could the individual members, for they had neither an undivided interest in the tribal land nor vendible interest in any particular tract. *Gritts* v. *Fisher*, 224 U. S. 640. But in pursuance of the legislation following the Report of the Dawes Commission (*Choate* v. *Trapp*, 224 U. S. 665), provision was made for dividing and distributing the tribal land in severalty among the members of the tribe. But, recognizing the probability of improvident and hasty sales being made, Congress provided that the land could not be sold until after the patent had actually issued, and even then only one-quarter could be sold in one year, three-quarters in three years, and the balance in five years. The act of 1904, relied on by plaintiff, removed some of the re-

strictions and permitted those members of the tribe, who were not of Indian blood, to sell land after it had been actually allotted in severalty. But it did not permit even a non-Indian to sell a mere float or expectancy, since he would not likely receive the full value of what thereafter might be patented to him.

The plaintiff further contends that even if the deed was inoperative when made, yet as Emmer Sisney was a white woman she had the capacity of a white person of full age to convey an expectancy, so that when she acquired title in 1906 it inured to the benefit of Franklin and Apple, as the grantees under the deed of 1905. But the trouble with this contention is that Emmer Sisney cannot be treated as a white woman, for the purpose of conveying an expectancy, and an Indian for the purpose of securing an allotment. When she applied to be enrolled as a citizen of the Choctaw Nation she, *ipso facto*, subjected herself to the restriction upon alienation of Indian land imposed upon all members of the tribe. All who dealt with her, as to land thereafter allotted to her, were charged with knowledge that the act of 1902 declared that such land should not be affected by any contract made before allotment. The deed of 1905 was therefore a nullity and did not estop her or her assigns from showing that it had been made in direct violation of the statute. For, to permit an Indian's deed, void when made, to operate as a conveyance of title to lands subsequently allotted, would be to disregard the express language of the statute and defeat the protective purposes for which the law was passed. *Starr* v. *Long Jim*, 227 U. S. 613, 624. The result is not changed by the provision of § 642 of Mansfield's Digest that 'if a person, without title, shall convey real estate and subsequently acquire title the legal or equitable estate afterwards acquired shall immediately pass to the grantee as if the estate had been in the grantor at the time of the conveyance.' The chapter of Mansfield's Digest of

Arkansas Law containing this section was extended (32 Stat. 841) to the Indian Territory "so far as the same may be applicable and not inconsistent with any law of Congress." It has no effect here because it is inconsistent with the act of 1902 which declared that Indian land should not be affected by a deed made before patent. The deed to Franklin having been made before allotment was void, and the judgment is

Affirmed.

TEVIS *v.* RYAN.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 189. Argued January 23, 26, 1914.—Decided April 6, 1914.

Covenants in a contract between individuals who control a corporation, in regard to disposition of its outstanding stock, construed in this case to import a personal responsibility on the parties and not on the corporation.

In this case, the cause of action being not on the contract alone, but also upon alleged fraudulent conduct, evidence as to oral declarations of the defendant was admissible to show the misrepresentations alleged as basis for the claim of fraudulent inducement to make the contract and fraudulent use of the property entrusted to the defendant thereunder.

Notice to either of joint contractors is notice to both.

A written paper offered and admitted as evidence of a demand and not objected to as coming too late is not inadmissible because it contains other matter. The proper course for the party objecting is to ask an instruction limiting the effect of the paper to the demand or else to base the objection on its coming too late.

A contract, providing that in a specified contingency the interest of the parties surrendering control to the other party shall revest in them in the same proportion and ratio as they held on the making of the contract, was properly construed as contemplating that

the surrendering parties be restored to the same proportionate interest in the property as they held prior to the making of the agreement.

In affirming the judgment of the Supreme Court of the Territory of Arizona which has been reduced by remittitur, this court does not necessarily hold that the rulings of the court below were indubitably correct, and it also takes into consideration Rev. Stat. Arizona 1901, par. 1588, providing in substance that the trial court shall not be reversed for want of form if there is sufficient matter of substance in the record to enable the Supreme Court to decide the case upon the merits, and that excessive damages may be remitted pending the appeal.

This court is not lightly disposed to disturb the decision of a territorial Supreme Court turning, as it does in this case, largely upon local practice.

13 Arizona, 282, affirmed.

THIS action was brought by defendants in error against Tevis and McKittrick, two of the plaintiffs in error, in a district court of one of the counties of the then Territory of Arizona. The trial resulted in a verdict and judgment in favor of plaintiffs below for $132,000. On appeal, the Supreme Court of the Territory held that because of error affecting the amount of the damages, $64,564.63 of the verdict ought to be remitted, and that upon the filing of a remittitur judgment should be entered in favor of plaintiffs below for the remaining sum of $67,435.37. 13 Arizona, 120. Both parties filed petitions for a rehearing, with the result that the court adhered to its former view. 13 Arizona, 282. Plaintiffs having filed the remittitur, judgment was entered in their favor for the last mentioned sum, and the present writ of error was sued out.

The controversy arises out of the following transactions. In the year 1902 plaintiffs and defendants were stockholders in an Arizona corporation known as the Turquoise Copper Mining & Smelting Company, which owned mining properties in Cochise County, Arizona. The stock consisted of 100,000 shares, of the par value of $10 each, of which the Ryans together owned four-

sevenths and Tevis and McKittrick owned three-sevenths. The Ryans were in control of the board of directors. About $160,000 had been expended towards the development of the mines, and this had been contributed by the respective parties in proportion to their holdings of stock, plaintiffs having contributed about $90,000, defendants about $70,000. One Bryant had secured a judgment and levied execution upon the property of the company, under which the mines had been sold on July 30, 1902, to one McPherson, subject to redemption on or before January 31, 1903. In this situation of affairs plaintiffs met the defendant McKittrick in Wilcox, Arizona, on November 29, 1902, and, after some negotiation, a written contract was drawn up and by them signed. Defendant Tevis was not present at this meeting, and the agreement was made contingent upon his signing, as he did a few days later. It reads as follows:

"This agreement, made and entered into this 29th day of November, 1902, by and between W. S. Tevis and W. H. McKittrick, of Bakersfield, California, parties of the first part, and Jepp Ryan, T. C. Ryan, and E. B. Ryan, of Leavenworth, Kansas, parties of the second part,

"Witnesseth: That, whereas, the parties above mentioned represent all the stock in the Turquoise Copper Mining and Smelting Company, a corporation organized and existing under the laws of the Territory of Arizona, and doing business in Cochise County, Arizona, and

"Whereas, the parties of the first part now own and control three-sevenths of the capital stock of the said corporation, and the parties of the second part four-sevenths of the capital stock thereof; and

"Whereas, the parties of the first part are desirous of securing the controlling interest of the said capital stock of the said corporation, and thereby obtain the full management of the affairs of the said corporation;

"Now, therefore, in consideration of, that the capital

stock of the said corporation shall be changed from its original capitalization to one million shares of the par value of one dollar each share, and that 240,000 of said shares of said capital stock shall be placed in the treasury of the said company, to be sold in whole or in part by the said parties of the first part, at such price or prices as the board of directors of said corporation may deem advisable, and the moneys received from such sale or sales shall be used as follows: First, to pay off and liquidate a certain judgment held by T. B. McPherson, of Omaha, Nebraska, or his assigns, against the said corporation, in the amount of about $25,532.47 dollars. Second, to use the next $20,000 received from the sale of said stock to develop the claims now owned and controlled by this company; the parties of the second part hereby agree to and with the parties of the first part, that the officers in the said corporation now representing the interest of the parties of the second part shall resign from said office or offices, and allow the parties of the first part to appoint or elect such officers in their place and stead as they may desire, said second parties agree to give the parties of the first part as their interest in the said company, a total of 280,500 shares of the capital stock thereof, and the parties of the second part shall receive as their portion 279,500 shares of capital stock of the said company. That the remaining 200,000 shares shall be divided between the parties hereto in the proportion of 101,000 shares to the first parties, and 99,000 shares to the parties of the second part; said 200,000 shares shall be issued to W. H. McKittrick, as trustee for the parties hereto. All of the parties hereto agree to use their best endeavors to sell as much of the said last-mentioned shares as possible, at not less than par value, and the proceeds of any of such sales of said block of stock shall be divided pro rata among the parties hereto, until they have been fully reimbursed for the money they now have expended upon this property,

amounting to about $160,000, when the remaining shares shall be divided equally among them, according to their respective interests in the ratio aforesaid.

"It is further understood and agreed between the parties hereto that they shall not be allowed to sell any of their individual holdings of stock in this company until the block of 200,000 held in trust for all shall have been sold, or apportioned, as above set forth. The parties of the second part shall not be liable for any expense connected with the operation of this company, excepting the expense of selling the stock held in trust for the parties hereto. The parties of the first part shall have a term of two years in which to comply with all the requirements of this contract. Should they fail or refuse to comply with all the agreements and stipulations herein mentioned within the period aforesaid, then this agreement shall become null and void and of no effect, otherwise to remain in full force and effect. Should this contract be annulled by any failure of the parties of the first part to do any and all things herein required of them, then the interest of the second parties shall reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement.

"It is further understood and agreed by and between the parties hereto that W. S. Tevis, not being present upon the signing hereof, that ten days' time be allowed him in which to sign and ratify the same. Should he fail or refuse to do so within the period above mentioned, then this instrument shall be null and void in respect to all parties hereto. All erasures and changes and interlineations were made prior to the signing of this instrument.

"Witness our hands, the day and year first above mentioned."

In accordance with the agreement, a reorganization of the company was effected, the Ryans resigned as directors, control of the directorate passed to Tevis and McKittrick,

and the capital stock was changed so as to consist of 1,000,000 shares, of the par value of $1 each, which were allotted as prescribed by the contract, viz:

To Tevis and McKittrick.....	280,500	shares
To the Ryans.....	279,500	"
To McKittrick as Trustee.....	200,000	"
Treasury stock.....	240,000	"
Total.....	1,000,000	"

The mines of the company were redeemed from the sheriff's sale with $30,000 loaned for the purpose by Tevis upon the company's note. This note, with others given by the company for the interest upon it, was transferred by Tevis to the Western Company of California, a corporation controlled by him.

The reorganized Turquoise Company did not prosper. Defendants sold 32,000 shares of the treasury stock at 25c per share, netting $8,000, and the remaining 208,000 shares at ¾c per share, netting $1,560. This money was spent in operating the mines and in paying for a diamond drill, for patents, and for attorney's fees. In May, 1905, the Western Company secured judgment against the company in a California court for the amount of the notes and interest, aggregating $44,078.05, and an action was brought on this judgment in Cochise County, Arizona, resulting on July 20, 1905, in a judgment for $44,549.43. On this same day McKittrick secured judgment against the company for $9,975 for services as general manager from May, 1903, to June, 1905. The following day (July 21, 1905) execution was levied against the mining properties to satisfy the judgments of McKittrick and the Western Company; and on July 11, 1906, the property was sold by the sheriff to that company. A few days later defendants, with others, organized the Tejon Mining Company under the laws of Arizona, and two years afterwards the Western Company conveyed the mining prop-

erties formerly of the Turquoise Company to the Tejon Company.

The present action was commenced November 30, 1906, and, after repeated modifications of the pleadings, came on for trial upon a complaint which, besides setting up the above facts, averred that after two years from the twenty-ninth day of November, 1902, had elapsed, and after plaintiffs were informed that defendants had failed to sell the 240,000 shares of the Turquoise Company for sufficient funds to pay the money advanced by them to redeem the property of the company from the sheriff's sale, and before the action of the Western Company against the Turquoise Company was commenced in the California court, to wit, on February 15, 1905, plaintiffs informed defendants that they desired to be reinvested with their interest in the property of the Turquoise Company and to be restored to their interest therein the same as before November 29, 1902, and informed defendants that they were then ready, able, and willing to pay defendants four-sevenths of the sum of $25,262.60 paid to redeem the property from the sale of July 31, 1902; and that defendants ignored said request. There were allegations of fraudulent conduct, in support of which certain evidence was introduced, but these allegations seem to have been abandoned; at least the trial judge submitted the case to the jury solely upon the ground of a breach of the contract.

Mr. Edward H. Thomas, with whom *Mr. Aldis B. Browne*, *Mr. Alexander Britton*, *Mr. Evans Browne*, *Mr. Ben Goodrich* and *Mr. A. C. Baker* were on the brief, for plaintiffs in error.

Mr. Eugene S. Ives for defendants in error.

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

The trial judge in submitting the case to the jury

adopted the following construction of the contract of November 29, 1902: That it provided for a general scheme to be carried out within the period of two years; that control of the Turquoise Company was to be given to defendants McKittrick and Tevis, and with a board of directors of their own choosing they were to carry on the business of the company, and within two years were to carry out the plan for the rehabilitation of the company according to the stipulations of the agreement; that they did not guarantee successful results, but were simply to use their best endeavors to carry out the plan; that if there was a failure on their part to do the things contemplated within the two years, this of itself did not raise any legal obligation on their part to the plaintiffs; but that if at the end of the two years the scheme contemplated by the contract had not been accomplished, then defendants agreed to reinvest plaintiffs with the interest they had at the time of entering into the contract, provided plaintiffs demanded that reinvestment. The jury were instructed that they should first determine whether at the expiration of the two years specified in the contract the situation was such that defendants were obligated to reinvest plaintiffs with the four-sevenths interest in the company that they formerly held. That if so, the next question was whether plaintiffs ever demanded that they should be so reinvested, for if there was no demand there was no liability on the part of defendants; but that if plaintiffs did make such demand within a reasonable time after the expiration of the two years it was the duty of defendants to comply with it; that certain evidence introduced to show a written demand made at a time in the summer of 1906 should be rejected because such demand, if made, came too late; but that if the jury should find [as, in fact, certain other evidence tended to show] that a demand was made on defendants by plaintiffs a few months following the expiration of the

two years and in the early part of 1905, that was a reasonable time in which to make the demand. The further instruction was that if there was a breach of the agreement by defendants in failing to reinvest plaintiffs as they ought to have done, the next question was the amount of the damages; and as to this, that what defendants agreed to do was to put plaintiffs back as nearly as might be in the situation they were in when the contract was made; that at that time the property was about to be foreclosed, and subsequently money was raised to redeem it from the judgment, and the money thus used became a debt against the company, and this should be considered by the jury, because plaintiffs ought not to be put back in possession of their interest in the property free and clear of any such incumbrance as stood upon it when the contract was made; "So if you should come to this question of damages at all, you should ascertain the damages in this way: You should ascertain the value of this mining property—this property that was owned by the Turquoise Copper Mining & Smelting Company—at the time the demand of the Ryans to be reinvested was made, if any such demand was made at all—ascertain first the value of that property. Then deduct from that value the amount of this claim of the Western Company which loaned this money, with interest, which at that time amounted to at least $39,000. Then take that balance, if there is any—the value of the property, from which deduct the $39,000, and if there is any balance left—that belongs to the plaintiffs and defendants in the proportion that they owned the property—that is, the Ryans four-sevenths and Tevis and McKittrick three-sevenths. So the Ryans would be entitled to four-sevenths of the balance after you deduct from the value of the property the amount of this Western Company's claim—this $39,000. So of course, it follows that if the value of the property was not so much as $39,000 they would not be entitled to anything."

There were no requests for particular instructions, and no specific objection to the instructions as given.

In the Supreme Court of the Territory the principal question raised was as to the correctness of the instruction respecting the measure of damages. In passing upon this, the appellate court interpreted the contract as binding defendants (in the event of the failure of the scheme, and a demand made for reinvestment) to turn over to plaintiffs, not a four-sevenths interest in the mining property, but a four-sevenths interest in the capital stock of the company. At the same time it was held that the trial court, in apparently adopting as a measure of damages the four-sevenths interest in the property of the corporation, did not actually construe the reinvesting clause to extend to the property or the mines of the corporation, but that the instruction was tantamount to an instruction that plaintiffs were entitled to the value of four-sevenths of the capital stock, which was the equivalent of, and was to be ascertained by determining from the evidence the value of, four-sevenths of the net assets of the corporation. And the appellate court held, as to this, that the result was right, and hence the judgment ought not to be reversed, though the instruction as given might be open to criticism as to its form, and even though the jury might have based their verdict upon an incorrect theory.

But it was held that the measure of damages as applied by the trial court was erroneous in failing to deduct from the valuation of the four-sevenths a proper allowance for the 279,500 shares of stock of the Turquoise Company that had been retained by the Ryans under the terms of the contract, and were still owned by them.

The court overruled certain minor contentions on the one side and on the other, and, finding that the proximate damage resulting from the breach of the contract was the loss of the value of the stock that was agreed to be returned, and that the loss of the value of the 279,500 shares

retained (attributed, as it was, to subsequent mismanagement of the company by Tevis and McKittrick), was only a remote and indirect consequence, and not such as was in contemplation at the time of the making of the contract as a probable result of such breach, held that there was error (and error only) in including in the allowance of damages the loss of the value of the retained shares. The court further found that the evidence and the verdict of the jury afforded a basis for computing the correct sum to be awarded, in that the jury by its verdict found in effect that the value of the entire capital stock of 1,000,000 shares of the Turquoise Company at the time of the breach of the contract was $231,000 (four-sevenths of this sum being $132,000, the amount of the verdict). Taking four-sevenths of the entire number of shares (or 571,428 shares) and deducting the 279,500 shares retained by the plaintiffs, there remained 291,928 shares, which, computed upon the basis afforded by the verdict of the jury, yielded $67,435.37 as the proper amount of the recovery. And under the provisions of paragraph 1588 of the Revised Statutes of 1901 and the practice approved in *Kennon* v. *Gilmer*, 131 U. S. 22, 29, plaintiffs were put to their election to either remit the excess beyond that amount or submit to a new trial, with the result mentioned in the prefatory statement.

It is now contended by plaintiffs in error that the interpretation of the contract adopted by the trial court, and followed by the appellate court respecting the question of liability, is unwarranted by anything in the language of the instrument. It is said that Tevis and McKittrick did not agree, as the trial court held they did, that they personally would use their best endeavors to do the things that were in contemplation. It is said that the directors of the corporation were to fix the price of the treasury stock and to use the money derived from its sale in the manner indicated; that Tevis and McKittrick were to be merely

the agents of the board of directors (if that board should so determine), without authority to fix the price of the stock, pay the judgment, or use the money to develop claims or in any other way for the company's benefit; that if the directors should fail to give such authority, Tevis and McKittrick could do nothing; that they did not covenant or agree that the stock would sell for any particular price, much less that it would sell for $20,000 more than the amount of the judgment; that the terms of the agreement show merely the expectations of the parties, which as the event befell were not realized, and that the agreement and all its stipulations were conditional upon the sale of the stock for a sufficient price to meet the purposes indicated. The insistence is that the Ryans simply sold and transferred a controlling interest in the stock in consideration of a future authority to sell the treasury stock for a price in no wise fixed, and that there was no agreement that Tevis and McKittrick were to contribute or pay anything to the company; that as between the corporation and the shareholders the 240,000 shares of treasury stock were contributed outright to the corporation, which by the terms of the agreement had the right to sell it; and that Tevis and McKittrick did not undertake to bind the company to return or pay for this stock.

The gist of the argument seems to be that Tevis and McKittrick incurred no personal liability except possibly to see to it that the capital stock of the company was changed from its original capitalization (100,000 shares, of the par value of $10 each), to 1,000,000 shares, of the par value of $1 each, that 240,000 of the new shares were placed in the treasury of the company, and that the board of directors of the corporation fixed a price for the sale of these shares.

The agreement shows on its face that it was not prepared by a skilled person; and it requires construction. But we think it was binding upon defendants, at least to

the extent that the decision of the territorial Supreme Court gave effect to it.

The argument for plaintiffs in error attributes too little force to what is referred to as the "reinvestment clause," viz: "The parties of the first part shall have a term of two years in which to comply with all the requirements of this contract. Should they fail or refuse to comply with all the agreements and stipulations herein mentioned within the period aforesaid, then this agreement shall become null and void and of no effect, otherwise to remain in full force and effect. Should this contract be annulled by any failure of the parties of the first part to do any and all things herein required of them, then the interest of the second parties shall reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement." This imports, at least, that if the project for rehabilitating the company, in contemplation of which the Ryans divested themselves for the time of the majority interest and control of the company, should come to naught, they should be reinvested with the same proportion of the stock of the company that they had held before. But the company was not named as a party to the agreement, and, even if treated as a party by implication, could hardly be supposed to covenant for a transfer of the outstanding stock. Hence the covenant quoted could bind Tevis and McKittrick, only, who themselves were to be placed in control of the company, and of the very stock that would need to be retransferred in order to fulfill the stipulation. Consequently, it imports a personal responsibility on their part to see to it that the Ryans were "reinvested" in accordance with the terms of the covenant.

It is insisted that if certain declarations of McKittrick, said to have been made during the negotiations that immediately preceded the signing of the contract, be eliminated, there is nothing in the terms of the instrument,

or in the circumstances under which it was made, to warrant the interpretation adopted. In this view we do not concur, for reasons already indicated.

The declarations referred to are also said to have been erroneously admitted. They were made by McKittrick in the absence of Tevis at the interview of November 29, 1902. Jepp Ryan, one of the plaintiffs, being called as a witness and asked to state the conversation between McKittrick and himself testified: "He went out and had an agreement made and brought it up into our room. Now, he says, 'Boys, Mr. Tevis is a multi-millionaire and rich and influential, and by putting him in control of this property, or giving us control of the property, we will try to handle it so each of us can get all our money back.' I says, 'Captain, suppose you don't handle it, where do we come in.' He says, 'If we don't sell the stock we will return to you the property the same as it is to-day.'" It appeared that this was after the contract was drawn up and before it was signed. A motion was made to strike it out "because the contract speaks for itself." This, the only objection, was overruled. Each of the other plaintiffs was permitted, over the like objection, to give evidence of a similar import.

If the action had been based alone upon the written instrument there would be force in the objection to the introduction of parol evidence of previous promises inconsistent with the terms of the writing. But the action was not so limited. The pleading upon which the parties went to trial (the third cause of action in the third amended and supplemental complaint) relied not upon the contract alone, but also upon alleged fraudulent conduct, beginning with representations of the abundant means and property of the defendants, on the strength of which, as was said, the plaintiffs entered into the written agreement, and followed by alleged fraudulent use of the control of the company that was turned over to Tevis and McKittrick

in pursuance of the terms of the agreement. The evidence of the oral declarations of McKittrick was admissible upon this question; and the fact that the allegations of fraud were afterwards abandoned, or were held by the trial court not to be sufficiently supported, does not render erroneous the previous rulings upon the admissibility of the evidence referred to.

For like reasons we find no error in the testimony to show that the Ryans were not notified, until long afterwards, that suit had been brought by the Western Company against the Turquoise Company in California, or that suit had been brought upon this judgment in Cochise County, Arizona. Assuming, for argument's sake, that defendants were under no duty to keep plaintiffs informed in regard to the status of the company, and that the contract did not require that they should do so, it nevertheless was a circumstance of more or less significance upon the question of fraud, that events of such consequence to the company were not communicated to parties who held legal and equitable rights such as the Ryans concededly held.

It is contended that the appellate court erred in holding that there was sufficient evidence to show a demand for reinvestment made by plaintiffs upon defendants. The complaint alleged two such demands, one on February 15, 1905, the other on August 26, 1906. Plaintiffs introduced testimony in regard to an oral demand claimed to have been made in May, 1905, and it was upon this alone that the trial court permitted the case to go to the jury. It is contended that this demand was insufficient because not made in proper form, nor made in a proper place, and made only upon McKittrick, and not upon Tevis also. Assuming, as both courts held, that a special demand was necessary, it seems to us that the oral demand referred to is not open to the objections made to it. McKittrick and Tevis were joint contractors, so that notice to either was

notice to both. And there is no doubt that it was sufficiently specific to fairly warn defendants that they were called upon to perform their engagement under the reinvestment clause.

Objection is made to the trial court's ruling, sustained by the appellate court, admitting in evidence a written demand served by plaintiffs upon defendants, marked Exhibit "K." This was a letter, undated, but apparently written after July 11, 1906, and stated to have been served upon defendants in September of that year. Its admission was not objected to on the ground that it did not evidence a proper demand (this, indeed, was admitted) nor on the ground that the demand came too late, but only because of other matters contained in the letter. The trial court having refused to exclude it as evidence, subsequently instructed the jury that as a demand it came too late to furnish a proper support for plaintiffs' cause of action. The contention now is that because of self-serving declarations contained in it, Exhibit "K," ought to have been excluded entirely from the consideration of the jury, and that it was likewise inadmissible because it contained veiled charges of fraud on the part of the defendants, and also offers of compromise made by the plaintiffs. But we have already pointed out that the action was in part based upon fraud, and we are not prepared to say that the fact that Exhibit "K" contained insinuations attributing fraud to defendants, coupled with the fact that defendants did not respond to it, would not in some degree tend to support this charge. It is sufficient, however, to say that the paper was introduced as evidence of a demand, and was admissible for that purpose (in the absence of objection based on the time of its delivery), since it contained a notice that plaintiffs insisted that defendants should comply, as well as might then be done, with the provisions of the agreement. The fact (if it were a fact) that it also contained matters irrelevant to the demand would not

render the document inadmissible. The proper course would have been for defendants to request an instruction limiting the effect that should be given to it by the jury; or, if intending to insist that it came too late to constitute a proper demand, then to exclude the paper from consideration. The present objection was not properly raised at the trial.

It is insisted that the court erred in holding that plaintiffs, under the averments of the complaint, were entitled to recover the value of a four-sevenths interest in the stock of the company. The basis of the objection is that such a recovery was inconsistent with the cause of action set forth in the complaint, which, it is said, sought a recovery of a four-sevenths interest in the property of the Turquoise Company, and not the value of four-sevenths of its share stock. This is a mere question of pleading, and is sufficiently disposed of in the opinion of the appellate court below.

It is contended that there was error in sustaining the trial court's instruction that the measure of plaintiff's damages was four-sevenths of the value of the mining company's property, minus the indebtedness to the Western Company. As already shown, however, the appellate court did not sustain this interpretation of the contract, but in terms rejected it; at the same time holding that the trial court, in referring to the value of a four-sevenths interest in the property of the corporation as a test for the measure of damages, in effect reached a correct result through the employment of inaccurate phraseology, and that although the jury may have found their verdict upon an incorrect theory, the error was harmless and the judgment should not be reversed, because under the evidence the rule adopted made no substantial difference in the result, saving as to the 279,500 shares, and as to this the error was easily cured by applying the proper correction as above mentioned.

Finally, the point is made that, assuming the alleged error of the trial court could be cured by a remittitur, the ruling of the Supreme Court and the remittitur as entered accounted only for the 279,500 shares that were retained by the Ryans under the contract; and it is insisted that the 200,000 shares of trust stock to which McKittrick held the legal title, with the 240,000 shares of treasury stock, the legal title to which was in the company and over which defendants had no control except in their capacity as directors of the company, should have been deducted from the entire share capital of 1,000,000 shares, and the plaintiffs allowed only the value of four-sevenths of the difference, less the 279,500 shares that they retained. Without spending further time in discussion, we will simply say that in our opinion the view suggested is inconsistent with the terms of the covenant, which was that in the contingency provided for "the interest of the second parties shall reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement." This, we think, contemplated that they should be restored to the same proportionate interest that they held prior to the making of the agreement.

In affirming the judgment we are not to be understood as holding that the rulings of the court below were indubitably correct. In dealing with the instructions of the trial court respecting the mode of ascertaining the damages, and in permitting the filing of a remittitur and affirming the judgment for the residue of the verdict, the Supreme Court of the Territory acted under the Revised Statutes of Arizona, 1901, paragraph 1588, which provides, in substance, that there shall be no reversal on an appeal or writ of error for want of form provided sufficient matter or substance be contained in the record to enable the court to decide the cause upon its merits; and also provides for remitting excessive damages pending the appeal. The record in the present case came fairly within the purview of

this provision. And we are not disposed to lightly disturb the decision of a territorial Supreme Court turning so largely, as this does, upon the local practice. *Phœnix Ry. Co.* v. *Landis*, 231 U. S. 578, 579; *Work* v. *United Globe Mines*, 231 U. S. 595, 599; *Montoya* v. *Gonzales*, 232 U. S. 375, 376.

We have dealt with all the questions that appear to have been raised in the Supreme Court of the Territory. Others we need not notice. *Gila Valley Ry. Co.* v. *Hall*, 232 U. S. 94, 98.

Judgment affirmed.

LEWIS *v.* FRICK, UNITED STATES IMMIGRATION INSPECTOR.

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

No. 208. Argued January 28, 1914.—Decided April 6, 1914.

Where an alien enters this country more than once, the period of three years from entry prescribed by §§ 20 and 21 of the Alien Immigration Law runs not from the date when he first entered the country, but from the time of his entry under conditions within the prohibitions of the act. *Lapina* v. *Williams*, 232 U. S. 78.

Where, as in this case, there was evidence sufficient to justify the Secretary of Commerce and Labor in concluding that the alien was within the prohibitions of the Alien Immigration Act, and the hearing was fairly conducted, the decision of the Secretary is binding upon the courts.

Under § 2 of the Alien Immigration Act of 1907 as amended in 1910, it is an offense for any person, citizen or alien, to bring into this country an alien for the purposes of prostitution, and any alien so doing or attempting to do may be excluded on entry or deported after entry.

A conviction under § 3 of the Alien Immigration Act is not necessary

for exclusion on entry or deportation after entry of an alien who has brought into this country an alien for the purpose of prostitution, nor is a verdict of acquittal of a charge under § 3 *res judicata* as to a proceeding before the Secretary under § 2 of the act.

There is a distinction between a criminal prosecution and an administrative inquiry by an Executive Department or subordinate officers thereof. *Zakonaite* v. *Wolf*, 226 U. S. 272.

The destination of an alien whose deportation after a second entry is based on § 2 of the Alien Immigration Act is to be determined in the light of §§ 20, 21 and 35 of the act and is not controlled by the factitious circumstance of his going to a contiguous country to obtain the alien brought in for purposes of prostitution. The act admits of his being returned to the country whence he came when he first entered the United States.

Quære, whether the act leaves any room for discretion on the part of the Secretary; and whether that part of a deportation order determining destination of the alien is open to inquiry on *habeas corpus*.

195 Fed. Rep. 693, affirmed.

THE facts, which involve the construction of the provisions of the Alien Immigration Act in regard to deportation of undesirable aliens, are stated in the opinion.

Mr. Guy W. Moore, with whom *Mr. Frederic S. Florian*, *Mr. Philip T. Van Zile* and *Mr. H. P. Wilson* were on the brief, for petitioner.

Mr. Assistant Attorney General Wallace for the United States.

MR. JUSTICE PITNEY delivered the opinion of the court.

Petitioner is an alien and a native of Russia. He came thence to this country, entering at the port of New York, in the month of September, 1904, lived in or near New York City until March, 1910, then removed to Detroit, Michigan, and has since made that city his home. On November 17, 1910, he crossed the river from Detroit to Windsor, Canada, and brought back with him into the United States a woman, avowed by him to be his wife, but

whose actual status was questioned, as will appear. A few days later he was arrested upon a warrant from the Department of Commerce and Labor, issued under the Immigration Act of February 20, 1907, as amended March 26, 1910, and after a hearing conducted by an inspector, the Secretary, on February 14, 1911, found "That said alien is a member of the excluded classes, in that he . . . procured, imported and brought into the United States a woman for an immoral purpose," etc., and thereupon ordered that he be deported to the country whence he came, to wit, Russia.

Meanwhile, he was indicted in the United States District Court for a violation of § 3 of the Act, the charge being that on the occasion above referred to he knowingly imported an alien woman from a foreign country for an immoral purpose, to wit, illicit concubinage and cohabitation. The trial of the indictment resulted, on March 23, 1911, in a verdict of not guilty.

On April 13th petitioner, being in custody under the deportation warrant, sued out a writ of *habeas corpus* from the United States Circuit Court. Appended to his petition for the writ was a copy of the record of his examination by the inspector, including the testimony and a list of exhibits but not the exhibits themselves. In his answer the immigration inspector set up the warrant of deportation as his authority for detaining petitioner, and recited the arrest and examination, and the finding of the Secretary of Commerce and Labor.

The Circuit Court held that there was no authority in the immigration law for deporting an alien because he had imported a woman for immoral purposes; that such importation might be fully proved, or, indeed, might be admitted by the alien, and still the Department of Commerce and Labor would be without jurisdiction to deport; that it had such jurisdiction only under § 3 of the Act, and only in case of conviction; that because by § 3 Congress

provided that where the woman imported is an alien and the person importing is an alien, a felony is committed, and the person convicted of this felony may be deported, therefore under the ordinary rules of statutory construction it must be held that out of the general class covered by § 2 Congress had selected a particular class named in § 3, and subjected it to a severe punishment, but in connection therewith had limited the right to deport to cases where there was a conviction. That the right to prosecute criminally and the right to deport are inconsistent as concurrent rights, and cannot both be exercised at the same time; and that Congress saw the necessity of making the proceedings successive, and clearly made the second step depend upon the result of the first. Hence, an order was made for the discharge of petitioner. 189 Fed. Rep. 146.

Upon appeal, the Circuit Court of Appeals reversed this judgment, 195 Fed. Rep. 693, holding that the power to deport an alien existed under §§ 2 and 21 of the act, irrespective of § 3; and further that the right to deport in this case could be found in § 3 in connection with § 21, without regard to conviction or acquittal under § 3. The court also held that the acquittal of Lewis was not *res judicata* of the present proceeding, and that since there was evidence tending to support the finding of the Secretary of Commerce and Labor respecting the bringing in of the woman for the purpose of prostitution, that finding was conclusive. And, finally, it sustained the deportation of petitioner to Russia rather than to Canada, holding that the former was "the country whence he came," within the meaning of the act.

The provisions that are especially pertinent are set forth in the margin.[1]

[1] "An Act To regulate the immigration of aliens into the United States," approved February 20, 1907, c. 1134, 34 Stat. 898, as amended by act of March 26, 1910, c. 128, 36 Stat. 263.

The decision of the Circuit Court of Appeals is attacked here on several grounds. The first is based upon the fact that the alien had an established domicile and residence in the United States dating from September 20, 1904, having obtained his admission into the country legally, and maintained a domicile here continuously from the date

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"SEC. 2. That the following classes of aliens shall be excluded from admission into the United States . . . persons who procure or attempt to bring in prostitutes or women or girls for the purpose of prostitution or for any other immoral purpose. . . .

"SEC. 3. That the importation into the United States of any alien for the purpose of prostitution or for any other immoral purpose is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien for the purpose of prostitution or for any other immoral purpose, . . . shall, in every such case be deemed guilty of a felony, and on conviction thereof be imprisoned not more than ten years and pay a fine of not more than five thousand dollars. . . . Any alien who shall be convicted under any of the provisions of this section shall, at the expiration of his sentence, be taken into custody and returned to the country whence he came, or of which he is a subject or a citizen in the manner provided in sections twenty and twenty-one of this act. . . .

"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. . . .

"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. . . .

"SEC. 35. The deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this Act, shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which said aliens embarked for such territory."

of his entry until the time of his arrest; and it is insisted that the fact of his having crossed the river into Canada, even though it was done with the object of bringing a woman into this country for the purpose of prostitution, did not bring him within the reach of the Immigration Act or subject him to the summary procedure therein prescribed.

This question is settled adversely to the contention of petitioner by our recent decision in *Lapina* v. *Williams*, 232 U. S. 78. That case arose under the act of February 20, 1907, while this arises under the same act as amended March 26, 1910. But the changes are not such as to affect the authority of that decision upon the present point.

In *Lapina* v. *Williams* it did appear that the alien had practiced prostitution for many years before her temporary departure from the country, and that she not only returned with the intent to continue the practice but did almost immediately engage in it, and continued it until her arrest under the provisions of the Immigration Act. But the real ground of decision was that Congress in the act of 1903 sufficiently expressed, and in the act of 1907 reiterated, the purpose of extending the prohibition against the admission of aliens of certain classes, and the mandate for their deportation, to all aliens within the descriptive terms of the excluding clause, irrespective of any qualification arising out of a previous residence or domicile in this country. This view was based (a) upon the legislative history of the act of 1903 (from which the material provisions of the 1907 act were taken), which was a reënactment of previous laws, but with the deliberate omission of the word "immigrant" and of certain other qualifying phrases that had been construed by the courts as giving so limited meaning to the word "alien" as not to include aliens previously resident in this country and who had temporarily departed with the intention of returning; (b) upon the clear language of the excluding clause of § 2

of the act of 1907 (quoted in full, 232 U. S. 91); (c) upon the fact that none of the excluded classes (with the possible exception of contract-laborers) would be any less undesirable if previously domiciled in the United States; and (d) upon the fact that the section contains its own specific provisos and limitations, which, upon familiar principles, tend to negative any other and implied exception.

We hold, therefore, that the fact that the petitioner, Lewis, had been domiciled for six years or more in this country, he remaining still an alien, did not change his status so as to exempt him from the operation of the Immigration Act; and that if he departed from the country, even for a brief space of time, and on reëntering brought into the country a woman for the purpose of prostitution or other immoral purpose, he subjected himself to the operation of the clauses of the Act that relate to the exclusion and deportation of aliens, the same as if he had had no previous residence or domicile in this country. In short, the period of three years from entry, prescribed by sections twenty and twenty-one, runs not from the date when the alien first entered the country, but from the time of the prohibited entry; that is to say, in the present case, the entry made by the alien when bringing in the woman.

The next question is whether there was sufficient evidence to fairly sustain the finding of the Secretary of Commerce and Labor to the effect that petitioner did on November 17, 1910, import and bring into the United States a woman for an immoral purpose. Upon this question, petitioner's contention was and is, that the woman is in fact his wife. He testified that he married her in Warsaw shortly before he came from Russia to this country, and that when he brought her across the river from Windsor he intended that he and she should live together in Detroit as husband and wife. The conten-

tion of respondent was and is, that the story of the marriage was a pure fabrication, resorted to in the effort to conceal the fact that the woman was a prostitute and imported by petitioner for immoral purposes. There is much in the evidence to support this view. Petitioner admitted that his real name was not Lewis, but Prezysuskier, and his "other name" was Nossek; that he first used the name of Lewis after coming to this country; that his father's name was Chaskel Prezysuskier; that he knew his alleged wife as "Leah," and did not know her other name, if any; that he knew her father as "Isaac," but did not know whether he had any other name; that two friends were present at the ceremony, but he could not remember their names; that he lived with the woman in Warsaw for five or six months, and then separated from her because he heard stories of improper conduct on her part, and that he afterwards heard she had had children before the marriage. Being questioned concerning his life in New York he professed himself unable to give the names of several persons among those with whom he said he had come in contact, and who could presumably have been called either to corroborate or to contradict his testimony. He declared that he had not seen his alleged wife since coming to America until the occasion when he met her at Windsor. Being asked "How did you happen to meet her at that time?" he answered as follows: "I was home not working one day and Berman comes up and asks for me and I don't know how he got my address and I was surprised that a strange man should ask for my name but my cousin, Mrs. Newman, told him he should come back at night when I got home from work and he came back and said 'I have regards for you' and he said, 'Are you Lewis' and I said 'Yes' and he asked me questions, if I was ever in Warsaw and I said 'Yes,' and he said, 'I have regards from your wife' and I pretended to say that I haven't got any, because I kept myself single, but still

when he mentioned the name I knew what it was and I said, 'Where is she, what does she want of me' and he said 'She is not here, she is in Canada, but I will let you know when she gets here.' On the 17th I went to work in the morning and at dinner time when I got back Mr. Berman was there waiting for me. I said, 'What is the matter' and he said, 'I received a telegram that my wife and your wife are coming here and I want you to come over with me to Windsor and meet them,' and I said, 'She will come over to the Immigration Office they should send for me over there and she could get out.' Well he said it was better for me to come over there, 'For you know how a woman is'; he said, 'She might make you trouble' and I didn't think about it, so I went there and met her and I went over to Windsor and stood there 15 or 20 minutes and got a train to the station at Windsor and met her there but very cool and came over here to the Immigration Office."

The story is extraordinary. How it happened that the alleged wife, who had known him as Prezysuskier in Warsaw, was able through the good offices of an entire stranger to identify him as Lewis, in Detroit, more than six years later, was not explained. The alleged husband's readiness to accept her is equally suspicious. There were other circumstances tending to discredit the story of the marriage. And if that story fell, the inference of an unlawful purpose was irresistible. It should be mentioned that the exhibits introduced upon the examination on which the warrant of deportation was issued are not included in the record; but it does appear that among them was a statement made by the alien at police headquarters in Detroit on November 21, 1910. Were there doubt whether the testimony itself, without the documentary evidence, would support the action of the Secretary of Commerce and Labor, we should be inclined to say that a court ought not to set aside that action without at least requiring the

production of the exhibits that were presented to the Secretary. But, without regard to them, enough appears to show that he was fully justified in concluding as a matter of fact that the whole story of the marriage in Warsaw was a fabrication, and that in truth Lewis went from Detroit to Windsor upon information from which he inferred that the woman was an alien and a prostitute, willing to accompany him to Detroit for an immoral purpose, and that he brought her to Detroit for that purpose.

This being so, and there being no contention that the hearing was not fairly conducted, the finding of the Secretary upon the question of fact is binding upon the courts. *Low Wah Suey* v. *Backus*, 225 U. S. 460, 468; *Zakonaite* v. *Wolf*, 226 U. S. 272, 275.

Respecting the construction of the act, we cannot assent to the view entertained by the Circuit Court. Section 2 declares that certain classes of aliens shall be excluded from admission into the United States, and among them "persons who procure or attempt to bring in prostitutes or women or girls for the purpose of prostitution or for any other immoral purpose." This section applies only where an alien brings in a woman or girl for the purpose indicated. It does not declare that the woman or girl need be an alien. Section 3 prohibits the importation of "any alien" for the purpose of prostitution or for any other immoral purpose. Of course, in order to constitute an offense against this section, the person brought in must be an alien. But the person need not be a woman or girl. This is clear from the changes made by Congress in § 3 when amending it in 1910. The section as it stood in the 1907 act (34 Stat. 898, 899, c. 1134) forbade and rendered felonious the importation or attempt to import "any alien woman or girl for the purpose of prostitution, or for any other immoral purpose"; the phrase "alien woman or girl" being repeated in other

clauses of the section; and one of the principal changes made in 1910 (36 Stat. 263, 264, c. 128) was to eliminate the words "woman or girl," so that now the section prohibits the importation of "any alien" for the purposes referred to, and declares that whoever shall import or attempt to import "any alien for the purpose," etc., or shall hold or attempt to hold "any alien" for any such purpose, etc., or shall keep, etc., in pursuance of such illegal importation "any alien," shall be deemed guilty of a felony. The purpose of the amendment is not to be mistaken. Moreover, the offense is made a felony irrespective of whether it is committed by an alien or by a citizen of this country, the only difference being that by one of the clauses any alien convicted under this section is, after the expiration of his sentence, to be returned to the country whence he came, or of which he is a subject or a citizen.

Again, § 20 provides: "That any alien who shall enter the United States in violation of law" shall be deported "at any time within three years after the date of his entry into the United States." This certainly includes those who enter in violation of § 2; indeed, violators of § 3 may not have "entered" at all, within the meaning of the Act.

Consequently, we deem that the Circuit Court erred in holding that the Act does not provide for deporting an alien for the offense of procuring or attempting to bring in prostitutes, etc., in the absence of a conviction for the felony under § 3. Section 2, read in connection with §§ 20 and 21, is not thus conditioned. And, as just now pointed out, the offense aimed at in § 2 and that which is punishable under § 3 are not the same. In short, it cannot be said that out of a general class covered by § 2, Congress selected the particular class named in § 3, for the latter class is not entirely included within the former.

We agree with the Circuit Court of Appeals that the

verdict and judgment acquitting petitioner under the indictment does not render the present controversy *res judicata*. The issue presented by the traverse of the indictment was not identical with the matter determined by the Secretary of Commerce and Labor. And, besides, the acquittal under the indictment was not equivalent to an affirmative finding of innocence, but merely to an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused. The distinction between a criminal prosecution and an administrative inquiry by an Executive Department or subordinate officers thereof has been often pointed out. *Zakonaite* v. *Wolf*, 226 U. S. 272, 275, and cases cited; *Williams* v. *United States*, 186 Fed. Rep. 479.

The final contention is that petitioner should have been deported to Canada, whence he came upon the occasion of his unlawful entry into this country, rather than to Russia, the land of his birth, from which he came six years earlier. By § 20, the alien is to be "deported to the country whence he came at any time within three years after the date of his entry into the United States;" by § 21, the Secretary of Commerce and Labor, upon being satisfied that an alien is subject to deportation, "shall cause such alien within the priod of three years after landing or entry therein [within the United States] to be taken into custody and returned to the country whence he came, as provided by section twenty of this Act;" by § 3, an alien convicted thereunder is at the expiration of his sentence to be "returned to the country whence he came, or of which he is a subject or a citizen in the manner provided in sections twenty and twenty-one of this Act;" and by § 35, "The deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this act, shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States; or, if such embarka-

tion was for foreign contiguous territory, to the foreign port at which said aliens embarked for such territory."

Petitioner not having been convicted under § 3, his destination is to be determined rather in the light of §§ 20, 21, and 35. And first, we take it to be clear (notwithstanding the peculiar phraseology of § 20) that the three year period limits only the authority to deport, and does not affect the determination of the country to which an alien is to be deported. Respecting this matter, the sections are somewhat lacking in clearness. But, at least, § 35 indicates a legislative intent that aliens subject to deportation shall be taken to trans-Atlantic or trans-Pacific ports, if they came thence, rather than to foreign territory on this continent, although it may have been crossed on the way to this country. This was recognized by Rule 38 of the Immigration Regulations, in force December 12, 1910.

It is to be noted that the classes of aliens who are subject to deportation are not wholly made up of those who enter in violation of the law; in some cases cause for deportation may arise after a lawful entry. And in many cases the unlawfulness of the entry may not be discovered until afterwards. The theory of the Act, as expressed in § 2, is that the undesirables ought to be excluded at the seaport or at the frontier; but §§ 20, 21, and 35, recognize that this is not always practicable. Of course, if petitioner's attempt to bring a woman into the country for an immoral purpose had been discovered in time, he might have been physically excluded from entry at Detroit upon his return from Windsor. In that event he would naturally have remained upon Canadian soil. But since his offense was not discovered in time to permit of his physical exclusion, so that he becomes subject to the provisions for deportation, his destination ought not to be controlled by the factitious circumstance that he went into Canada to procure the prostitute. And, upon the whole, it seems to

us that the Act reasonably admits of his being returned to the land of his nativity, that being in fact "the country whence he came" when he first entered the United States. See *Lavin* v. *Le Fevre*, 125 Fed. Rep. 693, 696; *Ex parte Hamaguchi*, 161 Fed. Rep. 185, 190; *Ex parte Wong You*, 176 Fed. Rep. 933, 940; *United States* v. *Ruiz*, 203 Fed. Rep. 441, 444. We need go no further, and may therefore leave undecided the question whether the Act leaves any room for discretion on the part of the Secretary of Commerce and Labor.

We have assumed, without deciding, that that part of the deportation order which determines the destination of the alien is open to inquiry upon *habeas corpus*.

Judgment affirmed.

SINGER SEWING MACHINE COMPANY *v.* BRICKELL, ATTORNEY GENERAL OF THE STATE OF ALABAMA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

No. 458. Argued January 12, 1914.—Decided April 6, 1914.

Where orders are taken in one State for goods to be supplied from another State, which orders are transmitted to the latter State for acceptance or rejection, and filled from stock in that State, the business is interstate commerce and not subject to a state license tax. *Crenshaw* v. *Arkansas*, 227 U. S. 389.

The separate license tax imposed by the statutes of Alabama on the business of selling or delivering sewing machines, either in person or through agents, for each county and for each wagon and team used in delivering the same is not, as to a corporation having regular stores established in the different counties to which it sends its goods in bulk and from which they are sold on orders to be approved by it at

its home office, unconstitutional as denying due process of law, or as interfering with interstate commerce, or as denying equal protection of the law because it does not apply to merchants selling such machines at regularly established places of business.

In determining whether a state tax statute is constitutional, there is a presumption that the legislature intended to tax only that which it had the constitutional power to tax, and the statute will be sustained if full and fair effect can be given to its provisions as confined wholly to intrastate business.

While a state license statute if void in part may be wholly void where its provisions are not separable, it may be sustained so far as it relates to business wholly intrastate and held inapplicable as to interstate commerce; and so *held* that the Alabama sewing machine license tax is constitutional as to those agencies of a foreign corporation which carry on an intrastate business and inapplicable as to those agencies of such corporation which carry on a wholly interstate business.

The classification of merchants selling sewing machines at regular places of business as distinguished from a manufacturer selling them by traveling salesmen is not so unreasonable and arbitrary as to render it a denial of equal protection of the law under the Fourteenth Amendment.

The State has a wide range of discretion in establishing classes for revenue taxes, and its laws will not be set aside as discriminatory if there is any rational basis for the classification.

The court below rightly held that a foreign corporation having an agency in each county of the State and selling sewing machines by traveling salesmen as well as at the agencies was subject to the license intended to be imposed on itinerant sales by the statute of Alabama, and that it fell without the excepted class of merchants although the latter made deliveries of machines by wagon.

APPELLANT, which is a New Jersey corporation carrying on a mercantile business in many places in the State of Alabama in the sale and renting of sewing machines, in part from regularly established places of business and in part by means of delivery wagons going from place to place in the respective counties in which its stores are located, filed its bill of complaint against appellees, who are the agents of the State charged with the administration of the tax laws, and therein sought to restrain by

injunction the enforcement against it of the state tax prescribed by § 32 of an act for providing revenues, approved March 31, 1911 (Session Acts, p. 180), which reads as follows:

"Sec. 32. Sewing Machines.—Each person, firm or corporation selling or delivering sewing machines either in person or through agents, shall pay fifty dollars annually, for each county in which they may sell or deliver said articles. And for each wagon and team used in delivering or displaying the same an additional sum in each county of twenty-five dollars annually; but this section shall not apply to merchants selling the above enumerated articles at their regularly established places of business."

And also to enjoin the enforcement of county taxes, amounting to fifty per centum of the state tax prescribed by the above section, which might be imposed in the several counties for county purposes under § 33F of the same act.

The bill, as amended, besides showing diverse citizenship of the parties, avers that complainant is qualified under the state laws to do business within the State as a foreign corporation, and has established, in thirty counties of the State, thirty-six regular places of business or stores, which are conducted by it; that complainant buys sewing machines and parts to supply breakage and defects therein and a variety of sewing machine accessories without the State, causes them to be shipped to its places of business within the State, and keeps them at these places for sale to the general public.

In each of the counties, except the County of Russell, the business is conducted as follows: a resident agent is employed for the purpose of making contracts for the sale and renting of machines in that county and that county only; machines are delivered to such agents and placed aboard wagons and taken by the agents into the

rural districts for the purpose of soliciting customers either to purchase or to rent machines; when a buyer is found the machine is delivered by the agent to the customer, who either pays cash for it or executes an instalment note in which the company retains title to the machine, or an instalment note secured by a mortgage upon the machine and other property; such sale on credit is made subject to the approval of the company, and if not approved the instalment note is returned to the maker and the machine returned to the company. If the agent makes a contract for the sale of the machine for cash this also is subject to the approval or disapproval of complainant. The final consummation of all sales is at one of complainant's established places of business. The same agents are engaged also in renting machines and collecting the rent arising therefrom, and the greater portion of their time is consumed in such renting, this constituting at least seventy per centum of the business done by complainant in the State. Rented machines are placed aboard wagons and taken by the agents into the rural districts. Each of these agents is attached to some one of the stores or places of business operated by complainant, and the machines handled by the agent are sent to him from the place of business to which he is attached, or taken from that place of business by him upon the wagon which he drives. Besides this, complainant sells and rents machines at its regularly established places of business and delivers such machines to the buyers or renters by the use of wagons and teams; and in those counties where complainant has established places of business, machines sold or rented at those places are delivered by the same agents and with the same wagons that are used in carrying machines into the rural districts. It is averred that the machines are of the average weight of 135 pounds. That there are many other merchants in the State who sell sewing machines of a different manu-

facture at their places of business, and the average weight of these also is about 135 pounds; that on account of their weight it is the custom and practice of complainant, and of the other merchants also, to make delivery by the use of wagons and teams whether the sales are made at their places of business or otherwise, and that it is impracticable to conduct the business without delivery by wagon.

With respect to the business conducted in Russell County, Alabama, it is averred that complainant operates a regularly established place of business in the City of Columbus, Georgia, where sewing machines and accessories are kept for sale, and in connection with this business agents are employed to deliver machines and accessories in Russell County, which adjoins the Georgia state line; and that complainant does not sell or deliver any sewing machines or accessories in Russell County except in the following manner, namely, its agents use wagons and teams in going about and displaying sample machines, and thereby obtain orders for machines and accessories, which orders are transmitted by the agents to the complainant at Columbus, Georgia, for acceptance or rejection, and if accepted the machines or other articles so ordered are taken out of stock there, placed upon wagons, and thereby delivered to the purchasers in Russell County.

The bill is based upon the contention that § 32 of the tax law violates the Constitution of the United States in that it is a regulation of interstate commerce, and contravenes the "due process" and "equal protection" clauses of the Fourteenth Amendment, and also that it violates the constitution of Alabama; and, finally, that appellant is within the exception of the statute.

To the original bill (prior to the amendments) demurrers were filed, and were sustained as to the whole bill except paragraph 6, which set forth the mode of conducting complainant's business in Russell County. As to this the court held that the facts showed a case of inter-

state commerce, and that the act had no application to it. 199 Fed. Rep. 654.

The amendments having been made, the amended bill was submitted upon the same demurrers, which were made to apply to the bill as amended. Again the court sustained the demurrers except as to paragraph 6 relating to Russell County, and as to this overruled them. Defendants then filed an answer admitting the allegations of paragraph 6, and the cause was submitted upon bill and answer, with the result that by final decree relief was accorded to complainant as to the license tax sought to be collected in Russell County, and in other respects relief was denied and the bill dismissed. Because of the constitutional questions, a direct appeal to this court was taken under Judicial Code, § 238.

Mr. John R. Tyson, and *Mr. Henry Axtell Prince*, with whom *Mr. M. A. Gunter* was on the brief, for appellant:

This court has jurisdiction of a direct appeal from the District Courts of the United States when the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. Judicial Code, § 238.

Although the appellant may insist that the law which is impeached has no application to his case, or that the *res* does not, for any reason, come within its terms, yet, if he insists *bona fide* that, though such defenses fail, the unconstitutionality of the law protects him, the court has jurisdiction, since "the question is (was) a substantial one, and is (was) directly presented, and its determination (is) required," unless other defenses succeed. *Smoot* v. *Heyl*, 227 U. S. 518.

When the constitutional question does not arise except on the condition of a preliminary question of general law being decided in favor of the appellant, then it cannot be said to be directly and necessarily involved and the court has no jurisdiction, as in *Empire Co.* v. *Hanley*, 205 U. S.

255; *Cosmopolitan Mining Co.* v. *Walsh*, 193 U. S. 460; *Casey* v. *H. & T. C. Ry.*, 150 U. S. 170; *Sloan* v. *United States*, 193 U. S. 614; *Muse* v. *Arlington H. Co.*, 168 U. S. 430.

When the constitutional point is directly presented and is necessarily involved in any decision against the appellant, though he may have preliminary points which might protect him without considering the constitutional question, the court has jurisdiction of the appeal, as is expressly decided in the *Smoot Case, supra. Penn Mut. Life Ins. Co.* v. *Austin*, 168 U. S. 685; *Mayor* v. *Vicksburg*, 202 U. S. 453; *Field* v. *Barber Asphalt Co.*, 194 U. S. 618; *Burton* v. *United States*, 196 U. S. 283; *Ill. Cent. R. R.* v. *McKendres*, 203 U. S. 554.

When the constitutional question is duly presented in the lower court the jurisdiction of this court does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the court below; and the jurisdiction of this court is not limited to the constitutional question, but extends to the whole case. Cases *supra* and *Holder* v. *Aultman*, 169 U. S. 81, 88; *Whitten* v. *Tomlinson*, 160 U. S. 231, 238; *Loeb* v. *Columbia &c.*, 179 U. S. 472; *Chappell* v. *United States*, 160 U. S. 499, 509; *Horner* v. *United States*, No. 2, 143 U. S. 570, 577.

When there is no full, adequate and complete remedy at law, there is an unqualified right to appeal to equity, and especially so when in that way only a multitude of ruinous and vexatious law suits, about a single matter, can be avoided. *Boyce* v. *Grundy*, 3 Pet. 210; *West. Union Tel. Co.* v. *Andrews*, 216 U. S. 165; *Ex parte Young*, 209 U. S. 123; *Smyth* v. *Ames*, 169 U. S. 466; *Walla Walla* v. *Water Co.*, 172 U. S. 1, 12; *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298.

The equal protection of the laws is denied when, all questions of police power being out of the way, a lawful

business, or the use of property in a lawful way, is palpably and unjustly discriminated against in favor of other business or other use of the same property by the same or other owners.

A business may be taxed for revenue or may be forbidden or regulated under the police power, and so with the use of property, but a business cannot be taxed on account of the manner of conducting it by one citizen while the same business conducted in a different and perhaps less efficient manner by other citizens is exempted. And so as to property. The use of wagons and teams for transporting sewing machines, for sale or display, cannot be taxed merely because they are used in such work while untaxed when not so used and when the same transportation and display may be effected without taxation in any other way. *Ala. Con. Coal Co.* v. *Herzberg*, 55 So. Rep. 305; *Montgomery* v. *Kelly*, 142 Alabama, 552; *Mefford* v. *Sheffield*, 148 Alabama, 539; *Phœnix Carpet Co.* v. *State*, 118 Alabama, 143.

Legislation cannot restrict or coerce industry as to its channels from pure whimsicality, or from any motive disconnected from the due exercise of the police power and from taxation for revenue according to constitutional formulas. Cases *supra* and see Constitution of Alabama, § 35.

A business or property cannot be taxed as a whole and then separately as to its constituents. As a tax on wagons and separately on the spokes of the wheels. *Montgomery* v. *Kelly*, 142 Alabama, 552; *Mefford* v. *Sheffield*, 148 Alabama, 539; *Mobile* v. *Richards*, 98 Alabama, 594; *Gambill* v. *Endrich Bros.*, 143 Alabama, 506.

No state statute can stand which by its terms will burden or regulate interstate commerce. And the courts cannot by judicial limitation preserve the statute in part by restricting its terms to a legitimate field of operation. *Civil Rights Cases*, 109 U. S. 3; *United States* v. *Reese*, 92 U. S.

214; *Howard* v. *Illinois Cent. R. Co.*, 207 U. S. 463; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1; *Crutcher* v. *Kentucky*, 141 U. S. 47, 62; *Norf. & West. Ry.* v. *Pennsylvania*, 136 U. S. 114, 118; *Leloup* v. *Mobile*, 127 U. S. 640; *Galveston &c. R. Co.* v. *Texas*, 210 U. S. 217; *Brimmer* v. *Rebman*, 138 U. S. 78–81; *Butts* v. *Mar. & Mins. T. Co.*, 230 U. S. 126.

Contracts are made, and the "business of selling" is done, at the place where the contract receives the final assent of the mind which concludes the negotiation, converting it into a contract or sale. *Holder* v. *Aultman*, 169 U. S. 81, 88.

Mr. Robert C. Brickell, Attorney General of the State of Alabama, for appellees.

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

With respect to the business conducted in Russell County, the decree of the District Court is not now directly under review; but, at any rate, it was clearly correct under *Crenshaw* v. *Arkansas*, 227 U. S. 389. With respect to the other counties, the correctness of the decision, so far as the commerce clause is concerned, seems to us equally clear under *Emert* v. *Missouri*, 156 U. S. 296.

But it is argued that the courts cannot properly sustain a statute which in direct terms applies to all commerce, by restricting it to cases of actual interference with interstate dealings. To quote from the brief: "All such laws as will necessarily affect interstate commerce when it arises are void. We do not have to await actual results on actual commerce to pronounce them void. . . . And, of course, a statute of this character, which is void as a whole, from its unity of character, will as readily be so declared in a case in which only intrastate commerce may be actually involved as otherwise. The lower court was

thus clearly in error in limiting the invalidity of the statute to the dealing in Russell County."

This argument, we think, misses the point. The statute under consideration does not in direct terms or by necessary inference manifest an intent to regulate or burden interstate commerce. Full and fair effect can be given to its provisions, and an unconstitutional meaning can be avoided, by indulging the natural presumption that the legislature was intending to tax only that which it constitutionally might tax. So construed, it does not apply to interstate commerce at all. The statute provides for a license or occupation tax. Normally, as the averments of the bill sufficiently show, the occupation may be and is conducted wholly intrastate, and free from any element of interstate commerce. The fact that, as carried on in Russell County, a like occupation is conducted with interstate commerce as an essential ingredient, is wholly fortuitous.

Nor has the tax that "unity of character" upon which the argument necessarily depends. The cases cited in support of the insistence that the act must be adjudged totally void because if applied in Russell County it would burden interstate commerce are readily distinguishable. In *United States* v. *Reese*, 92 U. S. 214, 221, there was a penal statute couched in general language broad enough to cover wrongful acts without as well as within the constitutional inhibition, and it was held that the court could not reject the unconstitutional part and retain the remainder, because it was not possible to separate the one from the other. In *Trade-Mark Cases*, 100 U. S. 82, 99, the court upon the same principle declined to sustain in part a trade-mark law, so framed as to be applicable by its terms to all commerce, by confining it to the interstate commerce that alone was subject to the control of Congress. In *Leloup* v. *Port of Mobile*, 127 U. S. 640, 647, the court held a general license tax, imposed by the State

of Alabama upon the business of a telegraph company in part interstate and in part internal, to be unconstitutional, and held that since the tax affected the whole business without discrimination it could not be sustained with respect to that portion of the business that was internal and therefore taxable by the State. To the same effect are *Norfolk &c. R. R. Co.* v. *Pennsylvania*, 136 U. S. 114, 119; *Crutcher* v. *Kentucky*, 141 U. S. 47, 62; *Galveston &c. Ry. Co.* v. *Texas*, 210 U. S. 217; *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 27. In *Williams* v. *Talladega*, 226 U. S. 404, 419, there was a state license tax that operated without exemption or distinction upon the privilege of carrying on a business, a part of which was that of an essential governmental agency constituted under a law of the United States. It was held that the tax necessarily included within its operation this part of the business, and since this was unconstitutional the whole tax was rendered void.

The statute now under consideration differs materially, in that it deals separately with the business as conducted in each county of the State, and provides for separate taxes to be laid for each county. And the facts as averred in the bill of complaint show that with respect to all of the counties in which appellant does business, excepting only the County of Russell, there is no element of interstate commerce. In each county there is a store or regular place of business, from which all of the local agents for the same county are supplied with sewing machines and appurtenances that are to be taken into the rural districts for sale or renting, and all transactions that enter into the sale or renting are completely carried out within a single county.

It would be going altogether too far to say that appellant, being properly taxable, and without the least interference with interstate commerce, in twenty-nine counties of the State, could obtain immunity from all such taxation

by establishing in one county a system of business that involved transactions in interstate commerce.

So far as the Fourteenth Amendment is concerned, the argument is confined to the "equal protection" clause. It is said there is no sufficient ground for a distinction, with respect to taxing the occupation, between the business of selling sewing machines from a regularly established store and the business of selling them from a delivery wagon. But there is an evident difference, in the mode of doing business, between the local tradesman and the itinerant dealer, and we are unable to say that the distinction made between them for purposes of taxation is arbitrarily made. In such matters the States necessarily enjoy a wide range of discretion, and it would require a clear case to justify the courts in striking down a law that is uniformly applicable to all persons pursuing a given occupation, on the ground that persons engaged in other occupations more or less like it ought to be similarly taxed. This is not such a case. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 559, 562; *Cook* v. *Marshall County*, 196 U. S. 261, 274; *Armour Packing Co.* v. *Lacy*, 200 U. S. 226, 235; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 121.

In *Quartlebaum* v. *State*, 79 Alabama, 1, 4, a previous statute (sub-section 20 of § 14, act of December 12, 1884; Session Acts 1884–5, p. 17), which imposed an annual license fee of $25 upon "each sewing machine . . . company selling sewing machines . . . either themselves or by their agents, and all persons who engage in the business of selling sewing machines . . . but when merchants engaged in a general business, keep sewing machines . . . they shall not be required to pay the tax herein provided," was sustained against the criticism that it discriminated between two classes of persons engaged in the business of selling sewing machines, namely, between persons who were "merchants engaged in a general business," and persons not so engaged;

the court saying as to the former, "If sewing machines be part of their stock in trade, they are taxed for them as for other merchandise. Their business is in its nature stationary, and there is little or no risk in levying taxes upon their business, on the rule of percentage. That rule may be wholly unsuited and ineffectual for other pursuits, and other lines of business. Much must be left to the discretion of the Legislature, for exact equality of taxation can never be reached." And see *Ballou* v. *State*, 87 Alabama, 144, 146.

The contention that the statute violates the state constitution is grounded upon two sections of the Bill of Rights, viz., § 1, "That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness;" and § 37, "That the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty and property; and when the government assumes other functions, it is usurpation and oppression."

The bearing of these provisions upon the case in hand is not clear. The argument seems to be that since the tax law in question is not a police measure but a revenue measure, the discriminations are arbitrary. To quote from the brief: "Selling sewing machines is the business, and it is taxed highly, and it may be in fact prohibitorily, when it is done by the use of wagons and teams, and not at all when done at stores." There are other suggestions of a like import. They seem to be sufficiently answered by what has been already said respecting the "equal protection" clause of the Fourteenth Amendment. The State has a wide range of discretion with respect to establishing classes for the purpose of imposing revenue taxes, and its laws upon the subject are not to be set aside as discriminatory unless it clearly appears that there is no rational basis for the classification.

The cases cited from the state courts lend no support to appellant's argument. *City of Mobile* v. *Craft*, 94 Alabama, 156; *Mayor and Aldermen of Tuscaloosa* v. *Holczstein*, 134 Alabama, 636, and *Gambill* v. *Endrich Bros.*, 143 Alabama, 506, involved the construction of certain municipal charters and the powers of the respective municipalities thereunder, and have no direct bearing upon the present question. In *Montgomery* v. *Kelly*, 142 Alabama, 552, 559, a municipal ordinance requiring each merchant who issued trading stamps in connection with his business to pay a license tax of $100, viewed in the light of another ordinance that fixed a license fee of $1,000 upon trading stamp companies, was held to be "A palpable attempt under the guise of a license tax, to fix a penalty on the merchant, for conducting his business in a certain way," and therefore unconstitutional. *Mefford* v. *City of Sheffield*, 148 Alabama, 539, sustained a city ordinance that imposed a tax of $200 on wholesale dealers in illuminating oil, while fixing the license tax on dealers in goods, wares, or merchandise in general at $10. *Alabama Consolidated Coal Co.* v. *Herzberg*, 59 So. Rep. 305, declared unconstitutional § 33A of the Revenue Act of March 31, 1911, p. 181, which undertook to impose upon persons, firms, or corporations conducting a store at which their employés trade on checks, orders, or the like, an annual license fee varying according to the number of persons employed; the court saying, p. 306: "The tax is not, therefore, imposed upon the business, or upon all engaged in a similar business, but is based solely upon the manner in which a party may conduct the business; and the foregoing section is repugnant to the state and Federal constitutions under the authority of *City of Montgomery* v. *Kelly*, 142 Alabama, 552."

The other state decisions to which we are referred have been examined, and we are unable to find in them any basis for declaring § 32 of the Act to be in contravention of the state constitution.

Finally, it is said that since it appears from the averments of the bill that all sales of sewing machines by appellant's agents in the field are executory only, and require the approval of appellant at its regularly established places of business, located in the various counties of the State, which are headquarters for all agents with their wagons and teams, it at the same time sufficiently appears that appellant is a merchant conducting a regular business at each of said stores, and therefore within the saving clause of § 32 of the Act in question, which declares that "This section shall not apply to merchants selling the above enumerated articles at their regularly established places of business."

It is quite plain, however, from a reading of the entire section, that the business of selling sewing machines by traveling salesmen is intended to be taxed, and the business of selling them at established places of business is intended to be left untaxed, so far as this section is concerned, although the machines sold at these places be delivered by wagons. Complainant is engaged in doing business of both kinds; and with respect to the itinerant sales it is subject to the tax under the section referred to.

Decree affirmed.

O'SULLIVAN *v.* FELIX.

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

No. 249. Submitted March 9, 1914.—Decided April 13, 1914.

That an action depends upon, or arises under, the laws of the United States, does not preclude the application of the statute of limitations of the State. *McLaine* v. *Rankin*, 197 U. S. 154.

An action brought in the state court for damages for personal assault against persons violating Rev. Stat., §§ 5508 and 5509, is not an action for penalties but for remedial damages, and the period of prescription depends upon the law of the State. Rev. Stat., § 1047, does not apply.

The criminal proceedings and punishment for public wrongs provided by Rev. Stat., §§ 1979–1981 and 5510 and the actions in law and equity for the redress of private injuries resulting from violations of laws of the United States also provided by §§ 1979–1981 are distinct.

The term "penalty" involves the idea of punishment for infraction of the law and includes any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered; while in a civil suit the amount of recovery for such damages is determined by the extent of the injury received and the elements constituting it.

194 Fed. Rep. 88, affirmed.

THE facts, which involve the construction and application of the statute of limitations of the State of Louisiana to claims for damages for personal assaults, are stated in the opinion.

Mr. W. S. Parkerson and *Mr. E. A. O'Sullivan* for plaintiff in error.

Mr. Charles S. Rice, Mr. R. B. Montgomery and *Mr. Alfred Billings* for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action for damages for personal assault upon plaintiff in error, herein called plaintiff, by defendants in error, referred to as defendants, in the sum of sixty thousand dollars.

The petition alleges that defendants and others were indicted for violating § 5508 of the Revised Statutes of the United States. The indictment is set out in the petition and charges, with the usual verbosity of such instruments,

that an election was held in the parish of Jefferson, State of Louisiana, on November 3, 1908, for presidential electors, members of Congress, and certain municipal officers under and in accordance with the laws and Constitution of the United States; that certain named persons were, as defendants well knew, qualified to vote at such election, that such persons were at the polling places with the intention and for the purpose of voting, and, knowing this, the defendants feloniously conspired and confederated with each other and other persons to intimidate and prevent and did prevent by the use of deadly weapons such persons from voting.

It is alleged that the indictment further charged in a second count, a violation of § 5509 in that the defendants, with other named persons, conspiring to intimidate the voters named in the first count from voting at the election named, "did then and there, with force and arms, armed with dangerous weapons, to-wit: pistols, guns, scissors, wilfully and maliciously, unlawfully and feloniously and upon" the defendant commit an assault, and with the purpose and in the disposition described, "with a dangerous weapon, to-wit: a pair of scissors, inflict a wound less than mayhem."

That the defendants herein were convicted on both counts and sentenced to fine and imprisonment, and upon appeal to the Circuit Court of Appeals the conviction, sentence and fine were affirmed.

That the defendants conspired to prevent and did prevent the voters named in the indictment from voting and that in furtherance of the conspiracy plaintiff was maliciously and without cause or provocation "cut, bruised, beaten, his face and eye blackened, his beard cut, he knocked down senseless, and other indignities were heaped upon him" by the defendants, for which he has suffered damages in the sum of $60,000.

That plaintiff is sixty-five years of age, has practiced

law and held positions of honor and trust in the State, having been district attorney, state senator, and city attorney for the city of New Orleans.

The petition recites the injuries plaintiff received in defending himself from the assault upon him, and that he "was forced to appear in public, in performing his duties, carrying on his person the signs of the degradation and humiliation placed upon him."

The items of damage are set out as follows: For the wounding less than mayhem, $25,000; for humiliation, degradation and public ridicule and pain of mind, $25,000; punitive and exemplary damages, $10,000. Judgment was prayed for $60,000, the sum of these items.

Exception was filed to the petition on the ground that the damages having, as it is alleged, been inflicted November 3, 1908, more than two years and five months before the filing of the petition, the action is barred "by the prescription of one year from and after the day on which such damages were sustained, under the provisions of Articles 3536 and 3537 of the Civil Code of the State of Louisiana. Dismissal of the suit was prayed. The plea of prescription was sustained and the sole question pressed by counsel and which we are called upon to decide is the application of the state statute to the conceded cause of action. The court in passing upon the application of the statute of limitations said that plaintiff conceded that if the action was to be governed by the state statute it was prescribed, but he contended that it was an action for a penalty and governed by the prescription of five years, established by § 1047 of the Revised Statutes of the United States. The court was of opinion that the action was for "remedial damages and not for a penalty," and maintained the plea of prescription, citing *Campbell* v. *Haverhill*, 155 U. S. 610; *Brady* v. *Daly*, 175 U. S. 148, and dismissed the action with costs.

Judgment of the Circuit Court was affirmed by the

Circuit Court of Appeals. The court decided that the action was one for damages and not for a penalty and the limitations of five years against penalties or forfeitures (Rev. Stat., § 1047) was not applicable. It followed, the court said, that the state statute, which prescribes the action in one year, must be applied, citing §§ 3536 and 3537 of the Civil Code of Louisiana. 194 Fed. Rep. 88.

The opinions of the lower courts exhibit the contentions in the case, and the short question presented is whether the action is for damages or for a penalty. If for a penalty, § 1047 of the Revised Statutes applies, which provides: "No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained . . . unless the same is commenced within five years from the time when the penalty or forfeiture accrued." If for damages, the provisions of the Louisiana Code are applicable. They are as follows: Article 3536. "The following actions are also prescribed by one year:

That for injurious words, whether verbal or written, and that for damages caused by animals, or resulting from offenses or *quasi*-offenses."

And the prescription runs from the day the damage is sustained. Section 3537.

That the action depends upon or arises under the laws of the United States does not preclude the application of the statute of limitations of the State is established beyond controversy by cases cited by the Circuit Court and by *McLaine* v. *Rankin*, 197 U. S. 154, 158.

It is, therefore, not necessary to pursue in detail the argument of plaintiff based on the postulate that "the Sovereign alone can limit the right of action," and that because injury was inflicted on him in the course of violating Federal laws the limitation of the State could not apply. Congress, of course could have, by specific provision, prescribed a limitation, but no specific provision is ad-

duced. The limitation of five years is asserted on the ground that the action is for a penalty, and that it is such is deduced from the provisions of Title XXIV of the Revised Statutes securing equal civil rights to all citizens.

These provisions secure to all citizens the same rights that white citizens enjoy and make every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, deprives another of the rights secured, liable "to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Section 1979.

It is also provided that if a conspiracy be entered into between two or more persons to deprive another of the equal protection of the laws, or of equal privileges and immunities under the laws, and the persons conspiring to or cause to be done any act in furtherance of the object of the conspiracy whereby another is injured in his person or property, or deprived of having or exercising any right or privilege as a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. Section 1980.

Any one having knowledge of the wrongs conspired to be done and who, having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, shall be liable to the party injured or his legal representatives in an action on the case. Any number of defendants may be joined in the action. If the death of any party be caused by such act or neglect, the legal representatives of the deceased shall have an action therefor and may recover not exceeding $5,000 for the benefit of the widow of the deceased, if there be one, and, if there be no widow, then for the benefit of the next of kin. But no action under the provisions of the section can be sus-

tained which is not commenced within one year after the cause of action accrued. Section 1981.

Conspirators to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of his rights under the Constitution and laws of the United States, or because of his having so exercised the same, shall be fined not more than $5,000 and imprisoned not more than ten years; and shall, moreover, be ineligible to office under the United States. Section 5508.

If in violating any of the provisions of the two preceding sections any felony or misdemeanor be committed, the offender shall be punished as provided in the state laws.

And every person who, under color of any law, etc., subjects or causes to be subjected any inhabitant of any State or Territory to the deprivation of rights under the laws and Constitution of the United States shall be fined not more than $1,000 or be imprisoned not more than one year, or both. Section 5510.

There are other criminal provisions not necessary to mention.

It will be observed, therefore, that the sections of the Revised Statutes, which we have quoted, provide criminal proceedings and punishment for the public wrong, and actions in law or equity for the redress of any private injury, with a limitation in one instance of the amount of recovery and of the time for commencing the action to one year.

The penal and remedial provisions are, therefore, distinct and cannot be confounded. The term "penalty" involves the idea of punishment for the infraction of the law, and is commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. *United States* v. *Chouteau*, 102 U. S. 603, 611; *Huntington* v. *Attrill*, 146 U. S. 657, 666, 667. There is no justification for the contention of plaintiff, therefore, that the

remedy provided for a penalty and the limitation of time of bringing an action is five years under § 1047. It is very clear that the public wrong is punished by the fines and punishment prescribed, that the private injuries inflicted are to be redressed by civil suit, and the amount of recovery is determined by the extent of the injury received and the elements constituting it. This plaintiff indicates in his pleading, praying damages in the sum of $25,000 "for the wounding less than mayhem," $25,000, "for the humiliation, degradation and public ridicule," and $10,000 "as punitive and exemplary damages."

Judgment affirmed.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* ANDERSON.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 319. Argued March 20, 1914.—Decided April 13, 1914.

A State may impose double damages and an attorney's fee on railway companies for failure to pay the owner of stock killed within a reasonable period after demand and award of the jury of the amount claimed before action commenced; and so *held* that the double damage statute of Arkansas is constitutional as applied to cases of this character.

St. Louis, Iron Mtn. & Southern Ry. Co. v. *Wynne*, 224 U. S. 354, distinguished, as in that case this statute was declared unconstitutional only as applied to claims where the jury awarded less than the amount demanded.

A statute is not necessarily void for all purposes because it has been declared by this court to be unconstitutional as applied to a particular state of facts; it may be sustained as to another state of facts where the state court has expressly decided that it should not be construed as applicable to such conditions as would render it unconstitutional if applied thereto.

A state statute imposing double damages and otherwise valid, is not unconstitutional as denying the equal protection of the laws because

it applies only to railroad companies and not to litigants in general. The classification is not arbitrary. *Seaboard Air Line* v. *Seegers*, 207 U. S. 73.

The States have a large latitude in the policy which they will pursue in regard to enforcing railroad companies to settle damage claims promptly and properly. *Chi., M. & St. P. Ry. Co.* v. *Polt*, 232 U. S. 165.

THE facts, which involve the constitutionality under the Fourteenth Amendment of a statute of Arkansas allowing double damages and attorney's fee to be awarded against railway corporations under certain conditions, are stated in the opinion.

Mr. Samuel W. Moore, with whom *Mr. Frank H. Moore* and *Mr. James B. McDonough* were on the brief, for plaintiff in error:

The record properly presents Federal questions which may be reviewed here. Act 61, of Arkansas of 1907, p. 144; *Kansas City Southern Ry. Co.* v. *Anderson*, 104 Arkansas, 500; *St. L., Iron Mtn. & So. Ry. Co.* v. *Wynne*, 224 U. S. 354.

The Arkansas act which is drawn in question in this case has been held unconstitutional by this court and is therefore void for all purposes. Cases *supra* and *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298; *Yazoo & Miss. R. R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217.

The Arkansas act is in conflict with the Fourteenth Amendment because it denies to defendant the equal protection of the law. *Atchison &c. Ry. Co.* v. *Matthews*, 174 U. S. 96; *Atlantic Coast Line Co.* v. *Mazursky*, 216 U. S. 122; *Bannon* v. *State*, 49 Arkansas, 167; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Fidelity Life Asso.* v. *Mettler*, 185 U. S. 308; *Gulf &c. Ry. Co.* v. *Ellis*, 165 U. S. 150; *Ill. Cent. R. R. Co.* v. *Crider*, 91 Tennessee, 489; Kirby's Digest Arkansas Statutes, §§ 6773, 6782, 7907; *Minn. & St. Louis R. R. Co.* v. *Beckwith*, 129 U. S. 26; *Mo. & Nor.*

Ark. R. R. Co. v. *State*, 91 Arkansas, 1; *Mo. Pac. Ry. Co.* v. *Humes*, 115 U. S. 512; *St. L., I. Mtn. & So. Ry. Co.* v. *Williams*, 49 Arkansas, 492; *St. L., I. Mtn. & So. Ry. Co.* v. *Wynne*, 90 Arkansas, 538; *Seaboard Air Line Ry.* v. *Seegers*, 207 U. S. 73; *Southern Ry. Co.* v. *Greene*, 216 U. S. 400; *Yazoo & Miss. Valley R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217.

This Arkansas act denies to defendant due process of law. *Chi., Mil. & St. P. Ry. Co.* v. *Polt*, 232 U. S. 165; *Ex parte Young*, 209 U. S. 123; *Mo. Pac. Ry. Co.* v. *Tucker*, 230 U. S. 340.

No appearance or brief filed for defendant in error.

Mr. Justice McKenna delivered the opinion of the court.

Error to review a judgment of the Supreme Court of the State of Arkansas affirming a judgment by which defendant in error was awarded against plaintiff in error (herein called the railway company) double damages and attorney's fee for a mare killed by one of the railway company's trains.

The judgment was recovered under a statute of the State which the railway company attacked in the courts below and attacks here, on the ground that it violates the due process clause of the Constitution of the United States. The statute provides that when any stock is killed or injured by railroad trains running in the State the officers of the train shall cause the station master or overseer at the nearest station house to give notice of the fact by posting and by advertisement, and, on failure to so advertise, the owner shall recover double damages for all stock killed and not advertised. "And said railroad shall pay the owner of such stock within thirty days after notice is served on such railroad by such owner. Failure to do so shall entitle said owner to double the amount of damages

awarded him by any jury trying such cause, and a reasonable attorney's fee." (Act 61, Acts of Arkansas of 1907, p. 144.)

If a suit be brought after the thirty days have expired and the owner recover "a less amount of damages than he sues for, then such owner shall recover only the amount given him by said jury and not be entitled to recover any attorney's fee."

For its contention that the act offends the Constitution of the United States the railway company relies on *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Wynne*, 224 U. S. 354.

In that case, however, there was a demand for $500 damages. The railway company refused to pay it. The owner sued for $400 and recovered a verdict for that amount, and the court deeming the statute applicable gave judgment for double that amount and an attorney's fee of $50.00. The Supreme Court sustained the judgment against the contention of the railway company that the statute so applied was repugnant to the due process clause of the Constitution of the United States. This court reversed the judgment, holding that so far as the statute was held to justify the imposition of double damages where there was demand for one sum and an action and judgment for less, it was void. The question was expressly reserved whether such would be the decision if the recovery corresponded to the demand; in other words, in the language of the opinion "Where the prior demand is fully established in the suit following the refusal to pay." That question is involved in the present case and we think it is determined by *Seaboard Air Line* v. *Seegers*, 207 U. S. 73, and *Yazoo & Miss. R. R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217. In both cases statutes (South Carolina and Mississippi) were sustained. Each provided for a penalty for failure to settle claims after certain time after demand, the penalty being $50 in one

statute and in the other $25, in addition to the actual damages. In the *Seegers Case* it was said, p. 78: "It must be remembered that the purpose of this legislation is not primarily to enforce the collection of debts, but to compel the performance of duties which the carrier assumes when it enters upon the discharge of its public functions." In the other case it was said, p. 219: the railroad company "has not been penalized for failing to accede to an excessive or extravagant claim, but for failing to make reasonably prompt settlement of a claim which upon due inquiry has been pronounced just in every respect." In *Chicago, M. & St. P. Ry. Co.* v. *Polt*, 232 U. S. 165, a statute of South Dakota was passed upon which makes a railroad liable for double damages if, within sixty days after demand, it does not pay the damage actually sustained for property destroyed by fire communicated from its locomotive engine. The plaintiff in the case got a verdict for less than he demanded but for more than the railroad offered. Judgment for double the amount of the verdict was entered and sustained by the Supreme Court of the State. It was reversed by this court, the ruling of the *Wynne Case, supra*, being applied. We said, p. 168: The case "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."

It is contended, however, that the statute having been declared unconstitutional as applied to one state of facts that properly raises the question, it is void for all purposes. The contention is based on the assumption that we decided the statute in the *Wynne Case* to be unconstitutional, but the ground of the decision was, as we have seen, that the statute was there applied to a case where the plaintiff in the action had recovered less than he demanded before suit. We declined to extend our opinion to a case where the amount of the judgment corresponded to the demand;

in other words, declined to pronounce the act entirely unconstitutional.

In *Yazoo & Mississippi Valley R. R. Co.* v. *Jackson Vinegar Co., supra,* when urged again to extend our ruling beyond the facts and declare the Mississippi statute entirely void, we declined to do so, considering it a matter for the state court to decide "how far parts of it may be sustained if others fail."

In the case at bar the Supreme Court of the State has limited the statute and has, indeed, declared that it had not intended in the *Wynne Case* to place upon the "statute a construction that would make it applicable to a case based upon a state of facts where a demand had been made before suit for a sum greater than that recovered upon a trial." And, further, "The construction and application of this statute as made by this court is, therefore, not such as to render it invalid under the decisions made by the Supreme Court of the United States."

It is also contended by the railway company that the statute deprives it of the equal protection of the laws in that it singles out railroads and subjects them to the payment of double damages and attorneys' fees when litigants in general are not subject to the same burdens. The contention is not tenable. *Seaboard Air Line* v. *Seegers, supra.*

We do not enter into a general discussion of the police power of the State. As we said in the *Polt Case,* "the States have a large latitude in the policy that they will pursue and enforce," and we do not think that the limit of their power has been transcended in the present case.

Judgment affirmed.

MR. JUSTICE HOLMES and MR. JUSTICE LAMAR dissent.

HAMMOND PACKING COMPANY *v.* STATE OF MONTANA.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 278. Submitted March 11, 1914.—Decided April 13, 1914.

So long as it does not interfere with interstate commerce, a State may restrict the manufacture of oleomargarine in a way that does not hamper that of butter. The classification is reasonable and does not offend the equal protection clause of the Fourteenth Amendment. *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238.

A State may forbid the manufacture of oleomargarine altogether without violating the due process or equal protection provisions of the Fourteenth Amendment. *Powell* v. *Pennsylvania*, 127 U. S. 678.

A State may express and carry out its policy in restricting and forbidding the manufacture of articles either by police, or by revenue, legislation. *Quong Wing* v. *Kirkendall*, 223 U. S. 59.

45 Montana, 343, affirmed.

THE facts, which involve the constitutionality under the due process and equal protection clauses of the Fourteenth Amendment of a statute of Montana imposing a license tax on the carrying on of the business of selling oleomargarine, are stated in the opinion.

Mr. M. S. Gunn for plaintiff in error:

The statute providing for a license tax of one cent per pound on sales of oleomargarine, butterine and imitation cheese denies to plaintiff due process of law and the equal protection of the laws in violation of the Fourteenth Amendment.

The Supreme Court of the State decided that the tax is imposed for the purpose of revenue in the exercise of the

taxing power and that the imposition of such tax is authorized by the constitution of the State.

The oleomargarine sold, after having been received, stored and held for sale in Silver Bow County, was subject to the taxing power of the State. *Am. Steel & Wire Co.* v. *Speed*, 192 U. S. 500; *Kehrer* v. *Stewart*, 197 U. S. 60; *McCray* v. *United States*, 195 U. S. 53.

The legislative assembly of Montana is authorized to classify for the purpose of taxation and may lawfully impose a tax upon one class of property or one occupation to the exclusion of other property and other occupations. *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114.

The only inquiry is whether the placing of oleomargarine, butterine and imitation of cheese in a separate class for the purpose of taxation is a legitimate exercise of the taxing power and whether such a classification is not arbitrary, unreasonable and discriminatory, and in violation of the equal protection clause of the Fourteenth Amendment.

Oleomargarine is a wholesome article of food, a recognized article of commerce, and its manufacture and sale cannot be prohibited by a State. *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Collins* v. *New Hampshire*, 171 U. S. 30.

While the State can, in the exercise of the police power, provide reasonable regulations with reference to the manufacture and sale of oleomargarine in order to prevent deception and fraud and in the interest of the health of the people of the State, *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, it may not abuse the taxing power. See *Spencer* v. *Merchant*, 125 U. S. 345; Cooley on Taxation (3d ed.), p. 1133.

No classification for the purpose of taxation is reasonable or justifiable, unless all articles used for the same purpose, and which are sold in competition, are placed in the same class. Such a classification as is made by this statute

under consideration does violence to the equal protection clause of the Fourteenth Amendment. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Gulf, Col. &c. R. R.* v. *Ellis*, 165 U. S. 150. *McCray* v. *United States*, 195 U. S. 27, distinguished.

Mr. D. M. Kelly, Attorney General of the State of Montana, and *Mr. J. H. Alvord*, for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is an action to recover a license-tax of one cent per pound sold for carrying on the business of selling oleomargarine. The answer, with some allegations not now material, admitted the facts and set up that § 4064 of the Political Code of Montana as amended by § 2763, Revised Codes, by which the tax was imposed, violates the Fourteenth Amendment. That is the only question raised here, so that other incidental or preliminary matters need not be mentioned. Judgment was entered for the State on the pleadings and the judgment was affirmed by the Supreme Court of the State.

The argument for the plaintiff in error is that, the tax being pronounced or assumed by the state courts to be a tax for revenue, it is unjustifiable to put oleomargarine in a class by itself and to discriminate, for instance, between it and butter. But we see no obstacle to doing so in the Constitution of the United States. Apart from interference with commerce among the States, a State may restrict the manufacture of oleomargarine in a way in which it does not hamper that of butter. *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 245, 246. It even may forbid the manufacture altogether. *Powell* v. *Pennsylvania*, 127 U. S. 678. It may express and carry out its

policy as well in a revenue as in a police law. *Quong Wing* v. *Kirdendall*, 223 U. S. 59, 62. The case really has been disposed of by previous decisions of this court. *McCray* v. *United States*, 195 U. S. 27, 62, 63.

Judgment affirmed.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY *v.* STATE OF IOWA.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 176. Argued March 3, 1914.—Decided April 13, 1914.

Whether commerce is interstate or intrastate must be determined by the essential character of the commerce and not by mere billing or forms of contract.

The reshipment of an interstate shipment by the consignees in the cars in which received to other points of destination does not necessarily establish a continuity of movement or prevent the shipment to a point within the same State from having an independent and intrastate character.

In this case, *held*, that shipments of coal when reshipped, after arrival from points without the State and acceptance by the consignees, to points within the State on new and regular billing forms constituted intrastate shipments and were subject to the jurisdiction of the State Railroad Commission.

Whether the common law or statutory provisions apply to a case is for the state court to determine, and so *held*, that in Iowa the State Railroad Commission has power under the state law to require common carriers to use the equipment of connecting carriers to transport shipments from the points of original destination to other points within the State.

A State may, so long as it acts within its own jurisdiction and not in hostility to any Federal regulation of interstate commerce, compel a carrier to accept, for further reshipment over its lines to points within the State, cars already loaded and in suitable condition; and an order to that effect by the State Railroad Commission is not

unconstitutional as depriving the carrier of its property without due process of law.

Where it appears that an order of the State Railroad Commission simply required the carrier to continue a former practice, and the record does not disclose that it involves additional expense over the new practice proposed, this court is not justified in holding that the order is unconstitutional as depriving the carrier of its property without due process of law because it subjects it to an unreasonable expense.

This court cannot, at the instance of the carrier, hold an order of the State Railroad Commission, otherwise valid, requiring the carrier to forward interstate shipments after receipt to intrastate points in the same equipment, void as interfering with interstate commerce because the cars are vehicles of interstate commerce, when no actual interference with such commerce is shown nor is any such question raised between the shippers and the owners of the cars.

152 Iowa, 317, affirmed.

THE facts, which involve the validity and also the constitutionality under the commerce clause of, and the Fourteenth Amendment to, the Federal Constitution, of an order of the State Railroad Commission of Iowa in regard to carload shipments of coal, are stated in the opinion.

Mr. O. W. Dynes, with whom *Mr. C. S. Jefferson* and *Mr. Burton Hanson* were on the brief, for plaintiff in error:

The proposed shipment from Davenport to destination in Polk County, Iowa, was an intrastate shipment.

At common law a carrier is not compelled to use foreign equipment designated by the shipper, but has the right to use its own equipment to transport property over its own rails.

There is no statute in Iowa that compels the initial carrier to receive a shipment in a foreign car and the statute of that State requiring a connecting carrier, acting as such, to receive shipments coming to it over other lines in foreign cars, does not apply to the case at bar for the reason that plaintiff in error was the initial carrier and not a connecting carrier.

The order of the Board of Railroad Commissioners was void *ab initio* because its enforcement would deprive plaintiff in error of its constitutional right to contract, secured by the Fourteenth Amendment; also because its enforcement would entail the taking of property without due process of law, in contravention of the Fourteenth Amendment.

The order, if enforced, would deny to the plaintiff in error the equal protection of the laws, contrary to the Fourteenth Amendment.

The order is also void because its enforcement would interfere with and burden interstate commerce through interfering with and burdening the instruments of interstate commerce.

In support of these contentions, see Act to Regulate Commerce, 24 Stat. 379; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *Atchison &c. R. R.* v. *Denver & N. O. R. R.*, 110 U. S. 667, 680; *Atchison &c. Ry. Co.* v. *United States*, 232 U. S. 199; *Baltimore & Ohio R. R. Co.* v. *United States et al.*, 215 U. S. 481; *Central Stockyards* v. *L. & N. Ry. Co.*, 192 U. S. 568, 571; Iowa Code, § 2116; *Id.*, Supp., 1907, § 2153; *Coe* v. *Errol*, 116 U. S. 517; *Gulf, Col. &c. Ry. Co.* v. *Texas*, 204 U. S. 403; *Int. Com. Comm.* v. *I. C. R. R. Co.*, 215 U. S. 452, 474; *Lake Shore & M. S. Ry. Co.* v. *Smith*, 173 U. S. 684, 698; *Little Rock &c. Ry. Co.* v. *St. Louis &c. Ry. Co.*, 63 Fed. Rep. 775; *Louis. & Nash. Ry. Co.* v. *Central Stockyards*, 212 U. S. 132, 144; *Louis. & Nash. R. R. Co.* v. *Garrett*, 231 U. S. 298; *Louis. & Nash. R. R. Co.* v. *Siler*, 186 Fed. Rep. 176; *McCulloch* v. *Maryland*, 4 Wheat. 415, 426; *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543; *Minnesota Rate Cases*, 230 U. S. 352, 400; *Mo. & Ill. Coal Co.* v. *I. C. R. R. Co.*, 22 I. C. C. 39; *Mo. Pac. Co.* v. *Nebraska*, 164 U. S. 403, 417; *Nor. Pac. Ry. Co.* v. *Washington*, 222 U. S. 370, 377; *O'Ferrall* v. *Simplot*, 4 Clarke (Iowa), 381, 399; *Ohio R. R. Comm.* v. *Worthington*, 225 U. S. 101; *Oregon Short Line* v. *Nor. Pac.*

R. R. Co., 51 Fed. Rep. 465, 472; *Smith* v. *Alabama*, 124 U. S. 465, 473; *So. Pac. Terminal Co.* v. *I. C. C.*, 219 U. S. 498; *Southern R. Co.* v. *United States*, 222 U. S. 20, 26; *Texas & N. O. R. R. Co.* v. *Sabine*, 227 U. S. 111.

Mr. George Cosson, Attorney General of the State of Iowa, with whom *Mr. Henry E. Sampson* was on the brief, for defendant in error:

The Board of Railroad Commissioners have authority under the statutes of Iowa to make the order requiring the Milwaukee Railway Company to receive coal on the interchange track at Davenport, Iowa, in the equipment in which the coal was then loaded, and to prohibit the Milwaukee Railway Company from requiring the coal companies at Davenport to unload the coal and reload the same in Milwaukee equipment as a condition precedent to its moving in intrastate commerce over the lines of the Milwaukee Railroad Company in Iowa. *State* v. *Chicago, Milwaukee Ry. Co.*, 152 Iowa, 317; *Louis. & Nash. R. R. Co.* v. *Kentucky*, 183 U. S. 503.

The order of the Board does not deny plaintiff due process either by taking its property or by denying it the right of the liberty of contract.

A reasonable regulation of public service corporations or persons and a reasonable limitation of the right to contract, if made under the police power in the interests of the public health, the public safety, the public morals, or the public welfare, convenience, necessity or prosperity, is valid. *Grand Trunk Ry. Co.* v. *Mich. Ry. Com.*, 231 U. S. 457; *Wis. &c. R. R. Co.* v. *Jacobson*, 179 U. S. 287; *Atlantic Coast Line* v. *Nor. Car. Com.*, 206 U. S. 1; *Holden* v. *Hardy*, 169 U. S. 366; *Slaughter House Cases*, 16 Wall. 36; *C., M. & St. P. Ry. Co.* v. *Solan*, 169 U. S. 133; *Carroll* v. *Greenwich*, 199 U. S. 401; *C., B. & Q. Ry. Co.* v. *McGuire*, 219 U. S. 549; *Engel* v. *O'Malley*, 219 U. S. 128; *West. Un. Tel. Co.* v. *Commercial Mill. Co.*, 218 U. S. 406;

Noble State Bank v. *Haskell*, 219 U. S. 104; *Assaria State Bank* v. *Dolley*, 219 U. S. 121; *Mobile, Jackson R. R. Co.* v. *Mississippi*, 210 U. S. 187; *C., R. I. & P. Ry. Co.* v. *Zernecke*, 183 U. S. 582.

On the other hand, an arbitrary, unreasonable taking of property or limiting of the right to contract is invalid, especially where the statute bears no relation to correcting some public evil or promoting the health, safety, morals, welfare or prosperity of a State or community. *Lake Shore Ry.* v. *Smith*, 173 U. S. 687; *Central Stock Yards* v. *Louis. & Nash. R. R.*, 192 U. S. 568; *Mo. Pac. Ry.* v. *Nebraska*, 164 U. S. 403; *McNeil* v. *Southern Ry. Co.*, 202 U. S. 543, 561; *Allgeyer* v. *Louisiana*, 165 U. S. 579; *Louis. & Nash. R. R. Co.* v. *Stock Yards Co.*, 212 U. S. 132.

Almost the precise question was passed upon by the Supreme Court of Iowa in the case of *B., C. R. & N. Ry. Co.* v. *Dey*, 82 Iowa, 312, 335.

This case does not present facts similar to those in the case of *Central Stock Yards* v. *Louisville Ry. Co.*, 192 U. S. 568.

A plaintiff in error can complain only of the injury which he himself may sustain and may not strike down a statute as violative of the Federal Constitution because of its possible injury to some one else. *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, p. 550.

The order of the Commission in question does not deny the railroad company the equal protection of the laws. *Wisconsin* v. *Jacobson*, 179 U. S. 287; *Atlantic Coast Line* v. *Nor. Car. Corp. Comm.*, 206 U. S. 1, 19; *Grand Trunk Ry. Co.* v. *Mich. R. R. Comm.*, 231 U. S. 457; *West. Un. Tel. Co.* v. *Commercial Milling Co.*, 218 U. S. 406; *Griffith* v. *Kentucky*, 218 U. S. 563; *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140; *German Alliance Ins. Co.* v. *Hale*, 219 U. S. 307; *District of Columbia* v. *Brooke*, 214 U. S. 138; *Brown-Forman Co.* v. *Kentucky*, 217 U. S. 563; *Field* v. *Barber Asphalt Co.*, 194 U. S. 618; *McLean* v. *Arkansas*, 211 U. S.

546; *Williams* v. *Arkansas*, 217 U. S. 79; *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401; *S. W. Oil Company* v. *Texas*, 217 U. S. 114; *Mo., K. & T. Ry. Co.* v. *May*, 194 U. S. 267.

The order does not offend against the commerce clause of the Federal Constitution; it is not a burden on interstate commerce, but rather an aid to interstate commerce.

The order is in aid of interstate commerce because it tends to a more prompt releasing of cars. Time is lost in the unnecessary unloading and reloading of cars at Davenport, Iowa. The time consumed in the unloading and reloading of the cars in question would often be equal to that required in transporting the car over the entire local shipment. In any event the regulation being reasonable, it is clearly within the police power of the State.

If the regulation is reasonable and Congress has remained silent upon the specific matter, it is neither a burden on interstate commerce nor in conflict with the acts of Congress to regulate interstate commerce. *Grand Trunk Ry.* v. *Mich. Ry. Comm.*, 231 U. S. 457; *Savage* v. *Jones*, 225 U. S. 501; *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540; *Reid* v. *Colorado*, 187 U. S. 137, 147; *Nor. Pac. Ry. Co.* v. *Washington*, 222 U. S. 370; *Cleveland &c. Ry. Co.* v. *Illinois*, 177 U. S. 514; *Minnesota Rate Cases*, 230 U. S. 352; and see *McLean* v. *Denver &c. Ry. Co.*, 203 U. S. 38, 55; *Smith* v. *Alabama*, 124 U. S. 465; *Nashville Ry. Co.* v. *Alabama*, 128 U. S. 96; *N. Y. R. R. Co.* v. *New York*, 155 U. S. 628; *Hennington* v. *Georgia*, 163 U. S. 299.

Mr. Justice Hughes delivered the opinion of the court.

This suit was brought by the State of Iowa to obtain a mandatory injunction requiring the Chicago, Milwaukee & St. Paul Railway Company to comply with an order of the State Railroad Commission promulgated December 22, 1909. The defendant answered, denying the validity of

the order, and also filed a cross petition to set it aside alleging that it was repugnant to the Constitution of the United States as an attempt to regulate interstate commerce and to deprive the Company of its property without due process of law and, further, that the Commission was without authority under the laws of the State to make the order. Judgment, sustaining the action of the Commission and directing compliance, was affirmed by the Supreme Court of the State. 152 Iowa, 317.

It appeared that the Railway Company, in 1909, had refused to accept shipments of coal in carload lots at Davenport, Iowa, for points in that State when tendered in cars of other railroad companies by which the coal had been brought to Davenport from points in Illinois. The Railway Company insisted that it was entitled to furnish its own cars. The Clark Coal and Coke Company, operating a branch at Davenport, complained of this rule to the Railroad Commission, stating that it was a departure from the practice which had obtained for several years with respect to such shipments, that the Clark Company paid all charges to Davenport and on receiving orders from its customers tendered written billing for transportation from Davenport to the designated points, and that it was unreasonable for the Railway Company to require in such cases that the coal should be unloaded and reloaded in its own cars. A hearing was had before the Commission at which other shippers intervened, adopting the coal company's complaint. The facts were presented in an agreed statement, as follows:

"The Clark Coal & Coke Company of Davenport, Iowa, have been making shipments of coal from points in Illinois to Davenport by the Chicago, Rock Island & Pacific Railway Company and the Chicago, Burlington & Quincy Railroad Company; that said coal is then placed by the railroad bringing it into Iowa on an interchange track at Davenport; that all charges from point of origin

in Illinois to Davenport, Iowa, are paid by the Clark Coal & Coke Company to the railroad company bringing said coal; that thereupon complainant had notified the respondent railway company of the placement of said coal and that it desired to ship said coal by the respondent railway company to different points on its own line, and tendered a written billing from Davenport to the point so designated; that thereupon respondent railway company has accepted said written billing from Davenport to said point and taken said cars from said interchange track to its own line and transported the same in accordance with said written billing; that the respondent railway company has changed its method of doing business in the above respects by its printed order and now refuses to accept said written billing and take said cars from said interchange track and transport them over its own line to the point designated by said billing, unless said coal is loaded in equipment belonging to respondent railway company. Respondent railway company, by its answer to the complaint, alleges that it 'will furnish cars for shipment of coal from Davenport to any point in Iowa, as provided by Iowa Distance Tariff, but will not accept shipments originating at Davenport, billed from Davenport in the equipment of other carriers,' and its readiness and ability to furnish cars of its own for shipment is not controverted and will therefore be taken to be true. It will thus be observed that before the respondent railway company will take coal for transportation on its own line, in equipment other than its own, it requires that the same shall be unloaded and reloaded into its own cars."

Thereupon, the Commission rendered a decision in favor of the shipper and entered the following order to which this controversy relates:

"In accordance with the conclusions heretofore expressed, it is therefore ordered by the Board of Railroad Commissioners of Iowa that upon arrival of loaded cars of

coal at the city of Davenport, upon any line of railroad, when said cars are placed upon the interchange track at Davenport as ordered or requested by the owner or consignee of said cars and the freight paid thereon, and the ordinary billing in use by the respondent railway is tendered to it for a billing of said cars so placed to a point on its own line within the State of Iowa, that the respondent railway company be and it is hereby ordered and required to accept said billing, receive said car or cars so billed and transport them on its own line to the point designated by the owner or consignee in said billing; and that it receive said car or cars in whatever equipment the same may be loaded, without requiring an unloading and reloading into its own equipment, and transport said car or cars over its own line to points within this State, so loaded, without unloading or reloading as above set forth, in the same manner that it receives cars from connecting lines loaded in its own equipment. It is expressly understood, however, in this order, that no questions in relation to switching charges are determined."

The Railway Company contended, both before the Commission and in the state court, that the shipments in question were interstate; and it was alleged in its answer that the method of transportation resorted to was a device of shippers to secure, by adding the rate from the initial point in Illinois to Davenport to the rate established by the Iowa distance tariff from Davenport to other points in the State, a lower rate than that applicable to an interstate shipment from the point in Illinois to the point of final destination.

The Railroad Commission held that the transportation desired from Davenport was a purely intrastate service, saying: "Under the admitted facts, the city of Davenport became a distributing point for coal shipped by the consignor. The certainty in regard to the shipments of coal ended at Davenport. The point where the same was to be

shipped beyond Davenport, if at all, was determined after the arrival of the coal at Davenport. The coal was under the control of the consignee and he could sell it in transit or at Davenport or reconsign it to a point on respondent's railway, or any other railway, at his own discretion." Upon the trial of the present suit in the state court, the State introduced in evidence the proceedings, decision and order of the Commission, and without further evidence both parties rested. The Supreme Court of the State took the same view of the facts that the Commission had taken and accordingly held that the shipments were intrastate. The court said that the facts showed that the coal was originally consigned to the coal company in Davenport, that it was there held until sales were made, that the consignee had taken delivery, paying the freight to the initial carrier and assuming full control. 152 Iowa, 317, 319.

The record discloses no ground for assailing this finding. It is undoubtedly true that the question whether commerce is interstate or intrastate must be determined by the essential character of the commerce and not by mere billing or forms of contract. *Ohio Railroad Commission* v. *Worthington*, 225 U. S. 101; *Texas & N. O. R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111; *Railroad Commission of Louisiana* v. *Texas & Pacific Rwy. Co.*, 229 U. S. 336. But the fact that commodities received on interstate shipments are reshipped by the consignees, in the cars in which they are received, to other points of destination, does not necessarily establish a continuity of movement or prevent the reshipment to a point within the same State from having an independent and intrastate character. *Gulf, Colorado & Santa Fe Rwy. Co.* v. *Texas*, 204 U. S. 403; *Ohio Railroad Commission* v. *Worthington*, 225 U. S. 101, 109; *Texas & N. O. R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, 129, 130. The question is with respect to the nature of the actual movement in the particular

case; and we are unable to say upon this record that the state court has improperly characterized the traffic in question here. In the light of its decision, the order of the Commission must be taken as referring solely to intrastate transportation originating at Davenport.

In this view, the validity of the Commission's order is challenged upon the ground that at common law the carrier was entitled to use its own equipment, and that the statute of the State of Iowa as to the receiving of cars from connecting carriers (Code, § 2116) is inapplicable for the reason that with respect to the transportation in question the plaintiff in error was the initial carrier. But the obvious answer is that what is required by the law of Iowa has been determined by the Supreme Court of that State. That court, examining the various provisions of the Iowa Code which have relation to the matter, has held that the order was within the authority of the Railroad Commission. 152 Iowa, 317, 320, 321.

Further, the plaintiff in error insists that the enforcement of the order would deprive it of its liberty to contract, and of its property, without due process of law, and would deny to it the equal protection of the laws in violation of the Fourteenth Amendment. We find these objections to be without merit. It was competent for the State, acting within its jurisdiction and not in hostility to any Federal regulation of interstate commerce, to compel the carrier to accept cars which were already loaded and in suitable condition for transportation over its line. The requirement was a reasonable one. It cannot be said that the plaintiff in error had a constitutional right to burden trade by insisting that the commodities should be unloaded and reloaded in its own equipment. Upon this point the case of *Wisconsin &c. R. R. Co.* v. *Jacobson*, 179 U. S. 287, is decisive. There is no essential difference, so far as the power of the State is concerned, between such an order as we have here and one compelling the

carrier to make track connections, and to receive cars from connecting roads, in order that reasonably adequate facilities for traffic may be provided. See also *Minneapolis & St. Louis* v. *Minnesota*, 186 U. S. 257, 263; *Atlantic Coast Line* v. *North Carolina Corp. Com'n*, 206 U. S. 1, 19, 27; *Missouri Pacific Rwy. Co.* v. *Kansas*, 216 U. S. 262; *Grand Trunk Rwy. Co.* v. *Michigan Railroad Commission*, 231 U. S. 457, 468.

It is argued that it was unreasonable to subject the Railway Company to the expense incident to the use of the cars of another carrier when it was ready to furnish its own. The record affords no sufficient basis for this contention. What the expense referred to would be was not proved, and, in the absence of a suitable disclosure of the pertinent facts, no case was made which would justify the conclusion that in its practical operation the regulation would impose any unreasonable burden. On the other hand, the agreed statement makes it evident that prior to the change which gave rise to this controversy it was the practice of the Company to accept such shipments.

Finally, it is said that the order of the Commission interferes with interstate commerce because the cars in question were the vehicles of that commerce and were brought into the State as such. No question, however, is presented here as between the shippers and the owners of the cars, and no actual interference with interstate commerce is shown. Nor does it appear that any regulation under Federal authority has been violated.

The plaintiff in error has failed to establish any ground for invalidating the order of the Commission and the judgment must be affirmed.

Affirmed.

WHITE *v.* ISLAND TRANSPORTATION COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

No. 206. Submitted January 26, 1914.—Decided April 13, 1914.

The jurisdiction of a district court in a proceeding in admiralty to limit the liability of a ship owner, under Rev. Stat., §§ 4283 *et seq.*, is not ousted merely because a damage claimant puts in issue the allegation in the petition or libel that the damage was occasioned without the privity or knowledge of the owner. *Butler* v. *Boston Steamship Co.*, 130 U. S. 527.

In a proceeding in admiralty under Rev. Stat., §§ 4283 *et seq.*, questions of fact, whether jurisdictional or otherwise, are to be settled by a trial; and where the petition alleges that the damage or injury, liability for which is sought to be limited, was occasioned without the privity or knowledge of the owner, and the damage claimant waives proof of that allegation, it must be taken as true, and there will be no defect of jurisdiction in that regard.

Under Rev. Stat., §§ 4283 *et seq.*, and admiralty rules 53–57, a proceeding to limit the liability of the ship owner may be maintained whether there be a plurality of claims or only one.

THE facts, which involve the construction and application of the statutes regarding limitation of liability of vessel owners, are stated in the opinion.

Mr. M. J. Gordon, Mr. P. C. Sullivan and *Mr. E. B. Stevens* for appellant:

The limited liability acts of Congress do not extend to appellant's cause of action, as that cause of action is disclosed by the record. Section 4283, Comp. Stat. 1901, p. 2943. As additional or supplementary thereto, see § 18, c. 121, act of June 26, 1884; *Richardson* v. *Harmon*, 222 U. S. 96.

The injury for which the appellant sought recovery did not arise out of the conduct of the master or crew, but

from the fault and negligence of the owners in improperly constructing a vessel which it thereafter devoted to the carriage of passengers for hire.

The claim which the appellant was asserting was one predicated on negligent construction by the owner, as contradistinguished from any negligence arising out of the conduct of the master and the crew.

The law devolved upon the appellee as a common carrier of passengers for hire the duty of providing safely constructed and properly equipped boats engaged in such carriage, so far as the exercise of the highest degree of care, prudence and foresight might contribute toward making them safe. *Phila. & Reading Ry. Co.* v. *Derby*, 14 How. 485; *Steamboat New World* v. *King*, 16 How. 469; *Penna. R. R. Co.* v. *Roy*, 102 U. S. 451; *Stokes* v. *Saltonstall*, 13 Pet. 181; *Railroad Co.* v. *Pollard*, 22 Wall. 341; *Williams* v. *S. F. & N. Ry. Co.*, 39 Washington, 77; *Firebaugh* v. *Seattle Electric Co.*, 40 Washington, 658.

Since the owner had the right to design and construct this vessel according to its own plan, it would seem to follow, as a necessary sequence, that an injury to a passenger which is the result of improper construction, must be attributed to the fault of the owner, rather than that of the master and crew.

Mr. Ovid A. Byers and *Mr. Alpheus Byers* for appellee.

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

While a passenger on the steamboat *Fairhaven*, plying upon Puget Sound, Laura G. White sustained a severe personal injury in being caught or thrown by a rod, called a hog-chain, extending through the deck and connecting with the paddle-wheel. To recover for the injury she brought an action against the Island Transportation

Company, the owner of the vessel, in the Superior Court for King County, in the State of Washington, naming $21,350.87 as her damages. The owner then filed a libel or petition in the District Court of the United States for that district to secure the benefit of the statute limiting the liability of vessel owners. Rev. Stat., §§ 4283–4285; Admiralty Rules, 53–57, 210 U. S. 562. The petition referred to the action in the state court, and alleged that the damage claimant was insisting that her injury was caused by "the carelessness and negligence of the employés" of the owner in handling the vessel, in not furnishing the passengers with safe and proper facilities, and in not informing them of dangerous conditions. It also alleged that the claimant was injured through her own negligence, without any fault in the construction, equipment, management, control or care of the vessel, and especially without the privity or knowledge of the owner; that there was a valid and meritorious defense to the claim; and that the value of the vessel did not exceed $10,000. The petition, while insisting upon the right of the owner, under admiralty rule 56, to contest its liability and that of the vessel in that proceeding, prayed for an appraisement of the vessel and her pending freight, for an order for the payment of the amount of the appraisement into court or the giving of a stipulation with sureties for such payment whenever required, for the issuance of a monition in the usual form and upon the usual condition, for an order restraining the prosecution of the action in the state court, for a decree limiting the owner's liability, if any, and for other appropriate relief. Although laying no special basis for it, the petition also, in a general way, indicated that the owner apprehended other claims and actions of a like character, and the prayer for the monition and relief was so framed as to include them. After other steps in the proceeding which need not be noticed, the claimant answered alleging, in substance, that her

claim was founded solely upon the owner's negligence in that the hog-chain was part of the construction of the vessel, and, with the knowledge and acquiescence of the owner, was negligently left unboxed, uncovered and unguarded so that it endangered the passengers when upon the deck, in the place regularly assigned to them, and that her injury was caused by such negligence and not by any fault of her own. In addition, the answer contained this paragraph: "8th. The respondent further alleges that the facts are such that the petitioner is not entitled to take the benefit of the limited liability acts, and joins issue with the petitioner thereon and asks that the court determine this question before it proceeds further in the said matter." The claimant also moved to dismiss the proceeding for want of jurisdiction, upon the ground that the pleadings showed that the injury was attributable to negligence of the owner, and that the petition disclosed but one claim and laid no basis for apprehending the existence of others. The motion to dismiss was overruled, and an exception reserved. The claimant elected to stand upon the motion and refused to move further in the proceeding, whereupon, proof of the allegations of the petition "being waived," a final decree was entered for the owner adjudging that the claimant take nothing by the proceeding. This appeal followed, and a certificate was granted showing the grounds of the motion, the court's ruling, and the exception. See Judicial Code, § 238.

The objection that the court was without jurisdiction, because the pleadings showed that the damage was occasioned by the negligence of the owner, evidently resulted from a misapprehension of what was in the pleadings. So far were they from settling where the fault lay that they put the matter directly in issue, the petition alleging that the injury was occasioned without the owner's privity or knowledge and the answer affirming that it was caused by the owner's negligence and not otherwise. If the fact was

as alleged in the petition, the case was within the statute, for § 4283 declares: "The liability of the owner of any vessel . . . for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." And while the claimant was at liberty, under admiralty rule 56, to contest the owner's right to a limitation of liability, the decision of the question necessarily rested with the court. Its jurisdiction was not ousted merely because the claimant took issue with what was alleged in the petition. *Butler* v. *Boston Steamship Co.*, 130 U. S. 527, 552, 553. The questions of fact so presented were to be settled by a trial, and this was so whether the facts were jurisdictional or otherwise. But there was no trial. Instead of insisting that the allegations of the petition be proved, the claimant expressly waived proof of them, thereby consenting that they be taken as true. As they were plainly to the effect that the injury was without the privity or knowledge of the owner, there was no defect in the jurisdiction at that point.

The objection that the court could not entertain the proceeding, because the petition disclosed only one claim arising out of the injury, is grounded upon the terms of §§ 4284 and 4285, which require a *pro rata* distribution of the value of the vessel and freight when not sufficient to satisfy all claims, authorize proceedings to obtain the benefit of the statute, make the surrender of the vessel and freight for the benefit of claimants a sufficient compliance with the statute on the part of the owner, and declare that upon such surrender all claims and proceedings against the owner shall cease. It must be conceded that these sections, if taken alone, give color to the objection, for, with a single exception, their words apparently contemplate a plurality of claims. But to a right understand-

ing of these sections it is essential that they be read with § 4283. It contains the fundamental provision on which the others turn. It broadly declares that "the liability . . . for *any* . . . damage . . . occasioned . . . without the privity or knowledge of such owner . . . shall *in no case* exceed" the value of the vessel and freight. The succeeding sections are in the nature of an appendix and relate to the proceedings by which the first is to be made effective. Therefore, they should be so construed as to bring them into correspondence with it. It was so held in *Butler* v. *Boston Steamship Co.*, *supra* (pp. 550, 551), where it became necessary to consider another difference in terms between them and it. In that case this court said, quoting from a decision of the Supreme Court of Rhode Island: "These sections [4284 and 4285], if we look only to the letter, apply only to injuries and losses of property. The question is, therefore, whether we shall by construction bring the three sections into correspondence by confining the scope of § 4283 to injuries and losses of property, or by enlarging the scope of the two other sections so as to include injuries to the person. We think it is more reasonable to suppose that the designation of losses and injuries in §§ 4284 and 4285 is imperfect, a part being mentioned representatively for the whole, and consequently that those sections were intended to extend to injuries to the person as well as to injuries to property, than it is to suppose that § 4283 was intended to extend only to the latter class of injuries, and was inadvertently couched in words of broader meaning." In the lower Federal courts there has been some contrariety of opinion upon the point now being considered, but the prevailing view has been that due regard for the broad terms and dominant force of § 4283 requires that §§ 4284 and 4285 be construed as authorizing a proceeding for limitation of liability whether there be a plurality of claims or only one. *Quinlan* v. *Pew*, 56 Fed. Rep. 111, 120; *The S. A. McCaulley*,

99 Fed. Rep. 302, 304; *The Hoffmans*, 171 Fed. Rep. 455, 457; Benedict's Admiralty, 4th ed., § 533. In the recent case of *Richardson* v. *Harmon*, 222 U. S. 96, where there was but a single claim, it was assumed by both court and counsel that a plurality of claims was not essential. We think that is the true view of the statute.

Decree affirmed.

FARRUGIA *v.* PHILADELPHIA & READING RAILWAY COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 823. Argued March 2, 1914.—Decided April 13, 1914.

The provision in § 238, Judicial Code, providing for a direct writ of error in any case in which the jurisdiction of the court is in issue, refers to cases in which the power of the court, as a Federal court, to hear and determine the cause is in controversy.

Where that power is not in question, but only the sufficiency of the evidence to establish an element of the plaintiff's asserted cause of action, § 238, Judicial Code, does not apply and the writ of error must be dismissed.

A decision of the District Court of the United States granting a compulsory non-suit in an action brought under the Employers' Liability Act because the evidence did not show that the plaintiff was engaged in interstate commerce, is subject to review in the Circuit Court of Appeals. A direct writ of error to this court under § 238, Judicial Code, will not lie as the jurisdiction of the court as a Federal court is not in issue.

THE facts, which involve the construction and application of the Employers' Liability Act, and the jurisdiction of this court of a direct appeal from the District Court under the Judicial Code, are stated in the opinion.

Mr. George Demming for plaintiff in error.

Mr. William Clarke Mason, with whom *Mr. Charles Heebner* was on the brief, for defendant in error.

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

This was an action against a railway company to recover for personal injuries. The right of action was predicated upon the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, as amended April 5, 1910, c. 143, 36 Stat. 291, and it was alleged that the injuries were sustained while the defendant was engaged, and while the plaintiff was employed by it, in interstate commerce. There was a plea of not guilty, and a trial resulted in a judgment of compulsory non-suit. The case is here upon a direct writ of error based upon a certificate that the court's decision was given upon a jurisdictional ground, namely, that "the evidence produced at the said trial of the case did not disclose that plaintiff, at the time of the happening of the accident by which he received the injuries complained of, was engaged in interstate commerce."

Although counsel have presented the case as if it were properly here, it is manifest that it is not. The clause in § 238 of the Judicial Code providing for a direct writ of error "in any case in which the jurisdiction of the court is in issue" refers, as we have repeatedly held, to cases in which the power of the court, as a Federal court, to hear and determine the cause is in controversy. *Fore River Shipbuilding Co.* v. *Hagg*, 219 U. S. 175, 178; *United States* v. *Congress Construction Co.*, 222 U. S. 199; *Darnell* v. *Illinois Central Railroad Co.*, 225 U. S. 243. No such issue is here disclosed. The power of the court, as a Federal court, to hear and determine the case was not questioned. Nor did the court hold that it was without jurisdiction

in that sense. On the contrary, it proceeded to a hearing and decided that the plaintiff could not recover under the Federal act, because one element of his asserted cause of action was without any evidence to sustain it. Had the action been brought in a state court, as it could have been, the same question would have arisen, and had the evidence been similarly insufficient a like decision must have ensued. We say the action could have been brought in a state court, because § 6 of the Federal act declares: "The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several States, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States." And we say the result must have been the same in a state court upon similar evidence, because the right of recovery given by the act (§ 1) is restricted to injuries suffered while the employé is employed in interstate commerce.

It follows that there was no basis for the direct writ of error. If a review of the decision was desired it should have been sought in the Circuit Court of Appeals.

Writ of error dismissed.

TENNESSEE COAL, IRON & RAILROAD COMPANY *v.* GEORGE.

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

No. 299. Argued March 17, 1914.—Decided April 13, 1914.

While the courts of a State are bound to give full faith and credit to all substantial provisions of a statute of another State creating a transitory cause of action which inhere in the cause of action or which name conditions on which the right to sue depends, venue is no part of a right, and whether jurisdiction exists is to be determined by

the law of the State creating the court in which the case is tried.

A State cannot create a transitory cause of action and at the same time destroy the right to sue thereon in any court having jurisdiction although in another State.

The jurisdiction of a court over a transitory cause of action cannot be defeated by the extraterritorial operation of a statute of another State even though the latter created the cause of action.

The statute of Alabama making the master liable to the employé for defective machinery created a transitory cause of action which can be sued on in another State having jurisdiction of the parties, notwithstanding the statute provides that all actions must be brought thereunder in the courts of Alabama and not elsewhere.

A state court does not deny full faith and credit to a statute of another State by taking jurisdiction of a transitory cause of action created thereby, although such statute provides that the action can only be brought in the courts of the enacting State. *Atchison &c. Ry.* v. *Sowers*, 213 U. S. 55.

11 Ga. App. 221, affirmed.

THE facts, which involve the validity of a judgment of the courts of the State of Georgia and the determination of whether those courts gave full faith and credit to a statute of the State of Alabama affecting the cause of action, are stated in the opinion.

Mr. Alexander W. Smith for plaintiff in error:

The mandate of the full faith and credit clause of the Constitution of the United States is not obeyed in the courts of a State when it recognizes the public acts of a sister State, creating a right of action nonexistent at the common law, and refuses compliance with the provision of the same statutes restricting the enforcement of that right to the courts of competent jurisdiction in the State creating it. *A., T. & S. F. Ry.* v. *Sowers*, 213 U. S. 55; *El Paso &c. Ry.* v. *Gutierrez*, 215 U. S. 87.

The condition, or limitation, put upon a right of action created by statute, and not existing at common law, inheres in the right itself and follows it into other jurisdictions. *Galveston &c. Ry. Co.* v. *Wallace*, 223 U. S. 481, 490;

The Harrisburg, 119 U. S. 199; *Davis* v. *Mills*, 194 U. S. 451, 454; *Munos* v. *So. Pac. Co.*, 51 Fed. Rep. 188; *Stern* v. *LaCompagnie &c.*, 110 Fed. Rep. 996 (2); *The Edna* (Ala. statute), 185 Fed. Rep. 206; *United States* v. *Boomer*, 183 Fed. Rep. 726; *Coyne* v. *So. Pac. Co.*, 155 Fed. Rep. 683.

Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right.

Such a condition, or limitation, need not be contained in the same statute. It operates the same way if it be specially attached to such a statutory right of action subsequently and in a different statute. *Davis* v. *Mills*, 194 U. S. 451, 454.

The courts of the United States take judicial notice of the public laws of each State of the Union. *Mills* v. *Green*, 159 U. S. 651, 657.

Where a limitation to local courts is affixed to a cause of action existing at the common law, and independently of the statute affixing it, the limitation may be disregarded as in the *Sowers Case, supra.* A well defined distinction exists between cases based on common law liability and those depending on statutory rules of liability. *Charleston &c. Ry. Co.* v. *Miller*, 113 Georgia, 15; *Chicago &c. Ry. Co.* v. *Ross*, 112 U. S. 377, 382; *Missouri &c. Ry. Co.* v. *Mackey*, 127 U. S. 205; *B. & O. R. R.* v. *Baugh*, 149 U. S. 368, 378, 379; *Missouri Pac. Ry.* v. *Castle*, 224 U. S. 541; *Employers' Liability Cases*, 207 U. S. 463, 537; *Second Employers' Liability Cases*, 223 U. S. 1, 49; *Mobile Ry. Co.* v. *Holburn*, 84 Alabama, 133; *S. C.*, 4 So. Rep. 146.

"Interstate venue," or venue as between different countries, is jurisdictional. "Municipal venue," or venue as between different places in the same jurisdiction, as a rule has to do with procedure merely. *Ellenwood* v. *Marietta Chair Co.*, 158 U. S. 105, 108; *British So. Africa Co.* v. *Companhia &c.*, 2 Q. B. 358.

There is a distinction between the existence of jurisdiction in a given court and its proper exercise in a given case therein. *Smith* v. *McKay*, 161 U. S. 355, 358; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225, 233; *United States* v. *Larkin*, 208 U. S. 333, 338; *Fore River &c.* v. *Hagg*, 219 U. S. 175; Van Fleet's Collateral Attack, Chap. IV.

Dennick v. *R. R. Co.*, 103 U. S. 11, 18; *Texas &c. Ry. Co.* v. *Cox*, 145 U. S. 593; *Stewart* v. *B. & O. R. R.*, 168 U. S. 445; *Whitman* v. *Oxford National Bank*, 176 U. S. 559, can be distinguished, as in not one of these cases was the right of action restricted or limited by the law which created it, and that restriction disregarded.

The principle involved is closely analogous to that found in the decisions relative to the enforcement of "death statutes" enacted in one State and invoked in another. All restrictions and limitations therein found are enforced everywhere. *Slater* v. *Mex. Nat. R. R.*, 194 U. S. 120, 126; *Chambers* v. *B. & O. R. R.*, 207 U. S. 142.

So, also, it is analogous to the application of statutes of limitations of the *lex loci* in the forum. *Davis* v. *Mills*, 194 U. S. 451, 457; *Selma &c.* v. *Lacey*, 49 Georgia, 106.

So, also, it is analogous to the question of statutory venue of suits under the act of Congress authorizing actions on contractors' bonds in Government work. *Davidson &c. Co.* v. *Gibson*, 213 U. S. 10, 16; *United States* v. *Boomer* (8 C. C. A.), 183 Fed. Rep. 726; *United States* v. *Congress Construction Co.*, 222 U. S. 199; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 213 U. S. 55.

Inasmuch as the statutes of Alabama, here under consideration, confessedly create a new and statutory cause of action, expressly abrogating common law principles otherwise applicable, the *Sowers Case, supra,* does not support the judgment.

Mr. Reuben R. Arnold for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

Wiley George, the defendant in error, was an engineer employed by the Tennessee Coal, Iron and Railroad Company at its steel plant in Jefferson County, Alabama. While he was under a locomotive repairing the brakes, a defective throttle allowed steam to leak into the cylinder causing the engine to move forward automatically in consequence of which he was seriously injured. He brought suit by attachment, in the City Court of Atlanta, Georgia, founding his action on § 3910 of the Alabama Code of 1907, which makes the master liable to the employé when the injury is "caused by reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the master or employer."

The defendant filed a plea in abatement in which it was set out that § 6115 of that Code also provided that "all actions under said section 3910 must be brought in a court of competent jurisdiction within the State of Alabama and not elsewhere." The defendant thereupon prayed that the action be abated because "to continue said case on said statutory cause of action given by the statutes of Alabama and restricted by said statutes to the courts of Alabama, . . . would be a denial so far as the rights of this defendant are concerned, of full faith and credit to said public acts of the State of Alabama in the State of Georgia, contrary to the provisions of Art. 4, § 1 of the Constitution of the United States." A demurrer to the plea in abatement was sustained and the judgment for the plaintiff thereafter entered was affirmed by the Court of Appeals. The case was then brought to this court.

The record raises the single question as to whether the full faith and credit clause of the Constitution prohibited the courts of Georgia from enforcing a cause of action

given by the Alabama Code, to the servant against the master, for injuries occasioned by defective machinery, when another section of the same Code provided that suits to enforce such liability "must be brought in a court of competent jurisdiction within the State of Alabama *and not elsewhere.*"

There are many cases where right and remedy are so united that the right cannot be enforced except in the manner and before the tribunal designated by the act. For the rule is well settled that "where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed." *Pollard* v. *Bailey*, 20 Wall. 520, 527; *Galveston Ry.* v. *Wallace*, 223 U. S. 481, 490; *Stewart* v. *B. & O. R. R.*, 168 U. S. 445; *National Bank* v. *Francklyn*, 120 U. S. 747, 753.

But that rule has no application to a case arising under the Alabama Code relating to suits for injuries caused by defective machinery. For, whether the statute be treated as prohibiting certain defenses, as removing common law restrictions or as imposing upon the master a new and larger liability, it is in either event evident that the place of bringing the suit is not part of the cause of action,—the right and the remedy are not so inseparably united as to make the right dependent upon its being enforced in a particular tribunal. The cause of action is transitory and like any other transitory action can be enforced "in any court of competent jurisdiction within the State of Alabama. . . . " But the owner of the defective machinery causing the injury may have removed from the State and it would be a deprivation of a fixed right if the plaintiff could not sue the defendant in Alabama because he had left the State nor sue him where the defendant or his property could be found because the statute did not permit a suit elsewhere than in Alabama. The injured plaintiff may likewise have moved from Alabama and for that, or other, reason may have found it to his interest to

bring suit by attachment or *in personam* in a State other than where the injury was inflicted.

The courts of the sister State trying the case would be bound to give full faith and credit to all those substantial provisions of the statute which inhered in the cause of action or which name conditions on which the right to sue depend. But venue is no part of the right; and a State cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction. That jurisdiction is to be determined by the law of the court's creation and cannot be defeated by the extraterritorial operation of a statute of another State, even though it created the right of action.

The case here is controlled by the decision of this court in *Atchison &c. Ry.* v. *Sowers*, 213 U. S. 55, 59, 70, where the New Mexico statute, giving a right of action for personal injuries and providing that suits should be brought after certain form of notice in a particular district, was preceded by the recital that "it has become customary for persons claiming damages for personal injuries received in this Territory to institute and maintain suits for the recovery thereof in other States and Territories to the increased cost and annoyance and manifest injury and oppression of the business interests of this Territory and in derogation of the dignity of the courts thereof." Despite this statement of the public policy of the Territory, the judgment obtained by the plaintiff in Texas was affirmed by this court in an opinion wherein it was said that where an action is brought in "another jurisdiction based upon common law principles, although having certain statutory restrictions, such as are found in this [territorial] act as to the making of an affidavit and limiting the time of prosecuting the suit, full faith and credit is given to the law, when the recovery is permitted, subject to the restrictions upon the right of action imposed in the Territory enacting

the statute. . . . When it is shown that the court in the other jurisdiction observed such conditions, and that a recovery was permitted after such conditions had been complied with, the jurisdiction thus invoked is not defeated because of the provision of the statute" requiring the suit to be brought in the district where the plaintiff resides or where the defendant, if a corporation, has its principal place of business.

It is claimed, however, that the decision in the *Sowers Case* is not in point because the plaintiff was there seeking to enforce a common law liability, while here he is asserting a new and statutory cause of action. But that distinction marks no difference between the two cases because in New Mexico, common law liability is statutory liability—the adopting statute (Compiled Laws, § 1823), providing that "the common law as recognized in the United States of America shall be the rule of practice and decision."

The decision in the *Sowers Case*, however, was not put upon the fact that the suit was based on a common law liability. The court there announced the general rule that a transitory cause of action can be maintained in another State even though the statute creating the cause of action provides that the action must be brought in local domestic courts.

In the present case the Georgia court gave full faith and credit to the Alabama act and its judgment is

Affirmed.

MR. JUSTICE HOLMES dissents.

CARONDELET CANAL AND NAVIGATION COMPANY *v.* STATE OF LOUISIANA.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 78. Argued March 16, 17, 1914.—Decided April 20, 1914.

As the judgment of the state court disposed of, and ordered the delivery of the property sued for, and in so doing disposed of the Federal defense interposed, it has substantial finality on which to base the writ of error, notwithstanding a reservation as to some property not appurtenant and provision for an accounting as to certain disbursements.

If the further proceedings in the court below apply only to questions reserved, so that the decree can be immediately executed as to the property involved, and as to that it is final, the judgment is final in form as well as in substance, and a writ of error properly lies from this court.

The fact that the Supreme Court of the State did not refer to a statute claimed to have impaired the rights of plaintiff in error, does not prevent this court from considering that statute, and if it was an essential, although an unmentioned, element of the decision, it is a basis for the Federal question set up.

Bad motives need not be imputed to a legislature in order to render a statute unconstitutional under the contract clause; it is not the motive causing the enactment, but the effect thereof on contract rights, which determines the question of constitutionality.

The repeal of a law which constitutes a legislative contract is an impairment of its obligation.

The acts of 1857 and 1858 of the legislature of Louisiana did grant certain contract rights to the Carondelet Canal and Navigation Company which are within the protection of the contract clause of the Federal Constitution, and the act of 1906 repealing the act of 1858 impaired the contract obligation of the latter.

The natural and grammatical use of a relative pronoun is to put it in close relation with its antecedent, and in this case so *held* as to the pronoun "it," notwithstanding its use rendered the sentence somewhat ambiguous.

The provision in the act of 1858 of Louisiana, granting rights to a corporation on certain conditions, that after fifty years "it may

revert to the State," *held* to relate to the company and not to one of the properties specified.

In construing a statute which at the time of its enactment was published in more than one language, the version in the other language is significant.

In this case, *held*, that as reversion of property to the State was contingent on compensation, the statute should be construed as making payment a condition precedent of the reversion, as it could not be intended to remit the owner to a mere claim against the State which could not be enforced as the sovereignty of the State would give immunity from suit.

129 Louisiana, 279, reversed.

THE facts, which involve the jurisdiction of this court to review judgments of the state courts and also the constitutionality under the contract clause of the Federal Constitution of a statute of Louisiana relating to the property of Carondelet Canal and Navigation Company and the right of the State to acquire its property, are stated in the opinion.

Mr. Edgar H. Farrar, with whom *Mr. Benjamin T. Waldo* and *Mr. W. C. Dufour* were on the brief, for plaintiff in error:

The judgment of the Supreme Court is final in form and in substance, as it decides the right to the property in contest, and directs it to be delivered up by the defendant to the State, the plaintiff in the action, and the plaintiff is entitled to have such decree carried immediately into effect. *Forgay* v. *Conrad*, 6 How. 201; *Thompson* v. *Dean*, 7 Wall. 342, 346; *French* v. *Shoemaker*, 12 Wall. 86, 98; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3; *Grant* v. *Phœnix Co.*, 106 U. S. 429; *Winthrop Iron Co.* v. *Meeker*, 109 U. S. 180; *St. Louis Ry.* v. *Southern Ex. Co.*, 108 U. S. 24, 28; *M., K. & T. R. R.* v. *Dinsmore*, 108 U. S. 30; *Keystone Iron Co.* v. *Martin*, 132 U. S. 91; *Lewisburg Bank* v. *Scheffey*, 140 U. S. 452.

The Federal questions involved were set up in oral argu-

ment and in the briefs on the merits. They were set up again in the application for a rehearing. *C., B. & Q. R. R.* v. *Drainage Commission*, 200 U. S. 561.

The judgment of a state court, even if it be authorized by a statute, whereby private property is taken for the State, or under its direction, for public use, without compensation, is upon principle and authority wanting in the due process of law required by the Fourteenth Amendment. The same principle applies to a statute of a State. *Chi., B. &c. R. R.* v. *Chicago*, 166 U. S. 226; *Fayerweather* v. *Rich*, 195 U. S. 276, and *Union Transit Co.* v. *Kentucky*, 199 U. S. 202.

This court will determine for itself what the contract claimed to be violated was. *Douglas* v. *Kentucky*, 168 U. S. 502; *McGahey* v. *Virginia*, 135 U. S. 662; *McCullough* v. *Virginia*, 172 U. S. 110; *Vicksburg* v. *Waterworks Co.*, 202 U. S. 467.

This court will review the findings of fact by a state court where a conclusion of law as to a Federal right and the finding of fact are so intermingled as to make it necessary to analyze and dissect the facts for the purpose of passing on the Federal question. *Creswill* v. *Knights of Pythias*, 225 U. S. 261; *Wood* v. *Chesborough*, 228 U. S. 678.

The necessary corollary of these propositions is that when the claim is that claimant has been deprived of property without due process of law, this court will find for itself what the claimant's property rights were, and how he has been deprived of them.

The plaintiff in error had legislatively recognized rights upon the property adjudged to the State by the Supreme Court of Louisiana.

The State never had any proprietary interest in and to the improvements on the Canal, Basin and Bayou, and never claimed any. She could have no claim to anything but to the Canal, Bayou and Basin as they stood in 1805;

and the act of 1896, which the court has enforced, takes plaintiff in error's property in violation of the charter rights of plaintiff under the acts of 1857 and 1858. La. Civil Code, Art. 23; *Henrietta Mining Co.* v. *Gardiner*, 173 U. S. 123; *United States* v. *Tyner*, 11 Wall. 92.

The reversion provided for in § 4 of the act of 1858 was the same thing as was originally provided for in the repealed section of the act of 1857.

If what was to revert under the act of 1858 on due compensation was the same thing as what was to revert under the repealed section of the act of 1857, then the act of 1906, sued on by the State and enforced substantially by the Supreme Court of Louisiana, impaired the obligation of the contract between the State and the plaintiff in error, because that act made no provision for compensation to the plaintiff in error.

If what was to revert, on due compensation made, expressed by the word "it" in the act of 1858 meant only the railroad, which was never built, and § 4 of the act of 1858 repealed § 20 of the act of 1857, then the State had no right of reversion to, or any other right to, any of the property and improvements connected with the Basin, Canal and Bayou St. John and the roadways on the sides thereof, and the adjudging of all of this property to the State by the state court without compensation to the company, and executing the act of 1906, was a taking of the company's property without due process of law in violation of the Fourteenth Amendment.

Even if the tenure by which the company held the waterway sued for was a lease, the State, as lessor, could not take the property at the end of the lease and keep the improvements made by the lessee, without making compensation therefor. La. Civ. Code, Art. 2726; *Ross* v. *Zuntz*, 36 La. Ann. 888.

The State had no title to the Canal and Basin; they were the property of the United States, on which the de-

fendant's antecessor in title had been granted perpetual rights by the legislative council of the Territory of Orleans, with the implied consent of Congress, to which rights the company had succeeded by the legislative direction of the State of Louisiana, and the State had no right to take this property and its improvements and appurtenances from the company except under its contractual right of reversion under the act of 1858.

The grant of the territorial council to the Orleans Navigation Company was valid, and it would have been valid even if made by the State. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 61.

Even the United States could not have taken the improvements made on the Basin, Canal and Bayou St. John by the grantee of a valid grant without compensation. See *Carondelet Canal &c.* v. *Tedesco*, 37 La. Ann. 100; *Carondelet Canal &c.* v. *Parker*, 29 La. Ann. 434; *City* v. *Carondelet Canal &c.*, 36 La. Ann. 396; *Orleans Nav. Co.* v. *City*, 1 Martin, (O. S.) 23; *Same* v. *Same*, 2 *Id.* 214; *State* v. *Orleans Nav. Co.*, 11 Martin (O. S.), 309; *S. C.*, 7 La. Ann. 679; *United States* v. *Tyner*, 11 Wall. 92.

Mr. Ruffin G. Pleasant, Attorney General of the State of Louisiana, with whom *Mr. Daniel Wendling* was on the brief, for defendant in error:

The judgment is not final. The case should also be dismissed because no Federal question is involved. *Haseltine* v. *Central Bank*, 183 U. S. 131; *Navigation Co.* v. *Oyster Com'n*, 226 U. S. 99; *Missouri &c. Ry.* v. *Olathe*, 222 U. S. 185; *Norfolk Turnpike Co.* v. *Virginia*, 225 U. S. 264; *Schlosser* v. *Hemphill*, 198 U. S. 175.

Plaintiff in error's sole contention is that the lower court did not give to the act of 1858 the interpretation placed thereon by it. This does not present a Federal question.

Act 161 of 1906, providing for the appointment of a

Board of Control to take over the canal, did not impair the contract in the act of 1858.

No specific claim is made in the answer that said act impairs contract obligation, and that act does not impair contract rights.

The State did not rely upon the act of 1906 in support of its demand, but upon the charter and amended charter of the Canal Company.

Section 9 of the act of 1906, creating a Board of Control, provides that the act shall take effect October 1, 1907, and this date was fixed on as the time when said Board should organize as such, and not when it should take over the canal property and improvements.

The Supreme Court held that the State should take over the canal, etc., from the date mentioned in the amended charter of 1858, March 10, 1908, and not the date mentioned in the act of 1906. *Beaupre* v. *Noyes*, 138 U. S. 397; *Bacon* v. *Texas*, 163 U. S. 207; *Cross Lake Club* v. *Louisiana*, 224 U. S. 632; *Central Land Co.* v. *Laidley*, 159 U. S. 110; *Chappell* v. *Bradshaw*, 128 U. S. 132; *Clark* v. *Pennsylvania*, 128 U. S. 397; *Commercial Bank* v. *Buckingham*, 5 How. 317; *Des Moines* v. *Railway Co.*, 214 U. S. 179; *Cons. Turnpike Co.* v. *Norfolk Ry.*, 228 U. S. 599; *De Saussere* v. *Gaillard*, 127 U. S. 222; *Deming* v. *Packing Co.*, 226 U. S. 102; *Fletcher* v. *Peck*, 6 Cr. 87; *Hamblin* v. *Land Co.*, 147 U. S. 531; *Kennebec &c. R. R.* v. *Portland &c. R. R.*, 14 Wall. 23; *Knox* v. *Exchange Bank*, 12 Wall. 379; *Lehigh Water Co.* v. *Easton*, 121 U. S. 388; *N. O. Water Works* v. *Am. Sugar Co.*, 125 U. S. 30; *Preston* v. *Chicago*, 226 U. S. 447; *Ross* v. *Oregon*, 227 U. S. 150; *Spies* v. *Illinois*, 123 U. S. 131; *St. Paul Co.* v. *St. Paul*, 181 U. S. 149; *Turner* v. *Wilkes Co.*, 173 U. S. 461; *Wood* v. *Chesborough*, 228 U. S. 672; *Wilson* v. *North Carolina*, 169 U. S. 586; *Y. & M. V. R. R.* v. *Adams*, 180 U. S. 41.

The judgment does not give effect to the act of 1906, but rests on entirely independent grounds.

The judgment is broad enough to sustain it without reference to alleged Federal question or giving effect to subsequent act. Cases *supra* and *Arkansas So. Ry.* v. *German Nat. Bank*, 207 U. S. 270; *Capital City Dairy* v. *Ohio*, 183 U. S. 238; *Chappell Chemical Co.* v. *Sulphur Mines*, 172 U. S. 471; *Chesapeake &c. Ry.* v. *McDonald*, 214 U. S. 193; *Columbia Water Co.* v. *Ry.*, 172 U. S. 475; *Delaware Co.* v. *Reynold*, 150 U. S. 361; *Fowler* v. *Lamson*, 164 U. S. 252; *Fisher* v. *New Orleans*, 218 U. S. 439; *Hammond* v. *Johnson*, 142 U. S. 73; *Iowa Central Ry.* v. *Iowa*, 160 U. S. 389; *Jenkins* v. *Lowenthal*, 110 U. S. 222; *Klinger* v. *Missouri*, 13 Wall. 257; *Long Island Water Co.* v. *Brooklyn*, 166 U. S. 685; *Miller* v. *Railroad Co.*, 168 U. S. 131; *Mo. Pac. R. R.* v. *Fitzgerald*, 160 U. S. 556; *Mobile &c. R. R.* v. *Mississippi*, 210 U. S. 187; *Murdock* v. *Mayor*, 20 Wall. 590; *Powder Co.* v. *Davis*, 151 U. S. 389; *Rutland Railroad* v. *Cent. Ver. R. R.*, 159 U. S. 630; *Snell* v. *Chicago*, 152 U. S. 191; *Simmerman* v. *Nebraska*, 116 U. S. 54; *Taylor* v. *Cass County*, 142 U. S. 288; *Wood Co.* v. *Skinner*, 139 U. S. 293.

Congressional grants of land to the Orleans Navigation Company do not involve a Federal question; there is no dispute as to the validity or construction thereof.

The ownership of the property is not a factor in the case, as it is agreed to surrender the same at the end of the corporate existence. *Chever* v. *Horner*, 142 U. S. 122; *Delamar Mining Co.* v. *Nesbit*, 177 U. S. 523; *Fla. Cent. R. R.* v. *Bell*, 175 U. S. 328, 329; *Gill* v. *Oliver*, 11 How. 529; *Gold Washing Co.* v. *Keyes*, 96 U. S. 199; *Hastings* v. *Jackson*, 112 U. S. 233; *McStay* v. *Friedman*, 92 U. S. 723; *Murray* v. *Mining Co.*, 45 Fed. Rep. 386; *Miller* v. *Swan*, 150 U. S. 132; *Mill* v. *Merrill*, 119 U. S. 581; *Maney* v. *Porter*, 4 How. 55; *Romie* v. *Cassanova*, 91 U. S. 379; *Theurkauf* v. *Ireland*, 27 Fed. Rep. 769.

There is no foundation for the claim of want of due process of law. *Bergman* v. *Backer*, 157 U. S. 655; *Central*

Land Co. v. *Laidley*, 159 U. S. 110; *Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 26; *Londoner* v. *Denver*, 210 U. S. 379; *Morley* v. *Lake Shore &c. R. R.*, 146 U. S. 162; *Standard Oil Co.* v. *Missouri*, 224 U. S. 270; *Twining* v. *New Jersey*, 211 U. S. 110; *Walker* v. *Sauvinet*, 92 U. S. 90; *West* v. *Louisiana*, 194 U. S. 261.

The Bayou St. John has always been held to be a navigable stream.

The State could not barter and sell, and, hence, could not give away the Bayou.

The plaintiff in error was bound to surrender the canal and property on the conditions named in its charter, and these conditions are what the Supreme Court held them to be.

The state court was construing its own statutes, which interpretation is always followed by this court.

If the contract of plaintiff in error, as evidenced by the acts of 1857 and 1858, is ambiguous and doubtful, plaintiff can take nothing thereby, for ambiguous grants are strictly construed against the grantee. Nothing can be inferred against the State. *Barney* v. *Keokuk*, 94 U. S. 338; 2 Baudry-Lacantinerie, "Du Contrat de Louage," p. 1, No. 1395; *Blair* v. *Chicago*, 201 U. S. 471; *Carondelet Canal Co.* v. *Tedesco*, 37 La. Ann. 102; *Carondelet Canal Co.* v. *New Orleans*, 38 La. Ann. 309; *Carondelet Canal Co.* v. *New Orleans*, 44 La. Ann. 396; *Cleveland* v. *Cleveland Ry.*, 204 U. S. 116; *New Orleans* v. *Carondelet Canal Co.*, 36 La. Ann. 397; *Dubuque &c. R. R.* v. *Litchfield*, 23 How. 66; *Elmendorf* v. *Taylor*, 10 Wheat. 152; *Enfield* v. *Jordan*, 119 U. S. 680; *Ill. Cent. R. R.* v. *Chicago*, 176 U. S. 659; *Maxwell Land Grant Case*, 121 U. S. 325; *Missouri &c. R. R.* v. *McCann*, 174 U. S. 586; *Canal Co.* v. *New Orleans*, 12 La. Ann. 365; *Orleans Nav. Co.* v. *Mayor*, 1 Martin (O. S.) (La.) 269; *Same* v. *Same*, 2 *Id.* 10, 214; *Rowan* v. *Runnels*, 5 How. 139; *Ridings* v. *Johnson*, 128 U. S. 212; *Shivley* v. *Bowlby*, 152 U. S. 57; *Spears* v. *Flack*, 34 Mis-

souri, 101; *State* v. *Orleans Nav. Co.*, 11 Martin (O. S.) 107; *S. C.*, 7 La. Ann. 679; *Stein* v. *Bienville Water Co.*, 141 U. S. 80; *Tallman* v. *Coffin*, 4 N. Y. 134; *Williams* v. *Eggleston*, 170 U. S. 311.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The State of Louisiana brought this suit in the Civil District Court of the Parish of Orleans, State of Louisiana, against the Carondelet Canal and Navigation Company of New Orleans (herein called the canal company) for the recovery from the company, through its liquidators, of the Carondelet Canal, Bayou St. John and Old Basin, a waterway used by vessels for the transportation of freight and merchandise, and for its improvements and appurtenant properties.

The suit was dismissed by the Civil District Court as premature. On appeal to the Supreme Court of the State that court reversed the judgment dismissing the suit and ordered that a judgment be entered against the canal company, in liquidation, ordering the delivery to the State of the canal and waterway in their entirety, as they stood on March 10, 1908, together with all the property and improvements appurtenant thereto, including the roadway or roadways upon the side or sides of the canal.

The claims of the State to a triangular strip of ground hereafter mentioned or to the proceeds thereof, or to any other property, movable or immovable, not appurtenant to the waterway and roadways, were reserved for further adjudication in the proceedings. And an accounting was ordered of the receipts and disbursements in the management of the property since March 10, 1908, and the case was remanded to the District Court "for further proceedings on all questions reserved as above stated, and that the right of the plaintiff to obtain judgment for such an

amount as may be found due upon defendant's accounting, and to take such further proceedings and obtain such further orders as may be required for the execution of this judgment, be reserved." 129 Louisiana, 279, 322.

We refer to the opinion of the Supreme Court for the history of the canal, which, while interesting, is quite long. There is no question of the source and origin of the rights of the canal company; no question of the right of the State to take possession of the canal and its appurtenant properties upon complying with the contract alleged to exist between the State and the company. There is a question as to the extent of the rights of the company under the contract and for what property the State must make compensation, and the factors in the solution of the question require quite an extended discussion.

We are met, however, at the outset by a motion to dismiss on the ground that the judgment is not final.

The judgment disposes of and orders the delivery of practically all of the property sued for: (1) the waterway in its entirety; (2) all the property and improvements appurtenant to it, including the roadway or roadways upon the sides of it. It reserves property not appurtenant and an accounting of certain disbursements. The reservation concerns only a small piece of ground upon which there was a dispute as to whether it was appurtenant to the canal, a question the court apparently could not determine as it was a question of fact. All else will be taken from the canal company and delivered to the State. That is, all was decreed that it was the purpose of the suit to have decreed and which not only constituted its success, but which involved and disposed of the Federal right asserted by the canal company. The judgment, therefore, has a substantial finality. Is it not as well in form?

Cases are cited which, the State contends, require a negative answer to the question. They are distinguishable from that at bar.

In *Haseltine* v. *Bank*, 183 U. S. 130, the action was against a national bank to recover under § 5198 of the Revised Statutes for usurious interest alleged to have been charged. There was judgment in favor of the plaintiff in the action. It was reversed by the Supreme Court of the State on the ground that he had neither paid nor tendered the principal sum, and the case was remanded for further proceedings. The case, therefore, was remanded for a new trial in its entirety. It was ruled that the face of the judgment is the test of its finality and that this court cannot be called on to inquire whether, when a cause is sent back, the defeated party might or might not make a better case.

This rule was again expressed in *Schlosser* v. *Hemphill*, 198 U. S. 173, in a case where a right to amend the pleadings existed and a new case could have been made.

In *M. & K. Interurban Company* v. *City of Olathe*, 222 U. S. 185, a demurrer was sustained to the plaintiff's pleadings in the trial court and the Supreme Court, but the latter court did not direct a dismissal of the suit but left it stand in the court below. We held that the judgment sought to be reviewed was not one which finally determined the cause and that we were without jurisdiction.

In *Louisiana Navigation Co.* v. *Oyster Commission of Louisiana*, 226 U. S. 99, we repeated the test of finality to be the face of the judgment and expressed the reason to be that this court cannot be called upon to review an action of the state court piece-meal. The language was appropriate to the condition presented by the case, for the pleading in the case was left open for amendment.

In the case at bar there is distinct and explicit finality and the further proceedings are directed to apply only to the "questions reserved." And, it is to be assumed, this was purposely done to give finality to the questions not reserved, so that the decree could be immediately executed

upon the property involved requiring it to be delivered into the possession and administration of the State. This disposition we can easily conceive, the court considered necessary to the rights which the State was adjudged to have and the remedy commensurate with them. The decree, therefore, had a definiteness which did not exist in the cited cases, the Federal rights asserted by the canal company were injuriously disposed of. The ground of dismissal of the writ of error based on the judgment is not, therefore, sustained.

There are other grounds urged, to-wit, that no Federal question is shown, and that besides the decision of the court below was rested on a non-Federal ground sufficient to sustain it. A consideration of this involves the issues in the case and their determination.

The suit involves, as we have said, the right to the canal and its appurtenant properties, and the controversy between the parties turns upon the construction of two acts of the legislature of the State passed, respectively, in 1857 and 1858. Those acts will be referred to hereafter with some particularity. By virtue of those acts the canal company derived its rights and its corporate existence. The petition of the State presents the following propositions: (1) The act of 1857 (act No. 160), gave the canal company a corporate existence of twenty-five years from October 17, 1857, with power in the State to take possession of the canal and appurtenant properties. If the State should not exercise such right at such time then the company was to have existence for a second term of twenty-five years, at which time the canal and its appurtenant properties were to be surrendered to the State without compensation to be paid to the company. (2) By the act of 1858 (Act No. 74) the charter existence of the company was extended to fifty years and at the expiration of such period the property was to be surrendered to the State without the necessity of compensation being made

therefor. (3) In 1906 (Act No. 161), in order that the State should be in a position to assume control and take possession of the property, the legislature passed an act creating a Board of Control of the canal, to be appointed by the Governor. This board was appointed and the property demanded. (4) The company refused to comply with the demand on the ground that the State had not complied with certain alleged contract obligations which the canal company claimed under § 4 of the act of 1858 and which gave it greater rights to the property than did the act of 1857, and until such obligations were performed the company would refuse to deliver the property. (5) If such was the effect of the act of 1858 the act was void as being in violation of the constitution of the State, especially of articles 108 and 109, which prohibited the granting of aid by the State to companies and corporations formed for the purpose of making works of public improvement. And further, if the company have the right to demand compensation, it has no right to claim against the State the property and improvements connected with or which belong to the Carondelet Canal, the Bayou St. John and the Old Basin on Toulouse Street, the State being sole owner of that part of the property. (6) The New Orleans Terminal Company, in a suit to expropriate a triangular piece of ground upon which stood the office building of the company, was condemned to pay $3,000, which sum was deposited in bank by agreement to await the determination of whether the State or the company should be entitled thereto. (7) The company has collected tolls through its liquidators since the expiration of its charter.

The State prayed an accounting of the revenues of the property after the expiration of the charter of the company, and that all the property and improvements connected with and appurtenant thereto, including the $3,000, the proceeds of the triangular piece of ground

referred to above, be delivered to the Board of Control created by the act of 1906 to be administered through the board.

Exceptions were filed to the petition of the State, and having been overruled an answer was filed. We need give only its basic allegations. They present, after denying the allegations of the petition of the State, the following propositions: (1) The State had no interest in the canal except under the contract between the canal company and the State, constituted of the acts of 1857 and 1858. (2) In 1857 the legislature, after anticipating the inability of a company called the New Orleans Canal and Navigation Company to carry out the terms of the purchase of the property under an act passed in 1852 (Act No. 309, March 18, 1852), passed the act of 1857, and that under those acts the canal company became possessed of the property. By § 4 of the act of 1858 (hereafter set out) it was provided that the company should have corporate existence during fifty years from the date of the act, after which time it might revert to the State upon due compensation being made according to award by three commissioners. (3) If the act of 1906 can be construed to authorize the Board of Control to take possession of the property without compensating the company therefor, it violates the contract clause of the Constitution of the United States. (4) The State never claimed any right or property in or to the canal and the improvements respectively made thereon by the Orleans Navigation Company and its successors, and whatever rights the State has are derived solely from the contracts between it and the canal company as defined in the acts of 1857 and 1858. The State never spent a dollar on the canal, the basin or the bayou, but the canal company has spent thereon a sum exceeding $750,000.

The State, as we have said, made a motion to dismiss on two grounds, one of which we have decided; the other is

that no Federal question is presented by the record, the canal company failing to distinguish, it is contended, between a subsequent act of the legislature impairing the contract and the decision of the court construing it. The question then is whether the act of 1906, appointing the Board of Control and investing it with powers, was an act which impaired the obligation of the contract, and in the solution of the question we must assume that the act of 1858 constituted a contract between the State and the canal company. The negative of the question is urged by the Attorney General in an argument of strength in which he contends the court did not consider or give any effect to the act of 1906 but considered only the act of 1858 and decided that the canal company did not acquire the rights under it which the company contends for. In other words, decided that the act of 1858 gave no rights which the State did not already have and which it was entitled to possess upon the expiration of the charter of the canal company. There is, as we have said, strength in the contention, but, of course, the fact that the Supreme Court did not refer to the act of 1906 does not put it aside from consideration. If it was the assertion of legislative power against the contract of the company and a legislative provision against the obligation of the contract, and was an essential, although unmentioned, element of the decision under review, it is a basis for the Federal question set up. Nor need bad motives be imputed to the legislature. It is not the motive which caused the enactment of the law which is of account, but the effect of the enactment, impairing the rights resting in the contract. And this, we think, was the effect of the act of 1906. It was treated as an important factor in the State's petition in both the charging part and the prayer. The Board of Control had something else to do besides to wait. It was an agency of invasion and it was by its especial command that the Attorney General made demand upon the com-

pany.[1] And in this the board exercised the power given it; and to remove the impediments to the exercise of the power, "all laws and parts of laws in conflict with" the act of 1906 which conferred the power were repealed. The repeal of a law which constitutes a contract is an impair-

[1] "Messrs. A. J. Davidson, J. H. Elliott and Hans Widner, Liquidators of the Carondelet Canal and Navigation Co., of New Orleans, New Orleans, La.:

"Dear Sirs—In view of the fact that the time during which the Carondelet Canal and Navigation Company of New Orleans has had the right to enjoy the possession and control of the Carondelet Canal and Bayou St. John, together with the Old Basin, with all of the revenue derived therefrom, has expired, and that it becomes the duty of the State of Louisiana, through the Board of Control for the Bayou St. John and Carondelet Canal and Old Basin, to take possession of the said Carondelet Canal, Bayou St. John and Old Basin, together with all the property and improvements connected therewith, or in any wise thereto belonging or appertaining, in order that the same may be controlled, managed, and administered by said board, for the use and benefit of the State, and, in view of the further fact that, at a meeting of said Board of Control, held on the first day of October, 1908, a resolution was adopted requesting me, as Attorney General of the State, to take such action as, in my judgment, would be proper to 'have the State put into possession of the Bayou St. John, Carondelet Canal and Old Basin, and all its properties and rights,' I now hereby make formal demand upon you to deliver into the possession and control of the said Board of Control of the Bayou St. John and Carondelet Canal and Old Basin, the said Bayou St. John and Carondelet Canal and Old Basin, together with all the properties and improvements connected therewith or in any wise thereto belonging or appertaining. In default of your complying with this formal demand, within a reasonable delay, I now notify you that I will institute suit for the purpose of recovering, for the State, to be controlled, managed and operated by the Board of Control aforesaid, the said Carondelet Canal and Bayou St. John and Old Basin, together with all the properties and improvements connected therewith or thereto belonging or appertaining.

"Be pleased to let me hear from you at your earliest convenience, and oblige,

"Yours truly,

(Signed) "WALTER GUION,

"Attorney General."

ment of its obligation. "It may be laid down, as a general principle, that, whenever a law is in its own nature a contract, and absolute rights have vested under it, a repeal of that law cannot divest those rights, or annihilate or impair the title so acquired." 2 Story on the Constitution, § 1391. The provision of the Constitution against the impairment of the obligation of contracts was intended "to prohibit every mode or device having such purpose. The prohibition is universal. It attempted no enumeration of the modes by which contracts might be impaired. It would have been unwise to have made such enumeration, since it might have been defective." Id., § 1386. The precaution was necessary. The prohibition is directed against the exertions of sovereignty which the citizens, unless protected by the organic law, would be impotent to resist, whether boldly declared in an explicit law or disguised in an ambiguous form. This case is an illustration. Here is a property sought to be taken from the canal company, and there can be no doubt that the Board of Control, through the affirmative and repealing provisions of the act of 1906, was to be the instrument and moving agency. The motion to dismiss must, therefore, be denied, and we are brought to the merits of the controversy—Did the acts of 1857 and 1858 constitute a contract?

In the consideration of that question we do not think it is necessary to discuss with any particularity the contributions, respectively, of the State and the canal company and its predecessors to the construction of the canal and its appurtenant properties. The case exhibits from the first conception and commencement of the enterprise by Governor Carondelet through its successive development and extension the interest the State had in its accomplishment and the difficulties which had to be overcome, two corporations going down to insolvency in the undertaking, the State being compelled to resume the

powers it had conferred and make provision for granting them to more efficient instruments. In these circumstances we find the impelling causes of the act of 1857.

A word or two of the act of 1852 becomes pertinent. It provided that in case of a judgment of forfeiture against the Orleans Navigation Company a liquidating commissioner should be appointed who should take possession of the entire property of the company, real and personal, movable and immovable, and, after advertisement, sell the same in block at public auction. The conditions of sale were that the purchasers should "organize themselves into a corporation under the laws of this State, for a term of twenty-five years, for the purpose of carrying out and effecting all the improvements detailed and described in the reports and plans known as Harrison's reports and plans, including the construction of a new basin at the junction of Canal Carondelet and Bayou St. John, of the depth and dimensions set forth in said reports," and to actually complete them within the term of three years from the date of the charter of the corporation. It was provided that at the end of the term of twenty-five years the State should have the option of granting a renewal of the right of receiving the tolls for a second term of twenty-five years or of purchasing for itself "the property and the improvements of the company" at the appraised value thereof, and provided further that if the said term of twenty-five years be granted, the whole property should revert to the State at the end of the second term, without any payment of compensation made to the company. Work and improvements were to be commenced within six months and completed within six years, otherwise the right, title and interest acquired, together with the improvements that might be made, should vest in and belong to the State. The purchasers organized themselves into a corporation called the New Orleans Canal and Navigation Company.

Then came the act of 1857. It organized the present canal company, making the capital stock of the company $500,000. The company was authorized to take possession of the canal for the purpose of completing the works of improvement undertaken and commenced by the New Orleans Canal and Navigation Company under the provisions of the act of 1852. The canal company was given authority to depart from the plan "of the improvement of said Canal and Bayou" designated as 'Harrison's plan,' so far as the plan proposes a basin at the junction of the said Canal with the Bayou, if the board of directors should determine that such works were not demanded by the interests, safety or convenience of commerce.

It was provided that in case of the New Orleans Canal & Navigation Company's failure to perform the obligations undertaken by it, suit should be instituted to forfeit its charter, franchises and privileges and property, including the interest in the Canal Carondelet and Bayou St. John and the works done and effected therein, which, after appraisement, should be sold and payment made therefor in the stock of the new corporation, the canal company. With expressions of detail, it was provided that the new company might take and have all and singular the rights, privileges, franchises, immunities, powers and authority which had been at any time granted to and possessed and exercised by the Orleans Navigation Company under §§ 9, 10, 11, 12 and 13 of the act of 1850 and those possessed and exercised under the acts of 1850 and 1852 by the New Orleans Canal & Navigation Company. The new company was to assume all of the debts and obligations imposed on the old one by the act of 1852, except in so far as the provisions of said act were modified or changed in and by the act of 1857.

The canal company was required to complete the works required by the act of 1852 within three years from and after the seventeenth of October, 1857, subject to the

modification provided, and in the case of failure the franchise, rights, privileges and immunities granted should cease and be forfeited to and become the property of the State.

The canal company was given an existence of twenty-five years from and after the seventeenth of October, 1857, "provided that the State of Louisiana shall have the right to take possession of said Canal Carondelet and Bayou St. John, and all the property and improvements connected therewith, at the expiration of the term above mentioned, should the Legislature determine so to do, paying to this corporation the value of said property, to be appraised by five competent persons, as experts, two to be appointed by this corporation and two by the Governor, and the four thus appointed shall appoint a fifth; said experts shall be required to take an oath to discharge their duty faithfully. In the event that the State shall not determine to take possession of said property, as herein provided, then this corporation shall be in existence for twenty-five years from and after the expiration of the term in this section mentioned aforesaid, and at the end of such second term of twenty-five years, the said property may still become absolutely the property of the State of Louisiana, and no compensation required to be made to this corporation." (§ 20, Act No. 160, March 16, 1857.)

The act of 1858 comes next to be considered. It gives the right to construct lay-outs, basins, and half moons, for steam and any other water craft on the Bayou St. John, the basin and canal and to extend them, provided public roads be constructed around them and be kept subject to the ordinance of the city of New Orleans.

The company was given (§ 2) the right to construct a railroad, with single or double track, on either side of the Basin, Canal and Bayou St. John from the head of the basin, on Toulouse Street, to the lake end, and transport freight and passengers for hire and employ steam loco-

motives within such limits of the city as the common council may prescribe.

After five years from the passage of the act, the city was prohibited from draining in the bayou except upon payment of indemnity. And the city is given the right to build bridges over the canal and bayou.

Section 4 is as follows: "That the said company shall enjoy corporate succession during fifty years from this date; after which time *it* [italics ours] may revert to the State, upon due compensation being made according to award, by three commissioners, one appointed by the Governor of the State, one by the company, and the third by any Court of Record of New Orleans." (Act No. 74, March 10, 1858.)

By subsequent section the company is given the right to tow vessels; exclusive power to carry out their works in conformity with such plan or plans as it may at any time adopt and deem best calculated to forward the interests of commerce; to impose fines for violation of its rules; to issue bonds and to secure them by hypothecating and mortgaging "all its property, privileges, and immunities whatever," the amount of bonds not to exceed $250,000; and the company shall be exempt from taxation.

The controversy centers in § 4 and turns upon the antecedent to the pronoun "it" in the sentence "after which time *it* may revert to the State."

The natural and grammatical use of a relative pronoun is to put it in close relation with its antecedent, its purpose being to connect the antecedent with a descriptive phrase. In the provision under discussion "it" stands in the place of something that is to revert to the State, and, following, therefore, the natural and grammatical use of "it," its antecedent would be the noun "company" (said company). The Supreme Court of the State, however, considered that there was ambiguity in the relation of "it" and rejected "company" as the antecedent and observed

that it could not relate to any of the things provided for in succeeding sections nor to the "lay outs, basins and half-moons" mentioned in § 1 and decided that the antecedent was the railroad authorized to be constructed by the canal company by § 2. The court, after elaborate argument, expressed the view that the company could not revert to the State, and, as it had no property in the canal and its appurtenances, the only thing which could revert to the State was the railroad. "Whether this be the true solution of the problem or not," the court said, p. 310, "we are unable to find anything else in the act of 1858 than the railroad to which the relative 'it,' as used in section 4, can in any way be made to relate." And it was further said that there being nothing else to which "it" could relate other than the railroad and that, "having never been built, can afford no basis for defendant's demand for compensation and for a continuance of its possession of public property" (p. 320).

We are unable to concur in the learned court's conclusion. We have already pointed out that the first companies organized went down successively in bankruptcy. Neither the rights given them nor the purpose for which they were given averted financial disaster. The same rights and property, in the main contingent upon the same conditions, were conferred upon the canal company, the record shows, by the act of 1857, but they offered no prospect of success and the company was about to abandon its charter, when the act of 1858 was passed. It was effective, and its effectiveness must have been due to the additive rights which it conferred and the security which it gave them. We have stated its provision and those of the acts which preceded it. Let us repeat them, for in them we shall find the answer to the question whether any property existed in the canal company which could revert to the State, under § 4 of the act of 1858, except the railroad. For the answer we need not go farther back than

1852. In the act of that year the rights and property of the Orleans Navigation Company were conveyed through its liquidators after proper legal proceedings to certain individuals who were to organize themselves into a corporation for the term of twenty-five years which was to undertake the construction of the work, with an option on the part of the State to grant a renewal of rights for another term of twenty-five years "or of purchasing for itself *the property and improvements of the company at the appraised value thereof.*" In case of the grant of a second term, at its end "*the whole property*" was to revert to the State "without any payment or compensation made to said company."

These provisions are a recognition of a property interest in the canal which would be acquired by the corporation that was to be organized. This is put beyond doubt by a subsequent provision. If the corporation did not complete the work in the time the act designated, it was provided that "*all right, title and interest acquired by the purchaser, under the provisions of this act, together with any improvements that may be made, shall vest in and belong to the State.*"

The corporation was organized, as we have said, and became the New Orleans Canal and Navigation Company. The latter company failing to perform its undertaking, the Carondelet Canal and Navigation Company, plaintiff in error, was, under the act of 1857, organized, and possession of the property was given to it for the purpose and with the rights, powers and privileges as provided in the act of 1857. There was a provision in that act, as we have seen, as in the act of 1852, for successive corporate terms of twenty-five years. At the end of the first term the State should "have the right to take possession of said Canal Carondelet and Bayou St. John, and all the property and improvements connected therewith, . . . should the legislature determine so to do," upon paying the value

thereof, to be appraised in the manner provided. If the State did not elect to purchase the property as provided, the second term of twenty-five years began, at the end of which it was provided that the "said property may still become absolutely the property of the State of Louisiana, and no compensation required to be made" to the canal company.

These provisions were idle—barren of everything but mischief and misleading effect—if the contention now made is tenable that the canal company, and necessarily as well its predecessors in the work, could acquire no property because the Bayou St. John was navigable water and the improvements had become appurtenant to it. Under the comprehensiveness of the contention there were no "property and improvements" to appraise or purchase, although the act declared there were both; there was no property to revert to the State, although the act provided for it, and took the precaution of excluding the requirement of paying for it. These circumstantial provisions cannot be misunderstood. They were not a precaution against the assertion of unfounded rights; they were the recognition of rights to be purchased and paid for in one contingency, to revert to the State without "compensation made" in the other contingency.

There was something more then than a prospective railroad for "it" to relate to and we might consider the contention of the State disposed of without the necessity of further discussion. The Supreme Court recognized that as "the act of 1858 contains no repealing clause, and the act of 1857 is in *pari materia*, the search for the vagrant antecedent [it was so considered by the court] may be prosecuted in the last mentioned statute" (p. 310). The court, however, did not locate the antecedent there because of the view that the railroad was the only property that the canal company had which could revert to the State. But, we have seen, there was property provided

for in the act of 1857 substantial enough to have value to be appraised and purchased, substantial enough therefore to revert to the State. Not, it may be, property to be considered the antecedent looked for but significantly determining it to be something else than the railroad which was but a subordinate instrument in the scheme and which might or might not be built.

The rights and property conveyed and provided for by the act of 1857 were then of substance and value and yet the enterprise halted. We need not conjecture the cause. It is manifest that the failures of the past warned against the conditions of the act of 1857. A large sum of money was necessary. It was conceived it might be as much as $500,000, and to encourage its investment the act of 1858 was passed. This being its purpose, whatever changes it made in the act of 1857 it must be construed as having been adopted to effect such purpose. A prominent fact in it was that it contemplated a greater expenditure than the capital of the company and authorized an issue of bonds of not exceeding $250,000. It is true that it was provided that the sum should be employed upon the improvement of the navigation of the canal and the building of the railroad; but, notwithstanding, the authorization of the bonds indicates the conception of the amount necessary for the undertaking.

The act of 1858 made other changes to which we have referred and it may be assumed that all of them were of some value to the State or to the company or to both. The Supreme Court assigned a special value to the power given to the company to adopt its own plans instead of being confined to the Harrison report and plans. The record, however, affords no basis of estimating the importance of this choice; besides by the act of 1857 the company had been authorized to depart from Harrison's plans in certain particulars, and what would have remained of them after exercises of the right we have no means of

knowing. But it was certainly not intended by the discretion conferred to give the company power to construct the works in a cheap and inefficient manner, and it is not intimated that the discretion was not wisely conferred or not wisely exercised.

We must look, therefore, for some other motive for the act of 1858, and we think, as said by Mr. Justice Provosty in his dissenting opinion, that it "will be sought for in vain, unless it is to be found in the purpose of prolonging the unconditional life of the company and the doing away with the clause for the reversion of its property without compensation." This conclusion is fortified by the structure of the act and the relation of its parts. We have seen that the natural and grammatical antecedent of "it" in § 4 is "said company," and that it was the intentional antecedent is clear from the French version of the statute, the practice of the State at that time being to publish statutes in French and English.

The use of "*elle*" in the French version is of strong significance. There is no neuter gender in the French language, every noun is masculine or feminine, and the pronoun which stands for it must agree with it in gender as in English, but in French there is more certain indication of the antecedent. The neuter *it* relative to a noun is *il* or *elle* and therefore the use of *elle* in the French version points unmistakably to an antecedent of the same gender—to "*cette compagnie*," and not to "*un chemin de fer*." Thus, wholly aside from which text is controlling, the context of both versions removes all doubt as to the meaning of the laws.

It is true, in a sense, that the company could not revert, for as a legal entity it would expire; but what it represented and possessed could revert—the result of its investments and energies, the property it had acquired under legislative sanction and the property it had created under like sanction. The company stood for its attributes and property.

It may be that it did not own the canal, or the bayou or the old basin. Indeed, ownership of their soil was disclaimed at the bar. But, we repeat, there was valuable property which the statute contemplated could revert and could be compensated for. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312.

The Attorney General separates in his argument the canal, the bayou and the old basin from the other properties and urges that at least as to them the State is entitled to take possession. And he seems to concede that the act of 1858 contemplated payment to the canal company not only for the railroad but also for the 'lay-outs, basins and half-moons'—giving "it" an antecedent of greater scope than did the Supreme Court. To the contention, however, that a distinction may be made between the properties, it must be answered that neither the act of 1857 nor that of 1858 makes such a distinction. The language of the act of 1858 is comprehensive and provides that all which is represented by "it" "may revert to the State upon due compensation being made according to award." And the same answer must be made to the contention that the company only has a lease of the properties and that its relation to the State being that of lessee, it, therefore, "has no defense to the State's demand for possession of the property." Whatever the relation created, payment of compensation was a condition precedent of the reversion to the State. It certainly was not intended to remit the canal company to a claim against the State. How would it be enforced against the resistance of the State, the sovereignty of the State giving immunity from suit?

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

GERMAN ALLIANCE INSURANCE COMPANY *v.* LEWIS, SUPERINTENDENT OF INSURANCE OF THE STATE OF KANSAS.

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

No. 120. Argued December 10, 1913.—Decided April 20, 1914.

The business of insurance is so far affected with a public interest as to justify legislative regulation of its rates.

A public interest can exist in a business, such as insurance, distinct from a public use of property, and can be the basis of the power of the legislature to regulate the personal contracts involved in such business.

Where a business, such as insurance, is affected by a public use, it is the business that is the fundamental thing; property is but the instrument of such business.

Munn v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *Brass* v. *North Dakota*, 153 U. S. 391, demonstrate that a business by circumstances and its nature may rise from private to public concern and consequently become subject to governmental regulation; and the business of insurance falls within this principle.

The fact that a contract for insurance is one for indemnity and is personal, does not preclude regulation.

A general conception of the law-making bodies of the country that a business requires governmental regulation is not accidental and cannot exist without cause.

What makes for the general welfare is matter of legislative judgment, and judicial review is limited to power and excludes policy.

The liberty of contract guaranteed by the Fourteenth Amendment is not more intimately involved in price regulation than in other proper forms of regulation of business and property affected by a public use, and so *held* as to the regulation of rates of fire insurance.

The inactivity of a governmental power, no matter how prolonged, does not militate against its legality when exercised. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366.

Whether rate regulation is necessary in regard to a particular business affected by a public use, such as insurance, is matter for legislative

judgment. This court can only determine whether the legislature has the power to enact it.

A discrimination is not invalid under the equal protection provision of the Fourteenth Amendment if not so arbitrary as to be beyond the wide discretion that a legislature may exercise; and so *held* as to a classification exempting farmers' mutual insurance companies doing only a farm business from the operation of an act regulating rates of insurance.

A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they appear and even degrees of evil may determine its exercise. *Ozan Lumber Co.* v. *Union National Bank*, 207 U. S. 251.

The Kansas statute of 1909, so far as it provides for regulating rates of fire insurance, is not unconstitutional under the Fourteenth Amendment as depriving insurance companies of their property without due process of law, as abridging the liberty of contract or as denying companies charging regular premiums the equal protection of the law by excepting farmers' mutual insurance companies from its operation.

BILL in equity to restrain the enforcement of the provisions of an act of the State of Kansas entitled "An act relating to Fire Insurance, and to provide for the Regulation and Control of rates of Premium Thereon, and to Prevent Discriminations Therein." Chap. 152 of the Session Laws of 1909.

The grounds of the bill are that the act offends the Constitution of the State and of the United States.

A summary of the requirements of the act is as follows:

Sec. 1. Every fire insurance company shall file with the superintendent of insurance general basis schedules showing the rates on all risks insurable by such company in the State and all the conditions which affect the rates or the value of the insurance to the assured.

Sec. 2. No change shall be made in the schedules except after ten days' notice to the superintendent, which notice shall state the changes proposed and the time when they

shall go into effect. The superintendent may allow changes upon less notice.

Sec. 3. When the superintendent shall determine any rate is excessive or unreasonably high or not adequate to the safety or soundness of the company, he is authorized to direct the company to publish and file a higher or a lower rate, which shall be commensurate with the character of the risk; but in every case the rate shall be reasonable.

Sec. 4. No company shall engage or participate in insurance on property located in the State until the schedules of rates be filed nor write insurance at a different rate than the rate named in the schedules, or refund or remit in any manner or by any device any portion of the rates; or extend to any insured or other person any privileges, inducements or concessions except as specified in the schedules.

Sec. 5. Any company making insurance where no rate has been filed shall, within thirty days after entering into such contract, file with the superintendent a schedule of such property showing the rate and such information as he may require. The schedule shall conform to the general basis of schedules and shall constitute the permanent rate of the company.

Sec. 6. The schedules shall be open to the inspection of the public, and each local agent shall have and exhibit to the public copies thereof relative to all risks upon which he is authorized to write insurance.

Sec. 7. No company shall directly or indirectly, by any special rate or by any device, charge or receive from any person a different rate of compensation for insurance than it charges or receives from any other person for like insurance or risks of a like kind and hazard under similar circumstances and conditions in the State. Any company violating this provision shall be deemed guilty of unjust discrimination, which is declared unlawful.

Sec. 8. The superintendent may, if he finds that any

company, or any officer, agent or representative thereof, has violated any of the provisions of the act, revoke the license of such offending company, officer, or agent, but such revocation shall not affect liability for the violation of any other section of the act; and provided that any action, decision or determination of the superintendent under the provisions of the act shall be subject to review by the courts of the State as provided in the act.

Sec. 9. The superintendent shall give notice of any order or regulation made by him under the act, and any company, or any person, city or municipality which shall be interested, shall have the right within thirty days to bring an action against the superintendent in any district court of the State to have the order or regulation vacated. Issues shall be formed and the controversy tried and determined as in other cases of a civil nature, and the court may set aside one or more or any part of any of the regulations or orders which the court shall find to be unreasonable, unjust, excessive or inadequate to compensate the company writing insurance thereon for the risk assumed by it, without disturbing others. The order of the superintendent shall not be suspended or enjoined, but the court may permit the complaining company to write insurance at the rates which obtained prior to such order upon the condition that the difference in the rates shall be deposited with the superintendent to be paid to the company or to the holders of policies as, on final determination of the suit, the court may deem just and reasonable. During the pendency of the suit no penalties or forfeitures shall attach or accrue on account of the failure of the complainant to comply with the order sought to be vacated or modified until the final determination of the suit. Proceedings in error may be instituted in the Supreme Court of the State as in other civil cases, and that court shall examine the record, including the evidence, and render such judgment as shall be just and equitable. No action

shall be brought in the United States courts until the remedies provided by the act shall have been exhausted. If any company organized under the laws of the State or authorized to transact business in the State shall violate the section, the superintendent may cancel the authority of the company to transact business in the State.

Sec. 10. Infractions of the act are declared to be misdemeanors and punishable by a fine not exceeding $100 for each offense, provided that if the conviction be for an unlawful discrimination the punishment may be by a fine or by imprisonment in the county jail not exceeding ninety days, or by both fine and imprisonment.

Sec. 11. No person shall be excused from testifying at the trial of any other person on the ground that the testimony may incriminate him, but he shall not be prosecuted on account of any transaction about which he may testify, except for perjury committed in so testifying; "provided, that nothing in this act shall affect farmers' mutual insurance companies organized and doing business under the laws of this State and insuring only farm property."

The bill alleged that it was brought by the German Alliance Insurance Company in behalf of itself and all other companies and corporations conducting a similar business and similarly situated, and that Charles W. Barnes was the duly elected superintendent of fire insurance of the State of Kansas. It alleged the jurisdictional amount, and that the controversy was one arising under the Constitution of the United States and of the State of Kansas. It alleged, further, the following facts, which we state in narrative form, omitting those which relate to the constitution of the State, no assignment of error being based upon them: The appellant, to which we shall refer as complainant, was incorporated under the laws of New York as a fire insurance company in 1879 and immediately entered upon such business, and it has for long periods of

time conducted the business of fire insurance in Kansas and other States of the United States.

The business of fire insurance as conducted by it consists of making indemnity contracts against direct loss or damage by fire for a consideration paid, known as a premium; that the rate or premium is the amount charged for each $100 of indemnity. The property which is the subject of insurance is ordinarily known and designated as the risk. Complainant issues indemnity contracts or fire insurance policies covering all kinds and descriptions of improvements upon real estate and the contents thereof and all kinds and descriptions of personal property and also farm houses, barns and granaries and their contents. The rate of premium varies with the kind of property covered, its physical characteristics and situation, its exposure, the presence or absence of fire protection, and many other causes.

The establishment of the basis rate for the premium to be charged is a matter of technical and mathematical deduction from the experience of all fire insurance companies covering a long period of years and, territorially, the whole civilized world. To make such deduction it is necessary not only to be in possession of the compiled statistics of fire insurance business, but also to be skilled in the mathematical 'theory of probabilities' and in the 'law of large numbers' so as to be able to apply with technical accuracy such laws and such data, and that no one not specially trained as an insurance statistician is competent to make such deductions.

A theoretically correct basis rate having thus been arrived at is subject to variation according to the risk, whether in town or country, and, if in the former, according to the class of town or city in which it is situated. The classification of towns and cities depends upon water supply, fire protection and general physical conditions. In addition to ascertaining the individual risk, if a build-

ing, the size, material of which and the manner in which it is constructed, the character of the occupancy, and the character of the occupancy and construction of adjacent buildings, also the character of the contents of the buildings and the manner in which they are stored and the precautions used to detect and prevent fires, are necessary to be ascertained.

Complainant and others engaged in the insurance business employ a large number of men skilled as inspectors to report upon individual risks, and it is impossible to fix and adjust a reasonable rate of premium for each and every individual risk without the information so obtained and having the same applied by experts. And such training and information are necessary to determine whether a basic rate or actual rate as applied to any particular risk is or is not reasonable, and the respondent is not possessed of the requisite information or special training necessary to qualify for such determination and any conclusion to which he might come would be a mere guess or arbitrary determination; and the provisions of the act can only be properly administered in any event by the employment by the State of a corps of inspectors and experts specially trained in the business of fixing rates of fire insurance.

The complainant has complied with all of the laws of the State and has received the regular license or authorization of the State, to transact the business of fire insurance therein.

It conducts its business by means of resident agents, of which it has seventy-two directly employed; it has a large and valuable established business to secure which it has expended a large sum of money, and to be compelled to give up its business would result in irreparable damage and injury to it. A large number of the fire insurance policies issued by complainant are written upon farm buildings and their contents and in writing such business

it comes into direct competition with various farmers' mutual insurance companies organized and doing business under the laws of the State and insuring only farm property.

The business of fire insurance is purely and exclusively a private business and may be transacted by private persons in their individual capacity or by unincorporated or incorporated companies, that the amount of indemnity and the premium is a matter or private negotiation and agreement, and the act of the legislature of the State of Kansas attempts to regulate the business in so far as the fixing of the rate of premium is concerned and in the attempted regulation distinguishes between fire insurance companies and individuals and partnerships, and thereby denies to complainant and other companies the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States, and is therefore unconstitutional and void.

Under the laws of Kansas, mutual fire insurance companies may be organized, that such companies having a guaranteed fund of $25,000 may do business on a cash basis and accept premiums in cash and that such premium measures the total liability of the insured under the policy either to the company or to its creditors; that by the eleventh section of the act under review, it is provided 'that nothing in this act shall affect farmers' mutual insurance companies, organized and doing business under the laws of this State, and insuring only farm property.' The complainant and many other companies insure farm property and come into direct competition with farmers' mutual companies of the character specified and the act of the legislature in excepting the latter companies deprives complainant of the equal protection of the laws and is therefore repugnant to the Fourteenth Amendment of the Constitution of the United States and is unconstitutional and void.

The business of fire insurance is private, with which the State has no right to interfere, and the right to fix by private contract the rate of premium is a property right of value; the business is not a monopoly either legally or actually, it may not be legally conducted by the National Government or by the State of Kansas or other States under their respective constitutions, and is not a business included within the functions of government. Neither complainant nor others engaged in fire insurance receive or enjoy from the State of Kansas, or any government, state or national, any privilege or immunity not in like manner and to like extent received and enjoyed by all other persons, partnerships and companies, incorporated or unincorporated, respectively, engaged in the conduct of other lines of private business and enterprises. Complainant, therefore, is deprived of one of the incidents of liberty and of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

The act distinguishes between fire insurance companies and other insurance companies, individuals and persons and distinguishes between insurance and other lines of business and thereby offends the equality clause of the Constitution of the United States.

Complainant, under protest, filed the general basis schedules of its rates as required by the act, which were arrived at by the process hereinbefore set out. On the nineteenth of August, 1909, respondent made a reduction of 12% from the rates as filed and from the rates filed by other companies, with the proviso that it should not apply to residence property, churches, school houses, farm property or special hazards. The order was to become effective September 1, 1909. And it was further ordered that on and after that date the exception of churches and dwelling houses should be eliminated. Complainant notified the superintendent by letter that it would, under

protest, and reserving the rights which it had under the law, comply with the provisions of the order.

The risks included in the order and not excepted therefrom, comprise all ordinary mercantile risks in the State and that the reduction of 12% will result in a rate which is much less than the cost of carrying the risks.

Respondent is threatening to make further reductions and it is proposed to revoke the license of any fire insurance company which may violate the provisions of the act, even though the rates fixed by him may be so low as to be confiscatory and to inflict upon the officers of the company, including complainant, the penalties prescribed for such violation, and such companies and complainant, unless defendant be restrained by injunction, will be obliged to comply with the requirements of the act to their irreparable damage and injury.

Complainant finally alleges that it is not its purpose to attack the orders of respondent on the ground that they were not made in strict compliance with the provisions of the act, but to have the act in its entirety declared to be unconstitutional and void for the reasons alleged, and to have respondent restrained and orders made by him under the provisions of the act enjoined. And such an injunction is prayed.

Respondent filed a demurrer stating that he demurred to so much of the bill as charges the act of the State of Kansas to be repugnant to the constitution of Kansas and the Constitution of the United States. The demurrer was sustained. Subsequently, upon the bill being amended, a general demurrer was filed, which was also sustained by the court, and the bill dismissed. Prior, however, to this action, it having been suggested that the term of office of Charles W. Barnes as superintendent of insurance had expired and that Ike Lewis had succeeded to that office and to all of its duties and powers, he was made defendant in the place and stead of Charles W. Barnes.

Mr. Thomas Bates and *Mr. John G. Johnson*, with whom *Mr. Seymour Edgerton* was on the brief, for appellant:

The business of fire insurance is a private business and the public has no legal right to demand its service. *Am. Surety Co.* v. *Shallenberger*, 183 Fed. Rep. 636; *Hunt* v. *Simmons*, 19 Missouri, 583; *Orr* v. *Home Ins. Co.*, 12 La. Ann. 255; *Queen Ins. Co.* v. *State*, 86 Texas, 250.

The State has not the power to fix the rates charged to the public either by corporations or individuals engaged in a private business, and the test as to whether a use is public or not is whether a public trust is imposed upon the property, and whether the public has a legal right to the use which cannot be denied. *Allen* v. *Jay*, 60 Maine, 124; *Am. L. S. C. Co.* v. *Chi. Live Stock Exch.*, 143 Illinois, 210; *Arnsperger* v. *Crawford*, 101 Maryland, 247; *Avery* v. *Vermont El. Co.*, 75 Vermont, 235; *Brown* v. *Gerald*, 100 Maine, 351; *Burlington* v. *Beasley*, 94 U. S. 310; *Ches. & Pot. Tel. Co.* v. *Manning*, 186 U. S. 238; *Citizens Savings Assn.* v. *Topeka*, 20 Wall. 655; *Collister* v. *Hayman*, 183 N. Y. 250; *Dutton* v. *Strong*, 1 Black, 1; *Ex parte Quarg*, 149 California, 79; *Fallsberg Co.* v. *Alexander*, 101 Virginia, 98; *Farmers' Market Co.* v. *P. & R. T. Ry. Co.*, 142 Pa. St. 580; *Gaylord* v. *Sanitary Dist.*, 204 Illinois, 576; *Howard Mills* v. *Schwartz Lumber Co.*, 77 Kansas, 599; *Horney* v. *Nixon*, 213 Pa. St. 20; *Hurley* v. *Eddingfield*, 156 Indiana, 416; *Jacobs* v. *Water Sup. Co.*, 220 Pa. St. 388; *L. & N. R. Co.* v. *West Coast Co.*, 198 U. S. 483; *Ladd* v. *Southern Cotton Co.*, 53 Texas, 172; *Pearce* v. *Spalding*, 12 Mo. App. 141; *People* v. *Steel*, 231 Illinois, 340; *Purcell* v. *Daly*, 19 Abb. N. C. 301; *Queen Ins. Co.* v. *State*, 86 Texas, 250; *Ryan* v. *Terminal Co.*, 102 Tennessee, 111; *Shasta Power Co.* v. *Walker*, 149 Fed. Rep. 568; *Sholl* v. *German C. Co.*, 118 Illinois, 427; *Stock Exchange* v. *Board of Trade*, 127 Illinois, 153; *State* v. *Associated Press*, 159 Missouri, 410; *Tyler* v. *Beacher*, 44 Vermont, 648; *Ulmer* v. *Ry. Co.*, 98

Maine, 579; *Weems Steamboat Co.* v. *People's Steamboat Co.*, 214 U. S. 345.

The regulation of rates and charges in a private business is not within the police power of the State. *Adair* v. *United States*, 208 U. S. 175; *Coffeyville Co.* v. *Perry*, 69 Kansas, 297; *Connolly* v. *Union Pipe Co.*, 184 U. S. 540; *Dobbins* v. *Los Angeles*, 195 U. S. 223; *Ex parte Dicky*, 144 California, 234; *Holden* v. *Hardy*, 169 U. S. 366; *Hurtado* v. *California*, 110 U. S. 535; *In re Berger*, 195 Missouri, 16; *Kreibohm* v. *Yansey*, 154 Missouri, 67; *Lawton* v. *Steel*, 152 U. S. 133; *Lochner* v. *New York*, 198 U. S. 45; *Mugler* v. *Kansas*, 123 U. S. 623; *Muller* v. *Oregon*, 208 U. S. 412; *Munn* v. *Illinois*, 94 U. S. 113; *People* v. *Steele*, 231 Illinois, 340; *People* v. *Coler*, 166 N. Y. 1; *State* v. *Associated Press*, 159 Missouri, 410; *Street* v. *Varney El. Sup. Co.*, 160 Indiana, 338; *West Branch Ex.* v. *McCormick*, 1 Pa. Dist. Rep. 542.

The Kansas rate law of 1909 cannot be sustained as a condition precedent to the right of a foreign corporation to do business in the State. *Ætna Ins. Co.* v. *Jones*, 78 So. Car. 445; *American Co.* v. *Shallenberger*, 183 Fed. Rep. 636; *Cargill* v. *Minnesota*, 180 U. S. 452; *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401; *Connolly* v. *Union Pipe Co.*, 184 U. S. 540; *Ins. Co.* v. *Prewitt*, 202 U. S. 246; *Lafayette Ins. Co.* v. *French*, 18 How. 404; *Nat. Council* v. *State Council*, 203 U. S. 151; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557; *So. Pac. Co.* v. *Denton*, 146 U. S. 202; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1.

The law cannot be sustained on the ground that it is within the power of the legislature of a State to impose such conditions as it likes upon corporations which derive their right to exist from the State. *Lake Shore &c. R. Co.* v. *Smith*, 173 U. S. 684; *People* v. *Budd*, 117 N. Y. 1; *State* v. *Associated Press*, 159 Missouri, 410.

The business of fire insurance is not a monopoly.

Herriman v. *Menzies*, 115 California, 16; *United States* v. *American Tobacco Co.*, 164 Fed. Rep. 700.

The business of fire insurance is not a proper function of government, nor does it receive special privileges from the State. *Ætna Life Ins. Co.* v. *Coulter*, 115 Kentucky, 787; *Ohio* v. *Guilbert*, 56 Oh. St. 575; *Opinion of the Justices*, 155 Massachusetts, 598; *Id.* 182 Massachusetts, 605; § 4091, Gen. Stat. Kansas, 1909.

A general public interest is not equivalent to a public use. *Lowell* v. *Boston*, 111 Massachusetts, 454; *Matter of Mayor of New York*, 135 N. Y. 253; *Matter of Niagara Falls Co.*, 108 N. Y. 375.

The power to regulate rates and charges is simply the power to take private property for public use. *Charles River Bridge Case*, 11 Peters, 420; *Cole* v. *La Grange*, 113 U. S. 1; *Dodge* v. *Michigan Twp.*, 107 Fed. Rep. 827; 2 Kent's Comm. 333; *Lowell* v. *Boston*, 111 Massachusetts, 454; *Opinion of the Justices*, 155 Massachusetts, 598. See also, as bearing on this subject: *Allnutt* v. *Inglis*, 12 East, 527; *Brass* v. *North Dakota*, 153 U. S. 391; *Budd* v. *New York*, 143 U. S. 517, *S. C.*, 117 N. Y. 1; *State* v. *Edwards*, 86 Maine, 102; *Munn* v. *Illinois*, 94 U. S. 113; *Spring Valley Co.* v. *Schottler*, 110 U. S. 347; *Burlington* v. *Beasley*, 94 U. S. 310; *Dow* v. *Beidelman*, 125 U. S. 680; *Wabash &c. Ry. Co.* v. *Illinois*, 118 U. S. 557; *German Alliance Ins. Co.* v. *Hale*, 219 U. S. 307; *Noble State Bank* v. *Haskell*, 219 U. S. 104 and 575; *Dodge* v. *Mission Township*, 107 Fed. Rep. 827; *Paul* v. *Virginia*, 8 Wall. 168.

Mr. John S. Dawson, Attorney General of the State of Kansas, with whom *Mr. S. N. Hawks*, *Mr. F. S. Jackson* and *Mr. C. B. Smith* were on the brief, for appellee:

The act complained of is within the police power of the State. *Noble State Bank* v. *Haskell*, 219 U. S. 112 and 575; *German Alliance Ins. Co.* v. *Hale*, 219 U. S. 307; *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 411; *Jacobson* v. *Mas-*

sachusetts, 197 U. S. 11, 27, 31; *Lake Shore &c. R. R.* v. *Ohio*, 173 U. S. 285, 297; *Citizens Ins. Co.* v. *Clay*, 197 Fed. Rep. 435; *German Alliance Ins. Co.* v. *Barnes*, 189 Fed. Rep. 769.

The act is not repugnant to § 1 of the Fourteenth Amendment, as the State has full power of classification. *Hays* v. *Missouri*, 120 U. S. 68; *Railroad Co.* v. *Mackey*, 127 U. S. 205; *Walston* v. *Nevin*, 128 U. S. 578; *Bell's Gap R. R.* v. *Pennsylvania*, 134 U. S. 232; *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339; *Giozza* v. *Tiernan*, 148 U. S. 657; *Columbia Southern Ry.* v. *Wright*, 151 U. S. 470; *Marchant* v. *Penna. R. R.*, 153 U. S. 380; *St. Louis & S. F. Ry.* v. *Mathews*, 165 U. S. 1; *Railroad Co.* v. *Matthews*, 174 U. S. 99; *Barbier* v. *Connolly*, 113 U. S. 27; *St. Louis &c. Ry. Co.* v. *Paul*, 173 U. S. 404.

The act is not repugnant to either the due process clause of the Fourteenth Amendment or to the equal protection clause. *Magoun* v. *Illinois Trust Co.*, 170 U. S. 283; *Railway Co.* v. *Mackey*, 127 U. S. 204, 208; *Minn. & St. L. Ry.* v. *Beckwith*, 129 U. S. 26; *Davidson* v. *New Orleans*, 96 U. S. 97; *Holden* v. *Hardy*, 169 U. S. 366, 389; *Hooper* v. *California*, 155 U. S. 648; *Paul* v. *Virginia*, 8 Wall. 168, 179; *Ducat* v. *Chicago*, 10 Wall. 410, 415; *Liverpool Ins. Co.* v. *Massachusetts*, 10 Wall. 566, 573; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 561; *Blake* v. *McClung*, 172 U. S. 239; *Santa Clara County* v. *Southern Pac.*, 118 U. S. 394; *Smyth* v. *Ames*, 169 U. S. 466; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Paul* v. *Virginia*, 8 Wall. 168; *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727; *Phila. Fire Assn.* v. *New York*, 119 U. S. 110; *Fritts* v. *Palmer*, 132 U. S. 282; *Mo. Pac. Ry. Co.* v. *Mackey*, 127 U. S. 209; *Barbier* v. *Connolly*, 113 U. S. 32; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Railway Tax Cases*, 115 U. S. 322; *Home Ins. Co.* v. *New York*, 134 U. S. 606; *Pac. Exp. Co.* v. *Seibert*, 142 U. S. 339; *New York &c.* v. *Bristow*, 151 U. S. 571.

The validity of the act can be sustained under the police power of the State, as well as under the power of the State to regulate corporations created by it, or permitted by it to do business within its borders. *Assurance Co.* v. *Bradford*, 60 Kansas, 85; *Railroad Co.* v. *Matthews*, 58 Kansas, 447; *Gulf R. R. Co.* v. *Ellis*, 165 U. S. 155; *Atkinson* v. *Woodmansee*, 68 Kansas, 74; *Fidelity Life Assn.* v. *Mettler*, 185 U. S. 322; *Railroad Co.* v. *Matthews*, 174 U. S. 96; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *N. Y. Life Ins. Co.* v. *Cravens*, 178 U. S. 384; *Insurance Co.* v. *Warren*, 181 U. S. 73; *Commonwealth* v. *Vrooman*, 164 Pa. St. 306; *Doyle* v. *Insurance Co.*, 94 U. S. 535; *State* v. *Mo. Pac. Ry. Co.*, 33 Kansas, 176; *Leavenworth* v. *Water Co.*, 62 Kansas, 643; *Inhabitants of Wayland* v. *Middlesex County*, 4 Gray (Mass.), 500; *Irrigation Co.* v. *Klein*, 63 Kansas, 484; *West* v. *Bank*, 66 Kansas, 524.

The classifications made by the legislature are proper. 4 Supreme Court Encyc. 357; *Heath & Milligan* v. *Worst*, 207 U. S. 354; *Ozan Lumber Co.* v. *Union Natl. Bank*, 207 U. S. 256; *Mobile Co.* v. *Kimball*, 102 U. S. 691; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150; *Missouri, K. & T. R. Co.* v. *May*, 194 U. S. 267.

Insurance is affected by public interest. *State* v. *Insurance Co.*, 30 Kansas, 585; *State* v. *Phipps*, 50 Kansas, 609; *Blaker* v. *Hood*, 53 Kansas, 499, 509; *State* v. *Phipps*, 50 Kansas, 619; Freund on Police Power, §§ 400–401; *Ætna Life Ins. Co.* v. *Hardison*, 199 Massachusetts, 181; *N. Y. Life Ins. Co.* v. *Hardison*, 199 Massachusetts, 190; 3 Selected Essays in Anglo-Am. Legal History, p. 108; Zartman's Yale Readings in Ins. pp. 9–10, and 213; Arnold on Marine Ins. 102; *Munn* v. *Illinois*, 94 U. S. 113; 7 Encyc. U. S. Sup. Ct. Rep. 78; 4 Encyc. U. S. Sup. Ct. Rep. 77; *Northwestern Ins. Co.* v. *Riggs*, 203 U. S. 243; *Phœnix Ins. Co.* v. *Montgomery*, 42 L. R. A. 468; *Exempt Firemen* v. *Roone*, 93 N. Y. 313; *Firemen's Assn.* v. *Louisburg*, 21

Illinois, 511; *Milwaukee* v. *Helfenstein*, 16 Wisconsin, 142.

As to the right to fix rates, see *Winchester Turnpike Co.* v. *Croxton*, 33 L. R. A. 177; *Munn* v. *Illinois*, 94 U. S. 113; *Georgia R. R. Co.* v. *Smith*, 128 U. S. 174; *Allnutt* v. *Lord Hale* (De Portibus Maris, 1 Hargraves Law Tracts, 78); *Mobile* v. *Yuille*, 3 Alabama, 137; *Laurel Fork R. R. Co.* v. *West Virginia Trans. Co.*, 25 W. Va. 324; *Allnutt* v. *Inglis*, 12 East, 527; *People* v. *Budd*, 117 N. Y. 1, *S. C.*, 143 U. S. 517; *Re Annon*, 50 Hun, 415, aff'd 26 N. Y. S. R. 554; *Spring Valley Co.* v. *Schottle*, 110 U. S. 347; *Brass* v. *Stoeser*, 153 U. S. 391, aff'g, 2 Nor. Dak. 482.

As to public interest and public use, see *Budd* v. *New York*, 143 U. S. 517; Freund's Police Power, §§ 304, 378; *People* v. *Formosa*, 61 Hun, 272; *Boxwell* v. *Security Life Ins. Co.*, 193 N. Y. 465; *Lumbermen's Exchange* v. *Fisher*, 150 Pa. St. 475; *Craig* v. *Kline*, 65 Pa. St. 399; *Henry* v. *Roberts*, 50 Fed. Rep. 902; *Genesee Fork Co.* v. *Ives*, 144 Pa. St. 114; *Mobile* v. *Yuille*, 3 Alabama, 137; *Brass* v. *Stoeser*, 153 U. S. 391; *McCarty* v. *Firemen's Ins. Co.*, 73 Atl. Rep. 80; *Civil Rights Cases*, 109 U. S. 62.

As to illegality of fire underwriters associations, see *N. Y. Bd. of Underwriters* v. *Higgins*, 114 N. Y. Supp. 506; *Firemen's Fund Ins. Co.* v. *Helner*, 49 So. Rep. 297; *Continental Co.* v. *Parks*, 142 Alabama, 650, 39 So. Rep. 204; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 565; *Farmers' Ins. Co.* v. *Dobney*, 189 U. S. 301; *Barbier* v. *Connelly*, 113 U. S. 27, 28.

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

The specific error complained of is the refusal of the District Court to hold that the act of the State of Kansas is unconstitutional and void as offending the due process clause of the Fourteenth Amendment of the Constitution of the United States. To support this charge of error,

complainant asserts that the business of fire insurance is a private business and, therefore, there is no constitutional power in a State to fix the rates and charges for services rendered by it. An exercise of such right, it is contended, is a taking of private property for a public use. The contention is made in various ways and, excluding possible countervailing contentions, it is urged that the act under review cannot be justified as an exercise of the police power or of the power of the State to admit foreign corporations within its borders upon such terms as it may prescribe, or of any other power possessed by the State; that no State has the power to impose unconstitutional burdens either upon private citizens or private corporations engaged in a private business.

The basic contention is that the business of insurance is a natural right, receiving no privilege from the State, is voluntarily entered into, cannot be compelled nor can any of its exercises be compelled; that it concerns personal contracts of indemnity against certain contingencies merely. Whether such contracts shall be made at all, it is contended, is a matter of private negotiation and agreement, and necessarily there must be freedom in fixing their terms. And "where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist." Many elements, it is urged, determine the extending or rejection of insurance; the hazards are relative and depend upon many circumstances upon which there may be different judgments, and there are personal considerations as well—"moral hazards," as they are called.

It is not clear to what extent some of these circumstances are urged as affecting the power of regulation in the State. It would seem to be urged that each risk is individual and no rule of rates can be formed or applied. The bill asserts the contrary. It in effect admits that there can be standards and classification of risks, determined by the

law of averages. Indeed, it is a matter of common knowledge that rates are fixed and accommodated to those standards and classification in pre-arranged schedules, and, granted the rates may be varied in particular instances, they are sufficiently definite and applicable as a general and practically constant rule. They are the product, it is true, of skill and experience, but such skill and experience a regulating body may have as well as the creating body. Indeed, an allegation in the original bill that the superintendent of insurance could not have the requisite technical and mathematical training to determine whether a basic rate or an actual rate as applied to any particular risk was or was not reasonable and that his conclusion, therefore, "would be a mere guess or arbitrary determination" was omitted by an amendment. It would indeed be a strained contention that the Government could not avail itself, in the exercise of power it might deem wise to exert, of the skill and knowledge possessed by the world. We may put aside, therefore, all merely adventitious considerations and come to the bare and essential one, whether a contract of fire insurance is private and as such has constitutional immunity from regulation. Or, to state it differently and to express an antithetical proposition, is the business of insurance so far affected with a public interest as to justify legislative regulation of its rates? And we mean a broad and definite public interest. In some degree the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite consequence, which makes the public interest that justifies regulatory legislation. We can best explain by examples. The transportation of property—business of common carriers—is obviously of public concern and its regulation is an accepted governmental power. The transmission of intelligence is of cognate character. There are other

utilities which are denominated public, such as the furnishing of water and light, including in the latter gas and electricity. We do not hesitate at their regulation nor at the fixing of the prices which may be charged for their service. The basis of the ready concession of the power of regulation is the public interest. This is not denied, but its application to insurance is so far denied as not to extend to the fixing of rates. It is said, the State has no power to fix the rates charged to the public by either corporations or individuals engaged in a private business, and the "test of whether the use is public or not is whether a public trust is imposed upon the property and whether the public has a legal right to the use which cannot be denied;" or, as we have said, quoting counsel, "Where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist." Cases are cited which, it must be admitted, support the contention. The distinction is artificial. It is, indeed, but the assertion that the cited examples embrace all cases of public interest. The complainant explicitly so contends, urging that the test it applies excludes the idea that there can be a public interest which gives the power of regulation as distinct from a public use which, necessarily, it is contended, can only apply to property, not to personal contracts. The distinction, we think, has no basis in principle (*Noble State Bank* v. *Haskell*, 219 U. S. 104), nor has the other contention that the service which cannot be demanded cannot be regulated.

Munn v. *Illinois*, 94 U. S. 113, is an instructive example of legislative power exerted in the public interest. The constitution of Illinois declared all elevators or storehouses, where grain or other property was stored for a compensation, to be public warehouses, and a law was subsequently enacted fixing rates of storage. In other words, that which had been private property had from its

uses become, it was declared, of public concern and the compensation to be charged for its use prescribed. The law was sustained against the contention that it deprived the owners of the warehouses of their property without due process of law. We can only cite the case and state its principle, not review it at any length. The principle was expressed to be, quoting Lord Chief Justice Hale, "that when private property is 'affected with a public interest it ceases to be *juris privati*' only" and it becomes "clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large"; and, so using it, the owner "grants to the public an interest in that use, and must submit to be controlled by the public for the common good." And it was said that the application of the principle could not be denied because no precedent could be found for a statute precisely like the one reviewed. It presented a case, the court further said, "for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress." The principle was expressed as to property, and the instance of its application was to property, but it is manifestly broader than that instance. It is the business that is the fundamental thing; property is but its instrument, the means of rendering the service which has become of public interest.

That the case had broader application than the use of property is manifest from the grounds expressed in the dissenting opinion. The basis of the opinion was that the business regulated was private and had "no special privilege connected with it, nor did the law ever extend to it any greater protection than it extended to all other private business." The argument encountered opposing examples, among others, the regulation of the rate of interest on money. The regulation was accounted for on the ground that the act of Parliament permitting the charging

of some interest was a relaxation of a prohibition of the common law against charging any interest, but this explanation overlooked the fact that both the common law and the act of Parliament were exercises of government regulation of a strictly private business in the interest of public policy, a policy which still endures and still dictates regulating laws. Against that conservatism of the mind, which puts to question every new act of regulating legislation and regards the legislation invalid or dangerous until it has become familiar, government—state and National—has pressed on in the general welfare; and our reports are full of cases where in instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the Constitution of the United States. The dread of the moment having passed, no one is now heard to say that rights were restrained or their constitutional guaranties impaired.

Munn v. *Illinois* was approved in many state decisions, but it was brought to the review of this court in *Budd* v. *New York*, 143 U. S. 517, and its doctrine, after elaborate consideration, re-affirmed, and against the same arguments which are now urged against the Kansas statute. Nowhere have these arguments been, or could be, advanced with greater strength and felicity of expression than in the dissenting opinion of Mr. Justice Brewer. Every consideration was adduced, based on the private character of the business regulated and, for that reason, its constitutional immunity from regulation, with all the power of argument and illustration of which that great judge was a master. The considerations urged did not prevail. Against them the court opposed the ever-existing police power in government and its necessary exercise for the public good and declared its entire accommodation to the limitations of the Constitution. The court was not deterred by the charge (repeated in the case at bar) that its decision had the sweeping and dangerous comprehension of subjecting to

legislative regulation all of the businesses and affairs of life and the prices of all commodities. Whether we may apprehend such result by extending the principle of the cases to fire insurance we shall presently consider.

In *Brass* v. *Stoeser*, 153 U. S. 391, *Munn* v. *Illinois* and *Budd* v. *New York* were affirmed. A law of the State of North Dakota was sustained which made all buildings, elevators and warehouses used for the handling of grain for a profit public warehouses, and fixed a storage rate. The case is important. It extended the principle of the other two cases and denuded it of the limiting element which was supposed to beset it—that to justify regulation of a business the business must have a monopolistic character. That distinction was pressed and answered. It was argued, the court said (p. 402), "that the statutes of Illinois and New York [passed on in the *Munn* and *Budd Cases*] are intended to operate in great trade centers, where, on account of the business being localized in the hands of a few persons in close proximity to each other, great opportunities for combinations to raise and control elevating and storage charges are afforded, while the wide extent of the State of North Dakota and the small population of its country towns and villages are said to present no such opportunities." And it was also urged that the method of carrying on business in North Dakota and the Eastern cities was different, that the elevators in the latter were essentially means of transporting grain from the lakes to the railroads and those who owned them could, if uncontrolled by law, extort such charges as they pleased, and stress was laid upon the expression in the other cases which represented the business as a practical monopoly. A contrast was made between those conditions and those which existed in an agricultural State where land was cheap and limitless in quantity. It was replied that this difference in conditions was "for those who make, not for those who interpret, the laws." And con-

sidering the expressions in the other cases which, it was said, went rather to the expediency of the laws, than to their validity, yet, it was further said, the expressions had their value because the "obvious aim of the reasoning that prevailed was to show that the subject-matter of these enactments fell within the legitimate sphere of legislative power, and that, so far as the laws and Constitution of the United States were concerned, the legislation in question deprived no person of his property without due process of law" (p. 404).

The cases need no explanatory or fortifying comment. They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation. And they demonstrate, to apply the language of Judge Andrews in *People* v. *Budd* (117 N. Y. 1, 27), that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the public on those affected cannot be supported. "The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation." Is the business of insurance within the principle? It would be a bold thing to say that the principle is fixed, inelastic, in the precedents of the past and cannot be applied though modern economic conditions may make necessary or beneficial its application. In other words, to say that government possessed at one time a greater power to recognize the public interest in a business and its regulation to promote the general welfare than government possesses to-day. We proceed then to consider whether the business of insurance is within the principle.

A contract for fire insurance is one for indemnity against loss and is personal. The admission, however, does not

take us far in the solution of the question presented. Its personal character certainly does not of itself preclude regulation, for there are many examples of governmental regulation of personal contracts, and in the statutes of every State in the Union superintendence and control over the business of insurance are exercised, varying in details and extent. We need not particularize in detail. We need only say that there was quite early (in Massachusetts 1837, New York 1853) state provision for what is known as the unearned premium fund or reserve; then came the limitation of dividends, the publishing of accounts, valued policies, standards of policies, prescribing investment, requiring deposits in money or bonds, confining the business to corporations, preventing discrimination in rates, limitation of risks and other regulations equally restrictive. In other words, the State has stepped in and imposed conditions upon the companies, restraining the absolute liberty which businesses strictly private are permitted to exercise.

Those regulations exhibit it to be the conception of the law-making bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation. A conception so general cannot be without cause. The universal sense of a people cannot be accidental; its persistence saves it from the charge of unconsidered impulse, and its estimate of insurance certainly has substantial basis. Accidental fires are inevitable and the extent of loss very great. The effect of insurance—indeed, it has been said to be its fundamental object—is to distribute the loss over as wide an area as possible. In other words, the loss is spread over the country, the disaster to an individual is shared by many, the disaster to a community shared by other communities; great catastrophes are thereby lessened, and, it may be, repaired. In assimilation of insurance to a tax, the companies have been said to be

the mere machinery by which the inevitable losses by fire are distributed so as to fall as lightly as possible on the public at large, the body of the insured, not the companies, paying the tax. Their efficiency, therefore, and solvency are of great concern. The other objects, direct and indirect, of insurance we need not mention. Indeed, it may be enough to say, without stating other effects of insurance, that a large part of the country's wealth, subject to uncertainty of loss through fire, is protected by insurance. This demonstrates the interest of the public in it and we need not dispute with the economists that this is the result of the "substitution of certain for uncertain loss" or the diffusion of positive loss over a large group of persons, as we have already said to be certainly one of its effects. We can see, therefore, how it has come to be considered a matter of public concern to regulate it, and, governmental insurance has its advocates and even examples. Contracts of insurance, therefore, have greater public consequence than contracts between individuals to do or not to do a particular thing whose effect stops with the individuals. We may say in passing that when the effect goes beyond that, there are many examples of regulation. *Holden* v. *Hardy*, 169 U. S. 366; *Griffith* v. *Connecticut*, 218 U. S. 563; *Muller* v. *Oregon*, 208 U. S. 412; *Mutual Loan Co.* v. *Martell*, 222 U. S. 225; *Schmidinger* v. *Chicago*, 226 U. S. 578; *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549; *Noble State Bank* v. *Haskell*, 219 U. S. 104.

Complainant feels the necessity of accounting for the regulatory state legislation and refers it to the exertion of the police power, but, while expressing the power in the broad language of the cases, seeks to restrict its application. Counsel states that this power may be exerted to "pass laws whose purpose is the health, safety, morals and the general welfare of the people." The admission is very comprehensive. What makes for the general welfare is

necessarily in the first instance a matter of legislative judgment and a judicial review of such judgment is limited. "The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance." *Chicago, Burlington & Quincy Railroad Co.* v. *McGuire*, 219 U. S. 549, 569.

The restrictions upon the legislative power which complainant urges we have discussed, or rather the considerations which take, it is contended, the business of insurance outside of the sphere of the power. To the contention that the business is private we have opposed the conception of the public interest. We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the insured, possessing great power thereby and charged with great responsibility. How necessary their solvency is, is manifest. On the other hand to the insured, insurance is an asset, a basis of credit. It is practically a necessity to business activity and enterprise. It is, therefore, essentially different from ordinary com-

mercial transactions, and, as we have seen, according to the sense of the world from the earliest times—certainly the sense of the modern world—is of the greatest public concern. It is, therefore, within the principle we have announced.

But it is said that the reasoning of the opinion has the broad reach of subjecting to regulation every act of human endeavor and the price of every article of human use. We might, without much concern, leave our discussion to take care of itself against such misunderstanding or deductions. The principle we apply is definite and old and has, as we have pointed out, illustrating examples. And both by the expression of the principle and the citation of the examples we have tried to confine our decision to the regulation of the business of insurance, it having become "clothed with a public interest," and therefore subject "to be controlled by the public for the common good."

If there may be controversy as to the business having such character, there can be no controversy as to what follows from such character if it be established. It is idle, therefore, to debate whether the liberty of contract guaranteed by the Constitution of the United States is more intimately involved in price regulation than in the other forms of regulation as to the validity of which there is no dispute. The order of their enactment certainly cannot be considered an element in their legality. It would be very rudimentary to say that measures of government are determined by circumstances, by the presence or imminence of conditions, and of the legislative judgment of the means or the policy of removing or preventing them. The power to regulate interstate commerce existed for a century before the Interstate Commerce Act was passed, and the Commission constituted by it was not given authority to fix rates until some years afterwards. Of the agencies which those measures were enacted to

regulate at the time of the creation of the power, there was no prophecy or conception. Nor was regulation immediate upon their existence. It was exerted only when the size, number and influence of those agencies had so increased and developed as to seem to make it imperative. Other illustrations readily occur which repel the intimation that the inactivity of a power, however prolonged, militates against its legality when it is exercised. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366. It is oftener the existence of necessity rather than the prescience of it which dictates legislation. And so with the regulations of the business of insurance. They have proceeded step by step, differing in different jurisdictions. If we are brought to a comparison of them in relation to the power of government, how can it be said that fixing the price of insurance is beyond that power and the other instances of regulation are not? How can it be said that the right to engage in the business is a natural one when it can be denied to individuals and permitted to corporations? How can it be said to have the privilege of a private business when its dividends are restricted, its investments controlled, the form and extent of its contracts prescribed, discriminations in its rates denied and a limitation on its risks imposed? Are not such regulations restraints upon the exercise of the personal right—asserted to be fundamental—of dealing with property freely or engaging in what contracts one may choose and with whom and upon what terms one may choose?

We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that "it is illusory

to speak of a liberty of contract." It is in the alternative presented of accepting the rates of the companies or refraining from insurance, business necessity impelling if not compelling it, that we may discover the inducement of the Kansas statute, and the problem presented is whether the legislature could regard it of as much moment to the public that they who seek insurance should no more be constrained by arbitrary terms than they who seek transportation by railroads, steam or street, or by coaches whose itinerary may be only a few city blocks, or who seek the use of grain elevators, or be secured in a night's accommodation at a wayside inn, or in the weight of a five-cent loaf of bread. We do not say this to belittle such rights or to exaggerate the effect of insurance, but to exhibit the principle which exists in all and brings all under the same governmental power.

We have summarized the provisions of the Kansas statute, and it will be observed from them that they attempt to systematize the control of insurance. The statute seeks to secure rates which shall be reasonable both to the insurer and the insured, and as a means to this end it prescribes equality of charges, forbids initial discrimination or subsequently by the refund of a portion of the rates, or the extension to the insured of any privilege; to this end it requires publicity in the basic schedules and of all of the conditions which affect the rates or the value of the insurance to the insured, and also adherence to the rates as published. Whether the requirements are necessary to the purpose, or—to confine ourselves to that which is under review—whether rate regulation is necessary to the purpose, is a matter for legislative judgment, not judicial. Our function is only to determine the existence of power.

The bill attacks the statute of Kansas as discriminating against complainant because the statute excludes from its provisions farmers' mutual insurance companies, organized

and doing business under the laws of the State and insuring only farm property. The charge is not discussed in the elaborate brief of counsel, nor does it seem to have been pressed in the lower court. It is, however, covered by the assignments of error.

The provision of the statute is, "That nothing in this act shall affect farmers' mutual insurance companies organized and doing business under the laws of this State and insuring only farm property." The distinction is, therefore, between coöperative insurance companies insuring a special kind of property and all other insurance companies. It is only with that distinction that we are now concerned. There are special provisions in the statutes of Kansas for the organization of coöperative companies and if the statute under review discriminates between them the German Alliance Company cannot avail itself of the discrimination. A citation of cases is not necessary, nor for the general principle that a discrimination is valid if not arbitrary, and arbitrary in the legislative sense, that is, outside of that wide discretion which a legislature may exercise. A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise. *Ozan Lumber Co.* v. *Union County Bank*, 207 U. S. 251. There are certainly differences between stock companies, such as complainant is, and the mutual companies described in the bill, and a recognition of the differences we cannot say is outside of the constitutional power of the legislature. *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557.

Decree affirmed.

MR. JUSTICE LURTON was not present when this case was argued, and took no part in its decision.

MR. JUSTICE LAMAR, dissenting.

I dissent from the decision and the reasoning upon which it is based. The case does not deal with a statute affect-

ing the safety or morals of the public. It presents no question of monopoly in a prime necessity of life, but relates solely to the power of the State to fix the price of a strictly personal contract. The court holds that fire insurance though personal is affected with a public interest and therefore, that the business may not only be regulated but that the premium or price to be paid to the insurer for entering into that personal contract can be fixed by law.

The fixing of the price for the use of private property is as much a taking as though the fee itself had been condemned for a lump sum—that taking, whether by fixing rates for the use or by paying a lump sum for the fee, has always heretofore been thought to be permissible only when it was for a public use. But the court in this case holds that there is no distinction between the power to take for public use and the power to regulate the exercise of private rights for the public good. That is the fundamental proposition on which the case must stand, and the decision must therefore be considered in the light of that ruling and of the results which must necessarily flow from the future application of that principle. For if the power to regulate, in the interest of the public, comprehends what is intended in the power to take property for public use, it must inevitably follow that the price to be paid for any service or the use of any property can be regulated by the General Assembly. This is so because the power of regulation is all-pervading, as witness the statute of frauds, the recording acts, weight and measure laws, pure food laws, hours of service laws, and innumerable other enactments of that class. And if this power be as extensive as is now, for the first time, decided, then the citizen holds his property and his individual right of contract and of labor under legislative favor rather than under constitutional guaranty. The principle is applied here to the case of insurance; but the nature of that business

and the intangible character of its contracts are such as to indicate the far-reaching effect of the principle announced, and warrants a statement of some of the grounds of dissent.

Insurance is not production; nor manufacture; nor transportation; nor merchandise. And this court in *N. Y. Life Co.* v. *Deer Lodge Co.*, 231 U. S. 495, at the present term, reaffirmed its previous rulings that "insurance is not commerce," "not an instrumentality of commerce," "not a transaction of commerce," "but simply contracts of indemnity against loss by fire." Such a contract is personal and in the State whose statute is under consideration, insurance companies are classed among those "strictly private." *Leavenworth County* v. *Miller*, 7 Kansas, 479, 520. The fact, that insurance is a strictly private and a personal contract of indemnity puts it on the extreme outside limit and removes it as far as any business can be from those that are in their nature public. So that if the price of a private and personal contract of indemnity can be regulated,—if the price of a chose in action can be fixed,—then the price of everything within the circle of business transactions can be regulated. Considering, therefore, the nature of the subject treated and the reasoning on which the court's opinion is based, it is evident that the decision is not a mere entering wedge, but reaches the end from the beginning and announces a principle which points inevitably to the conclusion that the price of every article sold and the price of every service offered can be regulated by statute.

And such laws are not without English precedent. For while no statute ever before attempted to fix the price of a contract of indemnity, [1] yet under a Parliament that sat as a perpetual constitutional convention, with power

[1] The statute fixing the premium rates on surety bonds was held to be void in *Am. Surety Co.* v. *Shallenberger*, 183 Fed. Rep. 636.

to pass bills of attainder, to take property for private purposes and to take it without due process of law, many statutes approaching that now under review were adopted and enforced. Acts were passed by Parliament fixing the price of many commodities that were convenient or useful. These laws did not stop at fixing the price of property, but, like the present act they fixed the price of private contracts, and, by statute prescribed the rate of wages, and made it unlawful for the employé to receive or for the employer to give more than the wage fixed by law. It is needless to say that these laws were felt to be an infringement upon the rights of men; that they were bitterly resisted by buyer and seller, by employer and employé, and were a source of perpetual irritation often leading to violence. But the fact that the English Parliament had the arbitrary power to pass such statutes made them valid in law, though they were in violation of the inherent rights of individual. In time, the great injustice in this, was so far recognized that these laws, fixing the price of strictly private contracts, seem to have been repealed, and Lord Ellenborough, while enforcing, as proper, a rate for *public* wharfs, was able to say, in *Allnutt* v. *Inglis*, 12 East, 527, 538, "that the general principle is favored both in law and justice, that every man may fix what price he pleases for his own property or the use of it." But what was a favor in England, that might at any time be withdrawn, was in this country made a constitutional right that could not be withdrawn. For although the practice of fixing prices may have prevailed in some of the Colonies "up to the time of independence," yet, as Judge Cooley says, since independence "it has been commonly supposed that a general power in the State to regulate prices was inconsistent with constitutional liberty." Cooley's Const. Law (7th ed.) 807; Stickney's State Control of Trade, p. 3 and the abstract of English price-fixing statutes, p. 9 *et seq.* That common supposition is rightly founded on the fact

that the Constitution recognizes the liberty to contract and right of private property. They include not only the right to make contracts with which to acquire property, but the right to fix the price of its use while it is held, and the further right to fix the price if it is to be sold. To deprive any person of either is to take property, since there can be no liberty of contract and true private ownership if the price of its use or its sale is fixed by law. That right is an attribute of ownership. *State Tax Case*, 15 Wall. 232, 278, top.

But it may be said that, though insurance is a contract of indemnity and personal, its personal character has not been thought to preclude the many regulatory measures adopted and sustained during the past hundred years.

This is most freely conceded. But it is equally true that the failure for more than 100 years to attempt to fix the rates of insurance is indubitable evidence of the general public and legislative conception that the business of insurance did not belong to the class whose rates could be fixed. That settled usage is not an accident. For rate-making is no new thing, and neither is insurance. Its use in protecting the owner of property against loss; its value as collateral in securing loans; its method of averages and distributing the risk between many persons widely separated and all contributing small premiums in return for the promise of a large indemnity, has been known for centuries. All these considerations were recently pressed upon the court in an effort to secure a ruling that insurance was commerce. In refusing to accede to the sufficiency of the argument, the court in the *Deer Lodge Case* pointed out that the size of the business of insurance did not change the inherent nature of the business itself, saying that "the number of transactions do not give the business any other character than magnitude."

The character of insurance, therefore, as a private and personal contract of indemnity, has not been changed by

its magnitude or by the fact that more policies and for greater amounts are now written than in the centuries during which no effort has ever before been made to fix their rates. It is, however, undoubtedly true that during all of that period *regulatory statutes* were, from time to time, adopted to protect the public against conditions and practices which were subject to regulation. The public had no means of knowing whether these corporations were solvent or not, and statutes were passed to require a publication of the financial condition. The policies were long and complicated, with exceptions, and qualifications, and provisos. They were often unread by the policyholder and sometimes not understood when read. Statutes were accordingly passed providing for a standard form of policy in order to protect the assured against his inexperience, to prevent hard bargains, and to avoid vexatious litigation, and as similar evils appear they may be dealt with by regulatory or prohibitory legislation just as statutes were passed and can still be passed to punish combinations, pooling arrangements, and all those practices which amount to unfair competition.

But these and those referred to in *Attorney General* v. *Firemen's Insurance Co.*, 74 N. J. Eq. 372, furnish instances of the exercise of this power to regulate which can be exerted against any person, trade or business, no matter how great or small. This power to regulate is so much oftener exerted against the large business, because the evils are then more apparent, that the size of the business and the number of persons interested is sometimes referred to as indicating that the business is affected with a public interest. But there is no such limitation. For the power to regulate is the essential power of government which can be exerted against the whole body of the public or the smallest business. And if, as seems to be implied, the fact that a business may be regulated is to be the test of the power to fix rates, it would follow, since all can be

regulated, the price charged by all can be regulated. Or if great size is the test, if the number of customers is the test, if the scope of the business throughout the nation is the test, if the contributions of the many to the value of the business is the test—or if it takes a combination of all to meet the condition,—then every business with great capital and many customers distributed throughout the country and making a large business possible, must be treated as affected with a public interest, and the price of the goods on its shelves can be fixed by law. Then could the price of newspapers, magazines and the like be fixed, because certainly nothing is more affected with a public interest, nothing is so dependent on the public, nothing reaches so many persons and so profoundly affects public thought and public business. Such a business is, indeed, affected with a public interest,—justifying regulation (*Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288), but not the fixing of the price of the paper or periodical or the rates of advertising. For great and pervasive as is the power to regulate, it cannot override the constitutional principle that private property cannot be taken for private purposes. *Missouri Pacific* v. *Nebraska*, 164 U. S. 403. That limitation on the power of government over the individual and his property cannot be avoided by calling an unlawful taking a reasonable regulation. Indeed, the protection of property is an incident of the more fundamental and important right of liberty guaranteed by the Constitution and which entitled the citizen freely to engage in any honest calling and to make contracts as buyer or seller, as employer or employé, in order to support himself and family.

It is said, however, that the validity of rate statutes has often been recognized, notably in the *Munn Case* (94 U. S. 113, 126) where a statute was sustained which regulated the price to be charged for storing grain in elevators.

The *Munn Case* is a landmark in the law. It is accepted

as an authoritative and accurate statement of the principle on which the right to fix rates is based. But the statute there under review did not undertake to fix the price of a personal contract, but to fix the price for the use of property, once private, but then public. The reasoning of the court clearly shows that in order to regulate rates, two things must concur—(1) the business must be affected with a public interest; and (2) the property employed in such business must be devoted to a public use. The basic principle of the decision was the oft quoted saying of Lord Hale that "when private property is affected with a public interest, it ceases to be *juris privati* only." The decision in the *Munn Case* was but an application of that terse statement and was applied in a case where the elevators had been devoted to a public use. This will distinctly appear from the statement by the court of the question involved and decided. For after reviewing and applying Lord Hale's pithy saying and reviewing the other authorities the court said (italics ours):

"Enough has already been said to show that, when private *property is devoted to a public use*, it is subject to public regulation. It remains only to ascertain whether the *warehouses* of these plaintiffs in error, and the business which is carried on *there*, come within the operation of this principle" (p. 130).

Not only does the *Munn Case* show that the right to fix prices depends on the concurrence of public interest and the employment of property devoted to a public use, but with the exception of the *Louisiana Bread Case*, 12 La. Ann. 432, it is believed that every American rate-statute since the requirement that property should not be taken without due process of law, related to a business which was public in its character and employed visible and tangible property which had been devoted to a public use.

The list of rate-regulated occupations is not too long to be here given. It includes canals, waterways and

booms; bridges and ferries; wharves, docks, elevators and stockyards; telegraph, telephone, electric, gas and oil lines; turnpikes, railroads and the various forms of common carriers, including express and cabs. To this should be added the case of the inn-keeper (as to which no American case has been found where the constitutional question as to the right to fix his rates has been considered), the confessedly close case of the irrigation ditches for distributing water (189 U. S. 439), and the toll mill acts. This of course does not include the case of condemnation for governmental purposes or for roads and ways where no question of rates is involved. There may be other instances not found, but it is believed that the foregoing numeration exhausts the list of what has heretofore been treated as a public business justifying the exercise of the price-fixing power against persons or corporations.

It is to be noted that in each instance the power to regulate rates is exercised against a business which in every case used tangible property devoted to a public use. Some of them had a monopoly (*Spring Water Co.* v. *Schottler*, 110 U. S. 347, 354). Some of them had franchises. Most of them used public ways or employed property which they had acquired by virtue of the power of eminent domain. They were therefore subject to the correlative obligation to have the use, of what had been thus taken by law, fixed by law. And as further pointing out the characteristics of the public use justifying the fixing of prices, it will be noted that, with the exception of toll mills (which, however, do employ property devoted to a public use), they all have direct relation to the business or facilities of transportation or distribution—to transportation by carriers of passengers, goods or intelligence by vehicle or wire;—to distribution of water, gas or electricity through ditch, pipe or wire; to wharfage, storage or accommodation of property before the journey begins, when it ends, or along the way.

When thus enumerated, they appear to be grouped around the common carrier as the typical public business and all employing in some way property devoted to a public use.

It will be seen, too, that the size of the business is unimportant, for the fares of a cabman, employing a broken-down horse and a dilapidated vehicle, can be fixed by law as well as the rates of a railroad with millions of capital and thousands of cars transporting persons and property across the continent.

The fact that rate-statutes, enacted and sustained since the adoption of constitutional government in this country, all had some reference to transportation or distribution, is a practical illustration of the accepted meaning of "public use" when that phrase was first employed in American constitutions, and when turnpikes and carriers, wharfingers and ferrymen had rates, tolls and fares fixed by law. No change was made in the meaning of the words or in the principle involved when it opened to take in new forms and facilities of transportation, whether by vehicle, pipe or wire, and new forms of storage, whether on the wharf or in the grain-elevator.

But it is said that business is the fundamental thing and the property but an instrument, and that there is no basis for the distinction between a public interest and a public use. But there is a distinction between a public interest—justifying regulation—and a public use—justifying price fixing. "Public interest and public use are not synonymous." *In re Niagara Falls Ry. Co.*, 138 N. Y. 375, 385. And since the case here involves the validity of a Kansas statute it is well to note that the Supreme Court of that State in *Howard* v. *Schwartz*, 77 Kansas, 599, recognizes that there is a difference and adjudges accordingly. It there cited numerous decisions from other States and in defining a public use, made the following quotation from the opinion of the Supreme Court of Maine:

"'Property is devoted to a public use when, and only when, . . . all the public has a right to demand and share in'" it " . . . In a broad sense it is the right in the public to an actual use, and not to an incidental benefit." (p. 608).

The effect of the difference between public use and public interest appears from the application; for the Supreme Court of Kansas on the authority of this and numerous other cases, held that a steam flour mill was not such a public use as would authorize its owners to exercise the power of eminent domain, though it was "a useful and important business instrumentality which contributed to the growth and development of the locality where the [mills] are situated. This may also be said, however, of every legitimate business. To a limited extent every honest industry adds to the general sum of prosperity and promotes the public welfare" (p. 609).

Nothing more can be said of insurance—nor can the power to take the private property of insurers, by fixing rates, be enlarged by a legislative declaration that the business is affected with a broad and definite public interest. For since the contract of insurance is private and personal, it is almost a contradiction in terms to say that the private contract is public or that a business which consists in making such private contracts is public in the constitutional sense. The fundamental idea of a public business, as well declared by the Supreme Court of Kansas, 77 Kansas, 608, is that "all the public has a right to demand and share in" it. That means that each member of the public on demand and upon equal terms, without written contract, without haggling as to terms, may demand the public service, and secure the use of the facility devoted to public use. If the company can make distinctions and serve one and refuse to serve another, the business *ex vi termini* is not public. The common carrier has no right to refuse to haul a passenger even if he has been

convicted of arson. But if an insurance company is indeed public it is bound to insure the property of the man who is suspected of having set fire to his own house, or whose statements of value it is unwilling to take. This is manifestly inconsistent with the contract of insurance which requires the utmost good faith, not only in making truthful answers to questions asked, but in not concealing anything material to the risk. If the company has the discretion to insure or the right to refuse to insure, then, by the very definition of the terms, it is not a public business. If, on the other hand, the company is obliged to insure bad risks or the property of men of bad character, of doubtful veracity or known to be careless in their handling of property the law would be an arbitrary exertion of power in compelling men to enter into contract with persons with whom they did not choose to deal where confidence is the very foundation of a contract of indemnity. Indeed, it seems to be conceded that a person owning property is not entitled to demand insurance as a matter of right. If not, the business is not public and not within the provision of the Constitution which only authorizes the taking of property for public purposes—whether the taking be of the fee for a lump sum assessed in condemnation proceedings, or whether the use be taken by rate-regulation, which is but another method of exercising the same power.

The suggestion that the public interest is found in the characteristics of the business of insurance, justifies a brief examination of those characteristics and a statement of the results that logically must follow from such a test. For if the power is to develop out of the characteristics, it must necessarily follow that other occupations, having similar characteristics, must be subject to the same rate-regulating power.

The elements which are said to show that insurance is affected with a public interest do not arise out of the size of any one company, but out of the volume of the aggre-

gate business of all the companies doing business within the State and beyond its borders. If that test be applied, and if the sum of the units is to determine whether or not a business is affected with a public interest (which is said to be the equivalent of a public use), then if the principle of the decision be applied to the business of farming all can see to what end it leads. In view of the amount of property employed and the aggregate number of persons engaged in agriculture and the public's absolute dependence upon that pursuit, it would follow that, farming being affected with a broad and definite public interest, the price of wheat and corn; cotton and wools; beef, pork, mutton and poultry; fruit and vegetables, could be fixed. Or if we take the aggregate of those who labor and consider the public's absolute dependence upon labor, it would inevitably follow that it, too, was affected with a broad and definite public interest and that wages in the United States of America in this Twentieth Century could be fixed by law, just as in England between the 14th and 18th centuries. And inasmuch as the prices of agricultural products are dependent on the price of land and labor, and as the price of labor is closely related to the cost of rent and food and clothes and the comforts of life, there would be the power to take the further step and regulate the cost of everything which enters into the cost of living. Of course, it goes without saying that if the rates for fire insurance can be fixed, then the rates for life and marine insurance can be fixed. By a parity of reasoning the rates of accident, guaranty and fidelity insurance could also be regulated. There seems no escape from the conclusion that the asserted power to fix the price to be paid by one private person to another private person or private corporation for a private contract of indemnity, or for his product, or his labor, or for his private contracts of any sort, will become the center of a circle of price-making legislation that, in its application, will destroy the right of

private property and break down the barriers which the Constitution has thrown around the citizen to protect him in his right of property—which includes his right of contract to make property, his right to fix the price at which his property shall be used by another. By virtue of the liberty which is guaranteed by the Constitution, he also has the right to name the wage for his labor and to fix the terms of contracts of indemnity,—whether they be contracts of endorsement or suretyship, or contracts of indemnity against loss by fire, flood, or accident.

In view of what Judge Cooley calls the general supposition that "the right to fix prices was inconsistent with constitutional liberty," it is not surprising that little is to be found in the books relating to a statute like this. It is, however, somewhat curious that among the few expressions to be found on the subject, is the intimation by Lord Ellenborough in *Allnutt* v. *Inglis*, 12 East, 527, 535, that insurance rates were not on the same basis as a public business using property devoted to a public use. For in answering the argument that if the rates of a public wharf could be fixed, insurance rates could also be fixed, he clearly intimates that this could not be done, since the wharf was a monopoly and "the business of insurance and of counting-houses may be carried on elsewhere."

In the following cases the statutes fixing prices have been held to be void. *Ex parte Dickey*, 144 California, 234, fixing the price to be charged by an employment bureau; *Ex parte Quarg*, 149 California, 79; *People* v. *Steele*, 231 Illinois, 340, prohibiting the sale of theater tickets at a price higher than that charged by the theater; *State* v. *Fire Creek Coke Co.*, 33 West Va. 188, limiting the profits on sales to employés. See also *State* v. *McCool*, 83 Kansas, 428, 430, bot., where in sustaining a statute regulating the weight of bread the court called attention to the fact that the statute did not attempt to fix the price. To these could be added a multitude of decisions showing that the power

to regulate is limited by the constitutional prohibition against the taking of private property. *Guillotte* v. *New Orleans*, 12 La. Ann. 432, is the only American case found which sustains the right to fix prices for other than a commodity or service furnished by a public utility company of the kind already pointed out. In that case the court said that the city could fix the price of bread and that if the baker did not desire to do business within the limits of such city he could go elsewhere. That reasoning would support any statute, for every citizen at least has the right to go out of business. But it has been repeatedly held by this court that such an answer cannot sustain an invalid statute, the Constitution being intended to secure the citizen against being driven out of business by an unconstitutional statute or regulation.

There is, in the opinion an allusion to usury laws as instances of fixing rates for other than public service corporations. We do not understand that the opinion is founded on that proposition, for even the usury laws do not fix a flat rate, but only a maximum rate, and do not require lenders to make loans to all borrowers, similarly situated, at the same rate of interest. Moreover interest laws were in their inception not a restriction upon the right of contract but an enlargement, permitting what theretofore had been regarded both as an ecclesiastical and civil offense. This fact may have been coupled with the idea that as the sovereign had the prerogative to coin money and make legal tender for all claims, he could fix the price that should be charged for the use of that money.

At any rate, interest laws had been long recognized before the Constitution and have been prevalent ever since. They, therefore, fall within the rule that contemporary practice, if subsequently continued and universally acquiesced in, amounts to an interpretation of the Constitution. But the same character of long continued ac-

quiescence and settled usage that sustains a usury law also sustains the right of the contracting parties to agree upon the charge for insurance. For centuries before the Constitution, and continuously ever since they have themselves fixed this charge, and this makes most strongly in favor of their right to continue to agree upon the price of a private contract of indemnity against loss by fire.

The act now under review not only takes property without due process of law but it unequally and arbitrarily selects those from which such property shall be taken by price fixing. Although including all other fire insurance companies, it excepts certain mutual insurance companies. *Persons* engaged in doing an insurance business are not within its terms. In Kansas, the right to do a fire insurance business is not limited to corporations, but may be conducted by persons, individuals, partners, companies and associations, whether incorporated or not. General Statutes of Kansas (1909), §§ 4086, 4091, 4122. And if it could be true that the legislature could fix the price of insurance it would seem to be doubly necessary that all doing an insurance business should be treated alike. There is no difference in principle and none by statute in the character of the contract, whether it is made by one man, or the Lloyds, or a corporation. There is no difference in the character of the contract made by a stock company and a mutual company. In each instance the contract is one of indemnity against loss for a fixed premium. If the policy-holder is a stockholder in an ordinary corporation, he may get back some of his premium by way of dividends; if he is a member of a mutual company, he pays his premium and gets back his share of the earnings. But to say that the State may fix the price to be charged for insurance by a stock company and that it will not fix the price to be charged by mutual companies or by the Lloyds, who do an enormous business of exactly the same nature on exactly

the same sort of property and on exactly the same terms, is to make a discrimination which amounts to a denial of the equal protection of the law.

THE CHIEF JUSTICE and MR. JUSTICE VAN DEVANTER concur in this dissent.

WHEELER *v.* SOHMER, COMPTROLLER OF THE STATE OF NEW YORK.

ERROR TO THE SURROGATES' COURT OF NEW YORK COUNTY, STATE OF NEW YORK.

No. 45. Argued November 5, 6, 1913.—Decided April 20, 1914.

The provision in the New York Inheritance Tax Statute, imposing a transfer tax on property within the State belonging to a non-resident at the time of his death, is not unconstitutional under the due process clause of the Fourteenth Amendment as applied to promissory notes the makers of which are non-residents of that State. *Buck* v. *Beach*, 206 U. S. 392, distinguished.

202 N. Y. 550, affirmed.

THE facts, which involve the power of a State to tax promissory notes located in the State although neither the owner nor the maker are residents thereof, are stated in the opinion.

Mr. Charles P. Howland for plaintiffs in error:

The taxation of the full value of the debts represented by these promissory notes deprived the executors and beneficiaries of the estate of their property without due process of law, and was in contravention of the Fourteenth Amendment.

Jurisdiction of a State for purposes of transfer or in-

heritance taxation is limited to property within the State, in the senses in which that phrase has been recognized. *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395.

Promissory notes are only evidences of debt and not the debts themselves. Their situs, therefore, is not the situs of the debts; the situs of the debts is at the residence of one or the other of the parties to the relation. *Buck* v. *Beach*, 206 U. S. 392; *Pelham* v. *Way*, 15 Wall. 196.

As to the distinction between a debt and the evidence establishing it, see *Wyman* v. *Halstead*, 109 U. S. 654; *Attorney General* v. *Bouwens*, 4 M. & W. 171, 191; *Hunter* v. *Supervisors*, 33 Iowa, 376; Hanson's Death Duties (4th ed.), p. 239.

A note is the representative of a debt as a warehouse receipt is the representative of personal property, but such a receipt cannot be taxed at the value of the goods on the theory that in some way it represents them. *Selliger* v. *Kentucky*, 213 U. S. 200.

The special factors which warrant inheritance taxation upon choses in action belonging to the estates of non-resident decedents—control over the person of the debtor or over the means of enforcement of the obligation—do not exist here. *Blackstone* v. *Miller*, 188 U. S. 189 (semble).

In the case of choses in action the State of the owner's domicile levies one tax, *Matter of Swift*, 137 N. Y. 77, while the State of the debtor's domicile levies a tax "not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor"—in other words, because it grants a practical privilege by providing means for the collection of the debt. *Blackstone* v. *Miller*, 188 U. S. 189; *Matter of Houdayer*, 150 N. Y. 37.

In this case the State of the decedent had no control over the persons of the debtors. That control was in the States of the debtors, *Buck* v. *Beach*, 206 U. S. 392, 407; *Chicago, R. I. & P. R'y* v. *Sturm*, 174 U. S. 710, 715, and

as neither the universal succession nor the control over the means of enforcement was granted or could be regulated by the former State, that State had no power to tax.

The situs of bonds appears to determine the situs of the debts they symbolize, but bonds have always been sharply distinguished from promissory notes in that regard.

For certain purposes bonds have a peculiar recognition in the common law, and for purposes of taxation, annual or inheritance, are often treated as having a situs dependent upon their physical whereabouts. *Matter of Bronson*, 150 N. Y. 1; *Matter of Fearing*, 200 N. Y. 340; *State Tax on Foreign Held Bonds*, 15 Wall. 300.

But the rule does not embrace promissory notes. *Buck* v. *Beach*, 206 U. S. 392, 403.

This distinction between bonds and promissory notes has a historical basis. *Selliger* v. *Kentucky*, 213 U. S. 200, 204.

A promissory note may be the subject of larceny. *People* v. *Ogdensburgh*, 48 N. Y. 390, 397; *Buck* v. *Beach*, 206 U. S. 407.

At common law a promissory note was not within the law of larceny, *Regina* v. *Watts*, 6 Cox, C. C. 304, but certificates of stock, warehouse receipts and policies of insurance are unquestionably the subjects of larceny (Penal Law of New York, 1909, c. 88), although none of them is the property whose situs determines the power of annual or of inheritance taxation. *Matter of James*, 144 N. Y. 6; *Selliger* v. *Kentucky*, 213 U. S. 200; *Matter of Horn*, 39 Misc. (N. Y.) 133.

Taxation rests upon protection as a correlative, and when no protection is either practically or theoretically possible, taxation should not be laid: this is the broad basis for the rules limiting taxation. *Union Transit Co.* v. *Kentucky*, 199 U. S. 194; *Matter of Bronson*, 150 N. Y. 1; Cooley on Taxation (3d ed.), p. 3.

In this case the State of testator's domicile may tax, and indeed does so (Public Laws of Connecticut, 1903, c. 63), because it protects the universal succession.

The States of the debtors may tax, because they protect the debts by affording recourse to their respective courts. *Matter of Daly*, 100 App. Div. (N. Y.) 373; *S. C.*, 182 N. Y. 524; *Matter of Clinch*, 180 N. Y. 300.

But New York has protected nothing.

If such taxation is allowed, triple taxation on many kinds of choses in action is possible; in the case of a bill of exchange issued in multiplicate, the domiciliary States of the owner and of the primary obligor would be able to tax, and also each State within which one of the multiplicate bills happened to be found at the owner's death.

Mr. William Law Stout for defendant in error.

Mr. Justice Holmes delivered the judgment of the court.

This proceeding began with a petition by an executor, acting under ancillary letters, for the appointment of an appraiser to determine the amount, if any, of the transfer tax due from the estate of the deceased testator, Charles C. Tiffany. Tiffany was not a resident of New York at the time of his death but left in a safe deposit box in New York four promissory notes made by Pottinger, a resident of Chicago, secured by mortgages of Chicago land to Illinois trustees, and promissory notes of the Southern Railway Company, a Virginia corporation. The appraiser held these notes taxable under the New York laws of 1905, c. 368, § 1, amending § 220 of an earlier law and imposing a tax "when the transfer is by will or intestate law, of property within the State, and the decedent was a non-resident of the State at the time of his death." The Sur-

rogate confirmed the appraiser's report, and his order was affirmed by the Appellate Division and the Court of Appeals. 143 App. Div. 327. 202 N. Y. 550. The Executors contend that the tax deprives them of their property without due process of law.

In support of this position it was argued that if bonds were subject to taxation simply because of their presence within the jurisdiction it was due to the survival of primitive notions that identified the obligations with the parchment or paper upon which they were written, that bills and notes had a different history, and that there was no ground for extending the conceptions of the infancy of the race to them. It was pointed out that the power to tax simple contracts depends upon power over the person of one of the parties and does not attach to documentary evidence of such contracts that may happen to be within the jurisdiction. Cases were cited in which this court has pronounced bills and notes to be only evidences of the simple contracts that they express, *Pelham* v. *Way*, 15 Wall. 196; *Wyman* v. *Halstead*, 109 U. S. 654, 656, and the precise issue was thought to be disposed of by *Buck* v. *Beach*, 206 U. S. 392. We shall discuss this case, but for the moment it is enough to say that for the purposes of argument we assume that bills and notes stand as mere evidences at common law.

But we are bound by the construction given to the New York statutes by the New York courts, and the question is whether a statute that we must read as purporting to give to bills and notes within the State the same standing as bonds for purposes of taxation, goes beyond the constitutional power of the State. Again for the purposes of argument we may assume that there are limits to this kind of power; that the presence of a deed would not warrant a tax measured by the value of the real estate that it had conveyed, or even that a memorandum of a contract required by the statute of frauds would not sup-

port a tax on the value of the contract because it happened to be found in the testator's New York strong box. But it is plain that bills and notes, whatever they may be called, come very near to identification with the contract that they embody. An indorsement of the paper carries the contract to the endorsee. An indorsement in blank passes the debt from hand to hand so that whoever has the paper has the debt. It is true that in some cases there may be a recovery without producing and surrendering the paper, but so may there be upon a bond in modern times. It is not primitive tradition alone that gives their peculiarities to bonds, but a tradition laid hold of, modified and adapted to the convenience and understanding of business men. The same convenience and understanding apply to bills and notes, as no one would doubt in the case of bank notes, which technically do not differ from others. It would be an extraordinary deduction from the Fourteenth Amendment to deny the power of a State to adopt the usages and views of business men in a statute on the ground that it was depriving them of their property without due process of law. The necessity of caution in cutting down the power of taxation on the strength of the Fourteenth Amendment often has been adverted to. *Louisville & Nashville R. R. Co.* v. *Barber Asphalt Paving Co.*, 197 U. S. 430, 434. Unless we are bound by authority, we think the statute, so far as we now are concerned with it, plainly within the power of the State to pass.

As to authority, it has been asserted or implied again and again that the States had the power to deal with negotiable paper on the footing of *situs*. "It is well settled that bank bills and municipal bonds are in such a concrete tangible form that they are subject to taxation where found, irrespective of the domicil of the owner; . . . Notes and mortgages are of the same nature . . . we see no reason why a State may not declare that if found within its limits they shall be subject to taxation." *New*

Orleans v. *Stempel*, 175 U. S. 309, 322, 323. *Bristol* v. *Washington County*, 177 U. S. 133, 141. *State Board of Assessors* v. *Comptoir National d'Escompte*, 191 U. S. 388, 403, 404. *Metropolitan Life Insurance Co.* v. *New Orleans*, 205 U. S. 395, 400, 402. This is the established law unless it has been overthrown by the decision in *Buck* v. *Beach*, 206 U. S. 392.

No such effect should be attributed to that case. The Ohio notes in Buck's hands that were held not to be taxable in Indiana were moved backward and forward between Ohio and Indiana with the intent to avoid taxation in either State. 206 U. S. 402. They really were in Ohio hands for business purposes, *ibid.*, 395, and sending them to Indiana was spoken of by Mr. Justice Peckham as improper and unjustifiable. *Ibid.* 402. Their absence from Ohio evidently was regarded as a temporary absence from home. *Ibid.* 404. And the conclusion is carefully limited to a refusal to hold the presence of the notes "under the circumstances already stated" to amount to the presence of property within the State. A distinction was taken between the presence sufficient for a succession tax like that in this case, and that required for a property tax such as then was before the court, and the only point decided was that the notes had no such presence in Indiana as to warrant a property tax. See *New York Central & Hudson River R. R. Co.* v. *Miller*, 202 U. S. 584, 597. If *Buck* v. *Beach* is not to be distinguished on one of the foregoing grounds, as some of us think that it can be, we are of opinion that it must yield to the current of authorities to which we have referred.

In the case at bar it must be taken that the safe deposit box in which the notes were found was their permanent resting place and therefore that the power of the State so repeatedly asserted in our decisions could come into play.

Judgment affirmed.

MR. JUSTICE MCKENNA, concurring.

I concur in the result, but cannot concur in the reasoning of the opinion, or rather its controlling proposition unmodified. I might pass it by in silence if it did not have larger consequence than the decision of the pending case. The opinion is rested on the proposition, said to be based on authority, that the States have power to deal "with negotiable paper on the footing of situs," that is, to regard such paper so far concrete and tangible as to be of itself a subject of taxation, irrespective of the domicile of its owner or, I add, the locality of the debt which it represents. For the proposition announced, Mr. Justice Brewer, in *New Orleans* v. *Stempel*, 175 U. S. 309, is quoted from. Other cases are cited and it is said to be established law unless it has been overthrown by the decision in *Buck* v. *Beach*, 206 U. S. 392. I refrain from meeting the judgment of my brethren by simply opposing assertion, and I feel constrained to review the cases, including *Buck* v. *Beach*. I will do so in the order of their decision.

Commencing with the *Stempel Case* I may immediately say of it that its facts did not call for the broad and general declaration it is adduced to sustain. The statute passed on did not attempt to tax negotiable paper simply because of its presence in the State. It regarded the origin and use of such paper and declared its (the statute's) purpose to be that no non-resident, by himself or through an agent, should transact business in the State "without paying to the State a corresponding tax with that exacted of its own citizens," and, to execute the purpose, declared: "All bills receivable, obligations or credits arising from the business done in this State are hereby declared assessable within this State, and at the business domicil of said non-resident, his agent or representative."

The property assessed was inherited by Stempel's wards, they and she being residents of the State of New York. It

was assessed to the estate of the grandfather of the wards, and was $15,000, "money in possession, on deposit, or in hand," and 800,000, "money loaned or advanced, or for goods sold; and all credits of any and every description." The contention was that "the situs of the loans and credits was in New York, the place of residence of the guardian and wards, and, therefore, being loans and credits without the State of Louisiana, they were not subject to taxation therein."

The question presented by the contention, this court said, was whether, under the statute as interpreted by the Supreme Court of the State, the properties were subject to taxation, and, if so subject, whether any rights secured by the Federal Constitution were thereby infringed. The tax was sustained, but it will be observed that negotiable paper was not assessed at all or dealt with as an entity separate from what it represented. The notes which represented the credits taxed were, it is true, in New Orleans, but in possession of the agent of Stempel. Not they, but the rights of which they were the evidence were taxed. The broad declaration, therefore, that negotiable paper had such tangibility as to be of itself a taxable entity was not called for. The true value of the case and its application to the case at bar can be estimated when we consider the other cases.

In *Bristol* v. *Washington County*, 177 U. S. 133, notes secured by mortgages in the State (Minnesota) were taxed. The question was of their situs. The state court put its decision on the ground that the notes were in the State for collection or renewal with a view of reloaning the money and keeping it invested as a permanent business. And this court in its decision said that "credits secured by mortgages, the result of the business of investing and reinvesting moneys in the State, were subject to taxation as having their situs there." The ruling was affirmed. We said, by Mr. Chief Justice Fuller: "Persons are not per-

mitted to avail themselves for their own benefit of the laws of a State in the conduct of business within its limits, and then to escape their due contribution to the public needs through action of this sort, whether taken for convenience or by design" (p. 144).

In *Board of Assessors* v. *Comptoir National d'Escompte*, 191 U. S. 388, credits in the form of checks were taxed under the same statute considered in the *Stempel Case*. They were held in the State for investment and reinvestment, and this was the basis of the decision. The checks, it was said, became a credit for money loaned, localized in Louisiana, protected by it and within the scope of its taxing laws as construed by the Supreme Court. And we further said, after reviewing the *Stempel Case* and the *Bristol Case:* "From these cases it may be taken as the settled law of this court that there is no inhibition in the Federal Constitution against the right of the State to tax property in the shape of credits where the same are evidenced by notes or obligations held within the State, in the hands of an agent of the owner for the purpose of collection or renewal, with a view to new loans and carrying on such transactions as a permanent business" (p. 403).

In *Metropolitan Life Insurance Co.* v. *New Orleans*, 205 U. S. 395, the assessment was also under the act passed on in the *Stempel Case*. I will not pause to detail the facts. It is enough to say that the credits taxed were loans (evidenced by notes) by the insurance company to its policy holders in Louisiana. The tax was not *eo nomine* on the notes but was expressed to be on "credits, money loaned, bills receivable," etc., and its amount was ascertained by computing the sum of the face value of all the notes held by the company at the time of the assessment.

The purpose of the taxing law was said to be to lay the burden of taxation equally upon those who do business within the State. And, after comment, it was said (p. 399): "Thus it is clear that the measure of the taxation

designed by the law is the fair average of the capital employed in the business." In other words, the investments in the State were taxed and the legality of the tax was determined by their situs, not by the locality of the notes which represented them, *the notes being in New York at the home of the insurance company.*

It was the situs of the debt which determined the legality of the taxation in all of the cases and united them under the principle expressed in *Metropolitan Life Insurance Co.* v. *New Orleans*, that the law regards the place of the origin of negotiable paper as its true home, to which it will return to be paid, and its temporary absence can be left out of account. They do not support the broad proposition that to negotiable paper can be ascribed such tangibility and entity as so to make it a taxable object of itself in a jurisdiction other than that of the obligation it represents. This broad generality is necessary to sustain the tax in the present case if it can be regarded a direct tax on property, for Illinois, not New York, is the situs of the debts of which the notes taxed are the evidence, and of the mortgages which secure them.

That broad proposition was asserted in *Buck* v. *Beach* and rejected. The notes involved had their origin in Ohio and represented investments in that State. Their owner died, and one of the two trustees of his will resided in Indiana. The notes were kept in the custody of the latter except that at the time of assessment of taxes in that State they were sent to Ohio and after the lapse of a few days returned to him. They were taxed in Indiana. The tax was sustained by the State Supreme Court but declared invalid by this court.

The proposition presented for decision was stated thus by Mr. Justice Peckham for the court: "The sole question then for this court is whether the mere presence of the notes in Indiana [the taxing State] constituted the debts of which the notes were the written evidence, property

within the jurisdiction of that State, so that such debts could be therein taxed" (p. 400). The prior cases were considered, and it was said: "There are no cases in this court where an assessment such as the one before us has been involved. *We have not had a case where neither the party assessed nor the debtor was a resident of or present in the State where the tax was imposed, and where no business was done therein by the owner of the notes or his agent relating in any way to the capital evidenced by the notes assessed for taxation.* We cannot assent to the doctrine that the mere presence of evidences of debt, such as these notes, under the circumstances already stated, amounts to the presence of property within the State" (p. 406). And it was pointed out that the prior cases, which were specifically reviewed, gave no support to the rejected doctrine. It was not overlooked that certain specialty debts, state and municipal bonds and circulating notes of banking institutions, have sometimes been treated as property where they were found though removed from the domicile of the owner, and *State Tax on Foreign-held Bonds*, 15 Wall. 300, 324, was cited. Promissory notes were held not to be within the rule.

It is, however, asserted that the circumstances of the case showed that the notes were fugitives from taxation, alternately from Indiana and Ohio, and that their stay in Indiana was in evasion of their obligations to Ohio and was "a transit, although prolonged." But the bad motive of the possessor of the notes was not made a ground of decision. If the court felt a retributive impulse to deny the notes sanctuary in Indiana it was suppressed. The court declared that the motive for sending the notes to Indiana was of no consequence and that the attempt to escape proper taxation in Ohio did not confer jurisdiction on Indiana to tax them (p. 402).

But we are not required to overrule *Buck* v. *Beach* nor make it yield in any particular in order to sustain the

tax in the case at bar. It, in effect, reserved from its principle inheritance or succession taxing acts by rejecting as not in point cases which involved them. We said, "The foundation upon which such acts rest is different from that which exists where the assessment is levied upon property. The succession or inheritance tax is not a tax on property, as has been frequently held by this court, *Knowlton* v. *Moore*, 178 U. S. 41, and *Blackstone* v. *Miller*, 188 U. S. 189, and therefore the decisions arising under such inheritance tax cases are not in point" (p. 408).

The tax under review is of that kind. In other words, it is not a tax on property, but a tax upon the transfer of the property by the will of the testator of plaintiffs in error as provided by the laws of the State. The will was probated in Connecticut, where the deceased was a resident, but ancillary letters of administration were issued to plaintiffs in error by the Surrogates' Court, County of New York, State of New York, and the taxed notes were part of the property disposed of by his will. It appears, therefore, that the property is in the control of the courts of New York. In other words, the laws of New York are invoked, accomplish its transfer and subject it to the dispositions of the will and make effectual the purposes of the testator. *Blackstone* v. *Miller, supra.*

I am dealing with the power of taxation under our decisions. If there be injustice in its exercise by measuring the tax by the value of the credits represented by the notes, it is an injustice which this court cannot redress.

I am authorized to say that MR. JUSTICE PITNEY concurs in this opinion.

MR. JUSTICE LAMAR, dissenting.

I concur in Mr. Justice McKenna's analysis of *Buck* v. *Beach* and the other cases, but am of the opinion that the principle there decided, applies as well to inheritance and

transfer taxes on notes as to direct taxes and that, therefore, the judgment in the present case should be reversed.

I am authorized to say that THE CHIEF JUSTICE and MR. JUSTICE VAN DEVANTER concur in this dissent.

NADAL *v.* MAY.

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

No. 130. Submitted December 12, 1913; Restored to docket for reargument January 26, 1914; Reargued April 6, 7, 1914.—Decided April 20, 1914.

The Civil Code of Porto Rico of March 1, 1902, did not go into effect until July 1, 1902, *Ortega* v. *Lara*, 202 U. S. 339, and prior thereto the wife's assent to a conveyance by her husband was not necessary.

Decisions of this court and of the local courts as to the date when a code of law making material changes in the prior existing law went into effect may well become a rule of property which should not be disturbed by subsequent conflicting decisions.

This court, as a general rule, is unwilling to overrule local tribunals upon matters of purely local concern. *Santa Fe Central Ry.* v. *Friday*, 232 U. S. 694.

5 P. R. Fed. Rep. 582, affirmed.

THE facts, which involve the validity of title to land in Porto Rico, and determination of the date when the Civil Code of 1902 went into effect, are stated in the opinion.

Mr. N. B. K. Pettingill, with whom *Mr. F. L. Cornwell* was on the brief, for plaintiff in error:

There was error in determining the meaning of the will. The translation of the official interpreter was not conclusive and the construction based thereon is erroneous.

There was error in the admission and exclusion of evi-

dence; as to excluding admission of Sanjurjo; excluding the statement as to property inherited by Altagracia Nadal; in the admission of the statement as to the liquidation of community property; the last inquiry is not within the issues nor is it material.

There was error in giving the peremptory charge. The plaintiff had established a *prima facie* case and defendant did not overcome it. There was error in overruling the demurrer to the special defense and holding the same sufficient to warrant directing a verdict for defendant.

The allegations were not sufficient to constitute estoppel.

In support of these contentions, see *Adams* v. *Akerlund*, 168 Illinois, 632; *Ambrose* v. *Moore*, 46 Washington, 463; *Arnett* v. *Reade*, 220 U. S. 311; *Boscio* v. *Registrar*, 14 P. R. Fed. Rep. 605; *Caballero* v. *Pomales*, 17 P. R. Fed. Rep. 691; *Caballero* v. *Registrar*, 12 P. R. Fed. Rep. 214; *Crary* v. *Dye*, 208 U. S. 515; *Dooley* v. *Registrar*, 12 P. R. Fed. Rep. 202; *Feliu* v. *Registrar*, 16 P. R. Fed. Rep. 728; *Fernandez* v. *Gutierrez*, 10 P. R. Fed. Rep. 59; *Gonzalez* v. *Ortiz*, 17 P. R. Fed. Rep. 563; *Garrozi* v. *Dastas*, 204 U. S. 64; *Guies* v. *Lawrence*, 2 La. Ann. 226; *Hanrick* v. *Patrick*, 119 U. S. 156; *Mutual Life Ins. Co.* v. *Phinney*, 178 U. S. 327; *Rodriguez* v. *Registrar*, 14 P. R. Fed. Rep. 754; *Royal Ins. Co.* v. *Martin*, 192 U. S. 149; *Sturm* v. *Boker*, 150 U. S. 312; *United States* v. *Turner*, 11 How. 663; *Vidal* v. *Registrar*, 12 P. R. Fed. Rep. 198; *Warburton* v. *White*, 176 U. S. 484; *Wiser* v. *Lawler*, 189 U. S. 260.

While the Supreme Court of Porto Rico in *Busó* v. *Busó* held that the Revised Civil Code went into effect July 1, 1902, and that § 1328 of that Code was a new section inserted therein, which changed the law as it had previously obtained and first gave to the wife the power, by withholding her consent, to prevent the alienation of the real property belonging to the conjugal partnership, an examination of *Busó* v. *Busó* will show that the Supreme Court of Porto Rico did not investigate the ques-

tion for itself as an independent legal proposition, but was merely misled by the recital contained in the certificate of the Secretary of Porto Rico prefixed to the official printed volume of the Codes. See *Morales* v. *Registrar*, 16 P. R. Fed. Rep. 109, 114. See also § 41, Political Code, that every statute, unless a different time is prescribed therein, takes effect from its passage.

This section is but declaratory of the law as uniformly settled in the absence of any express provision to the contrary. *Matthews* v. *Zane*, 7 Wheat. 164, 211; *Memphis* v. *United States*, 97 U. S. 293, 296; *Seven Hickory* v. *Ellery*, 103 U. S. 423; *Louisville* v. *Savings Bank*, 104 U. S. 476; *Robertson* v. *Bradbury*, 132 U. S. 491; *Ortega* v. *Lara*, 202 U. S. 339.

The Revised Civil Code was approved by the governor of Porto Rico on March 1, 1902, and went into effect on that day as a matter of law.

The validating act of February 24, 1903, was not effectual. It is clearly an attempt at retroactive legislation which is invalid, if applied to the conveyance in question, because it divests the settled rights of property. *Wilkinson* v. *Leland*, 2 Pet. 661; *Mitchell* v. *Campbell*, 19 Oregon, 198, 207; *Showk* v. *Brown*, 61 Pa. St. 320; *Brinton* v. *Seevers*, 12 Iowa, 389; *Boston F. Co.* v. *Condit*, 19 N. J. Eq. 394, 399; *Houston & T. C. R. Co.* v. *Texas*, 170 U. S. 243, 261. See also *Gunn* v. *Barry*, 15 Wall. 610, 622; *Arnett* v. *Reade*, 220 U. S. 311, 320.

The meaning of paragraph seven of the will is not doubtful, nor is the doctrine of innocent purchaser applicable.

Division of community property is not necessarily a matter of probate jurisdiction.

As to *Garzot* v. *Rubio*, 209 U. S. 283, see *Arnett* v. *Reade*, 220 U. S. 311, and other cases cited *supra*.

Mr. Felix Frankfurter, with whom *Mr. Wolcott H. Pitkin, Jr.*, Attorney General of Porto Rico, was on the brief, for defendant in error:

The new Civil Code did not go into effect until July 1, 1902, and the controlling conveyance of June 2, 1902, under the then existing Spanish Civil Code was properly made by the husband without the consent of the wife.

The will under which plaintiff claims conveys to him no interest in "Carmen."

As a bona fide purchaser for value ("third person") the People of Porto Rico could rely on the record title and took a clear title, for no defect or cautionary notice appeared in the registry against "Carmen."

Plaintiff's claim involves a preceding liquidation of a community between husband and wife. This is solely a subject-matter for the local probate court and beyond the jurisdiction of the District Court of the United States for Porto Rico.

The exceptions to rulings on evidence are without merit. In support of these contentions, see *Amadeo* v. *Registrar*, 3 P. R. Fed. Rep. 263; *Busó* v. *Busó*, 16 P. R. Fed. Rep. 864; *Castro* v. *Registrar*, 7 P. R. Fed. Rep. 458, 461; *Escalona* v. *Registrar*, 9 P. R. Fed. Rep. 523; *Garrozi* v. *Dastas*, 204 U. S. 64, 78; *Garzot* v. *de Rubio*, 209 U. S. 283; *Morales* v. *Registrar*, 16 P. R. Fed. Rep. 109, 111; *Ortega* v. *Lara*, 202 U. S. 339, 343; *Para* v. *Registrar*, 2 P. R. Fed. Rep. 592; *Riera* v. *Registrar*, 11 P. R. Fed. Rep. 223; *Roca* v. *Banco Territorial*, 6 P. R. Fed. Rep. 339, 351, 353, 355; *Santa Fe Central Ry. Co.* v. *Friday*, 232 U. S. 694.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit by the plaintiff in error to establish his title to one-half interest in a plantation called 'Carmen,' as devisee of his aunt, Altagracia Nadal. It is alleged that the plantation was bought with the separate money of Altagracia Nadal by her husband, after marriage; that she became the owner of one undivided half, subject to

the administration of her husband until the termination of the conjugal partnership, and that this half passed to her devisee at her death. The complaint admits that after the purchase the husband purported to convey the whole plantation to a third person but alleges that the wife did not consent to the conveyance and that therefore her rights remained.

It appears that on May 1, 1901, Altagracia Nadal brought a suit against her husband for an account of her paraphernal property, alleging among other things, that he had recorded in his favor the estate Carmen, acquired by a deed of October 25, 1900, and praying judgment that it was her private property because bought with her separate funds, and for a cautionary notice to be entered in the registry. On November 10, 1901, a settlement was made by which it was stated that the husband had received ten thousand dollars as the product of the wife's paraphernal property, had paid her five thousand dollars and given a mortgage for the other five thousand, and in view thereof she "renounces all the rights and interests which she might have against her husband because of the facts stated in the said complaint." The instrument was presented to the court with a prayer that the court would hold that the parties had desisted from continuing the action and that the cautionary notice be cancelled, which was granted on November 21. There had been conveyances of Carmen, without consideration, it was testified; there was a reconveyance to the husband, and on June 2, 1902, he conveyed it, without his wife's consent, to Elisa Sanjurjo, who on August 29 of the same year conveyed it to the People of Porto Rico, for valuable consideration, there being then no cautionary notice on record. On April 10, 1906, the wife assigned to the plaintiff the mortgage received by her on the above settlement, and on April 27, 1906, made the will under which the plaintiff claims.

By this will the testatrix left to the plaintiff a mortgage

described, with all its rights and actions (*asi como todos sus derechos y acciones*) and also the mortgage assigned on April 10, in case the assignment should not have been effective in favor of her said nephew 'Rafael Martinez y Nadal, *todos los derechos y acciones que puedan caberme en los bienes mios que estén á nombre de mi esposo Isidro Fernandez Sanjurjo, en virtud de la transacción celebrada con mi dicho esposo.*'

The plaintiff's claim is founded on these last words. The official translation accepted by the court reads that she leaves the mortgage "in case the assignment shall not have become effective, all the rights and actions which may pertain to me in my properties which are in the name of my husband Isidro Fernandez Sanjurjo, by virtue of the settlement made with my said husband." The plaintiff contends that the word 'and' should be read in before 'all the rights and actions' on the notion that a *y* has dropped out or should be implied. He argues that the estate Carmen was not embraced in the settlement, because community property in which the wife had and retained a community interest and that the last words devise it—*en virtud de* signifying more nearly in spite of the settlement than by virtue of it.

On the other hand it is argued that the settlement renounced all claim by the wife to Carmen if any she had; that the last words of the will have an import similar to that of those used in connection with the previous mortgage; that *en virtud de* means by virtue of; that if the wife had a claim it was outside the settlement and those words would not describe it, even if at the date of the will the estate had still stood in the husband's name, where notoriously and as she well knew it had not stood for years. The government also claims as a *bona fide* purchaser without notice. It is obvious, we think, from this summary that these arguments against the plaintiff's claim are hard to meet, and they were not met. But it is

not necessary absolutely to decide on their validity as the case is disposed of by a preliminary point.

Both sides agree that the wife's assent to a conveyance by her husband was made necessary for the first time by § 1328 of the Civil Code of March 1, 1902. Unless that Code went into effect at its date it did not apply to the conveyance of June 2. The plaintiff argues with much force that it was in effect then and that the decisions to the contrary are all based on a mistaken certificate of the Secretary of Porto Rico, but we are of opinion that the considerations on the other side must prevail. On the last day of its session the Legislature passed four codes making material changes in the existing law—the Political Code, the Penal Code, the Code of Criminal Procedure and the Civil Code, which although in form separate acts were published in one volume and constituted a large part of a system. Two of these Codes fixed July 1, 1902, as the time for their taking effect. It was the duty of the Secretary to promulgate the laws (Act of Congress of April 12, 1900, c. 191, § 19, 31 Stat. 77, 81), and he was directed by an act of the same date as that of the Codes to revise and arrange the provisions of the Codes for publication along with the Joint Codes Committee of the Legislature; the arrangement to be completed as soon as practicable after April 1, and publication being expected on or before August 1. A resolution of the day before shows that they had to be enacted before enrollment with manuscript corrections. Rev. Stats. & Codes of Porto Rico, 1902, p. 299. The Secretary certified that they were in effect on and after July 1, 1902. But the injustice of making the Civil Code operative before its contents could be known and before the revision contemplated by the law was so manifest that on February 24, 1903, an act was passed purporting to validate all conveyances of real estate and in general all acts that required certification by a notary executed after March 1, 1902, and on or before January 1,

1903, if they would have been valid by the laws in force on February 28, 1902. This court assumed that the Civil Code went into effect on July 1, in *Ortega* v. *Lara*, 202 U. S. 339, 343, and the Supreme Court of Porto Rico has decided the same point twice. *Estate of Morales* v. *The Registrar of Property of Caguas*, 16 P. R. Fed. Rep. 109, 114. *Busó* v. *Busó*, 18 P. R. Fed. Rep. 864, 867, 868. It is impossible to know how many or how important transactions may have taken place on the faith of these repeated solemn assurances, and apart from the general unwillingness of this court to overrule the local tribunals upon matters of purely local concern, *Santa Fe Central Ry. Co.* v. *Friday*, 232 U. S. 694, 700, it is not too much to say that the decisions have become a rule of property, even if we did not think, as we do, that probably the Secretary's certificate expressed the legislative will.

Judgment affirmed.

SAN JOAQUIN AND KINGS RIVER CANAL AND IRRIGATION COMPANY *v.* COUNTY OF STANISLAUS, IN THE STATE OF CALIFORNIA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 303. Argued March 18, 1914.—Decided April 27, 1914.

As the franchise involved in this case provides that the rates for supplying water may be fixed by a public body but so that the returns shall not be less than a specified per cent. on the value of all the property actually used and useful to the appropriation and furnishing of the water, the value of the water rights owned by the company must be taken into account in establishing such rates.

A party may wait until after a law is passed or a regulation is made which affects his interests and then stand upon his constitutional

rights; and so *held* that a public utility corporation may attack a rate as confiscatory after it has been made, although it offered no evidence as to the value of its property and of the service rendered before the governing body establishing the rate. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210.

The declaration in the California constitution of 1879 that water appropriated for sale is appropriated for a public use is not to be construed as meaning that the water belongs to the public at large but as meaning that those within reach may obtain it at a reasonable price.

191 Fed. Rep. 875, reversed.

THE facts, which involve the validity under the due process clause of the Fourteenth Amendment of orders establishing water rates of an irrigation company in California, are stated in the opinion.

Mr. Edward F. Treadwell, with whom *Mr. Garret W. McEnerney*, *Mr. Frank H. Short*, *Mr. Aldis B. Browne* and *Mr. Alexander Britton* were on the brief, for appellant.

Mr. James P. Langhorne, with whom *Mr. L. J. Maddux*, *Mr. Parker S. Maddux*, *Mr. Denver S. Church*, *Mr. M. F. McCormick* and *Mr. H. S. Shaffer* were on the brief, for appellees:

Complainant was not entitled to have its alleged water rights valued by the Circuit Court, because it failed to claim before the rate boards that it owned any water rights, or to introduce any evidence of value of water rights, or to refer to them in any manner.

The water rights cost complainant nothing.

Complainant was not entitled to have its alleged water rights valued, because it diverted the waters from a public stream for public use, without cost to it for such waters.

The contracts under which complainant furnishes water to Miller & Lux, its controlling stockholder, at less than the county rates complained of were not made in consid-

eration of the conveyance by Miller & Lux to complainant of any riparian or other water right.

The contract under which complainant furnishes Miller & Lux free water for 20,000 acres of pasture land was not made in consideration of any water right.

Even should the value of the alleged water right be included, yet complainant should not recover and the bill of complaint was properly dismissed since complainant donates 25.13 per cent of its receivable revenues under the rates complained of to Miller & Lux, its controlling stockholder, under its discriminatory rate contracts with Miller & Lux, and hence complainant has no standing in court because the court should only enforce the constitutional guaranties as to income actually receivable by complainant under the rates complained of.

Complainant does not own the water right.

Irrespective of whether or not complainant paid anything for its alleged water rights, it is not entitled to have them valued in a proceeding to fix rates, because under the constitution of the State of California it has dedicated its waters and water rights to a public use. It is the mere purveyor or carrier of the water for public use. The public served by complainant is the owner of the water rights.

Complainant is not entitled to have its alleged water rights valued as part of its franchise.

Complainant is not entitled to have its alleged water rights valued as increasing the value of its tangible properties; nor is complainant entitled to have its alleged water rights valued as part of its "going concern."

Complainant introduced no evidence of the value of "going concern" or of "good-will."

Complainant has a monopoly, and hence is not entitled to any valuation of "going concern," or "good-will."

The master and Circuit Court did not err in their valuation of the plant or in disallowing alleged appreciation value. Appreciation was offset by the proved depreciation.

Complainant has not come into court with clean hands.

The total of the valuations of complainant's properties made by the County Boards of Supervisors is not the total valuation of complainant's plant, but is the total of the valuations that the board respectively made of those portions of the plant, both within and without the county, that were useful to the counties respectively.

In support of these contentions, see *Anderson* v. *Bassman*, 140 Fed. Rep. 14; *Atchison* v. *Peterson*, 20 Wall. 514; *Balfour* v. *Fresno Irr. Co.*, 109 California, 221; *Basey* v. *Gallagher*, 20 Wall. 682; *Boise City I. & L. Co.* v. *Clark*, 131 Fed. Rep. 414; *Clarke* v. *White*, 12 Pet. 299; *Clyne* v. *Water Co.*, 100 California, 310; *Contra Costa W. Co.* v. *Oakland*, 159 California, 323; *Creath* v. *Sims*, 5 How. 192; *Duckworth* v. *Watsonville W. Co.*, 150 California, 530; *Fresno Irr. Co.* v. *Rowell*, 80 California, 114; *Fresno Irr. Co.* v. *Dunbar*, 80 California, 530; *Fresno Canal Co.* v. *Park*, 129 California, 437; *Galloway* v. *Finley*, 12 Pet. 297; *Home T. & T. Co.* v. *Los Angeles*, 211 U. S. 265; *Imperial Water Co.* v. *Halobird*, 197 Fed. Rep. 4; *Kitchen* v. *Rayburn*, 19 Wall. 518; *Knoxville* v. *Water Co.*, 212 U. S. 1; *Lanning* v. *Osborne*, 76 Fed. Rep. 319; *Lassen Irr. Co.* v. *Leavitt*, 157 California, 94; *Leavitt* v. *Lassen Irr. Co.*, 157 California, 82; *Manhattan &c.* v. *Ward*, 108 U. S. 218; *Merrill* v. *Southside Irr. Co.*, 112 California, 426; *McCrary* v. *Beaudry*, 67 California, 120; *McDonald* v. *Bear River Co.*, 13 California, 220; *New York* v. *Pine*, 185 U. S. 103; *Osborne* v. *San Diego Land Co.*, 178 U. S. 22; *People* v. *Stephens*, 62 California, 233; *People* v. *Elk River M. & L. Co.*, 107 California, 221; *Price* v. *Irrigating Co.*, 56 California, 431; *Roberts* v. *Nor. Pac. R. R. Co.*, 158 U. S. 13; *San Diego Flume Co.* v. *Souther*, 90 Fed. Rep. 164; 104 Fed. Rep. 707; *San Diego Flume Co.* v. *Chase*, 87 California, 561; *San Diego Co.* v. *National City*, 74 Fed. Rep. 79; *S. C.*, 174 U. S. 739; *San Diego W. Co.* v. *San Diego*, 118 California, 556; *Stanislaus* v. *San Joaquin R. R. & I. Co.*, 192 U. S.

201; *Stanislaus W. Co.* v. *Bachman*, 152 California, 716; *Souther* v. *San Diego F. Co.*, 112 Fed. Rep. 228; *Thayer* v. *Cal. Dev. Co.*, 164 California, 117; *Tyndale Palmer* v. *Southern Water Co.*, No. 418 Cal. R. Com.; *Watterson* v. *Saldunbehere*, 101 California, 107, 112; Weil on Water Rights, § 478; *Wheeler* v. *Northern Irr. Co.*, 10 Colorado, 298; *Wheeler* v. *Sage*, 1 Wall. 518; *Wilterding* v. *Green*, 45 Pac. Rep. 134; *Willcox* v. *Con. Gas Co.*, 212 U. S. 19; *Wyatt* v. *Lorimer*, 18 Colorado, 298.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill to restrain the enforcement of orders passed by the Boards of Supervisors of the three defendant Counties, Stanislaus, Fresno and Merced, establishing water rates to be charged by the plaintiff, the appellant; the ground of the bill being that the orders deprive the plaintiff of its property without due process of law. By a statute of March 12, 1885, the Boards are authorized to fix these rates for their several Counties, but so that the returns to the parties furnishing the water shall be not less than six per cent. upon the value of the 'canals, ditches, flumes, chutes, and all other property actually used and useful to the appropriation and furnishing of such water.' The rates when fixed are binding for one year and until established anew or abrogated. The bill concerns rates fixed in 1907, and the question before the court has been narrowed to a single issue. If the plaintiff is entitled to six per cent. upon its tangible property alone it is agreed that the orders must stand. But if the plaintiff has water rights that are to be taken into account, the rates fixed will fall short of giving it what it is entitled to and must be set aside. The Circuit Court dismissed the bill, 191 Fed. Rep. 875, and on this appeal figures are immaterial, the only question being whether the principle adopted is right.

It was suggested to be sure at the argument that it does not appear that the plaintiff offered any evidence as to water rights at the hearing before the Supervisors, and therefore that it ought not to be allowed to complain now that nothing was allowed for them. But this evidently is an afterthought. In general, a party may wait until a law is passed or regulation is made and then insist upon his constitutional rights. *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 227, 229. This we understand to be the view of the California courts as to these very boards. *Spring Valley Water Works* v. *San Francisco*, 82 California, 286, 315. *San Diego Water Co.* v. *San Diego*, 118 California, 556, 564. Moreover as the defendants contend that the plaintiff is entitled to no compensation for water rights, to offer evidence would have been an idle form.

It is not disputed that the plaintiff has a right as against riparian proprietors to withdraw the water that it distributes through its canals. Whether the right was paid for, as the plaintiff says, or not, it has been confirmed by prescription and is now beyond attack. It is not disputed either that if the plaintiff were the owner of riparian lands to which its water was distributed it would have a property in the water that could not be taken without compensation. But it is said that as the plaintiff appropriates this water to distribution and sale it thereby dedicates it to public use under California law and so loses its private right in the same. It appears to us that when the cases cited for this proposition are pressed to the conclusion reached in the present case they are misapplied. No doubt it is true that such an appropriation and use of the water entitles those within reach of it to demand the use of a reasonable share on payment. It well may be true that if the waters were taken for a superior use by eminent domain those whose lands were irrigated would be compensated for the loss. But even if the rate paid is not to be determined as upon a purchase of water from the plain-

tiff, still, at the lowest, the plaintiff has the sole right to furnish this water, the owner of the irrigated lands cannot get it except through the plaintiff's help, and it would be unjust not to take that fact into account in fixing the rates. We are not called upon to decide what the rate shall be, or even the principle by which it shall be measured. But it is proper to add a few words.

The declaration in the Constitution of 1879 that water appropriated for sale is appropriated to a public use must be taken according to its subject-matter. The use is not by the public at large, like that of the ocean for sailing, but by certain individuals for their private benefit respectively. *Thayer* v. *California Development Co.*, 164 California, 117, 128. *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 161. The declaration therefore does not necessarily mean more than that the few within reach of the supply may demand it for a reasonable price. The roadbed of a railroad is devoted to a public use in a stricter sense, yet the title of the railroad remains, and the use though it may be demanded, must be paid for. In this case it is said that a part of the water was appropriated before the Constitution went into effect, and that a suit now is pending to condemn more as against a riparian proprietor, for which of course the plaintiff must pay. It seems unreasonable to suppose that the Constitution meant that if a party instead of using the water on his own land, as he may, sees fit to distribute it to others he loses the rights that he has bought or lawfully acquired. Recurring to the fact that in every instance only a few specified individuals get the right to a supply, and that it clearly appears from the latest statement of the Supreme Court of California, *Palmer* v. *Railroad Commission*, January 20, 1914, 47 Cal. Dec., 201, that the water when appropriated is private property, it is unreasonable to suppose that the constitutional declaration meant to compel a gift from the former owner to the users and that in

dealing with water 'appropriated for sale' it meant that there should be nothing to sell. See *San Diego Water Co.* v. *San Diego*, 118 California, 556, 567. *Fresno Canal & Irrigation Co.* v. *Park*, 129 California, 437, 443 *et seq.* *Stanislaus Water Co.* v. *Bachman*, 152 California, 716. *Leavitt* v. *Lassen Irrigation Co.*, 157 California, 82.

Decree reversed.

MR. JUSTICE PITNEY did not sit in this case.

THADDEUS DAVIDS COMPANY *v.* DAVIDS MANUFACTURING COMPANY.

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

No. 184. Argued January 22, 1914.—Decided April 27, 1914.

A trade-mark consisting of an ordinary surname is not the subject of exclusive appropriation as a common-law trade-mark, but may, under the fourth proviso of § 5 of the Trade-Mark Act of 1905, be validly registered if in use for ten years next preceding the passage of that act in the manner specified therein.

A proviso in a statute will not be so construed as to have little or nothing to act upon and to have no reason for its insertion.

The fourth proviso of § 5 of the Trade-Mark Act of 1905 modifies the general limitations contained in the second proviso of the same section against the use of personal and geographical names and terms descriptive of character and quality.

In enacting the Trade-Mark Act of 1905 and inserting the provisos in § 5 thereof, Congress did not intend to provide for a barren notice of an ineffectual claim, but to confer definite rights, and an applicant properly registering under the act becomes the owner of the trade-mark and entitled to be protected in its use as such.

While a trade-mark consisting of a proper name may be registered

under the fourth proviso of § 5 of the Trade-Mark Act of 1905, another who uses that name will not be regarded as infringing the trade-mark unless the name is so reproduced, copied or imitated as to mislead the public with respect to the origin or ownership of the goods.

Improperly using a proper-name trade-mark registered under the fourth proviso of § 5 of the Trade-Mark Act of 1905 in such manner as to mislead the public and thereby constitute infringement is not merely unfair competition at common law, which would not give the Federal court jurisdiction unless diverse citizenship existed, but is a violation of a Federal right and a Federal court has jurisdiction of an action based thereon.

While in a case for unfair competition it may be necessary to show intent to deceive the public, in a case for violation of a properly registered trade-mark it is not necessary to show wrongful intent or facts justifying an inference of such intent.

Complainant having, for the period and in the manner specified in the proviso of § 5 of the Trade-Mark Act of 1905, used the name "Davids'" in connection with ink manufactured and sold by it in a particular manner, that name was properly registered as a trade-mark and the defendants by using the same word in such a similar style on the ink manufactured by them as to mislead the public infringed complainant's rights under the statute and should be enjoined.

192 Fed. Rep. 915, reversed.

THE facts, which involve the construction of the Trade-Mark Act of February 20, 1905, and what constitutes infringement of a trade-mark registered thereunder, are stated in the opinion.

Mr. W. P. Preble for petitioner.

Mr. Emerson R. Newell for respondents:

The court cannot take jurisdiction of unfair competition.

Defendants have a right to use their own name.

The acts complained of are mere alleged similarity of labels.

Complainant has made false statements: its registration was invalid.

There was no unfair competition.

There was no use by defendants as required by the statute.

The certificate of registration was not produced.

In support of these contentions, see *McLean* v. *Fleming*, 96 U. S. 828; *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 706; *Marsh* v. *Nichols*, 128 U. S. 538; *Singer* v. *June*, 163 U. S. 169; *Elgin* v. *Illinois*, 179 U. S. 665; *Holzapfel* v. *Rahtjen*, 193 U. S. 53; *Worden* v. *California Fig Syrup Co.*, 187 U. S. 282; *Warner* v. *Searle*, 191 U. S. 145; *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict*, 198 U. S. 134; *Leschen* v. *Broderick*, 201 U. S. 166; *Hutchinson & Pierce* v. *Loewy*, 163 Fed. Rep. 42; *S. C.* 217 U. S. 457; *Payne* v. *Trask*, 56 Fed. Rep. 233; *Mayor* v. *American*, 60 Fed. Rep. 1016; *Burt* v. *Smith*, 71 Fed. Rep. 161; *American* v. *Leeds*, 140 Fed. Rep. 981; *Davids* v. *Davids*, 178 Fed. Rep. 801; *National Casket Co.* v. *N. Y. & Brooklyn Casket Co.*, 185 Fed. Rep. 533; *Davids* v. *Davids*, 192 Fed. Rep. 915; *Diedrich* v. *Schneider*, 195 Fed. Rep. 35; *In re Cahn, Belt & Co.*, 27 App. D. C. 177; *Wrigley* v. *Norris*, 34 App. D. C. 138; *Worster Brewing Co.* v. *Rueter*, 30 App. D. C. 428; *Kentucky Distillers* v. *Old Lexington*, 31 App. D. C. 223; *Justin Seubert* v. *Santanella*, 36 App. D. C. 520; *Becker* v. *Gambrill*, 38 App. D. C. 585; *Wright* v. *Taylor*, 33 App. D. C. 510; *Ex parte L. & A. Scharff*, 128 Off. Gaz. 2531 (1907 C. D. 172).

Mr. Justice Hughes delivered the opinion of the court.

Thaddeus Davids Company, manufacturer of inks, etc., brought this suit for the infringement of its registered trade-mark "DAVIDS'". It was alleged that the complainant was the owner of the trade-mark; that it had been used in interstate commerce by the complainant and its predecessors in business for upwards of eighty years; that on January 22, 1907, it had been registered by the com-

plainant as a trade-mark, applicable to inks and stamp pads, under the act of February 20, 1905, c. 592, 33 Stat. 724; that the complainant was entitled to such registration under § 5 of the act by reason of actual and exclusive use for more than ten years prior to the passage of the act; and that the defendants, Cortlandt I. Davids and Walter I. Davids, trading as Davids Manufacturing Company, were putting inks upon the market with infringing labels. The bill also charged unfair competition. Upon demurrer, the validity of the trade-mark was upheld by the Circuit Court of Appeals (178 Fed. Rep. 801), and on final hearing, upon pleadings and proofs, complainant had a decree. 190 Fed. Rep. 285. This decree was reversed by the Circuit Court of Appeals which held that there was no infringement of the registered trade-mark and that the suit, if regarded as one for unfair competition, was not within the jurisdiction of the court, the parties being citizens of the same State. 192 Fed. Rep. 915. Certiorari was granted.

As the mark consisted of an ordinary surname, it was not the subject of exclusive appropriation as a common law trade-mark (*Brown Chemical Company* v. *Meyer*, 139 U. S. 540, 542; *Howe Scale Company* v. *Wyckoff*, 198 U. S. 118, 134, 135); and the complainant derived its right from the fourth proviso of § 5. This section, at the time of the registration, was as follows (33 Stat. p. 725): [1]

"Sec. 5. That no mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade-mark on account of the nature of such mark unless such mark—

"(a) Consists of or comprises immoral or scandalous matter;

"(b) Consists of or comprises the flag or coat of arms or

[1] Section 5 has been amended by the acts of March 2, 1907, c. 2573, 34 Stat. 1251; February 18, 1911, c. 113, 36 Stat. 918; January 8, 1913, c. 7, 37 Stat. 649.

other insignia of the United States, or any simulation thereof, or of any State or municipality, or of any foreign nation: *Provided*, That trade-marks which are identical with a registered or known trade-mark owned and in use by another, and appropriated to merchandise of the same descriptive properties, or which so nearly resemble a registered or known trade-mark owned and in use by another, and appropriated to merchandise of the same descriptive properties, as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers, shall not be registered: *Provided*, That no mark which consists merely in the name of an individual, firm, corporation, or association, not written, printed, impressed, or woven in some particular or distinctive manner or in association with a portrait of the individual, or merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, or merely a geographical name or term, shall be registered under the terms of this Act: *Provided further*, That no portrait of a living individual may be registered as a trade-mark, except by the consent of such individual, evidenced by an instrument in writing: *And provided further*, That nothing herein shall prevent the registration of any mark used by the applicant or his predecessors, or by those from whom title to the mark is derived, in commerce with foreign nations or among the several States, or with Indian tribes, which was in actual and exclusive use as a trade-mark of the applicant or his predecessors from whom he derived title for ten years next preceding the passage of this Act."

The fourth proviso, or ten-year clause, has manifest reference to marks which are not technical trade-marks; otherwise, it would have no effect. The owner of a trade-mark valid at common law and used in commerce with foreign nations, or among the several States, or with Indian tribes, may obtain its registration under the act

without showing the user of ten years required by this clause. Sections 1, 2. Congress evidently had in mind the fact that marks, although not susceptible of exclusive appropriation at common law, frequently acquired a special significance in connection with particular commodities; and the language of the fourth proviso was carefully chosen in order to bring within the statute those marks which, while not being technical trade-marks, had been in "actual and exclusive use" as trade-marks for ten years next preceding the passage of the act.[1] See

[1] In the bill as it passed the House of Representatives, the fourth proviso in § 5 read as follows: "*And provided further*, that nothing herein shall prevent the registration of any *trade-mark* used by the applicant or his predecessors, or by those from whom title to the *trade-mark* is derived, in commerce with foreign nations or among the several States or with Indian tribes, which was in actual *and lawful* use as a trade-mark of the applicant, or his predecessors from whom he derived title over ten years next preceding February twentieth, nineteen hundred and five." The bill was amended in the Senate so as to substitute the word "mark" for the word "trade-mark", where it is italicised above, and also by striking out the words "and lawful". The conference committee recommended that the House recede from its disagreement to these amendments and that the words "and exclusive" should be substituted for the words "and lawful". The managers on the part of the House made the following statement in explanation:

"On amendments Nos. 2 and 3: The word 'mark' is substituted in each instance for the word 'trade-mark' in the bill as it passed the House for the reason that the use of the word 'trade-mark' in this connection would not have accomplished the purposes of the proviso of the section in question.

"On amendment No. 4: The words 'and lawful' were stricken out by the Senate amendment, and by the conference report it is recommended that the words 'and exclusive' be substituted therefor. The purpose of this amendment is to prohibit the registration of any marks which are not technical trade-marks unless the applicant has used such mark exclusively for the period of ten years. The words 'next preceding' are inserted in place of the words 'prior to' the passage of the act, so as to require the exclusive use of the mark for the ten years immediately preceding the passage of this act." Cong. Rec. Vol. 39, pp. 1398, 2412.

In re Cahn, Belt & Co., 27 App. D. C. 173, 177; *Worster Brewing Corp.* v. *Rueter*, 30 App. D. C. 428, 430, 431; *In re Wright*, 33 App. D. C. 510.

It is suggested, however, that the privilege accorded by this proviso is limited to marks which lie outside the positive prohibitions contained in the earlier clauses of § 5. Thus, it is said that the exceptions with respect to marks of a scandalous sort, and as to those embracing public insignia, are plainly intended to apply to all marks of the described character whether or not they had been used for the preceding ten years (*In re Cahn, Belt & Co., supra*); and, it is urged that if this be so, the prohibitions of the provisos which precede the ten-year clause must likewise be deemed to restrict its scope. The emphasis in the present case is placed upon the second proviso in § 5. This, in substance, prohibits the registration of marks consisting merely of individual, firm or corporate names, not written or printed in a distinctive manner, or of designations descriptive of the character or quality of the goods with which they are used, or of geographical names or terms; and it thus contains, as the Court of Appeals said, "a fairly complete list" of the marks used by dealers in selling their goods, which are not valid trade-marks at common law. If the ten-year proviso be construed as not to apply to any marks within this comprehensive description, the clause would have little or nothing to act upon and we can conceive of no reason for its insertion.

We think that the intent of Congress is clear. In the opening clause of § 5, it is provided that no mark by which the goods of the owner may be distinguished from other goods of the same class shall be refused registration as a trade-mark, on account of its nature, unless it consists of, or comprises: (a) immoral or scandalous matter; or (b) certain public insignia. The marks within these excepted classes are withdrawn from the purview of the act. Then,

in dealing with the marks which remain, limitations upon registrability are defined by the first, second and third provisos; and the restrictions thus imposed are in turn qualified by the fourth proviso or ten-year clause. It follows that the fourth proviso in no way detracts from the force of the exceptions contained in clauses (a) and (b) which were plainly intended to be established without qualification; but the generality of the succeeding prohibitions is qualified. It may well be that this qualification, by reason of its terms, does not affect the first proviso, which relates to cases of conflicting trade-marks, as the ten-year clause explicitly requires that the use shall have been "exclusive." But there can be no doubt that this clause does modify the general limitations contained in the second proviso with respect to the use of marks consisting of names of persons, firms or corporations, of terms descriptive of character and quality, or of geographical names or terms. Marks of this sort, notwithstanding the general prohibition, were made registrable when the applicant or his predecessors had used them, actually and exclusively, as trade-marks for the described period.

In this view, the complainant was entitled to register its mark. We need not stop to discuss the contention that the complainant's use had not been exclusive, or that the mark had not been used in interstate commerce, or the further defense that the complainant should be denied relief because it had deceived the public. It is enough to say that these contentions were without adequate support in the evidence and were properly overruled by the Circuit Court.

Having the right to register its mark, the complainant was entitled to its protection as a valid trade-mark under the statute. As defined in § 29, (33 Stat. 731) "the term 'trade-mark' includes any mark which is entitled to registration under the terms of this act." The defendants,

however, insisted below, and urge here, that although the mark was registrable it was not susceptible of ownership and hence that the complainant could not maintain a suit for injunction, profits and damages, as provided in the statute, for the reason that the remedies it affords are available only to "owners" (§§ 16, 19). That is to say, that registration was expressly permitted but that protection to the registrant was denied. This interpretation, of course, would render the ten-year proviso meaningless by stripping it of practical effect. It was not the intention of Congress thus to provide for a barren notice of an ineffectual claim, but to confer definite rights. The applicant, who by virtue of actual and exclusive use is entitled to register his mark under this clause, becomes on due registration the "owner" of a "trade-mark" within the meaning of the act, and he is entitled to be protected in its use as such.

The further argument is made that, assuming that the complainant has a valid registered trade-mark, still the protection is limited to its use when standing alone (as the complainant has used it on its labels) and that there can be no infringement unless it is used in this precise manner. The statutory right cannot be so narrowly limited. Not only exact reproduction, but a "colorable imitation" is within the statute; otherwise, the trade-mark would be of little avail as by shrewd simulation it could be appropriated with impunity. The act provides (§ 16): "Any person who shall, without the consent of the owner thereof, reproduce, counterfeit, copy, or colorably imitate any such trade-mark . . . and shall use, or shall have used, such reproduction, counterfeit, copy or colorable imitation in commerce among the several States . . . shall be liable. . . ." This provision applies to all trade-marks that are within the act, including those which come under the ten-year clause, provided they are not used "in unlawful business", or "upon any article injurious in itself", or

"with the design of deceiving the public", and have not been "abandoned" (§ 21).

But, while this is true, the inquiry as to the extent of the right thus secured by the statute, in the case of marks which are admitted to registration under the ten-year clause, is not completely answered. It is apparent that, with respect to names or terms coming within this class, there may be proper uses by others than the registrant even in connection with trade in similar goods. It would seem to be clear, for example, that the registration for which the statute provides was not designed to confer a monopoly of the use of surnames, or of geographical names, as such. It is not to be supposed that Congress intended to prevent one from using his own name in trade, or from making appropriate reference to the town or city in which his place of business is located; and we do not find it necessary to consider the question of the validity of such an attempt if one were made. Congress has admitted to registration the names or terms belonging to the class under consideration simply because of their prior use as trade-marks, although they had not been such in law. Their exclusive use as trade-marks for the stated period was deemed in the judgment of Congress a sufficient assurance that they had acquired a secondary meaning as the designation of the origin or ownership of the merchandise to which they were affixed. And it was manifestly in this limited character only that they received statutory recognition, and, on registration, became entitled to protection under the act.

In the case, therefore, of marks consisting of names or terms having a double significance, and being susceptible of legitimate uses with respect to their primary sense, the reproduction, copy or imitation which constitutes infringement must be such as is calculated to mislead the public with respect to the origin or ownership of the goods and thus to invade the right of the registrant to the use

of the name or term as a designation of his merchandise. This we conceive to be the meaning of the statute. It follows that where the mark consists of a surname, a person having the same name and using it in his own business, although dealing in similar goods, would not be an infringer, provided that the name was not used in a manner tending to mislead and it was clearly made to appear that the goods were his own and not those of the registrant. This is not to say that, in this view, the case becomes one simply of unfair competition, as that category has been defined in the law; for, whatever analogy may exist with respect to the scope of protection in this class of cases, still the right to be protected against an unwarranted use of the registered mark has been made a statutory right, and the courts of the United States have been vested with jurisdiction of suits for infringement, regardless of diversity of citizenship. Moreover, in view of this statutory right, it could not be considered necessary that the complainant in order to establish infringement should show wrongful intent in fact on the part of the defendant, or facts justifying the inference of such an intent. (*Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 138 U. S. 537, 549; *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169; *Elgin Nat'l Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665, 674.) Having duly registered under the act, the complainant would be entitled to protection against any infringing use; but, in determining the extent of the right which the statute secures and what may be said to constitute an infringing use, regard must be had, as has been said, to the nature of the mark and its secondary, as distinguished from its primary, significance.

The distinction between permissible and prohibited uses may be a difficult one to draw in particular cases but it must be drawn in order to give effect to the act of Congress. That the distinction may readily be observed in practice is apparent. In this case, for instance, if the de-

fendants had so chosen, they could have adopted a distinct mark of their own, which would have served to designate their inks and completely to distinguish them from those of the complainant. It was not necessary that, in exercising the right to use their own name in trade, they should imitate the mark which the complainant used, and was entitled to use under the statute, as a designation of its wares; or that they should use the name in question upon their labels without unmistakably differentiating their goods from those which the complainant manufactured and sold.

We agree with the Circuit Court that infringement was shown. The complainant put its mark "DAVIDS'" prominently at the top of its labels. The defendants, in the same position on its labels, put "C. I. DAVIDS'". At the bottom of their labels the defendants placed "DAVIDS MFG. CO." The use of the name in this manner was a mere simulation of the complainant's mark which it had duly registered; it constituted a "colorable imitation" within the meaning of the act. The decree of the Circuit Court accordingly restrained the defendants from the use of the words "Davids Manufacturing Company", and from the use of the word "Davids" at the top of their labels in connection with the business of making and selling inks. We think that the complainant was entitled to this measure of protection.

The decree of the Circuit Court of Appeals must therefore be reversed and that of the Circuit Court affirmed. It is so ordered.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* BEHRENS, ADMINISTRATOR.

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

No. 241. Argued March 6, 1914.—Decided April 27, 1914.

When a railroad is a highway for both interstate and intrastate commerce, and the two classes of traffic are interdependent in point of both movement and safety, Congress may, under the power committed to it by the commerce clause of the Constitution, regulate the liability of the carrier for injuries suffered by an employé engaged in general work pertaining to both classes of commerce, whether the particular service performed at the time, isolatedly considered, is in interstate or intrastate commerce. *Employers' Liability Cases*, 207 U. S. 463, distinguished.

Notwithstanding its wider powers, Congress, in enacting the Federal Employers' Liability Act of 1908, has confined the liability imposed by that act to injuries occurring to employés when the particular service in which they are employed at the time of injury is a part of interstate commerce. *Pedersen* v. *Del., Lac. & West. R. R. Co.*, 229 U. S. 146.

An employé of a carrier in interstate commerce by railroad who is engaged on a switch engine in moving several cars all loaded with intrastate freight from one point in a city to another point in the same city is not engaged in interstate commerce and an injury then sustained is not within the Employers' Liability Act of 1908.

The fact that an employé engaged in intrastate service expects, upon completion of that task, to engage in another which is a part of interstate commerce, is immaterial under the Employers' Liability Act of 1908 and will not bring the action under that act.

THE facts, which involve the construction of the Federal Employers' Liability Act of 1908 and the determination of whether an injured employé was engaged in interstate commerce at the time of the injury, are stated in the opinion.

Mr. Blewett Lee, with whom *Mr. Hunter C. Leake* and *Mr. Gustave Lemle* were on the brief, for the Illinois Central Railroad Company.

Mr. Armand Romain for Behrens, Administrator:

The railroad company contends that the status of the employé must be fixed by the nature of the work he was actually performing at the exact time of the accident, and that if said work consisted only in the hauling of cars of strictly local freight, the question certified should be answered in the negative.

The administrator, on the other hand, contends that the question certified must be answered in the affirmative, because:

The general nature of the employment, and not any specific, isolated item of work, must fix the status of an employé.

The actual work of hauling cars of local freight was not the only work the employé was doing, and was not the true and full measure of his employment at the time of his injury.

Even if there had been no cars at all attached to the engine, at the time of the injury, the mere fact that said switch engine was destined to Chalmette, where the switching engine and crew were to take up other cars, either loaded or empty, belonging to various railroad companies, and take them to a point in the same State, and there turn them over to the yardmaster, who was to deliver them to various railroad systems to be transported to points within and without the State, rendered the fatal trip of said engine a necessary step in the interstate traffic of the railroad company and constituted the engine itself an instrument of said traffic, without which such interstate commerce could not have been carried on.

To sustain the contention of the railroad company, it would be necessary, not only to place an extremely narrow construction on the Employers' Liability Act, but to over-

look some of the controlling facts of the case. On the first proposition this court has repeatedly expressed itself in no uncertain terms, while construing this and similar statutes. On the second proposition, the lower court has found the facts and set them forth clearly in the certificate. Under both tests the contention of the company is untenable.

In support of contentions of defendant in error, see *Colasurdo* v. *Central R. R. Co.*, 180 Fed. Rep. 832; aff'd 192 Fed. Rep. 901; *Hanley* v. *Southern Ry. Co.*, 187 U. S. 620; *Ill. Cent. R. R. Co.* v. *Nelson*, 203 Fed. Rep. 956; *Johnson* v. *Southern Pacific Co.*, 196 U. S. 21; *Lamphere* v. *Railroad & Navigation Co.*, 196 Fed. Rep. 336; *Mich. Cent. R. R. Co.* v. *Vreeland*, 227 U. S. 65; *Mondou* v. *Railroad Co.*, 223 U. S. 51; *Pedersen* v. *Railroad Co.*, 229 U. S. 146; *Railway* v. *Conley*, 187 Fed. Rep. 951; *Railroad Co.* v. *Darr*, 204 Fed. Rep. 751; *Railway Co.* v. *Earnest*, 229 U. S. 114; *Railway Co.* v. *Seale*, 229 U. S. 156; *Schlemmer* v. *Railroad Co.*, 205 U. S. 10; *Railway Co.* v. *United States*, 231 U. S. 119; *Southern Railway* v. *United States*, 222 U. S. 27; *United States* v. *Great Northern R. R. Co.*, 145 Fed. Rep. 438; *United States* v. *Louis. & Nash. R. R. Co.*, 162 Fed. Rep. 185; *United States* v. *Railroad Co.*, 164 Fed. Rep. 347; *Same* v. *Same*, 154 Fed. Rep. 516; *Same* v. *Same*, 189 Fed. Rep. 964; 1 White, Personal Injuries on Railroads, p. 817; *Zikos* v. *Oregon Railroad Co.*, 179 Fed. Rep. 893.

By leave of the court, *Mr. Alfred L. Becker*, *Mr. Maurice C. Spratt* and *Mr. Lester F. Gilbert* filed a brief as *amici curiæ* in behalf of The New York Central & Hudson River Railroad Co.

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

In an action in the Circuit Court for the Eastern District of Louisiana, under the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, against a railroad

company, by a personal representative to recover for the death of his intestate, the plaintiff prevailed, and the defendant took the case by writ of error to the Circuit Court of Appeals. That court, desiring instruction upon a question of law arising in the case, certified the question here under § 239 of the Judicial Code. The facts shown in the certificate are these: The intestate was in the service of the railroad company as a member of a crew attached to a switch engine operated exclusively within the city of New Orleans. He was the fireman, and came to his death, while at his post of duty, through a head-on collision. The general work of the crew consisted in moving cars from one point to another within the city over the company's tracks and other connecting tracks. Sometimes the cars were loaded, at other times empty, and at still other times some were loaded and others empty. When loaded the freight in them was at times destined from within to without the State or *vice versa*, at other times was moving only between points within the State, and at still other times was of both classes. When the cars were empty the purpose was usually to take them where they were to be loaded or away from where they had been unloaded. And oftentimes, following the movement of cars, loaded or empty, to a given point, other cars were gathered up and taken or started elsewhere. In short, the crew handled interstate and intrastate traffic indiscriminately, frequently moving both at once and at times turning directly from one to the other. At the time of the collision the crew was moving several cars loaded with freight which was wholly intrastate, and upon completing that movement was to have gathered up and taken to other points several other cars as a step or link in their transportation to various destinations within and without the State. The question of law upon which the Circuit Court of Appeals desires instruction is, whether upon these facts it can be said that the intestate at the time of his fatal injury was employed in

interstate commerce within the meaning of the Employers' Liability Act.

Considering the status of the railroad as a highway for both interstate and intrastate commerce, the interdependence of the two classes of traffic in point of movement and safety, the practical difficulty in separating or dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution, we entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce. *Baltimore & Ohio Railroad Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 618; *Southern Railway Co.* v. *United States*, 222 U. S. 20, 26; *Mondou* v. *New York, New Haven & Hartford Railroad Co.*, 223 U. S. 1; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 213; *Minnesota Rate Cases*, 230 U. S. 352, 432. The decision in *Employers' Liability Cases*, 207 U. S. 463, is not to the contrary, for the act of June 11, 1906, c. 3073, 34 Stat. 232, there pronounced invalid, attempted to regulate the liability of every carrier in interstate commerce, whether by railroad or otherwise, for any injury to any employé, even though his employment had no connection whatever with interstate commerce.

Passing from the question of power to that of its exercise, we find that the controlling provision in the act of April 22, 1908, reads as follows: "Section 1. That every common carrier by railroad while engaging in commerce between any of the several States . . . 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 such injury or death resulting

in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." Giving to the words "suffering injury while he is employed by such carrier in such commerce" their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employé is engaged is a part of interstate commerce. The act was so construed in *Pedersen* v. *Delaware, Lackawanna & Western Railroad Co.*, 229 U. S. 146. It was there said (p. 150): "There can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employé is employed by the carrier in such commerce." Again (p. 152): "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?" And a like view is shown in other cases. *Mondou* v. *New York, New Haven & Hartford Railroad Co., supra; Seaboard Air Line Railway* v. *Moore*, 228 U. S. 433; *St. Louis, San Francisco & Texas Railway Co.* v. *Seale*, 229 U. S. 156, 158; *North Carolina Railroad Co.* v. *Zachary*, 232 U. S. 248, 256; *Grand Trunk Western Railway Co.* v. *Lindsay*, *ante*, p. 42.

Here, at the time of the fatal injury the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury.

The question is accordingly answered in the negative.

BAER BROTHERS MERCANTILE COMPANY *v.* DENVER & RIO GRANDE RAILROAD COMPANY.

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

No. 140. Argued December 16, 17, 1913.—Decided April 27, 1914.

Awarding reparation for excessive charges in the past and regulating rates for the future involve the determination of matters essentially different; while they may be dealt with in one order by the Interstate Commerce Commission, an order for reparation is not void because it does not fix the rate for the future.

An order of reparation is made by the Interstate Commerce Commission in its *quasi*-judicial capacity to measure past injuries to a private shipper, while an order fixing a new rate for the future is made in its *quasi*-legislative capacity to prevent future injury to the public.

An order for reparation for excessive rates in the past is not void because the order invalidates the excessive rate condemned for the future. Even though it might be desirable to deal with the entire matter at the time the joinder of the two subjects is not jurisdictional.

Although there may be no established through-rate or through-route between points in different States, the interstate character of the shipment cannot be destroyed by separating the rates into component parts and issuing local way-bills.

Where the shipment was actually interstate the Interstate Commerce Commission has jurisdiction to consider whether part of the rate which was charged on a local way-bill between two points in the same State is excessive.

A failure on the part of one of the carriers of a through interstate shipment to file tariffs cannot defeat the jurisdiction of the Interstate Commerce Commission to award reparation against that carrier for an unreasonable rate over its part of the haul because that part is wholly intrastate.

The voluntary dismissal of a suit for recovery of unreasonable rates is not a bar to a proceeding before the Interstate Commerce Commis-

sion for a reparation order. A voluntary dismissal is in the nature of a non-suit and does not operate as a judgment on the merits.
187 Fed. Rep. 485, reversed.

BETWEEN July, 1902 and March, 1907 The Baer Brothers Mercantile Company was engaged in the liquor business at Leadville, Colorado. During those years it purchased beer from a brewing company in St. Louis, Missouri, which delivered the same in carload lots to the Missouri Pacific, which acknowledged the receipt of the beer "in good order to be delivered to the Baer Brothers Company at Leadville, Colorado, via the Denver & Rio Grande." No through bill of lading was issued and as the two companies had not established a through route, each shipment was waybilled to Pueblo, Colorado, 923 miles distant, on the Missouri Pacific's local rate of 45 cents per cwt. The car was then delivered to the Denver & Rio Grande with an expense bill which described the shipment and disclosed the charges paid by or due to the Missouri Pacific. The Denver & Rio Grande then forwarded the beer to Leadville, Colorado, 160 miles from Pueblo, at its local rate of 45 cents per cwt., naming the Missouri Pacific as consignor and the Baer Company as consignee. Whether collected in advance at St. Louis or at destination in Leadville, the freight was always divided between the two companies according to their local rates, the Denver & Rio Grande in every instance receiving 45 cents per cwt. on every shipment.

The Baer Company insisted that the rate was unreasonable in fact and unjustly discriminatory and in 1906 brought suit, in the United States Circuit Court for the District of Colorado, against both carriers to recover from them $6,300, the amount of the unreasonable rate alleged to have been paid on beer. That suit was voluntarily dismissed by plaintiff upon the publication of the decision in the *Abilene Cotton Oil Case*, 204 U. S. 426.

The Baer Company then instituted proceedings before the Commerce Commission in which it prayed that the 90 cent rate should be declared unreasonable and unjust; that the Commission would establish a new and just rate on beer between St. Louis and Leadville, and that the two companies be required to pay plaintiff $7,299 as reparation for excess freight paid on beer shipped over the two lines between July, 1902 and March, 1907.

At the hearing it was admitted that the Missouri Pacific's charge of 45 cents for the haul of 923 miles from St. Louis to Pueblo was reasonable. In view of this admission the subsequent proceedings before the Commission involved an investigation as to the reasonableness of the Denver & Rio Grande's charge of 45 cents for hauling beer a distance of 160 miles, from Pueblo, Colorado, to Leadville, Colorado. The carrier insisted that in each instance the beer had been received by it as an independent shipment at Pueblo, Colorado, where a new waybill was issued and the car forwarded as an intrastate shipment to Leadville on an intrastate rate. It claimed that the Commission had no jurisdiction to inquire as to the reasonableness of such intrastate rate. It further contended that the rate of 45 cents was just and fair.

It appeared that although no through route had been established by the two roads, the regular filed tariff of the Missouri Pacific named 45 cents as the rate on beer between St. Louis and Pueblo. The Denver & Rio Grande had filed no tariff under the Commerce Act, but in compliance with the request of the Commission, addressed to all railroads, it had furnished a copy of tariffs showing its intrastate rates generally and that the local rate on beer from Pueblo to Leadville was 45 cents per cwt.

At the conclusion of the hearing, the Commission held (13 I. C. C. 329) that, even though no through route or through rate had been established, the Denver & Rio Grande in hauling this beer was engaged in interstate

commerce; that the mountainous character of the country through which the road was built and the steep grades made the cost of operation higher than for a similar distance on the Missouri Pacific, but ruled that, while this was true, the rate of 45 cents from Pueblo to Leadville was excessive to the extent of 15 cents per cwt. The report concluded as follows (p. 341):

"The prayer of the complaint is, among other things, that the Commission fix 'a just rate for the through transportation of beer in carload lots from said city of St. Louis to said city of Leadville.' There is no suggestion either in the complaint or in the prayer looking to the establishment of a joint rate, and that subject was not referred to either upon the trial or in the argument. This being so, we ought not to establish a joint through rate, and we do not think that we should undertake by our order to fix in this proceeding the locals which will make up the charge for the through movement in the future. There has been no practical difficulty in making these shipments over this route in the past. If the Denver & Rio Grande does not reduce its charge in accordance with this report, or if suitable through facilities are denied, the complainant can file its petition asking the establishment of a joint through route and rate."

Thereupon the following Reparation Order was entered April 6, 1908:

"This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon:

"It is ordered, That the defendant, The Denver & Rio Grande Railroad Company, be, and it is hereby, notified and required to pay unto the complainant, The Baer Brothers Mercantile Company, of Leadville, Colorado, on

or before the 1st day of June, 1908, the sum of $3,438.27, with interest thereon at the rate of six per cent per annum from May 6, 1907, as reparation for excessive and unreasonable charge for the transportation of 2,292,178 pounds of beer from Pueblo, Colorado, to Leadville, Colorado, as part of a through transportation from St. Louis, Mo., to said Leadville, as more fully and at large appears in the report of the Commission in this case."

The Denver & Rio Grande refused to pay the amount of reparation awarded and thereupon the Baer Company brought suit against it in the United States Circuit Court for the District of Colorado, attaching to the complaint a copy of the award of the Commission.

By demurrer and plea the defendant attacked the jurisdiction of the Commerce Commission to pass upon the reasonableness of its rate between Pueblo and Leadville. It further contended that the Commission could not make an order of reparation unless at the same time, and as a part of such order, it fixed a through rate to be charged in the future. These objections were overruled and thereupon the plaintiff introduced the report and order of the Commission, proved the weight of the beer shipped, the rate of freight paid, and that the freight on beer for the longer distance between St. Louis and Salt Lake City, via the Missouri Pacific and the Denver & Rio Grande, was 70 cents per cwt.

The defendant then offered evidence to show that Leadville was not on the through line and was reached by a road 4½ miles long, the operation of which was unusually expensive because of the very steep grade throughout its entire length.

Defendant also introduced testimony for the purpose of showing that the beer, though forwarded by the Missouri Pacific to be delivered in Leadville, was actually received at Pueblo by the Denver & Rio Grande as an independent shipment, as though originating at Pueblo

and was then forwarded as an intrastate shipment on a local waybill. The court overruled the various contentions of the defendant and directed a verdict for the plaintiff for $3,761.45, being the amount of the reparation order, with interest. The court also allowed attorney fees to the plaintiff. The case was then taken by the Denver & Rio Grande to the Circuit Court of Appeals which held (187 Fed. Rep. 485) that it was not necessary to decide whether the Interstate Commerce Commission had jurisdiction to pass upon the reasonableness of the rate of 45 cents from Pueblo, Colorado, to Leadville, Colorado, saying that "an order of reparation without such an establishment of a reasonable maximum rate is beyond the power of the Commission and void, and as no such rate was prescribed and no order forbidding the future use of an excessive rate was made in the case in hand, the Commission's order of reparation in this case was beyond its power and void. This conclusion disposes of the case in hand and renders it impossible for a judgment to be obtained against the Railroad Company upon the reparation order of the Commission upon which the action is based. It is, therefore, unnecessary to consider the other questions in the case, and the judgment below is reversed." (p. 491). A mandate issued in which it was "ordered that this case be and the same is hereby remanded to the said Circuit Court with direction for further proceedings in accordance with the views expressed in the opinion of this court."

The Baer Brothers Co. then brought the case here by writ of error.

Mr. William B. Harrison for plaintiff in error.

Mr. E. N. Clark, with whom *Mr. Joel F. Vaile* and *Mr. J. G. McMurry* were on the brief, for defendant in error:

Assuming that the Interstate Commerce Commission had jurisdiction over the matters in controversy, the Commission did not comply with the statutes in making

the order which the court is now asked to enforce. The rate in question was an established rate. It is immaterial in this case whether the rate had been established or not. The plaintiff is estopped to deny in this court that the rate was established. At the time the complaint was filed with the Interstate Commerce Commission, the law required the Commission to prescribe the maximum rate to be applied in future. The purpose and plan of interstate commerce legislation cannot be accomplished without imposing upon the Commission the primary duty of fixing the maximum rate.

There is nothing in the act that requires that the maximum to be established by the Commission for the future shall coincide with the reasonable rate found for the purpose of reparation.

The Commission could not have been embarrassed in this case in prescribing a maximum rate for the future.

The Interstate Commerce Commission had no jurisdiction over the rate of the Denver and Rio Grande Railroad Company applicable from Pueblo to Leadville under the circumstances detailed in evidence. The shipments in question, so far as they moved over the railroad of defendant, were not within the Interstate Commerce acts. The Commission had no power to deal with defendant's local rate from Pueblo to Leadville.

In support of these contentions, see *Balt. & Ohio R. R.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Chi., R. I. & Pac. Ry. Co.* v. *Inter. Com. Comm.*, 171 Fed. Rep. 680; *Denver & R. G. Co.* v. *Inter. Com. Comm.*, 195 Fed. Rep. 968; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Gulf, Col. & S. F. R. Co.* v. *Texas*, 204 U. S. 403; *Inter. Com. Comm.* v. *Ill. Cen. R. R. Co.*, 215 U. S. 452; *Inter. Com. Comm.* v. *Lake Shore Ry. Co.*, 134 Fed. Rep. 942; *Inter. Com. Comm.* v. *Ch., R. I. & Pac. Ry. Co.*, 218 U. S. 88; *Langdon &c.* v. *Penna. R. Co.*, 186 Fed. Rep. 237; *Phila. & R. Ry. Co.* v. *Inter. Com. Comm.*, 174 Fed. Rep. 687; *Robinson* v. *Balt. & Ohio R. R. Co.*, 222

U. S. 506; *So. Pac. Co.* v. *Col. Fuel Co.*, 101 Fed. Rep. 779; *So. Pac. Co.* v. *Inter. Com. Comm.*, 200 U. S. 536; *Tex. & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *The Floyd Acceptances*, 7 Wall. 666.

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

In proceedings before the Commerce Commission the plaintiff secured an order requiring the defendant to pay it $3,438.27 as reparation for unreasonable freight-rates charged and collected, the fixing of a new and just rate being left for future decision. The carrier failed to make the payment required and the plaintiff thereupon brought suit and recovered judgment for the sum awarded together with interest and attorneys' fees. This judgment was reversed by the Circuit Court of Appeals, which held that the order was void on its face and could not be the basis of a recovery for the reason that, while reparation had been awarded on the ground that the old rate was unreasonable, the Commission had not fixed a new and just rate for the future.

1. That the two subjects of Reparation and Rates may be dealt with in one order is undoubtedly true. *Texas & Pac. Ry.* v. *Abilene*, 204 U. S. 426, 446. *Robinson* v. *Balt. & Ohio R. R.*, 222 U. S. 506, 509. But awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different. One is in its nature private and the other public. One is made by the Commission in its *quasi*-judicial capacity to measure past injuries sustained by a private shipper; the other, in its *quasi*-legislative capacity, to prevent future injury to the public. But testimony showing the unreasonableness of a past rate may also furnish information on which to fix a reasonable future rate and both subjects can be, and often are, disposed of by the same order. This,

however, is not necessarily so. Indeed, under the original Commerce Act, the two matters could not possibly be combined in a single order for the reason that, while at that time the Commission could order the carrier to desist from unreasonable practices and award damages, it could not fix rates. This brought about an anomalous state of affairs. For if the shipper obtained his order of reparation because of unreasonable charges which the Railroad Company was ordered to discontinue, a slightly different, but still unreasonable, rate might be put in for the future, which the shipper had to pay and again institute proceedings for reparation. Section 15, act of February 4, 1887, c. 104, 24 Stat. 379, 384.

2. This situation was dealt with by the Hepburn Act, which, in addition to the existing power to make reparation, conferred upon the Commission the new power to make rates for the future. But the two matters were treated as different subjects and were dealt with in separate sections. Section 4 conferred the power of making rates. Section 5 gave the Commission power to make reparation orders. Sections 4, 5, act of June 29, 1906, c. 3591, 34 Stat. 584, 589, 590. Not only were the two functions separately treated, but an analysis of the act shows that there is no such necessary connection between them as to make the *quasi*-judicial order for reparation depend for its validity upon being joined with a *quasi*-legislative order fixing rates. Persons entitled to one may have no interest in the other. Persons interested in both may be entitled to reparation and not to a new rate; or to a new rate and not to reparation. For example,—§ 13 (24 Stat. 383) permits "any mercantile, agricultural or manufacturing society or any body politic or municipal organization to make complaints against the carrier." On the application of such bodies, old rates might be declared unjust and new rates established, but, of course, no reparation would be given, for the reason that such

complainants were not shippers and, therefore, not entitled to an award of pecuniary damages. *Cf. Louisville &c. R. R.* v. *Int. Com. Comm.*, 227 U. S. 88. Then, too, there are cases in which a rate, reasonable when made, becomes unreasonable as the result of a gradual change in conditions, so that no reparation is ordered even though a new rate be established for the future. *Anadarko Cotton Oil Co.* v. *Atchison &c. Ry.*, 20 I. C. C. 43. Conversely, there may be cases where what was an unreasonable rate in the past is found to be reasonable at the date of the hearing. In such a case reparation would be awarded for past unreasonable charges collected but no new rate would be established for the future.

3. It may, however, be said that even in such a case, the order while condemning the rate for the past, should contain a provision validating it for the future. But while this consideration might show that it was erroneous not to name the new rate, it would not follow that the order awarding reparation was void. The Hepburn Act treats the two subjects as related, but independent. The grounds of complaint may be joint or separate, and the very fact that they may sometimes be separate shows that the presence of both is not jurisdictional and that the absence of a provision for one need not operate to invalidate an order as to the other.

This conclusion is strengthened by considering the hardships that would result from nullifying a reparation order for error in omitting a provision for the future rate. It would punish the shipper for the failure of the Commission. It would deprive him of his award of damages for his private injury, because of the Commission's omission to make a rate for the benefit of the public. The shipper might or might not intend to remain in business. He might or he might not be interested in future rates. He might have been able to prove unreasonableness as to the past without being able to furnish evidence as to what

would be reasonable for the future. Or, the Commission might be in position to say with certainty that the rates had been unreasonable and award reparation accordingly, but it might require a protracted and lengthy hearing to establish what would be just for the future. To make the shipper wait on such a finding and deprive him of his present right to reparation, until the determination of an independent question, would work a hardship not contemplated by the act and not required by any of its provisions.

The present case illustrates some of these features. The plaintiff's petition asked for reparation and that the Commission would establish just rates. On the hearing it appeared that there was no through route or joint rate and that the established local charge of one of the carriers was just while that of the other had not been established or included in a filed tariff and was also unjust. The evidence was sufficient to sustain a finding of damages against such carrier, but it did not show how the through rate should be divided between the two companies, one of which hauled 923 miles and the other 160 miles. The carriers did not ask for an extension of the time within which the reparation should be paid. The fact that they were given an opportunity to agree on a through rate and how it should be divided, ought not to deprive plaintiff of its rights to damages for the past, under a reparation order which could not, by any possibility, be changed by any subsequent finding as to rates for the future.

The Report and Order gave the plaintiff no preference over other shippers, since they showed that 15 cents of the rate charged by the Denver & Rio Grande was unreasonable. If such a finding of unreasonableness was not sufficiently general to inure to the benefit of all other shippers, they could, on application, have secured such a modification as to enable them to maintain a suit for the recovery of damages for unjust charges and collections in the past.

So far as the future operation of the order was concerned, all shippers were left in the same position, where, from the necessity of the case, the old rate had to be paid until the time had elapsed within which a new and just through rate could be put into effect. But however desirable it may have been to deal with the entire matter at one time, the joinder of the two subjects was not jurisdictional. There was no such necessary connection between the two as to make the order of reparation void because of the absence of a concurrent provision establishing a rate for the future.

This conclusion makes it necessary to consider what judgment should have been entered by the Circuit Court of Appeals (*Baker* v. *Warner*, 231 U. S. 588). That necessitates an examination of the other assignments of error relied on by the Railroad Company.

4. The Denver & Rio Grande claimed in the record in the Court of Appeals that the order was void on its face for the reason that the Commission was without jurisdiction to pass upon the reasonableness of the rate from Pueblo, Colorado, to Leadville, Colorado. But while there was no through-rate and no through-route there was in fact, a through shipment from St. Louis, Missouri, to Leadville, Colorado. Its interstate character could not be destroyed by ignoring the points of origin and destination, separating the rate into its component parts and by charging local rates and issuing local waybills, attempting to convert an interstate shipment into intrastate transportation.

For "when goods shipped . . . from a point in one State to a point in another, are received in transit by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the Act to Regulate Commerce." *Cincinnati, N. O. & Tex. Pac. Ry.* v. *Int.*

Com. Comm., 162 U. S. 184, 193. This common arrangement does not depend upon the establishment of a through-route or the issue and recognition of a through bill of lading, but may be otherwise manifested. *Ibid.*

That there was a common arrangement between the two carriers here was shown by the long-continued course in dealing, and the division of the freight, with the knowledge that it had been paid as compensation for the single haul. If there had been a failure on the part of one of the carriers to file the tariffs, that did not defeat the jurisdiction of the Commission to award reparation against that same carrier, when it was shown that its unreasonable charge of 45 cents per cwt. formed a part of the total rate of 90 cents per cwt. actually paid by the Baer Company.

5. The dismissal of the suit brought in 1906, for the recovery of damages for collecting unreasonable freight-rates, was not a bar to this proceeding for the reason that a voluntary dismissal of an action at law is in the nature of a non-suit and does not operate as a judgment on the merits. *Haldeman* v. *United States*, 91 U. S. 584; *Jacobs* v. *Marks*, 182 U. S. 583, 591.

There were other assignments of error in the Circuit Court of Appeals, but as they are not discussed in the brief for the Railroad Company, they may be treated as abandoned here.

The judgment of the Circuit Court of Appeals is reversed and that of the Circuit Court affirmed.

SEABOARD AIR LINE RAILWAY *v.* HORTON.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 691. Argued February 27, 1914.—Decided April 27, 1914.

A writ of error in terms returnable within thirty days from the date thereof substantially complies with the return day provision in clause 5 of Rule 8 of this court.

Where the state court of last resort sustained the trial court in overruling contentions made by the plaintiff in error, asserting a construction of the Employers' Liability Act which if acceded to would have resulted in a verdict in his favor, this court has jurisdiction under § 237, Judicial Code.

Since Congress, by the Employers' Liability Act of 1908, took control of the liability of carriers engaged in interstate transportation by rail to employés injured while engaged in interstate commerce, all state laws upon the subject have been superseded. *Second Employers' Liability Cases*, 223 U. S. 1, 55.

Whatever may have been the common law rule theretofore, Congress, in enacting the Employers' Liability Act, intended to, and did, base the action on negligence only and excluded responsibility of the carrier to its employés for defects and insufficiencies not attributable to negligence.

The provision diminishing liability of the carrier in case of contributory negligence on the part of the injured employé except where there has been a violation by the carrier of any statute enacted for the safety of employés, relates to Federal statutes only and not to state statutes.

The Employers' Liability Act having expressly eliminated the defense of assumption of risk in certain specified cases, the intent of Congress is plain that in all other cases such assumption shall have its former effect as a bar to an action by the injured employé.

When the employé knows of a defect in the appliances used by him and appreciates the resulting danger and continues in the employment without objection, or without obtaining from the employer an assurance of reparation, he assumes the risk even though it may arise from the employer's breach of duty.

Where there is promise of reparation by the employer, the continuing on duty by the employé does not amount to assumption of risk unless the danger be so imminent that no ordinarily prudent man would rely on such promise.

Under the Employers' Liability Act a defect in an appliance which is not covered by any of the Federal Safety Acts does not leave the employer absolutely responsible for the defect, but the common law rule as to assumption of risk applies; and so *held* as to a defect in a water gauge of which the engineer had knowledge before the accident resulting therefrom.

162 No. Car. 77, reversed.

THE facts, which involve the construction of the Federal Employers' Liability Acts of 1908 and 1910, and the effect of those statutes on state laws in regard to liability of employers, are stated in the opinion.

Mr. Benjamin Micou and *Mr. Murray Allen*, with whom *Mr. Hilary A. Herbert* and *Mr. Richard P. Whiteley* were on the brief, for plaintiff in error.

Mr. William C. Douglass and *Mr. Clyde A. Douglass* for defendant in error:

There is no Federal question. Plaintiff in error has been denied no right, privilege, or immunity under the Employers' Liability Act and this court has no jurisdiction.

Plaintiff in error did not specifically claim, nor was it denied, any right, privilege, or immunity under the Employers' Liability Act.

Assumption of risk is a common-law defense and not a creation of the Federal power.

Plaintiff in error elected to have the question of defendant in error's continuing to work in the face of a known danger, tried under both the issue of contributory negligence and assumption of risk.

The record in this case shows clearly that the writ of error was taken for delay only, and that the questions on which the decision depends are so frivolous as not to need further argument, and that the case is of such a character as not to justify extended argument.

The servant cannot assume the risk of the negligence of the master.

This case was properly submitted to the jury upon the doctrine of the ideal prudent man.

In support of these contentions, see *Avandano* v. *Gay*, 8 Wall. 377; *Barber Asphalt Co.* v. *Austin*, 186 Fed. Rep. 443; *Burnett* v. *Atlantic Coast Line*, 79 S. E. Rep. 414; *Bissell* v. *Lumber Co.*, 152 Nor. Car. 124; *Bridgers* v. *St. Louis R. R. Co.*, 6 Mo. App. 389; *Craig* v. *Chicago R. R. Co.*, 91 Michigan, 634; *Consolidated &c. Co.* v. *Heanni*, 35 N. E. Rep. 162; *Deninger* v. *Am. Locomotive Co.*, 185 Fed. Rep. 32; *Fosburg* v. *Railroad Co.*, 94 N. Y. 374; *Gotlich* v. *Railroad Co.*, 100 N. Y. 467; *Green* v. *Minn. & St. L. R. R. Co.*, 39 Minnesota, 248; *Gardner* v. *Railroad Co.*, 150 U. S. 349; *Hicks* v. *Manufacturing Co.*, 138 Nor. Car. 319; *Hudson* v. *Railroad Co.*, 104 Nor. Car. 491; *Hemarick* v. *Railway Co.*, 186 Fed. Rep. 142; *Kane* v. *Nor. Cent. R. R. Co.*, 112 U. S. 91; *Lake Shore R. R. Co.* v. *McCormick*, 79 Indiana, 440; *Leggett* v. *Railroad Co.*, 152 Nor. Car. 111; *Mann* v. *Railroad Co.*, 111 Nor. Car. 482; *Marks* v. *Cotton Mills*, 138 Nor. Car. 402; *Murdock* v. *Memphis*, 20 Wall. 590; *N. Y. Elev. R. R. Co.* v. *Fifth Natl. Bank*, 135 U. S. 432; *Perkins* v. *So. Car. R. R. Co.*, 48 So. Car. 364; *Penna. R. R. Co.* v. *Hughes*, 191 U. S. 478; *Pressly* v. *Yarn Mills*, 138 Nor. Car. 417; *Schlacher* v. *Ashland Iron Co.*, 89 Michigan, 262; *Sims* v. *Lindsay*, 122 Nor. Car. 678; *Sibbert* v. *Cotton Mills*, 145 Nor. Car. 211; *So. Pac. Co.* v. *Yeargan*, 109 Fed. Rep. 441; *Snow* v. *Railroad*, 8 Allen, 441; 1 Shear. & Redf. on Neg., § 194; *Tanner* v. *Lumber Co.*, 140 Nor. Car. 477; *Un. Pac. R. R. Co.* v. *O'Brien*, 161 U. S. 452; *Worley* v. *Laurel River Co.*, 73 S. E. Rep. 107; 1 White on Personal Injuries, §§ 370, 377; *Wright* v. *Yazoo &c. R. R. Co.*, 197 Fed. Rep. 96.

The charge should be considered as a whole. The refusal to grant special requests to charge is not error, when their substance is embraced in the instructions actually given. *Northern Pac. Ry. Co.* v. *Urlin*, 158 U. S. 271; *Railroad Co.* v. *Leak*, 163 U. S. 280; *Laber* v. *Cooper*, 7

Wall. 565; *Mining Co.* v. *Cheeseman*, 116 U. S. 529; *Insurance Co.* v. *Ursur*, 144 U. S. 439; *Ayers* v. *Watson*, 113 U. S. 594.

MR. JUSTICE PITNEY delivered the opinion of the court.

Horton sued the Seaboard Air Line Railway in the Superior Court of Wake County, North Carolina, to recover damages for personal injuries sustained by him while in defendant's employ as a locomotive engineer. The action was brought under the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, as amended April 5, 1910, c. 143, 36 Stat. 291. In the complaint it was sufficiently averred that defendant was a corporation operating a line of railway as a common carrier in interstate commerce, and that plaintiff at the time he was injured was employed by defendant in such commerce. These facts were not in issue at the trial.

As to the circumstances of the occurrence of the injury, plaintiff's evidence tended to show that on July 27, 1910, defendant's locomotive engine No. 752 was placed in his charge; that it was equipped with a Buckner water gauge, a device attached to the boiler head for the purpose of showing the level of the water in the boiler, and consisting of a brass frame or case inclosing a thin glass tube which communicated with the boiler above and below, in such manner that the tube received water and steam direct from the boiler and under the full boiler pressure. In order to shield the engineer from injury in case of the bursting of the tube, a piece of ordinary glass, 2 or 3 inches wide, 8 or 9 inches long, and about half an inch thick, known as a guard glass, should have been provided, this being a part of the regular equipment of the Buckner water gauge. There were slots for receiving the guard glass and holding it in position in front of the water tube. At each end of the tube, valves were provided for the purpose of disconnect-

ing it from the boiler. As an alternative but probably less convenient method of determining the level of the water in the boiler, ordinary gauge cocks were provided.

Plaintiff was an experienced locomotive engineer, and, according to his own testimony, was fully aware of the function of the guard glass and of its importance to his safety. He testified that when he took the engine out on his first trip on July 27, he observed that the guard glass was missing; that on his return upon the following day he reported this to defendant's round-house foreman, to whom reports of such defects were properly made, and asked him for a guard glass; that the foreman stated there were none in stock at that place, and it would be necessary to send to a distance to get one; that he would do this, and that plaintiff should meanwhile run the engine without one; and that, having ineffectually endeavored to get a guard glass from another source, plaintiff proceeded to drive the engine with the use of the unguarded water gauge until August 4, when the glass exploded and flying fragments struck him in the face, causing the injuries upon which his claim for damages was based.

Defendant's evidence tended to show that when the engine was placed in plaintiff's charge on July 27 the water glass was in good condition, with a guard glass in place; that the gauge cocks were likewise in good working order; that it was the duty of a locomotive engineer to inspect his engine and know that it was in proper order before taking it out, and if not in proper order to make a written report to the round-house foreman specifying the defects; that if anything should happen to the water glass it was the engineer's duty to close the valves so as to exclude the steam pressure from it, and run the engine with the gauge cocks, and that these were sufficient for the purpose; and that plaintiff made repeated reports in writing between July 27 and the time of his injury mentioning other things needed about his engine, but making no mention of the

water gauge or the guard glass. The fireman testified specifically that when plaintiff took charge of the engine on the morning of the 27th the water glass had the shield or guard in front of it, but that it was smoky, so that one could not see through it; that he, the fireman, in the presence of plaintiff, removed the guard glass in order to clean it; and that in plaintiff's presence it became broken. The round-house foreman specifically denied plaintiff's testimony about the complaint and the promise of reparation.

Under instructions presently to be noticed, the case was submitted to the jury upon three issues, to which responses were made as follows:

(1) Was the plaintiff injured by defendant's negligence? Answer, Yes.

(2) If so, did plaintiff assume the risk of injury? Answer, No.

(3) Did plaintiff by his own negligence contribute to his injury? Answer, Yes.

The jury also assessed substantial damages, for which judgment was rendered by the trial court, and upon appeal the Supreme Court affirmed the judgment, 162 Nor. Car. 424. The case comes here, under § 237, Judicial Code, upon questions arising out of instructions given and refused to be given to the jury as to the nature of the duty of the employer and the rules respecting assumption of risk and contributory negligence under the Federal Employers' Liability Act.

There is a motion to dismiss, upon the ground that no return day is specified in the writ of error or citation. *Carroll* v. *Dorsey* (1857), 20 How. 204, 207, and *Sea* v. *Connecticut Mutual Life Ins. Co.* (1880), 154 U. S. 659, are relied upon. These decisions were based upon § 22 of the Judiciary Act of September 24, 1789, c. 20, 1 Stat. 73, 84, which was held to require a certain return day to be specified in the writ of error. Accordingly, General Rule

33, promulgated December Term, 1867 (6 Wall. vi), afterwards found as Clause 5 of Rule 8 of the revised rules promulgated January 7, 1884 (108 U. S. 577), required that the writ of error and citation should be returnable on the first day of the term in cases where final judgment was rendered more than thirty days before that day, and on the third Monday of the term in cases where judgment was rendered less than thirty days before the first day. Blatch. U. S. Ct. Rules 77. But under the authority conferred by Rev. Stat., § 917, the court, on January 26, 1891, amended Clause 5 of Rule 8 so as to read: "All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day," (137 U. S. 710). And in the present Rule as promulgated December 22, 1911 (222 U. S., Appendix, p. 14), the same language is retained, with an exception extending the time to sixty days in writs of error and appeals from the western States, and Alaska, Hawaii and Porto Rico, and to one hundred and twenty days as to the Philippine Islands. An extension of the time in favor of the more distant States and Territories was first introduced as Clause 3 of Original Rule 63, promulgated at December Term, 1853 (16 How. ix), and has been continued, with amendments, until the present time (21 How. viii; 2 Wall. viii; 108 U. S. 578). It has, however, no bearing upon the form of the writ or citation, aside from the limit of time that may be allowed between date and return.

The present writ of error and citation were dated the fourth day of August, 1913, and in terms were returnable "within thirty days from the date hereof." This form has been usually employed, with the approval of the court, since the amendment of the rule made in 1891, as mentioned. It is a substantial compliance with the present

rule, and tends to avoid errors that otherwise might be made in inserting a day certain as a return day.

This motion must therefore be denied.

A second motion to dismiss, based upon grounds still more technical, and which need not be particularly stated, will likewise be denied.

There is a further motion to dismiss for want of jurisdiction, upon the ground that no right, privilege, or immunity under the Employers' Liability Act was especially set up or claimed in the state court of last resort and by that court denied. But since that court sustained the trial court in overruling certain contentions made by plaintiff in error asserting a construction of the act which, if acceded to, would presumably have produced a verdict in its favor, and consequent immunity from the action, this motion must be denied, upon the authority of *St. Louis, Iron Mountain & Southern Ry.* v. *McWhirter*, 229 U. S. 265.

Coming now to the merits, we need consider only certain assignments of error that are based upon exceptions to the action of the trial judge in giving and refusing to give instructions relating to the issues of defendant's negligence, the assumption of risk, and contributory negligence.

At the outset we observe that the judge evidently misapprehended the effect of the Federal act upon state legislation. Thus, the jury was told that plaintiff had brought the action under the Federal statute; "And where Congress enacts a law, within the limits of its power, that law should be enforced uniformly throughout the entire United States. If it is in conflict with the state law, the state law is superseded, but where there is no conflict expressed by the statute of the United States, then the rule of the State prevails." This, of course, in the absence of a specific statement of the applicable rule of the state law, might be treated as academic. But the theory

was carried into the specific instructions, to the extent that upon the questions of the employer's duty and the assumption of risk by the employé, the charge was modeled rather upon the North Carolina statute than upon the act of Congress. By § 2646, Nor. Car. Revisal of 1905, "Any servant or employé of any railroad company operating in this State who shall suffer injury to his person, or the personal representative of any such servant or employé who shall have suffered death in the course of his services or employment with such company by the negligence, carelessness or incompetence of any other servant, employé or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company. Any contract or agreement, expressed or implied, made by any employé of such company to waive the benefit of this section shall be null and void."

Upon the issue of defendant's negligence, the trial court charged the jury as follows: "It is the duty of the defendant to provide a reasonably safe place for the plaintiff to work, and to furnish him with reasonably safe appliances with which to do his work." And in various other forms the notion was expressed that the duty of defendant was absolute with respect to the safety of the place or work and of the appliances for the work. Thus: "If you find from the evidence that it [the locomotive engine] was turned over to him without the guard, and if you further find from the evidence that the guard was a proper safety provision for the use of that gauge, and that it was unsafe without it, then the defendant did not furnish him a safe place and a safe appliance to do his work, and if it remained in that condition it was continuing negligence on the part of the defendant, and if he was injured in consequence thereof, if you so find by the greater weight of the evidence, you should answer the first issue 'Yes.'"

In these instructions the trial judge evidently adopted the same measure of responsibility respecting the character and safe condition of the place of work, and the appliances for the doing of the work, that is prescribed by the local statute. But it is settled that since Congress, by the act of 1908, took possession of the field of the employer's liability to employés in interstate transportation by rail, all state laws upon the subject are superseded. *Second Employers' Liability Cases*, 223 U. S. 1, 55.

The Act is quoted in full in that case at p. 6. By its first section a right of action is conferred (under conditions specified) for injury or death of the employé "resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

This clause has two branches: the one covering the negligence of any of the officers, agents, or employés of the carrier, which has the effect of abolishing in this class of cases the common law rule that exempted the employer from responsibility for the negligence of a fellow employé of the plaintiff; and the other relating to defects and insufficiencies in the cars, engines, appliances, etc. But, plainly, with respect to the latter as well as the former ground of liability, it was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employés for defects and insufficiencies not attributable to negligence. The common law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work; the extent of its duty to its employés is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and appliances of the work

may be safe for the workmen. *Hough* v. *Railway Co.*, 100 U. S. 213, 217; *Washington & Georgetown Railroad Co.* v. *McDade*, 135 U. S. 554, 570; *Choctaw, Oklahoma & Gulf R. R. Co.* v. *McDade*, 191 U. S. 64, 67. To hold that under the statute the railroad company is liable for the injury or death of an employé resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused, is to take from the act the words "due to its negligence." The plain effect of these words is to condition the liability upon negligence; and had there been doubt before as to the common law rule, certainly the Act now limits the responsibility of the company as indicated. The instructions above quoted imposed upon the employer an absolute responsibility for the safe condition of the appliances of the work, instead of limiting the responsibility to the exercise of reasonable care. In effect, the jury was instructed that the absence of the guard glass was conclusive evidence of defendant's negligence. In this there was error.

The questions more particularly discussed, however, and upon which the decision seems to have turned in the Supreme Court of North Carolina, pertain to the issues of assumption of risk and contributory negligence. By § 3 of the act of 1908 it is declared that "The fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé: *Provided*, that no such employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé." And by § 4, "Such employé shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for

the safety of employés contributed to the injury or death of such employé."

By the phrase "any statute enacted for the safety of employés," Congress evidently intended Federal statutes, such as the Safety Appliance Acts, (March 2, 1893, c. 196, 27 Stat. 531; March 2, 1903, c. 976, 32 Stat. 943; April 14, 1910, c. 160, 36 Stat. 298; February 17, 1911, c. 103, 36 Stat. 913); and the Hours of Service Act (February 4, 1907, c. 2939, 34 Stat. 1415). For it is not to be conceived that, in enacting a general law for establishing and enforcing the responsibility of common carriers by railroad to their employés in interstate commerce, Congress intended to permit the legislatures of the several States to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employés, since this would in effect relegate to state control two of the essential factors that determine the responsibility of the employer.

It seems to us that § 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action. And, taking §§ 3 and 4 together, there is no doubt that Congress recognized the distinction between contributory negligence and assumption of risk; for, while it is declared that neither of these shall avail the carrier in cases where the violation of a statute has contributed to the injury or death of the employé, there is, with respect to cases not in this category, a limitation upon the effect that is to be given to contributory negligence, while no corresponding limitation is imposed upon the defense of assumption of risk—perhaps none was deemed feasible.

The distinction, although simple, is sometimes overlooked. Contributory negligence involves the notion of some fault or breach of duty on the part of the employé, and since it is ordinarily his duty to take some precaution

for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employés in similar circumstances would use. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employé. The risks may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employé is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this court. *Choctaw, Oklahoma & Gulf R. Co.* v. *McDade*, 191 U. S. 64, 68; *Schlemmer* v. *Buffalo, Rochester & Pittsburgh Ry. Co.*, 220 U. S. 590, 596; *Tex. & Pac. Ry. Co.* v. *Harvey*, 228 U. S. 319, 321; *Gila Valley Ry. Co.* v. *Hall*, 232 U. S. 94, 102, and cases cited.

When the employé does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employé

assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance or until the particular time specified for its performance, the employé relying upon the promise does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise. *Hough* v. *Railway Co.*, 100 U. S. 213, 224; *Southwestern Brewery* v. *Schmidt*, 226 U. S. 162, 168. This branch of the law of master and servant seems to be traceable to *Holmes* v. *Clarke*, 6 Hurl. & Norm. 348; *Clarke* v. *Holmes*, 7 Hurl. & Norm. 937.

In the light of these principles, the rulings of the trial court in the case at bar must be considered.

Defendant specifically requested an instruction that plaintiff's right to recover damages was to be determined by the provisions of the Federal act, and that "If you find by a preponderance of evidence that the water glass on the engine on which plaintiff was employed was not provided with a guard glass, and the condition of the glass was open and obvious and was fully known to plaintiff, and he continued to use such water glass with such knowledge and without objection, and that he knew the risk incident thereto, then the court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue 'Yes.'" The court gave this instruction as applicable to the issue of contributory negligence, and instead of the words "then the court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue 'Yes,'" used the words, "then the court charges you that the plaintiff was guilty of contributory negligence, and you will answer the third issue 'Yes.'" To the refusal to give the instruction as requested, and the modification of it, defendant excepted.

The trial court evidently deemed, as did the state Supreme Court, that the topic of assumption of risk, with reference to the circumstances of the case, was sufficiently and properly covered by an instruction actually given as follows: after stating in general terms that "A man assumes the risk, when he takes employment, incident to the class of work which he has to perform," but that "He does not assume the risk incident to the negligence of his employer in providing machinery and appliances with which he has to work," the court proceeded as follows:

"On the other hand the employer has the right to assume that his employé will go about the work in a reasonably safe way, and give due regard to the machinery and appliances which are in his hands and under his control, and if you should find from the evidence, by its greater weight, because the burden in this instance is on the defendant, that the plaintiff knew of the absence of the guard or shield to the water gauge and failed to give notice to the defendant or to the agent whose duty it was to furnish the water gauge and appliance, and he continued to use it without giving that notice, *it being furnished to him in a safe condition*, then he assumed the risk incident to his work in the engine with the glass water gauge in that condition, although he might have handled his engine in every other respect with perfect care." [Italics ours.]

It will be observed that by this instruction the application of the rule of assumption of risk was conditioned upon the jury finding that the water gauge, when furnished to plaintiff, was in a safe condition. Here again the court appears to have followed the local statute, rather than the act of Congress; for § 2646, Nor. Car. Revisal of 1905, already quoted, has been held by the state Supreme Court to abolish assumption of risk as a bar to an action by a railroad employé for an injury attributable to defective appliances furnished by the employer. *Coley* v. *Railroad*

Co., 128 Nor. Car. 534. The trial court, while recognizing that the act of Congress applied so far as its terms extended, and that by its terms the employé is not to be held to have assumed the risk in any case where the violation by the carrier of a statute enacted for the safety of employés contributed to the injury, at the same time held that, since no statute had been enacted covering such an appliance as the glass water gauge, the rights of plaintiff were such as he would have under the state law. An instruction to the jury to this effect preceded the instructions we have just quoted.

It is true that such an appliance as the water gauge and guard glass in question is not covered by the provisions of the Safety Appliance Act, or any other law passed by Congress for the safety of employés, in force at the time this action arose. But the necessary result of this is, not to leave the employer responsible for the consequences of any defect in such an appliance, excluding the common law rule as to assumption of risk, but to leave the matter in this respect open to the ordinary application of the common law rule. The adoption of the opposite view would in effect leave the several state laws, and not the act of Congress, to control the subject-matter.

By the instruction as given, the application of the rule of assumed risk was confined to the single hypothesis that the jury should find the guard glass was in position when the engine was delivered to plaintiff on the morning of July 27. This, as already pointed out, was one of the questions in dispute; plaintiff having testified that the guard glass was missing at that time, while his fireman testified (and in this was corroborated by circumstantial evidence) that it was in place at that time, and was subsequently broken. But by the common law, with respect to the assumption by the employé of the risk of injuries attributable to defects due to the employer's negligence, when known and appreciated by the employé

and not made the subject of objection or complaint by him, it is quite immaterial whether the defect existed when the appliance was first placed in his charge, or subsequently arose. Hence, if the guard glass was missing when plaintiff first took the engine, as he testified, and he, knowing of its absence and the consequent risk to himself, continued to use the water gauge without giving notice of the defect to the defendant or its representative, he assumed the risk.

Defendant was entitled to have the requested instruction given respecting assumption of risk, and as the charge actually given did not cover the same ground, there was error.

Its harmful effect is conspicuously evident when we note that the jury, while finding that plaintiff did not assume the risk, at the same time found that he did by his own negligence contribute to his injury. Presumably, if instructed in the manner requested by defendant, the jury would have found that the risk was assumed, and this would have entitled defendant to a judgment in its favor, instead of a mere mitigation of the damages, which was the consequence of a finding of contributory negligence.

The judgment of the Supreme Court of North Carolina must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

UNITED STATES *v.* VULTE.

APPEAL FROM THE COURT OF CLAIMS.

No. 256. Argued March 10, 1914; Restored to docket for reargument April 6, 1914; Reargued April 21, 22, 1914.—Decided May 4, 1914.

A statute which fixes the annual salary of a public officer at a designated sum without limitation as to time is not abrogated or suspended by subsequent enactments which merely appropriate a less amount for that officer for particular years and which contain no words expressly, or by clear implication, modifying or repealing the previous law. *United States* v. *Langston*, 118 U. S. 389.

A provision making a special and temporary appropriation will not be construed as expressing the intent of Congress to have a general and permanent application to all future appropriations. *Minis* v. *United States*, 15 Pet. 423.

The provision in the appropriation acts of 1906 and 1907 excepting Hawaii and Porto Rico from the operation of the provision for additional pay for officers in foreign service is not to be construed as prevailing over the explicit provisions of the act of June 30, 1902, providing for such additional pay including those places, and the salary provided by law of officers on foreign service referred to in the act of May 11, 1908, is that fixed by the act of June 30, 1902.

47 Ct. Cls. 324, affirmed.

THE facts, which involve statutes regulating the amount of additional pay of officers of the United States Navy for service beyond the seas, are stated in the opinion.

Mr. Assistant Attorney General Thompson for the United States:

Congress had the power to repeal general salary or compensation acts through special appropriation acts. When such a repeal is claimed the question is determined by the intention of Congress. *United States* v. *Fisher*, 109 U. S. 143; *United States* v. *Mitchell*, 109 U. S. 146; *Matthews* v. *United States*, 123 U. S. 184; *Wallace* v. *United States*, 133 U. S. 180; *McKinstry* v. *United States*, 40 Fed. Rep. 519.

The army appropriation act of April 23, 1904, was intended to redefine the definition of "foreign stations" given in the act of June 30, 1902, so as to exclude Porto Rico and Hawaii; it repealed the act of June 30, 1902, to that extent. See H. Rept. No. 4644, 59th Cong., 1st Sess., p. 3, vol. 4908; H. Repts. (public), 59th Cong., 1st Sess.; S. Rept. No. 1199, 58th Cong., 2d Sess., p. 8, vol. 4573, S. Repts. (public); 38 Cong. Rec., 58th Cong., II, pt. 4, pp. 3906, 3907, and pt. 5, pp. 4406–4470; *Irwin* v. *United States*, 38 Ct. Cls. 87, 98.

The cases relied on by the Court of Claims and cited in its opinion are not opposed to this conclusion. As to *Langston* v. *United States*, 118 U. S. 389, see *Belknap* v. *United States*, 150 U. S. 588, 595; and as to *Converse* v. *United States*, 26 Ct. Cls. 6, see *Carden* v. *United States*, 45 Ct. Cls. 171, 176.

Service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be as now provided by law under the act of May 11, 1908, 35 Stat. 110, and did not include service in Porto Rico or Hawaii.

The act of June 12, 1906, having been construed by the comptroller and the act of May 11, 1908, having been prepared with reference to the act of 1906, so far as the definition of foreign stations was concerned, must necessarily refer back to the territorial definition of foreign stations as set forth in the act of 1906 and as construed by the comptroller. *Sessions* v. *Romadka*, 145 U. S. 41, 42; *Claflin & Others* v. *Commonwealth Ins. Co.*, 110 U. S. 81; *The "Abbotsford,"* 98 U. S. 440; *Plummer* v. *United States*, 224 U. S. 137, 140.

The army appropriation acts of 1909, 1910, and 1911, respectively, simply make appropriation for services outside the limits of the United States and the Territories contiguous thereto in conformity with existing law as construed by the comptroller.

Since the passage of the act of 1906, the accounting officers of the Treasury have uniformly disallowed increased pay for service in Porto Rico and Hawaii. Such contemporaneous, uniform, and continuous construction is, we submit, entitled to great weight and should not be overruled without cogent reasons. *Brown* v. *United States*, 113 U. S. 568; *Schells, Executor*, v. *Fouche*, 138 U. S. 562; *Hewitt* v. *Shultz*, 180 U. S. 139; *United States* v. *Healey*, 160 U. S. 136; *United States* v. *Sweet*, 189 U. S. 471. When such construction has been approved by Congress, as was done by the act of 1912, it is conclusive.

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

MR. JUSTICE MCKENNA delivered the opinion of the court.

The appellee, Nelson P. Vulte, filed a petition in the Court of Claims claiming to be entitled to $299.78, being ten per cent. of his regular pay for service beyond the seas. Judgment was entered in his favor for that amount, and the United States prosecuted this appeal.

The court found the following facts: Vulte was appointed second lieutenant in the Marine Corps June 30, 1903, and was promoted to first lieutenant March 3, 1904. Under orders assigning him for duty in Porto Rico with station at San Juan, he sailed from New York for Porto Rico June 27, 1908, and served there until November 3, 1909, when he was detached and ordered back to the United States. He was four days on the return voyage.

If it is held that he is entitled to ten per cent. for services in Porto Rico from the date of sailing from New York until the date of his detachment from duty at San Juan, there would accrue to him the sum of $296.72, and

an additional sum of $3.06 if entitled to pay en route from Porto Rico to New York.

Vulte's pay was originally fixed by § 1612 of the Revised Statutes as follows: "The officers of the Marine corps shall be entitled to receive the same pay and allowances, and the enlisted men shall be entitled to receive the same pay and bounty for reënlisting, as are or may be provided by or in pursuance of law for the officers and enlisted men of like grades in the Infantry of the Army."

On June 30, 1902, as part of the appropriation act for the Army (c. 1328, 32 Stat. 507, 512), Congress modified existing law respecting the pay proper of officers of this grade by the following language: "For additional ten per centum increase on pay of commissioned officers serving at foreign stations, four hundred and fifty-one thousand, four hundred and fifty-six dollars: *Provided*, That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto."

As observed by Mr. Justice Booth, delivering the opinion of the Court of Claims: "Thus far the rights of plaintiff [Vulte] respecting pay are obvious; the complications arise by subsequent legislation."

On June 12, 1906, Congress provided—"for additional ten per centum increase on pay of commissioned officers serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto (excepting Porto Rico and Hawaii) as provided by act of June thirtieth, nineteen hundred and two, the time of such service to be counted from the date of departure

from said States to the date of return thereto . . ." (c. 3078, 34 Stat. 240, 247).

This provision of the act of June 12, 1906, was repeated in the appropriation act of March 2, 1907, c. 2551, 34 Stat. 1158, 1164.

The act of May 11, 1908, provided as follows: "That increase of pay for service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be as now provided by law.

* * * * * * * *

"For additional ten per centum increase on pay of officers on foreign service, two hundred and eighty-five thousand dollars.

* * * * * * * *

"That nothing herein contained shall be construed so as to reduce the pay or allowances now authorized by law for any officer or enlisted man of the Army; and all laws or parts of laws inconsistent with the provisions of this act are hereby repealed." C. 163, 35 Stat. 106, 110, 114.

The short point in the case is to what the words "shall be as now provided by law" in the act of May 11, 1908, refer—whether to the acts of 1906 and 1907, or more limitedly, we may say, to the exceptions of Porto Rico and Hawaii in those acts, or to the proviso in the act of June 30, 1902, *supra*. In other words, whether the exceptions of those years of those special places shall prevail over the substantive provision of the act of June 30, 1902, *supra*, which is explicit, of enduring effect, and is besides comprehensive of all foreign stations, its language being—"That hereafter the pay proper of all commissioned officers . . . serving beyond the limits of the States . . . shall be increased ten per centum. . . ."

The Government contends for the exceptions as constituting new law, not as a temporary condition under an

old one. The claimant contends for the proviso of the act of 1902, and counsel, in quite elaborate arguments, have supported their respective contentions. We shall not follow the details of their arguments. The question presented, we think, is in brief compass. Congress manifestly did not think that by the first instance of the exception, that in the act of 1906, it had done more than temporarily suspend as to Porto Rico and Hawaii the act of June 30, 1902. The exception was repeated in 1907. If the first exception was not intended to affect permanently the act of 1902, why should such intention be ascribed to the second exception—or to both, neither having words of prospective extension, and, without such words, naturally having only temporary operation? It would be extreme to say that by making them Congress considered that it had established a policy which could be confidently referred to as having the status and effect of permanent law.

The exceptions, it is to be remembered, were in appropriation acts and no words were used to indicate any other purpose than the disbursement of a sum of money for the particular fiscal years. This court has had occasion to deal with such instances of legislation and their intended effect on existing law. In *United States* v. *Langston*, 118 U. S. 389, 394, it was decided that a statute which fixed the annual salary of a public officer at a designated sum without limitation as to time is not abrogated or suspended by subsequent enactments which merely appropriate a less amount for that officer for particular years, and which contained no words that expressly or by clear implication modified or repealed the previous law. See also *Minis* v. *United States*, 15 Pet. 423, 445, where it is said: "It would be somewhat unusual to find engrafted upon an act making special and temporary appropriation, any provision which was to have a general and permanent application to all future appropriations.

Nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation." This follows naturally from the nature of appropriation bills, and the presumption hence arising is fortified by the rules of the Senate and House of Representatives.

The ruling in the *Langston* and *Minis Cases* is not opposed by the cases cited by the Government. In all of them there was something more than the mere omission to appropriate a sufficient sum. There were expressions indicating a broader purpose. In two of them, *United States* v. *Fisher*, 109 U. S. 143, and *United States* v. *Mitchell*, 109 U. S. 146, it was intimated that the law was only suspended for the particular years. In another, *Wallace* v. *United States*, 133 U. S. 180, it was held that the appropriation constituted the law which prescribed the compensation of the office. And in all of them the *Langston Case* was referred to and not disturbed or modified.

Judgment affirmed.

UNITED STATES *v.* FOSTER.

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

No. 838. Argued April 13, 14, 1914.—Decided May 4, 1914.

Where the case is one of statutory construction, consideration of the statute becomes necessary, and if the validity of departmental regulations is involved, a construction of the statute authorizing the head of the Department to make them is also necessary, and this court has jurisdiction under the Criminal Appeals Act of 1907 to review the judgment sustaining a demurrer to the indictment.

The theory of the act of March 3, 1883, is that every postmaster shall receive a salary dependent upon and regulated by the amount of business done at his office as represented by normal and natural—not unlawfully induced—sales of stamps.

Under § 161, Rev. Stat., authorizing heads of the Executive Departments to prescribe regulations not inconsistent with law, the Postmaster General has power to prescribe regulations requiring postmasters to make proper returns of sales of stamps at their respective offices; and such regulations have the force of law.

An indictment charging a postmaster and others with conspiring under § 37, Penal Code, to violate §§ 206 and 208, Penal Code, by the sale and purchase of stamps in large quantities to be used at other post offices so as to fraudulently increase his salary, and also charging violation of regulations of the Department in that respect, is sufficient.

THE facts, which involve the jurisdiction of this court under the Criminal Appeals Act of 1907 and the construction of statutes regulating the pay of postmasters and the power of the Postmaster General to make regulations in regard thereto, are stated in the opinion.

Mr. Assistant Attorney General Wallace for the United States.

Mr. Philip Rubenstein, with whom *Mr. Timothy Howard* was on the brief, for defendants in error:

This court has no jurisdiction under the act of March 2, 1907. No statute was construed or interpreted by the court below. *United States* v. *George*, 228 U. S. 14, 19.

The whole case resolved itself into the question of the power to enact the regulation. If this be a construction by the lower court of Rev. Stat., § 161, it does not constitute a construction of the statute upon which the indictment is founded. *United States* v. *Keitel*, 211 U. S. 370, 378; *United States* v. *Patton*, 226 U. S. 525, 535.

The words "gross receipts" were not interpreted. The only question was whether there was power in an administrative officer to make a regulation limiting its scope.

The regulation is beyond the power of the Postmaster General to enact, and accordingly is invalid. The regulation is inconsistent with law, and in making it the Postmaster General has attempted to legislate. This regulation proposes to base the salary of the postmaster upon

gross receipts less unusual sales; in other words, upon something less than gross receipts. He has no right thus to change the method which Congress has clearly provided for fixing salaries. *United States* v. *George*, 228 U. S. 14; *United States* v. *Eaton*, 144 U. S. 687; *Morrill* v. *Jones*, 106 U. S. 466; *Williamson* v. *United States*, 207 U. S. 425.

Neither executive officers nor the appointing power can, during the service of an officer, either increase or diminish a salary fixed by statute. *Glavey* v. *United States*, 182 U. S. 595, 601; *United States* v. *Wilson*, 144 U. S. 24.

Many cases in that connection have been decided in the Court of Claims. *Rush* v. *United States*, 35 Ct. Cls. 223; *Andrews* v. *United States*, 47 Ct. Cls. 51; *Adams* v. *United States*, 20 Ct. Cls. 115, 117; *Geddes* v. *United States*, 38 Ct. Cls. 428; *Whiting* v. *United States*, 35 Ct. Cls. 291; *Sherlock's Case*, 43 Ct. Cls. 161; *Jacobs* v. *United States*, 41 Ct. Cls. 452.

Other cases in which the validity of departmental regulations have been considered are: *In re Page*, 128 Fed. Rep. 317; *Borden* v. *United States*, 132 Fed. Rep. 205; *United States* v. *Symonds*, 120 U. S. 46; *Patterson* v. *United States*, 181 Fed. Rep. 970; *Bruhl* v. *Wilson*, 123 Fed. Rep. 957; *Hoover* v. *Salling*, 110 Fed. Rep. 43; *Bruce* v. *United States*, 202 Fed. Rep. 100.

Sometimes legislation provides for departmental regulations to care for details of administration of the particular legislation and in aid of it. The regulation in issue is not of that kind. It is the expression of the views of a particular administrative officer as to salaries to be paid to second-class postmasters. The regulation is not supplementary to the statute, but inconsistent with it.

If the regulation is invalid the conspiracy to do acts prohibited therein is not a conspiracy to defraud. *United States* v. *Biggs*, 211 U. S. 507, 519, 521; *Williamson* v. *United States*, 207 U. S. 425.

The cases cited by the United States do not sustain its position.

United States v. *Johnston*, 124 U. S. 236, 253; *Lewis Publishing Co.* v. *Wyman*, 182 Fed. Rep. 13, 16; *McKee* v. *United States*, 164 U. S. 287, 293; *Brewer* v. *Blougher*, 14 Pet. 178; *Petri* v. *Commercial National Bank*, 142 U. S. 644; *State* v. *Ill. Cent. R. R. Co.*, 92 N. E. Rep. 814; *United States* v. *Antikamnia Co.*, 231 U. S. 654, are not in point.

Mr. Justice McKenna delivered the opinion of the court.

Indictment in two counts for conspiracy to defraud the United States, and to violate certain provisions of the postal laws. The object of the conspiracy and the manner of its execution are in substance, as charged in the indictment in the first count, as follows: Harold A. Foster was postmaster of the United States post-office at North Brookfield, Massachusetts, a second class office. The salary of the office was fixed by the Postmaster General, pursuant to law and the regulations established by him, at $2,000 a year, the salary being based and ascertained upon the gross receipts of the office for the twelve months next preceding the thirty-first of March, 1911. The law required the salary to be adjusted annually, and the next adjustment was required to be made by the Postmaster General in accordance with the gross receipts of the office as shown by the quarterly returns of the postmaster to the Auditor of the Post Office Department for the four quarters next preceding the thirty-first of March, 1912, the readjustment to take effect on the ensuing first of July, 1912. The Postmaster General was required by law and the established regulations in readjusting such salary not to include in the gross receipts of the office the moneys received by the postmaster for the sale of stamps to any person or persons in large quantities to be used in other

post-offices than the North Brookfield office for mailing purposes, or in that office if such matter in the ordinary course would not be deposited for mailing in the latter office.

Frank E. Winchell, of North Brookfield, was the president and general manager of the Oxford Linen Mills, a corporation having its usual place of business at North Brookfield, and William S. Edwards and Harry H. Platt, both of New York, were officers of the Sterling Debenture Company, a corporation having its place of business in New York, and they and Foster, well knowing the premises, conspired to defraud the United States of its money and property by Winchell purchasing from the United States in behalf of the Oxford Linen Mills, with the knowledge, consent and connivance of Foster, quantities of United States postage stamps to be sent to the Sterling Debenture corporation at New York, and Edwards and Platt as its officers were to cause it to use them in the prepayment of postage upon matter to be deposited in the post-office in New York or in some other office with the view and intent, by means of the purchase of stamps as stated, of irregularly and improperly increasing the gross receipts of the North Brookfield post-office for the twelve months beginning on the first of April, 1911, and ending on the thirty-first of March, 1912, and thereby enabling Foster, as such postmaster to make returns to the Auditor of the Post Office Department as a basis for the adjustment of Foster's salary for the fiscal year beginning July 1, 1912, which returns should include the sale of stamps so made to Winchell in addition to the sale of stamps made by Foster to other persons in the regular business of the North Brookfield office, with the intent and view of violating the regulations of the Post Office Department and for the purpose of fraudulently increasing Foster's salary, and with the further intent that such sales should, in violation of the Post Office regulations, be included and

deemed a part of the gross receipts of the North Brookfield office for the period above mentioned, and be made in part the basis of the readjustment of Foster's salary. All the acts done by Foster, Winchell, Edwards and Platt were done knowingly, wilfully and fraudulently for such purpose, that is, for the purpose of increasing the salary of Foster by a sum of money in excess of that which he would be lawfully entitled to receive and to cause such excessive sum to be paid to him and thereby cheat and defraud the United States thereof.

In pursuance of the unlawful conspiracy and to effect its object, on the first of July, 1911, Foster, as such postmaster, made a false return to the Post Office Department of the gross receipts of the North Brookfield office for the quarter ending June 30, 1911.

In further pursuance of the conspiracy and to effect its object, Winchell, on June 2, 1911, at North Brookfield, sent by registered mail to the Sterling Debenture corporation at New York a certain package, and also in pursuance of the conspiracy and to effect its object, Winchell bought from Foster postage stamps to the value of $200.

In a second count the indictment charges that the defendants unlawfully conspired to commit an offense against the United States, specified to be an offense denounced by § 206 of the act of March 4, 1909, entitled "An Act to codify, revise, and amend the penal laws of the United States," c. 321, 35 Stat. 1088, 1128, in that Foster, as such postmaster, should, in violation of the section, knowingly and fraudulently increase Foster's salary and compensation by knowingly and fraudulently failing to report, in the report of the gross receipts of his office required by law and the regulations of the Post Office Department, large and irregular sales of stamps to be made by Foster to Winchell as president and general manager of the Oxford Linen Mills, not to be used by that corporation, or by Winchell, or by any other person for

the mailing of matter at the North Brookfield office, but to be used for mailing matter at New York or in some post-office other than the North Brookfield office, with the intent and for the purpose of increasing the compensation of Foster as such postmaster. That in pursuance of such conspiracy Winchell, on June 2, 1911, purchased stamps of the value of $200.

In pursuance of the conspiracy and to effect its object, Foster, on the first of July, 1911, made a false return to the Auditor of the Post Office Department of the gross receipts of his office. An overt act by Winchell is charged.

The defendants were duly arraigned and pleaded not guilty, but subsequently withdrew their pleas of not guilty and filed demurrers to the indictment.

The grounds of demurrer were the same as to both counts and were: (1) The facts alleged did not constitute a crime; (2) nor an offense at common law; (3) nor a violation of the statutes or penal laws of the United States; (4) nor a violation of any valid regulation of the Postmaster General; (5) each and every one of his regulations is invalid.

The demurrers to the first count were sustained on the ground expressed by the court in its opinion, that the act of March 3, 1883 (2 U. S. Comp. Stat. 2619) provides that the salaries of postmasters of the second class shall be determined by the gross receipts of the office and that the Postmaster General had no power to qualify the requirement of the law by providing that unusual sales of stamps should not be included in estimating the gross receipts.

In passing upon the demurrers to the second count the court said that the count charged the defendants with a conspiracy to commit "the offense denounced by section 206 of the Criminal Code," that section providing, *inter alia*, that whoever being a postmaster shall, for the purpose of fraudulently increasing his compensation, make a false return, statement, or account to any officer of the

United States shall be punished. The crime denounced, the court said, included "two essential elements, (1) that a return shall be made, which was known to be false; and (2) that such false return shall have been made 'for the purpose of fraudulently increasing compensation.'" And the court observed that there could be no criminality unless a false return was made for the purpose stated, and that it appearing from the indictment that the alleged return made by Foster was to secure for him only what he was legally entitled to receive, he committed no crime under § 206, "and the alleged conspiracy to do so was not a conspiracy to commit the offense denounced thereby."

It will be observed, therefore, that the court held that the indictment charged neither a conspiracy to defraud the United States nor to make a false return, because the object of each conspiracy was to obtain only what Foster was legally entitled to, namely, an increase of salary based upon the gross receipts of his office, and that it was immaterial how they were increased or for what purpose increased.

The case was brought here under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, its provision being that this court has jurisdiction on writ of error taken by the United States in criminal cases "from a decision sustaining a demurrer to any indictment where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded." It is, however, contended by defendants in error that this court has no jurisdiction because, it is further contended, the district court gave the same meaning to the statutes upon which the indictment was based as the Government asserted was the correct one and only decided that the regulation of the Postmaster General was beyond his power to enact under Revised Statutes, § 161, upon which section alone he claimed the power. Nor, it is further contended, were the words "gross receipts" interpreted.

"The only question was," counsel say, "whether there was power in an administrative officer to make the regulation limiting its scope." It is further urged that if those words were interpreted the indictment was not founded upon the act of 1883, where they occur.

A lack of jurisdiction is also urged to review the ruling upon the second count, it being based on § 206 of the Criminal Code, the construction or interpretation of which was never in dispute. "Whether it applied or not," it is said, "had to be determined by the validity of the regulation."

We think the contentions are untenable. The court distinctly ruled that the indictment was in technical or formal details sufficient, and the contention of the parties not only submitted for decision the validity of the regulations of the Postmaster General but also the sufficiency and legality of the returns made by Foster under the provisions of the statutes. The court, it is true, gave especial prominence to the regulations, but the effect of the statutes independently of the regulations was necessarily considered. In other words, the court must have considered and decided that a conspiracy to establish a basis for a false return for the purpose of increasing Foster's salary was not prohibited by law; and, besides, a construction of the statutes was necessary to determine the validity of the regulation.

The case being one of statutory construction, a consideration of the statutes becomes necessary.

It is provided by the act of March 3, 1883, c. 142, 22 Stat. 600, that "the compensation of postmasters of the first, second and third classes shall be annual salaries, assigned in even hundreds of dollars, and payable in quarterly payments, to be ascertained and fixed by the Postmaster General from their respective quarterly returns to the Auditor of the Treasury for the Post Office Department . . . to be forwarded to the First As-

sistant Postmaster General, for four quarters immediately preceding the adjustment," according to the gross receipts, the amount of which not only determines the classes but the compensation of the offices within classes.

By § 4 of the act (22 Stat. 602), the Postmaster General is required to readjust the salaries of the first, second and third class at the beginning of each fiscal year. The same section fixed the salary of the postmaster at the Washington Post Office and provided that "in no case shall the salary of any postmaster exceed the sum of six thousand dollars, except in the city of New York, where the salary of the postmaster shall remain as now fixed by law, at eight thousand dollars."

Section 37 of the Criminal Code makes it an offense to conspire to defraud the United States in any manner or for any purpose.

Section 206 of the same code makes it a crime for a postmaster to make a false return, for the purpose of fraudulently increasing his compensation, or to induce or attempt to induce, for such purpose, any person to deposit mail matter in or forward in any manner for mailing at the office where such postmaster is employed, knowing such matter to be properly mailable at some other office.

Section 208 makes it a crime for a postmaster to dispose of stamps outside of the delivery of his office, or to induce or attempt to induce, for the purpose of increasing his compensation, the purchase of stamps, stamped envelopes or postal cards otherwise than as provided by law or the regulations of the Post Office Department.

By § 161 of the Revised Statutes it is provided that "the head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, and the distribution and performance of its business. . . ."

In pursuance of the authority so given, the Postmaster General made the following regulation:

"2. In determining the 'gross receipts' upon which the salary of a postmaster shall be based, stamps, stamped envelopes, and postal cards, sold in large or unusual quantities to any person to be used in mailing matter at other post offices will not be included, whether the sale be made with or without solicitation by the postmaster. When postage stamps or stamped paper are sold in large or unusual quantities, it shall be the duty of the postmaster to inquire into and ascertain whether or not the purchaser intends to use such postage stamps or stamped paper for mailing matter in his office, or other offices; and the fact shall be clearly indicated in his monthly stock report on Form 3240 to the Third Assistant Postmaster General. Upon evidence of neglect of the postmaster to ascertain and report such facts, he will be required to refund the amount of the excess salary and allowances he may have received on account of such sales."

It is manifest from the quoted provisions that their purpose is to fix the salary of postmasters by the normal receipts of their respective offices and thereby keep the offices in relation, and to secure such end quarterly returns are required to be made by each postmaster and each is prohibited under criminal penalty from selling or disposing of stamps, stamped envelopes or postal cards outside of the delivery of his office, or selling or disposing of stamps, etc., otherwise than as provided by law or the regulations of the Post Office Department. In other words, the false returns and designated disposition of stamps are made crimes, and made crimes to secure the purpose of the law to keep the legal measure of the salaries unimpaired and the relation of the offices intact. It may, indeed, be that in one sense the United States would suffer no loss by the derangement of their relation; in another sense the United States would be defrauded. One of the postmasters would fraudulently obtain a greater salary than he was entitled to. But distinctly would the United

States be defrauded under the facts charged in the indictment, the postmaster at New York having a fixed salary of eight thousand dollars. See in this connection *Haas* v. *Henkel*, 216 U. S. 462, 479.

The sole theory of the act of 1883 is that every postmaster shall receive a salary dependent upon and regulated by the amount of business done at his office (*United States* v. *Wilson*, 144 U. S. 24, 28) under normal and natural sales of stamps, not unlawfully induced sales. This being the law, what does the indictment charge?

(1) The salary of the postmaster was to be adjusted in accordance with the returns of the gross receipts. (2) By the law and regulations of the Postmaster General the postmaster was not to include in the gross receipts moneys received from the sale of stamps in large or unusual quantities which were (a) to be used upon matter in some other post office or (b) used upon matter deposited at North Brookfield if in the ordinary and usual course of business such matter would be deposited at some other office. (3) The defendants conspired with Winchell, who purchased from Foster with Foster's connivance large quantities of stamps to be used by the Sterling Debenture corporation for mailing matter at New York or some other office than North Brookfield, and by such purchase to irregularly and improperly increase the gross receipts of the North Brookfield office, and thereby enable Foster to make returns as a basis for the readjustment of his salary in violation of the regulations of the Post Office Department and for the purpose of increasing his salary and thereby cheat and defraud the United States.

The second count charges a violation of § 206 of the Criminal Code, by conspiring, in the manner we have already set out and which need not be repeated.

It is clear from these provisions that it is the gross receipts from lawful sales which are to be the measure of the salary of the postmaster and that unlawfully induced

sales (§ 208), sales made "outside of the delivery of the office" (*Id.*), and sales "otherwise than as provided by law or the regulations of the Post Office Department" (*Id.*), are unlawful sales and regarded as criminal.

It would, indeed, be strange if unlawful and criminal sales were intended to constitute a part of the gross receipts upon which the postmaster's salary should be adjusted, and it would seem clear that to prevent such result the Postmaster General could legally exercise by the regulation under review the power given him by Rev. Stat., § 161. The regulation is purely administrative of the law. (1.) It notifies the postmaster that in the gross receipts of his office stamps in large or unusual quantities sold to be used in mailing matter at other post offices will not be included. This but executed the purpose of the law; adds nothing to it. *United States* v. *Antikamnia Chemical Co.*, 231 U. S. 654; *Lewis Publishing Co.* v. *Wyman*, 182 Fed. Rep. 13. (2.) It requires the postmaster to ascertain and report the intention of the purchaser of stamps or stamped paper in large or unusual quantities. This is properly supplemental to the first requirement and a reasonable supervision of the office and a means of discovering unlawful and fraudulent sales. (3.) It provides that for a neglect to so ascertain and so report the postmaster will be required to refund the amount of the excess salary he may have received on account of such sales. This provision is of doubtful validity, but it is not of material consequence to the questions now involved.

But if the regulation be regarded as invalid the indictment yet states an offense. It counts not only upon the regulation but upon the law, and the facts it alleges show a violation of the law.

Judgment reversed.

BOWLING AND MIAMI INVESTMENT COMPANY *v.* UNITED STATES.

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

No. 177. Submitted April 17, 1914.—Decided May 4, 1914.

The guardianship of the United States over allottee Indians does not cease upon the making of the allotment and the allottee becoming a citizen of the United States. *Tiger* v. *Western Investment Co.*, 221 U. S. 286.

The United States has capacity to sue for the purpose of setting aside conveyances of lands allotted to Indians under its care where restrictions upon alienation have been transgressed. *Heckman* v. *United States*, 224 U. S. 413.

A transfer of allotted lands contrary to the inhibition of Congress is a violation of governmental rights of the United States arising from its obligation to a dependent people, and no stipulations, contracts or judgments in suits to which the United States is a stranger can affect its interest.

The authority of the United States to enforce a restraint lawfully created by it cannot be impaired by any action without its consent.

Restrictions on alienation imposed by acts of Congress imposed by the act of March 2, 1889, regarding the allotments to the confederated tribes specified therein, are not mere personal restrictions operative upon the allottee alone, but run with the land and are binding upon his heirs as well for the specified term.

The intent of Congress in regard to its enactments—such as those relating to restrictions on alienation of Indian allotted lands—may be indicated by subsequent enactments relating to the same subject-matter.

191 Fed. Rep. 19, affirmed.

THE facts, which involve the construction of statutes affecting the alienation of Indian allotments, are stated in the opinion.

Mr. James H. Harkless, Mr. Halbert H. McCluer and *Mr. Roland Hughes* for appellants:

As to location of land and history of allotment, see Acts of Congress Oct. 14, 1868, Revised; Indian Treaties, 839–848; Allotment Act, 25 Stat. 1013; Dawes' Allotment Act, 24 Stat., § 8, pp. 388, 391; *Jones* v. *Meecham*, 175 U. S. 13.

As to citizenship of allottee, see act of March 3, 1901, 24 Stat. 390; act of June 16, 1907, admitting Oklahoma to Statehood, 34 Stat. 268; *Boyd* v. *Nebraska*, 143 U. S. 135; Cooley's Const. Law, 270; *In re Heff*, 197 U. S. 488; 26 Stat. 99.

As to effect of restrictions on sale, see act of Congress under which patent was issued, § 1. 9 Am. & Eng. Ency. (2d ed.), p. 127, Title "Deeds," Note 4; 13 *Id.*, p. 794; *Anderson* v. *Corry*, 38 Am. Rep. 608; *Armstrong* v. *Athens Co.*, 70 Oh. St. 235; *Armstrong* v. *Athens Co.*, 16 Pet. 289; *Bauldin* v. *McDonnell*, 29 Michigan, 84; *Clark* v. *Lord*, 20 Kansas, 390–396; *Miami Co.* v. *Brackenridge*, 12 Kansas, 114; *Farrington* v. *Wilson*, 29 Wisconsin, 383; *Frederick* v. *Gray*, 12 Kansas, 518; *Handcock* v. *Mutual Trust Co.*, 103 Pac. Rep. 566; *Krause* v. *Means*, 12 Kansas, 267; *Libby* v. *Clark*, 118 U. S. 250; *Lowry* v. *Weaver*, 4 McClain, 82 (Fed. Cases, 8584); *McMahon* v. *Welch*, 11 Kansas, 280; *Oliver* v. *Forbes*, 17 Kansas, 130; 4 Ops. Atty. Gen. 529; Ottawa Treaty, 1862, Art. 7, 12 Stat. 1240; *Oxley* v. *Lane*, 38 N. Y. 325, 330, 351; *Pickering* v. *Lomax*, 145 U. S. 316; Treaty of Jan. 31, 1855; 7 Stat. 185, 191, 220, 297; 10 Stat. 1092, 1159, 1161; 11 Stat. 431, 583; 24 Stat. 389; 25 Stat. 1013; 26 Stat. 99, 989; 28 Stat. 334; 32 Stat. 641.

As to right of Government to maintain this suit as guardian, see *Civil Rights Cases*, 109 U. S. 25; *Ex parte Savage*, 158 Fed. Rep. 205; *In re Heff*, 197 U. S. 488; *In re Celestine*, 114 Fed. Rep. 551; *United States* v. *Boss*, 160 Fed. Rep. 132; *United States* v. *Dooley*, 151 Fed. Rep. 697; *United States* v. *Auger*, 153 Fed. Rep. 671; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273.

Suit cannot be maintained as trustee. *In re Iowa &c. Commission Co.*, 6 Fed. Rep. 801; *Libby* v. *Clark*, 118 U. S. 250; *McKay* v. *Kalyton*, 204 U. S. 458; Report Commission on Indian Affairs, 1907, p. 69; Rev. Stat., § 2296; *United States* v. *Kapp*, 110 Fed. Rep. 164.

As to organization and jurisdiction of courts in Indian Territory, see act of May 2, 1890, 25 Stat. 784; *Davenport* v. *Buffington*, 97 Fed. Rep. 237; 25 Stat. 783; *Thompson* v. *Rainwater*, 49 Fed. Rep. 406.

Buffalo v. *Goodrum*, 162 Fed. Rep. 817, is not applicable.

As to estoppel, see *Carr* v. *United States*, 98 U. S. 438; *Chope* v. *Detroit Plank Road Co.*, 37 Michigan, 195; *Cohn* v. *Burnes*, 5 Fed. Rep. 326; *Commonwealth* v. *Andre*, 3 Pick. 224; *Commonwealth* v. *Pejepscup Proprietors*, 10 Massachusetts, 155; *Vermont* v. *Society*, Federal Cases, No. 16920; *Gibbons* v. *United States*, 5 Cir. Court, 416; *Pengra* v. *Mung*, 29 Fed. Rep. 830, 836; *State* v. *Bailey*, 19 Indiana, 452; *Indiana* v. *Milk*, 11 Fed. Rep. 389; *State* v. *School Dist.*, 88 N. W. Rep. 751; *The Siren*, 7 Wall. 155; *United States* v. *Stimpson*, 125 Fed. Rep. 907, 910; *United States* v. *Wagon Road Co.*, 54 Fed. Rep. 811.

Mr. Assistant Attorney General Knaebel and *Mr. S. W. Williams* for the United States:

Without the consent of the Secretary of the Interior the heirs were powerless to sell the allotment.

The act of March 2, 1889, plainly declares, not that the allottee may not alienate, but that the land itself shall not be subject to alienation for a period of 25 years from the date of patent. In the absence of any clear and controlling reason to the contrary, the act should be applied according to this obvious meaning of its language.

Neither in the antecedents of the act nor in any consideration of necessity or convenience respecting its policy, can an excuse be discovered for departing from its letter. On the contrary, to imply an exception in favor of the

alienation of inherited lands would be productive of hardship and injustice and tend to defeat the protective purposes of the act and the objects of the reservation.

The acts of May 31, 1900, and May 27, 1902, which provide, the former with reference to this reservation specifically and the latter generally, that restricted allotments when inherited may be sold by the heirs subject to the approval of the Secretary of the Interior, remove all doubt, if any there can be, concerning the intention of the act of March 2, 1889.

The decree of the United States court for the Indian Territory is null and void.

The United States is entitled to maintain this suit in its own name.

In support of these contentions, see *Aaron* v. *United States*, 204 Fed. Rep. 943; *Bowling* v. *United States*, 191 Fed. Rep. 19; *Choctaw-Chickasaw Cases*, 199 Fed. Rep. 813; *Clark* v. *Lord*, 20 Kansas, 390; *Miami County* v. *Brackenridge*, 12 Kansas, 114; *Farrington* v. *Wilson*, 29 Wisconsin, 383; *Frederick* v. *Gray*, 12 Kansas, 518; *Goodrum* v. *Buffalo*, 162 Fed. Rep. 817; *Heckman* v. *United States*, 224 U. S. 413; *The Kansas Indians*, 5 Wall. 737; *McMahon* v. *Welch*, 11 Kansas, 280; *Mullen* v. *United States*, 224 U. S. 448; *Tiger* v. *West. Investment Co.*, 221 U. S. 286; *United States* v. *Aaron*, 183 Fed. Rep. 347; *United States* v. *Freeman*, 3 How. 556; and the following acts and treaties: act of March 3, 1859, 11 Stat. 425; act of March 3, 1873, 17 Stat. 631; act of June 23, 1873, 17 Stat. 417; act of February 8, 1887, 24 Stat. 388; act of March 2, 1889, 25 Stat. 1013; act of May 2, 1890, 26 Stat. 81; act of June 7, 1897, 30 Stat. 62; act of May 31, 1900, 31 Stat. 221; act of May 27, 1902, 32 Stat. 245; act of June 28, 1906, 34 Stat. 539; Treaty of October 27, 1832, 7 Stat. 403; Treaty of October 29, 1832, 7 Stat. 410; Treaty of May 30, 1854, 10 Stat. 1082; Treaty of June 5, 1854, 10 Stat. 1093; Treaty of February 23, 1867, 15 Stat. 513.

MR. JUSTICE HUGHES delivered the opinion of the court.

Pursuant to the act of March 2, 1889, c. 422, 25 Stat. 1013, a tract of land in the Indian Territory was allotted to Pe-te-lon-o-zah, or William Wea, a member of the confederated Wea, Peoria, Kaskaskia and Piankeshaw tribes of Indians. The patent, conveying the land to Wea and his heirs, was issued on April 8, 1890, and imposed a restraint upon alienation for a period of twenty-five years from its date. Upon the death of Wea, his heirs entered into a contract to sell the land and in a suit brought by them in the United States court for the Northern District of the Indian Territory, for the purpose of enforcing the contract, judgment was entered sustaining its validity. The property was thereupon conveyed by the heirs and passed by various mesne conveyances to the appellants.

The United States, by virtue of its interest in the enforcement of the restriction against alienation, instituted this suit to cancel these conveyances and also to set aside the above-mentioned judgment. The case was heard upon bill and answer, and a decree was rendered in favor of the United States which was affirmed by the Circuit Court of Appeals. 191 Fed. Rep. 19.

The relations of the Government to these Indians, and the legislation with respect to the lands occupied by them, may be briefly stated. In 1832, the Piankeshaw and Wea tribes of Indians ceded to the United States their interest in lands within the States of Missouri and Illinois, and lands were set apart for them in what is now the State of Kansas (7 Stat. 410), adjoining the lands assigned to the Peorias and Kaskaskias (7 Stat. 403). In 1854, the Piankeshaws and Weas were united into a single tribe with the Peorias and Kaskaskias, and the consolidated tribes ceded to the United States all their interest in the tracts theretofore assigned to them, reserving, in addition to

certain sections which were to be held as common property, a specified quantity of land for each individual, the patents for which were to be issued "subject to such restrictions respecting leases and alienation, as the President or Congress" might prescribe. (10 Stat. 1082; see *The Kansas Indians*, 5 Wall. 737, 757, 758.) By the treaty of February 23, 1867 (15 Stat. 513, 518, 519), provision was made for the sale of the common tract in Kansas and for the purchase with the proceeds of lands in the north-east portion of what is at present the State of Oklahoma; and to enable the Indians to dispose of their allotments in Kansas, the Secretary of the Interior was authorized to remove the restrictions upon sale. In 1873 (c. 332, 17 Stat. 631), members of the tribe of Miamis, so electing, were united with these confederated tribes under the name of the United Peorias and Miamis. The territory which they occupied was expressly excepted from the operation of the general allotment act of February 8, 1887, c. 119, § 8, 24 Stat. 388, 391; but the provisions of that statute, with certain exceptions, were extended to these Indians by the act of March 2, 1889, c. 422, 25 Stat. 1013.

By the latter act, the Secretary of the Interior was authorized to make an allotment of land to each member subject to the following restriction:

"The land so allotted shall not be subject to alienation for twenty-five years from the date of the issuance of patent therefor, and said lands so allotted and patented shall be exempt from levy, sale, taxation, or forfeiture for a like period of years. As soon as all the allotments or selections shall have been made as herein provided, the Secretary of the Interior shall cause a patent to issue to each and every person so entitled, for his or her allotment, and such patent shall recite in the body thereof that the land therein described and conveyed shall not be alienated for twenty-five years from the date of said patent, and

shall also recite that such land so allotted and patented is not subject to levy, sale, taxation, or forfeiture for a like period of years, and that any contract or agreement to sell or convey such land or allotments so patented entered into before the expiration of said term of years shall be absolutely null and void" (§ 1, p. 1014).

It was under this provision that the land here in question was patented to William Wea, the allottee.

The confederated Peoria Indians who received allotments were made citizens of the United States by the act of May 2, 1890, c. 182, § 43, 26 Stat. 81, 99; and in 1897, it was provided that adult allottees, who had received allotments of two hundred acres or more, might sell one hundred acres under such regulations as the Secretary of the Interior might prescribe. Act of June 7, 1897, c. 3, 30 Stat. 62, 72. Subsequent provisions permitted sales by heirs of allottees, but only upon the approval of the Secretary of the Interior. Acts of May 31, 1900, c. 598, § 7, 31 Stat. 221, 248; May 27, 1902, c. 888, § 7, 32 Stat. 245, 275.

It is contended by the appellants that when the allotment was made, and the allottee became a citizen of the United States, the guardianship of the Government ceased. But this contention is plainly untenable. *Tiger* v. *Western Investment Company*, 221 U. S. 286. And it is no longer open to question that the United States has capacity to sue for the purpose of setting aside conveyances of lands allotted to Indians under its care, where restrictions upon alienation have been transgressed. Since the decision below, the precise question has been determined by this court in *Heckman* v. *United States*, 224 U. S. 413, and it was there held that the authority to enforce restrictions of this character is the necessary complement of the power to impose them. It necessarily follows that, as a transfer of the allotted lands contrary to the inhibition of Congress would be a violation of the governmental rights of the

United States arising from its obligation to a dependent people, no stipulations, contracts, or judgments rendered in suits to which the Government is a stranger, can affect its interest. The authority of the United States to enforce the restraint lawfully created cannot be impaired by any action without its consent. *Heckman* v. *United States*, *supra*, p. 445. If, therefore, the conveyance by the allottee's heirs, in the present case, would otherwise have been subject to cancelation, it was not saved by reason of the judgment entered in their suit against the purchaser.

The question then is, whether the restriction imposed by the act of 1889 was a merely personal one, operative only upon the allottee, or ran with the land binding his heirs as well. This must be answered by ascertaining the intent of Congress as expressed in the statute. The restriction was not limited to "the lifetime of the allottee," as in *Mullen* v. *United States*, 224 U. S. 448, 453, nor was the prohibition directed against conveyances made by the allottee personally. Congress explicitly provided that "the land so allotted" should not be subject to alienation for twenty-five years from the date of patent. "Said lands so allotted and patented" were to be exempt "from levy, sale, taxation, or forfeiture for a like period of years." The patent was expressly to set forth that "the land therein described and conveyed" should not be alienated during this period, and all contracts "to sell or convey such land" which should be entered into "before the expiration of said term of years" were to be absolutely void. These reiterated statements of the restriction clearly define its scope and effect. It bound the land for the time stated, whether in the hands of the allottee or of his heirs. Moreover, the subsequent legislation, relating to the same subject-matter, which expressly provided for conveyances by heirs of allottees subject to the approval of the Secretary of the Interior, leaves no room

for doubt as to the intention of Congress. *United States* v. *Freeman*, 3 How. 556, 564; *Cope* v. *Cope*, 137 U. S. 682, 688; *Tiger* v. *Western Investment Company*, 221 U. S. p. 309.

The conveyance by Wea's heirs came directly within the statutory prohibition, and the later conveyances under which the appellants claim must fall with it.

Affirmed.

HOLDEN LAND AND LIVE STOCK COMPANY *v.* INTER-STATE TRADING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 354. Argued February 26, 27, 1914.—Decided May 4, 1914.

Where the judgment of the state court rests upon an independent or non-Federal ground which is adequate to sustain it, this court has not jurisdiction to review it.

Where, as in this case, the decision of the state court involves simply the exercise of the equitable jurisdiction in accordance with the jurisprudence of the State, the ruling which prescribes the conditions of relief is not reviewable by this court.

In this case *held* that the decision that a party seeking to redeem lands might do so on equitable grounds only and on the equitable condition that he pay the debt with legal interest, rested on a non-Federal ground sufficient to sustain it and was not reviewable here.

Writ of error to review 87 Kansas, 221, dismissed.

THE facts, which involve the jurisdiction of this court to review the judgment of a state court under § 237, Judicial Code, are stated in the opinion.

Mr. Edward P. Garnett, with whom *Mr. Oliver H. Dean* and *Mr. Charles Blood Smith* were on the brief, for plaintiffs in error:

This court has jurisdiction, as the construction of the National Banking Act is involved.

No case can be found where this court has refused to entertain jurisdiction when the state court undertook to interpret the provisions of the National Banking Act. This court has uniformly taken jurisdiction in those cases. *Haseltine* v. *Central Bank*, 183 U. S. 134; *Schuyler National Bank* v. *Gadsden*, 191 U. S. 451; *Brown* v. *Marion National Bank*, 169 U. S. 416; *National Bank* v. *Ragland*, 181 U. S. 45; *Barnett* v. *National Bank*, 98 U. S. 555; *National Bank* v. *Dearing*, 91 U. S. 29; *Lake Benton Bank* v. *Watt*, 184 U. S. 151, 155; *Citizens Bank* v. *Donnell*, 195 U. S. 369. *Eustis* v. *Bolles*, 150 U. S. 361, distinguished, and see *Kansas Railway Co.* v. *Albers Comm. Co.*, 223 U. S. 594.

The decision is not only contrary to the plain provisions of the National Banking Act, but to every decision of this court construing it. *Brown* v. *Marion National Bank*, 169 U. S. 416; *Lake Benton Bank* v. *Watt*, 184 U. S. 155.

The forfeiture provided in § 5198 is entirely a creature of the Federal statute. It is not dependent upon any principles of general law, nor upon any state statute. It is above and beyond them all.

A state court cannot ignore the plain provisions of a Federal statute and proceed to decide a case upon what it might consider general principles of law repugnant to such provisions. *Railroad Co.* v. *Chicago*, 201 U. S. 506; *Gaar, Scott & Co.* v. *Shannon*, 223 U. S. 468, 471; *Railway Co.* v. *McWhirter*, 229 U. S. 265.

Mr. Leonard S. Ferry, with whom *Mr. Thomas F. Doran*, *Mr. John S. Dean* and *Mr. Elijah Robinson* were on the brief, for defendants in error.

Mr. Justice Hughes delivered the opinion of the court.

This suit was brought by the Holden Land and Live Stock Company and Howard M. Holden in the District

Court of Shawnee County, Kansas, to have certain conveyances which were absolute on their face, and the accompanying contracts, decreed to be mortgages, and for an accounting in order to ascertain the amount of the indebtedness thereby secured. It was also alleged that usury had been exacted by the creditor (the National Bank of Commerce of Kansas City, Missouri), and upon this ground it was prayed that in taking the account the debtor should be charged only with the principal and that the entire interest should be adjudged to be forfeited under §§ 5197 and 5198 of the Revised Statutes.

The principal facts and the nature of the litigation are succinctly stated by the Supreme Court of Kansas, as follows (87 Kansas, 221, 222, 223):

"On June 6, 1901, the Holden Land and Live Stock Company executed to the Mutual Benefit Life Insurance Company a mortgage for $90,000, due in five years, upon a tract of land in Shawnee county, containing about 5,603 acres, of which it was the record owner. On July 1, 1901, the Holden company executed a note to Howard M. Holden for $82,000, secured by a second mortgage on the same tract. This note and second mortgage, with other security, Holden at once transferred to the National Bank of Commerce of Kansas City, Missouri, to secure his note to that bank for $80,000 bearing the same date, due in one year and drawing eight per cent. interest, which was subsequently renewed. Holden had personally purchased a tract of land in Missouri, borrowing a part of the amount necessary for the purpose from the bank. To secure the bank the deed was made to one W. H. Winants. Afterwards it was agreed that he should hold the title as further security for Holden's note to the bank. In May, 1904, Holden caused to be executed to the Inter-State Trading Company, deeds covering the tracts in Kansas and Missouri, less parts of the former that had been sold, most of the proceeds having been applied to

cutting down the incumbrances. On February 13, 1908, Holden and the Holden company brought an action against the bank and the Inter-State Trading Company, alleging in substance that the deeds had been given by way of security for the indebtedness owing to the bank, and asking, if this should be found to have been paid in full, a decree quieting title; otherwise, a decree declaring title to be held under the deeds as security for whatever balance should be found due. The defendants maintained that the deeds were intended as absolute conveyances, and operated as such. The court found, in accordance with the report of the referee before whom the case was tried, that the defendants were precluded, by their course of dealing with the plaintiffs, from claiming the absolute title to the land; that the plaintiffs should be allowed to redeem it by paying the defendants what they had in it, amounting at the time the action was begun to $81,091.93, this including the first mortgage, which the bank had purchased; judgment was rendered that if the plaintiffs should pay this amount (which had been reduced to $65,233.67 by sales of land made during the litigation) within six months, their title should be quieted; that if they failed to make the payment within that time they should be barred of all interest in the land. The defendants appeal on the ground that the court should have denied the plaintiffs any relief whatever. The plaintiffs appeal upon two principal grounds: (1) that in the accounting they should not have been charged with interest on the note given to the bank, because by the exaction of usury all interest thereon had been forfeited; and (2) that the first mortgage should not have been enforced against them otherwise than by a foreclosure and sheriff's sale."

The Supreme Court of the State decided in favor of the plaintiffs in error upon the second question. Approving the findings made in the trial court, it was concluded that

the relations between the parties were in effect those of mortgagor and mortgagee and that the appropriate remedy was a foreclosure and sale. Accordingly, the judgment was modified so as to provide that the lien upon the Kansas land should be enforced in this manner.

The court affirmed the judgment in other respects; and because, in fixing the amount to be paid in order to redeem the lands in question, the court did not require the forfeiture of all interest, this writ of error is prosecuted.

The question at once arises whether, in view of the character of the suit and the basis of the ruling, the judgment is subject to review in this court. The action, it will be observed, was not one brought by the bank to enforce the payment of the indebtedness, thus involving the application of the statutory measure of the bank's legal right. Nor was the debtor availing himself of the exclusive remedy afforded by the statute in cases where usurious interest has actually been paid to a national bank (*Barnet* v. *National Bank*, 98 U. S. 555; *Stephens* v. *Monongahela Bank*, 111 U. S. 197). While the plaintiffs insisted that interest should be forfeited, still they were suitors in equity seeking to be permitted to redeem the lands which had been conveyed; and the decision was placed distinctly upon the ground that the relief sought should be granted only upon the equitable condition that the plaintiff should be charged with the principal of the debt and legal interest. Upon this point the Supreme Court of Kansas said (87 Kansas, 221, 233, 234):

"Usury was charged and collected upon the Holden note. By the national banking act the exaction of usury destroys the interest bearing quality of a debt. The referee decided that the plaintiffs were estopped from claiming the benefit of that provision. Nothing was said about usury until the present action was begun. Whether or not an actual estoppel has arisen, it was proper under the circumstances, in view of the equitable relief sought,

that the plaintiffs should be charged with the principal and legal interest.

"'When the borrower appears in any capacity in a court of equity asking affirmative relief against a usurious contract to pay money such relief will, in the absence of statute providing otherwise, be granted him only upon condition of his doing equity, that is, tendering the money actually due. . . . The rule . . . applies when the relief sought is the reformation or cancellation of a deed, or mortgage, or other instrument, evidencing or securing a usurious debt, or an injunction against threatened damaging action by the creditor, or in fact, whatever be the character of the relief sought. . . . In case the usurious interest has been reserved, or paid in advance, the amount equitably due is the principal debt less the usurious excess of interest paid. In the absence of statute providing otherwise if the contract for the usurious interest is still executory the sum equitably due is the principal debt with legal interest thereon.' (39 Cyc. 1010–1012.)"

The judgment thus rests upon an independent or non-Federal ground which was adequate to sustain it. The court applied a familiar equitable principle in defining the basis upon which extraordinary aid would be given. "A court of equity is not positively bound to interfere in such cases by an active exertion of its powers; but it has a discretion on the subject, and may prescribe the terms of its interference." Story, Eq. Jur., § 301; *Fanning* v. *Dunham*, 5 Johns. Ch. 122, 142, 143; *Tiffany* v. *Boatman's Institution*, 18 Wall. 375, 385. It is manifest that the plaintiffs were not proceeding by virtue of any Federal right in seeking to have the conveyances which had been executed in the form of absolute transfers of title declared to be mortgages; and it was competent for the court, whose intervention was desired for this purpose, to demand that its conscience be satisfied by the doing of equity on the part of those who asked it.

The decision involves simply the exercise of the equitable jurisdiction in accordance with the jurisprudence of the State, and the ruling which prescribed the conditions of relief is not reviewable here.

The writ of error must be dismissed.

Dismissed.

MR. JUSTICE DAY, dissenting.

I am unable to agree that this court does not have jurisdiction of this writ of error. In my judgment, if the principle here invoked is applied to a case like the one under consideration, it will result that the state court may determine, without power of review in this court, the ultimate effect and scope of rights secured by a Federal statute.

It appears from the opinion of the Supreme Court of Kansas, quoted in the opinion in this case, that a national bank, organized under and subject to the limitations of the Federal statutes in that respect, received usury upon a debt which was secured by a conveyance of title which was upon its face a deed. The plaintiff in error stated in its petition the facts which showed the usurious arrangement with the bank and the charging upon the debt of interest in violation of the statute and thus distinctly relied upon a Federal statute controlling the right of national banks to take usurious interest. It asked to have the conveyance decreed a mortgage in fact and security for the debt, and that only the amount legally collectible thereon should be held to be due. These allegations brought the case within the provisions of §§ 5197 and 5198 of the Revised Statutes of the United States, fixing certain consequences for taking usurious interest by national banks. The state court found that the deed had at all times been intended by the parties to be and was security for the debt, but decreed that it should extend to the balance of the debt, with legal interest.

By means of this petition a right of Federal origin was specially set up, which, if denied, gave the right to come to this court under a Federal statute which has been in substantially the same form, so far as this writ of error is concerned, since the passage of the Judiciary Act in 1789. This is not controverted in the opinion in this case, but the position is taken that the decision rests upon an independent ground not involving a denial of Federal right, and therefore is not reviewable here.

I am not unmindful of the rule frequently recognized in the decisions of this court that if the judgment of the state court rests upon an independent, separate ground of local or general law broad enough or sufficient in itself to base the decision upon and to control the rights of the parties, this court has no jurisdiction to review the action of the state court. So far as I understand the decisions where such independent ground has been sustained, resulting in a lack of jurisdiction in this court to review a decision of a state court, the judgment has proceeded upon the principle that, irrespective of the Federal right asserted, an independent ground of judgment, not involving the Federal question, has controlled the decision. For example, in a number of cases in this court it has been held that, conceding the Federal right asserted to have been one which might have been maintained, nevertheless, if upon the general doctrine of laches that right no longer exists, the refusal to enforce it because of laches, rests the decision upon a principle of general law, applicable to all rights, Federal or otherwise, and is not of itself a denial of a Federal right. So this court has more than once held that a decision placing the rights of the parties upon the doctrine of *res judicata*, where the decision did not necessarily involve the denial of a right of a Federal character, places the decision upon a non-Federal ground and is not reviewable here. These are examples of independent grounds of general law. which the state court has the right

to apply to all asserted rights, and their maintenance does not amount to a denial of special claims of Federal right.

"But," said this court in *C., B. & Q. Railway* v. *Drainage Comm'rs*, 200 U. S. 561, 580: "it is equally well settled that the failure of the state court to pass on the Federal right or immunity specially set up, of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law." Without citing all the cases, the rule substantially as just stated has been frequently recognized. *Murdock* v. *Memphis*, 20 Wall. 590, 636; *Anderson* v. *Carkins*, 135 U. S. 483; *Wabash R. R. Co.* v. *Pearce*, 192 U. S. 179; *Terre Haute &c. Railroad Co.* v. *Indiana*, 194 U. S. 579; *Schlemmer* v. *Buffalo, R. & P. R. Co.*, 205 U. S. 1.

Applying these principles here, it seems to me that where a party specially asserts, as it did in this case, the application of the Federal statute, which in unequivocal terms provides (Rev. Stat., § 5198) that the "taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done [which the record discloses was so taken in this case], shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon," and the Supreme Court of the State, holding that notwithstanding the Federal statute it has the discretion to condition its relief, allowing redemption only upon the payment of principal and legal interest, it has in effect denied the right asserted under the Federal statute and the correctness of the decision is reviewable here. This statute has no conditions attached to it and is upon its face applicable

wherever a situation arises which comes within its terms. In effect the state court said this is true, usury has been charged upon this contract, and, because of the statute, the security is not enforceable beyond the face of the debt, but as the giver of the security has been obliged to apply to the equity powers of a state court for the carrying out of the contract, a condition may be attached to the relief to which the party is otherwise entitled, and the state court charged the plaintiff in error with the debt, with legal interest, notwithstanding the Federal statute which declares the interest forfeited upon such facts as are here presented. When the court so decided, in my judgment, it necessarily denied a Federal right, and, whether right or wrong, the denial of that right laid the basis for ultimate decision by this court as to the nature and extent of the rights secured by the Federal statute.

In my opinion this court should review the judgment and determine for itself whether the rule invoked in the state court has this effect upon a Federal statute, which unconditionally forfeits the entire interest where usurious interest has been knowingly reserved or taken.

I therefore dissent from the opinion of the court holding that there is no jurisdiction of the case.

MR. JUSTICE MCKENNA and MR. JUSTICE VAN DEVANTER concur in this dissent.

RICHARDS *v.* WASHINGTON TERMINAL COMPANY.

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

No. 52. Argued November 7, 1913.—Decided May 4, 1914.

Although in England, Parliament, being omnipotent, may authorize the taking of private property for public use without compensation, the English courts decline to place an unjust construction on its acts, and, unless so clear as not to admit any other meaning, do not interpret them as interfering with rights of private property.

Legislation of Congress is different from that of Parliament as it must be construed in the light of that provision of the Fifth Amendment which forbids the taking of private property for public use without compensation.

While Congress may legalize, within the sphere of its jurisdiction, what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use.

While the owners of a railroad constructed and operated for the public use, although with private property for private gain, are not, in the absence of negligence, subject to action in behalf of owners of neighboring private property for the ordinary damages attributable to the operation of the railroad, a property owner may be entitled to compensation for such special damages as devolve exclusively upon his property and not equally upon all the neighboring property.

In this case, *held* that an owner of property near the portal of a tunnel in the District of Columbia constructed under authority of Congress, while not entitled to compensation for damages caused by the usual gases and smoke emitted from the tunnel by reason of the proper operation of the railroad is entitled to compensation for such direct, peculiar and substantial damages as specially affect his property and diminish its value.

37 App. D. C. 289, reversed.

THE facts, which involve the right, under the Fifth Amendment, of an owner to be compensated for special and peculiar damages to his property by reason of the operation of a railroad near the premises, are stated in the opinion.

Mr. Hugh H. Obear, with whom *Mr. Charles A. Douglas*, *Mr. Thomas Ruffin*, *Mr. Edw. F. Colladay*, *Mr. Paul Sleman* and *Mr. Harry F. Lerch* were on the brief, for plaintiff in error.

Mr. John W. Yerkes, with whom *Mr. George E. Hamilton* and *Mr. John J. Hamilton* were on the brief, for defendant in error:

The Congress, in legislation directing the acquisition of the right of way for this railroad construction, provided only for payment of compensation to those whose land was actually appropriated, and made no provision for recovery of damages by those who suffered injury through the proper construction and operation of the road.

Where compensation for incidental and consequential injuries to property is allowed, it follows from constitutional provisions or direct legislation and in the absence thereof there can be no recovery.

There has been no such taking of the property of plaintiff in error by defendant in error as requires or justifies the making of compensation.

In support of these contentions, see *Atchison, Topeka & Santa Fe R. R. Co.* v. *Armstrong*, 1 L. R. A., N. S., 113; *Bedford* v. *United States*, 192 U. S. 217; *Beseman* v. *P. R. R. Co.*, 50 N. J. L. 235; *Boothby* v. *Androscoggin R. R. Co.*, 51 Maine, 318; *Briesen* v. *Long Island R. R. Co.*, 31 Hun, 112; *Chicago* v. *Taylor*, 125 U. S. 161; *Dunsmore* v. *Central Iowa Ry. Co.*, 72 Iowa, 182; *Friedman* v. *N. Y. & H. R. R. Co.*, 85 N. Y. Supp. 404; *Gainesville H. & W. R. R. Co.* v. *Hall*, 78 Texas, 169; *Gibson* v. *United States*, 166 U. S. 269; *Hatch* v. *Ver. Cent. R. R. Co.*, 25 Vermont, 49; *High Bridge Lumber Co.* v. *United States*, 69 Fed. Rep. 320; *Kansas, N. & D. Ry. Co.* v. *Cuykendall*, 42 Kansas, 234; *Marchant* v. *P. R. R. Co.*, 153 U. S. 380; *Millard* v. *Roberts*, 25 App. D. C. 225; *Northern Trans. Co.* v. *Chicago*, 99 U. S. 635; *Penna. R. R. Co.* v. *Miller*, 132 U. S. 75; *Pum-*

pelly v. *Green Bay Co.*, 13 Wall. 166; *Richards* v. *Wash. Terminal Co.*, 37 App. D. C. 289; *Spencer* v. *R. R. Co.*, 23 W. Va. 427; *Taylor* v. *B. & O. R. R. Co.*, 33 W. Va. 39; *Church of Latter-day Saints* v. *Oregon Short Line R. R. Co.*, 23 L. R. A., N. S., 860; *United States* v. *Alexander*, 148 U. S. 186; *United States* v. *Grizzard*, 219 U. S. 180; *United States* v. *Lynah*, 188 U. S. 445. *Fifth Baptist Church Case*, 108 U. S. 317, distinguished.

MR. JUSTICE PITNEY delivered the opinion of the court.

Plaintiff in error, who was plaintiff below, commenced this action in the Supreme Court of the District of Columbia to recover for the damage to his property resulting from the maintenance of an alleged nuisance by defendant by means of the operation of a railroad and tunnel upon its own lands near to but not adjoining those of plaintiff. Defendant having pleaded not guilty, the issue came on for trial by jury, and at the conclusion of plaintiff's evidence a verdict was directed in favor of defendant. The Court of Appeals affirmed the judgment (37 App. D. C. 289), and a writ of error brings the controversy under the review of this court.

An agreed abridgment of the evidence upon which the ruling of the trial justice was based is embodied in the bill of exceptions. From this it appears that plaintiff is and has been since the year 1901 the owner of Lot 34 in Square 693 in the City of Washington, having a frontage of 20 ft. upon the westerly side of New Jersey Avenue, Southeast, and an average depth of 81 ft., with improvements thereon consisting of a three-story and basement brick dwelling-house containing ten rooms, known as No. 415 New Jersey Avenue. The rear windows upon all the floors of the house open in the direction of the railroad tracks that lead from defendant's tunnel. The south portal of this tunnel opens within Square 693 and near its

northeasterly corner, and the tunnel extends thence in a northeasterly direction passing under the Capitol and Library grounds and First Street N. E., to the Union Station at Massachusetts Avenue. There are two sets of railroad tracks in the tunnel and leading from it, and as these emerge from the south portal they extend in a general southwesterly direction up an incline or grade across the central portion of Square 693 on to an elevated structure which carries the tracks over and beyond South Capitol Street. The tunnel and these tracks are used for the passage of trains running both northwardly and southwardly, about thirty each day, all of them being passenger trains with the exception of an occasional shifting engine. The trains frequently pass in and out of the tunnel without stopping, but trains also very often stop at or near a switch tower that is situate near the centre of Square 693. From the nearest portion of plaintiff's house to the centre of the south portal, the distance in a straight line is about 114 ft., there being three intervening dwelling houses, two of which have been purchased and are now owned by defendant. From the rear end of plaintiff's lot to the middle of the tracks southwestwardly from the portal the distance in a straight line is about 90 ft. Plaintiff's property has been damaged by the volumes of dense black or gray smoke, and also by dust and dirt, cinders and gases, emitted from the trains while passing over the tracks and in or out of the tunnel or standing upon the tracks near the signal tower. There is a fanning system installed in the tunnel which causes the gases and smoke emitted from engines while in the tunnel to be forced out of the south portal, and these gases and smoke contaminate the air, and also add to the inconvenience suffered by plaintiff in the occupation of his property. His house was pleasant and comfortable for purposes of occupation before the construction of the tunnel and tracks, but since then it has not only depreciated in value, but the tenant

removed therefrom, and plaintiff was obliged to occupy the house himself by reason of his inability to rent it. The property has depreciated from a value of about $5,500 to about $4,000, and the rental value from $30 per month to $20 per month. The furniture and other belongings in the house have been depreciated from a value of $1,200 to $600, all of which depreciation is due to the presence of smoke, cinders, and gases emitted from passing trains and from the mouth of the tunnel, which smoke, cinders, and gases enter the dwelling house and settle upon the furniture and other personal property contained in it, contaminating the air and rendering the house objectionable as a habitation. The house has also been damaged by vibrations caused by the movement of trains on the track or in the tunnel, resulting in cracking the walls and wall paper, breaking glass in the windows, and disturbing the peace and slumber of the occupants.

The defendant, the Washington Terminal Company, is the owner of the tunnel and of the tracks therein, but its ownership of tracks ceases at the south portal. The tracks extending therefrom in a southwesterly direction are owned and used by other railroad companies, but the movement of the trains is controlled by defendant.

The tunnel and the tracks leading from it across Square 693 were located and constructed and are now maintained under the authority of acts of Congress of February 12, 1901, c. 354, 31 Stat. 774, and February 28, 1903, c. 856, 32 Stat. 909, in accordance with plans and specifications approved by those acts. No claim is made by plaintiff that the tunnel, the tracks in Square 693, and the trains operated therein and thereon, were constructed, operated, or maintained in a negligent manner; and it is conceded that the tunnel and tracks were built upon property acquired by purchase or condemnation proceedings, and were constructed under authority of the acts of Congress

and of permits issued by the Commissioners of the District of Columbia.

Such being the essential facts to be deduced from the evidence, we have reached the conclusion, for reasons presently to be stated, that with respect to most of the elements of damage to which the plaintiff's property has been subjected, the courts below correctly held them to be *damnum absque injuria;* but that with respect to such damage as is attributable to the gases and smoke emitted from locomotive engines while in the tunnel, and forced out of it by means of the fanning system through a portal located so near to plaintiff's property that these gases and smoke materially contribute to injure the furniture and to render the house less habitable than otherwise it would be, there is a right of recovery.

The acts of Congress referred to, followed by the construction of the tunnel and railroad tracks substantially in the mode prescribed, had the effect of legalizing the construction and operation of the railroad, so that its operation, while properly conducted and regulated, cannot be deemed to be a public nuisance. Yet it is sufficiently obvious that the acts done by defendant, if done without legislative sanction, would form the subject of an action by plaintiff to recover damages as for a private nuisance.

At the same time, there is no exclusive and permanent appropriation of any portion of plaintiff's land, which indeed does not even abut upon defendant's property. The acts of Congress do not in terms provide for the payment of compensation to property owners damnified through the construction and operation of the tunnel and railroad lines in question, except to those whose lands, or a portion thereof, were necessarily appropriated. For damages, whether direct or consequential, to non-contiguous parcels such as that of plaintiff, there is no express provision. But § 9 of the act of 1903 (32 Stat. p. 916) authorizes the Terminal Company to acquire, by purchase or condemna-

tion, "the lands and property necessary for all and every the purposes contemplated" by the several acts of Congress under which the tunnel and railroad were constructed and are operated. This grant of the power of condemnation is very broad, but it has not been acted upon by the company in the case of the present plaintiff. And since he is not wholly excluded from the use and enjoyment of his property, there has been no "taking" of the land in the ordinary sense.

The courts of England, in a series of decisions, have dealt with the general subject now under consideration. *Rex* v. *Pease*, 4 Barn. & Ad. 30, 40; *Vaughan* v. *Taff Vale Ry. Co.*, 5 Hurl. & Nor. 679; 29 L. J. Exch. 247; 1 Eng. Rul. Cas. 296; *Jones* v. *Festiniog Ry. Co.*, L. R., 3 Q. B. 733; *Hammersmith &c. Ry. Co.* v. *Brand*, L. R., 4 H. L. 171; 38 L. J. Q. B. 265; 1 Eng. Rul. Cas. 623; *Metropolitan Asylum District* v. *Hill*, L. R. 6 App. Cas. 193, 201, 203; *London & Brighton Ry. Co.* v. *Truman*, L. R. 11 App. Cas. 45. The rule to be deduced from these cases is that while no action will lie for an invasion of private rights necessarily resulting from the establishment and operation or railways and other public works under the express sanction of an act of Parliament, yet that such acts are to be strictly construed so as not to impair private rights unless the legislative purpose to do so appears by express words or necessary implication. In short, Parliament, being omnipotent, may authorize the taking of private property for public use without compensation to the owner; but the courts decline to place an unjust construction upon its acts, and will not interpret them as interfering with rights of private property, unless the language be so clear as to admit of no other meaning.

But the legislation we are dealing with must be construed in the light of the provision of the Fifth Amendment—"Nor shall private property be taken for public use, without just compensation"—and is not to be given

an effect inconsistent with its letter or spirit. The doctrine of the English cases has been generally accepted by the courts of this country, sometimes with scant regard for distinctions growing out of the constitutional restrictions upon legislative action under our system. Thus, it has been said that "A railroad authorized by law and lawfully operated cannot be deemed a private nuisance"; that "What the legislature has authorized to be done cannot be deemed unlawful," etc. These and similar expressions have at times been indiscriminately employed with respect to public and to private nuisances. We deem the true rule, under the Fifth Amendment, as under state constitutions containing a similar prohibition, to be that while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use. *Pennsylvania R. R. Co.* v. *Angel*, 41 N. J. Eq. 316, 329; *Costigan* v. *Pennsylvania R. R. Co.*, 54 N. J. L. 233; *Cogswell* v. *N. Y., N. H. & H. R. R.*, 103 N. Y. 10; *Garvey* v. *Long Island R. R. Co.*, 159 N. Y. 323; *Bohan* v. *Port Jervis Gas Light Co.*, 122 N. Y. 18, 29; *Sadlier* v. *City of New York*, 81 N. Y. S. 308.

But the question remains, in cases of the class now before us, What is to be deemed a private nuisance such as amounts to a taking of property? And by a great and preponderant weight of judicial authority, in those States whose constitutions contain a prohibition of the taking of private property for public use without compensation, substantially in the form employed in the Fifth Amendment, it has become established that railroads constructed and operated for the public use, although with private capital and for private gain, are not subject to actions in behalf of neighboring property owners for the ordinary damages attributable to the operation of the railroad, in the absence of negligence. Such roads are treated as

public highways, and the proprietors as public servants, with the exemption normally enjoyed by such servants from liability to private suit, so far as concerns the incidental damages accruing to owners of non-adjacent land through the proper and skillful management and operation of the railways. Any diminution of the value of property not directly invaded nor peculiarly affected, but sharing in the common burden of incidental damages arising from the legalized nuisance, is held not to be a "taking" within the constitutional provision. The immunity is limited to such damages as naturally and unavoidably result from the proper conduct of the road and are shared generally by property owners whose lands lie within range of the inconveniences necessarily incident to proximity to a railroad. It includes the noises and vibrations incident to the running of trains, the necessary emission of smoke and sparks from the locomotives, and similar annoyances inseparable from the normal and non-negligent operation of a railroad. *Transportation Co.* v. *Chicago,* 99 U. S. 635, 641; *Beseman* v. *Pennsylvania R. R. Co.,* 50 N. J. L. 235, 240; affirmed 52 N. J. L. 221.

That the constitutional inhibition against the taking of private property for public use without compensation does not confer a right to compensation upon a land owner, no part of whose property has been actually appropriated, and who has sustained only those consequential damages that are necessarily incident to proximity to the railroad, has been so generally recognized that in some of the States (Arkansas, California, Colorado, Georgia, Illinois, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, South Dakota, Texas, West Virginia, and Wyoming are, we believe, among the number) constitutions have been established providing in substance that private property shall not be taken *or damaged,* for public use without compensation.

The immunity from liability for incidental injuries is

attended with a considerable degree of hardship to the private land owner, and has not been adopted without some judicial protest. But, as pointed out by Chief Justice Beasley in the *Beseman Case,* 50 N. J. Law at p. 238, if railroad companies were liable to suit for such damages upon the theory that with respect to them the company is a tortfeasor, the practical result would be to bring the operation of railroads to a standstill. And, on the whole, the doctrine has become so well established that it amounts to a rule of property, and should be modified, if at all, only by the law-making power.

But the doctrine, being founded upon necessity, is limited accordingly. This court, in a leading case that we deem controlling upon the questions now at issue, had occasion to recognize this, and at the same time to apply the distinction between public and private nuisances with respect to the private right of action. In *Baltimore & Potomac R. R. Co.* v. *Fifth Baptist Church,* 108 U. S. 317, the court, while recognizing (p. 331) that the legislative authority for operating a railway carried with it an immunity to private action based upon those incidental inconveniences that are unavoidably attendant upon the operation of a railroad, nevertheless sustained the right of action in a case where a building for housing and repairing locomotive engines was unnecessarily established in close proximity to a place of public worship and so used that the noises of the shop and the rumbling of the locomotive engines passing in and out, the blowing off of steam, the ringing of bells, the sound of whistles, and the smoke from the chimneys, created a constant disturbance of the religious exercises. The court (speaking by Mr. Justice Field) held that the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights

of others; and that whatever the extent of the authority conferred, it was accompanied with the implied qualification that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. In the language of the opinion: "Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion." The reasoning proceeded upon the ground (p. 332) that no authority conferred by Congress would justify an invasion of private property to an extent amounting to an entire deprivation of its use and enjoyment, without compensation to the owner; "nor could such authority be invoked to justify acts, creating physical discomfort and annoyance to others in the use and enjoyment of their property, to a less extent than entire deprivation, if different places from those occupied could be used by the corporation for its purposes, without causing such discomfort and annoyance"; and hence that the legislative authorization conferred exemption only from suit or prosecution for the public nuisance, and did not affect "any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."

The present case, in the single particular already alluded to—that is to say, with respect to so much of the damage as is attributable to the gases and smoke emitted from locomotive engines while in the tunnel, and forced out of it by the fanning system therein installed, and issuing from the portal located near to plaintiff's property in such manner as to materially contribute to render his property less habitable than otherwise it would be, and to depreciate it in value; and this without, so far as appears, any real necessity existing for such damage—is, in our opinion, within the reason and authority of the decision just cited. This case differs from that of the *Baptist Church,*

in that there the railroad company was free to select some other location for the repair shop and engine house; while here the evidence shows that the location of the tunnel and its south portal was established pursuant to law, and not voluntarily chosen by defendant. This circumstance, however, does not, as we think, afford sufficient ground for a distinction affecting the result. The case shows that Congress has authorized, and in effect commanded, defendant to construct its tunnel with a portal located in the midst of an inhabited portion of the city. The authority, no doubt, includes the use of steam locomotive engines in the tunnel, with the inevitable concomitants of foul gases and smoke emitted from the engines. No question is made but that it includes the installation and operation of a fanning system for ridding the tunnel of this source of discomfort to those operating the trains and traveling upon them. All this being granted, the special and peculiar damage to the plaintiff as a property owner in close proximity to the portal is the necessary consequence, unless at least it be feasible to install ventilating shafts or other devices for preventing the outpouring of gases and smoke from the entire length of the tunnel at a single point upon the surface, as at present. Construing the acts of Congress in the light of the Fifth Amendment, they do not authorize the imposition of so direct and peculiar and substantial a burden upon plaintiff's property without compensation to him. If the damage is not preventable by the employment at reasonable expense of devices such as have been suggested, then plaintiff's property is "necessary for the purposes contemplated," and may be acquired by purchase or condemnation (32 Stat. 909, 916, c. 856, § 9), and pending its acquisition defendant is responsible. If the damage is readily preventible, the statute furnishes no excuse, and defendant's responsibility follows on general principles.

No doubt there will be some practical difficulty in dis-

tinguishing between that part of the damage which is attributable to the gases and smoke emitted from the locomotive engines while operated upon the railroad tracks adjacent to plaintiff's land, and with respect to which we hold there is no right of action, and damage that arises from the gases and smoke that issue from the tunnel, and with respect to which there appears to be a right of action. How this difficulty is to be solved in order to determine the damages that should be assessed in this action, or the compensation that should be awarded in case condemnation proceedings are resorted to, is a question not presented by this record, and upon which, therefore, no opinion is expressed.

Judgment reversed and cause remanded to the Court of Appeals, with directions to reverse the judgment of the Supreme Court of the District and remand the cause to that court with directions for a new trial, and for further proceedings in accordance with the views above expressed.

MR. JUSTICE LURTON dissents.

GREEN *v.* MENOMINEE TRIBE.

APPEAL FROM THE COURT OF CLAIMS.

No. 285. Argued March 13, 16, 1914.—Decided May 11, 1914.

Section 2 of the act of May 29, 1908, c. 216, 35 Stat. 144, conferring jurisdiction on the Court of Claims to hear and determine claims of certain Indian traders against the Menominee Tribe of Indians and certain members thereof, created no new right in favor of such traders except removal of the bar of limitations, and gave no right to sue the United States or any member of the Tribe in his individual capacity

as disassociated from his dependent condition as an Indian subject.

A contract by a tribe of Indians to guarantee payment of supplies to individual members thereof must conform to § 2103, Rev. Stat.

A claim for lumber equipment furnished to individual members of a tribe of Indians on the guarantee of the Tribe based on an agreement that the proceeds of the lumber cut should, to the extent permitted by the Government, pass through the hands of an agent and be applied to payment for the equipment cannot be enforced, under the act of May 29, 1908, against the Tribe or the Indians as members thereof or the United States when it appears that such proceeds of the lumber were collected by the agent and misapplied.

The right of a licensed Indian trader to deal with Indian tribes and individual Indians does not extend to making unlawful contracts.

47 Ct. Cl. 281, affirmed.

THE facts, which involve a claim against the Menominee Tribe for supplies furnished to individual members of the Tribe and the jurisdiction of the Court of Claims to consider such claim under the act of May 29, 1908, are stated in the opinion.

Mr. L. T. Michener, with whom *Mr. P. G. Michener* and *Mr. C. F. Dillett* were on the brief, for appellant:

Full jurisdiction was conferred on the Court of Claims by § 2, act of May 29, 1908, 35 Stat. 444.

Appellant had the right to make the United States a party defendant to this action.

Congress had power to confer jurisdiction on the Court of Claims to adjudicate this case, even if the Indians were and are citizens of the United States.

The Secretary of the Interior and other officers have broad powers in dealing with Indian affairs.

The statutes conferred on the traders the right to trade with the Indians.

The agreement sued on related to dead and down timber and was made lawfully.

The petition alleges facts sufficient to constitute a cause of action.

Rev. Stat., § 2103, does not apply to the contract in the case at bar.

In support of these contentions, see *Blackfeather* v. *United States*, 155 U. S. 180, and 190 U. S. 368; *Braden's Case*, 16 Ct. Cls. 389; *Campbell* v. *Holt*, 115 U. S. 620; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Clark* v. *United States*, 95 U. S. 539; *Dahlgren's Case*, 16 Ct. Cls. 30; *Delaware Indians* v. *Cherokee Nation*, 193 U. S. 127; *Ex parte Wall*, 107 U. S. 265; *Journeycake* v. *Cherokee Nation*, 155 U. S. 196; *La Abra Mining Co.* v. *United States*, 175 U. S. 423; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553; *McElrath* v. *United States*, 102 U. S. 426; *Navarre's Case*, 33 Ct. Cls. 235; 173 U. S. 77; *Neal's Case*, 14 Ct. Cls. 280; *Nor. Pac. R. R. Co.* v. *Lewis*, 162 U. S. 366; *Roberts* v. *United States*, 92 U. S. 539; *Sac and Fox Indians Case*, 220 U. S. 481; *Tiger* v. *West. Invest. Co.*, 221 U. S. 286; *Townsend* v. *Little*, 109 U. S. 504; *United States* v. *Celestine*, 215 U. S. 278; *United States* v. *Cook*, 19 Wall. 591; *United States* v. *Nix*, 189 U. S. 199; *United States* v. *Rickert*, 188 U. S. 278.

Mr. Assistant Attorney General Thompson for the United States:

Appellant has attempted to set up a new and different agreement in his amended petition.

The United States have not been properly made a party defendant.

Congress has no power to refer controversies between residents of the same State to the Court of Claims.

Congress has no power to waive the statute of limitations in this case.

Service of notice was necessary in order to give Court of Claims jurisdiction of the persons of defendants.

Property rights of individual Menominee Indians are protected by state laws of Wisconsin.

Individual tribal Indians have the right to sue and be sued in the courts of States where they reside.

There is no liability on the tribe under an oral agreement.

The tribe is not liable for the negligence or torts of the Indian agent.

In support of these contentions, see *Alter's Appeal*, 67 Pa. St. 34; 15 Am. & Eng. Ency., 2d ed., 11, 12; *Brown* v. *United States*, 44 Ct. Cls. 283, 311; *Bank of Columbia* v. *Okely*, 4 Wheat. 234, 242; *Cohens* v. *Virginia*, 6 Wheat. 264, 293; *Clement* v. *Sigur*, 29 La. Ann. 798, 802; *Ex parte Wall*, 107 U. S. 265, 289; *Felix* v. *Patrick*, 145 U. S. 317, 332; *Finn* v. *United States*, 123 U. S. 227; *Forbes* v. *Mitchell*, 1 J. J. Marsh. 440, 441; *Green* v. *Menominee Indians*, 46 Ct. Cls. 68, and 47 Ct. Cls. 281; *Gho* v. *Julles*, 1 Wash. Ter. 325, 329; *Godfroy* v. *Scott*, 70 Indiana, 259; *Hitchcock* v. *United States*, 22 App. D. C. 275; *Hite* v. *Hite*, 2 Rand, 409, 417; *Ingraham* v. *Ward*, 56 Kansas, 550; *Justices* v. *Murray*, 9 Wall. 274, 287; *Ke-tuc-e-mun-guah* v. *McClure*, 122 Indiana, 541; *Langford* v. *United States*, 101 U. S. 341, 345; *La Abra Mining Co.* v. *United States*, 175 U. S. 423; *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 272, 276; *McElrath* v. *United States*, 102 U. S. 426, 439; *Palairet's Appeal*, 67 Pa. St. 479; *Rubideaux* v. *Vallie*, 12 Kansas, 38, 52; *Stacy* v. *La Belle*, 99 Wisconsin, 520, 524; *Schick* v. *United States*, 195 U. S. 71, 72; *Swartzel* v. *Rogers*, 31 Kansas, 374; *Stewart* v. *United States*, 206 U. S. 185; *United States* v. *Kagama*, 118 U. S. 375; *United States* v. *Klein*, 13 Wall. 128; *United States* v. *Flournoy*, 69 Fed. Rep. 891; *United States* v. *Mille Lac Indians*, 229 U. S. 498; *Vigo's Case*, 21 Wall. 648; *Woodford* v. *Baker*, 10 Oregon, 491, 494; *Water Valley* v. *Seamen*, 53 Mississippi, 655, 660. See also act of May 29, 1908 (jurisdictional act), 35 Stat. 445, 446; act of March 31, 1882 (ratifying permit), 22 Stat. 36, 37; acts of June 12, 1890 (showing how tribal fund was created), 26 Stat. 146, and June 28, 1906, 34 Stat. 547; Const. U. S., Art. III, §§ 1 and 2; Fifth and Seventh Amendments; Const. Wisconsin, Art. 1, § 5; *Id.*, Art. 75,

§ 20; Statutes Wisconsin, §§ 2629, 2630, 4222, 4225; Judicial Code, §§ 24, 145, 233, 235.

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

By this appeal a review is sought of a judgment of the court below holding that an amended petition filed by the appellant stated no cause of action and dismissing the same. (47 Ct. Cls. 281.) Our attention therefore must be directed to the petition, but as a means of at once clarifying the issues, we refer to the act of Congress authorizing the suit and briefly state the averments of an original petition which was likewise dismissed because stating no cause of action.

By an act of Congress of May 29, 1908 (35 Stats. 444, c. 216, § 2), jurisdiction was conferred upon the Court of Claims "to hear, determine, and render final judgment, notwithstanding lapse of time or statute of limitation, for any balances found due, without interest, with the right of appeal as in other cases," upon the claims of eight named persons who were described in the act as "traders," against the "Menominee tribe of Indians in Wisconsin and against certain members of said tribe at the Green Bay Agency, for supplies, goods, wares, merchandise, tools, and live stock furnished certain members of the said tribe after the first day of January, in the year eighteen hundred and eighty, for the purpose of carrying on logging operations upon the Menominee Indian Reservation, in Wisconsin." The statute further provided: "Said court shall, in rendering judgment, ascertain and determine the amount, if any, due upon each of said claims, and if the court find that there is a liability upon any of said claims, it shall then determine if such liability be that of the said Menominee tribe of Indians as a tribe or that of individual members of said tribe, and it shall

render judgment for the amount, if any, found due from said tribe to any of said claimants, and it shall render judgments for the amounts, if any, found due from any of the individual members of said tribe to any of said claimants." The statute then provided the means by which the judgments, if any were rendered, whether against the tribe or against individual Indians, should be paid.

Green, the appellant, one of the traders named in the act, sought to recover from the Menominee tribe and 158 named members thereof an amount alleged to be the price of certain equipment and supplies alleged to have been furnished by him. The liability of the individual Indians was based upon averments that they had received during the years 1886 to 1889 the amount of the equipment and supplies sued for, and that they had contracted to pay for the same, the supplies having been furnished them to enable them to carry on logging operations on the Menominee Reservation in Wisconsin. The liability of the tribe was based on averments that it had expressly guaranteed that the individual Indians, members of the tribe, would pay for the supplies furnished them for the purposes and under the circumstances alleged. The defendants jointly demurred on two grounds: first, that the act conferring authority to bring suit was repugnant to the Constitution, and second, because the petition stated no cause of action. Holding that Congress had the undoubted power to pass the jurisdictional act, the court overruled the first ground. It also overruled the second ground as to the individual members of the tribe who were made defendants, but it sustained the exception of no cause of action as to the tribe, the court holding that "under the averments of the petition the Menominee Tribe of Indians is but a naked guarantor for the debt of another, and such promise not being in writing is void under the statute of frauds." The suit, as to the tribe, was therefore dismissed.

By leave, an amended petition was filed stating a new cause of action and joining the United States as defendant. This petition after alleging that the petitioner was a citizen of the United States and a resident of Wisconsin and after counting upon the jurisdictional act, made in substance the following averments: That in 1881 the Menominee Indians on the reservation were in a destitute condition and to save them and their families from starvation, the United States granted them permission to cut and sell the dead and down timber on the reservation "ten per cent. of the proceeds to go to the benefit of the said tribe and of those performing labor in that respect." That when it developed that the Indians, because of their extreme poverty and want of credit could not procure the equipment and supplies which were essential to enable them to make use of the permission, the Commissioner of Indian Affairs sent a special agent, John A. Wright, to the Reservation to make some arrangement whereby such condition could be remedied. That a council of the tribe was thereupon held, attended by all the chiefs and head men and practically all the members of the tribe, and it was agreed by and between the then Indian Trader, M. Wescott, "as one party to the agreement, and the Menominee Indian Tribe as the other party thereto, that the said M. Wescott, the duly licensed Indian Trader, at Keshena, Wisconsin, should furnish necessary equipment and supplies to those members of the tribe who desired to engage in logging operations to enable them to carry on such work, and support their respective families while so engaged, such equipment and supplies not to exceed the sum of $2.50 for each thousand feet of logs so cut and sold; that all logs cut and hauled by the Menominee Tribe in the logging operations were to be sold through the Indian Agent to the highest and best bidder; and that the prices for such supplies as were to be furnished by the petitioner, should be such prices as were being paid in cash for similar

supplies in that part of the State, with transportation added; that said Menominee Tribe promised and agreed that such equipment and supplies so furnished should be paid for out of the first proceeds from the sale of the logs so to be cut and sold. That said agreement was made with the consent and approval of the Indian Agent residing at Keshena, Wisconsin, and in charge of said Menominee Indian Reservation, and also by said special agent, John A. Wright. That said agreement had the unanimous approval of all members of the tribe present at said council. That said agreement was made orally by the said M. Wescott, personally, and by the chiefs and head men on behalf of said tribe. . . ." It was alleged that the agreement thus made was carried out by the tribe and by Wescott who made advances for the purposes of the operations in cutting the dead and down timber and continued to do so until the year 1886 when Wescott ceased to be the Indian trader and was succeeded by Green, the petitioner, and one Stacy whose rights the petitioner Green had acquired. The petition then charged that as the condition of destitution and inability to obtain equipment and supplies which had led to the making of the agreement with Wescott yet prevailed after petitioner and Stacy became the Indian traders, on the first of January, 1887, it was agreed between petitioner and Stacy and the tribe that the previous agreement should be continued in full force and effect with petitioner and Stacy, the petition expressly averring that "said last mentioned agreement was made with your petitioner and W. H. Stacy, personally, and on behalf of the Menominee Tribe by the chiefs and head men thereof, which said chiefs and head men still continued to have and were recognized as having authority to make contracts in behalf of, and binding on said tribe. That said last mentioned agreement was approved by the Indian Agent at Keshena, Wisconsin, and was acquiesced in by all members of said tribe, and treated by all

parties interested as valid and binding on the contracting parties."

It was averred that up to 1889 supplies were furnished in accordance with the agreement with the approval of the Indian agent and the United States, and with a few exceptions were paid for by the methods pointed out by the contract; that during the year 1889, however, supplies amounting to $13,087.46 were furnished to 158 members of the tribe, the name of each member and the amount supplied him being stated, for which payment had not been made either by the Indians, the tribe, or the United States.

It was further averred that such unpaid for supplies were furnished "in accordance with and relying upon said agreement" and that petitioner and Stacy "did not and would not extend credit to the individual members of said tribe, but extended such credit solely to the tribe, relying upon said agreement." It was further alleged that the proceeds from the sales of the dead and down timber cut and hauled by the Indians were received by the Indian agent and if the amounts which came into his hands in accordance with the contract and which were subject by its terms to be applied to the payment of the supplies advanced under the terms of the agreement had been so applied, all the supplies would have been paid for, but that they remain unpaid for because "such proceeds were not so applied." After averring that the logging operations and the credits extended by the petitioner and Stacy were for the benefit of the tribe, the petition charged that "there is a large fund in the possession of the United States to the credit and for the benefit of said Menominee Tribe of Indians, derived through their logging operations, and now amounting to more than a million and a half of dollars, which fund has been accumulated through the credit extended and assistance rendered by licensed traders to the Menominee Indians in logging operations,"

but there was no averment that such sum or any part thereof was derived from payments made to the United States by the Indian agent of any portion of the sum derived from the ten per cent. provided for in the contract and which, it was contemplated would be used by the Indian agent for the purpose of paying the trader for the supplies furnished by him. There was also no averment that the money to the extent of the amount of the supplies which was received by the Indian agent out of the funds of the Indians and which was not by him applied to pay for the supplies, was ever turned over to the Indians or that they became in any way the beneficiaries thereof.

The petition concluded with the following averment and prayer:

"Your petitioner avers that there is due him from the Menominee Tribe of Indians, or from the individual members thereof, as may be found and adjudicated by the court, the sum of Thirteen Thousand and Eighty-seven Dollars, Forty-six Cents ($13,087.46).

"Wherefore the petitioner prays judgment for Thirteen Thousand and Eighty-seven Dollars, Forty-six Cents ($13,087.46)."

By a general demurrer the defendants besides questioning the right to file the amended petition on the ground that it constituted an entire departure, and insisting in any event that, if there was a right to file it, its averments did not state a cause of action, denied the right to implead the United States as a defendant and challenged the constitutionality of the jurisdictional act. The court without specifically directing its attention to the other grounds came to consider whether the amended petition stated a cause of action and deciding that it did not, dismissed the cause, and as we at the outset said, the rightfulness of its action in so doing is the matter we are called upon to decide.

The contentions pressed upon the one side to sustain the correctness of the conclusion of the court below and

on the other to demonstrate the existence of reversible error, all but involve an examination of the reasoning which led the court to its conclusion and we think the most direct way to dispose of the case will be to state under separate headings the propositions to which the court gave its sanction and the reasons relied upon to establish that error was committed.

1. The court held that the jurisdictional act except so far as concerned the statute of limitations created no new right in favor of the petitioner, but simply afforded a means of establishing by a proceeding in the Court of Claims the existence, if any, of a claim against the tribe and the individual members of the tribe as such. From this premise the conclusion was deduced that the act gave no right to sue the United States and conferred no jurisdiction upon the court below over claims against an Indian as a mere individual aside from his membership of the tribe or dissociated from his dependent condition as an Indian subject because of such condition to the exercise by the United States of governmental supervision and control. The court consequently decided that it was not concerned with any supposed liability of the individual defendants as citizens of the United States resulting from their purely individual and personal contracts and which, therefore, were not related to or connected with tribal membership or the dependency resulting from status as an Indian as distinguished from citizenship. We think the conclusions thus reached by the court are so clearly the necessary result of the text of the act that we content ourselves with referring to that text as a demonstration of their soundness.

2. Concluding that the relevant provisions of § 2103 of the Revised Statutes (which are in the margin [1]) were ap-

[1] SEC. 2103. No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in

plicable and controlling, as the contract alleged was not in writing and did not in other respects conform to the statute, it was held that no right to recover was stated in the petition. Again, we think that the conclusion of the court on this subject is so clearly within the text of the statute that it suffices to direct attention to such text without going further. But if it be conceded for argument's sake that there is ambiguity involved in determining from the text whether the statute is applicable, we are of the opinion that the case as made is so within the spirit of the statute and so exemplifies the wrong which it was intended to prevent and the evils which it was intended to remedy as to dispel any doubt otherwise engendered. Nothing, we think, could more cogently demonstrate this statement than does the development in the court below concerning the claim in controversy: the uncertainty as to the alleged debtor manifested by the claim against the individual members of the tribe as principals and against the tribe as a mere surety, shifting as the exigencies of the case required to a claim against the tribe as principal and secondarily against the members as mere

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present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall be executed before a judge of a court of record, and bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

* * * * * * * *

All contracts or agreements made in violation of this section shall be null and void, . . .

accessories, culminating in a prayer for relief which in and of itself points to the uncertainty with which the transactions referred to were environed. And this is additionally fortified by observing that on the face of the petition it appears that an adequate amount of the labor and property of the tribe or of its individual members passed into the hands of the person designated under the alleged contract and who by its terms was charged with the duty of paying it over for the equipment and supplies furnished. A situation which makes it clear that the controversy is not whether there is a liability express or implied for supplies and equipment received and not paid for, but upon whom the loss must fall resulting from the failure of the person designated under the asserted contract and who received the money, to discharge his duty by paying it over to the furnisher of the supplies who was a party to the alleged contract and in whose interest and for whose benefit presumably the provision as to the retention and paying over of the money was made.

But it is said the statute ought not to be held applicable because the petitioner was a licensed Indian trader authorized to deal with the tribe and its members. But manifestly the right to deal did not confer power to deal by making unlawful contracts. And this consideration also answers the proposition so much insisted upon that because the asserted contract was made in the presence of and with the assent of an agent of the Interior Department, therefore the provisions of § 2103 should not be held applicable. We say the prior reasoning is controlling since it cannot be held that the presence of the agent of the Interior Department authorized the doing of that which was expressly prohibited by law. In other words, that an unlawful contract became lawful because of the presence, at its making, of a public officer whose obvious duty it was to see to it that the law was not violated. Indeed when the prohibitions of § 2103 are considered and the

presence of the representative of the Interior Department at the time the alleged agreement was entered into is borne in mind, if inferences are to be indulged in it is not to be inferred that that which was prohibited by law was done, but rather the assumption should be that instead of leaving the trader who was to furnish the equipment and supplies for utilizing, by the Indians, the dead and down timber to depend for his payment upon the mere force of the contract agreements of the tribe or its individual members, having regard to the interest of the trader and his protection and with his consent it was arranged that the proceeds to arise from marketing the dead and down timber should go into the hands of the Indian agent so that before paying the Indians for their labor, the sum due for the supplies should be paid by the agent to the trader, thus in a sense impounding in the hands of the person selected by him the proceeds for the trader's benefit. And this view answers the contention made that even in the absence of an express contract, there should have been a judgment against the tribe and its members upon the theory of an implied obligation to pay arising from the fact of the receipt by the tribe or its members of supplies or equipment for which they had not paid. True, in a narrow sense it may be said that the case involves the right of the petitioner to be paid for the supplies furnished, but from the point of view of the Indians in a broad sense the case as made involves deciding whether the petitioner should bear the loss of the failure of the agent to pay over to him out of the moneys retained for that purpose, the sum of the advances of supplies, that is to say, whether the Indians after having placed in the hands of the designated person the sum of the supplies are under the obligation to pay again, that is to pay twice.

Affirmed.

SOUTHERN RAILWAY COMPANY *v.* GADD.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 645. Argued April 15, 1914.—Decided May 11, 1914.

In a case in which the writ of error directed to the Circuit Court of Appeals is based on the Employers' Liability Act, but presents for decision no question concerning the interpretation of that act, but only considerations of general law, this court, while it has power to consider all such questions, will not reverse as to such questions unless it clearly appears that error has been committed.

Although the trial court in replying to counsel may have followed counsel in erroneously referring to assumption of risk instead of contributory negligence and negligence of fellow-servants, if assumption of risk was not involved in the action or referred to in the testimony, the error, if any, was not prejudicial.

Where the record shows that the case was carefully and fully considered in both of the courts below and the contentions, advanced to support the assertion that the interpretation of the Employers' Liability Act is involved are so frivolous as to justify the conclusion that the writ of error is prosecuted for delay, this court will impose a penalty, in this case of five per cent. upon the amount involved, under paragraph 2 of Rule 23.

207 Fed. Rep. 277, affirmed.

THE facts, which involve the construction of the Employers' Liability Act of 1908 as amended 1910, are stated in the opinion.

Mr. Caruthers Ewing, with whom *Mr. L. E. Jeffries* was on the brief, for plaintiff in error:

The fact of injury to a servant carries with it no presumption of negligence on the part of the master, under the circumstances of this case. *Tex. &c. R. R. Co.* v. *Barrett*, 156 U. S. 617; *Patton* v. *Tex. &c. R. Co.*, 179 U. S. 658; *Looney* v. *Met. Ry. Co.*, 200 U. S. 480; Labatt's

Master & Servant (2d ed.), Art. 1604, p. 4898; *G. Nor. Ry. Co.* v. *Johnson*, 176 Fed. Rep. 328; *Midland Valley R. Co.* v. *Fulgham*, 181 Fed. Rep. 91.

A master is not an insurer of the safety of his servants, but must exercise reasonable care to protect them from injury. *Hough* v. *T. & P. R. R. Co.*, 100 U. S. 213; *W. & G. R. Co.* v. *McDade*, 135 U. S. 554; *U. P. Ry. Co.* v. *O'Brien*, 161 U. S. 451; *C. O. & G. R. Co.* v. *Tennessee*, 191 U. S. 326; *M. & O.* v. *Yockey*, 103 Fed. Rep. 265; *Sandige* v. *A., T. & S. F. R. R. Co.*, 193 Fed. Rep. 867; *Narramore* v. *C., C., C. & St. L. R. R. Co.*, 96 Fed. Rep. 298; *Maue* v. *Erie R. R. Co.*, 198 N. Y. 221; *Lancaster* v. *A., T. & S. F. R. R. Co.* (Mo.), 127 S. W. Rep. 607; *I. & G. N. R. R. Co.* v. *Schubert* (Tex.), 130 S. W. Rep. 708; White on Personal Injuries on Railroads, Art. 251.

Making a kicking switch, in the usual and customary manner, even though it involves a sudden movement of an engine, with a jerk or snap, is not negligence. *Randall* v. *B. & O. R. R. Co.*, 109 U. S. 478; *C., M. &c. R. R.* v. *Voelker*, 129 Fed. Rep. 532; *Olds* v. *R. R. Co.*, 178 Massachusetts, 73; *Worcester* v. *Ry. Co.* (Tex.), 91 S. W. Rep. 339; *Davis* v. *B. & O. R. R. Co.*, 152 Pa. St. 314; *Skinner* v. *Cen. Vt. R. R. Co.*, 73 Vermont, 336; *Dumas* v. *Stone*, 65 Vermont, 442; *Guffey* v. *H. & St. J. Ry. Co.*, 53 Mo. App. 462; *Hedrick* v. *Mo. Pac. Ry. Co.*, 195 Missouri, 104; *C. & A. R. R. Co.* v. *Arnol*, 144 Illinois, 261; *Cen. R. R. Co.* v. *Sims*, 80 Georgia, 749; *S. W. Tel. Co.* v. *Woughter*, 56 Arkansas, 206; *Rutledge* v. *Mo. Pac. Ry. Co.*, 110 Missouri, 312; *Youll* v. *S. C. & P. Ry. Co.*, 66 Iowa, 346; *Hunt* v. *Hurd*, 98 Fed. Rep. 683; *L. & N. R. R. Co.* v. *Smith*, 129 Alabama, 553; *Carr* v. *St. Clair Tunnel Co.*, 131 Michigan, 392; White on Personal Injuries, Arts. 330, 331; *Allen* v. *A. C. L. R. Co.*, 49 A. & E. R. R. Cas. (N. S.), 576; *Schaible* v. *L. S. & M. R. R. Co.* (Mich.), 21 L. R. A. 660.

The failure of the engineer to observe and take notice

of the defendant in error, under the circumstances, was not actionable negligence because the engineer owed the defendant in error no duty to keep watch and ward over him. A proper discharge of his duties, as engineer, made it impossible that he could keep track of the movements of the fireman. *C., C., C. & St. L. Ry. Co.* v. *Ballentine*, 84 Fed. Rep. 933, 937; *Goodlander Mill Co.* v. *Standard Oil Co.*, 63 Fed. Rep. 401; *Savings Bank* v. *Ward*, 100 U. S. 195, 202; *Aerkfetz* v. *Humphreys*, 145 U. S. 418; *Bottum's Admr.* v. *Hawks*, 84 Vermont, 370; *Cook* v. *Rice Lake Milling Co.*, 146 Wisconsin, 535; 1 White on Personal Injuries, Arts. 19, 322.

There is no conflict in the evidence sufficient to carry the case to the jury on the question whether the engineer did or did not see defendant in error while he was on the ground and about the steps of the engine cab. Evidence that defendant in error was there to be seen and had a torch which would have made him visible to anyone looking for him, or whose duty it was to look for him, does not create a conflict with the affirmative statement of the engineer that he did not see him and did not know he was there, especially when the engineer explains why he did not see him and why he did not know he was there. And the case of defendant in error was stated, at the trial, as based on the proposition that the engineer did not see him. *B. & O. R. R. Co.* v. *Baldwin*, 144 Fed. Rep. 53; *McMillan* v. *Grand Trunk Ry. Co.*, 130 Fed. Rep. 827.

A party will not be permitted to take one position at the trial and demand a judgment or verdict based thereon and, thereafter and in the appellate court, be heard to assert that what he stated at the hearing as the determinative question was not the real basis of his claim. *N. Y., Lake Erie & W. Ry. Co.* v. *Estill*, 147 U. S. 591; *Badger* v. *Ranlett*, 106 U. S. 255; *San Juan Light Co.* v. *Requena*, 224 U. S. 89.

The defense of assumed risk was not abolished by the

Employers' Liability Act, except to the extent that the employé does not assume the risk of his employment where the violation by the carrier of a statute enacted for the safety of the employé caused or contributed to his injury. The act does not affect the doctrine of assumption of risk as it relates to the ordinary and usual hazards of the master's service. *Bowers* v. *R. R. Co.* (Ga.), 73 S. E. Rep. 677; *Freeman* v. *Powell* (Tex.), 144 S. W. Rep. 1033; *Parker* v. *Pac. &c. R. R. Co.* (Kans.), 129 Pac. Rep. 1151; *Hall* v. *Vandalia R. R. Co.*, 169 Ill. App. 12; *Neal* v. *Idaho &c. R. R. Co.*, 22 Idaho, 74.

Authorities recognizing the existence of the defense of assumption of risk are: *Seaboard Air Line* v. *Moore*, 228 U. S. 433; *Amer. R. R. Co.* v. *Birch*, 224 U. S. 547; *Cen. R. Co.* v. *Colasurdo*, 192 Fed. Rep. 901; *Sandige* v. *A., T. & S. F. Ry. Co.*, 193 Fed. Rep. 867.

While the defense of contributory negligence was abolished, the defense of assumption of risk was, by § 4 of the act, left unimpaired, except in cases based on violation of statutory duty.

There is a wide distinction between contributory negligence and assumption of risk, the question of assumption of risk being quite apart from that of contributory negligence. *Schlemmer* v. *Buffalo &c. Ry. Co.*, 220 U. S. 590, 596; *R. R.* v. *McDade*, 191 U. S. 68; *Tuttle* v. *Ry. Co.*, 122 U. S. 189; *Sou. Pac. Ry. Co.* v. *Seley*, 152 U. S. 145.

Mr. John L. Stout for defendant in error.

Mr. Chief Justice White delivered the opinion of the court.

The defendant in error on this record sued the railway company, the plaintiff in error, to recover damages for personal injuries alleged to have been suffered through its negligence. The cause of action was expressly based

upon the Employers' Liability Act,[1] it being averred that at the time of the injury the plaintiff as an employé of the defendant was assisting in the actual movement of interstate commerce transportation in which the defendant company was then engaged. The case is here on error prosecuted by the Railway Company to a judgment of the court below affirming a judgment of the trial court upon a verdict. (207 Fed. Rep. 277).

In *Chicago Junction Ry.* v. *King*, 222 U. S. 222, it was held that as the pleadings in that case based the right to recover upon an act of Congress, the Safety Appliance Law, there was power in this court to review the judgment of a Circuit Court of Appeals—an authority which carried with it the duty to consider and pass upon all questions for decision in the case even although they might not concern the interpretation of the act of Congress upon which the suit was based. But while thus ruling it was nevertheless declared that as questions of common law negligence not involving the interpretation of the statute fell within the classes of questions which under the distribution of judicial power made by the act of 1891 (reëxpressed in the Judicial Code) were determinable by the Circuit Court of Appeals in last resort, where such questions were brought here from a Circuit Court of Appeals because they arose in a suit under the statute, and which for that reason alone could come here, whilst considering we would not reverse as to such questions unless it clearly appeared that error had been committed. Besides establishing this rule it was further said that in disposing of such questions we would not feel it our duty to re-state the case and reëxpound the principles applicable to its decision below, but would as a general rule leave those subjects where the Circuit Court of Appeals had left them, and

[1] The Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, as amended April 5, 1910, c. 143, 36 Stat. 291.

would hence content ourselves with merely expressing our ultimate conviction of the case as formed after an adequate examination of the record. The principles announced in the *King Case* were subsequently expressly reiterated and applied in *Seaboard Air Line* v. *Moore*, 228 U. S. 433 and *Chicago, R. I. & Pac. Ry.* v. *Brown*, 229 U. S. 317. And in both of these latter cases it was recognized that the ruling in the *King Case* was equally applicable to cases brought here from the Circuit Court of Appeals on the ground that the relief sought was based on the Employers' Liability Act where the cause of action arose since the adoption of the Judicial Code.

Coming to the case made by this record, although as we have said, it is manifest that the cause of action was based upon the Employers' Liability Act, we are of the opinion that it presents for decision no question concerning the interpretation of that act since all the questions which require to be decided merely involve considerations of general law depending in no sense upon the particular significance of the Employers' Liability Act. Under these conditions it is apparent that the case is absolutely controlled by the *King Case*, and we therefore content ourselves with saying that as after an adequate examination of the record we find no ground whatever affording a clear conviction that error was committed, affirmance must follow.

This disposes of the entire case, but as it is insisted that two propositions which it is asserted involve the meaning of the Employers' Liability Act arose upon the record and require to be decided, we come not to decide the propositions but to point out the absolute want of merit in the contention that they arose on the record for decision. The first contention is based upon the refusal of a request made by the defendant to take the case from the jury by a peremptory instruction. Granting that in its ultimate analysis the request involved an appreciation of the

Employers' Liability Act, nevertheless we are of opinion that the absolute want of merit in the proposition in view of the state of the proof caused the request intrinsically considered to be so unsubstantial and frivolous as not to furnish any support for the contention that its refusal raised a question concerning the interpretation of the statute.

The second contention rests upon the assumption that the court below affirmed a supposed action of the trial court in erroneously instructing the jury that the effect of the Employers' Liability Act was to abolish the doctrine of assumption of risk. The proposition is thus stated in the opening sentences of the argument of the plaintiff in error: "The trial judge held that said Employers' Liability Act abolished the defense of assumed risk so that the construction of the act is here involved." A brief statement of the condition of the record on the subject is necessary to demonstrate the entire want of foundation for the proposition. The plaintiff was a locomotive fireman, and the controversy in the case was whether the personal injury which he suffered was occasioned by the reckless and negligent conduct of the engineer in moving the engine under the circumstances disclosed by the proof. In its general charge, the court had instructed the jury that the plaintiff was entitled to recover if they believed the testimony of the plaintiff which disclosed an unusual and reckless movement of the engine by the engineer after he had directed the fireman to descend from the engine to ascertain whether there was a defect in its mechanism. Coming then to consider special charges asked by the respective parties, the court gave a charge requested by the plaintiff as follows: "If you believe from the evidence that the plaintiff was directed by the engineer Hunter to get off the engine and examine the engine for defects, then while said plaintiff was obeying the direction of Hunter, it was Hunter's duty to look out for plaintiff and not move

the engine until he knew that plaintiff was in a position of safety." Upon the giving of this charge the defendant excepted as follows: "I want to take exception to that last statement on the ground that the fact that he moved up that engine if he was in a place of safety is not stated to be any cause of action in this case, and not involved in the pleadings, and he was not injured by virtue of it." And the counsel added: "We further except to the statement that the court made to the jury (evidently referring to the general charge) that if they believe the facts as stated by the plaintiff which left out of question the doctrine of assumed risk." In response to which the court said: "I understand that the doctrine of assumed risk is abolished by the Employers' Liability Act, in so far as it relates to cases wherein the servant is injured because of the negligence of any of the officers, agents or employés, etc., of the carrier and contributory negligence is modified so as that it no longer bars the right of action but goes in reduction of the amount of recovery. But you reserve your exception." From this statement it is evident that no charge whatever was given by the court concerning the assumption of risk and hence that no exception was or could have been taken to any such charge, and that the exception which was reserved concerned the special charge as to the conduct of the engineer and the portion of the general charge concerning liability if the testimony of the plaintiff as to the negligence of the engineer was believed, the exception as to the latter having been placed on the ground that the court had been silent as to assumption of risk. And it is equally clear that this view is not affected by taking into account the reply of the court to the comment of counsel. We say this because while the reply echoed the counsel's mistaken use of the words "assumed risk," by the qualification which it affixed to these words, it clearly conveyed that as the matters to which the excepted charge related purely concerned the common law

principles of fellow-servant and contributory negligence, they were controlled by the provisions of the statute. And this becomes certain when it is borne in mind that there was nothing in that portion of the general charge which was excepted to which in any possible view was relevant to the doctrine of assumption of risk. If there were room for the slighest doubt on the subject it is dispelled by the following considerations: (a) because the record contains no intimation of any request for instruction concerning assumption of risk made by the defendant; (b) because although the elaborate application for a new trial stated many alleged grounds, not the slightest reference was made to any supposed error committed with reference to the mistaken construction of the statute concerning assumption of risk which is now relied upon; (c) because while in the assignments of error made for the purpose of review by the Circuit Court of Appeals the special charge in connection with which the colloquy between court and counsel took place was referred to and error assigned concerning it for specified reasons, no reference was made to the alleged mistake which is now relied upon concerning the wrongful interpretation of the statute as to assumption of risk. It may indeed be inferred that in the argument in some form alleged error on such subject was called to the attention of the Circuit Court of Appeals since that court in its opinion considered and disposed of the subject by directing attention to the qualifying words used in the remarks of the trial judge, and to the fact that as assumption of risk was not at all involved in the testimony to which the charge related, no prejudicial error could have arisen. Certain is it however that in the assignments of error made for the purposes of review by this court no complaint whatever was made of the alleged mistake concerning the operation of the statute upon the doctrine of assumed risk.

Before coming to order the judgment of affirmance

which is the necessary result of what we have said, we briefly state the considerations which lead us to the conclusion that our duty is in directing such judgment to award interest by way of damages for delay under the terms of the second paragraph of Rule 23. It is manifest on the face of the record that the case was carefully and fully considered in both of the courts below. In view of the ruling in the *King Case* and of what we have said concerning the contentions advanced to support the assertion that the interpretation of the statute was here involved, we think the conclusion that the writ of error was prosecuted only for delay is plainly justified and that a penalty by way of damages should be imposed. The judgment below is therefore affirmed with five per cent. upon the amount of the judgment in addition to the interest allowed by law.

Affirmed with interest and five per cent. damages.

ITOW AND FUSHIMI *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES, DIVISION NO. I, TERRITORY OF ALASKA.

No. 714. Argued April 8, 1914.—Decided May 11, 1914.

Judicial Code, § 134, governing the right to review cases in the District of Alaska, changed the general rule of the prior law by taking capital cases out of the class which could come to this court directly because they were capital cases and by bringing such cases within the final reviewing power of the Circuit Court of Appeals of the Ninth Circuit.

Under § 247, Judicial Code, this court has power to review directly the action of the District Courts of Alaska practically in the same classes of cases as were provided in § 5 of the Judiciary Act of 1891.

As the record in this case does not show that any reliance was placed,

or that any exceptions were based, on the Constitution in the court below, the assignments are inadequate to give this court jurisdiction of a direct appeal from the District Court for Alaska in a capital case.

Although under §§ 134 and 247, Judicial Code, the right to direct review on a constitutional question is confined to cases where the question was raised in the court below, this court still has power to pass upon the question either by certificate from the Circuit Court of Appeals or by certiorari from this court, if in its judgment the question was of sufficient importance to warrant issuing the writ.

THE facts, which involve the jurisdiction of this court to review judgments of the District Courts of Alaska in capital cases and the construction of § 134, Judicial Code, are stated in the opinion.

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

Mr. J. H. Cobb, for plaintiffs in error, submitted.

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

By an indictment found in the court below on the thirteenth of December, 1912, the plaintiffs in error, Itow and Fushimi, were charged with having murdered one Frank Dunn, on the fourteenth day of July, 1912, and to a verdict of murder and sentence of death against Itow and of manslaughter and sentence of 20 years imprisonment against Fushimi this direct writ of error is prosecuted.

The Government moves to dismiss for want of jurisdiction and at the threshold that motion requires to be disposed of. The crime charged was committed after the enactment of the Judicial Code and there is no question as to the applicability of its relevant provisions. By § 134 of

that Code governing the right to review cases in the district of Alaska or any division thereof, power is conferred on the Circuit Court of Appeals of the Ninth Circuit to review, and its judgments in such cases are made final, all cases including all criminal cases "other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States as provided in Section two hundred and forty-seven." It is obvious that this section changed the general rule of the prior law by taking capital cases out of the class which could come because they were capital cases directly to this court, and by bringing such cases within the final reviewing power of the Circuit Court of Appeals of the Ninth Circuit.

Section 247 which, as pointed out in § 134, defines the cases which are excepted from the general rule provided by § 134, gives authority to this court to directly review the action of the District Courts of Alaska "in prize cases; and in all cases which involve the construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question, or in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

These provisions being but a reëxpression of the language by which the subject of direct review by this court was governed as provided in the fifth section of the Judiciary Act of March 3, 1891 (c. 517, 26 Stat. 826, 827), the settled meaning which was affixed by the decisions of this court to the provisions as found in the act of 1891 necessarily determine the significance of the provisions of the section under consideration.

In *Ansbro* v. *United States,* 159 U. S. 695, where it became necessary in a criminal case to determine whether there was a right to come directly to this court from a Circuit Court of the United States in virtue of the

provisions of the fifth section of the act of 1891, the court, speaking through Mr. Chief Justice Fuller, said (p. 697):

"The jurisdiction of this court must be maintained then, if at all, on the ground that this is a case 'that involves the construction or application of the Constitution of the United States,' or 'in which the constitutionality of any law of the United States is drawn in question.' But we cannot find that any constitutional question was raised at the trial. Motions to quash, to instruct the jury to find for the defendant, for new trial, and in arrest of judgment were made, but in neither of them, so far as appears, nor by any exception to rulings on the admission or exclusion of evidence, nor to instructions given or the refusal of instructions asked, was any suggestion made that defendant was being denied any constitutional right or that the law under which he was indicted was unconstitutional. The first time that anything appears upon that subject is in the assignment of errors, filed February 13, 1895.

"A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege, or immunity is claimed under that instrument, but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. . . . An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court under the 5th section of the act of March 3, 1891 (c. 517, 26 Stat. 826, 827)."

And the doctrine thus announced has been followed and applied in many cases. *Cornell* v. *Green*, 163 U. S. 75, 79, 80; *Muse* v. *Arlington Hotel Co.*, 168 U. S. 430, 435;

Cincinnati &c. R. Co. v. *Thiebaud,* 177 U. S. 615, 619; *Paraiso* v. *United States,* 207 U. S. 368.

The assignments of error relate to these subjects: 1. Error asserted to have been committed by the court in refusing to allow a continuance pending the arrival of certain witnesses, thereby it is asserted "denying the defendant the right to have their counsel make an opening statement to the jury." 2. Error committed by the court in permitting the jury, with the consent of the accused, to separate after they were selected and empanelled and sworn. 3. Error by the court in refusing to discharge the jury because of an alleged publication made in a local newspaper during the trial, although the refusal of the court was based upon its opinion formed after a statement by the jurors that they had not seen the publication referred to. 4. Error committed by the court in admitting in evidence against Fushimi a statement made by him concerning the crime.

But in the light of the settled rule which we have stated it is apparent on the face of the record that the assignments are wholly inadequate to give us the power to directly review since there is nothing whatever directly or indirectly even intimating that the reliance on the Constitution was stated at the trial below in any form.

It may be fairly presumed under these circumstances that the direct writ of error from this court was sued out overlooking the fact that by operation of the Judicial Code the general right to direct review in capital cases was taken away or that the writ was prosecuted upon the assumption that the right to a direct review existed in any case where it was possible in this court to argue as to the existence of a constitutional right, wholly irrespective of whether the constitutional question relied upon was raised and considered in the lower court. But the latter conception overlooks the conclusively settled rule to which we have referred that the power to directly review

because of a constitutional question obtains only where such question was involved in the trial court, that is, was there actually raised. The destructive effect on the distribution of judicial power made by the act of 1891 which would result from holding that jurisdiction to directly review obtained in any case because of a constitutional question irrespective of the making of such question in the trial court merely because of the possibility after completion of the trial below of suggesting for the first time such question as the foundation for resorting to direct review, is apparent and finds apt illustration in this case. Thus, although the accused made no objection, constitutional or otherwise, to the permission given by the court to the jury to separate, and indeed expressly assented to such separation, yet as one of the grounds for direct review by this court it is insisted that as the Constitution guaranteed a jury trial according to the course of the common law and permission to separate could not be granted under that law, therefore the accused was deprived of a constitutional right.

It is to be observed that confining the right to direct review because of a constitutional question to cases where such question was raised in the trial court, that is, was there involved, does not deprive this court of the ultimate power to pass upon constitutional questions where it is necessary to do so, since if such a question not raised in the trial court germinates or emerges in a Circuit Court of Appeals, the right of that court to certify affords an opportunity of obtaining a review of the question by this court, and in the absence of a certification of the question the authority of this court to grant a writ of certiorari would enable the same result to be accomplished if in the judgment of this court the constitutional question was of sufficient importance to justify the calling into play of that power.

Dismissed for want of jurisdiction.

APAPAS *v.* UNITED STATES.

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

No. 746. Argued April 8, 1914.—Decided May 11, 1914.

The right of direct review by this court of a judgment of the District Court under § 238, Judicial Code, depends upon whether the question of jurisdiction only is involved or whether the case involves the constitutional or Federal question.

This court cannot review directly the judgment of the District Court on the question of jurisdiction under § 238, Judicial Code, when under the writ of error the whole case is brought up and there is no certificate as to the jurisdiction as required by § 238.

When the constitutional question was not raised in the court below this court cannot directly review the judgment of the District Court under § 238, Judicial Code. *Itow* v. *United States*, *ante*, p. 581.

Murder committed by Indians on a United States Indian reservation is a crime against the authority of the United States, expressly punishable by § 328, Penal Code, and within the cognizance of the Federal courts without reference to the citizenship of the accused.

Every objection to the admission of a statement or confession of the accused cannot be regarded as involving the construction of the Constitution merely because that instrument was referred to when in substance and effect there was no controversy concerning the Constitution but only a contention as to the method of procedure.

THE facts, which involve the jurisdiction of this court to review judgments of the District Court under § 238, Judicial Code, are stated in the opinion.

Mr. Miguel Estudillo, with whom *Mr. Theodore Martin* was on the brief, for plaintiffs in error.

Mr. Assistant Attorney General Adkins, with whom *The Solicitor General* was on the brief, for the United States.

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

Ten persons described as Indians were, in July 1912, indicted for the murder of William H. Stanley, a white person, "at, upon and within the limits of a United States Indian Reservation, known as the Cahuilla Indian Reservation, in the County of Riverside, within the Southern Division of the Southern District of California, and within the jurisdiction" of the court below, in violation of §§ 273, 275 and 328 of the Penal Code of 1909. As the result of a trial, four of the accused were acquitted and the six who are plaintiffs in error here were convicted of murder in the second degree and sentenced to ten years imprisonment each, and prosecute this direct writ of error to reverse such conviction and sentence. There are one hundred assignments of error, but before we come to consider them we must dispose of a motion made by the Government to dismiss on the ground that we are without jurisdiction because the case is susceptible only of review by the Circuit Court of Appeals of the Ninth Circuit.

Undoubtedly, under the general provisions of § 128 of the Judicial Code, power to review is lodged in the Circuit Court of Appeals of the Ninth Circuit, and our authority, if any, to consider the case depends therefore upon whether it comes within the class of cases authorized to be brought directly here from a trial court under the provisions of § 238. By such section in addition to the power conferred to bring directly to this court a question of jurisdiction of a trial court as a Federal court under the conditions and subject to the limitations stated, the right to directly review in a case of this kind is conferred only "in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its

authority is drawn in question; and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

The settled significance of these provisions we have just pointed out in the case of *Itow and Fushimi* v. *United States, ante,* p. 581, just decided, and under the principle there applied it follows that we must determine the right to direct review by ascertaining whether any of the issues enumerated in the provisions of § 238 were below involved in the cause. Coming to apply this test, only three out of the matters assigned as error have any conceivable relation to the conditions defined by the statute as essential to give the right to a direct review. They are: (1) a challenge of the jurisdiction of the court below; (2) a contention as to the effect of the treaty of Guadalupe Hidalgo; (3) an assertion that a constitutional question was involved in the action of the trial court in admitting over objection, testimony as to a statement or admission of Ambrosio Apapas, one of the accused.

As to the first, while it was raised below, it is obviously inadequate to sustain the right to direct review, since under the writ of error the whole case is brought here and not the question of jurisdiction alone, as provided in § 238, and because there is no certificate as to the jurisdiction as required by the section. *Maynard* v. *Hecht,* 151 U. S. 324; *Chappell* v. *United States,* 160 U. S. 499, 507; *Courtney* v. *Pradt,* 196 U. S. 89, 91, 92.

While the second contention based upon the treaty of Guadalupe Hidalgo was raised in the lower court, it in no sense involved the validity or construction of the treaty, and therefore affords no support for the right to directly review. In substance the proposition concerning the treaty is this: that as the ancestors of the accused prior to the termination of the war with Mexico were citizens of Mexico, and became by the treaty citizens of the United States and of the State of California, they were therefore

not amenable to prosecution in the courts of the United States for the crime of murder committed within the State of California, however much they may have been susceptible of being prosecuted for such crime in an appropriate state court. But assuming, for argument's sake, the premise based on the treaty to be sound, and disregarding for brevity's sake the fact that the accused were tribal Indians leading a tribal life, and living on a tribal reservation under the control of the United States, the deduction based on the premise is so absolutely devoid of merit as not in any real sense to involve the construction of the treaty. We so say because the prosecution was for murder committed by Indians on a United States Indian Reservation and therefore was for a crime against the authority of the United States, expressly punishable by statute (§ 328, Penal Code), and within the cognizance of the courts of the United States, without reference to the citizenship of the accused, as settled by a long line of authority. *United States* v. *Kagama*, 118 U. S. 375; *United States* v. *Celestine*, 215 U. S. 278; *Donnelly* v. *United States*, 228 U. S. 243, 270; *United States* v. *Sandoval*, 231 U. S. 28, 39. Indeed, in answering the argument of the Government on the motion to dismiss, if not in express terms, at least virtually, it is conceded that the two propositions we have disposed of thus are inadequate to sustain the resort to a direct writ of error. But it is urged that the third contention plainly is sufficient for that purpose, that contention as we have said being based upon an exception taken to the action of the trial court in receiving testimony concerning an alleged statement or admission made by one of the accused, Apapas. But we search the record in vain to find the slightest reference made to the Constitution of the United States at the time the objection referred to was taken or anything whatever to indicate in any manner that the attention of the court below was directed to the fact that there

was any controversy or dispute involving the Constitution of the United States.

Under this condition, as pointed out in the case of *Itow and Fushimi* v. *United States, supra,* there is no ground whatever for saying that a constitutional right was involved within the exceptions created by § 238 so as to justify disregarding the regular course of judicial procedure by coming directly to this court. The theory upon which it is insisted in argument that the right to direct review results because of the action of the trial court as to the admission of the statement is based upon the premise that because the Constitution guaranteed against compulsory self-incrimination, therefore any objection made to the admission of the statement or confession by the accused necessarily and inherently involved a constitutional right and amounted to a statement of the same although no express mention was made of the Constitution and nothing appears to indicate that any contention whatever existed as to the significance and operation of the Constitution. But this proposition if carried to its legitimate conclusion would embrace every conceivable controversy as to every possible right, since under a constitutional system of government all rights in their last analysis are referable to the safeguards of the Constitution. But we need not further demonstrate the unsoundness of the contention since it is directly in conflict with the settled rule which we have just re-stated in the *Itow and Fushimi Case.* And although to go further is superfluous, to prevent misconception or unfounded inferences as to what we decide, we say that we must not be understood as holding that even although it be assumed for the sake of argument that the constitutional guarantee against compulsory self-incrimination would apply to an objection made to the offer in evidence of an admission by an accused person, it would follow that such guarantee would be involved in an objection to the admission in evidence of a confession in

the sense of § 238, even if in making the objection the guarantee of the Constitution was expressly referred to unless there was some real controversy concerning the meaning of the constitutional guarantee. We make this reservation because it is quite apparent that such an objection in the absence of some difference as to the significance of the Constitution might well involve but the exercise of discretion as to the order or method of proof and the calling into play of judgment to determine whether or not the proof as offered brought the question which was to be decided within the undisputed scope of the constitutional safeguard. In other words, we do not hold that any and every objection to the admission of a statement or confession of an accused can be made to involve the construction of the Constitution merely by referring to that instrument when in substance and effect there is no controversy concerning the Constitution but only a contention as to the methods of procedure. Conceptions which are well illustrated by the record before us, where the entire argument concerning the Constitution is based on the following objection taken to the admission of the statement of the accused: Counsel for accused, "One minute. We object that there is no proper foundation laid for a confession as there is no evidence to show that there was any (no) inducement or immunity offered or what the circumstances were under which the statement was made."

Dismissed for want of jurisdiction.

CORNELL STEAMBOAT COMPANY *v.* PHŒNIX CONSTRUCTION COMPANY.

SAME *v.* SAME.

SAME *v.* SAME.

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

Nos. 933, 934, 935. Motion to dismiss or affirm submitted April 27, 1914.—Decided May 11, 1914.

While the fact of negligence may, if abstractly considered, be a state question concerning which this court would accept, and possibly might be bound by, the decision of the state court, when the negligence involves and concerns a subject of Federal jurisdiction which it is its duty to decide, this court must, to the extent necessary to enable it to discharge that duty, consider the subject independent of the action of the state court. *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601.

The fact that a vessel is anchored in a navigable river without the authority of the Secretary of War does not endow other vessels with a license to wrongfully injure it, nor does that fact relieve them from responsibility for colliding with the anchored vessel solely by their own negligence not contributed to in any way by it.

210 N. Y. 113, affirmed.

THE facts, which involve the jurisdiction of this court to review judgments of the state court, and also questions of negligence in colliding with vessels anchored in navigable waters, are stated in the opinion.

Mr. E. Crosby Kindleberger for defendant in error, in support of motion.

Mr. J. Parker Kirlin for plaintiff in error, in opposition to motion:

The Federal question involved must necessarily be the basis of the decisions in these cases. The Court of Appeals of the State of New York did actually decide these cases on the basis of the Federal question involved. 210 N. Y. 113, 118.

The judgment of the trial court that these cases could be decided solely on the ground of the defendant's negligence and the dictum in the opinion of the Court of Appeals to the same effect were erroneous and the Federal question raised by the defendant is necessarily involved in the decision. *Murdock* v. *City of Memphis*, 20 Wall. 590, 636.

One who erects a structure which is a public nuisance cannot recover damages for any injury to the structure in the absence of wilful fault. *Montgomery* v. *Portland*, 190 U. S. 89; *Cummings* v. *Chicago*, 188 U. S. 410; *Hart* v. *Mayor*, 9 Wend. 571; *Moore* v. *Commissioners*, 32 How. Pr. 184; *Blanchard* v. *W. U. Tel. Co.*, 60 N. Y. 510; *Moore* v. *Jackson*, 2 Abb. (N. C.) 211; *Gold* v. *Carter*, 9 Humph. 369; *Garey* v. *Ellis*, 1 Cush. 306; *Rathbun* v. *Payne*, 19 Wend. 399; *Foley* v. *McKeever*, 56 App. Div. (N. Y.) 517; *Haskell* v. *New Bedford* (1871), 108 Massachusetts, 208; *North Shore Boom Co.* v. *Nicomen Boom Co.*, 212 U. S. 406; *People* v. *Vanderbilt*, 26 N. Y. 287; 28 N. Y. 396; *People* v. *Horton*, 64 N. Y. 610; *Woodman* v. *Kilborn Mfg. Co.*, 30 Fed. Cas. No. 17978; *Hart* v. *Mayor*, 9 Wend. 571.

The Federal question involved is properly presented by the writs of error to this court.

The immunity claimed by the plaintiff in error under a proper construction of the act of March 3, 1889, presents a substantial Federal question to this court.

There can be no doubt that where a person claims a right under a Federal statute to carry on his business in a certain way and this right is denied him by any court, the question whether or not he has been deprived of his right or immunity is one which this court is authorized to pass

on. Rev. Stat., § 709; *Smalley* v. *Langenon*, 196 U. S. 93; *Belden* v. *Chase*, 150 U. S. 674; *Railroad Company* v. *Maryland*, 21 Wall. 456; *Missouri &c. Co.* v. *Haber*, 169 U. S. 613.

Where it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction, the case is one arising under the laws or Constitution of the United States. *Cooke* v. *Avery*, 147 U. S. 375; *Oil Company* v. *Miller*, 97 Fed. Rep. 690; *Northern Pacific Railway Co.* v. *Soderberg*, 188 U. S. 526; *Doolan* v. *Carr*, 125 U. S. 618.

The immunity claimed by the defendant is sustained by a proper construction of the statute.

The motion to affirm is premature and should not be granted before the cases have been reviewed upon the writs of error. *Steel* v. *Culver*, 211 U. S. 26; *Micas* v. *Williams*, 104 U. S. 556; *Jenkins* v. *Banning*, 23 How. 455; *Welmer* v. *Bauer*, 160 Fed. Rep. 240. *Philadelphia Company* v. *Stimson*, 223 U. S. 605, and *Gring* v. *Ives*, 222 U. S. 365, distinguished.

Mr. Chief Justice White delivered the opinion of the court.

The cases are before us on a motion to dismiss or affirm, and the facts essential to its consideration are these:

The Phœnix Construction Company, defendant in error, brought three actions to recover damages alleged to have resulted from the negligence of the Cornell Steamboat Company, plaintiff in error, in permitting its tugs and canal boats on three separate occasions in the year 1908 to collide with certain scows and other property of the Construction Company on the Hudson River. The cases were tried by a referee, resulting in judgments against the

Steamboat Company, which were affirmed by the Appellate Division of the Supreme Court (146 N. Y. App. Div. 951), and by the Court of Appeals (210 N. Y. 113). These writs of error were then prosecuted to the court below, to which the records were remitted by the Court of Appeals, upon the theory that Federal questions were involved and wrongly decided.

The Construction Company was a contractor for the Board of Water Supply of the City of New York, and in the year 1908 was engaged in making test borings in the bed of the Hudson River for the purpose of determining where it was best to tunnel under the river in the construction of the Catskill Aqueduct. At the times of the collisions complained of boring operations were carried on simultaneously at four points on a line across the river near Storm King Mountain, and it was with plants established at certain of these borings, consisting of pipes, drills, platforms, scows and other property that canal boats in tow of the Steamboat Company collided. The referee found in each case that the location of the borings was known to the masters of the tugs, who had many times passed between them with tows; that upon the nights of the accidents, lights which could be seen for more than a mile were displayed on the borings; that the collisions were the direct result of the negligence of the servants of the Steamboat Company in charge of its tugs, and that the Construction Company was in no wise negligent. In addition considering the defence made by the Steamboat Company that it was not liable because the structures of the Construction Company were unlawful obstructions in the channel, erected and maintained without a lawful permit from the Secretary of War, and without authority of Congress, as required by §§ 9 and 10 of the act of March 3, 1899 (c. 425, 30 Stat. 1121, 1151; U. S. Comp. Stat. 1901, p. 3541), the findings of the referee were in substance these: In 1906, upon the application of the

Board of Water Supply of New York City, a permit was issued by the Secretary of War authorizing borings to be made in the bed of the Hudson River at certain points near New Hamburg, and that subsequently such permit was modified by communications signed by members of the corps of engineers of the United States army located in New York City and having charge of the district in which the work was being executed, so as to permit the borings to be carried on at points near Storm King. Under these facts the referee stated that in his opinion it was extremely doubtful whether the Construction Company was lawfully authorized to establish its boring plants in the river, but held that even although the permits did not constitute lawful authority and the boring plants were unlawful obstructions in the river, the Steamboat Company was not because of that circumstance relieved of its duty to exercise ordinary care, and his decision in each case was based solely upon the fact that the collisions were caused by the exclusive negligence of the Steamboat Company. In affirming the judgments the Appellate Division filed no opinion, although it appears that two of the justices concurred "solely on the ground that authority was given by the Secretary of War to make the borings and anchor the barges in the river," from which it is to be inferred that a majority of the court were of opinion that the judgments were amply sustained by the reasoning of the referee. The Court of Appeals, however, while stating that as the actions were for common law negligence, the ground of negligence stated by the referee was adequate to sustain the judgments, also considered the contention based upon the statute and additionally placed the affirmance upon the conclusion that the facts found by the referee, which were concluded by the unanimous affirmance by the Appellate Division, were sufficient to establish authority given by the Secretary of War for the operations carried on by the Construction Company, and that the

contention of the Steamboat Company that action by Congress was essential to authorize the Construction Company to do the work was without foundation.

The assignments of error here insisted upon as involving a Federal question are directed to the conclusions of the Court of Appeals last stated.

Clearly the judgment of the Court of Appeals which is under review rests upon two propositions: (1) The sufficiency of the authority from a Federal point of view under which the Phœnix Construction Company was carrying on its work in the bed of the river, and in the execution of which work it had anchored in the river its barges and other appliances incidental to the boring operations in which it was engaged. (2) The absence of all negligence on the part of the Construction Company resulting from the place where its appliances were anchored in the stream, or from any other cause, and the happening of the accident solely because of negligence on the part of the Steamboat Company. It is elementary that where the judgment of a state court which is under review by this court rests upon two or more grounds one or more of which are Federal and others of which are not Federal because resting solely upon state grounds independent of Federal rights and which state grounds are therefore completely adequate to sustain the judgment under consideration, no jurisdiction obtains to review. This doctrine it is insisted is here applicable for the following reason: Because conceding that the first proposition, that is, the rightfulness of the acts of the company in placing its appliances in the stream involves Federal questions which are reviewable, the second proposition upon which the court based its decision, that is, the happening of the accident solely as the result of the negligent conduct of the Steamboat Company, is an independent state ground broad enough to sustain the judgment without the necessity of considering the Federal question involved in the first proposition.

But the mistake lies in the contention that the finding that there was no negligence on the part of the Construction Company and that the negligence of the Steamboat Company was the sole cause of the damage suffered involved purely questions of state cognizance involving no Federal considerations whatever. We say this is the error because the determination of the issue of negligence upon the hypothesis that there was no Federal authority given to place the obstructions in the river necessarily involves a consideration of the nature of the obstructions and the ascertainment of whether in and of themselves they so interfered with or impeded the right to navigate the river, that is, to carry on interstate commerce by using the river, as to cause the mere presence of the obstructions to constitute negligence *per se*, that is, to render the conclusion necessary that their mere presence was the efficient and proximate cause of the accident complained of. Because the elements involved in the decision of this Federal question are intermingled with the elements necessary to be considered to determine whether there was negligence irrespective of the Federal right affords no reason for not considering and disposing of the issue which the case presents from the Federal aspect, or to treat it as non-existing. It is indeed true that the fact of negligence in and of itself abstractly considered may be a state question concerning which we would accept, and indeed it may be conceded would be bound by the conclusion of the state court. But when negligence involves and concerns a subject of Federal jurisdiction which it is our duty to decide, to the extent necessary to enable us to discharge that duty, we must consider and review the subject independent of the action of the state court. *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 612.

The motion to dismiss being thus adversely disposed of, it remains to consider the motion to affirm, which we think should be granted because of the entire want of

foundation, that is in substance the frivolousness, of the proposition upon which the contention as to jurisdiction to review must rest, and we have reached this conclusion for the following reasons: (a) because under the circumstances disclosed by the record we are of the opinion that it is manifest that whether the ingredients of negligence be considered from the Federal point of view or from the point of view of the general law it clearly results that the injury which the Construction Company suffered was purely and exclusively, as held by all the courts below, the result of the negligence of the Steamboat Company unaffected in a legal sense by the act of the Construction Company in placing its works in the stream at the places and under the circumstances shown. (b) Because reaching this conclusion we are of the opinion that the question of the sufficiency or insufficiency of the Federal authority by which the appliances of the Construction Company were placed in the river becomes wholly negligible and need not be considered, because even assuming the want of authority, such absence of authority conferred upon the Steamboat Company no right to negligently injure the property of the Construction Company. In other words we are of the opinion that conceding that the appliances and boats of the Construction Company were in the river at the points stated without authority, that fact did not endow the Steamboat Company with a license to become a wrongdoer free from responsibility, and did not exempt it therefore from liability for the consequences of a wrong inflicted solely by its own negligence not contributed to in any way by the Construction Company.

Affirmed.

DENVER AND RIO GRANDE RAILROAD COMPANY *v.* ARIZONA AND COLORADO RAILROAD COMPANY OF NEW MEXICO.

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

No. 188. Argued April 22, 1914.—Decided May 11, 1914.

This court is slow to disturb the decision of the Supreme Court of a Territory in regard to matters of local practice and the construction of state statutes. *Nadal* v. *May*, *ante*, p. 447.

While the record of proceedings of a board of directors, when made, is the best evidence, if it is found that no record was made, the admission of secondary evidence is not reversible error. *Bank of the United States* v. *Dandridge*, 12 Wheat. 64.

This court sees no reason for reversing the Supreme Court of the Territory of New Mexico in holding that a railroad company was entitled under §§ 3850 and 3874, Compiled Laws, to protection as soon as its final location was completed.

Under the circumstances of this case, the plaintiff railroad company was not guilty of laches in the location and protection of its right of way.

A defendant railroad company acquires no new rights by going ahead with location and construction after a suit has been commenced by another company claiming a prior location.

16 New Mex. 281, affirmed.

THE facts, which involve the conflicting claims of two railroad companies to a right of way in New Mexico, are stated in the opinion.

Mr. E. N. Clark, with whom *Mr. Joel F. Vaile* and *Mr. R. G. Lucas* were on the brief, for appellant.

Mr. T. B. Catron, with whom *Mr. B. W. Ritter* was on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill brought by the appellee, a corporation of New Mexico, to restrain the appellant from entering upon and interfering in various ways with its right of way. After a trial the plaintiff (appellee) got a decree, conditioned, as to the portions of the line then occupied by the defendant in the actual operation of its railway, upon the plaintiff's constructing at least twenty-one miles of railroad, &c., and limited as a whole to five years from the date of the decree. This was affirmed by the Supreme Court of the Territory. 16 New Mex. 281. See 13 New Mex. 345. There are fifty-eight assignments of error, but the propositions argued fall into narrower compass. They are, that the plaintiff never adopted the line it claims; that there was no appropriation of the land until the plaintiff's location map was filed, after the beginning of this suit; that the plaintiff has lost whatever rights it had by laches and inability to construct its line; that there is no irreparable injury or other ground for equitable relief; and that the plaintiff had adequate remedies under the condemnation statutes and by ejectment. So far as they need discussion we will take these up in turn.

It is found that the plaintiff adopted the line in question; but it is argued that this finding is shown to be wrong as matter of law by reason of specific facts set forth in findings of the Supreme Court made, after the delivery of its opinion, in addition to those adopted from the court below. These are that certain small portions of the line between the northern boundary of the State and the town of Farmington are not covered by any order of adoption on the part of the directors shown by the records, and that the finding that those portions were adopted is based on the oral testimony of the plaintiff's chief engineer. (We do not stop to notice a slight contra-

diction in form between different parts of the findings, as the meaning is perfectly clear.) The argument is that adoption by the directors is necessary, which is admitted, and that, as the Compiled Laws of 1897, § 3832, require the directors to keep a complete record of all proceedings in a special book, such record is the only admissible evidence of the fact. But this is a matter of local practice and the construction of a local statute, as to which we should be slow to disturb the decision of the local court. *Nadal* v. *May*, this term *ante*, p. 447. The statute does not in terms purport to make the validity of the directors' action dependent upon being recorded. No doubt the record when made would be the best evidence, but it being found that no record was made, the admission of secondary evidence is no ground for reversing the decree. *Bank of the United States* v. *Dandridge*, 12 Wheat. 64, 69. In the opinion of the court this question is avoided, but the finding subsequently added, coupled with the finding that the line was adopted, imports the ruling of law that we have supposed.

The next objection is that the maps of the disputed portion of the road were not filed as required by § 3874 until the day after this suit was begun, and attention is called to § 3850 which requires a petition for condemnation to set forth that the company has surveyed the line of its proposed road and made a map thereof and that it has located its road according to such survey. But by § 3874 the company is not required to record its map until 'within a reasonable time after its road shall have been finally located,' which it is found to have done, and again we see no sufficient reason for reversing the decision of the local court that a company is entitled to protection as soon as its final location is complete. *Wheeling, B. & T. Ry. Co.* v. *Camden Cons. Oil Co.*, 35 W. Va. 205, 209.

Next it is said that the plaintiff has been guilty of laches. But it is found that the defendant with full knowledge

threatened and intended to take and occupy and has crossed and recrossed the plaintiff's location at many points and different grades, with circumstances not necessary to be detailed, and thus has made it impracticable for the plaintiff to proceed. It is found also that in the location and acquisition of its line the plaintiff proceeded with due diligence and in good faith, and that it had expended more than one hundred thousand dollars in the location and securing rights of way before the beginning of this suit. The defendant has gone ahead since the suit was begun, but of course has acquired no new rights by doing so. The objections to equitable jurisdiction do not need separate discussion. The line is found to be the best line between the points and the plaintiff is entitled to it. It neither is to be forced into a compulsory sale nor to be remitted to legal or statutory remedies that rightly are thought to be inadequate by the local court.

Decree affirmed.

GOMPERS *v.* UNITED STATES.

ERROR TO, APPEAL FROM AND ON PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Nos. 640, 574. Argued January 7, 8, 1914; restored to docket for reargument April 6, 1914; reargued April 20, 21, 1914.—Decided May 11, 1914.

While this court cannot review by appeal or writ of error a judgment of the Court of Appeals of the District of Columbia punishing for contempt it may grant a writ of certiorari to review the same.

Where two parties petition for writs of certiorari to review the same judgment, but the entire matter can be disposed of on one petition, the other will be denied.

Where the statute of limitations was pleaded, and, after a decision that it was inapplicable, one general exception was presented on his behalf in that regard, the rights of the defendant are sufficiently preserved.

The provision in Rev. Stat., § 1044, that no person shall be prosecuted for an offense not capital unless the indictment is found or information instituted within three years after commission of the offense, applies to acts of contempt not committed in the presence of the court.

Provisions of the Constitution of the United States are not mathematical formulas having their essence in their form, but are organic living institutions transplanted from English soil. Their significance is not to be gathered simply from the words and a dictionary but by considering their origin and the line of their growth.

Contempts are none the less offenses because trial by jury does not extend to them as a matter of constitutional right.

The substantive portion of § 1044, Rev. Stat., is that no person shall be tried for any offense not capital except within the specified time, and the reference to form of procedure by indictment or information does not take contempts out of the statute because the procedure is by other methods than indictment or information.

Quære, whether an indictment will lie for a contempt of a court of the United States.

In dealing with the punishment of crime, some rule as to limitations should be laid down, if not by Congress by this court.

As the power to punish for contempt has some limit, this court regards that limit to have been established as three years by the policy of the law, if not by statute, by analogy. *Adams* v. *Wood*, 2 Cranch, 336.

40 App. D. C. 293, reversed.

THE facts, which involve the construction of § 1044, Rev. Stat., and its application to past acts of contempt, are stated in the opinion.

Mr. Alton B. Parker and *Mr. Jackson H. Ralston*, with whom *Mr. William E. Richardson* was on the brief, for plaintiffs in error and appellants.

Mr. J. J. Darlington and *Mr. Daniel Davenport*, with whom *Mr. James M. Beck* was on the brief, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

These are proceedings for alleged criminal contempts in the matter that was before this court in *Gompers* v. *Bucks*

Stove & Range Co., 221 U. S. 418. In that case the proceedings instituted by the Bucks Stove & Range Company to punish the petitioners were ordered to be dismissed, but without prejudice to the power of the Supreme Court of the District to punish contempt, if any, committed against it. The decision was rendered on May 15, 1911, and the next day the Supreme Court of the District appointed a committee to inquire whether there was reasonable cause to believe the plaintiffs in error guilty, in wilfully violating an injunction issued by that court on December 18, 1907, and, if yea, to present and prosecute charges to that effect. The inquiry was directed solely with a view to punishment for past acts, not to secure obedience for the future; and to avoid repetition it will be understood that all that we have to say concerns proceedings of this sort only, and further, only proceedings for such contempt not committed in the presence of the court.

The committee, on June 26, 1911, reported and charged that the parties severally were guilty of specified acts in violation of the injunction, being the same acts of which they had been found guilty by the Supreme Court in the former case. Rules to show cause were issued on the same day. The defendants pleaded the Statute of Limitations, Rev. Stat., § 1044, as to most of the charges, and not guilty. There was a trial, the Statute of Limitations was held inapplicable and the defendants were found guilty and sentenced to imprisonment for terms of different lengths, subject to exceptions which by agreement were embodied in a single bill. The Court of Appeals reduced the sentences to imprisonment for thirty days in the case of Gompers and fines of $500 for each of the other two. 40 App. D. C. 293. The defendants brought a writ of error and an appeal to this court and also petitioned for a writ of certiorari. Of course an appeal does not lie, nor does a writ of error, but the writ of certiorari is granted.

The judges of the Supreme Court also petitioned for a writ of certiorari, but as the case will be disposed of on the first mentioned petition, the other will be denied.

The injunction, subsequently held too broad, not only forbade the defendants to combine to obstruct the business of the Bucks Stove and Range Company, or to declare or threaten any boycott against it (such a boycott already having been declared), but also to publish any statement calling attention of any body to any such boycott, or any statement of like effect, tending to any injury of the Company's business. This decree, although made on December 18, did not become operative until December 23, 1907. Before going to the Court of Appeals the injunction in substantially the same form was made permanent on March 23, 1908. It may be assumed for the purposes of our decision that the evidence not only warranted but required a finding that the defendants were guilty of some at least of the violations of this decree that were charged against them, and so we come at once to consider the Statute of Limitations, which is their only real defence. A preliminary objection was urged, to be sure, that the question of the validity of that defence was not reserved, but there is nothing in it. The bar was pleaded, there was a motion to dismiss on that ground for want of a replication, there was a decision that the statute did not apply to contempts, and the counsel for the plaintiffs in error stated at the trial that there was one general exception presented on their behalf with regard to that. We cannot doubt that it was perfectly understood, or that the record shows, that the plaintiffs in error preserved all their rights.

The statute provides that 'no person shall be prosecuted, tried, or punished for any offense, not capital, except . . . , unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed.' Rev. Stat., § 1044. Act of April 13, 1876, c. 56, 19 Stat. 32. The plaintiffs in

error treat these proceedings as having begun on May 16, 1911, when the Supreme Court directed an inquiry. They certainly did not begin before that date; so that, if the Statute applies, contempts prior to May 16, 1908, would be barred. It is argued with force that the inquiry was directed only to breaches of the preliminary injunction, which expired by its own terms upon the making of the final decree on March 23, 1908, and that therefore everything legitimately before the court, happened more than three years before. But as the report mentioned the final decree and charged a few acts later than March 23, though mostly rather unimportant, and as the order to show cause referred to a violation of the injunctions, in the plural, it perhaps would savor of a technicality that we should be loath to apply on either side, if we did not deal with all that is charged.

The charges against Gompers are: 1, hurrying the publication of the January number of the American Federationist and distributing many copies after the injunction was known and before it went into effect, in which number the Bucks Stove and Range Company was included in the 'We don't patronize' list; 2, circulating other copies in January, 1908; 3, on and after December 23, 1907, circulating another document to the like effect with comments, some of which were lawful criticism but others of which suggested that the injunction left the members of labor organizations free to continue their boycott; 4, publishing in February, 1908, a copy of the decree with the suggestion that those who violated the injunction outside of the District could not be punished unless they came within it; 5, in January and February, 1908, publishing in conjunction with the other defendants a paper appealing for financial aid, commenting on the injunction as invading the liberty of the press and free speech and reprinting the before-mentioned comments and suggestions; 6, in March, 1908, again suggesting that no law compelled the purchase

of a Bucks stove; 7, in April, 1908, after the final decree, reiterating the same suggestion in the American Federationist; 8, in April, 1908, repeating similar suggestions by transparent innuendo in a public address; 9, again repeating them in another address, on or about May 1; 10, and again in the July issue of the American Federationist; 11, publishing in the September Federationist an editorial characterizing the injunction as an invasion of constitutional freedom, (which hardly seems to exceed lawful comment unless on the ground that the case was not finished, although mistaken in its law); 12, in a report published after September 9, 1908, saying that if the Executive Council of the Federation of Labor obeyed the injunction they could not report the state of the case to the Denver Convention, and that they did not see how they could refuse to give an account of their doings; 13, on September 29, 1908, saying in a public address that the injunction forbade him to discuss the case, but that he must, (seemingly not going beyond that declaration); 14, on October 26, 1908, recurring in a single phrase in an address, to his old suggestion that no law compelled his hearers to buy a Bucks stove; 15, in November, 1908, in an address which he caused to be published in the Federationist in January, 1909, again referring to the injunction, mentioning his past advice and suggestions and that he had been called on to show cause why he should not be adjudged guilty of contempt, (in the former proceeding), and asking how he could have done otherwise; and finally, 16, in a report made in November, 1909, referring to the Judge as so far having transcended his authority that even judges of the Court of Appeals have felt called upon to criticize his action, and saying that in such circumstances it is the duty of the citizens to refuse obedience and to take whatever consequences may ensue. The charges against Mitchell and Morrison are mainly for having taken part in some of the above mentioned publications, but need not

be stated particularly, as all the acts of any substance in Mitchell's case and all in that of Morrison were more than three years old when these proceedings began.

The boycott against the Company was not called off until July 19 to 29, 1910, and it is argued that even if the statute applies the conspiracy was continuing until that date, *United States* v. *Kissel*, 218 U. S. 601, 607, and therefore that the Statute did not begin to run until then. But this is not an indictment for conspiracy, it is a charge of specific acts in disobedience of an injunction. The acts are not charged as evidence but as substantive offenses; each of them, so far as it was a contempt, was punishable as such, and was charged as such, and therefore each must be judged by itself; and so we come to what, as we already have intimated, is the real question in the case.

It is urged in the first place that contempts cannot be crimes, because, although punishable by imprisonment and therefore, if crimes, infamous, they are not within the protection of the Constitution and the amendments giving a right to trial by jury &c. to persons charged with such crimes. But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. *Robertson* v. *Baldwin*, 165 U. S. 275, 281, 282. It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute, offenses, because trial by jury as it has been gradually worked out and fought out has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are

they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure, 3 Transactions of the Royal Historical Society, N. S. p. 147 (1885), and that at least in England it seems that they still may be and preferably are tried in that way. See 7 Halsbury, Laws of England, 280, *sub v.* Contempt of Court (604); *Re Clements* v. *Erlanger*, 46 L. J., N. S., pp. 375, 383. *Matter of Macleod*, 6 Jur. 461. *Schreiber* v. *Lateward*, 2 Dick. 592. *Wellesley's Case*, 2 Russ. & M. 639, 667. *In re Pollard*, L. R. 2 P. C. 106, 120. *Ex parte Kearney*, 7 Wheat. 38, 43. *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 328, 331, 332. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 441.

We come then to the construction of the Statute. It has been assumed that the concluding words 'unless the indictment is found or the information is instituted within three years' limit the offences given the benefit of the act to those usually prosecuted in that way, and the counsel for the petitioners were at some pains to argue that the charges of the committee amounted to an information; a matter that opens vistas of antiquarian speculation. But this question is not one to be answered by refinements and curious inquiries.—In our opinion the proper interpretation of the Statute begins with the substantive not with the adjective part. The substantive portion of the section is that no person shall be tried for any offence not capital except within a certain time. Those words are of universal scope. What follows is a natural way of expressing that the proceedings must be begun within 3 years; indictment and information being the usual modes by which they are begun and very likely no other having occurred to those who drew the law. But it seems to us plain that the dominant words of the act are 'no person shall be prosecuted, tried, or punished for any offence not capital' unless.—

No reason has been suggested to us for not giving to the

statute its natural scope. The English courts seem to think it wise, even when there is much seeming reason for the exercise of a summary power, to leave the punishment of this class of contempts to the regular and formal criminal process. *Matter of Macleod,* 6 Jur. 461. Maintenance of their authority does not often make it really necessary for courts to exert their own power to punish, as is shown by the English practice in more violent days than these, and there is no more reason for prolonging the period of liability when they see fit to do so than in the case where the same offence is proceeded against in the common way. Indeed the punishment of these offences peculiarly needs to be speedy if it is to occur. The argument loses little of its force if it should be determined hereafter, a matter on which we express no opinion, that in the present state of the law an indictment would not lie for a contempt of a court of the United States.

Even if the statute does not cover the case by its express words, as we think it does, still, in dealing with the punishment of crime a rule should be laid down, if not by Congress by this court. The power to punish for contempt must have some limit in time, and in defining that limit we should have regard to what has been the policy of the law from the foundation of the Government. By analogy if not by enactment the limit is three years. The case cannot be concluded otherwise so well as in the language of Chief Justice Marshall in a case where the statute was held applicable to an action of debt for a penalty. *Adams* v. *Woods,* 2 Cranch, 336, 340, 341, 342: "It is contended that the prosecutions limited by this law, are those only which are carried on in the form of an indictment or information, and not those where the penalty is demanded by an action of debt.—But if the words of the act be examined they will be found to apply, not to any particular mode of proceeding, but generally to any prosecution, trial or punishment for the offence. It is not de-

clared that no indictment shall be found . . . But it is declared that 'No person shall be prosecuted, tried or punished' . . . —In expounding this law, it deserves some consideration, that if it does not limit actions of debt for penalties, those actions might, in many cases, be brought at any distance of time. This would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture." The result is that the judgments, based as they are mainly upon offences that could not be taken into consideration, must be reversed.

Judgments reversed.

MR. JUSTICE VAN DEVANTER and MR. JUSTICE PITNEY dissent.

LOGAN *v.* DAVIS.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 247. Submitted March 9, 1914.—Decided May 11, 1914.

Under § 237, Judicial Code, this court has jurisdiction to review a judgment of a state court denying a claim duly set up under a confirmatory patent issued under § 4 of the Land Grant Adjustment Act of 1887 and holding that the patentee was not entitled to the benefit of the provisions of that section.

The decision of the Secretary of the Interior that the grantee of a railroad company was a purchaser in good faith in the sense of the Adjustment Act of 1887, is conclusive so far as it is based on fact and cannot be disturbed except as it may be grounded upon an error of law, there being no charge of fraud.

The practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect; and, if acted upon for a number of years, will not be disturbed except for very cogent reasons.

Successive Secretaries of the Interior having uniformly interpreted the remedial sections of the Adjustment Act of 1887 as embracing pur-

chases made after the date of the act, no less than prior purchases, if made in good faith, and many thousands of acres having been patented to individuals under that interpretation, this court will not now disturb it. *Knepper* v. *Sands*, 194 U. S. 476, distinguished.

A remedial statute is to be construed liberally so as to effectuate the purpose of the legislative body enacting it; and so *held* as to the Adjustment Act of 1887. *United States* v. *Southern Pacific Railroad Co.*, 184 U. S. 49.

One is a purchaser in good faith within the sense of § 4 of the Adjustment Act of 1887, if he is in actual ignorance of defects in the railroad company's title and the transaction is an honest one on his part, the ordinary rule respecting constructive notice being inapplicable. *United States* v. *Winona & St. Peter R. R. Co.*, 165 U. S. 463.

147 Iowa, 441, reversed.

THIS case arises out of conflicting claims to 80 acres of land in O'Brien County, Iowa, under the act of March 3, 1887, c. 376, 24 Stat. 556, as amended February 12, 1896, c. 18, 29 Stat. 6, providing for the adjustment of railroad land grants, etc. The land is within the place limits of the grant made May 12, 1864, c. 84, 13 Stat. 72, to the State of Iowa to aid in the construction of a railroad from Sioux City, in that State, to the southern boundary of Minnesota. The grant was *in præsenti* and embraced every alternate section, designated by odd numbers, for ten sections in width on each side of the road, with the usual exceptions and provision for indemnity. The company which was to construct the road and receive the benefit of the grant was to be designated by the State legislature. Upon the presentation of a certificate by the Governor of the State that any section of ten consecutive miles of the road was completed, the Secretary of the Interior was to issue to the State patents for one hundred sections of land "for the benefit of" the company constructing the road, and this was to be repeated as each additional ten miles was constructed until the entire road was completed and all the lands patented. If the road was not completed within ten years from the company's acceptance of the grant,

the lands "granted and not patented" were to revert to the State to enable it to secure the completion of the work; and if the road was not completed within five years after the expiration of the ten years, then the "lands undisposed of" were to revert to the United States. The Sioux City and St. Paul Railroad Company was designated by the State legislature as the beneficiary of the grant in 1866, the company accepted it in the same year, and a map definitely locating the line of the road was filed with the Secretary of the Interior and approved in 1867. As so located, the road was about 80 miles in length. In 1872 the company constructed it from the southern boundary of Minnesota to Le Mars, Iowa, a distance of 56.25 miles, but the remaining part was never constructed, a trackage right to Sioux City over another road being acquired by the company. In 1872 and 1873 the Governor certified that five sections of ten miles each, constituting fifty miles of continuous road from the southern boundary of Minnesota, had been completed and put into operation conformably to the granting act, and the Secretary of the Interior thereupon caused a large amount of lands within the primary and indemnity limits of the grant to be patented to the State "for the use and benefit of" the company, the tract in controversy being among those so patented. Most of the lands patented to the State were soon conveyed by it to the company, but some were not, this tract being among the latter. The company, however, was claiming it in virtue of the grant and the patent to the State. Litigation was had between this company and another, by reason of their overlapping land grants, to determine which was entitled to this tract and others within the overlap, and by the final decree in 1886 this tract was awarded to this company. 117 U. S. 406. In truth, more land was patented to the State for the benefit of the company, and more land was conveyed by the State to the company, than the latter was entitled to

receive for the five ten-mile sections of completed road, not counting the additional 6.25 miles, and in 1882 the State legislature passed an act declaring that the State thereby resumed all lands "which have not been earned" by the company, but the act did not more definitely point out the lands intended to be resumed. Laws Iowa, 1882, c. 107. And in 1884 the State legislature passed an act declaring (§ 1) that all lands resumed and intended to be resumed by the act of 1882 "are hereby relinquished and conveyed to the United States," and also (§ 2): "The governor of the State of Iowa is hereby authorized and directed to certify to the Secretary of the Interior all lands which have heretofore been patented to the State, to aid in the construction of said railroad, and which have not been patented by the State to the Sioux City & St. Paul Railroad Company, and the list of land so certified by the governor shall be presumed to be the lands relinquished and conveyed by section one of this act. *Provided*, that nothing in this section contained shall be construed to apply to lands situated in the counties of Dickinson and O'Brien." Laws Iowa, 1884, c. 71. The tract in controversy, being in O'Brien County, came within the excepting words of the proviso.

This tract was part of an odd-numbered section of land immediately adjoining the third ten-mile section of constructed road, the completion of which was duly certified by the Governor, and was unreserved, unappropriated and vacant at the date of the granting act and at the time the line of road was definitely located. Thus it was not only a part of the lands granted but was earned by actual construction. And, strictly speaking, it was rightly patented to the State for the benefit of the company, the excess in the lands patented being caused by the inclusion in the patents of other lands differently situated and not earned by the completion of the five ten-mile sections of road.

September 11, 1888, while the tract was still free from

any homestead, preëmption or kindred claim and while the patent therefor, issued to the State in 1873 for the benefit of the company, was still outstanding, Ellen M. Childs purchased the tract from the company, paying $88.00 in cash and agreeing to pay ten deferred instalments with interest thereon, making the full price $1,270.64, which was the fair value of the land. At the time of her purchase the tract was in the actual and undisputed possession of the company through a tenant named Fitzgerald, who then became her tenant, and through him she continued in the undisturbed possession until October 8, 1889, when she sold to Logan, the plaintiff in error, who paid her $228.00 in cash and took the land subject to the payment of the ten deferred instalments. Fitzgerald then became the tenant of Logan and remained in possession in that capacity until the spring of 1890, when Davis, the defendant in error, with a gang of men and teams, went upon the land, took possession of it, and began cultivating the larger part of it. In what he did Davis acted without the consent of Logan and with knowledge of Mrs. Childs' purchase from the company in 1888, of her sale to Logan in 1889, and of Fitzgerald's possession as tenant of Mrs. Childs and then of Logan. Although subsequently maintaining the possession obtained in the spring of 1890, Davis did not reside upon the tract or erect any buildings upon it.

In October, 1889, the United States brought a suit—the bill was filed October 4 and the subpœna was served October 8—against the company under the adjustment act of March 3, 1887, *supra*, to regain the title to nearly 22,000 acres of land in Dickinson and O'Brien Counties, including this tract, theretofore patented to the State for the benefit of the company, the theory upon which such relief was sought being that the company had received a larger quantity of other lands than it was entitled to receive under the granting act and therefore

could not properly claim the 22,000 acres. In the Circuit Court the United States prevailed, and this court affirmed the decree. 159 U. S. 349. The ground upon which the decision rested is indicated by the following extract from the opinion (p. 370): "Our conclusion, then, is that the Sioux City company, having failed to complete the entire road, for the construction of which Congress made the grant in question, was not entitled to the whole of the lands granted, but, at most, only to one hundred odd-numbered sections—as those sections were surveyed, whatever their quantity—for each section of ten consecutive miles constructed *and certified by the governor of the State,* and that, according to the measurement of 1887, which is accepted as the basis of calculation, the railroad company had, prior to the institution of this suit, received more lands, on account of the fifty miles of constructed road, certified by the governor, than it was entitled to receive. Under this view, it is unnecessary to inquire whether the particular lands here in dispute should not have been assigned to the company, rather than other lands, containing a like number of acres, that were, in fact, transferred to it, and which cannot now be recovered by the United States, by reason of their having been disposed of by the company. If the company has received as much, in quantity, as should have been awarded to it, a court of equity will not recognize its claim to more in whatever shape the claim is presented."

There was no attempt to make Mrs. Childs, Logan, or the tenant Fitzgerald a party to that suit. During its pendency, and on May 13, 1894, Logan entered into an agreement in writing with the company whereby the latter extended the time for paying the ten deferred instalments until ninety days after a decision should be rendered in the suit by this court, and whereby he agreed that if the decision should be adverse to the company he would ac-

cept from it the amount already paid, with interest, in full satisfaction of all demands against the company on account of the failure of the title.

Shortly following the decision of this court in that suit the lands recovered by the United States, including this tract, were regularly restored to public entry in conformity with the provisions of the adjustment act, and a contest at once ensued in the Land Department over this tract. Logan, claiming to be a purchaser in good faith, applied for a confirmatory patent under § 4, and Davis, claiming to be a *bona fide* occupant, sought to obtain title under the homestead law. A hearing before the local land office, at which the parties presented such evidence as they had in support of their respective claims, resulted in a decision by the local officers in favor of Davis. This was affirmed by the Commissioner of the General Land Office on the theory that the agreement of March 13, 1894, was fatal to Logan's claim as a purchaser; and upon an appeal to the Secretary of the Interior the decisions below were reversed, it being found and held by the Secretary that Logan was a purchaser in good faith within the meaning of § 4 of the adjustment act; that the agreement of March 13, 1894, did not alter his status as a purchaser; and that Davis' possession, acquired after the purchase by Logan and with knowledge of it, did not eliminate the element of good faith from the latter's purchase or otherwise defeat his claim. As a result of this decision, Logan made the requisite payment to the Government (see amendatory act of February 12, 1896, *supra*) and was given a confirmatory patent.

It is conceded that Mrs. Childs and Logan were both citizens of the United States and in that respect within the remedial provisions of § 4 of the adjustment act, and also that in the contest before the Land Department Logan testified that at the time of his purchase from Mrs. Childs in 1889 he had no knowledge of any adverse claim to the

tract. The present record, however, does not purport to contain all the evidence produced in that contest.

When the proceeding in the Land Department was concluded Logan sued Davis in the local state court to recover the possession, and by the pleadings subsequent to the petition the character of the action was so far changed that Davis sought to have Logan declared a trustee of the title for him, Davis, and directed to convey the same to him, and Logan sought to have his title quieted as against Davis, as well as to recover the possession. In Davis' pleading Logan's right under the confirmatory patent was assailed upon the grounds (1) that the grant of 1864 was completely and finally adjusted by the legislation and action of the State in 1882 and 1884, and so was not within the operation of the adjustment act of 1887, (2) that the remedial provisions of § 4 of that act were confined to purchases made prior to the date of the act, and so were not applicable to Mrs. Childs' purchase in 1888 or Logan's purchase in 1889, (3) that Mrs. Childs and Logan were bound to take notice of the various acts and matters bearing upon the company's right to this tract, and so it was legally impossible for either to be a purchaser in good faith within the meaning of § 4, and (4) that the decision of the Secretary of the Interior, reversing the action of the local officers and of the Commissioner of the General Land Office, was given "unlawfully and without any authority of law." The last ground evidently was intended as a mere conclusion from the others, for nothing else was alleged to make it even colorable. The case was heard upon an agreed statement of facts, the substance of which has been recited, and a decree was rendered in favor of Davis, which was affirmed by the Supreme Court of the State. 147 Iowa, 441. That court held that Logan was not a purchaser in good faith within the meaning of § 4 of the adjustment act of 1887, and this upon the theory (a) that he was presumed to have

known the character of the company's title and (b) that § 4 was not applicable to a purchase made after the date of the act. To reverse that decision Logan prosecutes this writ of error.

Mr. William Milchrist, Mr. George C. Scott and *Mr. W. D. Boies* for plaintiff in error:

Defendant cannot maintain counterclaim. Plaintiff is entitled to protection under the act of March 3, 1887. The United States and defendant are estopped.

In support of these contentions, see *Atherton* v. *Fowler*, 96 U. S. 211; *Bausman* v. *Eads*, 48 N. W. Rep. 769; *Branon* v. *Worth*, 17 Wall. 32; *Cahn* v. *Barnes*, 5 Fed. Rep. 399; *Gibbons* v. *United States*, 5 Ct. Cls. 416; *Hosmer* v. *Wallace*, 97 U. S. 575; *In re McKeag*, 99 Am. St. Rep. 80; *Knepper* v. *Sands*, 194 U. S. 476; *Knevels* v. *Railroad Co.*, 62 Fed. Rep. 224; *Logan* v. *Davis*, 147 Iowa, 442; *Lyle* v. *Patterson*, 228 U. S. 211; *McCravy* v. *Remsen*, 54 Am. Dec. 194; *Olson* v. *Traver*, 26 L. D. 350; *Peters* v. *Jones*, 35 Iowa, 512; *Portis* v. *Hill*, 98 Am. Dec. 481; 2 Pomeroy's Eq. (3d ed.), § 813; *Quimby* v. *Conlan*, 104 U. S. 180; *State* v. *Jackson R. R. Co.*, 69 Fed. Rep. 116; *State* v. *Milk*, 11 Fed. Rep. 389; *State* v. *Flint Co.*, 51 N. W. Rep. 103; *Swanson* v. *Sears*, 224 U. S. 180; *United States* v. *Southern Pacific R. R.*, 184 U. S. 49; *United States* v. *Winona R. R. Co.*, 165 U. S. 463.

Mr. Madison B. Davis and *Mr. Edwin J. Stason* for defendant in error:

There is no Federal question involved. Plaintiff in error was not a good faith purchaser. Defendant had a right to make homestead entry. Equitable estoppel is not available to plaintiff in error.

In support of these contentions, see 11 Am. & Eng. Ency. (2d ed.), 434; 21 *Id.*, 588; 26 *Id.* 397, 398; *Ard* v. *Brandon*, 156 U. S. 537; *Atherton* v. *Fowler*, 96 U. S. 513;

Arkansas &c. R. Co. v. *German Nat'l Bank*, 207 U. S. 270; *Bacon* v. *Texas*, 163 U. S. 207; *Bement* v. *National Harrow Co.*, 186 U. S. 70; *Benner* v. *Lane*, 116 Fed. Rep. 407; *California Powder Co.* v. *Davis*, 151 U. S. 389; *Castillo* v. *McConnico*, 168 U. S. 674; *Clements* v. *Warner*, 24 How. 394; *Clark* v. *Lyster*, 155 Fed. Rep. 513; *De Saussure* v. *Gaillard*, 127 U. S. 216; *Delaware City Co.* v. *Reybold*, 142 U. S. 636; *Dower* v. *Richards*, 151 U. S. 658; *Duluth &c. R. Co.* v. *Roy*, 173 U. S. 587; *Elder* v. *Wood*, 208 U. S. 226; *Egan* v. *Hart*, 165 U. S. 188; *Eustis* v. *Bolles*, 150 U. S. 370; *Fowler* v. *Lamson*, 164 U. S. 252; *Giles* v. *Teasley*, 193 U. S. 146; *Gillis* v. *Stinchfield*, 159 U. S. 658; *Gjerstadengen* v. *Van Duzen* (Nor. Dak.), 76 N. W. Rep. 233; *Hamblin* v. *Western Land Co.*, 147 U. S. 531; *Hammond* v. *Johnson*, 142 U. S. 73; *Harrison* v. *Morton*, 171 U. S. 38; *Hedrick* v. *Atchison &c. R. Co.*, 167 U. S. 673; *Hale* v. *Lewis*, 186 U. S. 473; *Johnson* v. *Risk*, 137 U. S. 300; *Knepper* v. *Sands*, 194 U. S. 476; *Leathe* v. *Thomas*, 207 U. S. 93; *Leonard* v. *Vicksburg &c. R. Co.*, 198 U. S. 416; *Logan* v. *Davis*, 147 Iowa, 441; *Lyle* v. *Patterson*, 228 U. S. 211; *Lake Superior Iron Co.* v. *Cunningham*, 155 U. S. 354; *Manley* v. *Tow*, 110 Fed. Rep. 241; *Mo. Pac. Ry. Co.* v. *Fitzgerald*, 160 U. S. 556; *Moran* v. *Horsky*, 178 U. S. 205; *Moss* v. *Donovan*, 176 U. S. 413; *Murdock* v. *Memphis*, 20 Wall. 590; *Nelson* v. *Nor. Pac. R. Co.*, 188 U. S. 108; *Olson* v. *Traver*, 26 L. D. 350; *Ostrom* v. *Wood*, 140 Fed. Rep. 294; *Pierce* v. *Somerset R. Co.*, 171 U. S. 641; *Pittsburg Iron Co.* v. *Cleveland Iron Co.*, 178 U. S. 270; *Rakes* v. *United States*, 212 U. S. 58; *Remington Paper Co.* v. *Watson*, 173 U. S. 443; *Rutland R. Co.* v. *Cent. Ver. R. R. Co.*, 159 U. S. 630; *Seaboard &c. R. Co.* v. *Duvall*, 225 U. S. 477; *Seneca Nation* v. *Christy*, 162 U. S. 263; *S. C. & St. Paul R. Co.* v. *Osceola County*, 43 Iowa, 318; *S. C. & St. Paul R. Co.* v. *United States*, 159 U. S. 349; *Speed* v. *McCarthy*, 181 U. S. 269; *Smith* v. *Hollenbeck*, 231 Illinois, 484; *St. Louis &c. R. Co.* v.

McGee, 115 U. S. 469; *St. Louis &c. R. Co.* v. *Missouri*, 156 U. S. 478; *Walker* v. *Ehresman* (Neb.), 113 N. W. Rep. 218; *Weyerhauser* v. *Minnesota*, 176 U. S. 550; *Wood Machine Co.* v. *Skinner*, 139 U. S. 293; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 112.

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

As Logan claimed as a purchaser in good faith within the meaning of § 4 of the adjustment act of 1887, under which a confirmatory patent had been issued to him, and the Supreme Court of the State denied that claim and held that he was not entitled to the benefit of the provisions of that section, the judgment is so plainly subject to review by this court under § 237 of the Judicial Code that a contention to the contrary, found in one of the briefs, is dismissed as not justifying further comment. *Gauthier* v. *Morrison*, 232 U. S. 452.

And as the Secretary of the Interior found, from the evidence submitted in the contest before the Land Department, that Logan was a purchaser in good faith in the sense of the adjustment act, and no basis was laid in the pleadings or agreed statement of facts for rejecting or disturbing that decision save as it was said to be grounded upon error of law and misconstruction of the statute, it is manifest that unless some of the objections urged against it on that score are well taken, Logan's title should be sustained. *Vance* v. *Burbank*, 101 U. S. 514, 519; *Lee* v. *Johnson*, 116 U. S. 48; *Gertgens* v. *O'Connor*, 191 U. S. 237, 240; *Ross* v. *Day*, 232 U. S. 110, 116

The act of 1887, in its first section, authorized and required the Secretary of the Interior immediately to adjust, in accordance with the decisions of this court, the several land grants made by Congress to aid in the construction of railroads "and heretofore unadjusted." This included

the grant made by the act of 1864, unless already adjusted. That it had not been adjusted by the Land Department is conceded, but it is insisted that it had been adjusted by the legislation and action of the State in 1882 and 1884, and so was not within the operation of the adjustment act of 1887. To this we cannot assent. The United States had not committed the adjustment to the State, and neither had the State assumed to make an adjustment for the United States. Prior to the act of 1887 the administration of the several railroad land grants rested with the Land Department, of which the Secretary of the Interior is the head, *Catholic Bishop of Nesqually* v. *Gibbon*, 158 U. S. 155, 166–7, and some of the lesser grants had progressed to a final adjustment in regular course of administration. It was because of this that the restrictive words "and heretofore unadjusted" were inserted in the act. They meant only that adjustments theretofore effected by the Land Department in regular course were not to be disturbed. The facts before recited amply illustrate that this grant had not proceeded to such an adjustment. The Secretary of the Interior treated it as unadjusted, *Sioux City & St. Paul R. R. Co.*, 6 L. D. 54, 71, and this court impliedly, if not expressly, approved his action. *Sioux City & St. Paul Railroad Co.* v. *United States*, 159 U. S. 349.

The second section of the act of 1887 related to the recovery by the United States of lands which, upon the completion of any adjustment, or sooner, appeared to have been erroneously certified or patented by the Land Department "to or for the use or benefit of any company" claiming under a grant to aid in the construction of a railroad. The third section related to the reinstatement of preëmption and homestead entries found, in the course of any adjustment, to have been erroneously canceled by reason of such a grant or a withdrawal, and directed that where the entryman failed to apply for reinstatement within a

reasonable time, to be fixed by the Secretary of the Interior, the land should be disposed of under the public-land laws to *bona fide* purchasers, if any, and, if there were none, then to *bona fide* settlers. The fourth section read as follows:

"That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the Government price of similar lands; and in case of neglect or refusal of such company to make payment as hereafter specified, within ninety days after the demand shall have been made, the Attorney General shall cause suit or suits to be brought against such company for the said amount: *Provided*, That nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified, or patented as aforesaid from recovering the purchase-money therefor from the grantee company, less the amount paid to the United States by such company as by this act required: *And provided*, That a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act, nor shall this act be construed as a declaration of forfeiture of any portion of any land-grant for conditions broken, or as au-

thorizing an entry for the same, or as a waiver of any rights that the United States may have on account of any breach of said conditions."

This section was amended February 12, 1896, c. 18, 29 Stat. 6, by adding to it the following:

"*Provided further*, That where such purchasers, their heirs or assigns, have paid only a portion of the purchase price to the company, which is less than the Government price of similar lands, they shall be required, before the delivery of patent for their lands, to pay to the Government a sum equal to the difference between the portion of the purchase price so paid and the Government price, and in such case the amount demanded from the company shall be the amount paid to it by such purchaser."

Section five related to lands apparently within such a grant and lying opposite the constructed parts of the road, but excepted from the operation of the grant and not certified or patented to or for the benefit of the railroad company, and provided that where any such land was sold by the company to a *bona fide* purchaser, who was a citizen of the United States or had declared his intention to become such, the purchaser, his heirs or assigns, could obtain a patent by paying the ordinary Government price, but that this privilege should not exist if at the time of the sale by the company the land was occupied by an adverse claimant under the preëmption or homestead laws.

Whether § 4 was confined to purchases made prior to the date of the act, or equally included subsequent purchases, where made in good faith, is one of the controverted questions in the case. Both views have support in the terms of the act, and if the question were altogether new there would be room for a reasonable difference of opinion as to what was intended. Certainly, resort to interpretation would be necessary. But the question is not altogether new. It has often arisen in the administration of the act, and successive Secretaries of the Interior uniformly have

held that the remedial sections embraced purchases after the date of the act, no less than prior purchases, if made in good faith. *Sethman* v. *Clise*, 17 L. D. 307; *Holton* v. *Rutledge*, 20 L. D. 227; *Andrus* v. *Balch*, 22 L. D. 238; *Briley* v. *Beach, Id.* 549; *Re Carlton Seaver*, 23 L. D. 108; *Neilsen* v. *Central Pacific Railroad Co.*, 26 L. D. 252. Many thousands of acres have been patented to individuals under that interpretation, and to disturb it now would be productive of serious and harmful results. The situation therefore calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons. *United States* v. *Moore*, 95 U. S. 760, 763; *Hastings and Dakota Railroad Co.* v. *Whitney*, 132 U. S. 357, 366; *United States* v. *Alabama Great Southern Railroad Co.*, 142 U. S. 615, 621; *Kindred* v. *Union Pacific Railroad Co.*, 225 U. S. 582, 596.

The remedial sections of the act were also considered by this court in *United States* v. *Southern Pacific Railroad Co.*, 184 U. S. 49, 56, which involved several purchases made after the date of the act, and it was there said: "But the act itself bears upon its face evidence that it was not intended to be limited to cases of purchases from the railroad company prior to its date." And, after referring to the language of §§ 2 and 3, it was added: "This seems to imply an intent that all mistakes of the nature referred to which shall have occurred up to the very completion of the adjustment may be rectified. Section 4 makes provision for the issue of patents to certain purchasers from railroad companies, providing proof shall be made 'within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted.' While other sections may not be so specific, yet placing them

alongside of those from which quotations have been made it is reasonable to hold that the act applies not merely to transactions had before its date, but to any had before the time of final adjustment. In this case the several grants to the Southern Pacific have not yet been finally adjusted. Further, it must be borne in mind that this is a remedial statute, and is to be construed liberally, and so as to effectuate the purpose of Congress and secure the relief which was designed, and the mere date of the transaction between the purchaser and the railroad company is not of itself vital in determining whether there is or is not an equity in behalf of the purchaser."

Counsel for Davis rely upon *Knepper* v. *Sands*, 194 U. S. 476, as placing a different interpretation upon the adjustment act. But, although some broad language is found in the opinion, the real decision did not go as far as suggested. The case came here upon a certificate from a Circuit Court of Appeals, and the question presented for decision, considering the facts stated in the certificate, was, whether a purchase from the railroad company of land erroneously patented for its benefit under the grant of 1864 could be esteemed a purchase in good faith, within the meaning of § 4 of the act of 1887, where at the time of the purchase the land was occupied by a *bona fide* settler who was residing upon, improving and cultivating the same with a view to acquiring it under the homestead law. The question was answered in the negative, particular emphasis being laid upon the settler's occupancy at the time of the purchase and upon the well known policy of favoring actual settlers. The answer must have been the same whether the purchase was before or after the date of the act, and manifestly there was no purpose to overrule or qualify the decision in *United States* v. *Southern Pacific Railroad Co.*, *supra*, for it was not even mentioned. So, reading the opinion in *Knepper* v. *Sands* with appropriate regard for the facts of the case, we think it is not in point

or controlling here, for no one was occupying or claiming this tract under the settlement laws at the time it was purchased from the company.

The contention that Logan was charged with constructive notice of the defect in the company's title and so was not a purchaser in good faith, in the sense of the adjustment act, must be overruled, as was a like contention in *United States* v. *Winona & St. Peter Railroad Co.*, 165 U. S. 463. It was there said, referring to the remedial provisions of § 4 (p. 480): "It will be observed that this protection is not granted to simply *bona fide* purchasers (using that term in the technical sense), but to those who have one of the elements declared to be essential to a *bona fide* purchaser, to wit, good faith. It matters not what constructive notice may be chargeable to such a purchaser if, in actual ignorance of any defect in the railroad company's title and in reliance upon the action of the Government in the apparent transfer of title by certification or patent, he has made an honest purchase of the lands. The plain intent of this section is to secure him the lands, and to reinforce his defective title by a direct patent from the United States, and to leave to the Government a simple claim for money against the railroad company." And, referring to the provisions of § 5, it was further said (p. 481): "It is true the term used here is '*bona fide* purchaser,' but it is a *bona fide* purchaser from the company, and the description given of the lands, as not conveyed and 'for any reason excepted from the operation of the grant,' indicates that the fact of notice of defect of title was not to be considered fatal to the right. Congress attempted to protect an honest transaction between a purchaser and a railroad company, even in the absence of a certification or patent." This view of the purpose and meaning of the act was repeated and applied in *Gertgens* v. *O'Connor*, 191 U. S. 237, and *United States* v. *Chicago, Milwaukee & St. Paul Railway Co.*, 195 U. S. 524

As it thus appears that the decision of the Secretary of the Interior was right in point of law, and as it was conclusive upon all questions of fact (*Gertgens* v. *O'Connor*, *supra*), it follows that the state court erred in not sustaining Logan's title obtained under that decision.

Decree reversed.

SMITH *v.* STATE OF TEXAS.

ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

No. 268. Argued March 12, 1914.—Decided May 11, 1914.

Life, liberty, property and equal protection of the laws as grouped together in the Constitution are so related that the deprivation of any one may lessen or extinguish the value of the others.

In so far as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work.

Liberty means more than freedom from servitude; and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.

A State may prescribe qualifications and require an examination to test the fitness of any person to engage, or remain, in the public calling.

While the State may legislate in regard to the fitness of persons privately employed in a business in which public health and safety are concerned, the tests and prohibitions must be enacted with reference to such business, and not so as to unlawfully interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. *Lawton* v. *Steele*, 152 U. S. 133.

Arbitrary tests by which competent persons are excluded from lawful employment must be avoided in state regulations of employment in private business affecting public health and safety. *Smith* v. *Alabama*, 124 U. S. 465.

The statute of Texas of 1909 prohibiting any person from acting as a conductor on a railroad train without having for two years prior thereto worked as a brakeman or conductor of a freight train and prescribing no other qualifications, excludes the whole body of the

public from the right to secure employment as conductors and amounts, as to persons competent to fill the position but who have not the specified qualification, to a denial of the equal protection of the law.

A State cannot, in permitting certain competent persons to accept a specified private employment, lay down a test which absolutely prohibits other competent persons from entering that employment.

Quære, whether such a statute is not also unconstitutional under the Commerce Clause as applied to conductors employed on trains engaged in interstate commerce.

THE facts, which involve the constitutionality of the statute of Texas of 1909 prescribing qualifications for conductors on railroad trains, are stated in the opinion.

Mr. Gardiner Lathrop, with whom *Mr. Robert Dunlap* was on the brief, for plaintiff in error:

The Texas statute deprives defendant, without due process of law, of liberty to engage in a lawful occupation for which he was shown to be well fitted and denies to him the equal protection of the laws. *Yick Wo* v. *Hopkins*, 118 U. S. 369; *Barbier* v. *Connolly*, 113 U. S. 31; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 559; *Lochner* v. *New York*, 198 U. S. 53; *Adair* v. *United States*, 208 U. S. 173; *Dent* v. *West Virginia*, 129 U. S. 114, 124, 125; *Reetz* v. *Michigan*, 188 U. S. 508, 509; Cooley's Const. Lim., 7th ed., pp. 889, 890; *Bank of Columbia* v. *Okely*, 4 Wheat., p. 244; *Marbury* v. *Madison*, 1 Cranch, 176; *Wyeth* v. *Thomas*, 200 Massachusetts, 474; *Josma* v. *Western Car Co.*, 249 Illinois, 508; *Bonnett* v. *Vallier*, 136 Wisconsin, 193; *Chenoweth* v. *Examiners*, 135 Pac. Rep. 771; *Ruhstrat* v. *People*, 185 Illinois, 133, 141, 142; *People* v. *Schenck*, 257 Illinois, 384; *In re Opinion of Justices*, 211 Massachusetts, 618; *Morgan* v. *State*, 101 N. E. Rep. 7; *State* v. *Wagener*, 69 Minnesota, 206; *Commonwealth* v. *Snyder*, 182 Pa. St. 630; *State* v. *Kreutzberg*, 114 Wisconsin, 530; *People* v. *Hawkins*, 157 N. Y. 7; *Vicksburg* v. *Mullane*, 63 So. Rep. 412.

As to what is an arbitrary classification, see *G., C. &*

S. F. Ry. Co. v. *Ellis*, 165 U. S. 150; *Connolly* v. *Union Pipe Co.*, 184 U. S. 549; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79; *Smith* v. *Examiners*, 88 Atl. Rep. 963; *Little* v. *Tanner*, 208 Fed. Rep. 605, 609.

An enactment cannot invade the rights of persons and property under the guise of a police regulation when it is not such in fact. *Eden* v. *People*, 161 Illinois, 296; *People* v. *Marx*, 99 N. Y. 377; *Ritchie* v. *People*, 155 Illinois, 98; *Smith* v. *Alabama*, 124 U. S. 465; *N. C. & St. L. Ry.* v. *Alabama*, 128 U. S. 96; *Williams* v. *Arkansas*, 217 U. S. 79; *Watson* v. *Maryland*, 218 U. S. 173; *C., B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226; *Lawton* v. *Steele*, 152 U. S. 137; *Minnesota* v. *Barber*, 136 U. S. 319; *Brimmer* v. *Rebman*, 138 U. S. 78; *Henderson* v. *New York*, 92 U. S. 259, 268; *Eubank* v. *Richmond*, 226 U. S. 137; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *Butchers' Union* v. *Crescent City Co.*, 111 U. S. 761.

The Texas statute is an unreasonable interference with the carrying on of interstate commerce. *Adams Express Co.* v. *New York*, 232 U. S. 14; *Savage* v. *Jones*, 225 U. S. 525; *Yazoo & Miss. R. R.* v. *Greenwood Grocery Co.*, 227 U. S. 1, 3; *Houston & Tex. Cent. R. R.* v. *Mayes*, 201 U. S. 321; *Central Ry. Co.* v. *Murphy*, 196 U. S. 194, 203, 204.

Mr. B. F. Looney, Attorney General of the State of Texas, and *Mr. Luther Nickels*, for defendant in error, submitted:

The general purpose of the act was within the police power of the State. *Lochner* v. *New York*, 198 U. S. 53; *Mugler* v. *Kansas*, 123 U. S. 623; *In re Kemmler*, 136 U. S. 436; *Crowley* v. *Christensen*, 137 U. S. 86; *In re Converse*, 137 U. S. 624.

A State may prohibit unqualified men from occupying responsible positions in train operation. *Smith* v. *Alabama*, 124 U. S. 465; *N. C. & St. L. Ry. Co.* v. *Alabama*, 128 U. S. 96.

The State has the power to prevent individuals from

making certain kinds of contracts in regard to which the Federal Constitution offers no protection. *Smith* v. *Alabama*, 124 U. S. 465; *N. C. & St. L. Ry. Co.* v. *Alabama*, 128 U. S. 96; *Olsen* v. *Smith*, 195 U. S. 332; *Otis* v. *Parker*, 187 U. S. 606; *Holden* v. *Hardy*, 169 U. S. 366; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *St. L., I. M. &c. Ry. Co.* v. *Paul*, 173 U. S. 404; *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13; *Allgeyer* v. *Louisiana*, 165 U. S. 578.

A man has no right to engage in or pursue any calling, the proper prosecution of which requires a certain amount of technical knowledge or professional skill, the lack of which may result in material injury to the public or individuals, which can be controlled in all cases, or, in proper cases, be taken away by state legislation. *Lochner* v. *New York*, 198 U. S. 53; *Smith* v. *Alabama*, 124 U. S. 465; *N. C. St. L. Ry. Co.* v. *Alabama*, 128 U. S. 96; *Olsen* v. *Smith*, 68 S. W. Rep. 320; *S. C.*, 195 U. S. 332; 1 Tiedeman, p. 242.

The legislature, having the power to prevent unqualified men from pursuing the occupation of conductors, had also the power to classify and the power to prescribe the one qualification of prior service. *McCulloch* v. *Maryland*, 4 Wheat. 316, 421; *License Cases*, 5 How. 504; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Missouri &c. Ry. Co.* v. *May*, 194 U. S. 267; *Gundling* v. *Chicago*, 177 U. S. 183, 188.

If the statute admits of two constructions, one of which is a reasonable exercise of the police power and the other is unreasonable, in that it promotes or does not promote the public interests, the former construction should be adopted, and the statute sustained as constitutional. *People* v. *Warden*, 144 N. Y. 529; 1 Tiedeman, p. 235.

The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. *Dent* v. *West Virginia*, 129 U. S. 122; *Watson* v. *Maryland*, 218 U. S. 173; *State* v. *Loomis*, 115 Missouri, 307; *G., C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 155; *Jones* v. *Brim*, 165 U. S. 180, 183; *Hawker* v. *New*

York, 170 U. S. 197, 198; *County Seat* v. *Linn County*, 15 Kansas, 500, 528.

As to the extent to which the State may go in saying what classes shall be prohibited from engaging in an occupation, and in saying what qualifications those who are permitted to enter shall have, see *Ex parte Lockwood*, 154 U. S. 116; *Bradwell* v. *Illinois*, 16 Wall. 130; *Dent* v. *West Virginia*, 129 U. S. 122; *Hawker* v. *New York*, 170 U. S. 189; *Williams* v. *People*, 9 West. Rep. 461; 121 Illinois, 84; *State* v. *Creditor*, 44 Kansas, 565; *State* v. *Vandersluis*, 42 Minnesota, 129.

The statute does not constitute a direct regulation of interstate commerce. *Smith* v. *Alabama*, 124 U. S. 465, 482; *Nashville &c. Ry. Co.* v. *Alabama*, 128 U. S. 96.

The effect, if any, of the statute upon interstate commerce is incidental only, and, since the statute has a real relation to the suitable protection of the people of the State, it is not invalid even though it may incidentally affect interstate commerce. *Smith* v. *Alabama*, 124 U. S. 465; *Ry. Co.* v. *Alabama*, 128 U. S. 96; *Plumley* v. *Massachusetts*, 155 U. S. 461; *Hennington* v. *Georgia*, 163 U. S. 299; *N. Y., N. H. & H. Ry. Co.* v. *New York*, 165 U. S. 628; *C., M. & St. P. Ry. Co.* v. *Solan*, 169 U. S. 133; *M., K. & T. Ry. Co.* v. *Haber*, 169 U. S. 613; *Patapsco Guana Co.* v. *North Carolina*, 171 U. S. 345; *Reid* v. *Colorado*, 187 U. S. 137; *Pennsylvania Ry. Co.* v. *Hughes*, 191 U. S. 477; *Crossman* v. *Lurmann*, 192 U. S. 189; *McLean* v. *Denver & R. G. Ry. Co.*, 203 U. S. 38, 50; *Asbell* v. *Kansas*, 209 U. S. 251, 254–256; *C., R. I. & P. Ry. Co.* v. *Arkansas*, 219 U. S. 453; *Savage* v. *Jones*, 225 U. S. 525.

The effect of the statute being well calculated to secure competent train operatives, and thus to prevent delays and disasters to persons and property in transit in interstate commerce, it works as an aid to such commerce in so far as it affects the same at all. *Southern Ry. Co.* v. *United States*, 222 U. S. 20, 27; *Mobile County* v. *Kimball*

County, 102 U. S. 691; *N. Y., N. H. & H. Ry. Co.* v. *New York*, 165 U. S. 628.

MR. JUSTICE LAMAR delivered the opinion of the court.

W. W. Smith, the plaintiff in error, a man 47 years of age, had spent 21 years in the railroad business. He had never been a brakeman or a conductor, but for six years he served as fireman, for three years ran as extra engineer on a freight train, for eight years was engineer on a mixed train, hauling freight and passengers, and for four years had been engineer on a passenger train of the Texas & Gulf Railway. On July 22, 1910, he acted as conductor of a freight train running between two Texas towns on that road. There is no claim in the brief for the State that he was not competent to perform the duties of that position. On the contrary it affirmatively and without contradiction appeared that the plaintiff in error, like other locomotive engineers, was familiar with the duties of that position and was competent to discharge them with skill and efficiency. He was, however, found guilty of the offense of violating the Texas statute which makes it unlawful for any person to act [1] as conductor of a freight train without having

[1] SEC. 2. If any person shall act or engage to act as a conductor on a railroad train in this State without having for two (2) years prior thereto served or worked in the capacity of a brakeman or conductor on a freight train on a line of railroad, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars, and each day he so engages shall constitute a separate offense.

SEC. 3. If any person shall knowingly engage, promote, require, persuade, prevail upon or cause any person to do any act in violation of the provisions of the two preceding sections of this act, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars, and each day he so engages shall constitute a separate offense. (Act of March 11, 1909, c. 46, General Laws of Texas 1909, p. 92.)

previously served for two years as conductor or brakeman on such trains. On that verdict he was sentenced to pay a fine and the judgment having been affirmed the case is here on a record in which he contends that the statute under which he was convicted violated the provisions of the Fourteenth Amendment.

1. Life, liberty, property and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three. In so far as a man is deprived of the right to labor his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.

If the service is public the State may prescribe qualifications and require an examination to test the fitness of any person to engage in or remain in the public calling. *Ex parte Lockwood*, 154 U. S. 116; *Hawker* v. *New York*, 170 U. S. 189; *Watson* v. *Maryland*, 218 U. S. 173. The private employer may likewise fix standards and tests, but, if his business is one in which the public health or safety is concerned, the State may legislate so as to exclude from work in such private calling those whose incompetence might cause injury to the public. But as the public interest is the basis of such legislation, the tests and prohibition should be enacted with reference to that object and so as not unduly to "interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." *Lawton* v. *Steel*, 152 U. S. 133, 137.

A discussion of legislation of this nature is found in *Nashville &c. Ry.* v. *Alabama*, 128 U. S. 96, 98, where this court sustained the validity of a statute which required

all locomotive engineers to submit to an examination for color-blindness and then provided that those unable to distinguish signals should not act as engineers on railroad trains. That statute did not prevent any competent person from being employed, but operated merely to exclude those who, on examination were found to be physically unfit for the discharge of a duty where defective eyesight was almost certain to cause loss of life or limb. Another case cited by the plaintiff in error is that of *Dent* v. *West Virginia*, 129 U. S. 114. The act there under review provided that no one except licensed physicians should be allowed to practice medicine, and declared that licenses should be issued by the State Board of Health only to those (1) who were graduates of a reputable medical college; (2) to those who had practiced medicine continuously for ten years; or (3) to those who after examination were found qualified to practice. Ten years' experience was accepted as proof of fitness, but such experience was not made the sole test, since the privilege of practicing was attainable by all others who, by producing a diploma or by standing an examination, could show that they were qualified for the performance of the duties of the profession. In answer to the contention that the act was void because it deprived the citizen of the liberty to contract and the right to labor the court said no objection could be raised to the statutory requirements "because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation" (p. 122).

The necessity of avoiding the fixing of arbitrary tests by which competent persons would be excluded from lawful employment is also recognized in *Smith* v. *Alabama*, 124 U. S. 465, 480. There the act provided that all engineers should secure a license, and in sustaining the

validity of the statute the court pointed out that the law "requires that every locomotive engineer shall have a license, but it does not limit the number of persons who may be licensed nor prescribe any arbitrary conditions to the grant." This and the other cases establish, beyond controversy, that in the exercise of the police power the State may prescribe tests and require a license from those who wish to engage in or remain in a private calling affecting the public safety. The liberty of contract is, of course, not unlimited; but there is no reason or authority for the proposition that conditions may be imposed by statute which will admit some who are competent and arbitrarily exclude others who are equally competent to labor on terms mutually satisfactory to employer and employé. None of the cases sustains the proposition that, under the power to secure the public safety, a privileged class can be created and be then given a monopoly of the right to work in a special or favored position. Such a statute would shut the door, without a hearing, upon many persons and classes of persons who were competent to serve and would deprive them of the liberty to work in a calling they were qualified to fill with safety to the public and benefit to themselves.

2. The statute here under consideration permits those who had been freight conductors for two years before the law was passed, and those who for two years have been freight conductors in other States, to act in the same capacity in the State of Texas. But barring these exceptional cases, the act permits brakemen on freight trains to be promoted to the position of conductor on a freight train, but excludes all other citizens of the United States from the right to engage in such service. The statute does not require the brakeman to prove his fitness, though it does prevent all others from showing that they are competent. The act prescribes no other qualification, for appointment as conductor, than that for two years the

applicant should have been a brakeman on a freight train, but affords no opportunity to any others to prove their fitness. It thus absolutely excludes the whole body of the public, including many railroad men, from the right to secure employment as conductor on a freight train.

For it is to be noted that under this statute, not only the general public, but also four classes of railroad men, familiar with the movement and operation of trains and having the same kind of experience as a brakeman, are given no chance to show their competency but are arbitrarily denied the right to act as conductors. The statute excludes firemen and engineers of all trains and all brakemen and conductors of passenger trains. But no reason is suggested why a brakeman on a passenger train should be denied the right to serve in a position that the brakeman on a freight train is permitted to fill. Both have the same class of work to do, both acquire the same familiarity with rules, signals and methods of moving and distributing cars, and if the training of one qualifies him to serve as conductor the like training of the other should not exclude him from the right to earn his living in the same occupation.

It is argued in the brief for the State that in practice, brakemen on freight trains are generally promoted to the position of freight conductors and then to the position of conductors on passenger trains. And yet, under this act even passenger conductors, of the greatest experience and highest capacity, would be punished if they acted as freight conductors without having previously been brakemen.

The statute not only prevents experienced and competent men in the passenger service from acting as freight conductors, but it excludes the engineer on a freight train,—even though, under the rules of all railroads, the freight engineer now acts as conductor in the event the regular conductor is disabled en route. This general cus-

tom is a practical recognition of their qualification and is founded on the fact that the engineer, by virtue of his position, is familiar with the rules and signals relating to the train's movement and peculiarly qualified for the performance of the duties of conductor. If we cannot take judicial knowledge of these facts the record contains affirmative proof on the subject. For, according to the testimony [1] of the State's witness "acting as engineer on

[1] I understand the railroad business and know that a locomotive engineer learns as much about how a freight train should be operated by a conductor as a brakeman or conductor. Acting as engineer on a freight train will better acquaint one with a knowledge of how to operate a freight train than acting as brakeman. Under the rules of all railroads, and of The Texas & Gulf Railway Company, the engineer is held equally responsible with the conductor for the safe operation of the train. All orders are given to the engineer as well as to the conductor. Every order sent to a conductor on a train is made in duplicate and one copy of it is given to the conductor and the other to the engineer. It is a rule with railway companies that if anything should happen to disable the conductor or in any way prevent his proceeding with his train, the engineer is to immediately take charge of the train and handle it into the terminal. The engineer is constantly with the train and knows all of the signals, knows how the couplings are made, knows how the cars are switched and distributed, and knows how they are taken into the train and transported from one place to another. An engineer is so constantly associated with all the work of a conductor on a freight train that he should know as much about how a freight train should be operated by a conductor as the conductor himself. All actions of the conductor that pertain to the safe operation of the train are being carried on in his presence and within his observation all the time. The matter of handling the way bills and ascertaining the destinations of the cars in his train is easy and plain, and it does not take a person that has had experience as a conductor to understand that part of his service. The way bills are plainly written and the destinations plainly given, and booking the way bills and delivering them with the cars is clerical, and can be done by any one that can read and write and who has ordinary sense. Every act that is to be done by the conductor toward the safe handling of the train also has to be done by the engineer, and all of the conductor's acts with reference to this are in the view and observation of the engineer.

a freight train will better acquaint one with a knowledge of how to operate a freight train than acting as brakeman." And yet, though at least equally competent, the engineer is denied the right to serve as conductor and the exclusive right of appointment and promotion to that position is conferred upon brakemen.

3. So that the case distinctly raises the question as to whether a statute, in permitting certain competent men to serve, can lay down a test which absolutely prohibits other competent men from entering the same private employment. It would seem that to ask the question is to answer it—and the answer in no way denies the right of the State to require examinations to test the fitness and capacity of brakemen, firemen, engineers and conductors to enter upon a service fraught with so much of risk to themselves and to the public. But all men are entitled to the equal protection of the law in their right to work for the support of themselves and families. A statute which permits the brakeman to act—because he is presumptively competent—and prohibits the employment of engineers and all others who can affirmatively prove that they are likewise competent, is not confined to securing the public safety but denies to many the liberty of contract granted to brakemen and operates to establish rules of promotion in a private employment.

If brakemen only are allowed the right of appointment to the position of conductors, then a privilege is given to them which is denied all other citizens of the United States. If the statute can fix the class from which conductors on freight trains shall be taken, another statute could limit the class from which brakemen and conductors on passenger trains could be selected, and so, progressively, the whole matter, as to who could enter the railroad service and who could go from one position to another, would be regulated by statute. In the nature of the case, promotion is a matter of private business management, and

should be left to the carrier company, which, bound to serve the public, is held to the exercise of diligence in selecting competent men, and responsible in law for the acts of those who fill any of these positions.

4. There was evidence that Smith safely and properly operated the train which had in it cars containing freight destined for points in Texas, Missouri, Oklahoma and Kansas. But in view of what has been said it is not necessary to consider whether the plaintiff, as engineer, was in a position to raise the point that under the decision in *Adams Express Co.* v. *City of New York*, 232 U. S. 14, the statute interfered with interstate commerce.

The judgment is reversed and the case remanded to the Court of Criminal Appeals of the State of Texas for further proceedings not inconsistent with this opinion.

MR. JUSTICE HOLMES dissents.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS *v.* CADE.

ERROR TO THE JUSTICE COURT, PRECINCT NO. 7, DALLAS COUNTY, TEXAS.

No. 522. Submitted February 24, 1914.—Decided May 11, 1914.

Where a state statute has been held unconstitutional under the state constitution by an inferior state court, and subsequently has been upheld by the highest court of the State, this court, when the case is properly here under § 237, Judicial Code, must regard the statute as valid under the state constitution and consider only the question of its validity under the Federal Constitution, although intermediately this court has followed the decision of the lower state court.

The validity of a state statute under the commerce clause or the Act to Regulate Commerce cannot be attacked in a suit which is not based upon a claim arising out of interstate commerce.

A State may classify claims against persons or corporations where there is no classification of debtors and where the claims are not grouped together for the purpose of bearing against any class of citizens or corporations.

A state police regulation designed to promote payment of small claims of certain classes and discourage unnecessary litigation respecting them should not be set aside by the Federal courts on the ground that claims of other kinds have not been included, where the legislature was presumably dealing with an actual mischief and made the act as broad in its scope as seemed necessary from the practical standpoint.

The Fourteenth Amendment does not require that state laws shall be perfect.

In the absence of a construction by the state courts to that effect, this court will not concede that a state statute confers its benefits only upon natural persons who are plaintiffs in certain classes of actions and not upon corporation plaintiffs.

A defendant corporation is not in a position to assail a state statute as denying equal protection of the law because its benefits do not inure to corporations which are plaintiffs.

If the classification is otherwise reasonable, a state statute does not deny equal protection of the law because attorney's fees are allowed to successful plaintiffs only and not to successful defendants. The classification is reasonable.

A statute allowing an attorney's fee in cases involving small amounts is not one imposing a penalty where it appears that the effect is merely to require defendant to reimburse plaintiff for part of his expenses.

This court follows the construction of the highest court of the State to the effect that a statute imposing an attorney's fee on the defeated defendant is limited to claims of an amount specified in the title.

The statute of Texas of 1909 imposing an attorney's fee on the defeated defendant in certain classes of cases, as the same has been construed by the highest court of that State, is not unconstitutional under the equal protection provision of the Fourteenth Amendment. *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150, distinguished.

THE facts, which involve the construction and constitutionality under the equal protection provision of the Fourteenth Amendment of a statute of Texas of 1909 imposing an attorney's fee on the defeated defendant in certain classes of cases, are stated in the opinion.

Mr. Joseph M. Bryson, *Mr. Aldis B. Browne*, *Mr. Alexander S. Coke* and *Mr. A. H. McKnight*, for plaintiff in error:

The act is void because in conflict with the due process and equal protection provisions of the Fourteenth Amendment.

The act is in part a regulation of, a burden upon and an interference with interstate commerce, contrary to subd. 3, § 8, Art. I, Constitution of the United States, and is in conflict with the Act to Regulate Commerce, and to that extent is void, and since the good, if any, and the bad in it are so intermingled that the one cannot be separated from the other, the act must fail in whole.

In support of these contentions, see *Adams Exp. Co.* v. *Croninger*, 226 U. S. 491; *Adams Exp. Co.* v. *New York*, 232 U. S. 14; *A., T. & S. F. Ry. Co.* v. *Matthews*, 174 U. S. 96; *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186; *Barbier* v. *Connolly*, 113 U. S. 27; *Barrett* v. *Indiana*, 229 U. S. 30; *Blake* v. *McClung*, 172 U. S. 259; *Bradley* v. *Richmond*, 227 U. S. 481; *Central R. R. Co.* v. *Murphey*, 196 U. S. 194; *C., R. I. & P. Ry. Co.* v. *Hardwick Elevator Co.*, 226 U. S. 426; *Chi., Mil. &c. Ry. Co.* v. *Polt*, 232 U. S. 165; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79; *El Paso & N. E. R. R. Co.* v. *Gutierrez*, 215 U. S. 97; *Employers' Liability Cases*, 207 U. S. 501; *Fidelity Mut. Life Ass'n* v. *Mettler*, 185 U. S. 308; *Ft. Worth &c. Ry. Co.* v. *Lloyd*, 132 S. W. Rep. 899; *G., C. & S. F. Ry. Co.* v. *Dennis*, 224 U. S. 503; *G., C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150; *G., C. & S. F. Ry. Co.* v. *Hefley*, 158 U. S. 98; *G., C. & S. F. Ry. Co.* v. *Thorn*, 227 U. S. 675; *Hale* v. *Henkel*, 201 U. S. 76; *Ill. Cent. R. R. Co.* v. *McKendree*, 203 U. S. 529; *Int. Com. Comm.* v. *L. & N. R. R. Co.*, 227 U. S. 88; *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639; *M. K., & T. Ry. Co.* v. *Harriman*, 227 U. S. 657; *M., K. & T. Ry. Co. of Tex.* v. *Mahaffey*, 150 S. W. Rep. 881; *Mo. Pac. Ry. Co.* v. *Humes*, 115 U. S. 512; *Mondou* v. *N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1; *Nor. Pac. Ry. Co.* v. *Washington*, 222 U. S. 370; *St. L., I. M. & So. Ry. Co.* v. *Wynne*, 224 U. S.

354; *St. L. & S. F. Ry. Co.* v. *Mathews*, 165 U. S. 1; *Seaboard Air Line* v. *Seegers*, 207 U. S. 73; *Simpson* v. *Shepard*, 230 U. S. 352; *Sinnot* v. *Davenport*, 22 How. 242; *Smyth* v. *Ames*, 169 U. S. 522; *Southern R. Co.* v. *Greene*, 216 U. S. 400; *Southern R. Co.* v. *Reid*, 222 U. S. 424; *Southern R. Co.* v. *Reid & Beam*, 222 U. S. 444; *United States* v. *Reese*, 92 U. S. 221; *Yazoo & Miss. Valley R. R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

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

MR. JUSTICE PITNEY delivered the opinion of the court.

This action was brought in the Justice Court to recover the sum of ten dollars and seventy-five cents alleged to be due as wages from the defendant (now plaintiff in error) to the plaintiff below, with an attorney's fee of nine dollars. The fee was claimed only by virtue of an act of the legislature, approved March 13, 1909, Laws, p. 93, now forming Arts. 2178 and 2179, Texas Rev. Civ. Stat. 1911. Defendant specially excepted to this part of plaintiff's claim, on the ground that the act was invalid as constituting a burden upon interstate commerce, contrary to the Commerce Clause of the Federal Constitution and the Act to Regulate Commerce and amendments thereof, and as violating the "equal protection" and "due process" clauses of the Fourteenth Amendment. Notwithstanding these contentions, judgment was rendered in favor of plaintiff for the amount claimed, including the attorney's fee. Under the local practice, no appeal lies from a decision of the Justice Court to a higher state court in a case involving less than twenty dollars, and so the judgment is brought directly here by writ of error for a review of the Federal questions.

The statute in question (including its caption) is set

forth in the margin.[1] This is the same act that was held invalid under the state constitution by the Court of Civil Appeals in *Fort Worth & D. C. Ry. Co.* v. *Loyd*, 132 S. W. Rep. 899, because of which decision this court, in *Gulf, Col-*

[1] "An Act to regulate the presentation and collection of claims for personal services or for labor rendered, or for material furnished, or for overcharges in freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by any person or corporation, against any person or corporation doing business in this State, and providing a reasonable amount of attorney's fees to be recovered, in cases where the amount of such claims shall not exceed two hundred ($200) dollars, and declaring an emergency.

"SECTION 1. That hereafter any person in this State, having a valid, *bona fide* claim against any person or corporation doing business in this State, for personal services rendered or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation, its agents or employés, may present the same to such person or corporation or to any duly authorized agent thereof, in any county where suit may be instituted for the same; and if, at the expiration of thirty days after the presentation of such claim, the same has not been paid or satisfied, he may immediately institute suit thereon in the proper court, and if he shall finally establish his claim, and obtain judgment for the full amount thereof, as presented for payment to such person or corporation in such court he shall be entitled to recover the amount of such claim and all costs of suit, and in addition thereto a reasonable amount as attorney's fees, provided, he has an attorney employed in the case, not to exceed twenty ($20.00) dollars, to be determined by the court or jury trying the case; provided, however, that nothing in this Act shall be construed to repeal or in any manner affect any provision of the law now in force giving a remedy to persons having claims of the character mentioned in this Act, but the same shall be considered as cumulative of all other remedies given to such a person or persons.

"SEC. 2. The fact that there is no law now in force in this State providing an effectual remedy for persons having such claims as are mentioned in this Act, creates an emergency and an imperative public necessity requiring the suspension of the constitutional rule requiring bills to be read on three several days, and this Act shall take effect from and after its passage, and it is so enacted.

"Approved March 13, 1909."

orado & S. F. Railway v. *Dennis*, 224 U. S. 503, reversed a judgment that included an attorney's fee, without passing upon the question whether the act contravened the Fourteenth Amendment. And see *Gulf, Colorado & S. F. Railway* v. *Thorn*, 227 U. S. 675. Since that time the Supreme Court of Texas, overruling the decision in the *Loyd Case*, has upheld the act under the Texas constitution, in *Missouri, Kan. & Texas Ry. Co. of Texas* v. *Mahaffey*, 105 Texas, 394. We must therefore now consider the Federal questions.

But first, we should note the construction placed upon the act by the state court of last resort. Section 35 of Article III of the constitution of 1876 declares that no bill except appropriation bills shall contain more than one subject, which shall be expressed in its title; "But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." In the case last mentioned (105 Texas, 394, 398), the court construed the act as limited in its operation to the purpose expressed in the title, that is, as relating only to the collection of claims not exceeding two hundred dollars in amount, and as conferring no right upon persons having claims exceeding that amount which did not exist independently of the act. In reaching this conclusion, the court said: "Surely, the Legislature did not intend to limit attorney's fees to twenty dollars in a case involving one thousand dollars, and there is no apparent reason for allowing additional attorney's fee of twenty dollars in a case involving so large an amount, but there is a sound reason for allowing and limiting the amount of fee on small claims. If the claim be two hundred dollars, or less, and suit must be instituted, which makes an attorney necessary, it is a heavy tax on the claimant; therefore, if he present a just demand which is refused, the recovery of the full amount claimed shows that the demand of payment should have

been granted, and this law compels one refusing payment of such demand to pay the cost and attorney's fees, not to exceed twenty dollars. The limitation of the amount of the fee to twenty dollars and to cases in which an attorney has been actually employed practically implies that such action might be prosecuted without an attorney which in effect limits the amount of the claim to two hundred dollars, because the only court in which suits of that character could be instituted by non-professional claimants, without the services of an attorney, is that of justice of the peace, whose jurisdiction cannot exceed two hundred dollars, therefore, the limitation in the caption is in effect the same as that of the body of the law, because the proviso in the law can be harmonized with the title by no other construction."

So far as the present attack is founded upon the commerce clause and the Act to Regulate Commerce, it is sufficient to say that the judgment under review was not based upon a claim arising out of interstate commerce, and hence plaintiff in error does not bring itself within the class with regard to whom it claims the act to be in this respect repugnant to the Constitution and laws of the United States. *Seaboard Air Line* v. *Seegers*, 207 U. S. 73, 76; *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; *Farmers Bank* v. *Minnesota*, 232 U. S. 516, 530; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544.

Upon the other questions, plaintiff in error relies chiefly upon *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150. In that case a previous act of the legislature of Texas (act of April 5, 1889, c. 107, General Laws, p. 131; Supp. to Sayles' Tex. Civ. Stat., Art. 4266 *a;* p. 768) was held repugnant to the Fourteenth Amendment. That act

allowed the recovery of plaintiff's attorney's fees in certain classes of cases, but only where the defendant was a railroad company, and it was adjudged to be invalid because it singled out a particular class of debtors and imposed this burden upon them, without any reasonable ground existing for the discrimination. The classification was held to be arbitrary, because having no relation to the special privileges granted to this class of corporations, or to the peculiar features of their business, distinguishing *Missouri Pacific Railway Co.* v. *Humes*, 115 U. S. 512.

The present statute, however, differs in essential features. It applies to claims "against any person or corporation doing business in this State, for personal services rendered or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation, its agents or employés." There is here no classification of debtors; the act bears equally against individuals and against corporations of any class doing business in the State. It applies only to certain kinds of claims; but these cover a wide range, and do not appear to have been grouped together for the purpose of bearing against any class or classes of citizens or corporations. Unless something of this sort did appear, we should not be justified in holding the act to be repugnant to the Fourteenth Amendment. It is a police regulation designed to promote the prompt payment of small claims and to discourage unnecessary litigation in respect to them. The claims included appear to be such as are susceptible of being readily adjusted by the party responsible, within the thirty days that must intervene between the presentation of the claim and the institution of suit. We may imagine that some other kinds of claims might as well have been included; but it is to be presumed that the legislature was dealing with an actual mischief, and made the act as broad in its scope as seemed

necessary from the practical standpoint. As has been said before, the Fourteenth Amendment does not require that state laws shall be perfect; and we cannot judicially denounce this act as based upon arbitrary distinctions, in view of the wide discretion that must necessarily reside in a state legislature about resorting to classification when establishing regulations for the welfare of those for whom they legislate. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 293; *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557, 562; *Louisville & Nashville R. R.* v. *Melton*, 218 U. S. 36, 52; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78.

It is insisted that the benefits of the act are conferred upon natural persons only; but this we cannot concede, in the absence of a decision by the courts of the State giving to it a construction thus limited. *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 546. And besides, plaintiff in error is not in a position to assail the legislation on the ground that corporation-plaintiffs are not included within its benefits. *Rosenthal* v. *New York*, 226 U. S. 260, 271.

If the classification is otherwise reasonable, the mere fact that attorney's fees are allowed to successful plaintiffs only, and not to successful defendants, does not render the statute repugnant to the "equal protection" clause. This is not a discrimination between different citizens or classes of citizens, since members of any and every class may either sue or be sued. *Actor* and *reus* differ in their respective attitudes towards a litigation; the former has the burden of seeking the proper jurisdiction and bringing the proper parties before it, as well as the burden of proof upon the main issues; and these differences may be made the basis of distinctive treatment respecting the allowance of an attorney's fee as a part of the costs. *Atchison, Topeka &c. Railroad* v. *Matthews*, 174 U. S. 96; *Farmers' &c. Ins. Co.* v. *Dobney*, 189 U. S. 301, 304; *McMullin* v. *Doughty*, 68 N. J. Eq. 776, 781.

Even were the statute to be considered as imposing a penalty upon unsuccessful defendants in cases within its sweep, such penalty is obviously imposed as an incentive to prompt settlement of small but well-founded claims, and as a deterrent of groundless defenses, which are the more oppressive where the amount involved is small. In *Seaboard Air Line* v. *Seegers*, 207 U. S. 73, 77, the court sustained a state enactment that imposed a fixed penalty of fifty dollars upon common carriers, to be recovered by the party aggrieved, for failure to promptly adjust and pay claims for loss or damage to property while in the carrier's possession. In *Yazoo & Miss. R. R.* v. *Jackson Vinegar Co.*, 226 U. S. 217, 219, we upheld a state enactment that imposed a penalty of twenty-five dollars in addition to actual damages for failure to settle claims for lost or damaged freight within a limited time after written notice of the loss. And in *Kansas City Southern Ry.* v. *Anderson*, decided this term, *ante*, p. 325, we upheld the imposition of double damages in cases admitting of special treatment.

But we think it is not correct to consider this statute as imposing a penalty. The allowance is confined to a reasonable attorney's fee, not exceeding twenty dollars, where an attorney is actually employed; the amount to be determined by the court or jury trying the case. Manifestly, the purpose is merely to require the defendant to reimburse the plaintiff for a part of his expenses not otherwise recoverable as "costs of suit." So far as it goes, it imposes only compensatory damages upon a defendant who, in the judgment of the legislature, unreasonably delays and resists payment of a just demand. The outlay for an attorney's fee is a necessary consequence of the litigation, and since it must fall upon one party or the other, it is reasonable to impose it upon the party whose refusal to pay a just claim renders the litigation necessary. The allowance of ordinary costs of suit to the

prevailing party rests upon the same principle. 2 Bac. Abr. tit. Costs. Numerous cases in the state courts have sustained similar legislation. *Vogel* v. *Pekoc*, 157 Illinois, 339, 344, 346; *Burlington &c. Ry. Co.* v. *Dey*, 82 Iowa, 312, 340; *Cameron* v. *Chicago &c. Ry. Co.*, 63 Minnesota, 384, 388; *Wortman* v. *Kleinschmidt*, 12 Montana, 316, 330. If a reasonable penalty may be imposed for failure to satisfy a demand found to be just, it follows *a fortiori* that costs and an attorney's fee may be. See *Atchison, Topeka &c. Railroad* v. *Matthews*, 174 U. S. 96, 105; *Farmers' &c. Ins. Co.* v. *Dobney*, 189 U. S. 301, 304.

For these reasons, it seems to us that the statute in question is not repugnant to either the "equal protection" or the "due process" clauses of the Fourteenth Amendment.

Judgment affirmed.

ENNIS WATER WORKS *v.* CITY OF ENNIS.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 305. Argued May 1, 4, 1914.—Decided May 25, 1914.

Although when the assertion is made that contract rights are impaired it is the duty of this court to determine for itself whether or not there was a valid contract, in considering a contract arising from a state law or a municipal ordinance this court will treat it as though there was embodied in its text the settled rule of law which existed in the State when the action relied upon was taken.

Where the state court based its decision on the ground that there was no original legislative contract to be impaired under a rule of state law which had been so conclusively established as to make the assertion that contract rights were impaired by subsequent legislation

frivolous and unsubstantial, there is no basis afforded for jurisdiction of this court to review the judgment under § 237, Judicial Code. Writ of error to review 105 Texas, 63, dismissed.

THE facts, which involve the jurisdiction of this court under § 237, Judicial Code, are stated in the opinion.

Mr. G. C. Groce, with whom *Mr. Jack Beall* was on the brief, for plaintiff in error:

The franchise ordinance in issue, if properly construed, grants no exclusive rights and creates no monopoly.

A franchise grant should, if practicable, be given a construction which will uphold it, rather than one which would render it illegal.

The City of Ennis had authority to make the contract herein in issue with reference to its own lakes, and the franchise is reasonable in terms.

This court, in determining whether there is a contract, and whether it is being impaired, contrary to the guaranties of the Federal Constitution, acts independently of the state courts.

The ordinances undertaking to annul and repeal the franchise are laws impairing the obligations of a contract.

This court has jurisdiction.

In support of these contentions, see *Altgelt* v. *San Antonio,* 81 Texas, 436; *Atlantic City Water Co.* v. *Consumers Water Co.,* 44 N. J. Eq. 427; *Bartholomew* v. *Austin,* 29 C. C. A. 568; *Caldwell* v. *Water Power Co.,* 44 N. J. Eq. 245; *City of Austin* v. *Nalle,* 85 Texas, 520; *C., B. & Q. Ry. Co.* v. *Nebraska,* 170 U. S. 57; *Brenham* v. *Water Co.,* 67 Texas, 542; *Vicksburg* v. *Water Co.,* 202 U. S. 553; *Walla Walla* v. *Water Co.,* 172 U. S. 1; Const. Texas, Art. I, §§ 23 and 26; *Cunningham* v. *Cleveland,* 39 C. C. A. 211; *Davis & F. Mfg. Co.* v. *Los Angeles,* 189 U. S. 207; *Edwards County* v. *Jennings,* 89 Texas, 621; *Grand Trunk Ry. Co.* v. *South Bend,* 227 U. S. 544; *Hamilton Gas Co.* v. *Hamilton,*

146 U. S. 258; *Hartford Fire Ins. Co.* v. *Houston*, 102 Texas, 317; *Water Works Co.* v. *Helena*, 195 U. S. 583; *Hurley Water Co.* v. *Vaughn*, 91 N. W. Rep. 971; *Ill. Savings Bank* v. *Arkansas City*, 22 C. C. A. 171; *In re Brooklyn*, 143 N. Y. 596; *Joplin* v. *Light Co.*, 119 U. S. 184; *Water Co.* v. *Little Falls*, 102 Fed. Rep. 663; *Long Island Water Co.* v. *Brooklyn*, 166 U. S. 685; *Mahon* v. *Columbus*, 58 Mississippi, 310; *Mayor* v. *Houston St. Ry. Co.*, 83 Texas, 548; *Mercantile Trust Co.* v. *Columbus*, 203 U. S. 311; *Morgan Bros.* v. *M., K. & T. Ry. Co.*, 110 S. W. Rep. 985; *Nor. Pac. Ry. Co.* v. *Minnesota*, 208 U. S. 590; *Water Co.* v. *Oconto*, 105 Wisconsin, 76; Rev. Stat. Texas, 1895, Art. 418; *Id.*, 1911, Art. 865; *State* v. *G., H. & S. A. Ry. Co.*, 100 Texas, 153; *Stearns* v. *Minnesota*, 179 U. S. 223; *Stein* v. *Bienville Water Co.*, 141 U. S. 67; *Gaslight Co.* v. *St. Paul*, 181 U. S. 142; *Water Co.* v. *Syracuse*, 116 N. W. Rep. 167; *Tex. Cent. R. R. Co.* v. *Marrs*, 100 Texas, 530; *Valparaiso* v. *Gardner*, 49 Am. Rep. 416; *Water Co.* v. *Waco*, 27 S. W. Rep. 675; *Water Co.* v. *Hutchinson*, 207 U. S. 385.

Mr. Rhodes S. Baker for defendant in error.

Mr. Chief Justice White delivered the opinion of the court.

In March, 1909, the City of Ennis, Texas, passed an ordinance which purported to be a contract with A. M. Morrison, the owner of a waterworks system in the city, granting to him for the term of thirty years the privilege of supplying water to the city and its inhabitants from certain lakes or reservoirs owned by the city. Morrison accepted the ordinance and assigned his rights to the Ennis Water Works, the plaintiff in error. In April, 1909, the city passed an ordinance declaring that Morrison and the Ennis Water Works had derived no rights from the supposed contract made with them because the ordinance pur-

porting to confer such rights was originally void, and directing suit to be brought "to adjudicate the nullity of said claim of franchise and to regain for the city its rights in the premises." Suit was then brought to have it decreed that the alleged contract with Morrison was void. Pending the suit and before its decision, in March, 1910, for reasons which the record does not disclose, another ordinance in terms like the previous one was adopted by the city which was brought into the case by an amendment to the bill. A judgment in favor of the city was affirmed by the Court of Civil Appeals and by the Supreme Court (105 Texas, 63). This writ of error is prosecuted upon the assumption that the original ordinance was a contract and that the decree below gave effect to the subsequent ordinances thus impairing the obligation of the contract in violation of the Constitution of the United States.

At the outset our jurisdiction is challenged upon three grounds: 1. Because even under the assumption that the city ordinances were the sole authority for bringing the suit, those ordinances did not purport in any way to impair the contract if one existed, but simply directed a legal test to be made and therefore there was no subsequent act of impairment. 2. That even if the ordinances could be treated as impairing the supposed contract, the court below did not decide the case upon any theory that there was power to impair the contract if one existed, but exclusively rested its action upon the independent ground that the original ordinance at the time of its adoption was repugnant to the state constitution and was therefore void. 3. That even if it be the duty of this court to determine for itself whether the state court rightly concluded that there was originally no contract, nevertheless there is no jurisdiction in this case because the court below in deciding that there was originally no contract, based its action upon a rule of state law which had been so conclu-

sively determined at the time the alleged ordinance relied on as a contract was adopted, that the assertion that there is a contract right is of so frivolous and unsubstantial a character as to afford no basis for jurisdiction.

The face of the record so clearly manifests the correctness of the third proposition, that we pass at once to its consideration. It is apparent on the face of the opinion of the court below that it did not at all rest its conclusion upon original reasoning concerning the asserted contract, but only applied to the decision of that question a doctrine which long prior to the adoption of the ordinance relied on as a contract had been announced by the court of last resort of Texas in *City of Brenham* v. *Brenham Water Company* (67 Texas, 542, decided in 1887), in which case there was involved a city ordinance which was substantially identical with the one which is here under consideration. Nothing could more conclusively demonstrate this view than does the following excerpt from the opinion of the court below:

"If this court is to adhere to the holding in the *Brenham* case, then we are forced to the conclusion that the judgment of the Court of Civil Appeals should be affirmed, for there is no possible theory upon which this case can be distinguished from the *Brenham* case. This statement will receive verification by a comparison of the two contracts, as set out in the opinions in the two cases." (105 Texas, 71.)

After pointing out that the doctrine of the *Brenham* case was consecrated by other decisions which had followed it, and that the principle of interpretation which it applied could not be said to be clearly erroneous, the court said (p. 74):

"However, we do not feel called upon to enter into any further discussion of the subject of the nature of the contract in this case, as it has been construed by the *Brenham* case, which authority has stood the acknowledged law

of this State for twenty-five years. At the time the contract in the case at bar was entered into, the *Brenham* case had been promulgated for over thirteen years and had been approved by all the cases heretofore cited. It had placed upon a similar contract a rule of construction, and announced the general policy of the law of this State that was well known to its bar and people. No rights could have innocently accrued to the plaintiff in error demanding a change of the law to meet a great and imperative necessity. If a harsh rule of construction had been announced, it was not placed under a bushel, but set upon a hill. Such contract had been declared repugnant to the Constitution, and the provisions of that instrument declaring monopolies and perpetuities contrary to the genius of a free government had received a definite construction."

It is insisted, however, that since it is our duty when the assertion is made that contract rights are impaired to determine for ourselves whether or not there was a valid contract, we must hence now determine this controversy by resort to original reasoning without regard to the action of the court below in applying the state rule. But while the premise upon which this contention rests is well founded, the error lies in the deduction which seeks to make it applicable to this case. This is clearly the case since the doctrine which the premise embodies is subject to this qualification, that where a contract which is relied upon arises from a state law or municipal ordinance having the effect of such law, in interpreting for itself such law or ordinance this court will not give to it a meaning in conflict with the settled rule of the State at the time the law was enacted or the ordinance adopted. In other words, that where we come to consider a contract arising from a state law or ordinance we will treat it as if there was embodied in its text the settled rule of law which existed in the State at the time the state action relied upon as a

contract was taken. *Burgess* v. *Seligman*, 107 U. S. 20; *Warburton* v. *White*, 176 U. S. 484; *Gulf & Ship Island R. R.* v. *Hewes*, 183 U. S. 66; *Freeport Water Co.* v. *Freeport*, 180 U. S. 587; *Great Southern Hotel Co.* v. *Jones*, 193 U. S. 532, 548.

As by the application of this settled rule the absolute want of foundation for the asserted claim of Federal right appears on the face of the ordinance relied upon, it follows that there was no foundation whatever for the theory upon which the jurisdiction of this court was invoked, and hence it is our duty to dismiss the cause for want of jurisdiction because of the absolutely unsubstantial and frivolous character of the Federal right relied upon.

Dismissed for want of jurisdiction.

BOWE *v.* SCOTT.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 360. Argued May 6, 1914.—Decided May 25, 1914.

Where complainants duly asserted Federal rights in opposition to contemplated municipal action, the decision of the court below that they had no right to prevent such action because it was a public wrong which private parties had no right to redress, the Federal right asserted was denied and this court has jurisdiction to review the judgment.

A mere assertion in a state court of a right under the Constitution of the United States, in a petition for rehearing, affords no ground for invoking the jurisdiction of this court unless the court below, in dealing with the petition, considers and passes upon the Federal ground therein relied upon.

A mere allegation in the bill in a suit to enjoin enforcement of an ordinance, that the latter is unconstitutional because impairing the

obligation of a contract between the municipality and a third person not a party to the suit, is not such an assertion of Federal rights as will afford a basis for jurisdiction of this court under § 237, Judicial Code, to review the judgment dismissing the bill.

Where the state constitution contains a due process of law clause, an averment that contemplated action of a municipality would deprive complainant of his property without due process of law, without making reference to the Constitution of the United States or asserting express rights thereunder, is referable to the state constitution alone and affords no basis for invoking the jurisdiction of this court under § 237, Judicial Code.

Writ of error to review 113 Virginia, 499, dismissed.

THE facts, which involve the jurisdiction of this court under § 237, Judicial Code, and what constitutes raising the Federal question in the state court, are stated in the opinion.

Mr. Richard Evelyn Byrd and *Mr. David Meade White* for plaintiffs in error.

Mr. Legh R. Page and *Mr. John S. Eggleston*, with whom *Mr. John P. Leary* was on the brief, for defendants in error.

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

To an understanding of this case we outline the situation of the property in controversy:

Shafer owned a tract of land which came to be within the limits of the City of Richmond, bounded on the north by Franklin Street, on the south by Park Avenue, on the east by Shafer and on the west by Harrison Streets. He dedicated to public use by deed in due form which was accepted by the city, a public alley 20 feet wide, crossing from Shafer to Harrison Street at a distance of about 150 feet south of Franklin Street, the alley being therefore between Franklin and Park Avenue. All the plaintiffs but

one owned lots fronting on the south side of Franklin Street running back and abutting on this alley. The exception was Bolton, whose property faced on Harrison Street and was at the corner of that street and the alley. East of the lots fronting on Franklin Street owned by the plaintiffs in error, that is nearer Shafer Street than were such lots, the defendants in error, Scott and Myers, also owned lots on the south side of Franklin Street running back to the alley. They also owned property back of the alley and which extended a considerable distance between parallel lines towards Park Avenue. The City of Richmond passed an ordinance allowing Scott and Myers to close the alley along the line of their property for a period of thirty years upon the condition that they should not build upon it, that the right to keep it closed should be revocable by the city whenever it deemed best and that the city should be held harmless for any damage which might be incurred from closing the alley. As the result of this ordinance the direct movement between Harrison and Shafer Streets by means of the alley was cut off, but as the right to close only extended along the abutting lines of the Scott and Myers property, the alley remained open along the space where the property of the plaintiffs in error abutted and hence did not disturb their direct access to Harrison Street, and also did not deprive of access to Shafer Street as there were other alleys opening into the twenty-foot alley between Harrison Street and the point where the alley was closed by which this result could be accomplished.

The plaintiffs in error then began this suit against the defendants in error to enjoin the enforcement of the ordinance on the ground that as the alley in question had been dedicated to the public by Shafer and had been accepted by the city and treated as a public alley for many years, the city was without power to grant the right to close it and that doing so would wrongfully inflict damage upon

the plaintiffs as the owners of the property abutting on the alley for reasons which were fully stated in the bill and which it is unnecessary here to detail.

The prayer was that the ordinance be declared null and void and for an injunction enjoining the defendants from closing any portion of the said public alley "so as to obstruct the free passage of your complainants and the public through the said alley." Demurrers were sustained by the court of original jurisdiction among others upon the ground that "conceding for the moment that the ordinance of the City of Richmond challenged in the bill is wholly void, yet this is an attempt made by private individuals to enjoin a public nuisance where the complainants do not show that they had suffered any special or peculiar damage." The bill was dismissed.

The Court of Appeals in affirming the case said (113 Virginia, 499, 500):

"Speaking generally, the obstruction of a public highway is a public nuisance, and the trend of authority is that an individual cannot maintain a bill to enjoin such nuisance unless he can show that he has suffered, or will suffer therefrom, special and peculiar injury or damage to himself, as distinguished from injury or damage to the general public. Moreover, such special and peculiar injury or damage must be direct, and not purely consequential, but must be different in kind, and not merely in degree, from that sustained by the community at large."

And, referring to the opinion of the lower court, it was said (p. 501):

"The learned chancellor, in a clear and conclusive opinion, shows that though the injury to the plaintiffs, as stated in the bill, may be greater than that sustained by other persons living more remote from the scene of the obstruction, such injury is, nevertheless, greater in degree only, and not in kind. Therefore, under the authorities, the

bill does not state a case of such special injury as would entitle the plaintiffs to an injunction. . . .

"Concurring, as we do, in the ruling of the court sustaining the demurrer to the bill, it becomes unnecessary, and would, indeed, be improper, to express any opinion with respect to the validity of the ordinance, or the right of the public to redress the alleged invasion of their prerogative by prosecution, or other appropriate remedy, for a common nuisance."

The case is here upon the assumption that we have jurisdiction because Federal rights are involved, which hypothesis is challenged by a motion to dismiss which we at once come to consider.

The grounds of the motion are, first, that as the court below rested its decision upon the want of right of the plaintiff to prevent the closing of the alley because such closing was in any event a public wrong which under the circumstances the complainants had no right to redress, the case below was decided upon a state ground which was independent of any assumed assertion of Federal right, and there is hence no jurisdiction. We do not stop to notice the many authorities which are cited to sustain from many different angles of vision the premise upon which the proposition rests because we think its inapplicability to the case in hand is so obvious that it is unnecessary to do so. This conclusion is evident because upon the assumption that Federal rights were asserted, the contention of the complainants was that they had such an interest in the property or were so peculiarly and especially damaged that they had a right to prevent the closing of the alley which could not be taken from them without depriving them of their Federal rights. This being true, as it undoubtedly is, it follows that the decision of the court below under the hypothesis stated, amounted to a denial of the existence of the Federal rights which were adequately asserted. And from this it follows that the proposition

now relied upon when rightly considered comes to this, that jurisdiction to enforce and protect a Federal right obtains in no case where such Federal right has been denied.

Second. It is further urged that be this as it may there is no jurisdiction because no assertion of rights under the Constitution was made below until the petition for rehearing which was too late and the tardiness of which was not saved by the action of the court since it simply declined to grant the rehearing without deciding the questions presented as the basis of the request for rehearing. As it is elementary that a mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no ground for invoking the jurisdiction of this court unless the court below in dealing with the petition for rehearing considers and passes upon the Federal ground therein relied upon, we dismiss that subject from view and come to consider whether the record otherwise discloses that a Federal question was so raised below as to support our jurisdiction. The contention that it was, can alone rest upon two paragraphs in the bill as originally filed in the trial court, the one, No. 13, to the following effect:

"Complainants charge and aver that the said ordinance is null and void because it is in conflict with section 10, Article 1, of the Constitution of the United States; that it impairs the obligation of a contract between the said John C. Shafer, who dedicated the land as and for a public alley to the City of Richmond which alley was accepted by the City of Richmond as an alley for public use."

As at best there was no averment in the bill of any contract made with the complainants or any privity between them and Shafer, it cannot possibly be said that this averment amounted to the assertion of the existence in favor of the complainants of a contract protected by the Constitution from impairment. As the one party to the con-

tract, Shafer, was not before the court and was not suing either through himself or by anyone qualified to represent him or having a legal right in his behalf to assert his contract rights, and as the other party to the contract was the City of Richmond, one of the defendants, the entire want of foundation for the assumption that the bill presented a case of impairment of the obligation of a contract within the guarantee of the Constitution of the United States becomes obvious. Besides, we think the conclusion cannot be escaped that when the paragraph in question is considered in the light of the context of the bill, it is conclusively inferable that the averment in the paragraph of an alleged contract between Shafer and the city was not asserted because of the assumed presence of rights under the Constitution in that regard, but solely as a means of stating in another form the want of power in the city to close the alley because as the result of the contract with Shafer it was bound to treat it as a public alley and not close it. And this is reinforced by the fact that no reference to any right under the contract clause is found in the opinion of the trial court, that no suggestion by way of amendment making clear the assertion of a Federal right found expression in an application which was made to amend the bill after the case had been decided, that no assertion of such right was contained in the assignments of error for the purpose of the review by the Court of Appeals although the paragraph in question was referred to in the argument filed to support the assignments as made, and for the further reason that no intimation whatever is contained in the opinion of the Court of Appeals that it deemed that a question under the contract clause of the Constitution arose for decision.

The other passage in the bill is found in subdivision "c" of the tenth paragraph, and is as follows: "That the ordinance is an attempt to take from your complainants whose property adjoins and abuts upon the said alley

their rights in and to said alley without due process of law." But it is settled that such an averment making no reference to the Constitution of the United States and asserting no express rights thereunder is solely referable to the state constitution, which in this instance has a due process clause, and affords no basis whatever for invoking the jurisdiction of this court. *Miller* v. *Cornwall R. R. Co.*, 168 U. S. 131, 134; *Harding* v. *Illinois*, 196 U. S. 78.

As from what we have said it results that there is no foundation whatever for the claims of Federal right relied upon as the basis for invoking the jurisdiction of this court since such claims are so wholly unsubstantial and frivolous as to be devoid of any merit, it follows that we have not jurisdiction and the writ of error must be dismissed.

Dismissed for want of jurisdiction.

McDONALD *v.* OREGON RAILROAD AND NAVIGATION COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 463. Motion to dismiss submitted May 4, 1914.—Decided May 25, 1914.

The due process clause of the Fourteenth Amendment does not control methods of state procedure or give jurisdiction to this court to review mere errors of law alleged to have been committed by a state court in the performance of its duties and within the scope of its authority concerning matters non-Federal in character.

It is the lack of jurisdiction in the sense of fundamental absence of any and all right to take cognizance of the cause that amounts to deprivation of property without due process of law and gives this court power to review the judgment of the state court under § 237, Judicial Code, not the wrongful exercise of jurisdiction in the sense of duty to

rightfully decide subjects to which judicial power extends. *Castillo* v. *McConnico*, 168 U. S. 674.

Where a defendant in the state court did not object to the jurisdiction of the court to entertain an action to enjoin him from enforcing his rights of ownership, but went further and sought affirmative relief in that action, he cannot be heard in this court to deny that the court had any power to exert the very jurisdiction which he invoked.

Writ of error to review 58 Oregon, 228 dismissed.

THE facts, which involve the jurisdiction of this court under § 237, Judicial Code, to review a judgment of the state court involving a railroad right of way, are stated in the opinion.

Mr. W. W. Cotton, *Mr. H. W. Clark* and *Mr. Arthur C. Spencer*, for defendant in error, in support of the motion.

Mr. George E. Chamberlain, *Mr. Will R. King* and *Mr. Turner Oliver*, for plaintiffs in error, in opposition to the motion.

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

The defendant in error, hereafter referred to as the Railroad Company, was plaintiff below and sued the plaintiffs in error who were defendants to enjoin them from interfering with its right of possession of a strip of land constituting a railroad right of way. It was alleged that this strip which traversed property belonging to the defendants had been bought from them by the Railroad Company for a cash price of $600 which was paid, but nevertheless the defendants, asserting some title to the land, were threatening to disturb the railroad in its possession, to tear up a track where laid, and otherwise to prevent the use of the land for the purpose for which it had been bought. The defendants answered and although

admitting that they had sold the land to the railway for a right of way and had received the stipulated price, nevertheless asserted that they were yet the owners of the property for the following reasons: *a*, Because in the deed by which the property was conveyed there was an express condition "that the Oregon Railroad & Navigation Company will construct the line of road over the above described premises within two years from the date hereof." *b*, Because while after the deed the railroad had commenced to construct its road and had graded along the right of way, after doing so it suspended all work so that the two years provided in the deed elapsed without the railroad being built and therefore all right to the land had been lost and the defendants had reëntered and notified the railroad of the fact.

Averring that the land was "reasonably worth the sum of $1000 and the plaintiff has not paid the same nor any part thereof and has not offered to pay defendant anything for said land since its failure to comply with the condition of the deed," the answer prayed not merely the rejection of the plaintiff's demand and the dissolution of the injunction which had been allowed, but asked substantive relief, that is, that the defendants be decreed to be the owners and that the complainant be enjoined from in any way interfering with them and for the awarding of "such other and further relief as shall seem to the court equitable in the premises." After trial at which considerable testimony was taken among other things as to the value of the property, the court, holding in favor of the defendants, decided that the railroad by virtue of its failure to build within the period specified and the reëntry of the defendants, had lost all right to the land and therefore that the subsequent action of the railroad in entering upon the land to complete its railroad was a trespass. The injunction which was issued at the inception of the cause was dissolved. On appeal the court below expressly

adopted the legal principles which the trial court had applied, that is, the court likewise declared the clause in the deed to be a condition and decided that the failure of the railroad to comply with its terms had forfeited all its right and title in and to the land. But nevertheless the decree was not affirmed. After expounding its reasons for fully agreeing with the legal conclusions of the trial court, it was said: "So far, then, we have found that defendants were entitled to a forfeiture and that the land has reverted, but we now recur to the remedy. The situation is anomalous. Plaintiff has constructed its road and has it in operation, thereby performing an important public function for a large and increasing population. . . . It is to the interest of the public that it should continue to do so and that the defendants should not be allowed to acquire a portion of its roadbed to the detriment of public travel. The condemnation of land for railway purposes is usually the function of a court of law, but there are in this case such special circumstances as to authorize this court to end the whole litigation at once and forever. The pleadings show that this land is needed for the purpose of a railway, and the evidence shows that the railway is actually there on the ground. Defendants come into court, submit themselves to the jurisdiction of equity and ask affirmative relief. Much of the testimony was devoted to showing the value of the land taken, the effect of the taking on the remainder of the tract and all those things which are usually shown in an action to condemn for a railroad right-of-way. Having jurisdiction of this case we have concluded to assume it for all purposes and to so modify the decree that plaintiff shall take title to the land described in this strip upon the paying to defendants the damage occasioned by such taking, which we assess at $700, and the costs and disbursements of this suit." Upon the entry of a decree conformably to these views, the defendants asked that the decree be

modified so as to confine it to a recognition of their title and to exclude all its provisions conferring upon the Railroad Company the right to take the property on paying the adjudged sum. This application was supported by an elaborate argument challenging the right of the court under the state law to exert the power which it had exerted. In none, however, of the elaborate arguments pressed to sustain the motion to modify was there any reference whatever to any supposed denial by the state court of rights guaranteed by the Constitution of the United States, and for that reason and because it is insisted that on the face of the record it is manifest no Federal question is presented, a motion to dismiss has been made which we come to consider.

All the contentions as to Federal rights rest upon the assumption that the court below denied due process of law when it entered the decree complained of and this is based upon the conception that the court exceeded its jurisdiction and misconceived or wrongfully interpreted the evidence and thereby in effect while recognizing the title of the plaintiffs in error, virtually deprived them of the right conferred by the state law of having a common law trial for the purpose of determining the questions which would require to be decided in case of the exercise by the Railroad Company of the right of eminent domain including of course the fixing of compensation to be paid for the taking and the damages incident thereto. Leaving aside for the moment the question of the jurisdiction of the court in the fundamental sense, that is, *ratione materiæ*, it is manifest that the want of foundation for all the propositions insisted upon is quite clear, since after all, taking the aspect most favorable for the plaintiffs in error, the propositions but assert that the court below in deciding the case, committed error as to matters involving no Federal question because purely of state cognizance. It is elementary and needs no citation of authority to show that

the due process clause of the Fourteenth Amendment does not control methods of state procedure or give jurisdiction to this court to review mere errors of law alleged to have been committed by a state court in the performance of its duties within the scope of its authority concerning matters non-Federal in character. So far as the contentions address themselves to the subject-matter of jurisdiction it is clear that they do not deny jurisdiction in the sense of the fundamental absence of any and all right to take cognizance of the cause, but are confined to jurisdiction in the sense of the duty to rightfully decide subjects to which judicial power extends. In this aspect the error of all the contentions is within the principle announced in *Castillo* v. *McConnico*, 168 U. S. 674.

But aside from the reasons just stated the absolute want of merit in the Federal right asserted becomes doubly apparent when it is observed that the plaintiffs in error, who were defendants in the trial court did not simply stand upon their rights as defendants, but went further and sought affirmative relief at its hands and could only be now heard to deny all power by being permitted to deny the right to exert the very jurisdiction which they invoked.

Dismissed for want of jurisdiction.

ERIE RAILROAD COMPANY *v.* PEOPLE OF THE STATE OF NEW YORK.

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

No. 266. Argued April 24, 27, 1914.—Decided May 25, 1914.

When Congress acts in such manner as to manifest its constitutional authority in regard to interstate commerce the regulating power of the State ceases to exist, and if there is conflict between state and Federal legislation the former must give way.

After Congress acts on a matter within its exclusive jurisdiction there is no division of the field of regulation.

Regulation of the railroads is not a mere wanton exercise of power, but a restriction upon their management induced by public interest and safety; and so *held*, that the Hours of Service Act of 1907 is the judgment of Congress of the necessary extent of such restrictions as to employés engaged in interstate commerce which admits of no supplementary regulation by any of the States.

Provisions in the Labor Law of New York of 1907 relating to the hours of service of railroad telegraph operators engaged in interstate commerce are void in so far as they attempt to regulate interstate commerce, as Congress had completely covered the field by the Hours of Service Act of 1907, although that act did not take effect until March, 1908. *Northern Pacific Railway Co.* v. *Washington*, 222 U. S. 370.

Where the state court did not decide that a general law amounted to a repeal or alteration of the charter of a corporation, the contention that it did so decide cannot be founded on an expression of personal opinion to that effect of the judge writing the opinion.

Quære, and not decided in this case, whether it is competent for a State, through its power to alter or repeal charters of railroads incorporated under its laws, so as to displace or share the jurisdiction of Congress over interstate commerce.

Judgment based on 198 N. Y. 369, reversed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of the eight hour provisions of the New York Labor Law of 1907 as applied to railroads,

and employés engaged in interstate commerce, are stated in the opinion.

Mr. Frederic D. McKenney, with whom *Mr. George F. Brownell* was on the brief, for plaintiff in error:

Congress by the "Hours of Service Act" of March 4, 1907, having completely regulated the hours of labor of railway employés concerned with the movements of trains, including those making use of the telegraph or telephone for that purpose, the law of the State of New York from the date of its passage was void and of no effect as to all such employés engaged in or performing duties in connection with interstate commerce. And this is so notwithstanding that the prohibitions of the Federal law, by the terms of the act itself, only became effective one year after the date of its passage, that is to say, on March 4, 1908. *Nor. Pac. Ry. Co.* v. *Washington*, 222 U. S. 370; see also *Adams Exp. Co.* v. *Croninger*, 226 U. S. 491, 505, 506; *McDermott* v. *Wisconsin*, 228 U. S. 115, 131–132; *Chicago, Ind. &c. Ry. Co.* v. *Hackett*, 228 U. S. 559, 567; *Simpson* v. *Shepherd*, 230 U. S. 352, 399, 400; and *Missouri* v. *Mo. Pac. Ry. Co.*, 212 Missouri, 658; *Wisconsin* v. *Chic. Mil. & St. P. Ry. Co.*, 136 Wisconsin, 407, cited by this court with approval in *Nor. Pac. Ry. Co.* v. *Washington*.

Mr. Wilber W. Chambers, with whom *Mr. Thomas Carmody*, Attorney General of the State of New York, and *Mr. Claude T. Dawes* were on the brief, for defendant in error:

The statute is valid as it is within the reserved power of the State to amend corporate charters. 1 Rev. Stat. N. Y. 1827, 600, § 8; Const. N. Y. of 1846 and 1894, art. VIII, § 1.

As to this power of the State to amend corporate charters, see *Adirondack Railway Co.* v. *New York*, 176 U. S.

335; *New York & New Eng. R. R. Co.* v. *Bristol*, 151 U. S. 556, p. 567; *People* v. *O'Brien*, 111 N. Y. 1; *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Lord* v. *Equitable Life Assur. Co.*, 194 N. Y. 212; *N. Y. C. & H. R. R. Co.* v. *Williams*, 199 N. Y. 108.

The only limitation to this general rule is that the power may not be exercised to destroy property or rights guaranteed by the Fourteenth Amendment of the United States Constitution, and by similar provisions of state constitutions. *St. L., I. M. &c. Ry.* v. *Paul*, 173 U. S. 404, 409. See also *State* v. *Brown & Sharpe Mfg. Co.*, 18 R. I. 16; *Berea College* v. *Kentucky*, 211 U. S. 45.

A State's power to control its own corporations is a power quite as vital to the State as the power of interstate commerce is to the Federal Government. It has not been surrendered to the Central Government, and only to the extent that a Federal power conflicts with it is the state power devitalized. See *Minnesota Rate Cases*, 230 U. S. 352, 399.

This court will follow the New York Court of Appeals in its finding that the state legislation in question was enacted under its reserved control over a corporation created by it. *Adirondack Railway* v. *New York*, 176 U. S. 335; *Elmendorf* v. *Taylor*, 10 Wheat. 152, 159; *Forsyth* v. *Hammond*, 166 U. S. 506, 518; *Covington* v. *Kentucky*, 173 U. S. 231, 237; *Schaefer* v. *Werling*, 188 U. S. 516.

The statute is not unconstitutional as an unauthorized interference by the State with interstate commerce, and the decision of this court in *Nor. Pac. Ry.* v. *Washington*, 222 U. S. 370, is not controlling here.

The Hours of Service Act, 34 Stat. 1415, does not apply to employés employed in a State and engaged in intrastate business. In this case the employé was not engaged in interstate commerce; the corporation involved was a domestic corporation over which the legislature of the State of New York had power to amend and repeal its

charter; and the employé was not one of a train crew and the work which he was doing was local or intrastate.

Although the state act affects to some extent the operation of interstate commerce it is none the less local in its character. *Smith* v. *Alabama*, 124 U. S. 465; *Nashville &c. R. R.* v. *Alabama*, 128 U. S. 96.

Regulation of trains engaged in interstate commerce at crossings is within the power of the State. *Southern Ry. Co.* v. *King*, 217 U. S. 524. So also as to the heating of passenger cars and requiring guard posts on bridges. *N. Y., N. H. & H. R. R. Co.* v. *New York*, 165 U. S. 628.

In *West. Un. Tel. Co.* v. *James*, 162 U. S. 650, the state law forbade the running of freight trains on Sunday. In *Hennington* v. *Georgia*, 162 U. S. 299, the statute sustained required railroad companies to fix their rates annually for the transportation of passengers and freight, and also required them to post a printed copy of their rates in passenger stations. See also *Chicago & N. W. R. R.* v. *Fuller*, 17 Wall. 560; *Louis. & Nash. R. R. Co.* v. *Kentucky*, 161 U. S. 677; *Chicago, Mil. & St. P. R. R.* v. *Solon*, 169 U. S. 133; *Richmond & A. R. Co.* v. *Tobacco Co.*, 169 U. S. 311; *Wisconsin R. R. Co.* v. *Jacobson*, 179 U. S. 287; *Chesapeake &c. Ry.* v. *Kentucky*, 179 U. S. 388; *Louis. & Nash. Ry.* v. *Mississippi*, 133 U. S. 587; *Erb* v. *Morasch*, 177 U. S. 584; *Cleveland, C., C. & St. L. R. R. Co.* v. *Illinois*, 177 U. S. 514.

Congress under its commerce power may, by occupying the entire field of regulation of hours of service on interstate railroads, render nugatory, with respect to that subject, a State's police power or its local power over interstate commerce; but not with the State's power over its own corporations, which continues and gives force to a state statute regulating hours of service except at those points of conflict with the Federal commerce law. Cases *supra*, and see also *Mo., Kans. & Tex. Ry.* v. *Haber*, 169 U. S. 613, 623; *Sinnot* v. *Davenport*, 22 How. 227, 243.

Where there is direct opposition or antagonism between state and Federal law, or Congress under its delegated power over commerce has seen fit to act upon the entire subject, such congressional action is exclusive of any state action under state police or commerce powers. *Tua* v. *Carriere*, 117 U. S. 201; *Gulf, Col. &c. Ry.* v. *Hefley*, 158 U. S. 98; *Nor. Pac. Ry. Co.* v. *Washington*, 222 U. S. 370, 378. See also *Gladson* v. *Minnesota*, 166 U. S. 427, 430; *Lake Shore Ry.* v. *Ohio*, 173 U. S. 285.

In this case the statute is a direct aid to the purpose of the Federal statute, and should be sustained as an additional benefit to the State with no injury to the Federal legislation. *Reid* v. *Colorado*, 187 U. S. 137, 148; *Minn. &c. Ry.* v. *Haber*, 169 U. S. 613; *Wisconsin &c. R. R.* v. *Jacobson*, 179 U. S. 287; *Chi., R. I. & Pac. R. R.* v. *Arkansas*, 219 U. S. 453; *Grand Trunk Ry.* v. *Michigan Ry. Comm.*, 231 U. S. 457.

The state act having been enacted under the reserved power of the State of New York over one of its corporations, and there being no conflict or repugnance between it and the Federal act, the state act should be held to be valid.

Mr. Justice McKenna delivered the opinion of the court.

Action for penalty brought by the people of the State of New York against defendant in error, herein called the railroad company, for an alleged violation of the Labor Law of the State entitled "An Act in relation to labor, constituting chapter thirty-two of the General Laws," as amended by Chapter 627 of the Laws of 1907.[1]

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[1] "Section 1. Chapter four hundred and fifteen of the laws of eighteen hundred and ninety-seven, entitled 'An act in relation to labor, constituting chapter thirty-two of the general laws,' is hereby amended by adding a new section after section seven thereof, to be section seven-*a*, to read as follows:

"Section 7-*a*. Regulation of hours of labor of block system telegraph

It is alleged that at the times hereinafter mentioned the railroad company was a corporation under the laws of the State of New York and was and is operating a line of railroad in the State of New York, in Rockland County and

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and telephone operators and signalmen on surface, subway and elevated railroads.—The provisions of section seven of this chapter shall not be applicable to employés mentioned herein. It shall be unlawful for any corporation or receiver, operating a line of railroad, either surface, subway or elevated, in whole or in part, in the state of New York, or any officer, agent or representative of such corporation or receiver, to require or permit any telegraph or telephone operator who spaces trains by the use of the telegraph or telephone under what is known and termed the "block system" (defined as follows): Reporting trains to another office or offices or to a train dispatcher operating one or more trains under signals, and telegraph or telephone levermen who manipulate interlocking machines in railroad yards or on main tracks out on the lines or train dispatchers in its service whose duties substantially, as hereinbefore set forth, pertain to the movement of cars, engines or trains on its railroad by the use of the telegraph or telephone in dispatching or reporting trains or receiving or transmitting train orders as interpreted in this section, to be on duty for more than eight hours in a day of twenty-four hours, and it is hereby declared that eight hours shall constitute a day of employment for all laborers or employés engaged in the kind of labor aforesaid; except in cases of extraordinary emergency caused by accident, fire, flood or danger to life or property, and for each hour of labor so performed in any one day in excess of such eight hours, by any such employé, he shall be paid in addition at least one-eighth of his daily compensation. Any person or persons, company or corporation, who shall violate any of the provisions of this section, shall, on conviction, be fined in the sum of not less than one hundred dollars, and such fine shall be recovered by an action in the name of the state of New York, for the use of the state, which shall sue for it against such person, corporation or association violating this act, said suit to be instituted in any court in this state having appropriate jurisdiction. Such fine, when recovered as aforesaid, shall be paid without any deduction whatever, one-half thereof to the informer, and the balance thereof to be paid into the free school fund of the state of New York. The provisions of this act shall not apply to any part of a railroad where not more than eight regular passenger trains in twenty-four hours pass each way; provided, moreover, that where twenty freight trains pass each way generally in each twenty-four hours then the provisions of

other counties, extending from Piermont to Dunkirk, both in that State.

The following facts are also alleged: The railroad company, in violation of § 7-*a* of the Labor Law, required and permitted one David Henion, a telegraph operator, to be on duty more than eight hours, that is, from seven o'clock a. m. to seven o'clock p. m., on the first day of November, 1907, in the railroad company's tower at Sterlington, in the County of Rockland, New York, there being no extraordinary emergency caused by accident, fire, flood or danger to life or property.

His duty was to space trains by the use of the telegraph under what is known and termed the "block system" and to report trains to another office or offices and to train dispatchers, whose duties pertain to the movement of cars, engines and trains on the company's railroad, by the use of the telegraph.

There passed over the tracks of the railroad company on the day named more than eight regular passenger trains each way.

Judgment is prayed in the sum of $100.

The answer of the railroad company admits its incorporation and that it is operating a railroad as alleged, but alleges that its road extends from Jersey City, New Jersey, to Suffern, New York, and from Salamanca, New York, to Marion, State of Ohio, and elsewhere, passing through New Jersey, New York, Pennsylvania and Ohio, and that at all times mentioned in the complaint it was and is now engaged in interstate commerce and the transportation of persons, goods and merchandise by railroad from one State of the United States to other States of the United States, and to foreign countries.

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this act shall apply, notwithstanding that there may pass a less number of passenger trains than hereinbefore set forth, namely, eight.

"SECTION 2. This act shall take effect October first, nineteen hundred and seven."

It admits that the company required and permitted Henion to work as charged, but alleges that the cars, engines and trains that he was engaged in spacing and reporting were engaged in interstate commerce.

That the Labor Law of the State violates the Fifth and Fourteenth Amendments to the Constitution of the United States, as applied to Henion and other employés in the same class of work, in that it deprives both the railroad company and Henion of the liberty of contract and of property without due process of law and of the equal protection of the laws.

The answer also set up in defense the Federal "Hours of Service" act, approved March 4, 1907, in force one year after its passage (34 Stat. 1415, c. 2939), entitled "An Act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon."

The law, among other things, authorizes the employment of employés such as Henion was, for nine hours in twenty-four hour periods when employed night and day and for thirteen hours when employed only during the daytime, and, in case of extraordinary emergency, to be on duty for four additional hours in such period on not exceeding three days in any week.[1]

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[1] "SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employé subject to this act to be or remain on duty for a longer period than sixteen consecutive hours . . .

"Provided, That no operator, train dispatcher, or other employé who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period on all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places and stations operated only during the daytime, except in case

The answer also alleges that the jurisdiction of Congress is exclusive, and that the Labor Law of 1907 is in excess of the power of the legislature of the State of New York and unconstitutional and void, in that it is an attempt to regulate commerce between the States.

A jury was waived and the case tried by the court, which found the facts as alleged in the complaint and that upon the trains which passed the tower at Sterlington there "were passengers whose journey commenced and ended in the State of New York and did not extend into any other State, and some of said trains carrying passengers and property from one point to another in the State of New York."

As a conclusion of law the court found that the railroad company violated the law, had incurred a penalty of $100 by so doing, and that § 7-*a* of the law "is valid and its provisions do not violate and are not in conflict with the Constitution of the United States or the constitution of the State of New York."

Upon the request of the railroad company the court also found the facts of the interstate character of the railroad as alleged in the answer and that Henion was employed as alleged, and found a number of other facts concerning the manner of operating the "block system" and the duties of Henion. There were also findings relative to the Labor Law, the Penal Law, so called, and the act of Congress of March 4, 1907. The findings only serve to emphasize the defenses of the company and need not be set out at length.

The court also made the following findings:

"That at all times mentioned in the complaint or hereinafter mentioned, the defendant was, and now is, engaged in interstate commerce, and the transportation of persons,

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of emergency, when the employés named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week; . . ."

goods and merchandise by railroad from one State of the United States to other States of the United States.

"On that day [the day Henion was employed] there were fourteen eastbound and twelve westbound passenger trains, and twelve eastbound and fifteen westbound freight trains, which passed the Sterlington tower during said twelve hours.

"On November 1st, 1907, a majority of the trains which the said David Henion was engaged in spacing and reporting were engaged in interstate commerce, or in the transportation of passengers, persons, or property from one State to another."

The court refused to find—"That on November 1, 1907, said David Henion in the performance of his duties was an employé of the defendant engaged in interstate commerce."

The court further found that the effect of the Labor Law "was materially to increase the cost to the Erie Railroad Company of operating the 'Block System.'"

Judgment was entered for the penalty sued for. It was reversed by the Appellate Division, and a new trial granted, the court deciding that the jurisdiction of the subject-matter was exclusively in Congress and was exercised by the Hours of Service Law of March 4, 1907.

The Court of Appeals reversed the action of the Appellate Division and affirmed the judgment of the trial court. The Court of Appeals rested its decision on three propositions: (1) The Labor Law of the State was a legal exercise of the police power of the State. (2) There was no conflict between it and the act of Congress of March 4, 1907. "The State," the court said (198 N. Y., p. 381) "has simply supplemented the action of the Federal authorities. It is the same as if Congress had enacted that the classes of employés named might be employed for nine hours or less, and the State had then fixed the lesser number, which was left open by the Federal statute. The form of the latter

fixed the outside limit, but not expressly legalizing employment up to that limit, fairly seems to have invited and to have left the subject open for supplemental state legislation if necessary." (3) A statute does not become controlling until it actually becomes operative and that therefore, even if it should be decided that there was a conflict between the Federal and the state legislation after the former became effective, as the act of Congress did not take effect until March 4, 1908, in the meantime the state law was in operation.

The propositions decided by the Court of Appeals express the contentions made here by defendant in error and they are attempted to be supported by a citation of a number of cases in which this court has sustained legislation by the States more or less affecting interstate commerce. A review of them is unnecessary. Whatever difficulty may otherwise have been in the questions presented by the record have been met and overcome by decisions more apposite than the cited cases. The relative supremacy of the state and National power over interstate commerce need not be commented upon. Where there is conflict the state legislation must give way. Indeed, when Congress acts in such a way as to manifest its purpose to exercise its constitutional authority the regulating power of the State ceases to exist. *Adams Express Co.* v. *Croninger*, 226 U. S. 491, and cases cited. Also *Chicago, R. I. & Pac. Ry. Co.* v. *Hardwick Elevator Co.*, 226 U. S. 426; *Chicago, Ind. & L. Ry. Co.* v. *Hackett*, 228 U. S. 559; *McDermott* v. *Wisconsin*, 228 U. S. 115; *Minnesota Rate Cases*, 230 U. S. 352; *Taylor* v. *Taylor*, 232 U. S. 363.

This is the general principle. It was given application to an instance like that in the case at bar in *Northern Pacific Ry.* v. *Washington*, 222 U. S. 370. The case arose upon an asserted conflict between the Hours of Service Law of March 4, 1907, the one involved here, and a law of the State of Washington which also regulated the hours

of railway employés. The latter became effective June 12, 1907, that is, before the time the Federal Hours of Service Law was in force but after its enactment. The state act resembled the Federal act, and prohibited the consecutive hours of service which had taken place on the Northern Pacific Railroad and on account of which the action was brought by the Attorney General of the State against the company for the penalties prescribed for violation of the act. The railroad company admitted the facts but denied liability under the act, asserting that its train was an interstate train and was not subject to the control of the State because within the exclusive control of Congress on that subject. The trial court granted a motion for judgment on the pleadings, which was affirmed by the Supreme Court of the State. That court held that the train was an interstate train and conceded that Congress might prescribe the number of consecutive hours an employé of a carrier so engaged should be required to remain on duty; and when it so legislated upon the subject, its act superseded any and all state legislation on that particular subject. But the court held that the act of Congress did not apply because of its provision that it should not take effect until one year after its passage and until such time it should be treated as not existing.

We reversed the judgment on the ground that the view expressed was not "compatible with the paramount power of Congress over interstate commerce," and we considered it elementary that the police power of the State could only exist from the silence of Congress upon the subject and ceased when Congress acted or manifested its purpose to call into play its exclusive power. It was further said that the mere fact of the enactment of the act of March 4, 1907, was a manifestation of the will of Congress to bring the subject within its control, and to reason that because Congress chose to make its prohibitions take effect only after a year it was intended to leave the subject to state

power was to cause the act of Congress to destroy itself. There was no conceivable reason, it was said, for postponing the prohibitions if it was contemplated that the state law should apply in the meantime. The reason for the postponement, it was pointed out, was to enable the railroads to meet the new conditions.

The reasoning of the opinion and the decision oppose the contention of defendant in error and of the Court of Appeals, that the state law and the Federal law can stand together, because, as expressed by the Court of Appeals, "the State has simply supplemented the action of the Federal authorities," and, on account of special conditions prevailing within its limits, has raised the limit of safety; and the form of the Federal statute, although "not expressly legalizing employment up to that limit, fairly seems to have invited and to have left the subject open for supplemental state legislation if necessary."

We realize the strength of these observations, but they put out of view, we think, the ground of decision of the cases, and, indeed, the necessary condition of the supremacy of the congressional power. It is not that there may be division of the field of regulation, but an exclusive occupation of it when Congress manifests a purpose to enter it.

Regulation is not intended to be a mere wanton exercise of power. It is a restriction upon the management of the railroads. It is induced by the public interest or safety, and the "Hours of Service" law of March 4, 1907, is the judgment of Congress of the extent of the restriction necessary. It admits of no supplement; it is the prescribed measure of what is necessary and sufficient for the public safety and of the cost and burden which the railroad must endure to secure it.

Defendant in error attempts to distinguish *Northern Pacific Railroad Co.* v. *Washington, supra,* on the ground that the State was dealing with a corporation organized

under the laws of another State, and, the State of Washington had no power to alter or repeal its charter. This power, it is contended, the State of New York has over the Erie Railroad and exercised the power in the law under review, and that the Court of Appeals has so decided. It is asserted besides, that Henion was not engaged in interstate commerce. These assertions are not justified. The Court of Appeals did not decide that the Labor Law constituted an alteration or repeal of the charter of the company. The learned judge who delivered the opinion of the court expressed such to be his view, saying (p. 376) that "if the statute failed as a valid exercise of the police power, personally" he was "not doubtful that under its reserved control over corporations the legislature might pass such an act in regulation of the performance of the business for which a railroad was organized."

It is clear that the learned judge did not express the views of the court. We have no doubt that if the court entertained such view it would have been declared. It would have been a direct and, from the standpoint of the State, an adequate, solution of the questions involved, and would have made unnecessary the elaborate consideration of the extent of the police power of the State and its coincident exercise and adjustment with congressional power of regulation. The contention of defendant in error, therefore, has not the foundation asserted for it, and we may pass it without further comment, not considering whether it is competent for a State, through its power to alter or repeal the charter of railroads incorporated under its laws, to displace or share the jurisdiction of Congress over interstate commerce.

The assertion that Henion was not engaged in interstate commerce is also without foundation and is besides precluded by the opinion of the Court of Appeals. The interstate character of the business was recognized by the court and the law considered in view of such recognition. The

court said (p. 376) "that the Labor Law purports and attempts indiscriminately and inseparably, to regulate the hours of the classes of employés designated whether engaged in interstate or local traffic, and that, therefore, its validity must be tested by the power of the legislature over the former."

The trial court, it is true, undertook to make a distinction between the interstate business of the railroad and Henion's duties, but, in view of the cases which we have cited and of the decision of the Appellate Division and of the Court of Appeals, the distinction is untenable. *Balt. & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612; *Second Employers' Liability Cases*, 223 U. S. 1.

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

ERIE RAILROAD COMPANY *v.* WILLIAMS, AS COMMISSIONER OF LABOR OF THE STATE OF NEW YORK.

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

No. 274. Argued April 27, 1914.—Decided May 25, 1914.

While it is a fundamental principle that personal liberty includes the power to make contracts, the liberty of making contracts is subject to conditions in the interest of the public welfare, and whether that principle or those conditions shall prevail cannot be defined by any precise or universal formula. Each case must be determined by itself.

Each act of legislation has the presumption that it has been enacted in the public interest and the burden is on him who attacks it.

The burden of the party attacking a police regulation as unconstitutional under the due process clause is not sustained by the mere principle of liberty of contract; it can only be sustained by showing

that the statute conflicts with some constitutional restraint or does not subserve the public welfare.

The legislature is the judge in the first instance of whether a police regulation is necessary; judicial review is limited, and even an earnest conflict of public opinion does not bring the question of necessity within the range of judicial cognizance.

Cost and inconvenience to the party affected must be very great in order to justify the courts in declaring void the action of the State in exercising its reserved power over charters or its police power.

The effect of the reservation of the power to amend and alter charters of corporations is to make a corporation, from the moment of its creation, subject to the legislative power in those respects as a corporate body; and questions of expediency are for the legislature and not for the courts so long as the amendments or alterations do not defeat or substantially impair the object of the grant or rights vested thereunder.

Alteration of the manner or time of payment of employés does not defeat or substantially impair the object of the charter granted to a railroad corporation, and a state statute, otherwise valid, regulating such time and manner, is not unconstitutional as impairing such charter.

Whether a statute imposes an unjust burden depends upon its validity; and whether the public welfare is subserved thereby is, in the first instance, to be determined by the legislature, whose action the courts will not review unless unmistakably and palpably in excess of legislative power. *McLean* v. *Arkansas*, 211 U. S. 539.

In determining time and manner of payment of wages of employés the legislature can consider the fact that to those who work for a living there is an advantage in the ready purchasing power of cash over deferred payments involving the use of credit.

Where Congress has not acted on the subject, and there is no prohibition on interstate commerce, a State may regulate matters within its police power although incidentally affecting interstate commerce.

Congress has not, as yet, acted in regard to the time and manner of payment of wages of employés of interstate carriers.

A state statute regulating periods of payment of wages of railroad employés' which is limited to the employés wholly within that State or whose duties take them from that State to other States and which is not applicable to those employed in other States, is not a direct burden on interstate commerce.

An employer cannot be heard to attack a state statute relating to payment of wages, on the ground that it denies to some of his employés

the equal protection of the law because they are not within its protection.

The provision of the Labor Law of New York of 1907 requiring semi-monthly payments in cash of wages of employés of certain specified industries, including railroads, is not unconstitutional as denying due process of law, or, as to a railroad company incorporated in that State, as impairing the obligation of the charter contract; nor is it, as it has been construed by the highest court of that State, a direct burden on interstate commerce; but, as so construed, it is a valid exercise of the police power of the State.

Judgment based on 199 N. Y. 108, 525, affirmed.

SUIT brought by plaintiff in error, the Erie Railroad Company (as it was plaintiff below we shall so designate it) to restrain the defendant in error (herein called defendant) from instituting actions to recover penalties for non-compliance with the provisions of the Labor Law of the State of New York (Laws of 1907, c. 415; General Laws, c. 32) which required plaintiff to pay its employés semi-monthly and in cash.

The object of the suit is to test the constitutionality of the law.

The bill is very elaborate and alleges with much detail the following facts: Plaintiff is a New York corporation, and defendant is Commissioner of Labor of the State. Plaintiff maintains a railroad in New York which extends into other States, and operates car floats and other floating equipment, navigating the navigable waters of the United States. These and other equipment are used in the business of plaintiff as a common carrier of persons and property under and in compliance with tariffs duly promulgated and filed under the laws of the State and of the United States; and plaintiff is also a carrier of the United States mails. As a rule, the trains of plaintiff run over an operating division without change of employés. Some of the divisions are interstate and some wholly within the State of New York.

Plaintiff, in carrying out its functions, has in its service upon that portion of its road lying east of Meadville, Pennsylvania, upwards of 15,000 men, who are employed either wholly within or partially within the State of New York, and nearly all of them are employed in the movement of interstate commerce. The great majority of these employés render service in more than one State and many of them who reside in Pennsylvania or New Jersey render a part of their service in New York, and many who reside in the latter State render service in the other two States. The contracts of employment of many of them were made, and in the future must be made, in States other than New York, in which States they must reside.

By the laws of New York plaintiff was vested with its powers as a railroad and to contract and be contracted with for the employment of persons to conduct its operations and enterprises at and for such wages and upon such terms of payment as should or might be mutually agreed on; and thereunder it has been its custom to pay its employés monthly and thus pay them prior to or on the twentieth day of each month the wages earned during the preceding month.

The great majority of plaintiff's employés were in its service prior to January 1, 1908, and all accepted such service with full knowledge of its general and uniform custom so to pay its employés monthly.

Prior to January 1, 1908, there existed and has since existed a contract between plaintiff and its employés that the latter should be paid monthly as stated, and so to pay them, as distinguished from payment twice a month, is not inconsistent with the public interest or hurtful to the public order or detrimental to the common good.

Section 4 of Article I of the Labor Law of the State makes it malfeasance in office, for any officer, agent or employé of the State to violate or evade his duty under

the law or knowingly permit the violation or evasion of the act, and he is subject to removal from office.

Section 9 [1] provides that every railroad company and

[1] "SECTION 9. Cash payment of wages.—Every manufacturing, mining, quarrying, mercantile, railroad, street railway, canal, steamboat, telegraph and telephone company, every express company, every corporation engaged in harvesting and storing ice, and every water company, not municipal, and every person, firm or corporation, engaged in or upon any public work for the state or any municipal corporation thereof, either as a contractor or a sub-contractor therewith, shall pay to each employé engaged in his, their or its business the wages earned by such employé in cash. No such company, person, firm or corporation shall hereafter pay such employés in script, commonly known as store money-orders. (As amended by c. 443, Laws of 1908.)

"SECTION 10. When wages are to be paid.—Every corporation or joint-stock association, or person carrying on the business thereof by lease or otherwise, shall pay weekly to each employé the wages earned by him to a day not more than six days prior to the date of such payment. But every person or corporation operating a steam surface railroad shall, on or before the first day of each month, pay the employés thereof the wages earned by them during the first half of the preceding month ending with the fifteenth day thereof, and on or before the fifteenth day of each month pay the employés thereof the wages earned by them during the last half of the preceding calendar month. (As amended by c. 442, Laws of 1908.)

"SECTION 11. Penalty for violation of preceding sections.—If a corporation or joint-stock association, its lessee or other person carrying on the business thereof, shall fail to pay the wages of an employé, as provided in this article, it shall forfeit to the people of the State the sum of fifty dollars for each failure, to be recovered by the factory inspector in his name of office in a civil action; but an action shall not be maintained therefor unless the factory inspector shall have given to the employer at least ten days' written notice that such an action will be brought if the wages due are not sooner paid as provided in this article.

"On the trial of such action, such corporation or association shall not be allowed to set up any defense, other than a valid assignment of such wages, a valid set-off against the same, or the absence of such employé from his regular place of labor at the time of the payment, or an actual tender to such employé at the time of the payment of the wages so earned by him, or a breach of contract by such employé or a denial of the employment."

certain other companies shall pay their employés in cash, and no such company shall pay its employés in script commonly known as store money-orders.

Section 10 requires the payment of employés' wages semi-monthly.

Section 11 imposes a penalty of $50 for each failure to so pay, to be recovered by the factory inspector in his name of office in a civil action, and limits the defenses to the action to a valid assignment of such wages, a valid set-off against the same, or the absence of such employé from his regular place of labor at the time of the payment or an actual tender at the time of the payment or a breach of contract by such employé or a denial of the employment.

The Commissioner of Labor is required to enforce the provisions of the law, and notified plaintiff of his intention to do so, and to sue for the penalties imposed by the act. He expressed his opinion of the act to be that each failure to pay the wages of each employé constituted a separate offense and that the aggregate of the penalties would be $250,000. Plaintiff believes, unless that officer is restrained, that he will exercise his authority under the act.

The employés of plaintiff are distributed over more than 1,819 miles and the making of the payment of their wages in money semi-monthly instead of monthly will impose upon and subject plaintiff to an increased cost and expense of several thousand dollars each month.

The difficulty of semi-monthly payments is described and it is alleged that the drastic and enormous penalties are, by reason of their necessarily aggregate character and effect, so excessive as to evidence legislative intention to unduly limit or prevent judicial inquiry, and practically constrain plaintiff to submit to the statute rather than by contesting its validity to take the chances of the penalties it imposes.

That the statute by its terms prevents plaintiff from

setting up in defense the contracts existing between it and its employés for the payment of their wages once a month and that the statute violates, when applied to plaintiff, various provisions of the Constitution of the State and of the United States, and thereby is repugnant to Article III of the Constitution of the United States and Article VI of the constitution of the State of New York in that it is an invasion by the legislature of the judicial power; and it is also repugnant to § 1 of Article XIV of the Constitution of the United States and § 6, Article I of the constitution of the State of New York in that it deprives plaintiff of property without due process of law; and violates § 10, Article I, of the Constitution of the United States in that it impairs the obligation of contracts. The act in its other provisions deprives plaintiff of property without due process of law and of the equal protection of the laws. It also interferes with and impairs plaintiff's performance and discharge of its duties as a common carrier in interstate commerce, is not a valid exercise of the police power and is illegal and unenforceable and void under articles of the Constitution of the State and of the United States which are enumerated.

By the enforcement of the act plaintiff will be subjected to enormous penalties, a multiplicity of suits and to great and irreparable damage, and plaintiff has no adequate remedy at law.

The answer of the defendant admitted the allegations of the complaint as to the statute and alleged that he intended to give such notice to plaintiff as to enforcing such penalties as he was required by the law to give and enforce. He denied that he had any knowledge or information sufficient to form a belief regarding the truth of the other allegations of the complaint.

A stipulation of facts was entered into by the parties upon which the court entered judgment dismissing the complaint. The judgment was successively affirmed by

the Appellate Division of the Supreme Court and by the Court of Appeals.

The facts stipulated practically sustain the allegations of the answer and detail the manner of the payment by plaintiff of its employés. The plaintiff also introduced in evidence an exhibit which classified its employés and showed the number of days work, total compensation and average compensation per day as per pay rolls for the year ending June 30, 1908. Its materiality was contested.

Mr. Frederic D. McKenney, with whom *Mr. George F. Brownell* was on the brief, for plaintiff in error:

The Labor Law of New York is repugnant to the Fourteenth Amendment, in that it deprives the company of property, and specifically deprives the company and those of its employés to whom it applies of liberty without due process of law.

Cases holding to the contrary can be distinguished.

The statute imposes upon the employers to whom it relates a burden that is unjust and a duty which it is impossible to perform.

The excess cost of paying employés twice a month as distinguished from once a month and the burden of care, labor, and responsibility imposed by the statute constitute a direct burden upon interstate commerce and violate the commerce clause of the Federal Constitution.

The statute violates the Fourteenth Amendment in that it denies to the employés of the Erie Railroad Company the equal protection of the laws.

Mechanics, workingmen, and laborers are not a dependent class as compared with other railway employés.

The classification is arbitrary in the fact that it places the burden upon a corporation and does not place it upon individuals and copartners engaged in the same business.

In support of these contentions, see *Adair* v. *United States*, 208 U. S. 161; *Atlantic Coast Line* v. *Wharton*, 207

U. S. 328; *Beardsley* v. *N. Y., L. E. & W. R. R. Co.*, 162 N. Y. 230; *Bedford Quarries Co.* v. *Bough*, 168 Indiana, 671; *Braceville Coal Co.* v. *Illinois*, 147 Illinois, 66; *C., C., C. & St. L. Ry. Co.* v. *Illinois*, 177 U. S. 514; *Colon* v. *Lisk*, 153 N. Y. 188; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; Cooley's Const. Limitations, 7th ed., pp. 837 and 838; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79; *Forster* v. *Scott*, 136 N. Y. 577; *Foster* v. *New Orleans*, 94 U. S. 246; *Galveston &c. R. R. Co.* v. *Texas*, 210 U. S. 217; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Godcharles* v. *Wegeman*, 113 Pa. St. 431; *Gulf, Col. &c. Ry. Co.* v. *Ellis*, 165 U. S. 150, 158; *Ill. Cent. R. R.* v. *Illinois*, 163 U. S. 142; *House Bill No. 1230*, 163 Massachusetts, 589; *Matter of Jacobs*, 98 N. Y. 98; *Johnson* v. *Goodyear Mining Co.*, 127 California, 4; *Kane* v. *Erie R. R. Co.*, 133 Fed. Rep. 681; *Lake Shore Ry. Co.* v. *Smith*, 173 U. S. 684; *Lawrence* v. *Rutland R. R. Co.*, 80 Vermont, 370; *Leep* v. *St. L. & I. M. R. R. Co.*, 58 Arkansas, 407; *Leisy* v. *Hardin*, 135 U. S. 100; *Lochner* v. *New York*, 198 U. S. 45; *Lord* v. *Equitable Life Assur. Soc.*, 194 N. Y. 212; *Moran* v. *New Orleans*, 112 U. S. 69; *Rodgers* v. *Coler*, 166 N. Y. 1; *People* v. *Gillson*, 109 N. Y. 389; *People* v. *Hawkins*, 157 N. Y. 1; *People* v. *Orange County Construction Co.*, 175 N. Y. 84; *People* v. *Williams*, 189 N. Y. 131; *Philadelphia S. S. Co.* v. *Pennsylvania*, 112 U. S. 326; *Robbins* v. *Shelby Co.*, 120 U. S. 489; *Republic Iron Co.* v. *Indiana*, 160 Indiana, 379; *San Antonio &c. Ry. Co.* v. *Wilson*, 19 S. W. Rep. 910; *Shields* v. *Ohio*, 95 U. S. 319; *Simpson* v. *Shepherd*, 230 U. S. 352, 398; *State* v. *Brown Mfg. Co.*, 18 R. I. 16; *Toledo, St. L. & W. R. Co.* v. *Long*, 169 Indiana, 316; *Wright* v. *Hart*, 182 N. Y. 330, 344.

Mr. Joseph A. Kellogg, with whom *Mr. Thomas Carmody*, Attorney General of the State of New York, and *Mr. Wilber W. Chambers* were on the brief, for defendant in error:

The courts will not overturn enactments of the legislature of a State unless the clearest and gravest reasons exist for so doing.

Legislative acts will be presumed to be constitutional, and if there is any doubt at all such doubt will be resolved in favor of the validity of legislative acts. *Sinking-Fund Cases*, 99 U. S. 700; *Sweet* v. *Rechel*, 159 U. S. 380; *Home Tel. Co.* v. *Los Angeles*, 211 U. S. 265, 281.

These statutes are a proper exercise of the reserved power to amend corporate charters, contained in the constitution of the State of New York. 1 Rev. Stat. 1827, 600, § 8; Const. N. Y., adopted in 1846 and revised in 1894, Art. VIII, § 1.

The constitutionality of these statutes may be upheld as to corporations under this reserved power of amendment. *Berea College* v. *Kentucky*, 211 U. S. 45. See also *Leep* v. *Railway Co.*, 58 Arkansas, 407.

As to the power of the State to amend corporate charters, see *Adirondack Railway Co.* v. *New York*, 176 U. S. 335; *New York & New Eng. R. R. Co.* v. *Bristol*, 151 U. S. 556, 567; *People* v. *O'Brien*, 111 N. Y. 1; *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Lord* v. *Equitable Life Assur. Soc.*, 194 N. Y. 212.

The single limitation to this general rule is that the power may not be exercised to destroy property or rights guaranteed by the Fourteenth Amendment and by similar provisions of state constitutions. *St. L., I. M. &c. Ry.* v. *Paul*, 173 U. S. 404, 408; *State* v. *Brown Mfg. Co.*, 18 R. I. 16.

The reserved power to amend corporate charters is much greater than the police power. *Dartmouth College Case*, 4 Wheat. 518; *N. Y. & New Eng. R. R. Co.* v. *Bristol*, 151 U. S. 556.

The franchise to be a corporation may be entirely taken away, and the legislature may also prescribe the conditions and terms upon which it will allow the corporation to live

and exercise such franchise. It may enlarge or limit its powers, and increase or limit its burdens. It cannot subvert the purpose for which the corporation was formed by changing an insurance corporation to a railroad company, for instance, but short of that it would seem to have the right to make any regulation which in its judgment is desirable, so long as it does not deprive the corporation of property or impair the obligation of existing contracts. *Mayor* v. *Twenty-third St. R. R. Co.*, 113 N. Y. 311, 317; *Lord* v. *Equitable Life Assur. Soc'ty*, 194 N. Y. 212.

The provisions of the Labor Law here attacked are a legitimate exercise of the reserved power to amend because they relate simply to methods of internal administration to be followed by the corporations and do not deprive the corporations of any vested rights or subvert the purposes for which they were formed.

Regulation of methods of administration or internal management are included within the scope of this reserved power over corporate charters. *Lord* v. *Equitable Life Assur. Soc'ty*, 194 N. Y. 212.

See also *Berea College Case, supra; Sinking Fund Cases*, 99 U. S. 700; *Spring Valley Water Co.* v. *Schlotter*, 110 U. S. 347.

The present enactments are not subversive of the objects for which the corporations were formed and do not deprive them of vested rights.

These statutes are not unconstitutional as an exercise of the reserved power to amend corporate charters even if we should assume for argument's sake that they necessarily limited somewhat the freedom of contract of the employés of such corporations. *Red River Bank* v. *Craig*, 181 U. S. 548, 558; *Hatch* v. *Reardon*, 204 U. S. 152, 160, and cases cited.

These statutes do not deprive the employés of freedom of contract. So far as these are concerned, that question is merely academic. It can be raised only by the employés

themselves, and if they do not care to object to the law on that ground this plaintiff in error is not at liberty to do so. *Yazoo & Miss. R. R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217; *State* v. *Brown Mfg. Co.*, 18 R. I. 16.

The validity of similar laws has been frequently upheld by the courts of other States and by this court, upon this very ground. *Peel Coal Co.* v. *West Virginia*, 36 W. Va. 802; *Leep* v. *Railway Co.*, 58 Arkansas, 407; *St. Louis &c. Ry. Co.* v. *Paul*, 64 Arkansas, 83, aff'd 173 U. S. 404; *Shaffer* v. *Union Mining Co.*, 55 Maryland, 74; *Skinner* v. *Garnett Mining Co.*, 96 Fed. Rep. 735, 744; *Atkin* v. *Kansas*, 191 U. S. 207.

The statutes are also constitutional as a proper and legitimate exercise of the police power of the State.

As to definition of police power, see *Holden* v. *Hardy*, 169 U. S. 366; *Jacobson* v. *Massachusetts*, 197 U. S. 11; *People* v. *Ewer*, 141 N. Y. 129; *Nechamcus* v. *Warden*, 144 N. Y. 529, 535.

In determining whether the legislature properly exercised this power, the court will take into consideration all facts of which it has judicial knowledge, including public records or reports, encyclopedias, laws of other States and the general or commonly accepted belief of the community. *Jacobson* v. *Massachusetts*, *supra; Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13; *McLean* v. *Arkansas*, 211 U. S. 539.

The purpose of these acts is to benefit the community and the public in various ways, arising out of the protection which they afford to the large class of men employed by corporations.

The primary purpose of these laws, of course, is to secure to the laboring men the full value or purchasing power of their wages. Cases *supra*, and *Arkansas Stave Co.* v. *Arkansas*, 125 S. W. Rep. 1001.

There is no valid objection to that part of the statute involved because it applies to corporations and not to natural persons.

A classification of steam railroad companies is proper and does not invalidate the statute for that reason. *Aluminum Co.* v. *Ramsey*, 222 U. S. 251; *Mutual Loan Co.* v. *Martell*, 222 U. S. 225; *Louis. & Nash. R. Co.* v. *Melton*, 218 U. S. 36: *Chi., R. I. & Pac. Ry. Co.* v. *Arkansas*, 219 U. S. 453.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

The contention of plaintiff is that the Labor Law is repugnant to the Fourteenth Amendment "in that it deprives the company of property, and specifically deprives the company, and those of its employés to whom it applies, of liberty without due process of law." The contention may be limited at the outset to the rights of the company. It cannot complain for its employés; and before considering the contention thus limited, it is well to see what meaning or extent the Court of Appeals gave to the law.

The court decided that the law operates not only to require the railroads to pay their employés semi-monthly, but prohibits them from making contracts with their employés which shall vary the time of payment. If this were not the meaning of the law, the court said, neither railroads nor their employés would have any ground of complaint (199 N. Y. p. 114) "as both master and servant would be left at liberty to make any contract they pleased in regard to the time when the servant's wages should be payable and the medium in which they should be paid." This liberty not existing, the court stated the contention of the plaintiffs to be that the law deprives them "of the right of making contracts with their employés on advantageous terms, and that this is beyond the power of the legislature." The plaintiff also contended that it was denied the equal protection of the laws.

The opposing contentions were stated to be: (1) The legislation is a proper exercise of the power reserved by the constitution of the State to amend corporate charters; (2) It constitutes a legitimate exercise of the police power of the State.

The court rejected both contentions of plaintiff and sustained the law as an exercise of the power over plaintiff's charter; and, adverting to the objection that the requirement of semi-monthly payments was an unconstitutional interference with interstate commerce, the court said (p. 123): "It is to be observed that it [the law] is not in conflict with any legislation by Congress, nor does it affect interstate commerce directly." And, exhibiting the extent of the operation of the law, it was further said, "It relates to the wages of railway servants employed wholly within the State of New York as well as to the wages of those whose duties take them from this State into others. The subject is one upon which Congress has not undertaken to act."

How far the reserved power of the State over the charters of its corporations was helped out by its police power, the court gave no indication. Indeed, it may be said that in its reference to the reserved power in reviewing the decisions of other States, the sole ground of its decision was the possession and exercise of such power by the State. The court said (p. 127):

"There is an irreconcilable conflict in the decisions in different jurisdictions as to the constitutional validity of labor legislation fixing the medium and time of payment of the wages of those who work for corporations. After the foregoing review of the leading cases, I find no difficulty in sustaining our New York statute on the ground which has been stated. It does not confiscate corporate property directly or indirectly. It does impose a greater future burden upon the corporations to which it relates; but that, I think, is within the power of the legislature to the extent to which it has been exercised in this case."

The legislation having been passed in the exercise of the reserved power of the State, is it valid, notwithstanding it prohibits both the plaintiff and its employés from contracting against its provisions? Plaintiff asserts the negative and attempts to sustain the assertion by a very comprehensive argument in which a number of decisions of this court and of other courts are cited and reviewed. They illustrate by various instances the fundamental and indisputable principle that personal liberty includes the power to make contracts. But liberty of making contracts is subject to conditions in the interest of the public welfare, and which shall prevail—principle or condition—cannot be defined by any precise and universal formula. Each instance of asserted conflict must be determined by itself, and it has been said many times that each act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint or that the public welfare is not subserved by the legislation. The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance. *C., B. & Q. R. R. Co.* v. *McGuire*, 219 U. S. 549, 565; *German Alliance Insurance Co.* v. *Kansas*, *ante*, page 389.

In considering the competency of the legislative judgment and the power the courts have to review it, we may inquire, what is here complained of? What does the Labor Law of New York do that seriously affects the liberty of plaintiff? It requires cash payments. That requirement is not now resisted. It requires semi-monthly payments. Plaintiff now pays monthly. The extent of its grievance, therefore, is two payments a month instead of one, with

the consequence of expense and inconvenience. It is hardly necessary to say that cost and inconvenience (different words, probably, for the same thing) would have to be very great before they could become an element in the consideration of the right of a State to exert its reserved power or its police power. *New York & N. E. R. R. Co.* v. *Bristol*, 151 U. S. 556; *United States* v. *Un. Pac. Ry. Co.*, 160 U. S. 1; *St. Louis, I. M. &c. Ry. Co.* v. *Paul*, 173 U. S. 404; *Wisconsin &c. R. R. Co.* v. *Jacobson*, 179 U. S. 287. See also *Balt. & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612.

Putting cost and inconvenience to one side, there would remain only an abstract right. Taking them into consideration they constitute the detriment to which plaintiff is subjected by not being able to make the forbidden contracts. It may be admitted an advantage is taken away from plaintiff, or, to put it another way, a burden is imposed upon it. Is it within the power of the State to impose the burden by virtue of its reserved control over plaintiff? The question must be answered as if the requirement of the law was part of the charter of plaintiff, and in such case it would seem certainly that a liberty of contract could not be asserted against it, for it would be a part of the contract accepted and binding on plaintiff,—a liberty exercised precluding a liberty to be exercised,—and it would seem necessarily to be the very essence of the right of amendment reserved that what could have been put in the charter originally, whatever its consequence, can be added to the charter, whatever the consequence of the addition. Of course, we mean what was and is competent for the State to impose, and we are brought to the narrow question whether a regulation of the time and manner of payment by a railroad of its employés is within the competency of the State to require. A negative answer is contended for, the argument urged to support the contention being that a contract right of dealing with its em-

ployés is conferred by plaintiff's charter, which right the Labor Law takes away and plaintiff is deprived of property because of the expense to which it is subjected, which, it is contended, is not justified by a corresponding public benefit. It would seem, therefore, to be the contention of plaintiff that it acquired by its charter a vested right to deal with its employés according to its own judgment and, as alleged in its answer, that it was vested with its powers as a railroad and to contract and be contracted with, for the employment of persons to conduct its operations and enterprises at and for such wages and upon such terms of payment as might or should be agreed on. In other words, it is the contention that the rights asserted are of the very essence of its grant, giving it the rights of a natural person and investing it with the same immunity from control whether exercised under the police power or the reserved power of amendment. We may, in answering the contention, put aside the rights of natural persons and the rights which might exist under a constitution which did not reserve control in the State. The effect of the control reserved was to make plaintiff, from the moment of creation, subject to the legislative power of alteration and, if deemed expedient, of absolute extinguishment as a corporate body. *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, 352. And whether expedient or not, is a question for the legislature, not for the courts. *Id.* 353. In other cases the effect of the reserved power of amendment is said to be to make any alteration or amendment of a charter subject to it which will not defeat or substantially impair the object of the grant or any right vested under the grant. *Lake Shore &c. Ry. Co.* v. *Smith*, 173 U. S. 684, 697, 698. *Looker* v. *Maynard*, 179 U. S. 46, 52. Surely the manner or time of paying employés does not come within such limitation. It is a matter of pure administration, not comparable in its burden to those sustained in the cases which we have already cited.

In *St. Louis, Iron Mt. & S. Ry. Co.* v. *Paul, supra,* a law of Arkansas was sustained as an exercise of the reserved power of the State which required a railroad company discharging with or without cause, or refusing to employ, any servant or employé, to pay him his unpaid wages, then earned at the contract rate, without abatement or deduction, to the date of his discharge, and providing that if the same be not paid on such day, then, as a penalty for non-payment, his wages shall continue at the same rate until paid.

In *New York & N. E. Railroad Co.* v. *Bristol, supra,* the railroad company was required to remove various grade crossings at its own expense.

In the *Sinking Fund Cases,* 99 U. S. 700, legislation requiring the creation of a sinking fund was sustained under the reserved power of amendment, and, after reviewing the cases, the court said (p. 721) "that whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment." Many other cases might be cited, but to cite them would be to accumulate authorities on a proposition which might well be taken at this late day to be incontestable. Indeed, the contention of defendant that the legislation under review might be supported under the police power of the State has justification in cases.

In *Knoxville Iron Co.* v. *Harbison,* 183 U. S. 13, a law of the State of Tennessee which required all persons and corporations to redeem in money evidences of indebtedness given to their laborers or employés, in the hands of their laborers, employés, or a *bona fide* holder, came up for consideration. The Knoxville Coal Company paid its employés in cash and in coal orders. It made money by the practice. There was no proof of an express agreement between the company and its employés that the orders should be paid only in coal, except as implied from

accepting the orders, and no proof of an implied agreement except as drawn from the face of the orders and the custom of the company. There was no proof of compulsion except that if the employés did not accept pay in coal orders they had to submit to be in arrears about twenty days, but the company paid in coal orders the whole wages due at the end of each month. Harbison purchased a number of the coal orders and demanded their payment in cash, which was refused. He then brought suit against the company, relying on the statute. The Supreme Court gave him judgment, which was affirmed by this court on the ground that the law was a proper exercise of the police power of the State. This court, by Mr. Justice Shiras, commenting on *St. Louis, Iron Mt. & S. Ry. Co.* v. *Paul, supra,* said that in that case stress was laid upon the reserved power of amendment which the State had (p. 22), "but it is also true that, inasmuch as the right of contract is not absolute in respect to every matter, but may be subjected to the restraints demanded by the safety and welfare of the State and its inhabitants, the police power of the State may, within defined limitations, extend over corporations outside of and regardless of the power to amend charters. *Atchison, Topeka & Santa Fe Railroad* v. *Matthews,* 174 U. S. 96." The ruling was followed in *Dayton Coal & Iron Company* v. *Barton* (183 U. S. 23), although the Dayton Company was not incorporated under the laws of Tennessee.

In *McLean* v. *Arkansas,* 211 U. S. 539, a law of Arkansas required, where miners were employed at quantity rates, and more than ten were employed, that they should be paid by the weight of coal mined by them as it comes from the mine and before it was passed over a screen of any kind. One of the grounds of attack on the law was that it was an unwarranted invasion of the right of contract secured by the Fourteenth Amendment, the argument being that the law prevented the miners from con-

tracting for wages upon the basis of screened coal instead of the weight of the coal as originally produced at the mine. The law was sustained as a proper exercise of the police power of the State.

It is, however, contended by plaintiff that the law under review cannot be sustained either as an exertion of the police power or as an alteration of the charter of plaintiff unless the court can say from a comparison of the systems of payment—monthly and semi-monthly—that the former affects adversely the general welfare or public good and the latter "remedies that evil or condition and of itself does not constitute an unjust burden upon the employer." But whether the law imposes an unjust burden depends upon its validity, and whether the public welfare is subserved by one system or the other is, as we have said, in the first instance, for the legislature to determine, and its judgment will not be reviewed unless "unmistakably and palpably in excess of legislative power." *McLean* v. *Arkansas, supra,* 211 U. S. p. 547. The Labor Law of New York cannot be so characterized.

There are certainly advantages of cash payment over deferred payments, and an advantage to those who work for a living of a ready purchasing power for their needs over the use of credit. This is found as a fact by the trial court, and even if there is no affirmative evidence of it, it is the expression of experience.

The next contention of plaintiff is that the cost of paying twice a month is a direct burden on interstate commerce. It is not necessary to review and compare the cases in which this court has pointed out the difference between a direct and indirect burden of state legislation upon interstate commerce or the power of the States in the absence of regulation by Congress. It is enough to say in the present case that Congress has not acted, and there is not, therefore, that impediment to the law of the State; nor is there prohibition in the character of the burden. The

effect of the provision is merely administrative and so far as it affects interstate commerce it does so indirectly. The Court of Appeals, as we have seen, considered that the law relates to the wages of railway servants employed wholly within the State and to those whose duties take them from the State into other States. In other words, did not make it applicable to those employed in other States, and it therefore does not embrace all of the employés of plaintiff, and the contention based upon its application to all is without foundation.

The last contention of plaintiff is that the statute violates the Fourteenth Amendment, "in that it denies to the employés of the Erie Railroad Company the equal protection of the laws." Considerable argument is made to support the contention, in which a comparison is made between the employés, mechanics, workmen and laborers, to whom the law applies, and the other employés of the company, and it is declared that all, if any, suffer from monthly payments and all are entitled, therefore, to receive the benefit of semi-monthly payments. But, as we have said, employés are not complaining, and whatever rights those excluded may have, plaintiff cannot invoke.

Judgment affirmed.

VALDES *v.* LARRINAGA.

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

No. 343. Argued May 4, 1914.—Decided May 25, 1914.

Although the contract for participation in profits involved in this case may not have created a partnership, as defined under § 1567, Civil Code of Porto Rico, it gave the party entitled to participate an equitable interest in the property involved which attached specifically

to the profits when they came into being. *Barnes* v. *Alexander*, 232 U. S. 117.

In such a case, if the party having the legal control of the property and profits abuses the fiduciary relation created by the contract, equitable relief is proper.

In this case it does not appear that the contract under which one who had formerly occupied a government office in Porto Rico rendered services in connection with obtaining a franchise from the local and Federal governments was improper or against public policy. *Hazelton* v. *Sheckells*, 202 U. S. 71, distinguished.

In this case *held*, that notwithstanding the forfeiture of an original grant and the final sale relating to a new but similar grant, as there was a continuous pursuit of the end achieved, one who was entitled to a share in the profits of the enterprise as originally conceived was entitled to share in the proceeds.

Where no error of magnitude is made by the court below in construing a contract for services executed in a foreign language and establishing the amount due thereunder, and only a translation of the contract is before this court, the decree will not be reversed.

THE facts, which involve the validity of a judgment on contract for services entered by the District Court of the United States for Porto Rico, are stated in the opinion.

Mr. Hugo Kohlmann, with whom *Mr. F. Kingsbury Curtis* and *Mr. Martin Travieso, Jr.*, were on the brief, for appellant:

Complainant had a full, adequate and complete remedy at law, and was not entitled to specific performance, accounting or any other equitable relief.

No fraud either legal or actual was alleged or proved. Even if it did exist, it would not be ground for equitable jurisdiction.

The contract was purely one of employment and not of a partnership.

No other ground of equitable jurisdiction existed in the case at bar.

Complainant's prayer for specific performance did not confer equitable jurisdiction.

The fact that complainant's compensation under the contract was fixed at a proportion of the profits realized by the defendant from the franchise did not entitle him to an accounting in equity.

The contract in suit being one for contingent compensation for services in procuring legislation, or other action by public bodies or officials, is against public policy and void and therefore not enforceable either in law or in equity.

The franchise or concession, in the profits of which appellee by reason of his contract claims to share, was declared forfeited by the executive council and appellant did not sell or purport to sell the same or make any profit thereon.

The contract in any event limited appellee's compensation to ten per cent. of the profit derived by appellant from the franchise itself, and there could be no recovery of the total price received by appellant for valuable lands and easements conveyed by the deed of June 1, 1905.

In support of these contentions, see *Ambler* v. *Choteau*, 107 U. S. 586; *Babbott* v. *Tewksbury*, 46 Fed. Rep. 86; *Berthold* v. *Goldsmith*, 24 How. 536; *Brown* v. *Equitable Life Assur. Society*, 142 Fed. Rep. 835; *S. C.*, 213 U. S. 25; *Buzard* v. *Houston*, 119 U. S. 347; *Clippinger* v. *Hepbaugh*, 5 W. & S. (Pa.), 315; *Grieb* v. *Equitable Life Assur. Soc.*, 189 Fed. Rep. 498; *Hazelton* v. *Sheckells*, 202 U. S. 71; *Martin* v. *Wilson*, 155 Fed. Rep. 97; *S. C.*, 210 U. S. 432; *Meehan* v. *Valentine*, 145 U. S. 611; *Nutt* v. *Knut*, 200 U. S. 12; *Parkersburg* v. *Brown*, 106 U. S. 487; *Paton* v. *Majors*, 46 Fed. Rep. 210; *Providence Tool Co.* v. *Norris*, 2 Wall. 45; *Root* v. *Railway Co.*, 105 U. S. 189; *Safford* v. *Ensign Mfg. Co.*, 120 Fed. Rep. 480; *Scott* v. *Neely*, 140 U. S. 106; *Sussman* v. *Porter*, 137 Fed. Rep. 161; *Trist* v. *Child*, 21 Wall. 441; *United States* v. *Bitter Root Co.*, 200 U.S. 451; *Washburn & Moen Mfg. Co.* v. *Freeman Wire Co.*, 41 Fed. Rep. 410; *Weed* v. *Black*, 2 MacArthur (D. C.), 268; *Wood* v. *McCann*, 6 Dana (Ky.), 366.

Barry v. *Capen*, 151 Massachusetts, 99; *Boom Co.* v. *Patterson*, 98 U. S. 43; *Dunham* v. *Hastings Improvement Co.*, 57 App. Div. 426; *S. C.*, 118 App. Div. 127; *Houlton* v. *Nichol*, 93 Wisconsin, 393; *McBratney* v. *Chandler*, 22 Kansas, 482; *Mathewson* v. *Clarke*, 6 How. 122; *Minnesota Rate Cases*, 230 U. S. 352, 451; *Salinas* v. *Stillman*, 66 Fed. Rep. 677; *Stanton* v. *Embrey*, 93 U. S. 548; *Taylor* v. *Bemiss*, 110 U. S. 42, relied upon by appellee can all be distinguished from this case.

Mr. Frederic D. McKenney, with whom *Mr. Edward S. Paine* was on the brief, for appellee.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill in equity for an account under a contract between the parties, upon which the plaintiff (appellee), obtained a decree for $13,000 and interest. The contract was embodied in letters, as follows, according to the official translation: On October 30, 1898, Valdes wrote to Larrinaga reciting that he had applied for 'a water franchise from the river Plata, place called Salto, for the purpose of developing electric power,' while Larrinaga was Assistant Secretary of 'Fomento,' (now Department of the Interior), and going on, "So that you may help me in getting it through, and in all the rest in connection with said franchise, such as plans, projects, and in everything concerning the technical part thereof, I need a person of my absolute confidence, and as you deserve it fully to me, and not believing that this is inconsistent with your present position of Chief Engineer of Harbor Works, I propose to interest you in the profits of said concession in the amount of a 10%, provided that you accept the obligations hereinabove mentioned." The next day Larrinaga answered acknowledging the letter "Wherein you propose me a share of 10% in the property of the concession for the

utilization of waters from the La Plata River at the point called el Salto, near Comerio, I, in exchange to help you in the steps to be gone through and in everything in connection with said concession, such as plans, projects, and all what concerns to the technical part.—I hereby accept the participation of 10% of said concession in exchange of my personal or professional services without any obligation on my part" to contribute money to the exploitation.

It is objected in the first place that the case is not one for equitable relief. But whether the contract created a partnership under the definition of the Civil Code of Porto Rico, § 1567, as argued by the appellee, or not, it gave the appellee an equitable interest in the concession to the extent of securing his share of the profits, if any, and attached to these profits specifically if and when they came into being. *Barnes* v. *Alexander*, 232 U. S. 117, 121. It established a fiduciary relation between Valdes, who had legal control, and the plaintiff. The bill alleges an abuse of the relation by a secret transaction from which it is alleged that the profits accrued. It is a proper case for equitable relief.

It is contended more energetically that the contract was against public policy. We shall not speculate nicely as to exactly what the law was in Porto Rico at the time when the contract was made, but shall give the plaintiff the benefit of the decisions upon which he relies, such as *Hazelton* v. *Sheckells*, 202 U. S. 71. But we discover nothing in the language of the letters that necessarily imports, or even persuasively suggests any improper intent or dangerous tendency. Larrinaga had ceased to be Assistant Secretary, and while in that position had refused to take part in the plan. His answer, which must control if there is any difference, as the parties went ahead on it (*Minneapolis & St. Louis Ry. Co.* v. *Columbus Rolling Mill Co.*, 119 U. S. 149), binds him to help in the steps to be

gone through, and in the technical part. If his help in the steps to be gone through was not to be, like the rest of his work, in the technical part alone, still there is nothing to indicate that it was of a kind that could not be stipulated for. In view of the subject-matter, a grant, it would seem to a riparian owner, of the right to use water power for public service, the things done, such as joining in an application to the Military Governor for a franchise on the footing of a joint interest, or helping to present it to the Secretary of War when it came up to him, or preparing plans and specifications to be presented to the Executive Council of Porto Rico when the first franchise granted by the Secretary of War had been lost by not complying with its terms, have no sinister smack. We see nothing to control the decision of the District Judge that the contract was not against the policy of the law.

As we have intimated, the Executive Council of Porto Rico was applied to after the loss of the first franchise, and it granted a new one on December 17, 1900; but after some extensions of time it declared the grant forfeited in July, 1902. Valdes and the plaintiff, however, did not admit the forfeiture, and Valdes procured the formation of a Maine corporation to take over his rights. On January 14, 1905, he made a preliminary contract for the sale of the franchise alleged to be forfeited and lands, easements, and options for use in connection with the same, reciting that he had petitioned for a new concession, or confirmation of the franchise. For this he was to receive $27,000, par value, of the mortgage bonds of the new company and $102,778, par value, of its stock, to be put in escrow until the company got a good title to the water rights and the franchise applied for. On June 1, 1905, in pursuance of the contract, a conveyance was made of the easements and lands that Valdes owned on the La Plata and his right to construct works there on the terms above

mentioned, with a slight change of the figures, to $28,000 and $103,000 respectively. The franchise was granted on January 4, 1906, the grant expressly providing that it should not be deemed a recognition of any right of Valdes to any previous grant.

On these facts it is argued that the concession in which Larrinaga was interested was not sold by Valdes and was not the source of any profit. That Valdes purported to sell it by his conveyance, as he agreed to sell it by the contract which the conveyance referred to and executed, or else that his rights under it passed *sub silentio* with the land, we think admits of no doubt. And while it may be true that the sale would not be likely to have taken place without a confirmation or re-grant of the franchise, still, as between these parties, it seems fairly probable that there was a continuous pursuit of the end; that, while the franchise gave the value to the land, the land gave a *locus standi* to the franchise; that, notwithstanding the disclaimer of the Executive Council, the position of Valdes as riparian owner and previous grantee had their effect on the final grant; and that at all events when the contract was made on January 14, 1905, Larrinaga became entitled to receive his ten per cent. when that contract should be carried out.

The last objection to the decree is, that the court did not deduct from the sum paid the value of the other property which entered into the consideration. We do not think it clear that Larrinaga did not stipulate for ten per cent. of the land as well as of the franchise. The Spanish is not before us, and the words '10% in the property of the concession' well might mean that. At all events no error of magnitude is made out, and without mentioning every detail it is enough to add that no sufficient reason is shown why the decree should not be affirmed.

Decree affirmed.

DETROIT STEEL COOPERAGE COMPANY *v.* SISTERSVILLE BREWING COMPANY.

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

No. 368. Argued May 8, 1914.—Decided May 25, 1914.

The common law knows no objection to what is commonly called a conditional sale.

Chattels, such as tanks, furnished for a brewery under a contract of conditional sale duly recorded, although indispensable as part of the completed structure and attached to the real estate as between the mortgagor and the mortgagee, are not so attached to the realty as to become a part thereof and subject to the lien of a prior mortgage as between the vendor of the tanks and the mortgagee, if, as in this case, they can be removed without the physical disintegration of the building. *Holt* v. *Henley*, 232 U. S. 637.

An owner of a chattel may lose title thereto without his consent by its incorporation into a structure in such manner that its removal would destroy the structure.

The mere knowledge that a chattel, delivered under a contract of conditional sale, will be attached to the freehold, is of no importance, except as against innocent purchasers for value before the sale is recorded.

195 Fed. Rep. 447, 1023, reversed.

THE facts, which involve claims of the vendor and the holder of a mortgage bond to certain tanks and fixtures delivered to the owner of a brewery under a conditional sale, are stated in the opinion.

Mr. Charles N. Kimball and *Mr. George M. Hoffheimer*, with whom *Mr. Orla B. Taylor* and *Mr. Walter S. Sugden* were on the brief, for petitioner.

Mr. Thomas P. Jacobs, with whom *Mr. Arlen G. Swiger* was on the brief, for respondents:

The tanks cannot be removed from the brewery under

any circumstances, regardless of the question whether the removal would injure the structure or not; and whether they can be removed or not without injury to the building is not determinative of the issues in this case. *Lazear* v. *Foundry Co.*, 65 W. Va. 105; *Moore* v. *Patton*, 16 W. Va. 428; *McFadden* v. *Crawford*, 36 W. Va. 671.

The tanks being necessary for the purposes for which they were to be used, must be regarded as part of the realty, and not liable to be levied upon as personalty and not liable to be removed. In this case the said tanks were actually placed in the building and the opening through which they had been carried was fully walled up, and the tanks installed as an integral part of the brewery, and without which there could have been no brewery. *Moore* v. *Patton, supra; Green* v. *Phillips*, 26 Gratt. (Va.) 752; *Shelton* v. *Ficklin*, 32 Gratt. (Va.) 727; Ewell on Fixtures, p. 415; *Lazear* v. *Foundry Co., supra;* Bronson on Fixtures, p. 91, §§ 19, 20; *Union Trust Co.* v. *Southern Sawmill Co.*, 166 Fed. Rep. 193; *Tippett* v. *Barham*, 180 Fed. Rep. 76; *New York Security Co.* v. *Capital Railroad Co.*, 77 Fed. Rep. 529.

The Massachusetts rule is prevalent and recognized as the law, as has been before suggested, in the jurisdiction from which this litigation arose. The courts in Massachusetts make a clear distinction between that which is to remain in the form of goods and chattels, and that which becomes a part of the real estate, without regard to the fact of whether it is physically annexed or attached to the real estate or whether it is held in place by gravity. *Hunt* v. *Iron Co.*, 97 Massachusetts, 279.

There is a plain and marked distinction made between the Massachusetts line of decisions and the line of decisions headed by the New York Court of Appeals, and see *Porter* v. *Pittsburg Steel Co.*, 122 U. S. 267, 283; *Toledo &c. R. R. Co.* v. *Hamilton*, 134 U. S. 296, 302. See also *United States* v. *New Orleans & O. R. Co.*, 12 Wall. 362.

Machinery and appliances in a distillery are part of the realty. *Smith* v. *Altick*, 24 Oh. St. 369; *Wolford* v. *Baxter*, 33 Minnesota, 12; *Equitable Trust Co.* v. *Christ*, 47 Fed. Rep. 756; *Ege* v. *Kille*, 84 Pa. St. 333; *Triplett* v. *Mays*, 13 Ky. Law Rep. 874; *Farrar* v. *Stackpole*, 19 Am. Dec. 201; *Frat* v. *Whittier*, 58 California, 126.

Having sold and delivered the tanks to the Brewing Company to be attached to the real estate on which the trust mortgage given to secure the bonds was a first lien, and having permitted the tanks to enter into and become a material part of the brewery plant, the Steel Company is estopped from asserting any right or priority on the property or the proceeds derived from the sale thereof to the injury of the security of the bondholders, but must be regarded as having waived its rights, if any, as against defendants' prior lien. *Phœnix Iron Works* v. *N. Y. Security Co.*, 83 Fed. Rep. 757; *Evans* v. *Kister*, 92 Fed. Rep. 836.

The rights of the mortgagee cannot be affected by any agreement, to which he is not a party, made between the seller and the mortgagor in possession. The rights of the mortgagee are superior to those of the seller of the fixtures attempting to retain title. *Tippett* v. *Barham*, 180 Fed. Rep. 76.

Under the "Massachusetts Rule," as distinct from the "New York Rule," and which is the rule of the two Virginias, and of the Fourth Circuit Court of Appeals, the rights of the mortgagee cannot be affected by an agreement to which he is not a party, and such rights are superior to those of the seller of the fixtures retaining title. *Hunt* v. *Bay State Iron Co.*, 97 Massachusetts, 279; *Loraine Steel Co.* v. *Norfolk &c. Ry. Co.*, 187 Massachusetts, 500; *Watertown Engine Co.* v. *Davis*, 5 Houst. (Del.) 192; *Richardson* v. *Cokeland*, 6 Gray (Mass.), 536; *Clark* v. *Owen*, 15 Gray, 522.

Where the property is sold and is regarded as becoming an integral part of the realty, the retention of title thereto

or the reservation of a lien thereon is held to be ineffectual to preserve the rights of the seller. *United States* v. *New Orleans & O. R. Co., supra; Porter* v. *Pittsburg Steel Co., supra; Phœnix Iron Works* v. *New York Security & T. Co.*, 28 C. C. A. 76; *Meagher* v. *Hayes*, 152 Massachusetts, 228.

The mortgagees in obtaining the bonds contemplated the future acquisition of tanks from some source. The Cooperage Company, when it furnished the tanks, contemplated that they were putting into the plant something that would make it a complete brewery, and an integral part thereof. *Tippett* v. *Barham, supra.*

The interpretation given by petitioner to *Union Trust Co.* v. *Southern Sawmills Co.*, 166 Fed. Rep. 193; *United States* v. *Railroad Co.*, 12 Wall. 362; *Fosdick* v. *Schall*, 99 U. S. 235; *Myer* v. *Car Co.*, 102 U. S. 1; *York Mfg. Co.* v. *Cassell*, 201 U. S. 344, relied on by it, is not their true intent and meaning. There would have been no physical difficulty in removing the machinery involved in those cases. See *In re Williamsburg Knitting Mill*, 190 Fed. Rep. 871 [since reversed, *sub nom. Holt* v. *Henley*, 232 U. S. 637].

The Detroit Steel Company has waived its lien on these tanks by its conduct and acts. 35 Cyc. 673.

It was guilty of laches. *Chapman* v. *Lathrop*, 6 Cowen, 110; *Furniss* v. *Hone*, 8 Wend. 248; *Lupin* v. *Marie*, 6 Wend. 77; *Matthews* v. *Smith*, 31 Atl. Rep. 879; *Peabody* v. *Maguire*, 12 Atl. Rep. 631.

The other cases cited by petitioner can be distinguished.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill in equity for an injunction against the sale of certain tanks, fixtures and fittings supplied by the petitioner to the defendant Brewing Company, and for a return of the same. The bill was dismissed by the Circuit Court and the decree was affirmed by the Circuit Court of

Appeals. 195 Fed. Rep. 447; *ibid.* 1023, where Pritchard, J., dissented from the refusal of a rehearing. 115 C. C. A. 349; *ibid.* 669.

The contract under which the tanks were furnished provided that the title should remain in the petitioner until they were fully paid for, and that the petitioner might remove them on default. It was made on August 8, 1908, and duly recorded on December 7 of the same year. Before those dates the Brewing Company had made a mortgage of its land, brewery, 'and all the buildings, machinery and appliances thereon erected or to be erected' and the mortgage had been recorded. There were subsequent mortgages, judgment liens, &c., but they do not need special mention. A bill was brought to foreclose the first mortgage, to which the petitioner was not made a party. A receiver was appointed and a sale ordered and advertised. The petitioner then brought this bill against the various adverse claimants, joining the receiver by leave of court. The statute of West Virginia makes a reservation of title such as the petitioner's 'void as to creditors of, and purchasers without notice from, such buyer' unless a notice of the reservation is recorded as therein required. Code (1906), § 3101.

In *Holt* v. *Henley*, 232 U. S. 637, the court had to consider a similar question of priority in view of a Virginia statute like that of West Virginia upon which the petitioner relies, and, although in that case the conditional sale had not been recorded, it was held that the vendor was to be preferred. The main question now before us is whether this case is to be decided differently on the ground that the tanks were 'an essential indispensable part of the completed structure contemplated by the mortgage,' a question left open in the former decision. 232 U. S. 641. The tanks were essential to the working of the brewery, and after they were installed the opening into the recess in which they stood was bricked up. It may

be assumed that they became part of the realty as between mortgagor and mortgagee, but that is immaterial in equity, however it may have been at the old common law. The question is not whether they were attached to the soil, but we repeat, whether the fact that they were necessary to the working of the brewery gives a preference to the mortgagee. We see no sufficient ground for that result. This class of need to use property belonging to another is not yet recognized by the law as a sufficient ground for authority to appropriate it. If the owner of the tanks had lent them it would be an extraordinary proposition that it lost title when they were bricked in. That it contemplated the ultimate passing of title upon an event that did not happen makes its case no worse except so far as by statute recording is made necessary to save its rights. The common law knows no objection to what commonly is called a conditional sale. *William W. Bierce, Ltd.* v. *Hutchins*, 205 U. S. 340, 347, 348.

The cases to which the possible exception left open in *Holt* v. *Henley* applies are principally those in which the property claimed has become so intimately connected with or embodied in that which is subject to the mortgage that to reclaim it would more or less physically disintegrate the property held by the mortgagee; *e. g. Porter* v. *Pittsburg Bessemer Steel Co.*, 122 U. S. 267. A man sometimes may lose title without his consent, and it has been held that he loses it even to an innocent converter who has added labor of a value far in excess of that of the original chattel. *Wetherbee* v. *Green*, 22 Michigan, 311. When the obvious destination of an article is to be incorporated into a structure in such a way that to remove it would destroy the other work, like bricks or beams in a building, there is still stronger ground for not giving to title an absolute right of way. But unless we give a mystic importance to bolts and screws, the mere knowledge that the chattel will be attached to the freehold is of no im-

portance, except perhaps as against innocent purchasers for value before the sale was recorded, which the mortgagees were not. *Holt* v. *Henley*, 232 U. S. 637, 640, 641. The damage that will be done by removal in this case is trifling and the petitioner offers to make it good.

The West Virginia decisions that had been rendered before the petitioner's contract was made, like those of Virginia, favored the petitioner's right. *Hurxthal* v. *Hurxthal*, 45 W. Va. 584. We do not understand *Lazear* v. *Ohio Valley Steel Foundry Co.*, 65 W. Va. 105, to lay down a different doctrine. We take it rather as turning on the special effect of a sale to receivers whose certificates it was thought were backed by a promise of the court that they should constitute a first lien. Therefore, we find it unnecessary to consider whether otherwise the doctrine of *Burgess* v. *Seligman*, 107 U. S. 20, coupled with our own opinion that the rule applied in the earlier decision is correct, would require us to follow that rather than the later case.

Decree reversed.

MR. JUSTICE LURTON dissents.

OCEANIC STEAM NAVIGATION COMPANY, LIMITED, AS OWNER OF THE STEAMSHIP TITANIC, *v.* MELLOR.

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

No. 798. Argued January 13, 14, 1914.—Decided May 25, 1914.

This case falls within the general proposition that a foreign ship may resort to the courts of the United States for a limitation of liability under § 4283, Rev. Stat. *The Scotland*, 105 U. S. 24.

It is competent for Congress to enact that in certain matters belonging

to admiralty jurisdiction parties resorting to our courts shall recover only to such extent or in such way as it marks out. *Butler* v. *Boston S. S. Co.*, 130 U. S. 527.

In the case of a disaster upon the high seas, where only a single vessel of British nationality is concerned and there are claimants of many different nationalities, and where there is nothing before the court to show what, if any, is the law of the foreign country to which the vessel belongs, touching the owner's liability for such disaster, such owner can maintain a proceeding under §§ 4283, 4284 and 4285, Rev. Stat., and Rules 54 and 56 in Admiralty.

If it appears in such a case that the law of the foreign country to which the vessel belongs makes provision for the limitation of the vessel owner's liability, upon terms and conditions different from those prescribed in the statutes of this country, the owner can, nevertheless, maintain a proceeding in the courts of the United States under §§ 4283, 4284 and 4285, Rev. Stat., and Rules 54 and 56 in Admiralty.

In such a proceeding the courts of the United States will enforce the law of the United States in respect of the amount of such owner's liability, and not that of the country to which the vessel belongs.

THE facts, which involve the construction of the Limited Liability Act and the right of the petitioner in this case to the benefit thereof, are stated in the opinion.

Mr. Charles C. Burlingham, *Mr. Norman B. Beecher*, and *Mr. J. Parker Kirlin*, for Oceanic Steam Navigation Co., Ltd.:

The Limited Liability Act applies equally to American and foreign shipowners; it establishes maritime law of the United States to be universally applied in our courts as an expression of our conception of justice.

Under *The Scotland*, 105 U. S. 24, foreign shipowners are entitled to benefit of our Limited Liability Act.

The English cases giving narrow construction of early British statute were disapproved by this court in *The Scotland*.

The law of limited liability is a part of our maritime code, and is to be applied whether favorable or adverse to foreign ships.

The Harter Act decisions of this court are controlling authorities in the interpretation of the Limited Liability Act.

The application of the Harter Act to foreign ships, irrespective of nationality, is based on the broad interpretation previously given the Limited Liability Act.

The rule of limited responsibility has been uniformly applied in our courts, as shown by a history of the cases.

The application of the Limited Liability Act is not affected by the immaterial circumstance that but a single vessel is involved; and this notwithstanding the *dictum* of Mr. Justice Bradley in *The Scotland.*

Under the *La Bourgogne Case* the doctrine of the law of the flag applies only to very limited extent.

The claimants' authorities can be distinguished.

The purpose of the Limited Liability Act is not only to provide limitation, but also to enable all parties to be brought into concourse for the determination of whatever liability exists.

There is no question of limitation presented until the liability has been determined and until then the consideration of the law to be applied is premature.

In this case no other law than our own has been thus shown.

Question A should be answered in the affirmative; Question B, if answered, in the affirmative; Question C, if answered, The Law of the United States.

In support of these contentions, see *The Alaska,* 130 U. S. 201; *The Amalia,* 1 Moo. P. C. N. S. 471; Br. & Lush. 151; *The Belgenland,* 114 U. S. 355; *The Britannic,* 39 Fed. Rep. 395; *Butler* v. *Boston S. S. Co.,* 130 U. S. 527; *The Carl Johan,* cited in *The Dundee,* 1 Hagg. Adm. 109, 113; *Chartered Mercantile Bank* v. *Netherlands India Co.,* 10 Q. B. D. 521; *The Chattahoochee,* 173 U. S. 540; *Churchill* v. *The British America,* 9 Ben. 516; *The City of Norwalk,* 55 Fed. Rep. 98; *Cohens* v. *Virginia,* 6 Wheat. 264; *Cope*

v. *Doherty*, 4 Kay & J. 367; *S. C.*, 2 De G. & J. 614; *The Corsair*, 145 U. S. 335; *Cromartyshire* v. *La Bourgogne*, 44 Shipp. Gazette, 31; *S. C.*, 44 *id.* 311; *Cuba Railroad Co.* v. *Crosby*, 222 U. S. 473; *The Dundee*, 1 Hagg. Adm. 109; *Dyer* v. *National Steam Nav. Co.*, 3 Ben. 173; *S. C.*, 14 Blatchf. 483; *The Eagle Point*, 142 Fed. Rep. 453; *General Collier Co.* v. *Schurmanns*, 1 J. & H. 180; *The Girolamo*, 3 Hagg. Adm. 169; *The Great Western*, 9 Ben. 403; *The H. F. Dimock*, 52 Fed. Rep. 598; *The Hamilton*, 207 U. S. 398; *The Harrisburg*, 119 U. S. 199; *The Jason*, 225 U. S. 32; *The John Bramall*, 10 Ben. 495; *Knott* v. *Botany Mills*, 179 U. S. 69; *La Bourgogne*, 210 U. S. 95; *The Lamington*, 87 Fed. Rep. 752; *Levinson* v. *Oceanic Steam Nav. Co.*, 15 Fed. Cas. 422; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397; *The Lottawanna*, 21 Wall. 558; *Marckwald* v. *Oceanic Steam Nav. Co.*, 11 Hun, 462; *In re Morrison*, 147 U. S. 14; *The Norge*, 156 Fed. Rep. 845; *The North Star*, 106 U. S. 17; *Norwich Co.* v. *Wright*, 13 Wall. 104; *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429; *Prov. & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578; *Queen* v. *Keyn*, 2 Ex. D. 63; *Richardson* v. *Harmon*, 222 U. S. 96; *The San Pedro*, 223 U. S. 365; *The Scotland*, 105 U. S. 24; *The Silvia*, 171 U. S. 462; *Slater* v. *Mexican Railroad Co.*, 194 U. S. 120; *The State of Virginia*, 60 Fed. Rep. 1018; *The Strathdon*, 89 Fed. Rep. 374; *Talbot* v. *Seeman*, 1 Cranch, 1; *The Thingvalla*, 48 Fed. Rep. 764; *Thomassen* v. *Whitwell*, 9 Ben. 403; *The Wild Ranger*, 1 Lush. 553.

Mr. Frederick M. Brown and *Mr. George Whitefield Betts, Jr.*, with whom *Mr. Francis H. Kinnicutt*, *Mr. Kenneth Gardner* and *Mr. John C. Prizer* were on the brief, for Mellor and Anderson:

The law of the flag governs, and upon fundamental principle, the British law as the *lex loci delicti*, fixes the limit of petitioner's liability. The rule that liability for a tort on land is governed by the *lex loci delicti* is universal.

Kaiser Ferdinand v. *M——*, 57 Reichsgericht, 142; *Wilson* v. *McNamee*, 102 U. S. 572; *Huntington* v. *Attrill*, 146 U. S. 657, 670; *Herrick* v. *Minn. & St. L. Ry.*, 31 Minnesota, 11.

The only exception is where enforcement of the *lex loci delicti* would be contrary to the public policy of the State of the forum. *Nor. Pac. R. R.* v. *Babcock*, 154 U. S. 190, 198; *The Brantford City*, 29 Fed. Rep. 373, 395. And see *Powell* v. *Gt. Nor. Ry.*, 102 Minnesota, 448.

In maritime disasters upon the high seas, involving one foreign vessel or several vessels of the same foreign nationality, the law of the country to which the vessel or vessels belong, governs the rights of all parties. 1 Calvo Droit Int. (4th ed.), 552 (Bk. VI, § 3); Bluntschli, § 317; Vattel I, c. 19, § 216; Rutherford II, c. 9, §§ 8, 19; Kent I, page 26; Wheaton, 8th ed., § 106; Wharton, Internat. Law, Dig. I, § 26; Wharton, Confl. of Laws (3d ed.), § 356; *Crapo* v. *Kelly*, 16 Wall. 610, 625.

The law of the flag is the *lex loci delicti*. Minor, Confl. of Laws, § 195; Dicey, Confl. Laws, 2d ed., § 663; Wharton, Confl. Laws, § 473; *Patterson* v. *Barque Eudora*, 190 U. S. 169, 176; *The Hamilton*, 207 U. S. 398, 405; *The Scotia*, 14 Wall. 170, 184; *Crapo* v. *Kelly*, 16 Wall. 610, 624; *United States* v. *Palmer*, 3 Wh. 610, 631; *United States* v. *Klintock*, 5 Wh. 144; *Wilson* v. *McNamee*, 102 U. S. 572; *Re Ah Sing*, 13 Fed. Rep. 286; *Re Moncan*, 14 Fed. Rep. 44; *Marshall* v. *Murgatroyd*, L. R. (1870), 6 Q. B. 31.

Causes of action for death at sea, due to collision or other cause, are governed by the law of the flag. *The Hamilton*, 207 U. S. 398, 405; *La Bourgogne*, 210 U. S. 95, 138; 139 Fed. Rep. 433, 438; *The E. B. Ward*, 17 Fed. Rep. 456, 459; *McDonald* v. *Mallory*, 77 N. Y. 546; *Lindstrom* v. *Int. Nav. Co.*, 117 Fed. Rep. 170; 123 Fed. Rep. 475; *So. Pac. Co.* v. *de Valle da Costa*, 190 Fed. Rep. 689; 176 Fed. Rep. 843; *The Jane Gray*, 95 Fed. Rep. 693; *Stewart* v. *Balt. & O. R. R.*, 168 U. S. 445.

For the English rule see *Lloyd* v. *Guibert*, L. R. 1 Q. B.

115, 127 (1865). For the rule in France, see *The Dio Adelphi*, Nov., 1879, 91 Jour. du Palais, 1880, pp. 603, 609.

Where the colliding vessels are of the same nationality or where they belong to different nations whose laws, applicable to the disaster, are the same, irrespective of the nationality either of the persons on board the vessels or of the owners of property on board the vessels or of the parties litigant, the law of the flag must, on principle, govern the rights and liabilities and the limitations of the liabilities of all persons, growing out of the disaster. 5 Desjardins, Dr. Comm. Marit, 118; *The Amalia*, 1 Moore, P. C. N. S. 471, 482. For the single exception to this statement, see *Cope* v. *Doherty*, 4 Kay & Johns. 367.

For the views of the highest courts of the leading commercial nations in regard to the principles governing problems of rights and liabilities where vessels of different flags are involved, see Clunet Droit Int. Prive, 80, 154, 241, 593; *The Scotland*, 105 U. S. 24, 30; *The Apollo*, 103 Jour. du Pal. 1892, Pt. I, 69; *The Stokesley Darras*, Droit Int. Prive, 114, 125; *The Kong Inge*, 49 Reichsgericht, 182; *The Svea*, 74 Id. 46. Under the English rule positive municipal laws and regulations in this class of cases, yield to the general maritime law, even if the collision in question occur in the territorial waters of the country of the forum; *The Zollverein*, Swabey, 96; *The Saxonia*, Lush. Adm. 410; *The Nostra Signora*, 1 Dobson, 290; *The Wild Ranger*, Lush. 553; *The Leon*, 6 P. D. 148, unless the intention of the law-giving authority that the municipal law shall displace the general maritime law is clearly expressed. *The Amalia*, 1 Moore P. C., N. S., 471.

The English doctrine would afford no support to the contentions of the appellant. As the limited liability principle never was a part of the general maritime law, *The Volant*, 1 W. Rob. 383, 387; *The Alene*, 1 W. Rob. 111, 117, and has not acquired, for the United States, the

force of the general maritime law since the act of 1851 was adopted. *The Scotland; La Bourgogne, supra.*

The American view in such cases, see *The Scotland, supra,* applying the *lex fori* to cases of collision between vessels of different nations, has many adherents in continental Europe; although, as already seen, it has not found acceptance in the highest courts of France, whereas in Germany the Imperial Court has adopted it only in a modified form. See Valroger Droit Maritime, § 2124.

Diversity of citizenship of parties litigant is not a factor of legal significance. If the controversy were one of which the court might assume or decline jurisdiction in its discretion, the nationality of the parties litigant might be a material factor. *Neptune Nav. Co.* v. *Timber Co.*, 37 Fed. Rep. 159; *The Russia,* 3 Ben. 471; *Elder Dempster Co.* v. *Pouppirt,* 125 Fed. Rep. 732.

When once the court has assumed jurisdiction it should mete out justice with an even hand, regardless of race, nationality, politics or religion. If the transaction has happened beyond our territorial jurisdiction, the court should give litigants the benefit of the *lex loci* of the occurrence. *Huntington* v. *Attrill,* 146 U. S. 657, 670; *La Bourgogne,* 210 U. S. 95, 115; *Cuba R. R. Co.* v. *Crosby,* 222 U. S. 473, 478; *The Brantford City,* 29 Fed. Rep. 373, 384; *Nor. Pac. Ry.* v. *Mase,* 63 Fed. Rep. 114; *The Belgenland,* 114 U. S. 355, 370; *Thomassen* v. *Whitwell,* 12 Fed. Rep. 894.

A single-ship disaster involves the same principle as a collision between two ships of the same nation. *The Lamington,* 87 Fed. Rep. 752; *The Egyptian Monarch,* 36 Fed. Rep. 773; *The Maud Carter,* 29 Fed. Rep. 156; *Pope* v. *Nickerson,* Fed. Cas. 11,274. The American statute applies *ex proprio vigore* only to American territorial waters and to American vessels on the high seas.

The statutes of any State or nation have no extra territorial force or effect in regulating acts or occurrences be-

yond its territorial boundaries. *In re Sawers*, 12 Ch. Div. 522, 528; *Phillips* v. *Eyre*, L. R., 6 Q. B. 1, 28; cases *supra* and *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347; *Atchison &c. Ry.* v. *Sowers*, 213 U. S. 55, 70; *The Scotia*, 14 Wall. 170, 184; *Bank* v. *Earle*, 13 Pet. 519; *The Laminton*, 87 Fed. Rep. 752; *Whitford* v. *Panama R. R. Co.*, 23 N. Y. 465; *Mahler* v. *Transp. Co.*, 35 N. Y. 352; *Thompson* v. *Ketcham*, 8 Johns. 190; *Le Forest* v. *Tolman*, 117 Massachusetts, 109; *Rundell* v. *Comp. Gen. Trans.*, 100 Fed. Rep. 655, 660; *United States* v. *Palmer*, 3 Wh. 610, 631; *United States* v. *Klintock*, 5 Wh. 144; *United States* v. *Davis*, 2 Fed. Cas. No. 14,932; 1 Kent's Comm., p. 26.

The British courts invariably held American and other foreign vessels liable without limit for negligent disasters at sea, while the former British Limitation Act was in force; although it does not appear that the British courts were ever asked to apply the American Act as the *lex loci delicti*, after that act had been duly pleaded and proved. *The Wild Ranger* (P. C.), Lush. Adm. 553; *Cope* v. *Doherty*, 2 De Gex & J. 614; *The Carl Johan*, 3 Hag. Adm. 186; *The Amalia*, 1 Moore P. C., N. S., 471, 475.

Our courts should not give British shipowners here the benefit of a more favorable rule of international law than is accorded to American shipowners in the British courts. *The Amalia, supra; The Santa Cruz*, 1 C. Rob. 50, 60, 64, 67; *The Adeline*, 9 Cranch, 244, 288.

There is no analogy between the Limited Liability Act and the Harter Act. The national policies, of which the two acts are expressions, are wholly different. The one act was designed to increase the liability of foreign ships, the other to diminish the liability of domestic ships.

The purpose of the Limited Liability Act was to change the position of, and to confer a benefit upon American ships and shipowners only. *La Bourgogne*, 210 U. S. 95, 120; *Richardson* v. *Harmon*, 222 U. S. 96, 103; *Moore* v. *Am. Transp. Co.*, 24 How. 1, 39; *Providence Co.*

v. *Hill Mfg. Co.*, 109 U. S. 578, 588; *The Maine*, 152 U. S. 122, 128; *Chamberlain* v. *Transp. Co.*, 44 N. Y. 305.

The debates accompanying the passage of the liability acts of 1851 and 1884, and of 1886, extending them to lake vessels, barges, etc., show that Congress intended them to apply only to American vessels.

The law of Great Britain must be taken, presumptively, as a law holding shipowners to unlimited liability.

The petition cannot be aided by any legal rule that the British law of limited liability is presumed to be similar to the American law, until shown by proper pleading and proof not to be similar. No such rule exists. *Crosby* v. *Cuba R. Co.* (C. C.), 158 Fed. Rep. 144; *S. C.*, 222 U. S. 473; *Lloyd* v. *Matthews*, 155 U. S. 222; *Crashley* v. *Press Pub. Co.*, 179 N. Y. 27; *Wooden* v. *W. N. Y. & P. R. Co.*, 126 N. Y. 10, 15; *Whitford* v. *Panama R. Co.*, 23 N. Y. 465, 468; *Carpenter* v. *Grand Trunk R. R.*, 72 Maine, 388.

The presumption of identity of the foreign law with the common law of the forum is indulged as a practical rule of convenience only where the situation is such as to create a strong probability that the two laws are in truth and fact identical or substantially so. *Dainese* v. *Hale*, 91 U. S. 13, 20, 21; *Langdon* v. *Young*, 33 Vermont, 136; *McDonald* v. *Mallory*, 77 N. Y. 546; *Lewis* v. *Woodfolk*, 2 Baxter (Tenn.), 25; *Leonard* v. *Columbia Nav. Co.*, 84 N. Y. 48; Minor, Confl. of Laws, § 214.

The presumption is that the British law on the subject of limitation of liability is that which is represented by the common law, judicially known to our courts. *Commonwealth* v. *Chapman*, 13 Metc. 68; *United States* v. *Reid*, 12 How. 361, 363; *Murray* v. *Chicago & N. W. Ry. Co.*, 62 Fed. Rep. 24, 27. Cited with approval in *Western Union Tel. Co.* v. *Call Pub. Co.*, 181 U. S. 92, 103.

The common law, as understood in this country and in England, charges petitioner with liability without limit. *The Volant*, 1 W. Rob. 383, 387; *The Scotland*, 105

U. S. 24, 28; *The Great Western*, 118 U. S. 520, 534; *The Main*, 152 U. S. 122; *The Bourgogne*, 210 U. S. 95, 116.

Therefore it must be presumed that in Great Britain, shipowners are liable without limit for disasters governed by British law, if the shipowner before the court, challenged by his adversary to establish his legal right to enjoy the benefit of any statute or law of limitation of liability, fail to plead and prove the British law.

Under the legal principle actually applicable here, the American courts must be taken as having judicial knowledge of the fact that in 1776 when this country became independent of Great Britain, the laws of the latter (statutory and non-statutory) held shipowners to unlimited liability for torts in the navigation of their ships and the courts are bound to presume, in the absence of suitable pleadings and proof to the contrary, that such is still the state of the British law. *Matter of Huss*, 126 N. Y. 537, 542; *Raynham* v. *Canton*, 3 Pick. 293; *Stokes* v. *Macken*, 62 Barb. 145; *Malpica* v. *McKown*, 1 La. (O. S.) 248, 255; *Arayo* v. *Currel*, 1 La. (O. S.) 528, 541; *Davis* v. *Curry*, 5 Kentucky, 238, 240, 241; *Berluchaux* v. *Berluchaux*, 7 La. (O. S.) 34; *Mex. Cen. Ry.* v. *Glover*, 107 Fed. Rep. 356; *Mex. Cen. Ry.* v. *Marshall*, 91 Fed. Rep. 933; *People* v. *Manhattan Co.*, 9 Wend. 351; *People* v. *Calder*, 30 Michigan, 85; *Cochran* v. *Ward*, 31 N. E. 581; *Scales* v. *Sir John Key*, 11 Ad. & Ell. 819; *Dempster* v. *Stephen*, 63 Ill. App. 126; *Newton* v. *Cocke*, 10 Arkansas, 169; *Miller* v. *McVeagh*, 40 Ill. App. 532; *The Pawashick*, 2 Lowell, 142.

The only British law on this general subject existing in 1776 was the act of 1734 (7 Geo. II, c. 15), the scope of which was confined to embezzlement by the master and crew and acts *ejusdem generis*. *The Dundee*, 1 Hagg. Adm. 109, 121; Abbott, 14th ed., 1045; Maclachlan, 5th ed., 128.

The assertion by a shipowner of his freedom from fault does not justify the court in entertaining a limitation proceeding unless, in case of his opponent prevailing on the

issue of negligence, his averments bring him *prima facie* within the scope of some law of limited liability, properly applicable to the facts of the case.

If British law governs the Titanic disaster, the petition was properly subject to exceptions under the authorities. *Cope* v. *Doherty*, 2 De Gex & J. 614; *The Amalia* (1863), 1 Moore P. C., N. S. 471; *The Wild Ranger* (1862), Lush. Adm. 553; *Richardson* v. *Harmon*, 222 U. S. 96; *Delaware R. Ferry* v. *Amos*, 179 Fed. Rep. 756; *The Mamie*, 5 Fed. Rep. 813; 8 Fed. Rep. 367; 110 U. S. 742; *In re Eastern Dredging Co.*, 138 Fed. Rep. 942.

For authorities giving the history of the development of the law of Great Britain on the subject of the limitation of shipowners' liability, see *The Volant*, 1 W. Rob. 383, 387; *The Carl Johan*, 1 Hagg. Adm. 113; *The Dundee*, 1 Hagg. Adm. 109, 120, 121; *The Mellona*, 3 W. Rob. 16, 20; *Wilson* v. *Dickson*, 2 B. & Ald. 2; *The Amalia, supra; Chapman* v. *Nav. Co.*, 4 P. D. 157; *The Andalusian*, 3 P. D. 182, 189; *The Main*, 152 U. S. 122; Temperley & Moore (2d ed.), p. 292; Maclachlan (5th ed.), 126; Abbott (14th ed.), 637; Marsden, Collisions, chap. 7.

There have been two sorts of British acts regulating the liability of shipowners for torts happening without personal fault on their part: (*a*) those that regulate the liability of shipowners for loss or destruction of goods on board their ships, owing to fire or to robbery or to embezzlement, and (*b*) those that limit the liability of shipowners for torts generally.

In respect of fire, robbery, or embezzlement, Parliament referred to "any ship or vessel" in the acts of 7 Geo. II, c. 15 (1734), and 26 Geo. III, c. 86 (1786), and to "any sea-going ship" in the act of 17 & 18 Vict., c. 104; M. S. A., 1854, § 504, and (for greater clearness, Temperley, 2d ed., p. 293) to "any British sea-going ship" in the act of 57 & 58 Vict., c. 60; M. S. A., 1894, § 502.

In respect of limitation of shipowners' liability for torts

generally, Parliament referred to "any ship or vessel" in the act of 63 Geo. III, c. 159, § 1 (1813), and to "any seagoing ship" in the act of 17 & 18 Vict., c. 104; M. S. A., 1854, § 504, and to "any ship, whether British or foreign," in the acts of 25 & 26 Vict., c. 63; M. S. A., 1862, § 54, and 57 & 58 Vict., c. 60; M. S. A., 1894, § 503.

The acts of 61 & 62 Vict., c. 14 (1898); 63 & 64 Vict., c. 32 (1900); 6 Edw. VII, c. 48, §§ 69, 70, 71 (1906), although dealing with the same general subjects, afford no additional information concerning the will of Parliament as to the scope of the statutes regulating shipowners' liability.

For cases showing error in points advanced in appellant's brief see cases already cited and also *The Alaska*, 130 U. S. 201; *The Andalusian*, 3 P. D., 182, 189; *The Britannic*, 39 Fed. Rep. 395; *The British America*, 9 Ben. 516; *Camille* v. *Couch*, 40 Fed. Rep. 176; *The Carl Johan*, 1 Hagg. Adm. 113; 3 Hagg. Adm. 186; *Compania la Flecha* v. *Brauer*, 168 U. S. 104, 118; *Cope* v. *Doherty*, 4 Kay & J. 367, 391; *Danschewski* v. *Larsson*, 3 Revue Int. du Droit Marit, 348; *The Dundee*, 1 Hagg. Adm. 109, 120; *The Eagle Point*, 142 Fed. Rep. 453; 201 U. S. 644; *Foltz* v. *St. Louis R. Co.*, 60 Fed. Rep. 316; *Hale* v. *Allison*, 188 U. S. 56; *The John Bramall*, 10 Ben. 495, 502; *Kiefer* v. *G. Trunk Ry.*, 12 App. Div. 28, 31; *Le Forest* v. *Tolman*, 117 Massachusetts, 109; *Levinson* v. *Oceanic S. Nav. Co.*, 15 Fed. Cas. 422; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225, 236; *The Main*, 152 U. S. 122, 126; *Marselis* v. *Morris, Co. Canal*, 1 N. J. Eq. 31, 35; *The Mellona*, 3 W. Rob. 16, 20; *New* v. *Oklahoma*, 195 U. S. 252, 256; *The Norge*, 156 Fed. Rep. 845, 850; *Pritchard* v. *Norton*, 106 U. S. 124, 131; *Schulenberg Lumber Co.* v. *Hayward*, 20 Fed. Rep. 422; *Shelby* v. *Guy*, 11 Wheaton, 361, 371; *The State of Virginia*, 60 Fed. Rep. 1018; *The Strathdon*, 89 Fed. Rep. 374, 380; *Venice* v. *Woodruff*, 62 N. Y. 462, 470; *United States* v. *More*, 3 Cranch, 159, 171; *United States* v. *Sanges*, 144 U. S. 310, 319; *Washington County* v. *Williams*, 111 Fed. Rep.

801, 812; *Re Wentworth Co.*, 191 Fed. Rep. 821; Westlake, Priv. Int. Law, § 201; *Wilson* v. *Dickson*, 2 B. & Ald. 2.

By leave of court *Mr. Howard S. Harrington, Mr. Henry J. Bigham, Mr. D. Roger Englar* and *Mr. Oscar R. Houston* filed a brief for intervening claimants as *amici curiæ*, as did also *Mr. A. Gordon Murray* and *Mr. Benjamin Micou, Mr. Richard P. Whiteley* and *Mr. George S. Graham.*

Mr. Justice Holmes delivered the opinion of the court.

This case comes here upon a certificate from the Circuit Court of Appeals. The facts stated are as follows, with slight abbreviation. The Titanic, a British steamship, which had sailed from Southampton, England, on her maiden voyage for New York, collided on the high seas with an iceberg, on April 14, and sank the next morning, with the loss of many lives and total loss of vessel, cargo, personal effects, mails and everything connected with the ship except certain life boats. The owner, alleging that the loss was occasioned and incurred without its privity or knowledge, filed a petition for limitation of its liability under the laws of the United States, Rev. Stats., §§ 4283, 4284, 4285, and Admiralty Rules 54 and 56. 210 U. S. 562, 564. Before it did so a number of actions to recover for loss of life and personal injuries resulting from the disaster had been brought against the petitioners in Federal and state courts. The persons who sustained loss were of many different nationalities, including citizens of the United States. Mellor, a British subject, excepted to the petition, on the ground that 'the acts by reason of which and for which [the petitioner] claims limitation of liability took place on board a British registered vessel on the high seas' and therefore the law of the United States would not apply. Anderson, a citizen of the United States, excepted on the ground that the law of the United States

could not and that of England was not shown to apply. The District Court dismissed the petition as to these two. 209 Fed. Rep. 501. The petitioner appealed, and the Circuit Court of Appeals certified the following questions:

A. Whether in the case of a disaster upon the high seas, where (1) only a single vessel of British nationality is concerned and there are claimants of many different nationalities; and where (2) there is nothing before the court to show what, if any, is the law of the foreign country to which the vessel belongs, touching the owner's liability for such disaster,—such owner can maintain a proceeding under §§ 4283, 4284 and 4285 U. S. Revised Statutes and the 54th and 56th Rules in Admiralty?

B. Whether, if in such a case it appears that the law of the foreign country to which the vessel belongs makes provision for the limitation of the vessel owner's liability, upon terms and conditions different from those prescribed in the Statutes of this country, the owner of such foreign vessel can maintain a proceeding in the courts of the United States, under said Statutes and Rules?

In the event of the answer to question B being in the Affirmative,

C. Will the courts of the United States in such proceeding enforce the law of the United States or of the foreign country in respect to the amount of such owner's liability?

The general proposition that a foreign ship may resort to the courts of the United States for a limitation of liability under Rev. Stat., § 4283 is established. *The Scotland*, 105 U. S. 24. *La Bourgogne*, 210 U. S. 95. These were cases respectively of collisions between American and English and English and French vessels. See also *The Chattahoochee*, 173 U. S. 540. *The Germanic*, 196 U. S. 589, 598. But it is argued that there is an exception in a case like this, where only a single foreign ship is concerned. The argument is supported by a quotation from Mr. Justice Bradley in *The Scotland*, to the effect that if a collision occurred

on the high seas between two vessels belonging to the same nation the court would determine the controversy by the law of their flag. For, it is said, if the foreign law would govern in that case it must govern in this, and therefore at least in the absence of allegations bringing the case within the foreign law, the petition must be dismissed. If, in the observation referred to, Mr. Justice Bradley had been speaking of proceedings of this class it would be important as sanctioning the view that the United States courts offered a *forum concursus* for the administration of other systems as well as of our own; but we apprehend that he was speaking of an ordinary collision case and merely indicating that in such a case the principle usually governing foreign torts would apply. That principle may be accepted as equally governing here but it does not carry us far.

It is true that the act of Congress does not control or profess to control the conduct of a British ship on the high seas. See *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356. It is true that the foundation for a recovery upon a British tort is an obligation created by British law. But it also is true that the laws of the forum may decline altogether to enforce that obligation on the ground that it is contrary to the domestic policy, or may decline to enforce it except within such limits as it may impose. *Cuba Railroad Co.* v. *Crosby*, 222 U. S. 473, 478, 480. Dicey, Conflict of Laws, 2d ed., 647. It is competent therefore for Congress to enact that in certain matters belonging to admiralty jurisdiction parties resorting to our courts shall recover only to such extent or in such way as it may mark out. *Butler* v. *Boston & Savannah Steamship Co.*, 130 U. S. 527. The question is not whether the owner of the Titanic by this proceeding can require all claimants to come in and can cut down rights vested under English law, as against, for instance, Englishmen living in England who do not appear. It is only whether those who do see

fit to sue in this country are limited in their recovery irrespective of the English law. That they are so limited results in our opinion from the decisions of this court. For on what ground was the limitation of liability allowed in *The Scotland* or *La Bourgogne*? Not on their being subject to the act of Congress or any law of the United States in their conduct—but if not on that ground then it must have been because our statute permits a foreign vessel to limit its liability according to the act when sued in the United States. There may be some little uncertainty in the language of Mr. Justice Bradley in the earlier case. A slight suggestion that the statute is applied because of a vacuum,—the absence of any law properly governing the transaction. But it was no necessary part of his argument that people were to be made liable after the event by the mere choice of a forum; and if they were it would not be because of the act of Congress. That does not impose but only limits the liability—a liability assumed already to exist on other grounds. The essential point was that the limitation might be applied to foreign ships if sued in this country although they were not subject to our substantive law.

It is not necessary to consider whether the act of Congress may not limit the rights of shippers or American vessels to recover for injuries in our waters or on the high seas, so that if they sued in a foreign court they could not be allowed to recover more than the act allows, if our construction of the law were followed. A law that limits a right in one case may limit a remedy in another. This statute well might be held to announce a general policy, governing both obligations that arise within the jurisdiction and suits that are brought in the courts of the United States. *Emery* v. *Burbank*, 163 Massachusetts, 326, 328. It clearly limits the remedy, as we have shown, in cases where it has nothing to say about the rights. With the explanation that we have made we may repeat here Jus-

tice Bradley's words: "The rule of limited responsibility is now our maritime rule. It is the rule by which, through the Act of Congress, we have announced that we propose to administer justice in maritime cases."

We see no absurdity in supposing that if the owner of the Titanic were sued in different countries, each having a different rule affecting the remedy there, the local rule should be applied in each case. It can be imagined that in consequence of such diverse proceedings the owner might not be able to comply with the local requirements for limitation, as it also is conceivable that if it sought the advantage of an alien law it might as a condition have to pay more than its liability under the law of its flag in some cases. But the imagining of such possible difficulties is no sufficient reason for not applying the statute as it has been construed; on the whole, it would seem with good effect.

It follows from what we have said that the first two questions must be answered in the affirmative and the third, the law of the United States.

Answers: *A, Yes.*
B, Yes.
C, The law of the United States.

MR. JUSTICE MCKENNA considers it a proper deduction from *The Scotland* that the law of the foreign country should be enforced in respect of the amount of the owner's liability.

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jurisdiction on the Court of Claims to hear and determine claims of certain Indian traders against the Menominee Tribe of Indians and certain members thereof, created no new right in favor of such traders except removal of the bar of limitations, and gave no right to sue the United States or any member of the Tribe in his individual capacity as disassociated from his dependent condition as an Indian subject. *Green* v. *Menominee Tribe*, 558.

7. *On bond of government contractor, by materialman or laborer; time for bringing.*

Under the act of August 13, 1894, as amended by the act of February 24, 1905, a materialman or laborer may not bring suit on the contractor's bond in the Federal court in the name of the United States for his use and benefit, within six months from completion and settlement, even though the United States has not asserted any, and has no, claim against the contractor or his sureties. *Texas Portland Cement Co.* v. *McCord*, 157.

8. *On bond of government contractor; time for bringing; effect of intervention.*

Where the original bill was prematurely filed, an intervention after the six month, and before the twelve month, period is not effectual as such or as an original bill. *Ib.*

9. *On bond of government contractor; time for bringing; effect of filing amended bill.*

An amended bill filed more than one year after completion of the work and settlement, if treated as an original bill, is filed too late. *Ib.*

10. *Termination of litigation; public policy.*

It is in the interest of the Republic that litigation should come to an end. *De Bearn* v. *Safe Deposit Co.*, 24.

See ADMIRALTY; EMINENT DOMAIN, 3; EMPLOYERS' LIABILITY ACT, 2, 3, 10; INDIANS, 6; LIMITATION OF ACTIONS; RAILROADS, 2; RIPARIAN RIGHTS, 2.

ACTS OF CONGRESS.

ADMIRALTY.—Rev. Stat., §§ 4283 *et seq.* (see Admiralty, 1–7): *White* v. *Island Transportation Co.*, 346; *The Titanic*, 718. Rev. Stat., §§ 4284, 4285 (see Admiralty, 6, 7): *The Titanic*, 718.

BRIBERY.—Crim. Code, §§ 39, 117 (see Bribery, 1, 4): *United States* v. *Birdsall*, 223.

CIVIL RIGHTS.—Rev. Stat., §§ 1979, 1981 (see Actions, 2): *O'Sullivan*

ADMINISTRATIVE INQUIRIES.

See ACTIONS, 1.

ADMIRALTY.

1. *Limitation of liability; jurisdiction of District Court; effect of pleading.*

The jurisdiction of a District Court in a proceeding in admiralty to limit the liability of a ship owner, under Rev. Stat., §§ 4283 *et seq.*, is not ousted merely because a damage claimant puts in issue the allegation in the petition or libel that the damage was occasioned without the privity or knowledge of the owner. (*Butler* v. *Boston Steamship Co.*, 130 U. S. 527.) *White* v. *Island Transportation Co.*, 346.

2. *Limitation of liability; jurisdiction of District Court; settlement of questions of fact.*

In a proceeding in admiralty under Rev. Stat., §§ 4283 *et seq.*, questions of fact, whether jurisdictional or otherwise, are to be settled by a trial; and where the petition alleges that the damage or injury, liability for which is sought to be limited, was occasioned without the privity or knowledge of the owner, and the damage claimant waives proof of that allegation, it must be taken as true, and there will be no defect of jurisdiction in that regard. *Ib.*

CASES DISTINGUISHED.

CASES FOLLOWED.

CERTIFICATE.

See JURISDICTION, A 2.

CERTIORARI.

Denial of one of two petitions for, to review same judgment.

Where two parties petition for writs of certiorari to review the same judgment, but the entire matter can be disposed of on one petition, the other will be denied. *Gompers* v. *United States*, 604.

See JURISDICTION, A 2, 29.

CHARTERS.

See CONSTITUTIONAL LAW, 10, 18;
CORPORATIONS;
COURTS.

CHATTELS.

See CONDITIONAL SALE;
TITLE.

CONTRACTS.

CONVEYANCES.

CORPORATIONS.

COURT AND JURY.

COURT OF CLAIMS.

See ACTIONS, 6.

COURT RECORDS.

See JUDICIAL NOTICE.

COURTS.

Interference with exercise of state powers; justification for.

Cost and inconvenience to the party affected must be very great in order to justify the courts in declaring void the action of the State in exercising its reserved power over charters or its police power. *Erie R. R. Co.* v. *Williams*, 685.

See ACTIONS, 3, 4;
ATTACHMENT AND GARNISHMENT, 2;
COMMON CARRIERS;
CONSTITUTIONAL LAW, 32;
CORPORATIONS;
IMMIGRATION, 2;
JUDICIAL POWERS;
JURISDICTION;
PUBLIC LANDS, 16;
STATUTES, A 2.

CRIMINAL LAW.

1. *Limitations; legislative or judicial determination.*

In dealing with the punishment of crime, some rule as to limitations should be laid down, if not by Congress by this court. *Gompers* v. *United States*, 604.

2. *Pardon by President; effect on power of State to punish for crime subsequently committed.*

The granting of a pardon by the President for a crime committed against the United States does not operate to restrict the power of a State to punish crimes thereafter committed against its authority and to prescribe such penalties as it deems appropriate in view of the nature of the offense and the character of the offender taking in view his past conduct; and so *held* that the second offense provisions of the Penal Code of New York are not unconstitutional as applied to a person convicted of the same crime of which he had been previously convicted by the United States and pardoned by the President. *Carlesi* v. *New York*, 51.

3. *Penalties; effect of consideration of former offense which has been pardoned.*

Taking into consideration the fact that a person convicted of a crime against the State had previously committed the same crime against the United States is not a punishment of the former crime and does not deprive the person convicted of any Federal rights under a pardon of the President of the United States of the first offense. *Ib.*

EQUITY.

See CONTRACTS, 14;
TRESPASS, 1, 3, 4.

ESTOPPEL.

See INDIANS, 4;
PRACTICE AND PROCEDURE, 31;
TAXES AND TAXATION, 3.

EVIDENCE.

1. *Admissibility of paper writing as demand; effect of incorporation of other matter.*

A written paper offered and admitted as evidence of a demand and not objected to as coming too late is not inadmissible because it contains other matter. The proper course for the party objecting is to ask an instruction limiting the effect of the paper to the demand or else to base the objection on its coming too late. *Tevis* v. *Ryan*, 273.

2. *Secondary; admissibility.*

While the record of proceedings of a board of directors, when made, is the best evidence, if it is found that no record was made, the admission of secondary evidence is not reversible error. (*Bank of the United States* v. *Dandridge*, 12 Wheat. 64.) *Denver & Rio Grande R. R.* v. *Arizona & Colorado R. R.*, 601.

3. *Burden of proof on one attacking constitutionality of police regulation.*

The burden of the party attacking a police regulation as unconstitutional under the due process clause is not sustained by the mere principle of liberty of contract; it can only be sustained by showing that the statute conflicts with some constitutional restraint or does not subserve the public welfare. *Erie R. R. Co.* v. *Williams*, 685.

4. *Weight; sufficiency of instructions as to.*

It does not appear that any reversible error was committed by the court below concerning instructions asked and refused in regard to testimony of a car inspector and the weight attributable thereto. *Grand Trunk Western Ry. Co.* v. *Lindsay*, 42.

See CONTRACTS, 2;
PUBLIC LANDS 9, 11, 12, 13, 14, 19;
TRADE-MARKS, 5.

EXECUTIVE DEPARTMENTS.

Indian Office; powers and duties of.

The office of Commissioner of Indian Affairs was established to create

INJUNCTION.

See TRADE-MARKS, 6;
TRESPASS, 1, 3, 4.

INSTRUCTIONS TO JURY.

1. *Duplication and emphasis of immaterial point properly refused.*

It is not error for the court to refuse to affirm a particular and immaterial point in regard to the alleged negligence of the defendant when it would only serve to possibly confuse the jury and the point has already been covered by the charge. *Myers* v. *Pittsburgh Coal Co.*, 184.

2. *Isolated phrases in; effect as reversible error.*

An isolated phrase in the charge in a case involving the fall of an engine, which did not amount to *res ipsa loquitur*, but was to the effect that proof of a defect in the appliances that the master was bound to use care to keep in order and which usually would be in order if due care was taken was *prima facie* evidence of neglect, *held*, in this case, not to be reversible error, no attention having been called to the expression at the time. *Southern Ry. Co.* v. *Bennett*, 80.

See APPEAL AND ERROR, 2;
MASTER AND SERVANT, 5.

INSURANCE.

1. *Public interest in; regulation of rates.*

The business of insurance is so far affected with a public interest as to justify legislative regulation of its rates. *German Alliance Ins. Co.* v. *Kansas*, 389.

2. *Public interest in; power of state legislature to regulate contracts of.*

A public interest can exist in a business, such as insurance, distinct from a public use of property, and can be the basis of the power of the legislature to regulate the personal contracts involved in such business. *Ib.*

3. *Public interest in; fundamental thing.*

Where a business, such as insurance, is affected by a public use, it is the business that is the fundamental thing; property is but the instrument of such business. *Ib.*

4. *Public interest in; governmental regulation of.*

Munn v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *Brass* v. *North Dakota*, 153 U. S. 391, demonstrate that a business

LICENSES.

See CONSTITUTIONAL LAW, 1, 14;
INTERSTATE COMMERCE, 3;
TAXES AND TAXATION, 2.

LIENS.

See CONDITIONAL SALE, 2.

LIMITATION OF ACTIONS.

1. *Application of state statute to action based on Federal law.*

That an action depends upon, or arises under, the laws of the United States, does not preclude the application of the statute of limitations of the State. (*McLaine* v. *Rankin*, 197 U. S. 154.) *O'Sullivan* v. *Felix*, 318.

2. *Same.*

An action brought in the state court for damages for personal assault against persons violating Rev. Stat., §§ 5508 and 5509, is not an action for penalties but for remedial damages, and the period of prescription depends upon the law of the State. Rev. Stat., § 1047, does not apply. *Ib.*

See ACTIONS, 6, 7, 8, 9; CRIMINAL LAW, 1;
CONTEMPT OF COURT; IMMIGRATION, 1.

LIMITATION OF LIABILITY.

See ADMIRALTY;
INTERSTATE COMMERCE, 30, 32.

LOCAL LAW.

Alabama. Master and servant (see Actions, 5). *Tennessee Coal, I. & R. R. Co.* v. *George*, 354.

Sewing machine license tax (see Constitutional Law, 1, 14; Taxes and Taxation, 2). *Singer Sewing Machine Co.* v. *Brickell*, 304.

Arizona. Appellate practice; Rev. Stat. 1901, par. 1588 (see Practice and Procedure, 2). *Tevis* v. *Ryan*, 273.

Powers and duties of Board of Equalization (see Practice and Procedure, 14). *Arizona* v. *Copper Queen Mining Co.*, 87.

Arkansas. Railroad double damage statute (see Constitutional Law, 25). *Kansas City Southern Ry. Co.* v. *Anderson*, 325.

Mansfield's Digest, § 642; title to real estate (see Indians, 5). *Franklin* v. *Lynch*, 269.

LOCAL PRACTICE.

MAILS.

NAVY.

See ARMY AND NAVY.

NEGLIGENCE.

Question for determination of jury.

Where, on the evidence, reasonable men might well find that a man, found in a mangled and dying condition in a mine on a track beneath an overhead wire, was killed by negligence, and it cannot be said that no such conclusion could be reached on the testimony, it is not error to submit the question to the jury; and where, as in this case, the testimony can fairly support the verdict, it should not be set aside. *Myers* v. *Pittsburgh Coal Co.*, 184.

See EMPLOYERS' LIABILITY ACT, 2, 3, 4;
INSTRUCTIONS TO JURY, 2;
NAVIGABLE WATERS.

NOTICE.

See ATTACHMENT AND GARNISHMENT, 5, 6;
CONDITIONAL SALE, 3;
CONSTITUTIONAL LAW, 13.
CONTRACTS, 1;
INTERSTATE COMMERCE, 14, 16, 31;
PUBLIC LANDS, 8.

NUISANCE.

See EMINENT DOMAIN, 3.

OFFENSES.

See BRIBERY;
CONTEMPT OF COURT, 1;
IMMIGRATION, 3;
JURISDICTION, E.

OFFICIAL ACTION.

See BRIBERY.

OLEOMARGARINE.

See CONSTITUTIONAL LAW, 15, 22.

ONUS PROBANDI.

See EVIDENCE, 3.

PARDONS.

See CRIMINAL LAW, 2, 3;
STATES, 3.

PARTIES.

See ACTIONS, 6;
PRACTICE AND PROCEDURE, 27, 28.

PRESUMPTIONS.

RATE REGULATION.

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See CONSTITUTIONAL LAW, 8, 9.

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See IMMIGRATION, 4;
INTERSTATE COMMERCE, 37;
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RETURN OF PROCESS.

See APPEAL AND ERROR, 3.

REVERSION.

See STATES, 9;
WORDS AND PHRASES.

RIGHT OF WAY.

See RAILROADS, 4, 5.

RIPARIAN RIGHTS.

1. *Law governing.*

It is a question of local law whether the title to the bed of the navigable rivers of the United States is in the State in which the rivers are situated or in the owners of the land bordering on such rivers. *Archer* v. *Greenville Sand & Gravel Co.*, 60.

2. *Right of owner of upland to prevent removal of gravel from bed of navigable stream.*

An owner of the upland, who, under the law of the State, owns to the middle of a navigable river, has such an interest in the bed of the stream that, even though he cannot remove gravel therefrom without the consent of the Secretary of War, he can maintain an action to prevent others from doing so. *Ib.*

See LOCAL LAW (MISS.);
TRESPASS, 2.

SALES.

See CONDITIONAL SALE;
INDIANS.

SECRETARY OF COMMERCE AND LABOR.

See IMMIGRATION, 2.

SECRETARY OF THE INTERIOR.

See PUBLIC LANDS, 6, 7.

STATUTES.

A. Construction of.

1. *Legislative intent; effect of subsequent enactments to indicate.*

The intent of Congress in regard to its enactments—such as those relating to restrictions on alienation of Indian allotted lands—may be indicated by subsequent enactments relating to the same subject-matter. *Bowling* v. *United States*, 528.

2. *Motives for legislation; consideration unnecessary.*

When the purpose of Congress is stated in such plain terms that there is no uncertainty, and no construction is required, it is unnecessary to inquire into the motives which induced the legislation. The only province of the courts in such a case is to enforce the statute in accordance with its terms. *Texas Portland Cement Co.* v. *McCord*, 157.

3. *Administrative construction; weight to be given.*

In construing a statute, the practical interpretation given to it by the administrative body charged with its enforcement is entitled to weight. *Boston & Maine R. R.* v. *Hooker*, 97.

4. *Departmental construction; weight of.*

The practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect; and, if acted upon for a number of years, will not be disturbed except for very cogent reasons. *Logan* v. *Davis*, 613.

5. *Contemporaneous publication in two languages; weight of versions.*

In construing a statute which at the time of its enactment was published in more than one language, the version in the other language is significant. *Carondelet Canal & Nav. Co.* v. *Louisiana*, 362.

6. *Remedial statutes to be construed liberally.*

A remedial statute is to be construed liberally so as to effectuate the purpose of the legislative body enacting it; and so *held* as to the Adjustment Act of 1887. (*United States* v. *Southern Pacific Railroad Co.*, 184 U. S. 49.) *Logan* v. *Davis*, 613.

7. *Constitutional provisions; nature of; significance to be gathered, how.*

Provisions of the Constitution of the United States are not mathematical formulas having their essence in their form, but are organic living institutions transplanted from English soil. Their signif-

B. Statutes of the United States.
See Acts of Congress.

C. Statutes of the States and Territories.
See Local Law.

TAXES AND TAXATION.

1. *Constitutionality of state statute; presumption as to intention of legislature.*

In determining whether a state tax statute is constitutional, there is a presumption that the legislature intended to tax only that which it had the constitutional power to tax, and the statute will be sustained if full and fair effect can be given to its provisions as confined wholly to intrastate business. *Singer Sewing Machine Co.* v. *Brickell*, 304.

2. *License tax; who within scope of Alabama law imposing license on vendors of sewing machines.*

The court below rightly held that a foreign corporation having an agency in each county of the State and selling sewing machines by traveling salesmen as well as at the agencies was subject to the license intended to be imposed on itinerant sales by the statute of Alabama, and that it fell without the excepted class of merchants although the latter made deliveries of machines by wagon. *Ib.*

3. *Estoppel by payment of tax.*

In this case *held* that payments of taxes made under an attempted compromise agreement did not operate to estop the taxpayer from contesting the legality of the action of the taxing authorities in increasing the assessments on the property. *Arizona* v. *Copper Queen Mining Co.*, 87.

4. *Separate assessment of mining claims theretofore assessed en masse; law of Arizona.*

In this case this court affirms the judgment of the Supreme Court of the Territory of Arizona that the Board of Equalization had no power under the statute of the Territory to raise the separate assessed valuation of certain mining claims of groups which had originally been assessed *en masse*. *Ib.*

See Constitutional Law, 14, 17, 21;
Interstate Commerce, 1, 2, 22.

TITLE.

To chattel incorporated in structure; when lost.

An owner of a chattel may lose title thereto without his consent by

TRADE-MARKS.

WAIVER.

See PUBLIC LANDS, 1.

WATER RIGHTS.

See LOCAL LAW (CAL.);
RIPARIAN RIGHTS.

WORDS AND PHRASES.

"It may revert to the State" as used in statute of Louisiana.

The provision in the act of 1858 of Louisiana, granting rights to a corporation on certain conditions, that after fifty years "it may revert to the State," *held* to relate to the company and not to one of the properties specified. *Carondelet Canal & Nav. Co.* v. *Louisiana*, 362.

"Penalty" (see Penalties and Forfeitures, 1). *O'Sullivan* v. *Felix*, 318.

Relative pronouns; relation.

The natural and grammatical use of a relative pronoun is to put it in close relation with its antecedent, and in this case so *held* as to the pronoun "it," notwithstanding its use rendered the sentence somewhat ambiguous. *Carondelet Canal & Nav. Co.* v. *Louisiana*, 362.

WRIT AND PROCESS.

See APPEAL AND ERROR, 3;
ATTACHMENT AND GARNISHMENT;
CONSTITUTIONAL LAW, 13;
PRACTICE AND PROCEDURE, 4.